



ADVANTAGES OF INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

In international trade and commerce, resolving disputes by the procedure of arbitration has become exceptionally strong and widely accepted means. As pointed out by some commentators that around 90% of all international contracts are governed by an arbitration clause.

Rapid globalisation has provided a corresponding growth in the volume of international contracts with clauses providing resolution of dispute by means of international arbitration. In turn, the availability and effectiveness of international arbitration has been noticed by many as an urge to cross border commerce and investment.

As the pivot of the world economy has pointed towards the higher growth economies in emerging markets, the disputes to be resolved by international arbitration are increasingly drawn from trade with and between emerging economies. Although the traditional centres of international arbitration is situated in Western Europe and North America which are even more busier than ever, they are facing strengthening competition from elsewhere as well.

In particular, an increasing number of nations have developed their arbitration laws and supporting judicial practices, and an ever-widening choice of arbitral institutions worldwide now provide services to their potential customers. In other cases, in some

jurisdictions the courts themselves are dealing and making attempts to attract international disputes away from arbitration. The increasing complicated legal landscape provides an array of choice to international parties as to how they manage and resolve their disputes. Business needs will keep changing depending on the context provided, but some general guidance which can be drawn from an analysis of the aspects of international arbitration which can be noticed as most advantageous for international parties while minimising perceived disadvantages of international arbitration on the other hand.

Introduction

Indian law has provided provision for dispute resolution by the way of **International Commercial Arbitration**. This mechanism is aimed at resolving commercial disputes between an Indian party and a foreign party within the framework of **Indian Arbitration Laws**. The arbitration proceedings could be governed by the rules of the **arbitration institutions** or the courts have the power to appoint **arbitrators** under the provisions of section 11 of the **Arbitration and Conciliation Act 1996**. The business disputes between parties are settled through mutually agreed-upon terms by the way of arbitration. The parties basically submit the dispute to one or more arbitrators who settle the dispute by making a **binding decision** on the dispute. Thus, arbitration is a procedure of settling the dispute outside the courts in an efficient and timely manner.

International Commercial Arbitration

The section 2(1)(f) of the Arbitration Act defines **ICA** (International Commercial



Arbitration) as a legal and commercial relationship and either of the parties in dispute is a foreign national/resident or a foreign body corporate, company, association or body of individuals whose central management is in foreign land¹. Thus, as per Indian laws, arbitration with having a **seat in India** involving a **foreign party** is regarded as ICA, subject to Part I of the Act.

Objectives of International Commercial Arbitration

Arbitration is an advanced alternative to the legal system and aims to fill up gaps that persevere in the conventional court proceedings. Various legal characteristics of **commercial arbitration in India** include, the provided provision of a Neutral Dispute Resolution Forum against the local courts, providing parties with commercial expertise to adjudicate the tribunal, not similar to courts that merely exercise general jurisdiction. The **law in India** provides parties with an enforceable award as opposed to jurisdictional uncertainties in litigation and the arbitration proceedings is speedy trial avoiding the delays and appeals that always occurs in the court system. In addition, the parties are not subject to public trials, thereby sustaining the confidentiality of the parties.

International Arbitration Legislation

The **UNCITRAL Model Law** was unanimously adopted in the year 1985 and was further subsequently amended in year 2006. Basically, there are more than 60 countries that have adopted this model law

¹ Susan Gaultier, 'International Commercial Arbitration' (International Commercial Arbitration - GlobaLex 2014) <<https://www.amazon.com/Intehttps://www.nyulawgl>

that permits comprehensive legislative treatment of the international arbitral process. The Model sustains the validity and enforceability of arbitration agreements under (Article 7 - Article 9) by providing a guideline for **competent arbitrators under** (Article 16) and the absolute judicial non-interference under (Article 5). The parties are always provided with the choice of arbitral seat under (Article 1(2), Article 20), and for appointing of the arbitrators under (Article 10 - Article 15) and the provisional measures under (Article 17) to be taken. The Model only lays down an objective procedure for arbitration under (Article 18 - Article 26), and evidence taking under (Article 27) as per the applicable substantive law under (Article 28) to come to a concluding arbitral award (Article 29 - Article 33). Most importantly, the model provides provisions for the recognition and **enforcement of foreign arbitral awards** including bases of non-recognition (Article 35 - Article 36).

Advantages of International Commercial Arbitration

• Decision-Maker Selection and Expertise

One specific area where international arbitration will always have an advantage over any court proceeding is in the extent of party control, and the same is being reflected strongly in the ability in many cases for parties to select arbitrators through a mechanism of their choice.

As there are many experienced and competent judges, and on the other hand many judges specialize in these field of large-scale commercial disputes, sometimes it is

www.globalex.org/globalex/International_Commercial_Arbitration.htmlnational-Commercial-Arbitration-Second-Three/dp/9041152199> accessed July 10, 2020



the case that judges sitting in a national court have to deal with a very wide range of cases, and then frequently need to balance the limited resources of the court system between their caseload. However dedicated and skilful judges sitting in a national court, may not be best equipped to deal with a dispute occurring in the context of international trade and commerce, which in case may involve both a high degree of factual complexity and particular issues of fact or law arising from the international dimension as well.

Moreover, there could be the case that an individual who has excelled to the extent of reaching the rank of judge in a national court system will be very strongly influenced by their own national law and the various assumptions and principles which are provided under the law, rather than focus on the provisions of different systems of national law with one another and other issues of international law².

However, the situation concerning the appointment of arbitrators is evidently very distinct, the approach is not uniform. Indeed, there are divergent views in the international arbitration community as the right of party for nomination of arbitrators is fundamental in nature. Instead, if the parties in dispute require such a right for nomination of arbitrators, they must specifically mention that under the clause in the arbitration agreement. In international arbitration specifically, there is wide range of guidelines provided for selection of sole arbitrators or panels of arbitrators, with variation to the extent of party involvement. However, in international arbitration there is a spectrum which at one end allows a high degree of control by the parties in dispute over the choice of arbitrator, and on the other side if

the parties find themselves at the other end of the spectrum with limited party control over nomination, it is basically due to the parties' own choice.

In most of the cases it is possible to find well qualified and experienced arbitrators who will combine their gained commercial knowledge with their legal skills and proceed forward to adopt a more international and pro-business outlook. As international arbitration has continued to grow worldwide, there has been a expanding growth in the number of potential arbitrators, nowadays there is a wealth of choice available with the parties in dispute.

• Co-ordinated Dispute Resolution

In addition to the expanding internationalisation of business, the past few decades have noticed an escalation in the complexity of economic activities. The growth of numerous regional trade blocks, such as the EU, is, in part, a recognition of the reality that modern business is conducted on a global scale, with national boundaries having lost much of their former significance in that regard.

As national courts and systems of national law are limited within the national boundaries, the risk associated is that a dispute relating to modern global business will be subject to the courts of different nation's involved in parallel proceedings, or having difficult and lengthy proceedings concerned with the question arising of that which will exercise their jurisdiction. Such a confusion, with appropriate forethought, could be avoided with well-drafted arbitration clauses providing an international arbitral tribunal a wide jurisdiction as possible. In such a procedure, there is scope

² Subodh Asthana, 'Role of National Courts in the International Commercial Arbitration' (iPleaders

2019) < <https://blog.ipleaders.in/international-commercial-arbitration-2/> accessed July 12, 2020



for exercising the enormous advantage of carrying all relevant aspects related to dispute considered in one arbitral forum, and for the arbitral tribunal exercising jurisdiction to have appropriate powers over the entire issue in dispute.

As told, it is not ordinary situation for there to be disputes over the arbitral tribunal's jurisdiction and the same serves to emphasise the need to take care in drafting the arbitration clause with due precision³. Even the well-drafted clause, however, may not be able to expect everything that may eventuate, and the most common issue is that the arbitration agreement may not cover all the potential disputes which may arise, specifically if there are multiple contracts merged or multiple parties involved.

However, none of these difficulties at the margin detract from international arbitration's advantage over national and state courts in providing a co-ordinated procedure for resolution of all the disputes among the international parties, notwithstanding the geographical distribution of the subject matter providing situations for the disputes.

- **Finality of Decision**

To a greater extent as compared to the litigation in the courts, international arbitration provides finality in the decision-making process. One of the disadvantages of the court proceedings is that judgments can sometimes be subject to one or more appeals, and they could take many years to be resolved.

The basic feature of most of appeals through the court proceeding is that, by their nature, they can rely on the principles of law which

the appeal court may often want to consider in a way that is generally applicable, or at least consistent with all other decisions. The court, in paying attention to the wider legal landscape, inevitably doesn't decide the case solely by reference to the particular situation and facts of that case, and may be persuaded to backed away from the recent decision awarded on the facts of the particular case, in the favour of a decision that more appropriately fits to the interpretation of the law itself.

Such a delay and potential diversion towards scrutiny of legal principle can be avoided in the arbitral process, where the arbitral tribunal's decision is final other than usually limited available grounds of challenge in the courts.

However, in the most of the arbitration-friendly jurisdictions, the courts are determined to emphasise their enthusiasm of not to interfere in the arbitral process, they could not properly surrender their entire rights, and even in these jurisdictions there U plies a range of limited grounds on which the award can be challenged.

The inability to appeal awards is observed as a strength in general, but parties in dispute sometimes express concern about the lack of any corrective mechanism which could provide remedy to the obvious errors. To some extent, concerns in that regard are reduced by the ability of the parties in dispute to choose their arbitrators and the lack of any probable remedy beyond the decision of the arbitrators is a strong encouragement to exercise due care when choosing the appointment procedure for arbitrators and in nominating arbitrators as well.

³ Maurice Kenton and Peter Hirst, 'Advantages of International Commercial Arbitration - International Law - Worldwide' (Welcome to Mondaq July 30, 2015) < <https://www.mondaq.com/uk/international->

[trade-investment/416416/advantages-of-international-commercial-arbitration](https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration)> accessed July 16, 2020



- **Costs and Speed**

The arbitrations could acquire benefits in terms of costs and speed, and absolutely the procedure can be tailored to save time and money.

In spite of this, there are numerous examples of arbitrations being costly and the procedure enduring quite a while. In some cases, this is in part because parties may prefer a more thorough process and will opt for a detailed examination of the issues, in the knowledge that this is more likely to produce a fair result. In any case, it is fair to say that there are few techniques within court processes which can sometimes curtail expense and, for example, in the English courts it is possible to apply for a summary determination of the case without a trial⁴. Under most arbitral rules, there is no similar procedure for synopsis determination. However, while in a clear case the summary procedure will shorten the length of the court process, in a more complicated case it may result in time being wasted on an unsuccessful application, with the effect of extending the length of the court process even further.

Most of the arbitral rules provide the option of an expedited process for dispute resolution or fix a time limit for the award to be granted. However, it is open for the parties in dispute to mutually agree on a timetable which suits their choice of expediate resolution. Furthermore, there is also a scope for the parties in dispute to agree, either at the time of drafting the arbitration clause or subsequently, to limit within reasonable bounds the extent of procedure which would otherwise be time-consuming or expensive or both, such as the extent of document

disclosure and/or the extent to which particular facts must be proved.

Moreover, it is difficult to derive a comparison at a very basic level between the costs and speed of arbitrations, as opposed to the costs and speed of litigation in the national court. In some cases, there are chances in which litigation can be an attractive option, but in numerous cases of international disputes, international arbitration provides a more flexible model with the capacity to adjust itself more closely to the parties' expectations and requirements considering costs and speed.

Conclusion

The rapid and continual state of change in international trade provides that the choice for business parties of whether to arbitrate international disputes in relation to litigation in the courts, and exactly the manner of arbitration, will often be complex decisions of requiring careful consideration and wise counsel. There are many instances in which the right decisions can lead to an international arbitral process which is optimal in meeting the needs of the parties, offering as it does a system of dispute resolution tailored to the parties' needs and recognising the need for a business-like resolution, so as to allow trade to continue.

⁴ Rituparna Padhy, 'Applicable Law in International Commercial Arbitration' (Law Times Journal 2019) <<https://lawtimesjournal.in/applicable-law-in->

[international-commercial-arbitration/](https://www.supremoamicus.org/international-commercial-arbitration/)> accessed June 29, 2020