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The Future of International Commercial Arbitration in India

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ABSTRACT

In the last decade or two, we have witnessed a dramatic shift in the way world operates. Gone are the days when people conducted businesses with other party residing within their domestic boundaries. Since the spread of globalization, business world has turned into a global village. People are transcending boundaries while collaborating with businesses having their base in another country. However, not every meeting takes place physically. In the post-COVID scenario, almost all the businesses are conducting their meetings virtually. When disagreements or disputes between the interested parties arise, they generally resort to the methods of arbitration, conciliation, mediation and the like instead of knocking the doors of respective courts. These alternative dispute mechanisms have turned out to be a boon for the aggrieved parties since it saves tones of litigious costs, time and energy. Arbitration is at the forefront of the most preferred dispute resolution mechanism by the businesses. The Arbitration and Conciliation Act's statutory framework, which governs how international arbitration plays a significant role and has evolved over two decades into an ideal tool for resolving disputes abroad. Even the Indian courts have imputed a more sincere interpretation to the arbitration clauses as it will be reflected in this article. Through this article, the author hopes to inform the readers on how and when arbitration processes are carried out in cases involving international trade, as well as the difficulties that arise while doing so.

Keywords: *ADR, Commercial Laws, Trade, Arbitration, Companies*

I. INTRODUCTION

The growth and development of the process of international trade, speculation, and commerce has inevitably resulted in the establishment of complicated co-relations between different businesses, financial institutions, investors, and States all over the world. Parties must think carefully about the best way to resolve any issues that may arise between them when the time comes to settle any of those relationships disintegrate. Arbitration is one of these quick, consensual methods of settling disputes between two parties that are alternatives to going to

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court and take place outside of its jurisdiction.

II. MAPPING INDIA'S HISTORY IN REFERENCE TO ARBITRATION LAW

Arbitration was originally discussed in the "*Brhadaranayaka Upanishad*," according to Hindu law. *Bengal Regulation Act of 1772*, which was enacted in India, established the present arbitration law. The "*Indian Arbitration Statute of 1899*" was the first specific legislation dealing with arbitration law that was created after the gaps in the original act were quickly identified. This resulted in the establishment of India's first legislative council in 1834. The following act "to take effect was the *Civil Procedure Code (CPC) of 1908*, which supplanted the earlier Act of 1859". The new law includes particular arbitration rules outlined in Schedule II sections 89 and 104, which apply to all portions of British India not covered by the 1899 Act.

The 1940 Arbitration Act, which is technically equivalent to the 1908 Civil Procedure Code, superseded the 1899 Act's technical elements. Many individuals had doubts regarding the technical features of the arbitration process during the 1940 Arbitration Act. The "*Arbitration and Conciliation Act of 1996*" (A&C Act) replaced the whole Act after it was examined by the "Indian Law Commission" owing to delays and problems brought on by barriers that impeded the efficient development of the arbitration process. *The Arbitration and Conciliation (Amendment) Act, 2015*, which was the necessary amendment to the 1996 Act, was passed by the government in 2015, bringing about significant changes.

In India, conflict resolution has been a common practice for a very long time. Legal literature describes an "*antiquated system of arbitration for settling disputes involving the family, commerce, or social group*". As stated in *Article 51(d),*[3] the state shall promote "*arbitration as a means of resolving international disputes*", according to the Directive Principle of State Policy (DPSP) established by the Indian Constitution.

III. INTERNATIONAL ARBITRATION

Over the years, there has been a sharp rise in global business ventures and worldwide commerce, which has had the primary negative of escalating conflicts between states. As a result, the law of international business arbitration plays an important role in resolving disputes peacefully. There is a foreign element to the term "international arbitration." When at least one of the parties engaged resides or is domiciled outside of India, or when the dispute is of an international nature, arbitration becomes international as a whole. Based on relevant contract terms and the applicable conflict of laws rules, Indian law or foreign law may govern the

[3]INDIA CONST. art. 51, cl. d.

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arbitration proceeding.

The case of ***Chloro Controls India Pvt. Ltd.***[4] is referred to here. Here, the court observed that several companies entered into joint venture agreements with one another regarding those agreements. A dispute arose regarding those agreements, but the court in the aforementioned case held that "they are in favor of arbitration clauses" and added that they must be "constructed liberally to achieve the goals of the act."

In another landmark ruling in the case of ***UE Development India Pvt. Ltd***.,[5]the court determined that "a corporation formed in India may only have Indian nationality for the purpose of the Act" despite TDM Infrastructure (the other party) having foreign control. In the landmark ruling by the Apex Court in ***Atlas Export***,[6] case it was held, "A foreign arbitral ruling is enforceable in India since it does not contravene Indian law." The court also said in its Obiter Dicta that "*the agreement does not stands unlawful in lime since the parties to the agreement have legally consented to the arbitral agreement*" despite the fact that the arbitral decision is of a foreign origin.

According to the "Sec. 2(1)(f)": "*International commercial arbitration refers to arbitration involving disputes arising from legal relationships, whether contractual or not, that are deemed to be commercial under Indian law and in which at least one of the parties is –*

(i) an individual who is a national of, or habitually resides in, any country other than India;

(ii) a body corporate that is incorporated in any country other than India; or

(iii) a company, an association, or

(iv) other body of Indian corporations."

The 1996 Act also states in *Section 28* that "*in matters of international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute*"; and in the event that no predetermined laws exists, due consideration shall be given to the rule of law in order to reach an amicable settlement.

International Arbitration through Judicial Lens

The *section 2(1)(f)*[7] applied to international business arbitration, which was formerly a novel

[4]Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification, (2013) 1 SCC 641.
[5]TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd, (2008) 14 SCC 271.
[6]M/S Atlas Export Industries v. M/S Kotak & Co., (1999) 7 SCC 61.
[7]The Arbitration and Conciliation Act, 1996, § 2(1)(f), No. 26, Acts of Parliament, 1996 (India).

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idea in India. However, as time has gone on, international arbitration has become a more popular method for resolving conflicts in society. The rising tendency of arbitral tribunals being located overseas may have numerous causes. The researcher points out some of the most important problems, such as the fact that the Higher Court has too much of an advisory role, that orders take too long to come out, and that the entire award can only be enforced if an order is passed in the form of a decree. All of these problems go against the whole point of arbitration.

We may also examine how effective international arbitration is at amicably and swiftly resolving disputes. However, over time, it has become clear that "India is working to advance the culture of international arbitration in order to compete favorably with other countries". Most recently, on "November 11, 2021, the government issued a new notification known as the Arbitration and Conciliation (Amendment) Act, 2021, which repealed the ordinance of 2020 and paved the way for the promotion of international commercial arbitration." In ***Sundaram Finance Ltd***.,[8]the court stated that "the award holders might now initiate execution actions before any court where the parties' assets are situated".A same kind of view was supported in the cases of ***Daelim Industrial Co Ltd***,[9] and ***Tata Motor Finance Ltd &Ors***.[10]

We can also observe that since the 2015 amendment to the Arbitration Act, there have been notable developments in the "promotion of international commercial arbitration", which has contributed to the restoration of confidence in ADR procedures generally. Institutionalizing independent commercial arbitration centers was introduced with the aim of "making India one of the global centers for arbitration".

The 2015 amendment noted that the parties to the dispute would be "subject to the retrospective application of section 36 of the act, which addressed automatic stay orders. In 2017, a high-level committee was constituted under the direction of Justice BN Srikrishna, a former judge of India's Supreme Court". The committee's main responsibility was to advise the union government on matters relating to international centers for commercial arbitration. In 2019, the amendment was amended by removing the eighth schedule, which dealt with the qualifications for arbitrators. This change was made with the ratio d in mind. The government's intention to "promote international commercial arbitration in India with maximum governance and little government"[11] is one of the main goals that is *prima facie* obvious.

[8]Sundaram Finance Ltd. v. Abdul Samad & Ors., Civil Appeal No 1650 of 2018.
[9]Daelim Industrial Co Ltd v. Numaligarh Refinery Ltd., (2009) 159 DLT 579.
[10]Sri Chandrashekhar v. Tata Motor Finance Ltd & Ors, (2015) AIR Kant R 261.
[11]Abhinav Kumar, *Making India a global hub for arbitration*, BUSINESS LINE (Mar. 24, 2021), https://www.thehindubusinessline.com/opinion/making-india-a-global-hub-for-arbitration/article34152992.ece.

IV. INTERNATIONAL COMMERCIAL ARBITRATION: TRANSPARENCY AND DIVERSITY

ICA proceedings, which are far-flung and independent of any national government influence, tend to resolve private law matters between private parties methodically. Instead of "formal, unambiguous instructions, authorities established procedures", the outcomes of which are chosen by arbitrators based on their socially competent interactions with others. These procedures are effectively discreet, with a sense of justice, fairness, and reasonableness.

According to Section 42A of the Act, secrecy must be maintained throughout the arbitration process in order to protect the arbitrators and arbitration institutions from any conflicts, with the exception of revelation of arbitral verdicts. International Commercial Arbitration has, however, undergone a progression of changes as it has become significantly simpler, implying that the system will be "more adaptable to changes and be transparently accessible to the invested individuals, who in this case are the parties involved in the matter".

A growing number of willful and mandatory disclosures concerning different cases have been made to the parties involved as well as the general public concurrently, with the goal of promoting the internal workings of the alternative way of conflict resolution. In the case of ***Afcons Infrastructure Ltd.***,[12]in which the Apex Court established "effective guidelines for the courts to enforce the authorization of s. 89 of CPC, to promote the ADR mechanisms, and to respect and uphold the will of the parties involved in the case, courts have started to adopt procedures that support arbitration". The concept of diversity in international arbitration may be evaluated in terms of "diverse groups, caste, gender, or it may be connected to geographic, social, and ethnic variety".

The situation with arbitrators, however, is not comparable since arbitrators have consistently remained homogeneous across the world and are difficult to penetrate because their community is still controlled by "pale, stale, and male decision-makers who are mostly from the western world".[13]

However, it should be acknowledged that when the problem of arbitration nomination occurs, it should be based only on his "legal expertise and experience in the field, not on their gender or country of origin". The importance of diversity should be addressed there in order to ensure the equality of the parties in the arbitrary method and to ensure that diversity does not interfere when the award is passed in the process.

[12]Afcons Infrastructure Ltd. v. Cherian Varkey Constructions, 2010 (8) SCC 24.
[13]Payel Chatterjee & Vyapak Desai, *Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern*?, KLUWER ARBITRATION BLOG (Mar. 1, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/.

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V. OBSTACLES TO THE USE OF INTERNATIONAL ARBITRATION

Concerning the status quo in India, parties to the disputes are becoming more likely to choose "arbitration over litigation", and government policy is also moving the country in the direction of becoming a hub for international arbitration, however, there are certain obstacles to overcome.

(A) Problem pertaining to Appeal

The issue with an appeal is that the arbitrators' verdict must be abided by "the parties to the arbitration who chose them under a business agreement". However, the drawback arising out of such arbitral award is that the parties prefer litigation over ADR, regardless matter how "good" or "bad" the judgment may be,[14] rendering the arbitration provision ineffective. Furthermore, it should be remembered that the parties to the arbitration dispute have a right to a reasonable and fair conclusion, which "need not necessarily be the correct one". In our opinion a review of the international arbitration normally cannot be done based on the case's merits. However, numerous nations are advocating to change the international statute to enable the appeal in compliance with the law since the trend of arbitration is growing. We also make reference to the arbitration appeal provision, whose legality was confirmed by the Indian Supreme Court.

(B) Execution

According to the "1958 New York Convention", the requirements for enforcing a foreign arbitral judgement were divided into two portions in the Act of 1996. It is governed by "Section 36 of the 1996 arbitration legislation, which states that an arbitral award would be executed and interpreted in accordance with its whole with the CPC of 1906".[15] However, the act contains terms like "public policy and prima facie corruption that are constantly evolving in the Indian context". These terms are used by the counsel as stalling strategies, delaying the resolution of the dispute, and the researchers note that such behavior clearly violates the rule of law. It should be noted that the New York Convention may reject a dispute subject to arbitration if the parties are unable to resolve it amicably via domestic law.

(C) Efficiency in the proceeding

The researcher cites a 2015 survey by "*Queen Marry/White & Black International Arbitration Survey*", which revealed: "The cost of conducting international arbitration is (68%), Lack of

[14]Iris Ng, Melissa Ng, Andre Soh & Chen Siyuan, "Five Recurring Problems in International Arbitration: The Relationship between Courts and Arbitral Tribunals", 8 *IJAL* 19, 20 (2020).
[15]*International Arbitration Challenges in India*, VIA MEDIATION & ARBITRATION CENTRE, https://viamediationcentre.org/readnews/Mzc1/International-Arbitration-Challenges-in-India.

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arbitral efficiency (39%), Lack of Speed (36%)" and the previously mentioned characteristics where the arbitrator is slow. In another literature it was said that, "International commercial arbitration has frequently been accused of being an expensive and time-consuming affair".[16] The author advises giving the arbitrator an effective incentive to settle the dispute quickly in order to address this issue. In addition, "the arbitrator takes too long to make an arbitral ruling".

VI. PLANNING A COURSE OF ACTION FOR FUTURE

We refer to the aforementioned difficulties and discernible pitfalls in the enforcement of commercial arbitration and observed several gaps in its "*effective implementation*" in India and, in fact, throughout the world. As researchers, we suggest the solutions below to help overcome these issues and ensure effective implementation, prompt action, and amicable resolution.

(A) Emphasis on Technical Expertise

It has been argued repeatedly before the tribunal that the arbitrators are overly technical and stringent with the set procedure. On the other hand, it has been argued that when arbitrators lack technical expertise, this results in errors and delays in issuing decisions, which defeats the objective of alternative dispute resolution (ADR). Consequently, a technical expert arbiter should be chosen. According to *Justice D.Y. Chandrachud*:

"*The Arbitration and Conciliation Act, 1996, should, in my opinion, be read so as to bring its guiding principles into line with accepted practices in the common law world. The development of Indian law must increase arbitration's institutional effectiveness. Respect for a forum that the parties have selected as a comprehensive remedy for resolving all of their claims is just one aspect of that progression. Keeping judicial interference to a minimum is another acknowledgement of the same idea*".[17]

(B) The Court's discretionary power to decide costs

In an easy language, cost is the sum that the court imposes upon ruling on the issue at hand; it is often an expenditure that the parties to the case suffer. Black's Law Dictionary defines cost as follows: According to the rulings in the cases of ***Apperson* v. *Insurance Co.,***[18]***Bennett* v. *Kroth***,[19] and ***Chase* v. *De Wolf***,[20] "A pecuniary allowance, made to the successful party, (and recoverable from the losing party,) for his expenses in prosecuting or defending a suit or a

[16]Michelle Grando, *Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop*, KLUWER ARBITRATION BLOG (Sep. 19, 2017), http://arbitrationblog.kluwerarbitration.com/2017/09/19/challenges-legitimacy-international-arbitration-report-29th-annual-ita-workshop/.
[17]A. Ayyasamy v. A. Paramasivam & Ors, (2016) 10 SCC 386.
[18]Apperson v. Insurance Co, 38 N. J. Law 388.
[19]Bennett v. Kroth, 37 Kan. 235.
[20]Chase v. De Wolf, 69 111. 49.

distinct proceeding within a suit," as well as "*Code of Civil Procedure (CPC) section 35 determining the term 'cost' read with section 35A 'Compensatory Cost', section 35B 'Miscellaneous Cost'*".

If the decision is silent on the underlying factual issue, the parties to the arbitration must pay their own costs. In the event of arbitration, the arbitrator may award costs in their order. Currently, there has been an increasing tendency toward imposing costs in place of awards, which the researcher notes to be fair, but on few occasions, it has been noticed that the tribunal has given exorbitant costs. The researchers propose that, unless the parties agree differently, adequate attention should be placed on Section 31 of the Act.

(C) Support for Technological Development

Massive technical growth has transformed society throughout time, and people have gradually begun to embrace it in their surroundings. However, given the current developments, society is more obligated than ever to accept technology innovation in order to live in these paranoid times. In ***Slowakische Republik* v. *Achmea BV***,[21] a significant case decided in 2018, the court stated, "*there may be more risk involved in international commercial arbitration today than ever before. Because the future of arbitration is uncertain and unforeseeable, it is essential to have an eye on and be ready for the future ahead due to the development of new technological know-how*."

To close the gap between artificial intelligence and international arbitration, more focus must be placed on providing the arbitrators with proper training via arbitral institutions. Further to strengthen the relationship between humans and technology, adequate consideration must be given to electronic evidence, and technology acquisition must be emphasised. In addition, legislation must be improved to defend the community against threats such as data theft and hacking.

(D) Controlling Counsel's Conduct

In light of the ethical concerns raised by lawyers practicing transitional law, it is necessary to set rules for the conduct of counsel in international arbitration. Many arbitral organizations have instituted norms for more ethical practice of its counsel as a result of the changing circumstances. For example, these are the *Singapore Institute of Arbitrators* (SIArb) Guidelines, the *LCIA Rules* 2014 and 2020, and the "*International Bar Association* (IBA) *Guidelines on International Arbitration Party Representation* (2013)". A more rigorous standard for tribunal proceedings would be set by establishing standards and implementing a

[21]Slowakische Republik v. Achmea BV, [2018] EUECJ C-284/16.

mechanism to monitor the conduct of attorneys.

(E) Accountability

In the past, there have been questions made about the quality of the reasoning used to support the arbitrators' awards, the length of time they took to issue them, and other issues. It should be mentioned that "arbitrators, like judges, are responsible for applying the law in an unbiased and fair manner as well as with integrity, independence, and competence."[22]

Higher degree of accountability would ensure "better decision making, Higher degree of accountability would ensure greater transparency, thereby to achieve transparency do exist with the *UNCITRAL Transparency Rules and the Mauritius Convention*, and references to such rules in practically all the recent treaties."[23]

(F) Tackling the Appellate Concern

The appellate procedure puts at risk the complicated legal concerns involved in international commercial and investment arbitration. To ensure a speedy and fair appeals process, it is essential that the arbitration appellate structure be based on the interests of the entire legal community. Carefully crafted applications that satisfy the board's requirements are necessary for the *Arbitration Appellate Review* to be successful. "The duty of an ad hoc committee is a limited one, confined to examining the validity of the judgment and not its accuracy," the court said in the *Enron case*.[24] "Consistency in the interpretation and execution of international investment law is not the goal of the annulment mechanism". The investment tribunals are largely in charge of establishing jurisprudential uniformity and creating a cohesive body of legislation. The formation of a "common legal opinion" and the gradual creation of *"une jurisprudence constante*" aid them in their work.

VII. CONCLUSION & SUGGESTIONS

Due to a growing worldwide convergence and harmonization of international commercial arbitration laws, we can now see that India is on its way to become a center for international arbitration, as intended by the country's governments. However, we can also see that the judicial authorities meddle disproportionately in international business arbitration cases. As the 2021 amendment to the 1996 Act has the primary goal of reducing the involvement of the judiciary in international arbitration issues, such action would be antithetical to the intent of

[22]Prof. Gabrielle Kaufmann-Kohler, "Accountability in International Investment Arbitration", *American Society of International Law*, University of Geneva (Mar 31, 2016).
[23]*Id*.
[24]Skilling v. United States, No. 08-1394 (2010).

the 1996 act.

In the ***Bhatia International v. Bulk Trading S.A***. ("Bhatia International") case,[25] the court held that "the concept of Public Policy also applies to foreign arbitral awards and that the judiciary has the authority to nullify the validity of law if the award is in violation of the Indian statutes". This reasoning was used by the Apex Court in the ***Venture Global case***.[26] Such judgements have influenced arbitration's development and helped it become a more effective conflict resolution method.

Future insolvency cases will likely be arbitrated, several disputes over the "Force Majeure" clause are likely, and countries are increasingly concerned with achieving sustainability and growth, more environmental issues will be raised. All of these trends are expected to continue in the near future. Numerous approaches that may be used to solve the problem at hand have been stated above by us, the researchers. We as a country will soon be able to completely accomplish our objectives to "make India a Hub of International Arbitration"[27] with efficient legislation implementation and enough government backing.

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[25]Bhatia International v. Bulk Trading S.A., & Anr., (2002) 4 SCC 105.
[26]Venture Global Engineering v. Satyam Computer Services Ltd, (2008) 4 SCC 190.
[27]*Supra* note 9.