INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

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INTRODUCTION

With the advent of globalization, the world has become a global village. Business organizations have expanded themselves beyond borders and hence, there has been a real time increase in cross-border transactions. Agreements and contracts executed between the commercial organizations many times go ugly, thus, giving rise to disputes which are not within the confines of municipal law of a particular country, because the transactions are 'cross-border' in nature. Adjudication of cross-border business disputes demand expertise of a different sort, especially when the organizations in dispute hail from nations following different legal systems, as for example common law system and civil law system. Usually, as a matter of practice, all agreements executed between corporations inter-se, to bring to fore a common purpose, have three covenants, worth stressing, in particular; one is that of the 'governing law', second is the 'jurisdiction clause', and third is the 'arbitration clause'. The 'governing law' stipulation states, as to law of which country shall be taken recourse to, if and when deals between the international corporations go sour. The 'jurisdiction clause' states, as to courts of which country shall have the 'say' in the matter in dispute, at hand. The 'arbitration clause' states, how the disputes are to be resolved between the corporations before they are formally brought before the court of law for adjudication; arbitration clause speaks of mechanisms which are in the nature of 'out-of-the-court-settlement-of-disputes', such as: mediation, conciliation and arbitration.

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The Indian arbitral regime has witnessed its share of ups and downs with the constantly over-looming air of criticism, scrutiny and widely expressed aversion towards the mechanism for resolving ICAs. In the past there have innumerable circumstances when international parties have been victims of the excessive intervention of the court and the enormous delay in reaching a conclusive determination of their disputes through arbitration. Such arbitrations in the past were marred with the procedural and substantive lacunas present at every step on the way in the 1996 Act.

Due to such experiences the arbitral regime in India seemed more and more unattractive with most of such international commercial disputes being centered outside India only to avoid all the hurdles and barriers that the 1996 presented. This can be corroborated from the Annual Report released by the Singapore International Arbitration Centre (hereinafter referred to as "SIAC"), which shows that highest number of filings came from parties with Indian nationality with a total of 91 cases filed. This shows that India was not a preferred destination to carry out arbitration due to shortcomings of the 1996 Act.

In light of these prevailing facts and circumstances coupled with the new policy regime concentrating on foreign trade and investment, it became imperative that an amendment is brought about to cure all the deficiencies that were prevalent in the arbitral regime in India regulated by the 1996 Act. It was with this in light that several changes were introduced through the 2015 Act, which has changed the entire landscape of ICAs and its conduct under the Indian arbitral regime.

PRINCIPAL CHARACTERISTICS OF ARBITRATION

Whilst there is no universal accepted comprehensive meaning of arbitration, there is a general consensus about the characteristics or main features of arbitration. Its principal characteristics are:

Arbitration is one of the best methods for the settlement of disputes

Arbitration is the best available method for resolving all type of disputes particularly commercial disputes. All over the world, arbitration has been accepted as the most efficient

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method available to participants in national and international level is viewed by parties as a cost effective, swift and neutral to the time consuming and expensive of traditional courts.

Arbitration is Consensual or Semi- Consensual

The arbitration agreement is the basis form of any consensual arbitration, so that there cannot be an arbitral reference in the lack of a legally valid and enforceable arbitration agreement. On the other words, the legal foundation of arbitration is the arbitration agreement. If there is arbitration agreement, or if it is legally valid, a dispute can be submitted to arbitration but if there is no arbitration agreement, or if it is legally invalid (it is not in doubt, but it is contended that the arbitration agreement is for some particular reason invalid), a dispute cannot be submitted to arbitration, and even if it is submitted, the award would not be legally binding.

Arbitration is a private procedure but not necessarily confidential

Arbitration is an important vehicle for the resolution of disputes, supported by a strong national policy favoring the arbitration of disputes. One of the potential advantages of the process is that it is private. Third parties can be prevented from observing the proceedings. Parties to the arbitration can contract to prevent each other from disclosing arbitration communications to third parties.

Arbitral award is final and binding on the disputant parties

An important characteristic of arbitration is that in most situations the award made by an arbitral tribunal is final and binding upon the disputant parties: either because the disputant parties have agreed this expressly in the arbitration clause, or because the arbitration rules referred to by the disputant parties exclude any appeal against the award.

TYPES OF ARBITRATION

There are many types of arbitration depending upon the terms of arbitration agreement, the subject matter of dispute and the law governing the arbitration. These types are as follows;

Ad hoc Arbitration

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Ad hoc arbitration refers to arbitration where the disputants and the arbitral tribunal conduct the proceeding according to procedure which is either be agreed by the disputants or, in default of an agreement, laid down by the arbitral tribunal at the preliminary meeting once the arbitration has begun.

Institutional Arbitration

In this sort of arbitration, disputants are not free to decide the rules and procedure but they are abiding by the rules and procedure of the specific institution. Typically, the commercial contract between the parties will contain an arbitration clause, which will designate an institution as the arbitration administrator

Contractual Arbitration

It may be called consensual arbitration or Contractual in-built arbitration as well. Every arbitration which comes into being by a contract through the consent of the disputants for settlement of their disputes is a contractual arbitration. Parties will contain an arbitration clause, which will designate an institution as the arbitration administrator.

Statutory Arbitration

Where for settlement of disputes, the solution is statutorily provided through the mode of arbitration, the disputant parties, in case of disputes because of its provision in the statute by which the transaction happens to be governed.

Domestic Arbitration

Domestic arbitration is usually limited to and concerned a single State. The laws of a single State usually govern the contracts, and the arbitral proceedings are governed solely by the laws of place of arbitration

International Commercial Arbitration

Generally, the nature of the dispute and the disputants determine whether the dispute is International or Domestic. Few Domestic arbitration laws, the same rules apply to both and they do not clearly distinguish between International and Domestic arbitration, such as those of UK, Germany, Netherland, Czech Republic, Austria and Slovenia. Most legal regimes, such

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as USA, China, France, Hungary, Iran, Romania, Australia, Switzerland or Ukraine do make this distinction. No doubt, international arbitration differs from domestic arbitrations in that the first involves parties from different countries and deals with international trade matters.

Foreign Arbitration

Arbitration is said to be Foreign Arbitration where the place of arbitration happens to be place outside of territory of a State. The arbitral award out of such foreign proceedings is also called as a foreign arbitral award and is enforced as such.

Look Sniff Arbitration

In this kind of arbitration, arbiter plays the role of expert. No specialist comes from outside but arbiters only perform the role of expert. Arbiters are responsible to see everything in the proceeding himself and then come with decision.

Flip Flop Arbitration

In this kind of arbitration disputants make out their own case, for example, what is the allegations, supporting document, how the damages can be quantified, etc., is been work out by the parties only.

Fast Track Arbitration

Fast Track Arbitration is a new type of arbitration and also achieves the impetus in today's scenario of dispute resolving system. In Fast Track Arbitration, disputants can settle their disputes rapidly and also it is cheap to run. In this kind of arbitration disputants can glue the time and also it could be possible that they made the agreement with the arbiter that he will not take any of the case before firm up the present case.

SCHEME OF THE ARBITRATION ACT

The Act has three significant parts. Part I of the Act deals with Domestic Arbitrations and International Commercial Arbitrations ("ICA") when the arbitration is seated in India. Thus, an arbitration seated in India between one foreign party and an Indian party, though defined as

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an ICA, is treated akin to a domestic arbitration. Part II of the Act deals only with foreign awards and their enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") and Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention"). Part III of the Act is a statutory embodiment of conciliation provisions.

In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, and 28 to 33 regulate the conduct of arbitration, Section 34 regulates the challenge to the award and Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37 and 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary.

Courts have found that Chapters III to VI, specifically Sections 10 to 33 of Part I of the Act, contain the curial or procedural law which parties would have the autonomy to opt out of. The other Chapters of Part I of the Act form part of the proper law, thus making those provisions non-derogable by parties, subject to Part I, even by contract.

Part II, on the other hand, regulates arbitration only in respect to the commencement and recognition /enforcement of a foreign award, and no provisions under the same can be derogated from by a contract between two parties.

The objective of the Act is to provide a speedy and cost-effective dispute resolution mechanism which can give parties finality in their disputes. A number of decisions from the courts slowly but steadily ensured that the preferred seat in any cross-border contract was always a heavily negotiated point and, more often than not, ended up being either Singapore, New York, or London (the established global arbitration centres). Foreign investors and corporate doing business in India were just not ready to take risks with the Indian legal system.

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

Pre-arbitral Proceedings

i. **Independence and impartiality:** Applications for appointment of an arbitrator should be endeavoured to be disposed of within a period of sixty (60) days from date of service

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of notice on the opposite party. Drawing from the IBA Guidelines on Conflict of Interest, a detailed schedule on the ineligibility of arbitrators has been put in place.

ii. **Interim reliefs:** Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitrations.
Section 9 applications to be made directly before the High Courts in case of ICAs seated in India as well as outside.
Interim reliefs granted by arbitral tribunals seated in India are deemed to be the orders of courts and are, thus, enforceable in the new regime.
Post the grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

Arbitral Proceedings

i. Expeditious disposal

A twelve-month timeline for completion of arbitrations seated in India was prescribed.

Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts, in relation to interim reliefs, the appointment of arbitrators, and challenging petitions.

Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

ii. Costs

"Costs follow the event" regime has been introduced.

Detailed provisions have been inserted in relation to the determination of costs by arbitral tribunals seated in India.

Post-arbitral proceedings

i. Challenge and enforcement

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In the case of an ICA seated in India, the grounds on which an arbitral award can be challenged have been narrowed.

Section 34 petitions to be filed directly before the High Courts in case of ICA seated in India.

Section 34 petitions to be disposed of expeditiously and, in any event, within a period of one year from the date on which notice is served on the opposite party.

Upon filing a challenge under Section 34 of the Act, there will not be an automatic stay on the execution of the award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

APPOINTMENT OF ARBITRATORS

The parties are free to agree on a procedure for appointing the arbitrator(s). In absence of any agreement on the procedure for the appointment of arbitrators, for a tribunal with three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. If one of the parties does not appoint an arbitrator within 30 days, or if the two appointed arbitrators fail to appoint the third arbitrator within 30 days, the party can request the Supreme Court or relevant High Court (as applicable) to appoint an arbitrator.

Supreme Court/High Court can authorize any person or institution to appoint an arbitrator. In case of an ICA, the application for appointment of the arbitrator has to be made to the Supreme Court and in case of domestic arbitration, the respective High Courts having territorial jurisdiction will appoint the Arbitrator. The 2015 Amendment Act also limited the power of the Supreme Court in an India-seated ICA and the High Courts in domestic arbitrations and prescribed that the Court can examine only the existence of an arbitration agreement at the time of making such appointment.

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CHALLENGE TO JURISDICTION

Under Section 16 of the Act, an arbitral tribunal has the competence to rule on its own jurisdiction, which includes ruling on any objections with respect to the existence or validity of the arbitration agreement. The doctrine of 'competence-competence' confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. In S.B.P. and Co. v. Patel Engineering Ltd. and Anr. the Supreme Court had held that where the arbitral tribunal was constituted by the parties without judicial intervention, the arbitral tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act.

SETTLEMENT DURING ARBITRATION

It is permissible for parties to arrive at a mutual settlement even when the arbitration proceedings are going on. In fact, even the tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the arbitral tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms, which is called a consent award. Such an arbitral award shall have the same force as any other arbitral award. Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

ARBITRAL AWARD

A decision of an arbitral tribunal is termed as an 'arbitral award'. An arbitral award includes interim awards. However, it does not include interim orders passed by arbitral tribunals under Section 17. The decision of the arbitral tribunal must be by a majority. The arbitral award must be in writing and signed by all the members of the tribunal. It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given. The arbitral award should be dated and the place where it is made should be mentioned (i.e. the seat of

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arbitration). A copy of the award should be given to each party. Arbitral tribunals can also make interim awards.

OBJECTIVES

1. To investigate several aspects of arbitral proceedings in India
2. To study the various types of arbitration

REVIEW OF LITERATURE

Review of literature is very important to study the different aspects of International Commercial Arbitration, which gives a clear picture about the development of ICA all over the world. ICA literature helps us to know the different aspect of ICA in both national and international levels. And, it has made great contribution towards development of international trade law.

Rajan, R. Desing. (2015) carried out a historical review of the origin and growth of arbitration to its present period of development in India. This book created a clear picture and certain view of arbitration in India with a brief history of International Commercial Arbitration. The author without a deep discussion has concluded that arbitration method in India suffered from fatal diseases such as slow, expensive, lack of infrastructural facilities, lack of adequate knowledge of potential parties, lack of institutional framework and contestants avoid finality. The author for remedies of the poor conditions of working of arbitral process in India has suggested thirteen technical solutions such as development of arbitration culture, infrastructural facilities, fast track arbitration awareness programs, teaching and training at law school and setting up more arbitration center, etc.

Suri, Prit. (2015) conducted a study entitled "Enforcement of Foreign Awards in India: Simplification Under the 1996 Act" with the goal to understand the present situation of India for enforcement of foreign awards. But without any suggestion for improvement of this mechanism in India, she has concluded that the Arbitration Act, 1996 has provided an effective

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and efficient basis for dispute resolution between Indian and foreign companies by minimising the intervention of Courts in the arbitral process. Nonetheless, the role of the Courts is not completely dispensed with, since they play a crucial role in the enforcement of arbitral awards.

Jujjavarapu, Aparna Devi. (2017) in a research work entitled "Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India" has highlighted that though India has not effectively recognized many non-statutory standards for reviewing arbitral awards, Indian courts have been inconsistent in their approach in setting-aside of the arbitral awards under the Arbitration Act, 1996. This is a cause for concern since it is precisely this independence from the courts which is imperative for achieving some of the key goals of arbitration, namely speed and efficiency.

Atul, Chitale. (2017) in a study entitled "The Asia-Pacific Arbitration Review - Country Overview (India)" has tried to answer the question, why arbitration is not succeeded in India? To answer the question, the author focused on the speed in arbitration process without an enough attention for others factors like expensive and judicial Court intervention. The author has concluded that even though the numbers of ICA in relation to India are growing, most arbitration agreements provide for seat of arbitration outside of India. This is largely on account of the fact that the court process in India is slow and disputant parties don't want to subject themselves to the jurisdiction of Indian courts and there is also a lack of reputable arbitral institution in India.

Dev, Chopra. (2018) in a study entitled "Supreme Court's Role vis a vis Indian Arbitration and Conciliation Act, 1996" with the aim to examines some aspects of the growth of judicial law making by the Supreme Court in the last twelve years of the working of the Indian Arbitration and Conciliation Act, 1996. It also examined the negative role of the Supreme Court in taking the law backward thus preventing the growth of international trade and commerce. According to conclusion of this study, the court interference should be minimal as is set out in the Model Law (1985) on which it is based. The Arbitration Act, 1996 experience is obvious by the fact that the Court's interference is not minimal and the Indian courts are hyper active. The Supreme Court has also forgotten that the Arbitration Act, 1996 was intended as an alternative dispute resolution method as it was both less time consuming and was effective and for promoting international trade and commerce and by continuously interfering in such matters these purposes are defeated.

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Agarwal, Anurag K. (2018) in his article entitled "Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of 'Court" has concluded that an Arbitration as a method for speedy redressal of business disputes is facing uncertainty in India. Court intervention has to be reduced to the minimum. It is true that this intervention can never be eliminated. Thus, there is an urgent need to speed up the numerous matters pending in the subordinate courts, particularly in the court of District Judges. This can easily be done if the legislation allows transfer of these matters to the courts of the Additional District Judges.

Kachwaha, Sumeet. (2018) without understand the real difference between recognition and enforcement, carried out a study entitled "Enforcement of Arbitration Awards in India". The author used both phrases together and did not make a distinction between them. According to conclusion of this study, the recognition and enforcement of awards is of paramount important for the success of arbitration in international arena. This is well evidenced by the fact that the enforcement of awards worldwide is considered one of the primary advantages of arbitration but unfortunately the Indian enforcement mechanism for foreign awards has thus been rendered inefficient, clumsy and uncertain. The most effective solution to the present problem would be just solved by an amendment to the Arbitration Act, 1996. Article 1(2) of Model Law on ICA should be added the Act, 1996 and notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards

Hirani, Lavin. (2019) carried out a study entitled "The Legal Regimes Affecting International Commercial Arbitration in India & Singapore". The author tried to separately describe the arbitration laws of both countries without any comparative tool and technique. He has concluded that India with its vast population and current enormous economic growth has great potential to become a world class center for ICA. India due to its new liberal policies has opened up to foreign investments in various fields and the legal sector must make full use of this opportunity to tap the international market for commercial disputes by ironing out its issues with the problem of judiciary and faulty systems which are now hindering its progress to become a hub for arbitration in spite of there being so many reasons for it to progress like cheap work force, a huge source of lawyers, etc

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CONCLUSION

India has highly developed rules and principles governing all aspects of arbitration in recent years but practically, it faced many serious procedural problems with international arbitration which cannot be overlooked in the present day of international trade transactions. The implication is that Indian law of arbitration is now less in line with universally accepted standards and practice, which is one of the main reasons why a country like India with rich background in arbitration, close copied foreign arbitration law even modern international standard, still is not a world centre for arbitration. The road for International Commercial Arbitration (ICA) in India is not smooth. It is still in neophyte stage with many loopholes that obstructed in working of successful of this method in India which are multifold- starting from emergent needs to modify or amendment of certain provisions of the Arbitration Act, 1996 to changing the mindset of all potential parties who are involved.

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