

International standardization of arbitration as an alternate dispute resolution forum and its acceptance in India

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Abstract

With trade and commerce increasing rapidly between nations, there has been a significant rise in disputes, leading to an urgent need for an effective and unified dispute resolution system which can sufficiently settle disagreements/issues among parties in dispute and which has to be arrived at keeping in mind the differences in laws of every nation, hence, immensely increasing the scope of private international law, or conflict of laws as called by different nations. Such urgency led to many conventions, one of most important being The New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the UNCITRAL Model Law promulgated in 1985 and amended as recently as 2006 which has been the source for International Arbitration, the most widely used dispute resolution method for international commercial trade and transactions and many countries like India have also based their legislations on the rules of the UNCITRAL Model Law. Most European countries as well as India have ratified the New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) for the purposes of International trade and commercial transactions therefore opening the gateway for international commercial transactions to take place among such convention countries easier. Further, the judiciary of concerned countries has also affirmed such ratification and the applicability of the Model Law laid down

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1. Introduction

There has been a significant rise International commercial transactions, leading to an urgent need for an effective and unified dispute resolution system which can sufficiently settle disagreements/issues among parties in dispute and which has to be arrived at keeping in mind the differences in laws of every nation, hence, immensely increasing the scope of private international law, or conflict of laws as called by different nations. One of the challenges posed before adjudicators is decision on award of damages – their quantum, period over which they are to be assessed and requirement of mitigation by the claiming party with the qualification that the requirement of mitigation has to be seen keeping in mind that it should be reasonable to expect mitigation and not ‘undue’.

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2. Prospect of investment in India

India with approximately 1.27 billion people² is the second most populous country in the world. The economy of India is the tenth largest in the world by nominal GDP and the third largest by purchasing power parity (PPP)³ as of 2013. The country is one of the G-20 major economies and a member of BRICS. On a per capita income basis, India ranked 140th by nominal GDP and 129th by GDP (PPP) in 2011, according to the IMF⁴. India is one of the world's fastest growing economies and of major interest to foreign investors as a popular investment hub. As per IMF figures, the FDI in India for the year 2011 was 34.2 billion USD and 4.2 billion USD for the first quarter of 2012.⁵

In 1991, the Indian economy was opened to FDI under the New Industrial Policy, 1991 and since then the Government has liberalized the exchange control regulations, and moved from a strict regime allowing investments only in particular sectors, to a much more free approach with the objective of inviting and facilitating foreign investments. The Investments are approved through two routes - 'automatic route' (requires no prior approval) and 'government approval route' (applications must be made to the Foreign Investment Promotion Board). One-hundred per cent foreign ownership is permitted in most activities under the automatic route. Such ownership is subject to compliance with certain conditions, except inter-alia in certain sectors such as airports, asset reconstruction companies, atomic minerals, broadcasting, postal services, courier services, print media, single brand retail, and telecoms. In these sectors there are specified sectoral caps/ thresholds on foreign ownership. FDI is prohibited in agriculture, atomic energy, retail trading (except single brands up to 51%), lottery, betting and gambling.

India therefore has a system for foreign investors that is straightforward, and rarely requires government approval beyond an investment notification. There are still a number of restrictions that the US and Europe are trying to encourage the government to change, in sectors such as legal, insurance and banking, and those efforts remain ongoing.

² As of 2015, Office of the Registrar General of India, Ministry of Home Affairs.

³ "Report for Selected Countries and Subjects". World Economic Outlook, International Monetary Fund. April 2014. Retrieved 21-09-2015.

⁴ "Report for Selected Countries and Subjects (PPP valuation of country GDP)". IMF. April 2014.

⁵ International Monetary Fund website – www.imf.org (as retrieved on 21-09-2015).

3. Legislative hurdles in India

India's attraction to foreign investors is tempered only by its sometimes unclear legislation. The problem with legislation arises when government policy is changed, since new laws can often be badly drafted.

Another problem faced by investors is with the Indian judicial system which arises because the pleadings system is archaic, and therefore most court proceedings require large volumes of paperwork since everything needs to be pleaded. The result being, there is large volume of pending cases and therefore it can take as much as a decade for a trial to complete. Therefore, from a business perspective, the Indian courts are used more as a means of achieving interim results rather than definitive decisions. Most companies will go to court to get injunctions but will otherwise avoid them where possible.

4. Access to judicial relief and adoption of arbitration for dispute resolution in India

In India, access to courts is relatively easy as litigation costs are relatively low as access to courts is a fundamental right as enshrined in the Constitution of India. The Indian courts usually do not award realistic costs and as a result arbitration is the preferred option for dispute resolution. Legal Advisors advice investors to include arbitration clauses in their contracts so as to provide for a dispute resolution mechanism in case differences/disputes arise.

India has been one of the fastest growing economic powers in recent times and has seen many changes in its economic policies leading to many foreign companies and corporations investing in the country's various profitable sectors, thus making it a global economic power also giving its international commercial arbitration system an overhaul for changing times. Arbitration is governed by the Arbitration and Conciliation Act 1996 in India which is based on the Model law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 for most parts. This Act has resulted in facilitation of Foreign Direct Investment (FDI) in India in a big way by providing for interim measures, implementation of foreign awards in India and appeal against awards in certain cases in matters of arbitration.

India's Arbitration Act is based on the UNCITRAL model, thereby forbidding the local courts from taking any view on the merits of a case where there is an arbitration clause. The Indian Arbitration Act is divided into two parts, domestic and international, based on the venue of arbitration. Indian courts' ability extends to govern international arbitrations as well. Therefore, if arbitration takes place outside India, the parties in dispute can very well approach the Indian Courts for Interim relief. An important case law in this regard is *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105. At page 120, it has been held⁶: "23. That the legislature did not intend to exclude the applicability of Part I to arbitrations,

⁶ Bhatia International v. Bulk Trading S.A., (2002) 4 Supreme Court Cases 105, India.

which take place outside India, is further clear from certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows: “2. (7) An arbitral award made under this Part shall be considered as a domestic award.”

As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians, and (b) international commercial arbitrations. As set out hereinabove international commercial arbitrations may take place in India or outside India. Outside India, an international commercial arbitration may be held in a convention country or in a non-convention country. The said Act however only classifies awards as “domestic awards” or “foreign awards”. Mr Sen admits that provisions of Part II make it clear that “foreign awards” are only those where the arbitration takes place in a convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be “foreign awards” under the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a “domestic award”. There would thus be no need to define an award as a “domestic award” unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking, an award passed in an arbitration which takes place in a non-convention country would not be a “domestic award”. Thus the necessity is to define a “domestic award” as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a “domestic award”.⁷

*In Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 SCC 275, at page 284, it has been held⁷: “22. The scope and purport of such a clause was considered in *Heyman v. Darwins Ltd.*(1942) 1 All ER 337 and it was stated: (All ER pp. 339 H-340 A): “The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute, and (b) what disputes the arbitration clause covers. To take (b) first, the language of the arbitration clause in this agreement is as broad as can well be imagined. It embraces any dispute between the parties ‘in respect of’ the agreement or in respect of any provision in the agreement or in respect of anything arising out of it. If the parties are one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened—e.g. as to whether the agreement has been broken by either of them; or as to the damage resulting from such breach; or as to whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further—in all such cases it seems to me that the difference is within such an arbitration clause as this. In view, however, of phrases to be found in the report of some earlier decisions, the availability of the arbitration clause when ‘frustration’ is alleged to have occurred will require closer consideration.”*

⁷ Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 Supreme Court Cases 275, India.

In *Gas Authority of India Ltd. v. Ketu Construction (I) Ltd.*, (2007) 5 SCC 38, at page 52, it has been held⁸: “21. The Preamble to the Act makes it amply clear that Parliament has enacted the Arbitration and Conciliation Act, 1996 almost on the same lines as the Model Law, which was drafted by the United Nations Commission on International Trade Law. In *Sundaram Finance Ltd. v. NEPC India Ltd* (1999) 2 SCC 479. it has been observed that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law.”

In *Fuerst Day Lawson Limited v. Jindal Exports Limited*, (2011) 8 SCC 333, at page 353, it has been held⁹: “54. The Arbitration and Conciliation Act, 1996 that has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961, consolidates and amends the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and defines the law relating to conciliation and provides for matters connected therewith and incidental thereto taking into account the UNCITRAL Model Law and Rules.”

Further, the provisions relating to enforcement of an arbitral award passed by a foreign country require that the award is not opposed to ‘public policy of India’. What constitutes the ‘public policy of India’ has been detailed by way of amendment of Sections 48 and 57 of the Arbitration and Conciliation Act, 1996 by passing of the Arbitration and Conciliation (Amendment) Ordinance, 2015.

In India, in cases involving claims of damages, there is not enough precedent under Indian Law to refer to. This is further made difficult by absence of substantive law on torts, albeit little support in contract law. Therefore, litigators turn to foreign decisions in commercial cases in support of claims and in counter of them, to establish date of breach, quantum of damages and the extent of mitigation required by the non-breaching party.

5. International commercial arbitration and advantage of arbitration as ADR forum

International Commercial Arbitration is taking place rapidly all across the globe and is being preferred over and hence replacing traditional methods of dispute resolution such as litigation for international commercial transactions by corporations making foreign investments or making investments in collaboration with foreign parties. The enormity and complexity of business trade transactions and globalization in today’s time is a clear indicative of an increase in unexpected and unforeseen problems and disputes and therefore any state or corporation intending to make foreign investment or investment in collaboration with a foreign party as also governments of nations across the globe are in dire need of an

⁸ Gas Authority of India Ltd. v. Ketu Construction (I) Ltd., (2007) 5 Supreme Court Cases 38, India.

⁹ Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 Supreme Court Cases 333, India.

effective dispute resolution system to ensure the smooth functioning of their agreements, policies and economies. Private justice of contractual origin and with judicial functions, the arbitration is a juridical omnipresent reality¹⁰.

India, like many other nations, has recognized the need for adoption of standardized law for dispute resolution in this era of globalization and increase in international commercial transactions and the Judiciary in India, as can be seen from the above case law set by the Apex Court, i.e., the Supreme Court of India, has also affirmed ratification and the applicability of the Model Law adopted by the legislature.

There are various methods and forums of dispute resolution but Arbitration is definitely preceding in usage of such forums for settlement of disputes and is a relatively modern technique as is practiced today even though the concept has been around for many years as the methods and techniques of conducting arbitration as well as the laws governing such arbitration have been updated and modernized by nations from time to time to meet modern day requirements and so as to be in consonance with internationally accepted principles and laws.

Arbitration is a form of alternative dispute resolution (ADR) and is a legal technique for resolution of disputes between parties outside the courts in private wherein the parties to a dispute refer it to one or more than one person, as maybe stipulated by the arbitration clause incorporated by the parties in the contract itself, for dispute redressal, called 'Arbitrators' or the 'arbitral tribunal' by whose decision they agree to be bound as such decision being the award and being legally enforceable¹¹. Arbitration has established itself as the best method of determining complex commercial disputes all over the world. Countries such as India and Singapore have come a long way in this aspect and arbitral centers are being set up and established and there has been a rise in the study of the law and practice of international commercial arbitration as an important subject among students at universities and law colleges.

International Commercial Arbitration is an effective way of putting an end to disputes between parties, without recourse to the courts of law, as arbitration usually takes much lesser time as compared to trial in a court of law, is less costly and usually results in fair and realistic awards. Furthermore, the laws to govern arbitration proceedings in a particular matter, the arbitral tribunal and the seat of arbitration can be agreed upon and predetermined by the parties as convenient to them, making dispute resolution easier, effective and practical. Arbitration proceedings can be agreed upon by parties to be conducted in a totally independent country if the laws governing arbitration in such country are suitable to the parties and any award passed by such arbitral tribunal is legally binding upon such parties.

¹⁰ Diana Lazăr, *Efficacite des sentences arbitrales etrangeres en Republique de Moldova, dans le contexte de la Convention de New Zork de 1958*, "Perspectives of Business Law" Journal, Volume 4, Issue 1, 2015, p. 221.

¹¹ See Cristina Florescu, *On Dissenting Opinions in International Arbitration*, in Cătălin-Silviu Săraaru (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 296.

Arbitration is conducted in different countries and against different legal and cultural backgrounds, on neutral grounds and are not formal proceedings like trials in courts. Therefore, arbitration has the advantages of fairness, bias free decision, practicality, speed, efficiency, control, cost effective, can be made confidential as proceedings are generally non-public, and the advantage of awards being internationally enforceable unlike orders of traditional courts due to various agreements and conventions entered into between countries encouraging International Arbitration such as the New York Convention 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Another major advantage of arbitration over traditional methods of dispute resolution is that since the parties are free to choose the arbitrator(s), in today's world where technology, research, commodities, finance among various other fields are complex to understand and which need fact finding and expertise of someone who has the required capabilities of make a well reasoned decision, Arbitration allows the parties to choose an arbitrator with such requisite technical knowledge and experience enhancing the quality of decision-making in many cases. Each party in arbitration is free to choose procedural matters to be employed and also the rules pertaining to taking testimony, language, interim measures, substantive law, evidentiary matters, presiding arbitrators and the degree of procedural formality. In today's time, Arbitration procedure has advanced so much that arbitration has become more sophisticated to the extent that it is even being conducted online with a system known as Online Dispute Resolution or ODR having the parties to file disputes online and proceedings taking place over the internet and judgments given on basis of documents submitted online.

6. Disadvantages of arbitration as ADR forum

But Arbitration as a dispute resolution method is not free from disadvantages, some of which being arbitration may become highly complex and may take up as much time to resolve the dispute as a trial in court. Further, if there is a predetermined and incorporated arbitration clause in an agreement, the parties are bound by it and therefore, it is mandatory and binding in nature and the parties waive their rights to access the courts and to have a judge or jury decide the case. Sometimes, the cost of arbitration goes much higher than what a trial in court would cost and further, usually both parties have to bear the cost of arbitration equally and therefore, the award of the winning party is accordingly reduced.

Another major disadvantage of arbitration is that there are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned especially in cases of international commercial arbitration and in some legal systems, arbitral awards have fewer enforcement options than judgments. Although usually thought to be speedier, when there are multiple arbitrators on the panel, arbitration proceedings may take very long to be concluded as proceedings being informal in nature, are conducted at convenience of all parties and arbitrators.

7. International conventions and protocols

There are various conventions and protocols that were entered into by various countries to bring in sync the rules governing International Commercial Arbitration. In the past there have been various conventions like the following: the Geneva Protocol of 1923, the Geneva Convention of 1927, the European Convention of 1961, the Washington Convention of 1965.

In recent times the UNCITRAL Model Law promulgated in 1985 and amended as recently as 2006 has been the source for International Arbitration and many countries like India have also based their legislations on the rules of the UNCITRAL Model Law. The New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) is the most important convention till date in the field of Arbitration. As of September 2012, 145 of the 193 United Nations Member States have adopted the New York Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards)¹². India as well as most European countries have ratified the convention and therefore, making trade and commerce to take place among them much easier for prospective parties.

The growth of International Commercial Arbitration has also given rise to various private and state run associations to conduct arbitration most of them having their own rules and procedures allowing parties to select them as their choice of institutions to conduct and take care of the procedural aspects of Arbitration which is also known as Institutional Arbitration. A few of the prominent associations conducting Arbitrations in the International Arbitration sphere are: the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), American Arbitration Association (AAA), International Centre for Settlement of Investment Disputes (ICSID).

Therefore, there has been widespread growth in the field of International Commercial Arbitration for which various countries have associated themselves with this new phenomenon in the legal field to enhance their economy and development of their countries judicial system through providing alternative forums for businesses and states.

8. Conclusion

It is without doubt that International Commercial Arbitration is one of the most effective methods of dispute resolution in a world of complex and ever growing global business transactions between nations governed by different commercial laws. International Commercial Arbitration provides a platform to parties of different nations entering into commercial trade to agree upon the method of dispute resolution by giving them flexibility in terms if applicable laws,

¹² UNCITRAL website - http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention.html (as retrieved on 21-09-2015).

the venue of dispute resolution and more practical proceedings presided over by competent persons and have the award so passed legally enforceable. India has come a long way in international trade and by being a reliable investment opportunity and gaining trust of investors by putting in place an effective arbitration mechanism.

Bibliography

1. Cristina Florescu, *On Dissenting Opinions in International Arbitration*, in Cătălin-Silviu Săraru (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang, Frankfurt am Main, 2013, p. 295-316;
2. Diana Lazăr, *Efficacite des sentences arbitrales etrangeres en Republique de Moldova, dans le contexte de la Convention de New Zork de 1958*, "Perspectives of Business Law" Journal, Volume 4, Issue 1, 2015, p. 221-232;
3. "Report for Selected Countries and Subjects". World Economic Outlook, International Monetary Fund. April 2014. Retrieved 21-09-2015;
4. "Report for Selected Countries and Subjects (PPP valuation of country GDP)". IMF. April 2014;
5. Bhatia International v. Bulk Trading S.A., (2002) 4 Supreme Court Cases 105, India;
6. Rashtriya Ispat Nigam Ltd. v. Verma Transport Co., (2006) 7 Supreme Court Cases 275, India;
7. Gas Authority of India Ltd. v. Ketu Construction (I) Ltd., (2007) 5 Supreme Court Cases 38, India;
8. Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 Supreme Court Cases 333, India;
9. UNCITRAL website - http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (as retrieved on 21-09-2015);
10. International Monetary Fund website – www.imf.org (as retrieved on 21-09-2015).