



POSITION OF INTERNATIONAL COMMERCIAL ARBITRATION IN THE INDIAN LEGAL SYSTEM

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ABSTRACT

With the emerging global trends the world has become a global village. With the expansion of Business' across borders, cross border transactions have also multiplied. Sometimes the agreements and contracts executed between the commercial organizations may turn ugly and give rise to disputes which are not covered under the ambit of municipal laws of a particular country. Adjudication of cross border disputes requires expertise, especially when organizations in dispute hail from nations following different legal norms. India also opened its gates for foreign companies, and in this scenario the arbitration proves to be a successful dispute resolution mechanism. The Arbitration and Conciliation Act 1996 based on the UNCITRAL model law governs the arbitration regime in India. In order to match the pace with the international fronts the Arbitration Act was amended in 2015 and 2019. The amendments brought by the Parliament are optimistic and provide a ray of hope to establish India as a preferred seat of arbitration. Both the Government and the Judiciary have taken steps to create an arbitration friendly environment and strengthen the position of domestic laws to build confidence at the international front. The current objective of the Government is to promote institutional arbitration in India and establish an independent body to govern the same. This paper will analyze the efforts of

the government and the Judiciary and some landmark changes that have taken place in the past few years to stabilize the arbitration laws and make India a preferred seat for international commercial arbitration.

INTRODUCTION

Arbitration as a dispute resolution has not gained huge importance. But with the growing trends and globalization the need for establishing a platform to conduct fair arbitration proceedings and reduce the intervention of courts in arbitration proceedings. With various economic reforms and changing policies there is a need to bring changes in the driving force too. The obsolete arbitration Act required changes in order to keep pace with the growing trends. The Government has successfully taken steps in the positive direction to promote international arbitration and bring faith in the domestic arbitration regime. The paper seeks to address the various problems in the field of arbitration and how the government and judiciary have addressed the same by bringing amendments and various landmark judgments. The paper will provide an insight of the problems faced and the various solutions that can be adopted to provide for smooth working of arbitration tribunals in India.

INTERNATIONAL COMMERCIAL ARBITRATION AND ITS POSITION IN THE INDIAN LAW SYSTEM **CHAPTER I - HISTORY OF ARBITRATION IN INDIA**

International arbitration has emerged as a key method to resolve disputes between States, individuals and corporations in almost every sphere of international trade, commerce and investment. The established centers of arbitration depict increasing activities, with



each passing year. States have modernized their laws so as to be recognized as 'arbitration friendly'. Firms have established dedicated groups of arbitration specialists and the practice of international arbitration has become a subject for study in universities and law schools alike.

The origin of arbitration in India may be traced back to the ancient system of village Panchayats. The complexities of modern commercial transactions in the wake of globalization of economy have necessitated effective redressal mechanism for speedy settlement of domestic as well as international commercial disputes with a view to ensure uninterrupted flow of trade and commerce. Arbitration and Conciliation have been recognized as valuable adjuncts to the Court system. Overcrowding of court dockets and mounting arrears of cases awaiting disposal has shaken public confidence in court litigation and the public perception of delayed justice has raised a question mark on some basic assumptions on which the judicial system is rested.

In India the first statutory enactment in relation to arbitration law was the Indian Arbitration Act, 1899. The Indian Law on Arbitration was consolidated and redrafted in 1940 on the basis of English Arbitration Act, 1934. With globalisation and a vibrant change in the economy's dynamics, there arose a need to modify the existing statute on Arbitration laws. The Law Commission of India, proposed the need of updating the Arbitration Act of 1940. Presently, Arbitration and Conciliation Act, 1996 governs the Arbitration laws in the country

which came into effect on 25th January 1996. The Act is based on the UNCITRAL¹ Model law. The need of updating the existing laws was to be more receptive towards the contemporary issues.

TYPES OF ARBITRATION IN INDIA

Section 2(1) (a) of the Act defines arbitration. The Supreme Court has interpreted arbitration as 'judging of a dispute between parties or groups of people by someone not involved in the dispute and whose decision both parties agree to accept.'² Broadly there are 4 types of Arbitration that the parties may resort to settle their disputes. They are as following:

Ad-hoc arbitration: these proceedings are not administered by any institution and the parties determine all aspects of arbitration.

Contractual arbitration: to seek early settlement the parties chose to insert an arbitration clause as a part of the contract to refer to their existing or future disputes to a named arbitrator or arbitrators to be appointed by a designated authority.

Institutional arbitration: the parties pre-decide that in case of any future disputes arising in course of their business, the matter will be settled by a named institution. Such institutions have their own published rules and guidelines. Eg: SIAC

Statutory arbitration: in certain cases the parties are statutorily required to take arbitration proceedings according to the law of land. Eg: Indian Trust Act, 1882.

CHAPTER II - AMMENDMENTS IN THE ARBITRATION LAWS OF INDIA

¹ UNCITRAL United Nations Commission on International Trade Law

² Amar Chand v. Ambika Jute Mills, AIR 1966 SC 1036



Since 1996, the Arbitration and Conciliation Act has undergone tremendous transformations. The arbitration and conciliation Act was turning obsolete and incompatible to meet with changes due to globalization and increasing commercial disputes. The foreign parties as well as the Indian party never preferred India as a seat of arbitration. Inadequacy of laws governing arbitration, the excessive intervention of the Indian Courts and exorbitant delay in the disposal of cases were some of the major reasons which induced the parties to opt for arbitration outside India. The foreign investors often got involved into never ending litigations. In the White Industries Case³, India was chastised by the arbitral Tribunal in a bilateral Treaty Arbitration as there had been a delay of 7 years in the Indian courts. This delay was considered equivalent to not providing a speedy and effective remedy and thus keeping the foreign investor in a disadvantageous position. The Australian Company successfully claimed a compensation equivalent to the amount of, compensation from the Indian Government.

However the judiciary acknowledged the need of vibrant arbitration laws to improve its notoriety in the international front. Both the judiciary and the Government have shown support towards arbitration and have taken steps to change the landscape of arbitration. From 2012-2015, the Supreme Court delivered several judgments, showing positive attitude towards International Commercial Arbitration by minimizing judicial intervention in arbitration proceedings, refer a non-signatory to settle disputes of arbitration, explaining the scope of public policy in foreign seated arbitration,

and even ascertaining fraud as arbitrable. Moreover the Government has made efforts to bring accountability in the sphere of arbitration and has focused on fast track proceedings. The Government by bringing amendment in 2015 and 2019 amendments has taken a positive step towards making India a hub for International Commercial Arbitration.

AMMENDMENTS IN 2015

Arbitration becoming the most viable option to settle disputes demanded certain changes in the existing act. On 23rd October, 2015 the President of India assented to the Arbitration and Conciliation (Amendment) Ordinance, 2015 to amend the arbitration regime, 1996. Acting upon the recommendation of the 246th law Commission Report, the bill was passed in both the houses of the Parliament, and was signed on 31st December, 2015 by the President of India.

REDEFINING THE EXPRESSION "COURT"

One of the crucial amendments introduced is in respect to the definition of the word "Court." It clearly distinguishes between a domestic arbitration and international commercial arbitration. With this amendment the authority of deciding disputes related to international matters has been vested in the High Courts for a speedy and efficient ascertainment of issues and their disposal. Lower courts will have no jurisdiction on international matters to ensure that the matters are disposed off without any undue delay, and by judges who are well equipped with the required knowledge of law.

³ White Industries Australia Ltd. V Republic of India, IIC 529 (2011)



This modification in the definition as well as its interpretation will now help in building trust of foreign investors in the Indian legal system and will help in making India as the preferred seat of arbitration in International disputes.

APPLICABILITY OF PART I

The Arbitration and Conciliation Act, 1996 has been divided into 4 parts where the first part deals with arbitration proceedings taking place in India and the second part deals with International arbitrations.

The applicability of Part I of the Act has always been in dilemma. The Apex Court in *Bhatia International v. Bulk Trading*⁴ administered the application of Part I of the Act to foreign seated arbitrations. The Court while interpreting section 2(2) of un-amended Act, held that part I of the Act was applicable to arbitration proceedings taking place outside India, unless its exclusion has been expressed or implied by the parties. The court was of the view that if Part I was not applicable to arbitrations outside India, then the parties would have no remedy while seeking for interim reliefs as mentioned in Part 1.

Later in 2012, the Hon'able Court in *Bharat Aluminium and Co. v. Kaiser Aluminium and Co.*⁵ overruled decision laid down in the *Bhatia International Case* and held that 'Part I of the Act is applicable only to arbitrations taking place within the territory of India.'

The proviso added to section 2(2) strikes a balance between the plight created by the two judgments by extending the application of

Part I of the Act to arbitration proceedings taking place in India, whereas the provisions of section 9 (interim measures), section 27 (taking of evidence) and section 37(1)(a) and 37(3) dealing with appealable orders shall apply to international commercial arbitration regardless of the seat of arbitration, unless parties to the agreement have exclusively agreed to the contrary.

EXPEDITIOUS PROCEEDINGS AND EMPOWERING ARBITRATION TRIBUNALS

Another significant amendment is to section 9, where 2 new sub-sections have been inserted in order to minimize judicial intervention and empowering the arbitration tribunals.

Section 9(2) has been inserted with an objective to invoke the arbitration proceedings within 90 days from the date of passing any interim order under section 9(1)⁶, to avoid intentional delays. This will promote an arbitration friendly environment and would help in minimizing the number of pending applications in the Courts.

Section 9(3) has been inserted with the objective of empowering the arbitral tribunals and giving them powers to grant interim reliefs. This will help in minimizing the role of courts in arbitration proceedings.

The amended Act provides for a time frame for completion of the arbitral proceedings. Section 29-A has been inserted with a view of speedy trial which provides for a span of 12 months for disposing the matters related to arbitration, which can be extended to 18

⁴ *Bhatia International v. Bulk Trading* (2002) 4 SCC 105

⁵ *Bharat Aluminium and Co. v. Kaiser Aluminium and Co* (2012) 9 SCC 552

⁶ The Arbitration and Conciliation (Amendment) Act, 2015



months, but only with the permission of the Court.

Section 29-B introduces Fast track procedures. This type of procedure can be executed when the arbitration proceedings are not very complex and evidence and facts of the case can be established easily within the documents so that the hearings can be omitted. This amendment is based on 'documents only arbitration.'

These amendments will help in making the domestic arbitration powerful, and will build trust at the international forum. Resolving disputes invoking the fast track procedures and setting up a time frame within which the disputes need to be disposed off will strengthen the arbitration process in India and aid international arbitration in various ways.

AUTONOMY AND PROBITY

Section 12 of the principal Act was based on Article 12 of the model law, which gave a room to both the parties to carve their requirements accordingly in an arbitrator.) The Fifth schedule has been added to the Act which spells out the grounds which would provide the sufficient reasons for justifiable doubts to independence and impartiality of the arbitrator. The circumstances provided in the schedule are exhaustive and any person not falling under the ambit of the said schedule is regarded as impartial and independent. This list is based on the Orange List of the IBA Guidelines on conflict of interest in International Arbitration.⁷ This list comes into account when an arbitrator files a mandatory declaration about his

⁷ IBA Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, IBA Council, International Bar Association

⁸ The Arbitration and Conciliation (Amendment) Act, 2015, sec 12(1)

independence and impartiality, and his ability to complete the proceedings within a span of 12 months.⁸ Schedule VII enumerates a list for situations where a person who is to be appointed as an arbitrator if he shares a relationship with any party or the subject matter.⁹

This particular amendment empowers the arbitrator as well as save the arbitration proceedings with and kind of bias, and prevents miscarriage of principle of natural justice. Earlier decisions by arbitral tribunal were tainted and were not taken care of due to the obsolete laws. With the changes and transformations in the existing laws, India has taken a step ahead in making it possible seat of international arbitrations.

THE SCOPE OF THE EXPRESSION "PUBLIC POLICY"

Section 34 of the principle act has been amended in order to limit the gamut of the term Public Policy. The said section of the Act provides that an arbitral award may be set aside on the grounds if it contradicts the expression Public Policy. Challenging awards on the grounds of public policy had become a popular way by which the losing parties could challenge the arbitral awards. The Apex Court in *ONGC V Saw Pipes*¹⁰ had broadened the scope of the test of "public policy by including the scope of patent illegality." As a consequence of the Saw Pipes Case the parties could present their case in the Courts, and the Courts had the power to re-evaluate the facts and evidences of the case, which eventually frustrated the idea of

⁹ The Arbitration and Conciliation (Amendment) Act, 2015, sec 12(5)

¹⁰ONGC V Saw Pipes (2003) 5 SCC 705



arbitration. Subsequently the Hon'able Court in *Associate Builders v DDA*¹¹ held that section 34 does not permit the Courts to reevaluate decisions of the arbitrators. However, the Apex court only analyzed, and did not put any restrictions on the law governing the expression public policy.

The Law Commission in its 246th Report advised to restrict the definition of public policy by Courts. Accordingly, in 2015 explanations were inserted to section 34, in order to limit the application of public policy while enforcing foreign awards. There should be a prima facie case to substantiate the need for any reconsideration by the courts and a provision to dismiss the case at the initial stage. Section 2A¹² has been inserted to compensate for the intended consequences of the *Saw Pipes Case*, which mentions the distinction between a domestic award and a domestic award made in relation to International Commercial Arbitration.

While enforcing the foreign awards the Indian Courts often had a narrow approach¹³, and the courts upheld a very broad view of the expression public policy. There was a need to bring change in the archaic approaches by the Courts, and restrict the interpretation of public policy in order to yield the essence of arbitration, which was losing its significance by getting entangled in the obsolete laws.

This will encourage the foreign investors as now the enforcement of foreign awards will not face challenges in Indian Courts and the

investors will not be languishing in courts awaiting enforcement of the awards.

FOREIGN AWARDS

Part II of the Act deals with enforcement of foreign awards. To record the amendment of section 2(e) of the Act, Section 47 and 56 have been amended. The amendment now facilitates a party with foreign arbitral award to directly approach the High Court which is well equipped to handle international matters. Both the sections determine a public policy test akin to section 34.

Section 34 deals with awards that are neither final nor executable whereas section 48 and 57 are concerned with the enforcement of a final and executable arbitral award. The patent illegality test laid down in the *Saw pipes case* was wrongly applied in *Phulchand Exports v. O.O.O. Patriot*¹⁴ where the Court held that public policy will be treated on parallel grounds under section 34 and 48. The Hon'able Court in *Shri Lal Mahal Ltd. V Progetto Grano SpA*¹⁵, repudiated to apply the same test of public policy as under section 34.

The amendment narrows the approach of the expression public policy and lays down circumstances where foreign award will be in conflict with the public policy of India. This helps in streamlining the enforcement procedure, and makes arbitration the preferred means for a dispute resolution mechanism for foreign investors.

AMENDMENTS 2019

¹¹ *Associate Builders v Delhi Development Authority* 2014 (4) ARBLR 307

¹² *The Arbitration and Conciliation (Amendment) Act, 2015, Sec 31(2A)*

¹³ *Shri Lal Mahal Ltd -v- Progeto Grano Spa (Civil Appeal No. 5085 of 2013)*

¹⁴ *Phulchand Exports v. O.O.O. Patriot, (2011) 10SCC 300*

¹⁵ *Shri Lal Mahal Ltd. V Progetto Grano SpA (2014) 2 SCC 433*



After getting passed by both houses of the Parliament, the Arbitration and Conciliation (Amendment) Act, 2019 received the assent of the President on 9th August 2019. This amendment was long awaited, after the 2015 amendment to rationalize institutional arbitration. The 2019 amendment summarizes various recommendations made by the High Level Committee constituted under the Chairmanship of Justice B N Srikrishna. The key objective of the Committee was to eradicate the challenges that were present in the Arbitration and Conciliation (Amendment) Act 2015. The Act focuses on making India a hub for international commercial arbitrations and promotes institutional arbitration.

APPOINTMENT OF ARBITRATORS

Before the 2015 amendment the courts could exercise wide jurisdiction while deciding any matter under Section 11 to appoint an arbitrator. After the decision in *SBP V Patel Engineering*,¹⁶ the court could determine its own jurisdiction to adjudicate the arbitration petition and live claims. This power was narrowed down by the 2015 Amendment with the by introducing section 11(6A) and the power of the court was restricted only to examination of the existence of an arbitration agreement. In 2017 the Apex Court in *Duro Felguera*¹⁷ held that “after the amendment, all courts need to see whether an arbitration agreement exists- nothing more nothing less.”

The Amended Act¹⁸ has altered Section 11 of the Act, which discussed about appointment of arbitrators by Courts after submitting an

application the parties. The Amendment authorizes the Supreme Court to delegate the appointment of arbitrators to arbitral institutions graded by the council in case of international commercial arbitrations and High Court in case of other arbitrations. Appoint of arbitrators should be completed within 30 days, after the application has been presented by the parties. Moreover, the arbitral institutions will have the power to regulate the fees of arbitrators as stipulated in the Fourth Schedule which shall be applicable to the arbitrator. With the delegation of the power to appoint arbitrators in context of section 11, being given to arbitral institutions, the Supreme Court will now directly take up matters, under Article 136 against the orders passed by the authorized arbitral institutions. The amendment in Section 11 aims to expand the growth of institutional arbitration in India.

ALTERED TIMELINE

After the 2015 Amendment, the arbitration proceedings were to be completed on fast track basis, by inserting a time frame of 12 months which could be extended upto 18 months with the permission of the Court.¹⁹ The said amendment faced criticisms on the grounds that complex matters relating to international matters could not be disposed off in such a short period of time.

The revised timelines according to the new amendment are mandatory only for arbitrations where all the parties are Indian. These guidelines are only recommendations for international commercial arbitration.

ARBITRAL PROCEEDINGS

¹⁶ *SBP V Patel Engineering*, AIR 2006 SC 450

¹⁷ *Duro Felguera, S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729

¹⁸ The Arbitration and Conciliation(Aamendment) Act, 2019

¹⁹ The Arbitration and Conciliation (Amendment) Act, 2015 section 29-A



The 2019 amendment envisages confidentiality of arbitration proceedings, under the ambit of section 42-A. The said clause is associated with confidentiality of information and inflicts an obligation on the parties to uphold the confidentiality of arbitral proceedings except where the disclosure of the award is necessary for its implementation. This amendment imposes a burden on the parties by not only to impede intervention of third party but also forbids them to unveil any information.

THE ARBITRATION COUNCIL OF INDIA

The Arbitration Council of India (ACI) is expected to “lay down standards, make arbitration process more party friendly, cost effective and ensure timely disposal of arbitration cases.”²⁰ The ACI will be entitled to grade arbitral institutions, elevate the status of institutional arbitrations, review and restore various norms to establish satisfactory level of arbitration. The key role of the ACI is to formulate uniform professional standards for regulation arbitration proceedings in India. The criteria’s for accreditation of arbitrators has been specified in the Eighth Schedule to the Act.²¹

The constitution of ACI manifests the legislature’s motive to promote the expansion of institutional arbitration in India. The ACI is entrusted with the power to make regulations in consultation with the Central Government. Though the intent of empowering the ACI is to promote effective

institutional arbitration, but the 2019 amendment has added one more regulator to the list of this independent dispute resolution process.

CHAPTER III - THE ROAD AHEAD

The Act defines International Commercial Arbitration as 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—

- i. An individual who is a national of, or habitually resident in, any country other than India; or
- ii. A body corporate which is incorporated in any country other than India; or
- iii. An association or a body of individuals whose central management and control is exercised in any country other than India; or
- iv. The Government of a foreign country;²²

India being a preferred destination for foreign investment and growing business, business disputes is also pie size and everybody wants to have a slice. According to SIAC India saw the most number of parties involved with 485, more than triple the number involved in 2018.²³ Institutions in India are equally proficient as their global counterparts. India needs to promote an arbitration friendly environment, create awareness and most

²⁰ Press Release dated March 7, 2018, from Press Information Bureau of India, ‘Cabinet Approves the Arbitration & Conciliation (Amendment) Bill, 2018

²¹ The Arbitration and Conciliation (Amendment) Act, 2019

²² The Arbitration and Conciliation Act, Section 2(1)(f)

²³ Singapore Global dispute resolution reputation grows as the arbitration cases hit record in 2019, available at <https://m.globallegalpost.com/big-stories/singapores-global-dispute-resolution-reputation-grows-as-arbitration-cases-hit-record-in-2019-33394772/> (15.05.2020) (14:51)



importantly prove its self sufficiency to resolve in India,

The amendments made in the Arbitration and Conciliation Act 1996 has brought about various changes in the sphere of International Commercial Arbitration. Revolution in the international arbitration regime is an optimistic step to strengthen arbitration in India. Though Indian Government and Judiciary is emphasizing on making India a hub of International Commercial Arbitration, there are certain gaps that need to be filled in order to achieve the desired goal.

INCONSISTENCIES

- Governmental supervision over the institutionalization process
- Inclination towards ad-hoc arbitration
- Often retired judges and technocrats head the arbitration proceedings, but they often lack international exposure
- Lack of knowledge about the existing arbitration institutions, laws and their functioning
- The choice of arbitrators is restricted by nationality
- Lack of human capital. Arbitration experts shall be indulged.
- The perception of arbitration needs to be changed amongst the legal fraternity. It should be seen as whole time dispute resolution mechanism
- Promote arbitration culture. Include International commercial Arbitration in the curriculums and generate well equipped arbitrators.
- Lack of infrastructure and technology

The future of International Commercial Arbitration in India depends upon 5 P's.

I - INSTITUTIONALIZATION

I - INDEPENDENCE

I - IMPARTIALITY

I - IN-TIME JUSTICE

I - INFRASTRUCTURE

The Road ahead to establish an arbitration friendly environment and attract maximum foreign investment is by promoting institutional arbitration. These Institutions provide a pre-determined arbitration procedure and are well updated in lieu of the latest developments. They provide an efficient panel of arbitrators and are experienced in the required fields. Though various arbitral tribunals exist in India like ICADR, MCIA etc. but still the people are reluctant to approach these institutions. Recently LCIA office in India closed as its caseload was in single digits²⁴. There is a need to create awareness amongst the business fraternity and bring them in parlance with the arbitration institutions India. The process has to start with the root level by introducing International Arbitration to the budding lawyers. It is essential that institutional arbitration in India is speedier and cost effective and receives support from the state in every possible way. In order to make India a hub of international arbitration we need to open ourselves to the outside world and integrate the best practices to establish world class Institutional and legal procedure. The lack of oversight over procedural aspects of arbitrations has often

²⁴ 'LCIA India to end operations', Herbert Smith Freehills – Arbitration Notes, 08.02.2016, available at

<https://hsfnotes.com/arbitration/2016/02/08/lcia-india-to-end-operations/> (accessed on 15.05.2020) (14:55)



resulted in arbitral awards in arbitrations administered by such institutions being vulnerable to challenge in court.²⁵

CHAPTER IV - CONCLUSION

Change is the law of the nature. With changing trends the world needs to change and so does the law governing the world. The provisions of Arbitration and Conciliation Act, 1996 had turned obsolete and required reforms in order to match the speed of the growing world. The steps taken by the Government and the judiciary are very optimistic, but its success will depend upon its practical application. The judiciary has been very supportive towards the reforms made. The Supreme Court invoked section 11 of the Act²⁶ asked MCIA to appoint an arbitrator in an international dispute indicating a major boost to arbitration. The Judiciary has been constantly expanding the horizons of arbitration and giving pro-arbitration judgments.

There is a need to change the mindset of the people and introduce them to arbitration. The phrase “*see you in court*” has to change and the arbitration regime has to ***evolve as the new way to resolve***. The coming time is going to witness foreign investment in the Indian Territory and we need to work on our arbitration regime. India is on the way to establish confidence in its legal system which is important to make India a hub of International Commercial Arbitration.

To establish an effective dispute resolution mechanism for international fronts India need to focus on the needs of the world. Foreign parties would choose India as a seat of

arbitration if Indian law system offers them what they require. SIAC has emerged as place where the world arbitrates because of its versatility and engagement of arbitrators across the globe who have been exposed to the international front.

India has started to walk on the path of making India a hub for international arbitration, but it needs to pace up and compensate for the crucial times that have been lost. The Amendments introduced are definitely a step ahead but the arbitration regime of India need to scurry instead of taking baby steps.

The quality of our lives depends not on whether or not we have conflicts, but on how we respond to them.

-Thomas Crum

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