ARBITRATION BEING THE ALTERNATIVE WAY OF SETTLEMENT OF INTERNATIONAL TRADE DISPUTES: AN APPRAISAL

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INTRODUCTION

In a recent survey report of 2018 in the field of International Arbitration by White & Case LLP and the school of International Arbitration at Queen Mary University of London; it was mentioned that 98% of the companies would prefer to solve their dispute with the mechanism of International Arbitration rather than Litigation before courts.

International trade disputes should not be considered as an Alternative Dispute Resolution or Litigation Light. Instead it should be considered as a commercial arbitration which has become the dispute resolution mechanism of choice in international transactions and projects. If we go back in the history we'll find out that in the Jay Treaty for the very first time arbitration was taken as a method to settle the international dispute after which a treaty was signed between The Great Britain and The United States of America mainly to settle outstanding issues following the American War of Independence.

In the Indian context if we see Article 51 (d) of the Indian Constitution it clearly states that the state shall endeavour to encourage settlement of international disputes by arbitration. International Arbitration is a method of private, binding and enforceable dispute resolution system which may be chosen by the parties as an alternative to litigation before the court.

Article 21.3 of the DSU provides that a Member found to be in violation of its WTO obligations must comply with the rulings and recommendations of the Dispute Settlement Body immediately. When immediate compliance is impracticable, however, the Member shall have a "reasonable period of time" to implement the DSB's rulings and recommendations. The "reasonable period of time" may be "the period of time proposed by the Member concerned,

provided that such period is approved by the DSB" or "a period of time mutually agreed by the parties to the dispute". If neither of these two options is possible, Article 21.3(c) provides that the "reasonable period of time" shall be "a period of time determined through binding arbitration". Arbitrators are selected by the parties to the arbitration or, if they cannot agree on an arbitrator, the Director-General appoints the arbitrator. Thus far, every arbitration under Article 21.3(c) has been conducted by an Appellate Body Member acting in his individual capacity.

RESEARCH QUESTIONS

- What is arbitration?
- Is the Arbitration really an Alternative Dispute Resolution system as far as International trade disputes are concerned?
- Whether International Chamber of Commerce is efficient enough in resolving the disputes between two nations? If yes then what could be the reason behind unprecedented delay in the enforcement of arbitral awards in India?

ARBITRATION

In India Arbitration is an alternative disputes resolution (ADR) mechanism which is adversarial in nature. However, the court is not deciding on the disputes between the parties and it is left to the arbitrator appointed by the parties themselves or the Chief Justice of High Court/ Supreme Court to decide on the disputes amongst the parties. Arbitration is possible only when the parties to a 'civil' dispute agree to refer the matter to Arbitrator in writing (can be separate agreement or as a clause in the agreement).

It has to be by the way of an agreement between the parties:

Whereby the parties 'submit' to arbitration all or certain disputes that have arisen or may arise in the future between the parties with respect to the legal relationship they have.

History of Arbitration in India

Until the Arbitration and Conciliation Act, 1996 ("Act), the law governing arbitration in India consisted.

Mainly of three statutes:

- The Arbitration (Protocol and Convention) Act, 1937 ("1937 Act)
- The Indian Arbitration Act, 1940 ("1940 Act") and
- The Foreign Awards (Recognition and Enforcement) Act, 1961 ("1961 Act")

The 1940 Act was the general law governing arbitration in India and resembled the English Arbitration Act of 1934 than in January 1996 new Arbitration Act was passed by repealing all the three laws and most of the portion of the Arbitration Act, 1996 was based on UNCITRAL (United Nations Commission on International Trade Law) model law. But the basic difference in both of them is that Indian Arbitration Act, 1996 talks about both domestic arbitration law as well as International Commercial Arbitration whereas UNCITRAL only deals with International Commercial Arbitration.

Scheme of Act (Act of 1996)

Part I of the Act deals with domestic arbitrations and International Commercial Arbitration (hereinafter to be referred as "ICA") when the arbitration is seated in India. Thus, Arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated akin to a domestic arbitration. Part II of the Act deals only with foreign awards, their enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 "New York Convention" and the Convention on the Execution of Foreign Arbitral Awards, 1927 "Geneva Convention".

Part II of the Act is a statutory embodiment of conciliation provisions. Section 8 regulates the commencement of arbitration in India. ***Sections 10 to 33 of Part I*** of the Act contains 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 them binding to all the parties who are subject to Indian Arbitration Law. Part II, on the other hand regulates arbitration only in respect to the commencement and recognition/enforcement of a foreign

arbitral award, and no provisions under the same can be derogated from by a contract between two parties. The 2019 Amendment introduces Part 1A to the Act, which is titled as 'Arbitration Council of India[i]' and which empowers the Central Government to establish the ACI by an official gazette notification.[ii]

INTERNATIONAL COMMERCIAL ARBITRATION

As far as International trade disputes are concerned in my opinion, Arbitration is not an Alternative Dispute Resolution mechanism instead it is the only possible way to resolve the International commercial disputes peacefully in an efficient manner between different sovereign nations, companies and individuals.

Section 2(1)(f) of the Act defines ICA as a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands.

Thus, under Indian law, the arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA and will be subject to Part I of the Act. However, where an ICA is held outside India, Part I of the Act would have no applicability on the parties (save the stand-alone provisions introduced by the Amendment Act, unless excluded by the parties, as discussed later) but the parties would be subject to Part II of the Act.

Scope of *Section 2 (1) (f) (iii)* was determined by the Supreme Court in the case of TDM Infrastructure Pvt. Ltd.[iii] having foreign control, it was concluded that "a company incorporated in India can only have Indian nationality for the purpose of this Act. Act recognizes companies controlled by foreign hands as a foreign body corporate, the Supreme Court has excluded its application to companies registered in India and having Indian nationality. Hence, in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act, such corporation would not be regarded as a foreign corporation.

In one case where Indian company was the lead partner in a consortium (which also included foreign companies) and was the determining voice in appointing the chairman and the

consortium were in Mumbai, the Supreme Court held that the central management and control was in India. *M/s Larsen and Toubro Ltd.*[iv] case

With increase in International Trade and Cross Border Business Transactions, Cross-Border Commercial Disputes are getting common and therefore need of mechanism for effective dispute resolution and for preserving business relations arise.

'INTERNATIONAL COMMERCIAL ARBITRATION' has emerged as a preferred option of resolving cross border commercial disputes.

There are number of factors which have compelled the people to move out of the national boundaries, some of which includes specialized markets, wide availability of resources and advance means of communication etc. Industrialization, modern transportation methods, multinational corporations and outsourcing are the factors, the influence of which can be seen in no ordinary terms.[v]

Part I of the act covers such cases in which International Commercial Arbitration are seated in India. The provisions of setting aside the Award as in section 34 are applicable. However, with the 2015 Amendment the ground of Patent Illegality is taken away in cases of ICA seated in India.

Pre BALCO[vi] position was that the provisions of Part I of the Act will apply to the ICA seated outside India unless they are impliedly or expressly excluded by the parties. In BALCO case it was said that Part I of the Act will not apply in case of foreign seated arbitration. The decision was given prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. If the arbitration agreement was executed prior to September 6, 2012, necessary modifications would have to be made in the arbitration agreement in order to be governed by the ruling in the BALCO. **Part I** of the Act will not only apply in case of foreign seated arbitration *except Sections 9, 27, and 37* unless *a contrary intention appears in the arbitration agreement.*[vii]

Part II of the Act is applicable to all foreign awards sought to be enforced in India and to refer parties to arbitration when the arbitration has a seat outside India. Part II is divided into two chapters, chapter 1 being the most relevant one as it deals with foreign awards delivered by the signatory territories to the New York Convention which have reciprocity with India, while **Chapter II** is more academic in nature as it deals with foreign awards delivered under the Geneva Convention. (As mostly all parties signatory to the Geneva Convention are now

members of the New York Convention, **Chapter 2 of Part II** remains primarily academic). ***Section 34*** of the Indian Arbitration Act makes a mere challenge to an award act as an automatic stay even without an order of the court, which in turn encourages many parties to file petitions under that provision to delay the execution proceedings of the award. However, under the old Act, there was no such automatic stay on the execution of the award.

A foreign award under Part II is defined as (a) an arbitral award (b) on differences between persons arising out of legal relationships, whether contractual or not, (c) considered as commercial under the law in force in India, (d) made on or after 11th day of October, 1960 (e) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies and (f) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which said convention applies.[viii] About *48 countries* have been identified by the Indian Government so far including UK.

Efficiency of International Chamber of Commerce

In a recent judgment the Supreme Court of India has enforced foreign arbitral monetary award which was passed by the International Chamber of Commerce since (29th Sep 2001) precisely, but the appellant was a foreign company and after the announcement of award from ICC the decree-holder filed an appeal for its enforcement as a foreign award in the Calcutta High Court.[ix]

REASON BEHIND THE DELAY IN ENFORCEMENT OF AN ARBITRAL AWARD IN INDIA

I am going to explain the reason behind the delay with the help of a recent case M/s Centrotrade Minerals and Metals Co. Ltd. v. Hindustan Copper Ltd.[x]

In this case Appellant, M/s Centrotrade Minerals and Metals Inc. (hereinafter to be referred as "Appellant"), a US company and the Respondent, Hindustan Copper Ltd. (HCL), an Indian company, entered into a contract under which Centrotrade was required to supply 15,500 DMT(Dry Metric Ton) of copper concentrate to HCL at Kandla Port of Gujarat in India.

Centrotrade supplied the concentrate, but disputes arose over the dry weight of the concentrate supplied.

There was an agreement between both the parties that:

"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."

Earlier during the pendency of the London arbitration, HCL filed a suit before a court in the Khetri region of Rajasthan, challenging the arbitration clause and seeking an anti-arbitration injunction against Centrotrade. The court in Khetri did not interfere with the arbitration but in a revision petition before the Rajasthan High Court against this order in April, 2000, the High Court granted an ***ex-parte*** stay order in HCL's favor against the London arbitration. This ad-interim, ex-parte stay was vacated by the Supreme Court in February, 2001.

Then Centrotrade received a monetary award in its favor through the ICC arbitration in London on September 29, 2001 and filed for its enforcement as a foreign award in the Calcutta High Court. HCL did not file any challenge proceedings against the ICC award under English arbitration law (which would have been available since the ICC award was made in London). A single judge of the Calcutta High Court allowed enforcement, but in appeal, this order was vacated by a division bench on the basis that the ICC award could not be treated as a foreign award and that the earlier Indian award as well as the ICC award were passed by tribunals having 'concurrent jurisdiction.' Accordingly, the awards were deemed 'mutually destructive' and neither could be enforced.

The Centrotrade case has passed from three stages in the first one it did not come to a consensus due to conflicting views of the Division bench then the matter was referred to a three-judge bench of the Supreme Court, which ruled that parties are free to enter into an agreement providing for non-statutory appeals so that their disputes and differences are settled without

resorting to court processes.[xi] It also observed that the Act does not prohibit a two-tier system, nor does it exclude the autonomy of the parties to mutually agree to a procedure. The Apex Court ruled that there was no difficulty in honoring their mutual decision and accepting the validity of their agreement. The Court, however, refused to consider the actual enforceability of the ICC Award as a foreign award, dealing instead only with the question of validity of a two-tier arbitration clause. The Court noted that the matter would be set down for hearing on the remaining issue at a later date on account of its roster of business allowing it to hear appeals only sporadically. The ruling of the three-judge bench of the Supreme Court is referred to as Centrotrade2**.** But the Supreme Court in Centrotrade3 has taken into consideration the validity of the two-tier arbitration and answered in affirmative and took another question to be decided in this case that is as follows:

Assuming that a 2-tier Arbitration procedure is permissible under the Indian Laws, whether the award rendered in the appellate arbitration being a "foreign award is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996 at the instance of Centrotrade? If so, what is the relief that Centrotrade is entitled to?

Shri Gourab Banerjee, learned Senior Counsel appearing on behalf of Centrotrade, has relied strongly on this court's recent judgment in Vijay Karia[xii] case and also suggested to approach towards the section 48 proceeding by quoting two commentaries on arbitration[xiii]. It was observed that the term "otherwise" appearing in Section 48(1) (b) of the Act cannot be read *ejusdem generis* with words that precede it. The immediate effect of doing so would be that it would be read expansively to include hearing beyond the arbitrator and to the award itself. The Court reflected that Section 48 of the Act contains well-defined but narrow exceptions to enforcement of award. The expression "was otherwise unable to present its case" cannot be given expansive means and would have to read in the context and color of words preceding the said phrase.

So, this case literally shows that where India actually stands in International Commercial Arbitration and how we have maintained the reputation of delaying the arbitration cases in the same way as we do in the litigation cases for which number of pending cases is a living example. ICC has efficiently and correctly awarded the Centrotrade in the year 2001 but it took 19 years for its enforcement in India due to bad or can say no proper mechanism to deal with such type of cases. Particularly in my opinion what is the need of involving politics and judiciary to deal with the arbitration cases.

I would like to mention here what Law Minister of India has said at the time of introducing Indian Arbitration (Amendment) Act, 2019. He said that it will make India a hub of the Domestic and International Arbitration.[xiv] But I personally don't think that it would be possible because of the same old technique of institutionalization. The 2019 Amendment introduces Section 11(3A) to the Act whereby the Supreme Court of India and the High Court shall have the power to designate arbitral institutions, which have been graded by the Arbitration Council of India. ("Hereinafter to be referred as ACI") under Section 43-I (also introduced by the 2019 Amendment). The underlying idea is that instead of the court stepping in to appoint arbitrator(s) in cases where parties cannot reach an agreement, the courts will designate graded arbitral institutions to perform that task (per Sections 11(4)–(6) of the Act, as amended by the 2019 Amendment). The 2019 Amendment introduces Part 1A to the Act, which is titled as 'Arbitration Council of India' (Sections 43A to 43M) and which empowers the Central Government to establish the ACI by an official gazette notification.[xv] The ACI shall be composed of (i) a retired Supreme Court or High Court judge, appointed by the Central Government in consultation with the Chief Justice of India, as its Chairperson, (ii) an eminent arbitration practitioner nominated as the Central Government Member, (iii) an eminent academician having research and teaching experience in the field of arbitration, appointed by the Central Government in consultation with the Chairperson, as the Chairperson-Member, (iv) Secretary to the Central Government in the Department of Legal Affairs, Ministry of Law and Justice and (v) Secretary to the Central Government in the Department of Expenditure, Ministry of Finance – both as *ex officio* members, (vi) one representative of a recognized body of commerce and industry, chosen on rotational basis by the Central Government, as a part-time member, and (vii) Chief Executive Officer-Member-Secretary, *ex officio*.[xvi] The ACI is *inter alia* entrusted with grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations.[xvii]

The main drawback of this scheme is that it limits party autonomy in international arbitration through governmental and court interference. The ACI is a government body which shall regulate the institutionalization of arbitration in India and frame the policy for grading of arbitral institutions. The fact remains that the court's choice in designating an arbitral institution will be limited by the options presented to it by the ACI. Consequently, the choice of a foreign party appearing before the Supreme Court and seeking appointment of an arbitrator

will be limited to institutions which have ACI accreditation and to such arbitrators who may be on the panel of such arbitral institutions. The court will be equally handicapped in designating an ungraded institution – which has a global reputation for its facilities and quality of services and which wants to simply establish its local office in India, without going through the administrative hurdles of being graded by the ACI.

The 2019 Amendment, albeit aimed at institutionalizing the arbitration scene in India, leaves the discretion in the hands of courts and executive to decide who gets to be a part of this reform. Another problem associated with this governmental control over the institutionalization process is the (possible) nepotism, lack of objectivity and lack of transparency in the grading process. In my experience, a foreign party often prefers to stay away from an arbitration regime with significant degree of court or governmental interference particularly in India. However, it is nonetheless a welcome move by the government to acknowledge that institutional arbitration is the only way ahead to attract foreign parties to include India as the seat in their arbitration agreements.

CONCLUSION

I must say that there is a need to change the perspective towards International Commerce and International Commercial Arbitration. Because without change, there cannot be development as the current government is planning to make India 10 trillion dollar economy till 2030. But with this kind of delays, hiding, procrastination and poor mechanism to tackle the International Trade Disputes it can never be possible. We all know that vision without action changes nothing, these kind of cases stops traders to trade with such nations due to fear of delays in the trade disputes and dispute is obvious where there is a trade. To become the super economy in the world International Trade plays very important role and for that we'll have to work on our thought process then only we'll able to earn that repute in the world otherwise we will always be labelled as a developing nation.

As India is the member of New York Convention (1958) i.e. the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and one of the founding member countries of the United Nation Commission on International Trade Law (UNCITRAL) model which says that, The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally

capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal. So, this is the responsibility of India to follow the fundamental principles of these conventions to be competent and consistent in the global market.

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ENDNOTES

[i] Indian Arbitration (Amendment) Act 2019, (Sections 43A to 43M)

[ii] Indian Arbitration (Amendment) Act 2019, (Sections 43A to 43M)

[iii]TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd. (2008) 14 SCC 271, 279

[iv]M/s Larsen & Toubro Ltd. v. State of Karnataka SLP (C) No. 17741 of 2007

[v]Ajit Mazumdar, "IX Biennial International Conference on Critical Issues in International Commercial Arbitration", Indian Council of Arbitration (Oct. 19-20 (1) 2007)

[vi]Bharat Aluminium Co. v. Kaiser Aluminium Technical Services (C) 3678 of 2007 (28th Jan. 2016)

[vii]Indian Arbitration (Amendment) Act, 2020

[viii]Section 44 of the Indian Arbitration (Amendment) Act, 2020

[ix](2006) 11 SCC 245

[x](2017) 2 SCC 28

[xi]M/s Centrotrade Minerals and metals Inc. v. Hindustan Copper Ltd. (2017) 2 SCC 28

[xii]Vijay Karia &Ors. v. Prysmian Cavi E Sistemi SRL & Ors. Civil Appeal No. 1545 of 2020

[xiii]Redfern and Hunter on International Arbitration 6th Edition & Merkin and Flannery on the Arbitration Act, 1996

[xiv]Available at https://www.financialexpress.com/india-news/changes-in-law-needed-to-make-india-hub-of-arbitration-ravi-shankar-prasad/1648775/

[xv]Section 43 B

[xvi](Section 43 C (1)(a)–(f))

[xvii]Section 43 I of Indian Arbitration (Amendment) Act, 2019