INDIA A LESS PREFERRED ARBITRAL SEAT TO RESOLVE THE INTERNATIONAL COMMERCIAL DISPUTE: A CRITICAL ANALYSIS

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ABSTRACT

The Arbitration and Conciliation Act,1996 and its Amendments apply to arbitrations in India. Part, I of the Act applies to the Indian seated Arbitration, and Part II deals with Arbitration having a seat outside India. The provisions concerning assistance from the Court during the arbitration are laid down under Part I of the Act and apply to the arbitrations seated outside India. The concept of international commercial Arbitration constitutes a foreign element, giving rise to questions about the choice of law and jurisdiction of courts. The growth in cross-border commercial disputes due to increased international trade and investment has helped international Arbitration emerge as a preferred option for resolving and preserving business relationships. Due to the influx of foreign investments, foreign trade, and overseas commercial transactions in India, commercial disputes involving Indian parties have also risen rapidly. The international community has often criticized the Indian Judiciary and its unfriendly approach to international commercial Arbitration. India has also been considered a less preferred seat in international Arbitration due to judiciary interference and extraterritorial application of domestic laws in foreign seated arbitrations. One of India's most significant challenges concerning international commercial arbitration reforms could be unnecessary judicial intervention. This court intervention has been considered as undermining the values of Model Law from which the Arbitration and Conciliation Act,1996 has been based upon.

INTRODUCTION

The Arbitration and Conciliation Act,1996 and its Amendments apply to arbitrations in India. Part, I of the Act applies to the Indian seated Arbitration, and Part II deals with Arbitration having a seat outside India. The provisions concerning assistance from the Court during the arbitration are laid down under Part I of the Act and apply to the arbitrations seated outside India. The concept of international commercial Arbitration constitutes a foreign element, giving rise to questions about the choice of law and jurisdiction of courts. For an arbitration to be treated as a "commercial" international Arbitration in India, a commercial relationship must exist among the parties to the Arbitration. International commercial Arbitration generally involves four levels of law[1]:

1. The proper law of the arbitration agreement regulating the obligation of parties
2. The curial law which means the law that governs the parties in the Arbitration
3. The law governing the arbitration proceedings
4. Law that applies to the subject matter of the dispute.

In an international commercial arbitration with its seat in India, the arbitral tribunal constituted must decide the dispute according to the rules of law designated by the parties to the dispute.

The growth in cross-border commercial disputes due to increased international trade and investment has helped international Arbitration emerge as a preferred option for resolving and preserving business relationships. Due to the influx of foreign investments, foreign trade, and overseas commercial transactions in India, commercial disputes involving Indian parties have also risen rapidly. With international commercial disputes increasing steadily, the international community has increased its focus on India's international commercial arbitration framework.

Why Is India a Less Preferred Arbitral Seat to Resolve the International Commercial Dispute?

The international community has often criticized the Indian Judiciary and its unfriendly approach to international commercial Arbitration. India has also been considered a less preferred seat in international Arbitration due to judiciary interference and extraterritorial application of domestic laws in foreign seated arbitrations. One of India's most significant

[1] Dr.Ashwinie Kumar Bansal, "Arbitration Awards: Law on setting aside and execution of arbitration awards, agreements and appointment of arbitrators", Pg no: 423, (Universal Law Publishing Co, 2014)

challenges concerning international commercial arbitration reforms could be unnecessary judicial intervention. This court intervention has been considered as undermining the values of Model Law, such as obstruction in party autonomy by intervening too much in the arbitral process, setting aside, or refusing to enforce arbitral awards for reasons going to the merits[2]. The extent of judicial intervention could be analysed from two viewpoints. One way is to look at the objective criteria, such as the rate courts enforce arbitral awards and agreements or the ease of prosecuting enforcement. The other way is to look at whether courts interpret and apply arbitration law in ways that either enhance or diminish support for Arbitration[3]. The Indian courts have earned a reputation as interventionists in international Arbitration as the enforcement rates are less and because of their interpretation of the Arbitration Act, undermining the values of Model Law. The judgment in the case of Bhatia International v Bulk Trading S.A.[4] has played a significant role in establishing the unfriendly reputation that India has earned concerning international commercial Arbitration.

The rule laid down in the Bhatia case formed the law dictating the scope and applicability of Part I of the A&C Act,1996, for over a decade. In this case, the Court set aside a foreign arbitral award under Section 34 of the Act, which was essentially meant for challenging the domestic Award. The subsequent decisions of the Indian courts were also on the same concept of implied exclusion of the provisions[5]. A similar instance that could be cited is that of the case Dozco India Pvt Ltd v. Doosan[6]. The law governing this case was Korean Law, and the place of Arbitration was abroad, but the Indian Court held that the agreement expressly excluded Part I. The Supreme Court in Bharat Aluminium Co v. Kaiser Aluminium Technical[7](BALCO) revisited the position in the Bhatia case concerning the exclusion of the implied provisions. In the BALCO case, the Apex Court overruled the decision of the Bhatia case. It was held that Part I of the Act would not apply to a foreign seated arbitration, and the supervisory jurisdiction of the Indian courts would not extend to such courts[8]. Following the decision of the BALCO case, a foreign award cannot be set aside under Section 34 of the Arbitration and Conciliation Act, 1996. This judgment has settled the confusion of applicability of Part I of the Arbitration

[2] Anselmo Reyes & Weixia Gu, "The developing world of arbitration: A comparative study of Arbitration reform in the Asia Pacific", Pg no:221, (Hart Publication,2018)
[3] Anselmo Reyes & Weixia Gu, supra note 2, at 227
[4] (2002) 4 SCC 105
[5] Gary F.Bell, "The UNCITRAL Model Law and Asian Arbitration Laws", Pg no:33,(Cambridge University Press,2018)
[6] (2011) 6 SCC 179
[7] (2012) 9 SCC 552
[8] Gary F.Bell, supra note 5,at 34

Act, 1996 to an International Arbitral Award, which is seated outside India[9]. Due to the judgment given in the Bhatia case, not only were the International Awards challenged under Section 34 of the Act, but the parties used to approach the Courts of India for interim relief under Section 9 of the Arbitration Act. This defeated the whole purpose of the Act as the parties sought to delay. Arbitration proceedings were entertained by the Indian Courts, which caused immense prejudice to the opposite parties[10]. But as a result of the BALCO judgment, the foreign awards cannot be challenged under Section 34 of the Arbitration & Conciliation Act, 1996, and the parties seeking to resist the enforcement of the Award have to take recourse to one of the grounds provided under Section 48 of the Act.

Further, interim remedies under Section 9 of the Act have also been restricted where the Arbitration is seated outside India. India also suffers from backlogged courts, a weak rule of law environment, and the lack of a professional cadre of arbitrators and advocates who specialise in Arbitration[11]. In India, the lack of institutional Arbitration also contributes to increased judicial intervention. In most scenarios, retired judges are appointed as arbitration tribunals, they being experienced with the lengthy litigation procedures involving procedure and evidence. This leads to lengthy arbitration procedures, resulting in a battle of pleadings with the parties attempting to stall the process until it works.

The fact that India did take pro-arbitration approaches in international Arbitration should not be left unseen. The Indian Judiciary, in its attempt to make India arbitration-friendly, has, in certain instances, reduced its interventionist approach. In Enercon (India) Ltd v. Enercon GMBH[12], the Supreme Court stated that minimal judicial intervention is an accepted principle in all jurisdictions and said that courts support the process of arbitration[13]. The Amendment made by the Indian Parliament in 2019 to the Arbitration and Conciliation Act has made it mandatory that awards concerning international commercial Arbitration must be passed expeditiously as possible to dispose of the Arbitration within 12 months from the completion of pleadings. After the Amendments that have been made to the Arbitration and Conciliation Act, a distinction has been drawn between the jurisdiction of courts in case of domestic and international commercial Arbitration. For judicial intervention or assistance in the case of

[9] Akshay Malhotra, International Arbitral Awards: Judicial Intervention Redefined, (last visited March 20,2022), International Arbitral Awards: Judicial Intervention https://www.mondaq.com/india/arbitration-dispute-resolution/247560/international-arbitral-awards-judicial-intervention-redefined
[10] Supra note 9, Akshay Malhotra, International Arbitral Awards: Judicial Intervention Redefined
[11] Anselmo Reyes & Weixia Gu, supra note 2, at 222
[12] AIR 2014 SC 3152
[13] Gary F.Bell, supra note 5,at 35

domestic Arbitration, a petition must be made before the civil Court of original jurisdiction. The significant change to be noted is in the case of judicial intervention in international commercial Arbitration. As and when judicial intervention is necessary for international Arbitration, a petition is to be filed with the High Court that has original jurisdiction, and the jurisdiction of District courts in the same has been curtailed.

Tracing Judicial Intervention Through Case Laws

The main feature of Arbitration is minimum judicial intervention, and it forms the basis of arbitral proceedings. The Act stipulates only three circumstances under which the courts can intervene in the arbitration proceedings, which are:

1. To appoint the arbitrator if the parties fail to do so[14].

2. To decide regarding termination of the arbitrator's mandate due to failure of the arbitrator to perform his duties without delay[15].

3. To assist the tribunal in taking evidence[16].

It can be said that the concept of minimal judicial intervention in arbitration has been, to some extent, understood and followed by the Indian Judiciary, but in some instances, it can be seen that the Judiciary acts in complete ignorance of the very essence of arbitration.

While examining the scope of judicial intervention in commercial arbitration, the first case that could be cited is that of the Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd[17]. In the Konkan Railway case, a question was raised as to whether the appointment of an arbitrator by the Chief Justice of India under Section 11(6)[18] of the Act could be classified as an act don in an administrative capacity or judicial capacity. This was not the first time the question was raised about the C.J.I.'s capacity (administrative or judicial) while appointing the

[14] Arbitration and Conciliation Act,1996, Section 11, Acts of Parliament,1996
[15] Arbitration and Conciliation Act,1996, Section 14(2), Acts of Parliament,1996
[16] Arbitration and Conciliation Act,1996, Section 27, Acts of Parliament,1996
[17] (2002) 2 SCC 388
[18] Arbitration and Conciliation Act,1996, Section 11(6) Acts of Parliament,1996; Appointment of Arbitrators: (6) Where, under an appointment procedure agreed upon by the parties, —
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

arbitrators. In the case of Ador Samia Private Limited v. Peekay Holding Limited and Ors[19] and Sundaram Finance Ltd v. Nepc India Ltd,[20] the capacity of C.J.I. were questioned, and in both cases, it was held that the power of C.J.I. was administrative in nature and not judicial. Keeping these cases as the precedent, the Supreme Court in the Konkan Railways case also held that C.J.I. acts in an administrative capacity while appointing an arbitrator. This decision was also reasoned out by stating that the appointment of arbitrators must be done promptly. Hence, C.J.I. must do the same in the administrative capacity and not judicial. But later, the decision in Konkan Railways was overruled in the case of S.B.P. & Co v. Patel Engineering Ltd. & Anr[21], wherein it was held that C.J.I. acts in judicial capacity while appointing the arbitrator. Later on, by passing the Amendment Act of 2015 and 2019, to reduce interference of the Court, the interpretation of Section 11 of the Act is only confined to the existence of the arbitration agreement.

The decision in the case of Schlumberger Asia Services Ltd v. Oil & Natural Gas Corp Ltd[22] could be considered as one that has positive and negative impacts on India's international arbitration scenario. In this case, the issue arose as to the appointment of an arbitrator under Section 11 of the Act. Even after a repeated request by the petitioner (a company incorporated in Hong Kong), the respondent (a company registered under the Companies Act,1956 in India) did not appoint arbitrators as per their arbitration agreement, due to which the petitioners had to approach the C.J.I. for the appointment of the arbitrator. The respondents objected by stating that the dispute had been barred by limitation and hence no case exists. But the decision rendered by Supreme Court was a pro-arbitration one. Even though the precedent set by S.B.P&Co. was prevailing, the Apex Court held that once there exists an arbitration agreement, all other elements of the dispute, such as its limitation, are to be decided by the arbitral tribunal.

The ONGC decision was not arbitration-friendly if looked at from the point of view that Supreme Court, in this case, appointed the whole three-member arbitral tribunal consisting of Supreme Court Judge as well. This appointment was a clear case of excessive judicial intervention, especially in the case of the third arbitrator, as the parties in their arbitration clause had agreed that the appointment of the third arbitrator would be done by the two arbitrators appointed.

[19] AIR 1999 SC3246
[20] AIR 1999 SC565
[21] AIR 2006 SC450
[22] (2013) 7 SCC 562

Through its decision in the case N. Radhakrishnan v. M/S Mastero Engineers & Ors[23] , the Supreme Court undermined the authority of the arbitrators and the sanctity of the whole arbitral proceedings by stating that the Court would only decide a dispute involving an element of fraud and such cases could not be settled by Arbitration. The arbitrability of the cases involving fraud was again questioned in the case of World Sport Group (Mauritius) Ltd v. M.S.M. Satellite (Singapore) Pte. Ltd[24]. In this case, the decision given by the Apex Court could be seen as a step forward in promoting Arbitration and raising India into an arbitration hub as well. In this case, the Supreme Court held that the arbitral tribunal could decide disputes involving allegations involving fraud. The Court's judgment was a most welcoming one; the Court gave the decision was a delayed one. The Supreme Court passed the judgment in 2014 in response to the Special Leave Petition filed in 2010. This delay taken by the Court in arriving at the judgment indicates the weakened State of the Indian Judiciary and defeats the Arbitration's very purpose. The whole idea of parties involved in a dispute choosing Arbitration is for the speedy resolution and cost-effective disposal of their case.

The recent Amazon-Future-Reliance[25] dispute could be cited as an example of the Indian Judiciary adopting modern-day arbitral principles in international commercial Arbitration. In this case, the Supreme Court had to decide questions as to whether an emergency arbitrator appointed under SIAC would be qualified as an arbitrator under the Arbitration and Conciliation Act of 1996 and also whether an order passed under Section 17(2) of the Act in the enforcement of the Award of an Emergency Arbitrator by a learned Single Judge of the High Court is appealable or not[26]. The Court, in this case, took a very arbitration-friendly approach by stating that arbitrator under the Act also includes emergency arbitrator even though it is not expressly provided under the provisions of the Act. The Apex Court, through this decision, reiterated the very central idea of Arbitration, that is, the party autonomy. The Court, in this case, adopted an extensive interpretation of the term arbitrator to incorporate emergency arbitrator as well. This decision is of much importance as it makes India an arbitration-friendly jurisdiction for international dispute resolutions and a hotspot for carrying out international arbitrations by embracing principles of modern arbitral jurisprudence[27]. However, to make India an arbitration powerhouse, a provision for emergency arbitration must

[23] (2010) 1 SCC 72
[24] Judgement in Civil Appeal No. 895 of 2014
[25] CIVIL APPEAL NOs. 4492-4493 OF 2021
[26] Yusra Raouf, Amazon v. Future Group: Case Analysis, https://legalbots.in/blog/amazon-v-future-group-case-analysis (last visited on April 6,2022)
[27] Yusra Raouf, supra note 26

be incorporated in the Act through further amendments. This will provide a much-needed push to the developing arbitral framework of India.

CONCLUSION

The legislative framework of the international commercial arbitration in India is formed by the Arbitration and Conciliation Act,1996, along with its amendments in 2015, 2019, and 2021. Since India is a party to the New York and the Geneva Convention, the recognition and enforcement of the foreign arbitral award also depends upon the provisions of the Conventions. Part II of the Act deals with the enforcement of foreign arbitral awards in India.

The legislative framework adopted in India for the recognition and implementation of international commercial arbitration alone cannot form the basis of a sound arbitral framework. The Indian Judiciary and the Legislature must work hand in hand for a better implementation of the arbitral framework concerning international commercial arbitration. An enhanced arbitral framework is necessary, especially for international commercial arbitration, due to its growing importance in a worldwide scenario. The Indian courts must work alongside the Government for a smooth implementation of the statutory provisions concerning the ICA with the aim to raise India into an internationally preferred arbitration hub.

In this paper, the extent of judicial intervention of the Indian courts concerning international commercial arbitration has been examined. Minimal judicial intervention forms the essential characteristic of the Arbitration and Conciliation Act 1996. On examining the cases decided by the Indian Judiciary concerning arbitration, it can be understood that in almost all of the cases, the courts have time and again intervened to a larger extent ranging from the appointment of the arbitrator to the enforcement of the arbitral awards. This excessive judicial intervention by the court delays the whole of the arbitral proceedings. The delay in the conduct of arbitral proceedings is the basic reason why many international parties think twice before they prefer to settle their disputes with the seat of arbitration in India.

Statutorily as per the Arbitration and Conciliation Act,1996, the scope of judicial intervention is very limited. The courts can intervene in the arbitral proceedings only under the following circumstances:

a) As per Section 9 of the Act, for the passing of an interim injunction or any interim measures.

b) For the appointment of arbitrators under Section 11, if the parties fail to appoint the arbitrators.
c) To assist the arbitrators while taking evidence if a dispute requires so as per Section 27 of the Act.

Despite the Act permitting only such minimal judicial intervention, the Indian court's intervention goes above and beyond the permissible intervention. Adding to the reasons for the weakened arbitral regime in India are the different and conflicting interpretations given by the courts in various cases. The persistent judicial intervention will only defeat the very purpose due to which arbitration is sought by the parties, which is the speedy resolution of the dispute. Since party autonomy is the essence of the arbitration, it is the parties who decide the seat of arbitration as well the governing law, and if the parties don't feel the confidence of settling their disputes through a particular forum, they will not select the same for dispute resolution.

The recent decision by the Apex Court in the Amazon-Future dispute in recognising the appointment of an emergency arbitrator by the SIAC and recognition of the award passed by the emergency arbitrator has been a very welcoming step in raising India into an arbitration hub in matters relating to international commercial arbitration. Suppose India has to be raised as a preferred arbitration forum in international commercial arbitration. In that case, the Judiciary's approach must be changed from interventionist to that of one assisting in the arbitral proceedings.