

International Commercial Arbitration: An Indian Perspective

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Abstract: Arbitration is an old method of justice as civilization. It is a technique where the parties settle their disputes without going to court. The settlement is being done by arbitration, mediation and conciliation. With the increasing of international trade and investment between nations it also increases the cross border disputes which are related to commerce. For such commercial disputes settlement arbitration plays an important role. With the effective participation of India in globalizing world i.e. of foreign investments, economic policies it raises the interest of international community on India's international arbitration. In India judiciary plays an important role in arbitration it works as watchdog on international commercial arbitration disputes.

The main purpose of this research paper is to discuss the role and procedure of arbitration in commercial disputes at national or international level with the help of certain landmark judgements of Supreme Court.

Keywords: International Commercial Arbitration

1. Introduction

Arbitration is a method to solve disputes in the global economic level with providing speedy justice. Most of the nation selects the UN Commission on International Trade Law (UNCITRAL) Model Laws of arbitration. With this arbitration enjoy a certain level of standardization across nations. By this arbitration is an attractive method of dispute resolution for foreign investors in many countries. In India, commercial lawsuit is a long-drawn-out and time-consuming process. Thus, arbitration has become a favoured mode of dispute resolution in India. Detailed arbitration clauses typically form an integral part of every commercial contract in India. Moreover, in a majority of contracts, parties select an arbitration venue outside India, beyond the jurisdiction of Indian courts, where legal battles can be extended. Nevertheless, until a recent ruling of the Supreme Court of India in *Bharath Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, MANU/SCOR/6940/2012 (the BALCO judgment), even where arbitration is conducted outside India, the parties could approach the courts in India for a judicial intervention that could stall the entire arbitration process.

A. Arbitration

- Arbitration is method of settlement of disputes between the parties, in which the parties by mutual consent agree to

submit the dispute to the one or more number of arbitrators who tries to settle the dispute between the parties by making a binding decision on the dispute. Arbitration is a way of settling the dispute outside the courts.

- According to section 2 (1) (a) of The Arbitration and Conciliation Act, 1996 "arbitration" means any arbitration whether or not administered by permanent arbitral institution. The arbitrator is the neutral third party and the arbitration proceedings are conducted privately unlike courts.
- Arbitration and Conciliation Act, 1996 (amended in 2015) is an act that deals with domestic arbitration, international commercial arbitration and with the enforcement of foreign arbitral awards.

B. International Commercial Arbitration

With the growth of globalization, liberalization and rapid advancement in international business relationships, it is increasingly important to have a flexible and quick method of resolving disputes. Arbitration is a favoured process of dispute resolution chosen by parties, wherein parties intentionally agree to submit their case to a neutral third party and agree to be bound by his/her decision.

- As per section 2 (1)(f) of The Arbitration and Conciliation Act, 1996 (amended in 2015), "international commercial arbitration" means 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,
 - An individual who is a national of, or habitually resident in, any country other than India; or
 - A body corporate which is incorporated in any country other than India; or
 - An association or body of individuals whose central management and control is exercised in any country other than India; or
 - The Government of a foreign country.
- International Commercial Arbitration is an arbitration where the matter involved is a cross-border dispute and the parties do not want to get into filing of case in national courts. International Commercial Arbitration, in this manner helps the parties get liberate of the long and technical procedure

of the courts. International Commercial Arbitration, unlike the pre-established rules and procedure of the law, works on the terms and the manner before decided by the parties in the arbitration agreement. The whole procedure of arbitration rotates around the arbitration agreement before signed between the parties and rotates around the same.

C. Arbitration Agreement

- As per section 7 (1) of The Arbitration and Conciliation Act, 1996 (amended in 2015) “arbitration agreement” is an agreement that is submitted by the parties for the purpose of arbitration of all or some of the specific, which have arisen or which might arise between the parties. The relation between the parties has to be a legal relationship, which may or may not be a contractual relation.
- According to section 7 (2) of the above-mentioned act, here can be a whole separate agreement for the arbitration agreement or it can be in the form of an arbitration clause in an arbitration agreement.
- According to section 7 (3) of the act, the arbitration agreement has to be in writing.
- According to section 7 (4) an arbitration agreement is considered to be in writing if it is contained in-
 1. A document signed by both the parties
 2. An exchange of letters, telegrams, information through electricity, which also includes telecommunication.
 3. If in a contract, a reference has been made to the document to make the arbitration clause part of the agreement, then the part that consists of arbitration clause is considered to be arbitration agreement, as a whole, provided that the contract is in writing and the intention is to make the arbitration clause part of the agreement.

D. International Commercial Arbitration in India

As cited above, international commercial arbitration is an arbitration that deals with commercial matters, wherein the parties may be of a foreign nation or a resident there or an association or a company incorporated there. The same parallel is followed by Indian law. When the seat of arbitration is in India but at least one of the parties is a foreign national, then such matters would be dealt under the provisions of ICA, i.e., International Commercial Arbitration and are dealt under part 1 of “The Arbitration and Conciliation Act”. However, if the seat of arbitration is outside India, then part 1 would not be applicable and such matters would come under the domain of part 2 of the act.

E. Advantages of Arbitration

Arbitration is most commonly used method of dispute resolution at national and international level. Most of the corporation prefer arbitration to dispute resolution rather than going to court. Reason behind that is as following.

1. Speedy dispute solving mechanism: Court process

involves extensive procedures and rules, which a party needs to follow. If parties refer their dispute to arbitration, they need not follow strict procedures of law. Hence, the dispute solving becomes speedy.

2. Enforce ability of Arbitral Awards: It is more readily and swiftly enforced as compared to the court judgements.
3. *Arbitrator is impartial*: Neutral third party is chosen to decide disputes. This third party is chosen mutually by both the parties to dispute.
4. *Arbitrator chosen may be an expert*: based on the issue of dispute, parties may choose a specific arbitrator having that particular technical experience and expertise in the area disputed.
5. *Arbitration less expensive*: since arbitration is a time effective remedy and does not involve too many procedures, it is less expensive as compared to litigation procedures.

Part I:

When the Seat of International Commercial Arbitration is in India

The following laws would apply to ICA (International Commercial Arbitration), when the case falls under part 1 of the act, i.e., when the seat of the arbitration is in India.

F. Notice of The Arbitration

It is the first step in any arbitration proceeding. One party sends notice to the other party, asking for the settlement of the dispute through arbitration. There should be an intention of the party submitting the notice to refer the matter to arbitration. The party notifying should ask the other party to settle the dispute through arbitration

G. Court's reference for arbitration

As per section 8 of “The Arbitration and Conciliation Act, 1996”, if the party before the judicial authority, applies for referring the case to arbitration by submitting an application along with the original copy of the arbitration agreement on the date of submitting its first statement itself, then the judicial authority is bound to accept such application and refer the parties to arbitration. If these requirements are complied with then such judicial authority would not give any negative judgment, i.e., it cannot deny the parties to refer to arbitration in spite of any judgment, decree or order of the Supreme Court or any Court, unless the court feels that prima facie there is no arbitration agreement. However, if the party fails to submit the original arbitration agreement or a duly certified copy thereof, then such application can be dismissed.

If the original arbitration agreement or the certified copy is not available with the party or is retained by the other party, then in such a situation the party applying will submit the application along with the copy of the agreement and shall file a petition, praying to the court to order the other party to submit the original arbitration agreement or its duly certified copy, to the court. If the application that has been submitted under sub-

section (1) is pending before the judicial authority, the parties may commence or continue the arbitration and an arbitral award can also be made.

H. *Interim Reliefs in Arbitration*

Interim relief is available to the parties under section 9 and section 17 of The Arbitration and Conciliation Act, 1996. Under section 9, interim relief is granted to the parties by the court and under section 17, interim relief is granted by the arbitral tribunal. The objective of this provision is to provide security to the party seeking relief until the final decision is given.

I. *Appointment of Arbitrators*

Section 11 of the act provides for the appointment of arbitrators. The arbitrator can be of any nationality unless otherwise agreed by the parties. The parties have to appoint one arbitrator each and both the arbitrators have to further appoint a third arbitrator, within thirty days, since the arbitrators are required to be an odd number. However, if there are even number of arbitrators, for example there are two arbitrators and both the arbitrators give the same decision, then, in that case, there is no foundation of having a third arbitrator.

Grounds for Challenging the Appointment of an Arbitrator

An arbitrator is required to act in an independent and impartial manner. These are the basic two requirements that have to be there in an arbitrator. If he is found to be partial and dependent, then his appointment can be challenged. If he does not possess the qualifications that are agreed to by the parties then in that case also his appointment as an arbitrator can be challenged. The arbitrator is also required to solve the dispute in a time bound period.

J. *Basics of The Proceedings*

The parties are needed to be flexible in terms of the procedure, place and language of the arbitration. The arbitral tribunal has the power to decide that in what sequence the evidence is to be examined. The parties can also settle the dispute through a mutual consent or it can be settled by the arbitral tribunal a well. After the decision is given it is recorded as an arbitral with the consent of both the parties and the arbitral tribunal as per section 30 of "The Arbitration and Conciliation Act, 1996".

K. *Cost of The Arbitration*

The arbitral tribunal decides the cost of the arbitration and that how much amount each party has to pay. If a party refuses or fails to pay the legal and administration fees, then the tribunal in such a case refuse to give the award. After refusing to pay, the parties can approach the court and the court can further give its decision on the cost.

L. *Application for setting aside arbitral award*

If a party is not satisfied with the decision of the tribunal then it can make an application to the court under section 34 of the act to set aside the arbitral award. For example, if the party making the application was not given proper notice of the

appointment of the arbitrator, or if a party was under some incapacity, or if the arbitration agreement is not valid, or if the arbitral award is not related to the dispute, or is against the terms of submission to arbitration, or the matters that are not appropriate to submit to the arbitration. As per section 34 (2-A), an arbitral award arising out of arbitrations other than international commercial arbitration may also be set aside, if the award made is illegal in nature. The application to set aside the award has to be made within three months from the date of receiving of the award, unless there is a sufficient reason due to which the party could not apply within the required time. In such a case the court can entertain the application to set aside the arbitral award within a further period of thirty days.

M. *Appeals*

An appeal can be filed for the following situations: firstly Refusal to provide interim relief under section 9 and section 17, secondly to set aside the arbitral award under section 34.

N. *Finality and enforcement of arbitral award*

The arbitral award becomes binding on both the parties under section 35 of the act and is considered to be the same as an order passed by a court of law based on the provisions of the Code of Civil Procedure, 1908.

When the Seat of International Commercial Arbitration Is Outside India:

In *Bhatia International v Bulk Trading* it was held that Part I of Arbitration and Conciliation Act, 1996 would equally apply to International Commercial Arbitrations having seat outside India, unless any or all the provisions have been expressly excluded .

In *Bharat Aluminium v Kaiser Aluminium*, the Court decided that a constitutional bench of the Court would reconsider the Court's own ruling in *Bhatia International* case. The Supreme Court gave following ruling in the above mentioned case:

- Part I not applicable to International Commercial Arbitrations having seat outside India: Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India.
- No Interim Injunction: No suit for interim injunction would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.
- Law to be applied prospectively: In order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively to all the arbitration agreements.

2. Conclusion

With the changing time, there has been an increase in the international dealings and contracts. Thus it also increases the need of the international arbitrations, since with the increase in

businesses on international level there is an increase in the disputes pertaining to international arbitration. It also provides a sense of protection to the parties and because of this parties can easily enter into agreements on international level. The judgment of the BALCO case holds importance with the view that parties while entering into arbitration do not want to face any inconvenient procedures. It is important that the judicial process is followed in the country where the arbitration is taking place in order to simplify the procedure for the parties in the cases of international commercial arbitration.

In recent years there has been a significant increase in international businesses operating out of India. This has led to an increase in international arbitrations having its seat of arbitration in India. Both arbitration and litigation perform the same function i.e. effective delivery of justice but the fact is that

arbitration has few characteristics which makes it a more viable option as compared to its counterpart. Thus, the degree of protection that it guarantees is far reaching.

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