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RESEARCH ARTICLE

EVOLUTION OF INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA POST AMENDMENTS TO ARBITRATION AND CONCILIATION ACT 1996.

Pallavi Bajpai.

Assistant Professor, School of Law, Northcap University, Gurgaon.

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Abstract

India is a large and a diverse country. It had opened its market in the early 1990s and has embraced the good and the bad of the globalisation process. The globalisation trends as well as the large population exert tremendous pressure on India's resources and Institutions including the Judicial System. In this scenario the ADR mechanism especially arbitration has proved to be a success resort to dispute resolution. India has acknowledged this fact and has a specific legislation governing the arbitration regime called the Arbitration and Conciliation Act, 1996 which is based upon the UNCITRAL Model Law. India is also a signatory to the New York convention on Recognition and Enforcement of arbitral awards. Acutely conscious of the pace which India should have at international counterparts, it has amended the Arbitration and Conciliation Act, 2015. The amendments were much needed as India was at a cross road, pushing forward a permissive party autonomy regime where courts were to play a minimum interventionist role with a frame work of making, challenging and enforcing awards. Theoretically the system was workable but on a practical front it had become cumbersome. The changes brought by the new legislation are heartening and intents to make India a desired destination for International Commercial Arbitration. The Article will cover the major pro-arbitration changes brought in by the new amended legislation and a critical review of the gaps still left. The article would also try to analyse what efforts are yet to be undertaken to reach to the desired platform which is the shift from Ad-hocism towards Institutionalisation.

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Introduction:-

With the Globalisation trends all over the world International trade and investment is increasing accompanied by cross – border commercial disputes. These disputes needed an effective dispute resolution mechanism and international arbitration has proved to be one of the most successful legal regime. International commercial Arbitration has many advantages such as flexibility, confidentiality, internationally enforceable decision, neutrality etc. which have made this regime cross the path from preference of the people to choice and today a necessity. International disputes with respect to India are steadily increasing because of influx of foreign investments, overseas commercial transactions and open ended economic policies. This has drawn a tremendous focus from the international community on India's International arbitration regime.

Corresponding Author:- Pallavi Bajpai.

Address:- Assistant Professor, School of Law, Northcap University, Gurgaon.

There is no mandatory legal regime governing International commercial Arbitration, it has a permissive regime of conventions which a nation follows if it is a signatory of the same. The two most important conventions in this regard are, The Geneva Convention, The New York Convention 1958 and the UNCITRAL MODEL Law 1985. India is a signatory for the same. Infact India was amongst the 10 original Asian nations to have signed the Geneva Convention 1927¹. But for understanding the pro- arbitration attitude of a nation, besides being a signatory what is equally important is a well framed and at the same time implemented domestic legal frame work of arbitration.

History of Arbitration In India:-

India enacted the Arbitration and Conciliation act 1996 which was modelled on the UNCITRAL MODEL LAW. Before that Indian arbitration law consisted of three main statutes:

1. The Arbitration (Protocol and convention) Act, 1937
2. The Indian Arbitration Act, 1940
3. The foreign awards (Recognition and Enforcement) Act, 1961.

The 1996, Act was permissive in nature. It provided Party autonomy to the parties and permitted them to derogate from provisions of the act in certain manner. The arbitrator assumed powers, where the law or the arbitration agreement was silent; this gave substantial flexibility which may be responsible for India's abstruse loyalty to ad-hoc arbitration. However India is not considered to be at the forefront and is perhaps considered to be laggard. The Main reasons for this are: Procedural hassles, delays, Interference of the court, low ratio of effective hearing etc. The Indian Judiciary in the last decade has delivered some controversial decisions, particularly involving foreign party because of which it is often criticized. However India realized that it needs to develop more vibrant arbitration jurisprudence for improving its reputation at the international forum. Lately the judiciary has shown a pro-arbitration approach and a series of pro-arbitration rulings by the Supreme Court and High court has attempted to change the arbitration landscape completely. From 2012-2015, the Supreme Court delivered various rulings which showed positive attitude of the judiciary towards International commercial Arbitration such as declaring the Indian arbitration law to be seat- centric, removing the Indian judiciary's power to interfere with the arbitration seated outside India, referring non-signatory to an arbitration agreement to settle disputes through arbitration, defining the scope of public policy in foreign seated arbitration, and determining that even fraud is arbitrable. Not only judiciary has shown certain positive changes but even the government has in support of ease of doing business in India has brought in amendment to the arbitration regime, 1996. On October 23, 2015 the president of India promulgated The Arbitration and Conciliation Act, 2015. The Amended Act incorporated major rulings of the last two decades, and recommendations of 246th Law commission Report. After getting declarations from the two houses, on December 31st, the president of India signed the bill and gazette notification was made on January 1st, 2016.

Positive Judicial Trends aiding International Commercial Arbitration in India:-

1. The Supreme Court in World Sport Group (Mauritius) Ltd. MSM Satellite (Singapore) Pte. Ltd² held that allegations of fraud are not a bar to foreign seated arbitration.
2. In Enercon (India) Ltd. & Prs. V. Enercon GmbH & Anr³ The Supreme Court held that arbitration cannot be invalidated by mere allegations of non-conclusion of the contract. What is important is the intention of the parties to resolve their dispute through arbitration. The Law laid down in the act is to aid and support arbitration and discourage it.
3. In Reliance Industries Ltd. & Ors. V. Union of India ⁴ it was stated by the Supreme Court that it is important that an arbitrator should be impartial, neutral and unbiased but it is equally important that an arbitrator should be appointed with parameters like qualification, experience and integrity.
4. In Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi⁵ it was held that even fraud is arbitrable in India. The Supreme Court laid down that if the substantive contract is void; there is no bar to arbitration with respect to the same. The Court said that judiciary should follow the principle of least interference.

¹ The other five nations were Japan, New Zealand, Pakistan, Thailand and Hong Kong. None of the Americans subscribed to it. F.S Nariman: "East Meets West: Traditions, Globalization and the Future of Arbitration", LCIA Arbitration International, Vol 20, Issue 2, page 123.

² Judgement in Civil Appeal No.895 of 2014 dated January 24, 2014

³ (2014)5 SCC 1

⁴ AIR 2014 SC 2342

⁵ AIR 2014 SC 3723

5. In *Union of India v. U.P State Bridge Corp Ltd.*⁶ the Supreme Court held that if a government official consents to act as an arbitrator then he should not deal with it as a subsidiary matter. The Court also held that the principle of “Default Procedure” will apply from inaction of arbitral tribunal to protect the interest of the parties.
6. In *Chloro Controls (I) P.Ltd. v. Seven Trent Water Purification Inc. & Ors.*⁷ The Supreme Court said that in certain exceptional situations involving composite transactions, even the non -parties such as parent companies, group companies or directors can be included. The court interpreted the term “Person Claiming through or under” to include multi -party and non-signatory.
7. In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*⁸ the Supreme Court narrowed down the concept of Public Policy by removing Patent illegality from the purview. This would not lead towards frequent challenge of foreign awards.
8. In *Antrix Corp. Ltd v. Devas Multimedia P. Ltd.*⁹ the court in this case delivered that once arbitration has been invoked, then one party cannot again apply to the court for the appointment of arbitrator unilaterally.

The Indian arbitration jurisprudence has been ever evolving to adjust to the needs of the changing complexities of International trade .Though the Indian Jurisprudence was not that faithful in the first millennium but lately this approach has changed. The above stated cases show a pro-arbitration approach towards the international community.

Arbitration and Conciliation Act, 2015:-

The Amendments aim at creating an ambience which offers certainty and neutrality reduces judicial interventions and incentives compliance.

The amendment seeks to:-

1. make arbitration in India a quicker and more streamlined process;
2. reduce interference by the courts;
3. make India a more attractive destination for foreign investors; and
4. Facilitate the ease of doing business in India.

The provisions that further each of these ends are discussed individually.

Independence and Impartiality:-

1. The Amended Act has introduced specific guidelines in a new schedule (Schedule V) with respect to Independence and impartiality of the arbitrators, which is based on IBA Guidelines on Conflict of Interest in international arbitration.¹⁰
2. The appointment of arbitrators in case to be undertaken (in administrative capacity) by courts would be done by Supreme Court in case of International arbitration and by the high court in case of domestic arbitration .
3. Time framed disposal of applications for appointment of arbitrators which is within 60 days from the date of service of notice on the opposite party.
4. Detailed schedule on ineligibility has also been incorporated in the new regime.

Interim Reliefs:-

1. Parties are granted autonomy to approach the aid and assistance of Indian Courts in foreign seated arbitration.
2. Applications under section 9 of the act to be made directly before the high court in case of International commercial arbitration seated in as well as outside India.
3. The Interim relief granted by the arbitral tribunal seated in India will have the status of a court order.
4. The arbitration proceedings after the interim orders must commence within 90 days of such an order.
5. A new provision has been included which restricts parties from filling application under section 9 for interim relief once an arbitral tribunal has been constituted. The parties can approach the court only when the remedies provided by section 17 are not effective.

⁶ 2014 (10) SCALE 561

⁷ AIR 1994SC 1136

⁸ 2003(2)ARBLR 5 (SC)

⁹ 2013 (7) SCALE 216

¹⁰ THE IBA GUIDELINES, available at

http://www.ibanet.org/ENEWS_Archive/IBA_July_2008_ENEWS_ArbitrationMultilpleLang.aspx

Expeditious Disposal:-

1. A Time framework for completion of arbitration has been provided in the new regime which is 12 months.
2. Speedy disposal of applications along with indicative timelines for filing arbitration before courts in relation to interim relief, appointment of arbitrator, and challenge petitions.
3. Incorporation of fast track arbitration procedure to resolve disputes within a period of 6 months.

Costs:-

1. Introduction of “costs follow the event regime”, which as a rule of thumb, makes the losing party bear the entire cost of the litigation.
2. Introduction of Compound Interest from the arbitrary 18%.
3. An attempt has been made to provide certainty from a budgeting perspective by providing a model cost table as a schedule which slabs a slab-wise model fee structure which makes the arbitrator fee dependent on the stakes involved in the dispute.(though these structure are not binding in nature)

Challenge and Enforcement:-

1. The scope of challenging and award of international arbitration seated in India has been narrowed down.
2. Petitions under section 34 to be filed directly under the high court in case of International commercial arbitration.
3. Petitions filed under section 34 to be disposed of within a year from service of notice to the opposite party.
4. Upon filling a challenge, under section 34 of the Act, there will not be any automatic stay on the execution of award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

Attempts to Limit Judicial Intervention:-

1. Judicial intervention has been reduced by restricting the scope of pre-arbitration review by courts to a prima facie review of the existence of an arbitration agreement.
2. The New Act has restraint the ambit of the term “Public policy”, especially in relation to international commercial arbitration, wherein it states that an award passed in an international arbitration can only be set aside on the ground that it is against the public policy of India if and only if a) the award is vitiated by fraud or corruption, b)it is in contravention with the fundamental policy of Indian Law, c) it is in conflict with basic notions of morality and justice.
3. The Amendment to section 36 makes it clear that the mere filing of a petition under section 34 will not render the award in executable.

Areas of Concern:-

While the act has brought in potential to turn the table in favour of India, there are some aspects which cause concern.

Prospectively of the Act:-

The New act states that unless otherwise agreed upon by the parties the act will not be applicable to arbitration prior to 2015(section 26),there is ambiguity as to whether the amendments would apply to court proceedings relating to arbitral proceedings where notice of arbitration was initiated prior to 23th October 2015.while the Madras High Courts¹¹, the Calcutta High Court Division Bench¹² and the Bombay High Court¹³ have held that the amendments would apply to such proceedings, the single judge of the Calcutta High court¹⁴ has taken a contrary view. This issue is currently being argued before different fora.

Termination of Mandate / Time Frames:-

Section 29A, which sets a 12 month time period for completing the arbitration proceedings. If the arbitration is not conducted within this frame work, the parties can further extended the period for 6 more months. If the proceedings are not completed within this time frame, the mandate of the tribunal is terminated, unless the court extends the

¹¹ New Tirupur Area Development Corporation Ltd. v. HCC Co Ltd. Application No. 7674 of 2015 in O.P NO.931 OF 2015.

¹² Tufan Chatterjee v.Ranjan Dhar, AIR 2016 Cal 213.

¹³ Kohi Cricket Pvt. Ltd v. The Board of Control for Cricket in India, Executive Application (L) No. 2482 of 2015.

¹⁴ Nitya Ranjan Jena v.Tata Capital Financial Services Ltd, G.A. No. 145 of 2016, with A.P.No.15 of 2016

period and gives more time for sufficient cause. If the court extend such period then it has power to substitute the arbitrator and reduce the fee upto 5% of the total fee for each months delay.

The intention of the legislature while framing such a law might be good infact to felicitate speedy justice. But time frame of 12 months for every kind of arbitration is unrealistic and stands against constitutional parameters also. There is no rationale behind setting up of such a time limit with respect to every kind of arbitration notwithstanding factors such as need for oral arguments, existence of counter claims, appointment of experts etc. The Supreme Court in¹⁵ reference to arbitration has stated that “The object is to expedite the hearing and not to scuttle the same. While justice delayed is justice denied, justice hurried may in some cases amount to justice buried”.

The arbitration regime in order to function smoothly should be free from judicial intervention, for which time and again guidelines are issued .But provisions like this provide opportunities of judicial intervention and are directly in contract to be objective of the ADR regime which is to reduce Judicial Intervention.

This Provision was challenged in Delphi TVS Diesel System Limited v. Union of India ¹⁶ where Madras High Court inquired whether Law Commission was consulted while drafting such a provision.

An unrectified and apparent mistake this national legislation has is also with respect to proviso added to section 9, 27, 37(1) (a) and 37(3) shall also apply to foreign seated international commercial arbitration , however section 37 (1) (a) as amended in 2015 has no applicability in a foreign seated arbitration.

Appointment of Arbitrators by the Courts:-

There are loopholes and ambiguities with respect to section 11(14) and the Fourth Schedule, which relates to the Fee Structure of the Arbitrators in relation to the cost of the dispute. It is very difficult to quantify the sum in dispute and whether the amount includes amounts of the claimants as well as that of the respondents is not clear.

The applicability of the fourth schedule is not clear whether it apply to domestic arbitrations or even international arbitrations.

There is Potential of misuse of this provision especially in ad-hoc arbitration, where parties can in order to take advantage of the fourth schedule lower down the sum involved in dispute and agree upon a comparatively low fee. This may also lead to judicial interference.

Gaps to be filled:-

The Law Commission in its 246th Report had recommended that a provision be made where by a three month time limit would be set for taking any objections to the enforceability of the foreign award under section 48 of the act. It had further suggested that any objections if taken should be settled within 1 year. The Act has not accepted these recommendations for reasons unknown.

Provisions for Interim measures are provided with much needed teeth as per the new legislation however certain standards could have been also set. Traditionally the standards applied by the national courts while granting interim measures such as application of specific standard specified in order XXXVII Rule 5 while security, ought not to be applied while granting security in arbitration proceedings.

Eminent experts in the field of International arbitration such as Gary B. Born¹⁷ have suggested that instead of applying standards of national courts (which may be more technical in nature), the arbitral tribunal should normally require a party to demonstrate a) risk of serious or irreparable harm, b) urgency; c) establishments of prima facie case and balance of convenience; and d) no pre-judgement on the merits of the case. These very standards have been incorporated in the UNCITRAL Model Law in 2002 in the form of Article 17A, yet the 1996 Act remains wanting of such corresponding amendments, thus relying heavily on the courts to set such standards.

¹⁵ R N Jadhav v. Subash Chandra (2007) 6 SCC 420.

¹⁶ W.P Nos. 37355 TO 37357 OF 2015 , decided on 24March 2016.

¹⁷ International Commercial Arbitration (2nd ed), pp 2424-2563

There is a complex interaction of laws which regulates the actual arbitral proceedings. There is the Law governing the main Contract, the law governing the arbitration agreement, the law governing the arbitration proceedings and the law of the seat of arbitration. There is an ambiguity regarding the applicability of the law governing the arbitration agreement i.e the obligations of the parties to submit the dispute to arbitration and to honour the award.

Generally it is presumed that parties will exercise their autonomy and choose these sets of law for proper governance of their mechanism but if the law regulating the arbitration agreement is not chosen by the parties, it is for the court to decide the same.

In majority of situations the law chosen by the parties to regulate the arbitration agreement is the law of the seat of arbitration, though it is open to the parties to choose different set of laws governing the same. In cases where the law chosen is different for both then the court investigates whether the issue is arbitrable as per the law chosen by the parties and then to the procedural law to see how reference should be conducted¹⁸.

The Supreme Court of India has wrongly interpreted the situation which is not in inclination towards the International regime. The Supreme Court in *National Thermal Power Corporation v. Singer Company and Others (NTPC)* has held that “the proper law of the arbitration agreement is normally the same as the proper law of the contract”¹⁹. Most of the Nations which have pro-arbitration regime such as England, Singapore etc. have time and again held that if the parties fail to make a choice towards the law regulating arbitration agreement it shall be regulated by the law of the seat of arbitration. This approach is supported by the New York Convention. (Which states that the validity of an arbitration agreement can also be sought from the law of the seat of arbitration.)

Another area of gap is where two Indian parties choose a foreign seat of arbitration Part 1 of the arbitration is applicable when the seat of arbitration is in India, therefore arbitration between two Indian Parties seated abroad would not be governed by Part 1. The section defining International Arbitration²⁰ states that arbitration where one of the parties is not an Indian party which in turn would mean that such arbitration would not be either considered International arbitration as per the act. In such a situation party would not be able to seek help from the Indian Courts. The Various High Courts have recently ruled upon this issue and have stated that award from such arbitration would be an international award and consequently would be covered by Part II of the Arbitration Act²¹. If arbitration in India is conducted through an institute which aids the provision of emergency arbitrator, the order passed by such an arbitrator is not enforceable in nature. This stand makes an order futile and not effective at all. The legislature should specifically make provisions for such a gap. The Law Commission in its report²² had suggested giving statutory recognition to the concept of Emergency arbitrator but such suggestion has not been included in the new regime.

Way Forward towards the Regime:-

Notwithstanding the above hurdles, the 2015 amendments if implemented in letter and spirit would revolutionise the Indian arbitration regime. In order to make India a regional hub and global player in domestic and international arbitration it needs to develop systematic eco-system. The A, B, C, D should be in the right direction. A would mean (UNIVERSAL) Access, B (REDUCING) backlog (LOWERING) costs, D (REMOVING) Delay. The need of the hour is not only the Brick and Motor but operationalization. The following considerations can lead India forward in this regime:

1. There is a need to shift towards institutional arbitration rather than ad-hoc arbitration. It is no coincidence that the leading arbitration centres in the world are also home to leading institutes.
2. The local Judiciary should be in tune with the ethos of arbitration. There should be Training/workshops on how to aid and assist arbitration rather than interfering with it. It would be develop education and ethic for arbitration regime.
3. Good Human Capital is required for the regime, Arbitration Bar should be developed .lawyers should bring in Change in attitude of lawyers, problem of peripatetic lawyer. It should not act like a Third cousin of judiciary.

¹⁸ *Sumitomo Heavy Industries Ltd. v. ONGC Ltd. and Others* (1998)1 S.C.C305 (India)

¹⁹ (1992)3 S.C.C 551 Page 21 (India)

²⁰ Section 2(f) of the Arbitration and Conciliation Act, 2015

²¹ F.A 310 OF 2015. Sep.11 2015

²² Law Commission of India, Report No. 246- Amendments to the arbitration and conciliation Act, 1996, 37 (2014), available at <http://lawcommissionofindia.nic.in/reports/Reports246.pdf>.

4. Judiciary should maintain Right Balance by with respect to arbitration Process with respect to the Mandate of arbitration (refer the parties to arbitration if arbitration agreement exists rather than trying such a matter), for giving interim measures, for settlement of applications under section 11 of the arbitration act.
5. Use of Technological Infrastructure to build in the advantage of this regime which is speed and cost reduction.
6. Bring in Transparency in the process of appointment of arbitrator by the court.
7. The law should also incorporate qualifications for the appointment of arbitrator.

India as a Centre for arbitration should not be viewed in any narrow prism as serving the economic agenda of a few. It should be viewed as a matter of national interest and the mind-set of the state agencies should contribute towards this effort. Surely the desirability for a country to come into its own on the international dispute resolution stage has advantages beyond the obvious. Indian Participants should will take it forward in right earnest and try to bridge the gap by moving way forward towards the much needed path suggested above.