INTERNATIONAL ARBITRATION A DOUBLE-EDGED SWORD

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I. INTRODUCTION

From an Indian student's frame of reference, the Indian judicial system is advancing progressively in the field of arbitration. The Indian Arbitration and Conciliation Act, 1996 is the governing arbitration statute which is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law also known as UN-CITRAL. The Act is comprehensive and includes both domestic and international arbitration. India is a party to the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

II. PIONEERING INTERNATIONAL ARBITRATION

International arbitration is a licit relationship considered commercial under the law in force in India. Such relation, however, may be contractual or otherwise wherein at least one of the parties is an individual who is 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 a body of individuals whose central management and control is exercised in any country other than India; or the Government of a foreign country.[1] Proliferation in the mobility factors of production across countries, International Trade and Foreign Direct Investment have evolved into signing of agreements with Indian businessmen and vendors. India has seen a sizeable growth in the number of disputes that have been referred to arbitration with an increase in the pro-arbitration approach of the Indian courts. The reason being, despite many meticulous judges, the system is holding up under strain. The courts are understaffed and the delays are ineludible as a result, commercial cases may take years to reach a judgement. These delays induced the parties to opt for arbitration at a place outside of India. However, there are also various domestic institutions such as the Indian

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[1] *Internation Arbitration 2019 | India* - **www.globallegalinsights.com**

Council of Arbitration (ICA), the Delhi International Arbitration Centre (DAC), the Indian Merchant Chamber (IMC) in Mumbai and the Nani Palkhivala Arbitration Centre (NPAC) in Chennai that have gained momentum apropos domestic arbitration.[2] The majority of arbitrations that take place in India are on an ad-hoc basis due to which there is a dearth of uniform standards and the outcomes of such proceedings are foreseeable. However, inconsistencies with the arbitration practice in India have weakened the trust and confidence in the system, many multinational companies have moved outside of the country because of the lack of dexterity.

III. REFORMATION

In a prospective decision by the Indian Supreme Court in *Bharat Aluminium Co & ors v Kaiser Aluminium Technical Service, Inc. (2012) 9 SCC 552* 2012 held that Indian Courts had no supervisory jurisdiction over arbitrations held outside India, however, interim relief under section 9 was not available to parties outside of India. This void was filled with the 2015 Arbitration Act Amendments.[3] On August 9, 2019, the President of India gave his assent to the amendments to the Arbitration and Conciliation Act, 1996 and the same has been published in the Official Gazette of India. It relaxes the stringent time-period for completion of arbitration proceedings as prescribed by the 2015 Amendment to a certain extent. The 2019 Amendment frees international commercial arbitrations from a pre-determined period, however, provision for completion thereof within 12 months from the date of completion of pleadings.

IV. PROS AND CONS

International Contracts consist of parties who are from different countries. This makes it expedient for parties to prefer arbitration over submitting the dispute to courts of respective countries. Arbitration offers a qualified decision-maker who is unattached to either party and thereby ensuring a neutral process. It provides for interim measures in cooperation with the judiciary.

[2] *Effective arbitration process can make India a sought after business destination.* - **www.economictimes.indiatimes.com**
[3] Niyati Gandhi and Vyapak Desai, *What Finally Happened in Balco v. Kaisar Technical Services?* - www.mondaq.com

Fast-track: The arbitration proceedings tend to develop over a period extending from six months to a year. It represents a time span considerably shorter than it would take to resolve the conflict in ordinary jurisdiction.

Language facilities: In international dispute resolutions, it is undoubtedly one of the most important advantages i.e the parties may choose freely the language in which to lead the arbitration, which can not be limited to the national languages of those involved.[4]

The Flexibility of Arbitral Process: International commercial arbitration provides the parties great freedom to agree on procedural rules and to select a technically expert decision-maker which will be most suitable to the particular circumstances of their unique dispute. The beauty of arbitration lies in the fact that although a formal option it takes place outside of the courts so no strict regulations apply. However, since there are no detailed procedural rules, this situation may lead to misconduct in favour of one or more parties or it may create even greater disputes between parties while determining the procedure that will be applied. In my opinion, arbitrators should be required to apply a more specific rule for the identification of any governing laws as uncertainty over law leads to uncertainty over the parties rights and obligations.

Confidentiality: International commercial arbitration is essentially a private process, in which press and public are not entitled to be present thereby avoiding any kind of trial by media unlike the proceedings in courts and the confidentiality of arbitral proceedings is often taken to be one of the important advantages of arbitration.

An Enforceable Decision: The final award of an arbitral tribunal, which is a binding decision rather than a recommendation, is a directly enforceable decision both nationally and internationally. In this respect, the award from an arbitral tribunal differs from the judgement of a national court of law. The international treaties concerning the enforcement of arbitral awards such as the New York Convention are more acceptable internationally than reciprocal enforcement of judgements. However, there is a general apprehension in some developing and other counties that international commercial arbitration is biased towards Western commercial interests. This assumption causes some countries to be hostile towards international commercial arbitration and to pose some obstacles to the enforcement of international arbitration agreements and awards in their countries. Additionally, it may be very difficult to construct an effective arbitration agreement and regime,

[4]ICC Rules of Arbitration - *www.iccwbo.org*

especially in multi-party contracts. Therefore, one needs to be careful in drafting contracts as defective or incomplete arbitration clauses may result in multiple judicial proceedings in different courts.

V. SUGGESTIONS AND RECOMMENDATIONS

There is a dearth of strong arbitral institutions around the globe, setting up more arbitral institutions can help in streamlining the arbitration process and make it accessible to common people. The more established arbitration institutions there are, the more likely international arbitration will become a preferred mode of dispute resolution. Advantages of arbitration should be strenuously promoted by holding conferences, seminars, sponsors and workshops with technical and legal experts, which not only promote the cause but also draw potential end users who avail such services. Another often overlooked factor is physical infrastructure. The growth of Singapore as a hub for international arbitration can be significantly attributed to the hearing facilities available to parties during an arbitration that compliment the favourable legal regime. Physical infrastructure would go a significant way in lending credibility to the arbitration process.[5] Uniform rules can sprucely help deal with many procedural issues, such rules should also provide for pre-award scrutiny which limits appeals and long-drawn-out procedures. [6] It is often said that arbitration is only as good as the arbitrators and factors such as credibility, integrity, impartiality are imperative to the outcome of the arbitration process. Arbitration can provide an attractive alternative to the traditional legal system when resolving disagreements. However, the pros and cons of arbitration, the particular transaction and the needs of the parties should all be carefully considered before agreeing to arbitrate a dispute. Furthermore, any issues or concerns with the process can largely be addressed through a well-drafted agreement to ensure a more fair and efficient resolution for all parties involved. Thus, as a deterrent, it is suggested that the aforementioned propositions should be reckoned with for successful execution of arbitral procedures.

VI. CONCLUSIVE REMARKS

[5] Rishabh Kumar, *Remove hurdles to effective, fruitful international arbitration by* - www.economictimes.indiatimes.com
[6] Ashish Bhakta, *What Indian Arbitration needs to do to make Institutional Arbitration a success in India?* - www.indianbarassociation.org

Recent developments should go some way towards enhancing arbitration as a faster, cheaper and preferable method of dispute resolution. The decision of whether to choose arbitration or litigation is a very complex one. Those facing it will have to assess several factors, including costs and duration. With regard to these two factors, the particular characteristics of the party and the right in dispute are important starting points for the assessment. Whether the party is financially healthy and able to wait a longer period for the solution of the case, and whether the market opportunities for new investments justify affording a more expensive but faster proceeding are just two elements to be taken into account. International Commercial Arbitration has not been a completely ideal way to resolve international disputes yet, but is the least ineffective and comparatively better than the alternatives. Thus, within the limits of the present article and based on the analysis above, is safe to say that International Arbitration is a double-edged sword.