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RESEARCH ARTICLE

RESEARCH REPORT ON INTERNATIONAL COMMERCIAL ARBITRATION: CONCEPT AND CASES

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Abstract

Introduction:-

An ICA is described in **Section 2(1)(f)** of the Act as an arbitration relating to disputes arising out of a legal relationship that must be considered commercial[1], where either of the parties is a foreign national or resident, is a foreign body corporate, or is a company, association, or group of people whose central management or control is in foreign hands. As a result, an arbitration with a seat in India and a foreign party is treated as an ICA under Indian law. **Part I of the Act** is applicable to all arbitrations with seats in India, including ICAs. **Parts 9, 27, and 37 of Part I of the Act** would not apply to an arbitration with a seat outside of India, unless the parties had agreed to exclude the applicability of these sections.

The Supreme Court ruled in a recent instance where an Indian company was the lead partner in a Mumbai-based consortium (which also included international corporations) and had the last say in choosing the chairman that the primary management and control was in India.[2]

International Commercial Arbitration with Seat in India:

Below is a discussion of the law that governs ICA when India is the arbitration's seat.

(i) Notice of Arbitration:

According to **Section 21**, arbitration begins as soon as the opposing party receives the notice of arbitration ('Notice of Arbitration') requesting that the matter be referred to arbitration. Arbitral proceedings under the Act begin on the day the respondent gets the notice. The desire to submit the issue to arbitration and the request that the other party take some action on his behalf are both communicated in a Notice of Arbitration. This will typically be sufficient to specify when arbitration under the Act begins.

(ii) Referral to Arbitration:

If the dispute's subject matter is covered by the arbitration agreement, the courts may order the parties to arbitrate it under **Part I**. According to **Section 8** of the Act, upon a party's request, a judicial authority must send a dispute to

[1] 'Commercial' should be construed broadly having regard to the manifold activities which are an integral part of international trade today (R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136).
[2] M/s. Larsen and Toubro Ltd. SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority, 2018 SCC OnLine SC 1910.

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arbitration if it receives a judicial action that is the subject of an arbitration agreement. It is important to note that the arbitration agreement need not be in writing in order to be considered valid.[3]

It has been determined that, as long as the party expressed an issue to the maintainability of the suit in light of the arbitration clause, no formal application requesting a particular petition for reference is necessary.[4]

A **Section 8** application under the Act would not be maintainable when an application under **Section 7** of the Insolvency and Bankruptcy Code 2016 ('IBC') is admitted, according to a recent ruling by the Supreme Court in **Indus Biotech Pvt. Ltd v. Kotak India Venture**.[5] The reasoning behind this decision was that the dispute would become non-arbitrable upon admission and would create a third-party interest, as well as have an erga omnes effect. It further ruled that the adjudicating body must initially rule on the application under **Section 7** of the IBC, even if a **Section 8** application under the IBC is filed prior to admission of a **Section 7** application under the IBC.

(iii) Interim Reliefs:

A party may apply to a court under **Section 9** of the Act for interim measures and protections, including interim injunctions, before, during, or after the arbitration or at any time after the arbitral decision is made but before it is enforced (in the case of domestic awards). However, courts have ruled that a victorious party may only submit an application under **Section 9** after the award has been made.[6]

Furthermore, the Calcutta High Court ruled in **Medima LLC v. Balasore Alloys Ltd.**[7] that just because the underlying agreement is regulated by a foreign law does not mean that the parties intended to exclude **Section 9**'s applicability to such arbitration. Only through a written agreement between the parties may they waive **Section 9** of the Act's application to an arbitration with a foreign seat.

In accordance with **Section 17**, the Arbitral Tribunal may further request that a party provide suitable security in connection with the subject matter of the dispute during the arbitral procedures. In contrast to the court's powers under **Section 9** of the unamended Act, the Arbitral Tribunal's authority was limited.

(iv) Appointment of Arbitrators:

The method for selecting the arbitrator is up to the parties to decide. For a tribunal of three arbitrators, if there is no agreement on how the arbitrators will be chosen, each party will chooseone arbitrator, and the two designated arbitrators will choose the third arbitrator, who will serve as the presiding arbitrator.[8]

A party may ask the Supreme Court or the appropriate High Court (as appropriate) to appoint an arbitrator if one of the parties fails to name an arbitrator within 30 days or if the two appointed arbitrators fail to name the third arbitrator within 30 days.[9]

The Supreme Court ruled that a court may decline to submit a case to arbitration when the claims are presumptively time-barred and that the limitation period for filing an application under **Section 11** would be three years from the day when the arbitrator is not appointed. The Supreme Court said that because the three-year period is excessively long and would go against the Act's purpose, **Section 11** must be amended by the legislature to incorporate a limitation period provision. However, the High Court of Delhi found in **Foodworld v. Indian Railway Catering**[10] that the issue of limitation is a jurisdictional issue and should therefore be addressed by the arbitrator rather than the court.

- **The challenge to the appointment of arbitrators:**

Only these two factors can be used to contest an arbitrator's appointment:

- ✓ When circumstances exist that give rise to a reasonable doubt about their objectivity or independence;
- ✓ The qualifications demanded by the parties were not possessed by the arbitrator.

(v) Settlement During Arbitration:

Even though the arbitration is still ongoing, the parties are free to reach a mutual settlement. In reality, the tribunal itself can work to promote amicable resolution. The arbitration shall end if the parties amicably resolve their differences. However, the settlement may be documented as an arbitral award on mutually acceptable terms, or a

[3] M/s. Caravel Shipping Services Pvt. Ltd. v. M/s. Premier Sea Foods Exim Pvt. Ltd., 2018 SCC OnLine SC 2417.
[4] Parasramka Holding Pvt. Ltd. &Ors. v. Ambience Pvt. Ltd. &Anr., 2018 SCC OnLine Del 6573.
[5] Indus Biotech Pvt. Ltd v. Kotak India Venture, 2021 6 SCC 436.
[6] Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited, 2013 (7) Bom.C.R 493; Tecnimont Private Limited &Anr. vs Ongc Petro Additions Limited, 2020 SCC OnLine Del 653.
[7] AP/267/2021
[8] Section 11(3) of the Act.
[9] Section 11(6) of the Act.
[10] Arb. P. 658/2021

consent award, if all parties and the arbitral tribunal concur. Similar to other arbitral awards, this one shall also be enforceable.[11]

According to **Section 30** of the Act, the arbitral tribunal may, with the express approval of the parties, mediate or conciliate with the parties to resolve the problems referred for arbitration even in the absence of any provision in the arbitration agreement.

(vi) Law of Limitation Applicable:

Arbitrations under **Part I** are subject to the Limitation Act of 1963. The date the aggrieved party asks the other party to refer the dispute to arbitration will be taken into account for this purpose. The arbitration cannot proceed if by that time the claim has expired in accordance with the Limitation Act.[12] The limitation period for submitting a counterclaim is calculated as of the date the counterclaim was submitted.

The earlier date of such notice would be taken into consideration for determining whether the counterclaim is within limitation, though, if the respondent, against whom a claim has been made in arbitration, can demonstrate that the respondent had previously made a claim against the claimant and sought arbitration by serving a notice to the claimant, as found out in to **Voltas Limited v. Rolta India Limited**.[13]

(vii) Arbitral Award:

An 'arbitral award' is a judgement rendered by an arbitral tribunal. Interim awards are a part of an arbitral award.

But it excludes interim orders issued by arbitral tribunals in accordance with **Section 17**. The arbitral tribunal's ruling must be reached by a majority.[14] The arbitral award must be made in writing and contain the signatures of each panel member.[15] Unless the parties have agreed that no justification for the award should be provided, it must disclose the reasons for the award.[16] The arbitral award must be dated and must identify the location where it was rendered (i.e., the seat of arbitration).[17] Each party should receive a copy of the award. Interim awards may also be made by arbitral tribunals.[18]

(viii) Challenge to an Award:

An application to vacate an arbitral award is provided by **Section 34** of the Arbitration and Conciliation Act. Within three months of the day the arbitral award was received, either party may dispute it. If a valid justification is offered, an extra 30 days may be granted. By providing the necessary evidence, a party may contest the arbitral award on the following grounds:

1. A party has some limitations.
2. The arbitration agreement is not enforceable under the law.
3. Due to little notice and lack of time to choose arbitrators, the side was unable to make a persuasive argument.
4. The arbitral ruling covers topics unrelated to the dispute but does not include the conflict's resolution.
5. The parties did not agree on how the arbitral trials and arbitral proceedings would be structured.
6. If the court determines that the arbitral award violates public policy or that the disputes involved are too complex to be arbitrated.

The Supreme Court has reiterated that procedures under **Section 34** of the Act cannot be started to challenge a foreign award in **Noy Vallesina Engineering SpA v. Jindal v. Jindal Drugs Ltd. &Ors**.[19] Only in line with **Part II** of the Act may objections be filed to the enforcement of foreign arbitral awards.

The Supreme Court recently affirmed a decision to annul an arbitral verdict in the case of **South East Asia Marine Engineering and Constructions (Seamec) v. Oil India Ltd.**[20] The Supreme Court chose to set aside the award on a number of grounds, including that the tribunal gave an incorrect, perverse, and impossible interpretation of the contract. The Supreme Court did not agree with the reasoning used by the tribunal, the District Court, or the High Court in reaching its decision.

(ix) Appeals:

[11] Section 30 of the Act.
[12] Section 43(2) of the Act.
[13] Voltas Limited v. Rolta India Limited, (2014) 4 SCC 516.
[14] Section 29 of the Act.
[15] Section 31(1) of the Act.
[16] Section 31(3) of the Act.
[17] Section 31(4) of the Act.
[18] Section 31(6) of the Act.
[19] MANU/SC/0899/2020.
[20] AIR 2020 SC 2323.

Under the Act, a court may only be approached in unusual situations. Only after an arbitral award has been made may the party who feels wronged petition the court. The aggrieved party may petition the court following the passing of an order made pursuant to **Section 17** of the Act. Even a third party who is directly or indirectly harmed by interim measures ordered by the arbitral tribunal pursuant to **Section 17** of the Act may file an appeal pursuant to **Section 37** of the Act as per **Prabhat Steel Traders v. Excel Metal Processors**.[21]Only a limited number of grounds still allow for an appeal to the courts.

Only from the following orders may an appeal be made to the court designated by statute to consider appeals from the court's original decrees:[22]

- Approving or rejecting any measure pursuant to **Section 9;**
- Reversing or refusing to reverse a decision of an arbitral tribunal pursuant to **Section 34**.

In **Centrotrade Minerals & Metal v. Hindustan Copper**,[23] a three-judge Supreme Court bench concluded that the parties may stipulate that an appeal from the award may be made to an appellate arbitral tribunal.

A refusal to send the parties to arbitration under **Section 8** of the Act is now one of a wider range of rulings that can be appealed after the 2015 Amendment Act.

A court may also be appealed from an Arbitral Tribunal decision:

- Admitting the plea mentioned in **Section 16's subsections (2) or (3);** or
- Approving or rejecting a temporary order under **Section 17**.

No second appeal shall be allowed from a decision made in an appeal under this Section, and nothing in this **Section 37** shall impact or limit a party's ability to appeal a decision to the Supreme Court.

Emerging issues in indian arbitration laws:

There has been a lot of excitement recently regarding the developing arbitration laws in India and the arising issues therein, such as (a) the potential applicability of the Amendment Act; (b) whether two Indian parties can select a foreign seat of arbitration; and (c) whether a dispute arising out of claims of oppression and mismanagement can be arbitrated.

(i) Issues in the 2019 Amendment Act:

Through grading and accreditation by the Arbitration Council of India, the 2019 Amendment Act seeks to give certification to arbitral institutions and arbitrators. However, the Arbitration Council of India's own constitution is heavily influenced by the government, which could jeopardize the impartiality of arbitration in India.

It's possible that the 2019 Amendment Act lost the chance to offer sufficient exceptions to the secrecy requirement. The insufficiency of the secrecy's exceptions may result in a number of problems.

"A person shall not be eligible to be an arbitrator unless..", according to the **Eighth Schedule** of the 2019 Amendment Act. Thus, even though the clause relates to arbitrators' accreditation, it appears that the Eighth Schedule is defining the minimal requirements for someone to serve as an arbitrator.

Additionally, the **Committee Report** indicated that arbitrators felt that a 12-month deadline should apply after the completion of pleadings, which led to the creation of an additional six-month window for pleading completion. The Committee Report omitted a discussion of the rationale for the arbitrators' recommendation. However, it is understandable that due process considerations prevent arbitrators from making firm procedural rulings regarding the submission of pleadings. As a result, the parties' time spent completing pleadings consumes the majority of the 12-month time frame, leaving a very small window for finishing the remaining steps in the procedure. However, addressing this issue by allowing a six-month deadline for the statement of claim and defense could lead to the emergence of other problems.

(ii) Arbitrability of Oppression and Mismanagement Cases:

The Bombay High Court rendered a significant decision on the arbitrability of oppression and mismanagement matters in **Rakesh Malhotra v. Rajinder Kumar Malhotra**,[24] holding that such conflicts cannot be arbitrated and must be decided by the judicial body itself. The issue must go to arbitration, though, if the judicial authority determines that the petition is malicious or vexatious and represents an attempt to circumvent an arbitration clause. This might unintentionally affect **Section 8**'s prima facie requirement, which was altered and added by the 2015 Amendment Act.

[21] Prabhat Steel Traders v. Excel Metal Processors, 2018 SCC OnLine Bom 2347
[22] Section 37 of the Act
[23] 2016 (12) SCALE 1015.
[24] (2015) 2 Comp LJ 288 (Bom).

According to the Bombay High Court, a petition under **Sections 397 and 398** of the Companies Act, 1956, may involve covert, non-contractual behaviour that leads to either the mishandling of the company's activities or the repression of the minority owners, or both.

(iii) Arbitrability of Consumer Disputes:

Despite the changes made to **Section 8** of the Act, the National Consumer Dispute Resolution Commission ('NCDRC') has ruled in **Aftab Singh v. Emaar MGF Land Ltd**., that an arbitration clause in a contract between a builder and consumers cannot limit the NCDRC's authority. Because consumer fora were specifically established authorities to address consumer issues, it was decided that the nonobstante clause did not nullify their authority.

(iv) Enforcement of Foreign Interim Orders Including Emergency Awards:

Part II of the Act does not contain a provision that addresses the enforcement of temporary orders issued by an arbitral tribunal in a foreign-seated arbitration, in contrast to **Section 17** of the Act. Where applicable, parties have used **Section 9** to request interim measures from courts in the absence of a particular provision under the Act.

In **Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd**.,[25] the Delhi High Court discussed Ashwani Minda and decided that in foreign-seated arbitrations, a foreign interim order or emergency award may be enforced in accordance with **Section 9** of the Act. However, it must be demonstrated that a remedy before the arbitral tribunal under **Section 17** was ineffective if such interim relief is requested during the arbitral proceedings. The Delhi High Court held that a remedy before the tribunal would be ineffective, allowing the **Section 9** application, because any meaningful reliefs, such as the attachment of assets and giving directions to third parties, could only be granted by the courts and not the foreign arbitral tribunal due to the absence of a corresponding provision to **Section 17.**

(v) Unconditional Stay on the Enforcement of Arbitral Award:

The 2021 Amendment Act added a new proviso to **Section 36** of the Act's **sub-section 3**, which permits an unconditional stay on the enforcement of an India-seated arbitration award until the challenge to the award is resolved, provided that the Court finds that the arbitration agreement or contract that serves as the basis for the award or its creation was induced or effected by fraud or corruption.

Although this change has good intentions, defining the scope of the stay on the application of an arbitral award with an India-seated party could have unforeseen consequences and pave the way for several lawsuits, prolonging the implementation of the arbitral award in the process. Under the current framework, the stay provision is broadly drafted, thus it was not necessary to precisely identify the circumstances in which one might be issued.

Conclusion:-

For a rapidly expanding economy to be able to draw in foreign investment, a trustworthy, stable conflict resolution procedure is essential. Commercial players in India and overseas have established a strong preference for using arbitration to settle disputes due to the enormous backlog of cases before Indian courts.

Despite being one of the initial signatories to the New York Convention, India has not always adhered to the best standards around the world in arbitration. However, there has been a noticeable improvement in strategy over the past five years. In order to bring Indian arbitration legislation in line with the world's best practices, courts and legislators have taken action. There is hope that these best practices may soon be incorporated into Indian arbitration law because of the courts' pro-arbitration stance and the current 2015, 2019 and 2021 Amendment Acts.There are exciting times ahead for Indian arbitration law, and our courts are prepared to handle a number of cases involving the interpretation of the Act's numerous modifications.

[25] Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd., 2022 SCC OnLine Del 2112.