International Commercial Arbitration in India – Issues and Challenges

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Introduction

Recentlyit has been observed that a number of commercial disputes have risen with the passage of time globally. In order to lessen the burden of courts, alternative modes have been considered appropriate to settle the dispute outsidecourt. Further, it encourages the practice of maintaining confidentiality and trade practices worldwide. In the present scenario, we can observe that the trend which the business community is following is redressal of commercial disputes through arbitration rather than going for litigation. Due to change in the attitude,preference has been given to the arbitration process because of its many advantages. It is important to note that this journey started when the Government of India introduced the Arbitration and Conciliation Bill, 2003 which was a remarkable step taken to overcome the shortcomings of the Arbitration and Conciliation Act, 1996 related to domestic as well as international arbitration. It was felt that the need of the hour is to have a better mechanism in relation to conducting international arbitration practices. According to Mr. Fali S. Nariman, it would be appropriate to say that the real problem is about enforcing foreign awards which is sadly due to lack of awareness regarding the significance of having international arbitration among people especially lawyers and judges because of which we are not able to achieve our goal.[3]

Subsequently, with the advent of globalization and liberalization, it encouraged the practice of trade and commerce in India and resulted in understanding the importance of international commercial arbitration in order to settle the commercial dispute. For instance, International

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[3]DR. N. V. PARANJAPE, LAW RELATING TO ARBITRATION & CONCILIATION IN INDIA 434 (7th ed., 2016).

Chamber of Commerce (ICC) came up with ICC Dispute Board Rules for solving commercial matters.[4]

In the previous Act of 1996, the term 'Commercial' was not defined although the 2015 amendment brought changes and resulted in defining the term 'International Commercial Arbitration' under Section 2(1)(f).[5] From this, we can understand the necessity to have laws which could be helpful in maintaining international standards.

The authors postulate that there are large numbers of pending cases in India and to lessen the burden of courts we need to follow alternative modes. For example, learning from past experience there are almost over 30 million pending cases in Indian courts among of which 80 percent are in district courts as per figures of December 2014.[6] Therefore, to lessen the burden of the courts, alternative modes have been given preference.

The Chief Justice of India, Dipak Misra stated that in order to solve commercial disputes it is essential to motivate practice of institutional arbitration in India rather than following ad hoc arbitration it has been suggested in order to have cost-effective arbitration system in India. It is important to understand the significant role played by arbitration centre. It is well stated by Chief Justice of India that the whole economy of the nation is based on trust.[7] In order to make India a hub for international arbitration in future, we need to make effective efforts to improve the arbitration mechanism in India.

This paper explores the journey of Indian arbitration law in relation to international commercial arbitration. This will help us in maintaining international standards in Indian arbitration mechanism and will motivate those activities which will be beneficial for Indian economic growth.

International Commercial Arbitration in India

It is with this perspective in the mind, Part II of the Act deals with foreign awards and enforcement under New York Convention and Geneva Convention. The objective of the 1996

[4] *Ibid.*
[5] PARANJAPE, *supra* note 2, at 70.
[6] *Arbitration most viable form of dispute resolution: Justice TS Thakur,* DNA INDIA, http://www.dnaindia.com/india/report-arbitration-most-viable-form-of-dispute-resolution-justice-ts-thakur-2566596 (last updated Dec. 11, 2017).
[7] Prabhati Nayak Mishra, *CJI Dipak Misra bats for Institutional Arbitration to resolve commercial disputes*, ,http://www.livelaw.in/cji-dipak-misra-bats-institutional-arbitration-resolve-commercial-disputes/ (last updated Dec. 9, 2017).

Act is to provide speedy disposal and a cost saving mechanism in India. Furthermore,the 2015 amendment has deleted the word 'company' and has highlighted international commercial arbitration which is meant for the body of individuals or association.

It is, therefore, interesting to study this aspect, as it is essential to understand the concept of international commercial arbitration globally.Therefore, it isa process by which a dispute is considered or it may deal with the difference between two or more parties which focuses on their mutual legal rights as well as liabilities and it is determined judicially, therefore, it has binding effect through application of law by one or more persons.[8] In another words, international commercial arbitration would be known as a consensual means of dispute resolution by non-governmental decision makers which produces a definitive as well as a binding award which is capable of enforcement with the help of national courts.[9]

As per the Indian arbitration law the term 'International Commercial Arbitration' has been defined and it will be an arbitration which is related to disputes arising out of legal relationships, whether contractual or not will be considered commercial in nature under law in force in India and will have a party at least one which will be an individual belonging to a nation or is a habitual resident in any country apart from India. Moreover, it can be a corporate body which is corporate in any country besides India. Also, if the company or an association or a body of the individual has central management and control is exercised in any another country another than India or if the government of a foreign country will be under the ambit of international commercial arbitration in India.[10]

It is necessary, to begin with, Bhatia International v. Bulk Trading[11]where it was held that Part I of Arbitration and Conciliation Act, 1996 will be equally applicable to international commercial arbitration where there is seat outside India unless any or all provisions has expressly excluded. After ten years from the Bhatia International case later in Bharat Aluminium v. Kaiser Aluminum,[12]it was observed that a constitutional bench of the court will reconsider Bhatia International case. Finally, it was held that Part I is not applicable to international commercial arbitration which is having a seat outside India and there will be no

[8]HALSBURY'S LAWS OF ENGLAND 322 (4th ed., 1991).
[9]CARY B. BORN, *International Commercial Arbitration in the United States: Commentary and Materials*1 (2nd ed.,1994).
[10]Arbitration and Conciliation (Amendment) Act, 2015,s. 2(1)(f).
[11](2002) 4 S.C.C. 105.
[12](2012) 9 S.C.C. 552.

interim injunction if the seat is outside India and interim relief cannot be granted under Section 9.[13]

Similarly, in order to understand the scope of this provision, we can refer the decision made by the Apex Court earlier where it was held that in spite of company having a foreign control it is essential that a company incorporated in India can only have Indian recognition.[14] In order to improve the previous situation, the new law has stated a clear demarcation of the international commercial arbitration aspect. Further, in N. Radhakrishnan v. Maestro Engineer[15]it was held that cases concerning fraud as well as malpractices will be settled in the court only and cannot be transferred to arbitration although the decision was overruled in Swiss timing Ltd. v. Organizing Committee, Commonwealth Games, Delhi[16] where it was decided that the allegation of fraud and other malpractices will be arbitrable in India and the courts need to interfere least in such matters.

Previously, before the 2015 amendment it was held by the Supreme Court that any allegations which are made on deceit and malpractices cannot be a bar to direct parties seated in a foreign country related to a dispute to arbitration.[17] On contrary, the Supreme Court made it clear that only matters related to simple fraud will be considered for arbitration. Additionally, it is essential to note that there is the difference between natures of fraud considered under the case one is simpler which can be decided by the court and another is of serious nature which can be decided by the arbitral tribunal.[18] From this decision, it was made clear that it does not overrule the decision of N. Radhakrishnan.

Institutional Arbitration v. Ad Hoc Arbitration

Institutional arbitration is a proceeding where the parties designate an institution to administer the arbitral process according to arbitration rules. Whereas, ad hoc arbitration is a proceeding which requires the parties to select specific rules, procedures as well as

[13]*Supra* note 11.
[14]TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., 2008 (2) U.J. S.C. 721.
[15]2010 (1) S.C.C. 72.
[16]A.I.R. 2014 S.C. 3723.
[17]World Sport Group (Mauritius) v. MSM Satellite (Singapore) Pte Ltd.,Civil Appeal No. 895 of 2014 (Arising out of S.L.P. (C) No. 34978 of 2010.
[18]A. Ayyasamy v. A. Paramasivam&Ors., (2016) 10 S.C.C. 386.

arbitrators. However, the parties can still designate an arbitral institution as the appointing authority if the rule allows the parties to follow that institution rules.[19]

Since the parties have to decide to solve their dispute through arbitration by following arbitral institutions or ad hoc arbitration in such situations both have their merits and demerits. In institutional arbitration, the parties follow the institutional rules and it has been observed that it is cost efficient as well as effective in many circumstances. Moreover, it is internationally recognized and has more credibility around the world.[20] On the other hand, ad hoc arbitration is not administered by institution rules. The parties have more opportunity to follow a procedure properly to the specific kind of dispute. It can be useful in situations where the party is a State in such situation the proceedings are required to be more flexible.[21] Therefore, we can say that it is more flexible and may be less expensive as well as more confidential in nature than institutional arbitration. For instance, in State to State arbitration is conducted on the basis of ad hoc arbitration rather than institutional arbitration.[22]

According to Henry and Arthur Marriot, these rules are step up by specific institutions that play a supervisory and supportive role. This will result in encouraging the practice of establishing institutional arbitration.[23] One needs to make it clear that institutional arbitration charges reasonably. It is a simple mechanism as well as flexible in nature, therefore, it is high time to make public aware that it is helpful for everyone not only meant for big business in India.[24] Therefore, it will be helpful in making India arbitration friendly country.

Prior To 2015 Amendment- Judicial Intervention

When we look at the NTPC v. Singer Co.[25]decision it was held by the Court that parties have the freedom to choose the law governing international commercial arbitration agreement. Moreover, they may choose substantive law governing the arbitration agreement as well as procedural law for conducting the arbitration. Further, in Sumitomo,[26] it was held that the law will apply to the filing the award, to its enforcement and to its setting aside will be the law

[19]William Hartnell, QC, et al., *Ad Hoc v. Institutional Arbitration –Advantages and Disadvantages*, ADRIC, http://adric.ca/wp-content/uploads/2017/09/Hartnett-and-Shafler.pdf (last updated Dec. 1, 2017).
[20]Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*10 (3rd ed.,2017).
[21]*Ibid.*
[22]R. Niek Peters, *The Fundamentals of International Commercial Arbitration*55(1st ed., 2017).
[23]Sukumar Ray, *Alternative Dispute Resolution along with Gram Nyayalayas Act*21(1st ed., 2012).
[24]Department of Legal Affairs, M.L.J, *Report of the High Level Committee to review the Institutionalization of Arbitration Mechanism in India*, LEGAL AFFAIRS http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (last updated Dec. 2, 2017).
[25]A.I.R. 1993 S.C. 998.
[26]Sumitomo Heavy Industries Ltd. v. ONGC Ltd. Ors, (1998) 1 S.C.C. 30.

governing the agreement to arbitrate and the performance of that agreement. Even in ShreejeeTraco v. Paperline[27], it was observed that in the absence of any contrary indication, in such scenario the presumption that the parties have intended that the proper law of the contract, as well as the law governing the arbitration agreement, will be same as the law of the country in which arbitration is agreed to be held.

Earlier, it was observed by the Apex Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[28]that the term 'public policy' would be widely interpreted and will also include patent illegally. This resulted in causingthe delay in the arbitral proceedings and opened the ground for greater judicial intervention in arbitral awards. Additionally, the decision was criticized and was considered wrong for giving a wider interpretation to the term 'public policy' at that time.[29] To illustrate, Venture Global v. Satyam Computer[30]where the Supreme Court held that the foreign awards can be challenged under Part I and can be refused for recognition and enforcement under Section 48 contained in Part II of Arbitration and Conciliation Act, 1996.As a consequence, this caused uncertainty in making a decision by the parties to make India a seat for arbitration as foreign award were considered same as domestic awards.[31] Also, Dozco India v. Doosan infracore[32]where the parties have expressly stated that the seat of arbitration will be Seoul, South Korea and therefore the contract was governed by the respective country law of contract as wellas it was held that Part I will not be applicable under such circumstances. Subsequently, in Reliance Industries Limited and Another v. Union of India[33]it has been observed that parties have excluded the applicability of Part I of the Arbitration Act, 1996 by express agreement to the arbitration proceedings.

In 2014 Enercon (India) Ltd. v. Enercon,[34]it was held that since the parties have chosen London as a venue in order to hold meetings meant for arbitration only in such circumstances London can't be accepted as a place of arbitration. As stated above, from this we can

[27](2003) 9 S.C.C. 79.
[28]A.I.R. 2003 S.C. 2629.
[29]Aishwarya Padmanabhan, *Analysis of Section 34 of the Arbitration and Conciliation Act - Setting aside of arbitral award and court's interference : An evaluation with case laws*, MANUPATRA, http://manupatra.com/roundup/326/Articles/Arbitration.pdf (last updated Dec 2, 2017).
[30](2008) 4 S.C.C. 190.
[31]Dru Miller, *Indian Courts Expands its Jurisdiction over Foreign Arbitral Panels*, PSU, http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1067&context=arbitrationlawreview (last updated Dec. 2, 2017).
[32](2011) 6 S.C.C. 179.
[33](2014) 7 S.C.C. 603.
[34](2014) 5 S.C.C. 1.

understand that prior to 2015 amendment it has been a challenging aspect for Indian judiciary to consider matters related to arbitration.

Recent Amendment-Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Bill was introduced on 3 December 2015 in the Lok Sabha which was passed later as Arbitration and Conciliation (Amendment) Act, 2015.Moreover, if one of the parties has not appointed the arbitrator within thirty days or the two arbitrators haven't appointed the third arbitrator then the parties can request the Supreme Court or the High Court as the case may be in order to appoint an arbitrator. Further, the Supreme Court or the High Court can authorize any person or institution in order to appoint an arbitrator. Especially in matters related to international commercial arbitration, the application for appointing an arbitrator has to be made to Supreme Court and High Court for domestic arbitration which has territorial jurisdiction. Section 8 will be applicable for referring a dispute for arbitration which will empower the court only for mere examines the prima facie existence of an arbitration agreement.[35]

It is significant to understand that during the time period between 2012 and 2017 many decisions have been made by the Apex Court in order to develop international standards in arbitration mechanism in India. As mentioned above, after 2015 amendment we can see Section 11 according to which when an arbitrator is not appointed with thirty days by the party from the receipt of the request to do so from the other party or the two arbitration haven't decided the third arbitrator within thirty days from the date of their appointment then in such circumstances the appointment shall be made on request of a party by the High Court concerning domestic arbitration or any person or institution designated by him or the Supreme Court for international commercial arbitration matters or even by any person or institution designated by him.[36] From this, we can understand that recent amendment has widened the ambit of appeal. For instance, Section 8 can consider the order refusing to refer the parties to arbitration.[37] With 2015 amendment concern has been made on giving minimum interference to the court in order to provide effective dispute resolution mechanism in India.[38]

[35]Arbitration and Conciliation (Amendment) Act, 2015, s. 11.
[36]Yashu Bansal, *The judicial intervention in Arbitration*, 3 I.J.S.A.R.D. 14-15 (2017).
[37]Arbitration and Conciliation (Amendment) Act, 2015, s. 8.
[38]Bansal, *supra* note 35, at 17.

Learning from Bhatia International[39]where it was held that where the clause in arbitration agreement reflected the intention of parties to apply English Law to arbitration to the arbitration agreement and not limited to conduct of arbitration, therefore, Part I is impliedly excluded.[40]In addition, Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.[41]it was observed by the Court that where the seat of arbitration was held to be London because it would be better to interpret the clause which is a proper clause or substantial clause than procedural. With this view, also the Court held in Eitzen Bulk v. AshapuraMinechem[42]that where there is an intention to apply English law to the resolution of any dispute arising under the law. In such situation, we can say that English law will be applicable to the conduct of the arbitration.

It has been made clear that by not inferring with an award under Part I is meant for international commercial arbitration.[43]Subsequently, the tribunal was justifying in awarding damages in favor of investor and the court has refused to interfere with the award and negated objects with the qualifications of the arbitrator. From this, we understand that foreign investors entering into a contract with Indian parties will promote confidentiality and will be reasonable for Indian courts in order to support the arbitral process by having party autonomy and the minimum threshold for keeping the intervention.[44]

At an event recently Chief Justice of India, Dipak Misra has emphasized on having institutional arbitration than ad hoc arbitration in India and further focused was made on having less interference by the Courts in the arbitration matters. In order to make arbitration mechanism cost efficient, we need to make laws which could motive in making India a seat for international arbitration. In addition, Justice Madan B Lokur stated that in order to maintain neutrality and confidentially it is necessary to have trained arbitrators. Moreover, in order to raise the percentage of foreign direct investment today, we need to have technological skills as well as sustainability in the arbitration system.[45] We need to keep this is in mind that India has to keep pace with the development taking place in arbitration

[39]A.I.R. 2016 S.C. 1285.
[40]PARANJAPE, *supra* note 2, at 79.
[41](2015) 9 S.C.C. 172.
[42](2016) 11 S.C.C. 508.
[43]ShakiNath &Ors. v. Alpha Tiger Cyprus, (2017) S.C.C.OnLine Delhi 6894.
[44]AnchitOswal, *India and International Commercial arbitration*, KHAITANCO, https://www.khaitanco.com/PublicationsDocs/Mondaq-KCOCoverage23June17Anchit.pdf, (last updated June 23, 2017).
[45]Mishra, *supra* note 6.

mechanism internationally in order to maintain global standards.[46] In order to draw the attention of the investors, we need to improve our standards in arbitration mechanism. By having a sophisticated legal system and commercial judiciary we can make an effort to promote arbitration.[47] Sadly, International Centre for Alternative Dispute Resolution (ICADR) has not been recognized globally and it has very less caseload. With the establishment of MCIA new hopes are drawn to make India a destination seat for international commercial arbitration. Along with this, it was stated by Prime Minister of India at a conference that we need a legal system with vibrant arbitration mechanism in order to grow business in India.[48] The Indian Government can achieve its objective only by establishing world-class arbitration centre and it is hoped that arbitration mechanism in India improves with time. For instance, Singapore International Arbitration Centre (SIAC) has tied up with Gujarat International Finance Tec-City and recent announcement done in relation to BRICS-centric arbitration centre in Delhi is a great example to reflect promising India for better future.[49]

Conclusion

In 2016 the Srikrishna Committee was set in order to improve arbitration mechanism in India among of which focus was made on to encourage the use of arbitration for matters related to international commercial arbitration.[50] After a year the Committee submitted its Report stating that we need to make laws which could encourage the practice of international commercial arbitration and make further efforts to make India a hub for international commercial arbitration in coming years.[51]

From this, we can conclude that the 2015 amendment is one important step taken by the Indian lawmakers to make India a preferable seat for international arbitration in near future. With a positive believe India has set up its first international arbitration centre in Mumbai

[46]*Supra* note 5.
[47]*Fifteen years on from Bhatia: the Indian Government looks At How to Institutionalize Arbitration in the Subcontinent*, CLYDE & CO, https://www.clydeco.com/uploads/Blogs/brexit/Article_-_Fifteen_years_on_from_Bhatia.pdf (last updated Dec. 10, 2017).
[48]Harisankar K. Sathyapalan& Madhu Sivaraman, *A Lot Still Needs To Be Done For India To Fulfil Its International Arbitration Ambitions*, THE WIRE, https://thewire.in/77002/international-arbitration-india/ (last updated Nov. 2, 2016).
[49]*Ibid.*
[50]*Govts set up high-level committee to review arbitration system in India*, LIVE MINT, http://www.livemint.com/Politics/RFXklIPqtVX6qnLV9DJxpI/Govt-sets-up-highlevel-committee-to-review-arbitration-syst.html (last updated Dec. 29, 2016).
[51]Government of India, Ministry of Law and Justice, *Constitution of high level committee to review Institutionalization of Arbitration Mechanism in India*, PIB, http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 (last updated Dec. 29, 2016).

known as Mumbai Centre for International Arbitration (MCIA), it encourages the practice of institutional arbitration in India. Although there is a long way to make India internationally recognized to draw the attention of the parties to consider India to be their seat for settling out their commercial disputes. In order to encourage the practice of trade and commerce, it is considered welcoming by limiting judicial intervention as well as by providing proper and better facilities for conducting arbitration proceedings in India. Nevertheless, the existing Act has been broughtin order to maintain international standards in the arbitration mechanism.

It is, therefore necessary to remove misconceptions that have been there about institutional arbitration in India. At present we need to develop as well as promote those activities, which encourage the practice of institutional arbitration in India. For instance, when we look worldwide we see that SIAC has considered 343 cases and London Court of International Arbitration (LCIA) has handled 303 cases in 2016. From this, we can understand the necessity of having a better Indian arbitration mechanism with the passage of time.[52]Furthermore, in order to maintain international standards, it is essential to have institutional rules that are arbitration friendly and encourage the practice of investment.

[52]Annual Report 2015-2016, *The International Centre for Alternative Dispute Resolution*, ICADR, http://icadr.nic.in/file.php?123?12:1490865651 (last updated Dec. 10, 2017).