# INTERNATIONAL COMMERCIAL ARBITRATION ASPECTS IN UNITED KINGDOM

Gunish Aggarwal, Queen Mary University of London

## ABSTRACT

International Commercial Arbitration (ICA) is a way to resolve disputes that the parties choose themselves, it is efficient and effective and it is private/confidential, and it is accepted as the finest method for resolution of commercial/corporate disputes globally. This paper basically argues this statement throughout the paper. This paper examines the importance of International Commercial Arbitration in the context of English Legal system. This paper concludes with the fact that ICA is an efficient and effective method of resolution of disputes in the United Kingdom. This paper further examines the key aspects and their terminology that is, Arbitration Agreements and third-party funding in International Commercial Arbitration. Furthermore, what are arbitration awards and how are they enforced, that is, implementation of the doctrine of res-judicata in ICA, Ethics in Arbitration, choosing arbitral institution [only, London Court of International Arbitration (LCIA)] will be discussed, Brexit. Moreover, what are the grounds for challenging arbitral awards will also be discussed. In addition to this, what are the grounds for challenging arbitral awards will also be discussed. On the other hand, this paper discusses the Coronavirus impact on International Commercial Arbitration in the United Kingdom. This paper concludes with the fact that ICA has achieved a milestone in the UK.

## Introduction

International Commercial Arbitration (ICA) is a modus operandi for the resolution of commercial/corporate disputes in the globalised world. Over the years, it has been considered, both efficient and effective method of dispute resolution. The parties to the dispute have the right to keep their award private. ICA is not only about resolving disputes, but also about choice of law applicable for arbitration, ethics in ICA, Third Party Funding (TPF) in ICA, Arbitration Agreements (AA), choosing arbitral institution, arbitration awards and its enforcement and challenging the award. Furthermore, it is important to understand and evaluate how ICA has transformed after the Covid-19 crisis.

This paper examines ICA in the context of, English Legal System. This paper maintains the stance that ICA is excellent method for resolving commercial/corporate disputes across the globe.

This paper is divided into the following sections. Section 1 will examine ICA and how is it efficient and effective method of resolving disputes globally. Section 2 of the paper will examine key aspects and their terminology that is, (AA), TPF in ICA. Furthermore, what are arbitration awards and how are they enforced, that is, implementation of the doctrine of res-judicata in ICA, Ethics in Arbitration, choosing arbitral institution [only, London Court of International Arbitration (LCIA)] will be discussed, Brexit. Moreover, what are the grounds for challenging arbitral awards will also be discussed. Section 3 of the paper examines ICA in the context of Covid-19 crisis and what significant changes have been introduced or proposed, if any. Section 4 is Conclusion.

## Basis and Purpose of International Commercial Arbitration:

There are significant benefits of ICA. This is because of the likelihood of obtaining enforcement by the virtue of New York Convention (NYC) as 156 countries are parties to it and parties being able to stay out of other parties' court.[1] "An arbitration award is generally easier to enforce internationally than a national court judgement because under the NYC courts are required to enforce an award unless there are serious procedural irregularities, or problems that go to the integrity of the process"[2]. Furthermore, the other advantages include the ability

[1] Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, (Cambridge University Press, 2017) 1.
[2] ibid, 3.

to keep the proceedings and the award confidential.[3] It is pertinent to mention that arbitration is less expensive than litigation.

On the other hand, there are many demerits of arbitration. For example, because number of commercial arbitrations has grown, the parties to dispute have incorporated many litigation tactics into arbitration.[4] This is because ICA is confronted with the two main challenges, globalisation and privatization that has produced growing number of parties to international transactions.[5] Is there a need to reframe ICA procedure to avoid litigation tactics. Similarly, the arbitrators do not have any coercive powers, that is, they do not have the power to penalise or impose penalties the party that fails to comply with the request.[6]

The LCIA, explains about more power for the arbitrator to spell out counsel conduct.[7] By granting more powers to the arbitrators has both demerits as well as merits. It is important that a Code of Conduct is also laid down for the arbitrators as well. Does this mean that institutional arbitration has their own rules? Similarly, an issue further arises as to whether the arbitrators have knowledge and expertise in their area to resolving commercial disputes or not? The arbitration institutions will be discussed in detail further.

Commercial Arbitration, whether domestic or international, is an alternative method of dispute resolution.[8] It is an alternative method to the Courts of Law, that is, if the governing Law permits for the submission of the disputes to the arbitration, the parties to the dispute may decide for exclusion of jurisdiction to ordinary courts and make the matter sub-judice before the arbitration instead.[9] Arbitration is mostly based upon the will/interest of the parties and the applicable sources of Law confirm the parties will.[10]

The parties have the right to decide whether an arbitration is an adhoc, that is, no institution is involved or whether the arbitration is administered by institutional arbitration.[11] An argument arises, which system is better, an adhoc system or an institutional system of arbitration. In

[3] ibid, 4.
[4] ibid.
[5] Enforcing Arbitration Awards under the New York Convention, (United Nations, New York) 10 1999 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/40th_anniversary_nyc_papers.pdf> accessed on July 22, 2021.
[6] Margaret L. Moses, (n 1) 5.
[7] ibid, 5
[8] Giuditta Cordero-Moss, International Commercial Contracts, (Cambridge University Press, 2014) 211.
[9] ibid, 210
[10] ibid, 211.
[11] Margaret L. Moses, (n 1) 1.

adhoc arbitration, parties choose the arbitrator themselves, it's cost effective.[12] But to what extent, will the arbitrators will be willing to agree to arbitration procedures is the key demerit of the adhoc arbitration.[13] Whereas, in the case of institutional arbitration, it is procedure oriented as the institutions have the rules, qualified arbitrators that ensure arbitration proceedings.[14] But, institutional arbitration is expensive, not flexible enough.[15] Furthermore, institution arbitration will be time consuming as it is procedure oriented. Thus, both institution and adhoc arbitration have pros and cons.

For commercial arbitration to take place, it presupposes an agreement that parties undertake to submit their dispute for arbitration. In this case, it is pertinent to examine whether interpretation of Commercial AA, "may" or "can" be submitted for the arbitration.[16] The English Courts have taken the view that the contract gives a reasonable clear indication that arbitration has been agreed by both as a means of dispute resolution.[17] This view of English Courts is absolutely correct because it gives emphasis to contractual principles and AA is a contract only. Furthermore, the English Law does not attach any importance to whether AA is combined with the choice of courts as to where will the dispute be administered.[18] The English Law has adopted the implied Choice of Law to govern the AA and it is presumed that the AA is governed by the Law of Contract.[19] This will be further examined in the section below.

**Key Aspects and Terminology in International Commercial Arbitration**

The contractual interpretation of the AA in English Law is based on two principles, the words used and the context in which those words used.[20] As explained above, the English Courts have moved from strict interpretation to a more purposive interpretation approach in order to overcome the rigidity of the commercial contracts to understand the underlying commercial objective and to avoid unambiguous interpretations.[21] Thus, the English Law has created more

[12] Out-Law Guide, 'Institutional vs. 'ad hoc' arbitration' (*Pinsent Masons*, 12 August 2011) < https://www.pinsentmasons.com/out-law/guides/institutional-vs-ad-hoc-arbitration > accessed on July 26, 2021.
[13] ibid.
[14] ibid.
[15] ibid.
[16] Dr Morten Frank, 'May or may not: the interpretation of permissive words in commercial arbitration agreements - a common law perspective' (2020) 23(2) International Arbitration Law Review, 114.
[17] ibid, 121.
[18] ibid, 125.
[19] Mark Campbell, 'The law applicable to international arbitration agreements: the English Court of Appeal departs from Sulamerica' (2020) 23(3) International Arbitration Law Review, 193.
[20] Simon James and Kate Gibbons, 'English law contractual interpretation: shades of grey' (2016) 19(2) International Arbitration Law Review, 35.
[21] ibid, 35.

space as it opts for broad interpretation of AA.

The NYC, 1958 marks the fiftieth anniversary of "inoperative" AA.[22] There are some terms like null and void that means, AA has no legal effect, inoperative that is, agreement ceased to be performed, due to some reason and incapable of being performed, ie, the agreement that cannot be performed in any manner that needs to be understood for the correct interpretation of the AA.[23] If the AA has ceased to perform, the reason must also be cited why it cannot be performed. It's important to analyse, what parties to an AA must do, what remedies are available in the case of failure to adhere to the agreement are important to consider.

The English Arbitration Act, 1996 is direct and has specific mandatory rules as it imposes general duties on the parties to "do all things necessary for the proper and expeditious conduct of the arbitral proceedings".[24] The English Law has recognised an implied duty of good faith for the performance of contracts and the AA should be adhered as it is the best source for the duty to participate.[25]

In the case of Choice of Law in AA, English Courts give emphasis to the AA drafted. Furthermore, they lay emphasis on an implied choice of law as explained above. They make a careful analysis of the agreement, take a presumption that the dispute arising out of the relationship of between the parties is decided by same tribunal and "one stop" presumption where parties have made different agreements to make a rational choice to decide the disputes.[26] With the Brexit, the Brussels Regulation ceased to have its effect December 31, 2020.[27] Instead, UK has applied for Lugano Convention, but was rejected on May 4, 2021 because UK chose not to remain with EU, whereas, convention is for mutual for cooperation with EU.[28]

In order to avoid conflicts in the AA, TPF takes place, that has two issues, where it is the duty of the arbitrator to avoid conflict of interest among the parties in accordance with the AA and

[22] Max Bonnell, 'When is an arbitration agreement "inoperative"?' (2008) 11(3) International Arbitration Law Review, 111.
[23] ibid, 112.
[24] Benedict Tompkins, 'The duty to participate in international commercial arbitration' (2015) 18(1) International Arbitration Law Review, 17.
[25] ibid, 18, 21.
[26] Andrew Behrman and Kiran Unni, 'English courts provide guidelines to address inconsistent jurisdictional provisions in related agreements' (2016) 19(4) International Arbitration Law Review, 48.
[27] Trevor Hartley, 'Arbitration and the Brussels I Regulation – Before and After Brexit' (2021) 17(1) Journal of Private International Law 53.
[28] Thomas Reilly, 'The Lugano Convention and The UK' (*Global Policy Watch*, 11 May 2021) < https://www.globalpolicywatch.com/2021/05/the-lugano-convention-and-the-uk/ > accessed on August 8, 2021.

the second is the liability of the funder to avoid adverse costs.[29] In some years, it is corporate litigants, who have resorted to TPF, unlike the plaintiff in the past, in order to avoid risks.[30] This trend will continue because of the fact that the Coronavirus pandemic has resulted in unfavourable impacts on the economy.[31]

The arbitrators should be independent and impartial for the adjudication of disputes, while they adhere to the AA, but due to the issue of TPF, the relationship of the arbitrator and funder can be questioned as to the independence and impartiality of the arbitrator.[32] Whenever the TPF issue is raised, the principle of bias is recalled. It is important that the TPF has the knowledge of the engagements that you are in, ie, TPF should be placed under responsibility as to what the position of the dispute is and at what best level, TPF can help in redressal of dispute in order to avoid the conflict of interests.[33] Thus, it can be concluded from these arguments that TPF does attract the principle of bias. But yes, it does help the party with the funding as it provides financial support.

A question arises, can TPF deliver justice in ICA. Lord Denning has explained that the "purity of justice will be sullied" by an unconnected person to the case as the case will be exploited by him/her for his/her personal means.[34] However, in England, this was overturned by Lord Justice Jackson's Report as it has been considered as TPF basically provides with financial support for the litigation and it has brought a sea change in the litigation of disputes in the UK.[35] Similarly, a 'Code of Conduct for Litigation Funders'[36] was also introduced that is an attempt to set out standards of practice and to regulate the funders behaviour.[37] It is pertinent to mention that the TPF has not provided with the clear guidelines, that is, if there is conflict of interest, what are the rights and duties among stakeholders to prevent delivery of justice in ICA.[38] And, what are the legal and jurisprudential grounds for supporting the arguments or the moral effects for

[29] Siddhanth Prasad, 'Issues surrounding the use of third-party funding in international commercial arbitration' (2021) 24(2) International Arbitration Law Review, 135.
[30] ibid, 136.
[31] ibid.
[32] ibid.
[33] ibid, 144.
[34] Hong-Lin Yu, 'Can third party funding deliver justice in international commercial arbitration?' (2017) 20(1) International Arbitration Law Review, 20.
[35] Review of Civil Litigation Costs, (Volume One, 2009) 160 < https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf > accessed on July 30, 2021.
[36] Code of Conduct for Litigation Funders (January 2014) < https://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf > accessed on July 30, 2021.
[37] Hong-Lin Yu, (n 34) 20.
[38] ibid, 21.

allowing access to justice and to implement procedural justice in ICA.[39] Thus, efforts should be made to overcome the demerits of TPF. Furthermore, Justice Jackson's Report does make sense because TPF provides parties with financial support.

As explained above, when hearing takes place, that is, when both the sides are heard award is administered? A question arises is, whether awards can be recognised and enforced, but which awards can be recognised and enforced is a question before national courts as there is no single interpretation by the national courts.[40] Furthermore, can an award administered be challenged. When the award challenge succeeds, the award is set aside. The NYC court may refuse its enforcement by interpreting art. 5(1)(e) that the award made has been set aside.[41] The enforcement court is not specifically concerned for setting aside, rather than the respect of supervisory court and the enforcement court follows a transnational approach would reject the ground on which the award was set aside.[42] It is the losing party that makes the claim to set aside the award. It is presumed that this right to set aside the award gives the parties to meet the criteria of fairness and impartiality in order to avoid any kind of corruption, bias or improper conduct.[43] Furthermore, a question arises whether parties should waive the award given to that party. There is no direct answer to this argument. It causes delay in the whole dispute resolution mechanism as the dispute remains as it is.[44] Parties choose the dispute resolution mechanism in order to avoid wastage of time and litigation costs and when the award is set aside, the dispute remains as it is.[45]

When considering the Code of Conduct for the counsel, it is important to understand the ethical rules in the ICA as well.[46] Arbitral tribunals are appointed case by case basis for the purpose of deciding particular disputes between the parties and the arbitration procedure is based upon private agreement between the parties.[47] Thus, the arbitrator must practice the ethical Code of Conduct while deciding dispute.

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[39] ibid.
[40] Dr Melis Ozdel, 'The doctrine of res judicata in international commercial arbitration: the preclusionary effects of court decisions' (2017) 20(6) International Arbitration Law Review, 191, 192.
[41] Harisankar K. S., 'Annulment versus enforcement of international arbitral awards: does the New York Convention permit issue estoppel?' (2015) 18(3) International Arbitration Law Review, 50.
[42] ibid.
[43] Md. Sameer Sattar, 'Can or should the parties waive the right to set aside an arbitral award?' (2018) 21(3) International Arbitration Law Review, 55, 56.
[44] ibid, 57.
[45] ibid.
[46] Dr Martin Rauber, 'The impact of ethical rules for counsel in international commercial arbitration - is there a need for developing international ethical rules?' (2014) 17(1) International Arbitration Law Review, 17, 18.
[47] ibid, 18.

## International Commercial Arbitration and Coronavirus Crisis

After the Coronavirus crisis (CC), a pertinent issue arises if arbitration has been frustrated because of the CC, that had made it difficult to cope with arbitration procedures. It is important that the parties must comply with the AA in good faith and the arbitrators must adjust the AA in accordance to the principles of contract law and balancing rights of the parties in equality.[48]

The pandemic has resulted in the disruption of arbitration proceedings. The lockdown has enabled the state to explore the technologies and telecommunications in order to ensure justice to all people.[49] The LCIA and the ICC have issued guidelines for the continuance of services in arbitration.[50] Online arbitration can be useful. But is has raised challenges as for example, if a document has to be submitted, delivery of it has become impossible.[51] Thus, it should be made possible for the arbitrators to amend some of these procedural elements of the AA.[52] Thus, it's important to grant autonomy to the arbitrators. The LCIA amendment October 2020, provides for the fact that parties must act in good faith respecting the AA.[53] Article 22(1) states that the parties shall make every effort to conduct arbitration in an immediate and cost-effective manner with regards to the arbitrability of dispute.[54]

The enforceability of arbitral awards does attract concerns regarding the validity and enforceability presided after the proceedings. The awards require signature of all arbitrators and this is almost impossible during lockdown. However, "the English Arbitration Act, 1996 does not require any mandatory requirement for writing an award, empowering parties to agree on its form"[55].

## Conclusion

This paper evaluates the fact that ICA is an effective and efficient method of resolving Commercial/Corporate disputes across the globe. This paper focuses on the English Legal system throughout evaluating the ICA. To begin with, the paper first begins with the merits where it has been explained that ICA helps in and demerits of ICA where it is being transformed into litigation. LCIA is the only key arbitral institution discussed in this paper. Then, discussion

[48] Mohammad Bashayreh, 'The autonomy of arbitrators: a legal analysis of the validity of arbitrator-imposed virtual hearings in response to the COVID-19 crisis' (2021) 24(1) International Arbitration Law Review, 75.
[49] ibid.
[50] ibid.
[51] ibid, 75, 76.
[52] ibid, 76.
[53] ibid, 79.
[54] ibid.
[55] ibid, 83.

about the contractual interpretation begins as to how AA are interpreted and English Courts avoid the unambiguous interpretation. Furthermore, in the case of Choice of Law, English Courts follow contractual interpretation approach. TPF that supports parties with litigation costs, has been accepted in English Legal system. And the arbitrators must follow the code of conduct. Also, an emphasis must be placed upon the online arbitration in context of ICA is required. At last, due to CC the arbitrators must be given autonomy to decide parties' disputes. This is because due to Coronavirus crisis, the procedural rules cannot be followed.