
AN ANALYSIS OF LEGAL ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

Shreya Patel, Unitedworld School of Law, Karnavati University

ABSTRACT

The Indian Arbitration law is widely based on UNCITRAL Model Law and other international law such as New York Convention. This article aims to significantly identify the legal issue pertaining to the Indian Arbitration and Conciliation Act, 1996 and its subsequent amendments while sticking to its impact on International Commercial Arbitration. The matter of jurisdiction with regard to ICA has also been analysed. Further, the article sought to limelight the issues in Indian Arbitration law.

Introduction

The term ‘arbitration’ is till date not defined accurately anywhere. There have been various attempts to define the legal forms of arbitration. Rene David one of the known French Law Professor defines arbitration as ‘the settlement of a question of dispute between two or more parties by a third distinct party or parties. These private parties gain their power from the agreement between the parties and not from the State’¹. Though definition of arbitration remains vague in the Arbitration and Conciliation Act, 1996 but it defines International Commercial Arbitration under Section 2(f)², “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

1. An individual who is a national of, or habitually resident in, any country other than India;

¹ Chauhan Vatsala, Arbitration in India: the Process and the Problems with a Special Focus on International Commercial Arbitration (July 1, 2020); SSRN-id3713559.pdf; Accessed on 10th August 2023

² THE ARBITRATION AND CONCILIATION Act 1996.doc (cag.gov.in); Accessed on 12th August 2023

or

2. A body corporate which is incorporated in any country other than India; or
3. A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
4. The Government of a foreign country.

Arbitration has gained its importance after the upliftment of trade barriers and opened up trade. India has been making several policy changes to portray the country as a hub for domestic and international arbitration. For instance, recently, the International Arbitration Centre Bill, 2018 at New Delhi and the Arbitration and Conciliation (Amendment) Act, 2018 were passed by the Lok Sabha, merely three years after the last amendment. However, most such exercises at revamping the Arbitration and Conciliation Act, 1996 have completely skipped the jurisprudence of arbitrability of disputes which has, time and again, strangle arbitration in this country³.

One of the leading judgments which describes jurisprudential aspect of arbitration in India is **Booz Allen Case**⁴ Lays foundation on matter concerning arbitrability of a dispute in India. The Supreme Court sided view that the question of arbitrability is to be decided on the basis of the 'nature of right' involved in the dispute. There are two types of disputes -

- a. Right in Rem, which means a person's right against the world at large, such disputes are not arbitrable.
- b. Right in Personam, which means rights against specific individuals involving a contract, such disputes are arbitrable.

Further, the Supreme Court carved out the lists of disputes, which are not arbitrable

³ Chauhan, Vatsala, Arbitration in India: the Process and the Problems with a Special Focus on International Commercial Arbitration (July 1, 2020).

Available at SSRN: <https://ssrn.com/abstract=3713559> or <http://dx.doi.org/10.2139/ssrn.3713559>; Accessed on 10th August 2023

⁴ 37919.pdf (sci.gov.in); Accessed on 10th August 2023

1. Disputes which give rise to or arise out of criminal offense
2. Matrimonial Disputes
3. Guardianship matters
4. Insolvency and winding up matters
5. Testamentary matters
6. Eviction or tenancy matters

Origin of International Commercial Arbitration

Alternative Dispute Resolution methods are widely opted in cross border transactions which was founded in 1648 in Treaty of Westphalia⁵, the concept of state sovereignty, mediation between nations, and diplomacy all find their origins in the text of this treaty. The International Commercial Arbitration can be classified as general or specified, institutional or ad hoc arbitration and arbitration in law and in equity and judicial arbitration and contractual arbitration. The 1958 New York Convention functions as the principal control mechanism in International Commercial Arbitration by strategizing the limited role of judicial intervention in matters concerning arbitration. The Indian Arbitration Act Part 2 deals with the regulation of and the recognition and enforcement of foreign awards made under the New York Convention on Recognition and Enforcement of Foreign Awards⁶.

The first age – Hankingering⁷

From 1780s to the 1920s a period described by historians as 'long nineteenth century'. It was the age of aspirations where intense exploration of Arbitration was seen in all its form.

⁵ delivery.php (ssrn.com); Accessed on 12th August 2023

⁶ Chauhan, Vatsala, Arbitration in India: the Process and the Problems with a Special Focus on International Commercial Arbitration (July 1, 2020). Available at SSRN: <https://ssrn.com/abstract=3713559> or <http://dx.doi.org/10.2139/ssrn.3713559> ; Accessed on 22nd August 2023

⁷ <https://www.shearman.com/-/media/files/perspectives/2020/08/bull-2020-2-com-schinazi.pdf> ; Accessed on 22nd August 2023

At the regional level Arbitration was commonly used to settle the disputes between merchants belonging to trade associations in Europe. Specifically for England which had become the dominant world economic power and undertook volume of trade between buyers and sellers. Arbitration Committees were set up within cotton, corn and coffee trade associations in Liverpool and London.

The London Association was founded in 1878 to encourage use of standard contracts contained Arbitration clauses which specified that any dispute arising out of the contract would be settled under the rules of trade associations.

Early adaptation of arbitration placed their hopes in its ability to bring appeasement and prosperity, believing that it represents an essential means to achieving the peace through law in a complex and divided world. In fact, a number of key treaties and events, such as the Jay Treaty of 1794 between the United States and Great Britain, relied on recourse to arbitration. A century later, it was also used in the famous Alabama Arbitration of 1871, in which the United States alleged that the British Government had violated its legal duty to respect neutrality during the American Civil War. After several years of unsuccessful diplomatic efforts, an agreement was reached in 1871 the Treaty of Washington. An arbitral commission met in 1871 in Geneva's town hall and ordered Great Britain to compensate the United States within a year with a payment in gold worth USD 15.5 million.

Age of Institutionalization

The institutionalization of International Commercial Arbitration began in 20th century after the World War 1. The Atlantic City Conference led to establishment of International Commercial Centre in 1920 was first step to build permanent institution for maintaining peace in the world. It opened court of Arbitration in 1923 and started administering cases.

Few years later in the year 1926 the American Arbitration Association was set up through the merger of Arbitration Society of America and Arbitration Foundation. This age lasted till 1950 till the establishment of Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') in 1958. The 1958 New York Convention functions as the principal control mechanism in International Commercial Arbitration by strategizing the limited role of

judicial intervention in matters concerning arbitration. The Indian Arbitration Act Part 2 deals with the regulation of and the recognition and enforcement of foreign awards made under the New York Convention on Recognition and Enforcement of Foreign Awards⁸.

Age of Autonomy

The age of autonomy is one from where modern-day international arbitration developed. It started in late 1950s and extended till date. The autonomy period saw three distinct types of autonomy the first begin *mercatorocracy* wherein, a distinct class of professionals have devoted an increasing amount of time and attention to international commercial arbitration, coming to see themselves first and foremost as experts in international arbitration. The Age of Autonomy has thus been characterized, to a large extent, by increased expertise and specialization.

Second begin the autonomy the field as a whole. That is Lawyers, Professors and Scholars who had considered ICA as subcategory of civil procedure law or other international laws started viewing the discipline as full-fledged field of practice and research.

Third was that in addition to working on cases, professionals developed theories and intellectual constructs about international commercial arbitration.

Present day scenario: Issues and recommendation

1. Confidentiality issue

The Arbitration and Conciliation Act, 1996 only provides for the confidentiality of the conciliation proceedings and not of arbitration and mediation proceedings. This gap has been brought up by several foreign parties and was taken into consideration by the Apex court in case *Moti Ram v Ashok Kumar*⁹ the court held that mediation proceedings are confidential in nature. However, the question of confidentiality in matters of arbitration remained unanswered until a high-level committee report oversaw that UNCITRAL Model Law on International Commercial

⁸ Chauhan, Vatsala, Arbitration in India: the Process and the Problems with a Special Focus on International Commercial Arbitration (July 1, 2020). Available at SSRN: <https://ssrn.com/abstract=3713559> or <http://dx.doi.org/10.2139/ssrn.3713559> ; Accessed on 22nd August 2023

⁹ 2019 14 (SCR) 809

Arbitration does not provide for any express provision relating to confidentiality in arbitration proceedings. It merely permits parties to incorporate a clause of confidentiality in the arbitration agreement if they wish to. The Indian arbitration law is based on UNCITRAL Model Law which is why clause on confidentiality remained obscured until Section 42A was inserted¹⁰. Section 42A is a non-obsolete clause which means it prevails over any other law for the time being in force and makes it mandatory to abide by it.

Limitations of Section 42A

Section 42A mentions that arbitrator or arbitrators, arbitral institution and the parties to the arbitration are obligated to abide by the principle of confidentiality. It fails to take into account witnesses, stenographers, transcribers and such other persons who attend or are part of the proceedings. The act nowhere mentions consequences of failure of complying Section 42A.

2. Enforceability of arbitral awards

In India the enforcement of arbitral awards was discussed by Supreme Court at length in case of *Fuerst Day Lawson v Jindal Exports Ltd.*¹¹ it held that a party holding foreign award can apply for enforcement of it but the Court before taking further effective steps for the execution of the award has to be proceed in accordance with Sections 47 to 49. In one proceeding there may be different stages. In the first stage the Court may have to decide about enforceability of the award having regard to the requirement of the said provisions. Once the Court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a Rule of Court/decreed again. If the object and purpose can be served in the same proceedings, in our view there is no need to take two separate proceedings, resulting in multiplicity of litigation. It is also clear from objective contained in paragraph 4 of the statement of objects and reasons, Section 47 to 49 and Scheme of the Act that every final arbitral award is to be enforced as if it were a decree of the Court. The submission that the execution petition could not be permitted to convert as an application under Section 47 is technical and is of no consequence in the view we have taken. In our opinion, for enforcement of

¹⁰ <https://chambers.com/articles/confidentiality-in-arbitration-proceedings> ; Accessed on 25th August 2023

¹¹ 2001 (3) SCALE 708

foreign award their award to make Rule of the Court or decree and the other to take up execution thereafter. In one proceeding, as already stated above, the Court enforcing a foreign award can deal with the entire matter¹².

In one of the recent case, known as *NAFED v Alimenta S.A*¹³ Supreme Court refused to enforce foreign arbitral award on the ground of violation of public policy under Section 7 (1) (b) (ii) of the foreign awards and (recognition and enforcement) Act, 1961. The decision raised certain question with regards to scope of public policy in enforcement of foreign awards. In the above case the Supreme Court had placed reliance on its interpretation of “public policy” in its in its previous cases. It is worthwhile to notice that one of the principles of New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity with national laws. Thus, the expression "Fundamental Policy of Law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment¹⁴.

In India, enforcement process seems to be interrupted by judicial interference which is expressly barred by the principle of judicial non-interference¹⁵. The said principle is adopted by New York Convention and other international statutes. In view with this principle Supreme Court of India in case *Govt. of India v Vedanta Ltd.*¹⁶ the three-judge bench aggressively criticized NAFED case and held that, minimum interference shall be exercised by the courts in enforcing foreign arbitral awards.

India is yet to achieve the pro enforcement regime. Decisions of the courts needs to be mindful of the Article V of New York Convention, 1958.

¹² NDLI: JINDAL EXPORTS LTD. v. FUERST DAY LAWSON LTD. [OMP 204/1998 INDLHC 5251 (11 December 2009)] (iitkgp.ac.in) ; Accessed on 25th August 2023

¹³ NAFED v. Alimenta S.A.: Has the Indian Supreme Court Opened a Pandora’s Box on Enforcement of Foreign Awards? - Kluwer Arbitration Blog; Accessed on 25th August 2023

¹⁴ Unitec Ltd. v. Cruz City I Mauritius Holdings - Supreme Court Cases ; Accessed on 25th August 2023

¹⁵ Principle of Judicial Non-Interference in International Arbitral Proceedings, The Anniversary Contributions - International Litigation & Arbitration (upenn.edu) ; Accessed on 25th August 2023

¹⁶ Recognition and Enforcement of Foreign Arbitral Award in India: In Search of a Formidable Shore | SCC Blog (scconline.com); Accessed on 25th August 2023

3. Reduced flexibility due to 2019 amendment

The amendment act of 2019 is considered to be a positive step but the introduction of the Arbitration Council of India has raised questions on various levels. The reason behind the concern is that the members of Arbitration Council are either part of the Central Government or else appointed by them. Allowing government to exercise major control over the Council and may result in reduction of independence of Arbitrator and to some extent Arbitration institution.

On the other hand the Arbitration Council India can be viewed as an important step in that direction, as it will work to promote institutional as well as ad-hoc arbitration, and, at the same time, ensure that the quality of arbitrators and arbitral institutions does not fall.

CONCLUSION

Arbitration in India have seen increase with commercial disputes being at peak due to India's new Foreign Direct Investment Policy. With increase in preference for arbitration India is all set to become a global hub of arbitration soon. But before it embarks on the journey for the same the challenges need to be meet up to be more welcoming than restricting. Moreover, the issue of judicial interference must be restricted in consonance with New York Convention 1958 or else developed countries like U.A.E, U.S.A or U.K would think twice before investing in India or be party with Indian companies. Present time is economically perfect for to consider singing and implementing international conventions which are yet to be part of Indian arbitration law. This would enable Indian parties to enter into agreement with other foreign nationals at ease.