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A STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

Human conflicts are inevitable. Disputes may arise amongst the people in relation to their personal, family, economic and political lives. Since disputes are inevitable, there is an urgent need to find a quick and easy method of their resolution. Disputes must be resolved at minimum possible cost both in terms of money and time, so that more time resources and energy can be utilized for constructive pursuits. The research work is with respect to the International Commercial Arbitration (ICA) in India. This research is further analyze of legislative approach towards International Commercial Arbitration(ICA) in India whereas also Judicial approach toward International Commercial Arbitration(ICA) has been discussed.

Keywords:- International commercial arbitration, legislative approach, judicial approach

INTRODUCTION

India has successfully matured & risen in prominence as a rapidly progressing economic power, ensuring its place as a key actor in world trade & commerce. It is critical that our arbitration methods and regulations, while continuing to meet special demands of Indian citizens, are on par with best practises developed throughout world.

The Arbitration & Conciliation Act of 1996, for example, is based on UNCITRAL Model Law, which includes globally acknowledged norms for arbitration proceedings. Because international business arbitration is increasingly transnational & multijurisdictional, procedural components of international commercial arbitration range greatly among nations.

In this regard, India's Arbitration & Conciliation Act, 1996, may be traced back to UNCITRAL Model Law, which includes universally recognised norms for arbitration procedures. The role of judiciary in augmenting alternative dispute resolution system is a critical issue in this regard. Discussions in this respect should eventually take into account India's potential to develop as an internationally preferred arbitration centre.

The rationale and purpose of International Commercial Arbitration (ICA) are generally to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce. The Basic features which are uniform in the legal framework for resolution of international commercial disputes can be broken down into three stages, Jurisdiction, choice of law and the recognition and enforcement of Arbitral Award.

In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when the parties fails to agree upon a choice of law for the settlement of their dispute.

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THE ARBITRATION AND CONCILIATION ACT, 1996:

The Act of 1940 was thought to have a number of flaws in both law and practise of arbitration. In this regard, Secretary of Legal Affairs made a proposal on July 27, 1977, stating that because the Public Accounts Committee had commented negatively on working of Arbitration Act due to its delay, enormous expenses, and long time spent, government wanted to revisit provisions of Arbitration Act, 1940 to determine whether enormous delay occurring in arbitration proceedings and disproportionate costs incurred therein could be a problem.

The Supreme Court stated in Food Corporation of India v. Joginderpal[1] that "law of arbitration" must be simple, with less technicality, & more responsive to actual reality of situations, responsive to canons of justice & fair play, & that "that being command of law pronounced by highest court of land made Law Commission as well as legislature & thinkers think over issues rather seriously to consider amending law."

Under auspices of United Nations Commission on International Trade Law, an attempt was made to create standard national arbitration rules across world, and the UNICITRAL Model Law in Respect of International Arbitration was recommended in 1985.

It is now required and critical to implement reforms to the present arbitration legislation. The question here was whether the aforementioned 1940 Act should be changed or a new statute drafted. Aside from the 76th Report, several recommendations from the Indian Council of Arbitration (ICA), Indian Society of Arbitrators (ISA), Confederation of Indian Industries (CII), Federation of Indian Chambers of Commerce & Industry (FICCI), and Associated Chambers of Commerce & Industry (ACCI) were made to amend 1940 Act.

THE ACT OF 1996 ACCORDING TO 176th REPORT OF LAW COMMISSION AND ITS ANALYSIS

The commission's 176th report requires a study of the operation of the aforementioned Act in light of several defects discovered in its provisions & representations received. The Commission evaluated numerous arguments and concluded that UNCITRAL Paradigm was primarily intended to provide a standard model for international commercial arbitration among distinct countries. The Indian Act of 1996 introduced provisions comparable to model legislation & made them applicable to situations of exclusively domestic arbitration involving Indian nationals, which has caused some issues in the Act's implementation.

The grounds for objecting to an award under Sections 34 and 37 have been made common for both local & foreign arbitration rulings. It was also suggested that principle of least court interference may be a good principle for international arbitral awards as well as for Indian conditions, & that because several awards are passed in India for Indian nationals by laymen who are not well acquainted with applicable law, interference with such awards should not be as limited as it is in the case of international arbitrations.

The reading of preceding text conjures up the image that, in instance of domestic arbitrations b/w Indian nationals, State may want from the courts to have stronger or stricter control over the arbitrations. It is not intended that the Commission was advocating for an increase in judicial intervention in solely domestic arbitration proceedings. In reality, the Commission proposed limiting judicial intervention in some areas beyond what is permissible under the Model Law and the Act of 1996. It was requested that all matters brought before the court in relation to the award be scheduled for an initial hearing and be denied at first sight.

A provision comparable to Section 99 of Civil Procedure Code was also proposed to emphasise that awards should not be tampered with lightly until significant prejudice is demonstrated. It was also recommended to remove difficulties presented by Section 36, which prevents enforcement of an award just because an application to set aside award has been filed and is pending, & that simply filing an application should not result in an automatic stay of award. Furthermore, panel advocated allowing court to set restrictions for compliance with award, partially or entirely, pending resolution of objections.

It was suggested that "Court of Principal Judge, City Civil Court of a city exercising original jurisdiction" be included in meaning of the word "Court" under section 2(1). (e). Another clause was proposed to be added to allow Principal Courts referred to in Section 2(1)(e) to refer problems to Courts of direct jurisdiction. The same clause was thought to get past various High Court decisions that found that Principal Court under Section 2(1)(e) & restrict transfer of proceedings to other Courts. Congestion at Principal Courts would be reduced, as seen by this design.

Sections 8, 9, 27, 35, and 36 were enacted to allow arbitration processes to take place outside of India. Section 8(4) was planned to be added to empower judicial authorities to determine on whether-

- there is no dispute,
- arbitration agreement is null and void or inoperative,
- the arbitration agreement cannot be completed, or
- arbitration agreement does not exist.

Section 8(5) was proposed to be added to state that the judicial authority may not decide above-mentioned issues referred to in proposed sub-section (4) if-

- relevant facts or documents are in dispute,
- oral evidence is required,
- inquiry into preliminary questions is likely to delay referral to arbitration,
- request for a decision is unduly delayed, or
- decision on questions is unlikely to produce.

Based on the foregoing, the judicial authority shall either determine the questions or submit them to arbitration. The above-mentioned parameters were required to ensure that spurious jurisdictional issues are not raised at the outset, causing the orientation to be delayed. At the same time, if the aforementioned questions can be determined quickly and without the need of oral evidence, they can be decided & will almost likely avoid the expenses of arbitration.

Various modifications were requested in Section 11, and effort was made to ensure that the reference to arbitration was not delayed. The intention was to replace the wording "Chief Justice of India" and "Chief Justice" in sub-sections 11(4) to (12) with the words "Supreme Court" & "High Court," so that arbitral panel is appointed on judicial side. Furthermore, Section 24B was proposed to be introduced to allow parties and arbitral tribunal to approach Court in order to enforce interim orders given by arbitral tribunal in Sections 17, 23, & 24.

It was also proposed to completely manage delays before arbitral tribunal by changing sections 23, 24, & 82, as well as introducing new sections 24A, 29A, and 37A. A proposal was also made about time restrictions for passing awards that may be extended by courts, with the caveat that arbitration would continue while Court considered the application.

Temporarily, there were also inconsistent High Court judgements in relation to some clauses of the 1996 Act. The Commission was also made aware of a number of additional issues concerning the difficulty in implementing the aforementioned Act. The Commission principally developed a Consultation Document, hosted two seminars, one in Mumbai & one in Delhi in February & March

2001, & widely publicised the paper by posting it on the Commission's website.

The lectures were attended by retired judges and prominent attorneys. Various luminaries also participated in seminars and supplied written notes outlining their recommendations. Suggestions not included in Consultation Paper were also offered & thoroughly considered. Following an in-depth examination of the legislation pertaining to the issue, with an emphasis on the situation of the law in other jurisdictions, the Commission submitted a number of suggestions for revisions to the Arbitration & Conciliation Act of 1996.

Another Committee, widely known as "Justice Saraf Committee on Arbitration," was formed to investigate severity of the Law Commission of India's recommendations included in its 176th Report and Arbitration and Conciliation (Amendment) Bill, 2003.

Justice Dr. B. P. Saraf, Retired Chief Justice of High Court of Jammu and Kashmir, presided over the Committee. In January 2005, the Committee submitted its final report[2]. The Report included a thorough examination of the Law Commission's recommendations, as well as suggestions for how the 1996 Act may be revised to improve India's arbitration system. The Government decided to 'withdraw' Bill from Rajya Sabha, where it had been presented, in April 2006.[3]

FOREIGN AWARDS UNDER ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration & Conciliation Act of 1996 provides statutory backing for the recognition of international arbitral awards rendered in nations that have signed either the Geneva Convention of 1927 or New York Convention of 1958. For a foreign arbitral award to be enforced in Indian courts, it must be issued under the Geneva Convention or the New York Convention.

In Bhatia International v. Bulk Trading, Supreme Court declared that "an arbitral award not delivered in a convention, country would not be treated as a foreign award and, as such, a fresh action would have to be started on basis of award." The New York Convention creates a consistent yardstick for recognising and enforcing these agreements & rewards throughout the nations that have ratified it. As a result, arbitral agreements & judgments that come from it will be recognised and enforced by courts of states where enforcement is sought, encouraging trust in the parties, who may be unfamiliar with different laws common in many nations with whom they trade. [4]

In Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.[5], Supreme Court considered whether award might be set aside if Arbitral Tribunal failed to follow required procedure outlined in Sections 28 and 29, so jeopardising parties' interests. Section 28 Subsection (1)(a) requires Arbitral Tribunal to determine dispute in accordance with substantive law in force in India at time.

The Indian Contract Act, Transfer of Property Act, & any other related laws would likely be included in substantive legislation. For example, if the award is issued in violation of the Transfer of Property Act or the Indian Contract Act, question is whether award may be overturned. Similarly, under subsection (3), Arbitral Tribunal is directed to resolve dispute in accordance with contract's terms & conditions, as well as after taking into account transaction's trade usage. Is it feasible to reverse a judgement if arbitral tribunal disregards contract's or trade usage's terms applicable to transaction?

The Supreme Court stated that, when interpreting Section 34 in connection with other parts of Act, it appears that legislative goal could not be that award could not be set aside by the court even if it violated the Act's provisions. It would be contrary to the fundamental notion of justice if it were found that such an award could not be challenged. If Arbitral Tribunal fails to follow Act's mandatory procedure, it has acted outside of its power, & judgement is therefore manifestly illegal

& may be set aside under Section 34. Furthermore, Supreme Court found that if award is contradictory to substantive provisions of law or requirements of Act, or contrary to terms of contract, it is clearly illegal & may be interfered with under Section 34.

When a court determines that a foreign award is enforceable, it considers the award to be a decree of that court. Under section 48, an order refusing to enforce a foreign award may be appealed to court authorised by law to hear such appeals. However, no second appeal shall lie from an order issued in appeal, notwithstanding that any right to appeal to Supreme Court shall not be affected or limited, & no appeal shall lie if foreign award is implemented.

JUDICIAL APPROACH TOWARDS INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

CHALLENGES TO THE FOREIGN AWARDS:

Arbitration law is founded on two pillars: party autonomy and award finality. If judicial interference misleads these two plinths, arbitration law will fail to realise its ultimate objectivity and would lose its essence. The evolution of Indian arbitration law from undiscriminating judicial interventions established in the Colonial Act and subsequent 1961 legislation to a more sophisticated Act based on Model Law demonstrates need of limited judicial participation. It is difficult to define public policy as a generic term and as a foundation for overturning an arbitral ruling. Judicial rulings on the scope of public policy that allow for nearly unlimited judicial review of arbitral awards are a death blow to international commercial arbitration.

INTERVENTION BY COURTS

The 1996 Act is thought to have two major goals: quick arbitration and little court intrusion. The intervention of a judicial authority is likewise prohibited. In accordance with Section 5 of Act. This fundamental clause is included in the statutes of every other country that has accepted the UNCITRAL Model. The primary goals of the 1996 Act, as stated in the Statement of Objects and Reasons, are "to decrease the supervisory function of courts in arbitral process" and "to assure that every final arbitral award is enforced in the same manner as a civil court order." [6] Section 5 of Act prohibits the courts from interfering in instances where an arbitration agreement exists. In comparison to 1940 Act, the Court's intervention in all matters relating to the conduct of Arbitration, judgement of Arbitrator, & award has been much reduced under the current Arbitration Act.

POST BHATIA CASE MYSTERY

The decision in Bhatia case, which agreed that an India court could issue interim orders prior to commencement of arbitral proceedings, resulted in scores of Section 9 applications for interim relief being filed in courts across country in relation to arbitrations held in India or elsewhere.

The Court accepted just one exception: parties' express or implied exclusion of Part I. There was no definition of a Part I implied exclusion. Part I also included extensive regulations for nomination of arbitrators and setting aside of awards, among other things, which further added to difficulty. Uncertain whether Part I was impliedly or explicitly excluded in specific situations, Indian courts began to appoint arbitrators in arbitrations performed outside India, such as in National Agricultural (2007) & Indtel (2008), & to enable setting aside of foreign rulings, such as in Venture Global (2008).

BALCO AND WHITE INDUSTRIES

On September 6, 2012, Indian Supreme Court's five-judge Constitution Bench released its decision in matter of BALCO v. Kaiser Technical Services Inc[7]. The BALCO judgement resulted from a two-judge panel that couldn't agree on validity of Bhatia ruling referring several similar matters to a larger bench of Supreme Court. The historic White Industries Case, which resulted in first ever BIT judgement against India, was a comparable case that was heard by Court alongside BALCO & raised same legal difficulties.

In BALCO, Court stated that it disagreed with decisions in Bhatia & Venture Global, and that competence to grant interim remedies in foreign-seated arbitrations or deal with appeals to foreign judgements did not stem from provisions of 1996 Act. In doing so, Court decided that the 1996 Act supported 'board' interpretation of Bhatia that entirety of Part I applies to arbitrations held outside India.

The Judicial firmly established the seat of arbitration as the "centre of gravity" of an arbitration, specifically to decide court jurisdiction in connection with that arbitration. Another advantage is that it clarifies previously ambiguous distinction in India b/w contract law & arbitration agreement law.

Perhaps most importantly, it defines phrases "of nation in which" & "under New York Convention obligations." While term has sparked debate around world, Court determined that there cannot be concurrent jurisdiction of two distinct courts in seat of arbitration & nation whose law governs arbitrations—only the court at seat of arbitration can exercise such authority to resolve a dispute. Prior to BALCO proceedings, Court requested interested parties to comment on matters before it.

The SIAC was one such intervener, & it shared Singapore's position on these issues by citing Singapore decisions such as Swift Fortune (2007), Sui Southern Gas (2010), & PT Asuransi Jasa (2007), as well as legislative amendments made to Singapore International Arbitration Act in 2009, particularly regarding courts' ability to grant interim measures of protection in foreign-seated arbitrations.

The SIAC has considered India to be an important jurisdiction. For past three years, Indian parties have remained single largest contingent of nationalities arbitrating at SIAC, with a near 200 percent increase in number of cases involving Indian parties in various sectors such as trade, construction, joint ventures, energy & natural resources, international trade, shipping and maritime, and general commercial disputes, among others. In comparison to number of incidents, monetary worth of disputes involving at least one Indian party has increased by more than 140 percent during same time period.

Significantly, in the BALCO case, the Supreme Court defines application of its interpretations by assuming that its view of law only applies to arbitration agreements entered into after its judgement, i.e. after September 6, 2012. In doing so, Court appears to have been influenced by practical considerations & inevitable complications that may have arisen as a result of retroactively applying its opinions. This raises intriguing questions about the stance that Indian courts may adopt in present arbitrations & related litigations, as well as prospective litigations based on agreements that are now in effect but were signed before to the Court's ruling. It will also be interesting to watch if parties re-execute arbitration terms in their business contracts in order to fall inside BALCO net.

The availability of remedies for parties seeking such protective measures against an Indian party or assets based in India is one question that emerges as a result of prohibition on Indian courts affording temporary measures of protection in respect of foreign seated arbitrations.

In this regard, the SIAC Rules' emergency arbitrator provisions provide a plausible alternative because they have been used often in arbitrations involving Indian parties. Indian parties were engaged in 10 of ten applications that SIAC has received and accepted thus far. Interim injunctive and other types of remedies issued in these actions were either followed or resulted in agreements between the parties.

In this connection, the Madras High Court's statement in Unknown (2011) about the availability of emergency arbitrator procedures under SIAC Rules for obtaining interim relief is also pertinent.

However, the legal argument about the enforceability of an emergency arbitrator's instructions remains. Singapore revised the IAA in 2012 to recognise that an emergency arbitrator would also be considered a 'arbitral tribunal,' assuring validity of such decisions, instructions, or awards in Singapore under Section 12 (6) of IAA.

The judgement is a big step forward for India since it aligns Indian stance with international arbitration jurisprudence and practise. This ruling is certain to instil increased faith in the Indian legal system & courts. Similarly, it is bound to boost investor trust in India, and uniformity & consistency in judicial approach can only help to develop a more effective dispute resolution procedure for both Indian & non-Indian parties.

CONCLUSIONS

The current structure of International Commercial Arbitration in India is insufficient to establish India as a centre for International Commercial Arbitration. With the great 'Make in India' goal, which is based in part on increasing investor trust, certain of our regulations must be brought into line with worldwide practise. The Arbitration and Conciliation Act of 1996 is particularly significant, especially since India positions itself as a worldwide centre for commercial arbitration. The goals are to reduce delays, bring international business arbitrations under our jurisdiction, reduce the role of courts as supervisors, and ensure efficient enforcement of arbitral rulings. Despite the fact that Arbitration & Conciliation (Amendment) Act of 2016 has created new opportunities for India to serve as a centre for international commercial arbitration before other countries. This research paper examines briefly the efficacy of the new Arbitration Act of 2016, through which the Indian government intends to attract international investment by portraying India as an investor-friendly country with a solid legal framework. The result may be summarised as follows.

- The statutory provisions in India for execution of foreign awards and international commercial arbitration are ineffective.
- There are significant disparities across the nations included in this study in terms of procedural and substantive elements.
- The enforcement agencies participating in international commercial arbitration are not adequately sanctioned.
- Indian institutions created for arbitration, especially international commercial arbitration, such as ICA and ICADR, have struggled to achieve the required global reputation.

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