

# International Commercial Arbitration

Accamma C.G,  
Assistant Professor, Department of Management,  
Center for Management Studies, JAIN (Deemed-to-be University), Bangalore, India  
Email Id: accamma\_cg@cms.ac.in

**ABSTRACT:** *The globe has turned to a multicultural society with the emergence and growth of globalization. Business entities have reached beyond oceans, and cross-border businesses have thus risen in real time. Agreements between commercial enterprises are often ugly, thereby giving rise to conflicts that are not within the boundaries of a specific country's municipal law, since transactions are international in nature. A most preferred method for settling industrial disagreements is international commercial arbitration. Within international trade all commercial activities are typically followed by a contract which sets out the parties' responsibilities and commitments to avoid legal disputes. But conflicts between contracting parties are unavoidable in this dynamic world of commerce and trade. This paper is a study towards understanding the emergence of international commercial arbitration, an alternative method of dispute resolution with rise in international transactions along with the laws cornering international commercial arbitration.*

**KEYWORDS:** *Arbitration, Commercial Arbitration, Arbitrability, International Arbitration.*

## INTRODUCTION

Improvements in international trade and investment are followed by increases in trade disputes across borders. In maintaining business relations, international arbitration has evolved as the favored choice for settling commercial disputes cross-border after realizing necessity w.r.t. an effective dispute resolution process. Trans-boundaries trade conflicts concerning India are increasingly growing with the surge of foreign investment, overseas trade transactions, and after serving of open-ended economic practices as a spark. This scenario has created considerable attention towards India's system of international arbitration by international community.<sup>1</sup>

International Commercial Arbitration (ICA) implies a legal arrangement that is deemed to be commercial whether both the parties and one of the parties per se is a citizen or a foreigner or is a corporate entity outside India or affiliation, association or group of persons with their principal administrative or operating power vests into foreign entity. An ICA is considered as an arbitration which has seat situated at India and involves foreign aspect such as foreign partners or foreign transactions, will qualify as an ICA as per Indian laws and will thereby be matter of Act of 1996. Situation where an ICA is conducted outside India, the parties are not subjected to the follow Part I of Act and instead Part II is applicable upon them as per Act. International Commercial Arbitration in nature is an arbitration imbibing cross-border dispute as the chief issue and the participants generally won't prefer not to approach national courts to bring a lawsuit.

International Commercial Arbitration establishes an alternative way by discarding the old, long procedure of approaching courts, where parties involved can easily resolve the arisen disputes. Unlike the laws and procedures already developed, International Commercial Arbitration operates with the terms and methods already selected by the participants under the arbitration agreement. The whole arbitration process revolves around the agreement of arbitration that the parties have already agreed to execute.

Section 2(1)(f)<sup>2</sup> of Act describes an ICA. It say, "legal contractual relationship that also be treated as a commercial relationship where one party is a citizen of foreign national or a foreign corporation or may be business, association or group of persons whose core administration or control is vested with foreign hands.

## DISCUSSION

### 1. Meaning of Arbitration

<sup>1</sup> International Commercial Arbitration: Law and Recent Developments in India by Nishith Desai Associates

<sup>2</sup> Refer Arbitration and Conciliation Act of 1996

Arbitration is referred as legal mechanism to resolve dispute, not inside courts but outside it, where one or more persons known as "arbitrators", their panel or arbitration tribunal is referred by the parties having dispute, and their decision ("award") becomes binding upon them as agreed. In other words, Arbitration is a technique to resolve issues or conflicts in which parties can forgo deciding their issue through public litigation. It is largely employed to resolve disputes arising out of commercial agreements. Making arbitration and mediation interchangeable isn't a sensible approach. The arbitrator's job in the arbitration was not to try to reach an agreement, which is what a mediator does, but to resolve the disagreement using specified laws.

Two kinds of arbitration generally exist: first, ad hoc arbitration and other one, permanent institutions' organized arbitration. Ad hoc arbitration occurs outside of any organizational oversight and in accordance with the norms determined by the participants. The arbitrators are named upon bases of case-by-case principle in this specific procedure, typically by the parties. One choice is to choose an appointing authority from the parties that will nominate arbitrators for the prosecution. Depending on procedural rules, the composition of the tribunal will range from one to multiple arbitrators.

## 2. *Reliefs in Arbitration*

Through power of provisions within section 9 and 17 of Act of 1996, temporary relief is available to the concerned parties. Through former section, court furnishes relief to parties whereas latter section provides relief through arbitral tribunal. The purpose of this clause is to provide the party with security before a final decision is made.

## 3. *Appointment of Arbitrators*

The recruitment of arbitrators is enshrined in section 11 of the Act. Unless authorization is given by the parties, the arbitrator may be of any country. The Arbitrator panel is always needs to be in odd numbers. Parties are authorized to choose one arbitrator each and these appointed arbitrators then designate another arbitrator to complete their panel. These two arbitrators have time of only thirty days for appointing the third arbitrator. However, if the arbitrators are of even count, for example, there are two arbitrators and both authorities provide a similar option, they are not obliged to appoint an additional arbitrator at that stage, considering all things<sup>3</sup>.

## 4. *International Arbitration*

International Arbitration is a dispute settlement procedure by which the parties consent to have one or more independent persons, i.e. the arbitrators, rather than a court of law, to settle their conflicts. This process requires the consent of the parties, which is typically granted by an arbitration clause which is included in the agreement or an agreement itself. On the terms of original agreement between the parties for arbitration, the arbitrator's decision is definitive and compulsory upon the parties. Such a mechanism is time and again preferred at disputes with respect to foreign investments, interstate or commercial level.

## 5. *Meaning of International Commercial Arbitration*

Section 2(1)(f) of mentioned Act describes ICA. An agreement form upon contract, that could be regarded as business relationship is ICA, wherein a party needs to foreign national, or might be foreign company, or group of individuals having their operation controlled through foreign hands. Arbitration having its seat within India geography, involving international aspect such as foreign partners or foreign transactions, will qualify as an ICA as per Indian laws and will thereby be matter of Act's Part I. Scenario where ICA is conducted beyond Indian premises, the applicability of Part I would diminish there itself over parties. The governing portion would be Act's Part II over existing parties.

Through case of TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd, Apex Court established the horizon of section 2 (1) (f) (iii). Despite former party possessed foreign administration, a corporation constituted in India will hold only Indian nationality as per the Act was laid down by the Apex Court.

<sup>3</sup> DHINGRA AARUSHI, *ARBITRATION AND CONCILIATION ACT, 1996-AN OVERVIEW*.

According to this Act, companies administered by foreign based controls is regarded as foreign corporate entity and its application has been debarred by Supreme Court upon Indian registered companies acquiring Indian national status. Therefore, for the requirements of the Act, in the instance, a company is having twin nationality, one being foreign based and the other based upon Indian registration, the corporation will not be considered a foreign entity.

### 6. Concept of Arbitrability

Arbitrability is one of the problems arising at scenario where international commercial arbitration's two aspects namely contractual and jurisdictional aspects collide with each other. It covers the simple question of what issues should and could indeed not be subjected to arbitration. Principle of arbitrability was mentioned in description in case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* by Apex court. Court concluded "term arbitrability carries different meanings at different circumstances." First is whether the subject matter of dispute worth approaching arbitration. Second is that whether such disputes falls within arbitration clause. And the last factor is that whether parties have agreed to resolve dispute through arbitration mechanism.

It claimed that any conflict that may be settled inside civil court is capable to be settled by arbitration mechanism. Such conflicts can however, by reasonable implication, remain prohibited from acquiring resolution by a private tribunal. Category of non-arbitrable involves disputes concerning rights and duties arising from or arising from criminal offences, the matter concerning guardianship, family disputes like divorce, custody of child, conjugal rights restoration or judicial separation, matters of testamentary, insolvency matters and winding up of companies, Expulsion or lease matters regulated through statutes of special laws where occupant holds statutory immunity from ousting and authority to grant eviction or to settle disputes is only bestowed on the courts listed.

Apex Court ruled via *N. Radhakrishnan v. M/S Maestro Engineers* that a case relating to suspicion about serious fraud and malpractices can never be assigned to an arbitrator and can only be resolved by the approaching courts. Accordingly, financial malpractice, such frauds and collusion attracts criminal punishments and charges with criminal implications, an arbitrator has no jurisdiction over them being a body created out of provisions of a contract. The courts are best prepared to make serious and nuanced claims and have authority to provide a broader variety of remedies to the parties to the conflict.

The claims of bribery are not an obstacle to referring parties to an arbitration located abroad as concluded in *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi* as well as *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.* by Apex Court of India. Those mentioned in sec. 45 of Act are only exception from approaching parties at international seated arbitration. Situation where the arbitration arrangement is null, sometimes void; or becomes inoperative; or incapable to carry out, parties can't approach. Thus, as it appeared, while charges of fraud during ICAs having bench at India were not arbitrable as per Indian Laws, the identical bar does not extend to ICAs where seat is abroad.

Ruling laid by "*A Ayyasamy v. A Paramasivam & Ors.*" By Apex court explained fraud charges could be qualified for arbitration till they are linked to fraud of basic nature. The court gave a conclusion that:

- Fraud charges are arbitrable if they are not severe and nuanced in scope.
- There is no hindrance to the arbitrability of fraud until fraud doesn't form the integral part of claim of arbitration agreement,
- Radhakrishnan was not at all overruled by the Swiss Timing case.

The judgment distinguishes among 'fraud simpliciter' and 'serious fraud'. Also, concluded that the 'fraud simpliciter' should be resolved by the arbitration tribunal while 'fraud bearing seriousness' is better to get assessed through court to resolve. The Supreme Court came up that the claims of fraud can be thoroughly investigated by a designated arbitrator, in similar manner.

SC currently focused on its judgment in *A Ayyasamy in Rashid Raza v. Sadaf Akhtar* and established operating criteria for deciding if an accusation of fraud could be arbitrable after nominating arbitrators pursuant to standards of Act. To establish this contrast between a clear accusation of fraud and furthermore it derived out working tests as shown:

- Plea encompasses the overall agreement and above all, the arbitration agreement, making it void or rendering it null.
- If the accusations of fraud impact affairs of parties internally, without any public domain implications.

In *Vimal Shah & Ors* matter, Court ruled “it was therefore not appropriate to transfer disputes arising from Trust Deeds along with Indian Trusts Act, 1882 to get resolved through such arrangement. During the preceding of other matter, Court observed “court is expected to ascertain that brought arbitrable dispute must be prima facie convincing enough w.r.t veritable or authenticity of the plea of oppression at the platform of Section 11; it might not be specific about essence of plea which shall be necessarily rendered to develop in the substantive proceedings.

### 7. *Laws Applicable on International Commercial Arbitration*

This part of work will assess the approach of analysts to the issue by examining the various circumstances that an arbitrator might be faced with in deciding the relevant law in an arbitral dispute. The method would not be purely theoretical because, since there is no official statement regarding arbitral awards, with relation to arbitral judgments, every author promotes his opinion on the relevant law.

#### 7.1. *Applicable Law Selection by Parties*

Where arbitrator is required for determining law that would be applied for resolving conflict, arbitrator might look upon contract based provision specifying for an explicit choice of law. Contractual clauses might differ from interpretations of party to party. The parties could specify for some national legislation to be followed or some non-national collection of rules to be applied.

##### 7.1.1. *If the Parties Choose a National Law*

Circumstance where parties agree for national law, arbitrator must consider that is it essential for arbitrator to test party autonomy while selecting statute applicable throughout scheme of conflict, and would the arbitrator accept that independence rules beyond any conflict of laws? In reference with both, common law and civil law, notion of party autonomy is generally accepted. Not every nation, though, offers the parties unrestricted freedom to make choice over law to apply. Since the statute of the nation is embedded in every right, power or obligation of an individual, the doctrine of autonomy related to parties including arbitration shall reflect through national law system and obtain its life from it.

The arbitrator shall analyze the independence of the party in the context of the substantive law of the *lex fori*. It may dismiss option of parties if not chosen appropriate statute be it national to which agreement is closely linked. In performing so they will find an arrangement that they could possibly not have established if any involved party's national law had been enforced. These variables find the decision of the parties "appropriate" which implies that the contract has ample links to that law for certain purposes, such as approving that choice.

##### 7.1.2. *Parties Choosing Set of Non-National Rules*

In various ways, non-national norms have interpreted. The same pattern undoubtedly persists in spite of all these distinct tags: a system of regulations established in the commercial sector to govern foreign trade. Problem persists where preference of the participants should be respected by an arbitration panel. In addition, *lex mercatoria*, not of a highly established method, does not encompass all the concerns that may be the topic of a conflict.

### *7.2. Selection by the Arbitrator of the relevant statute when the parties fails to settle for a choice*

It appears that a contract is reasonable, but they face a problematic task when the parties enter the stage of choosing the governing statute. They come from diverse nations, so they are not familiar with the applicable national laws and do not trust that. Within commercial arbitration at international platform, why the arbitrator's determination of the relevant law contributes to a major issue?

#### *7.2.1. Implementation of the country's conflict of law structure is that which derives the authority that which statute to enforce if an arbitration clause is not inserted.*

The conflict of laws regulating arbitration settlement shall be that of the country that will hold the authority to settle conflict among parties if the arbitration provision were not included in agreement. In fact, that nation has been disenfranchised by the arbitration provision of its regulatory authority and may therefore reinforce its power over execution of arbitration process in this way. Mainly on two factors, this hypothesis has been opposed. Under Anzilloti's philosophy, an arbitration panel has the daunting burden of deciding which nationality of court will have authority if the parties did not agree to initiate arbitration. Second, since it is linear, this answer is not appropriate. In order to know country that must hold the authority, an arbitrator must pick a rule w.r.t conflict of law, thus the question of the relevant scheme of private international law emerges again.

#### *7.2.2. Application of System of Conflict of Laws: Arbitral Tribunal seems to have established its seat*

The choice put up by relevant parties is appreciated within this principle. They are free in choosing seat for arbitrating, thus obliquely choosing applicable laws to conflict. As other arrangements involving private parties, an arbitration clause can't get dissolved without reasonable justification, but must extract power from regulation of national law.

#### *7.2.3. Conflict of Laws System*

It was proposed for arbitrator's conflict of law guidelines three mentioned governing theories shall apply. Initial one concern to which test to undergo with: arbitrator's current residence, nationality or domicile per se? The rationale hidden is to favor parties because this principle aids best understanding of party's personal rule to their arbitrator. It is very straightforward to assert that the two sides come through separate countries in an ICA and hence an arbitrator renders the other one party remains unsatisfied after selecting the rule of either country by another. The effort to implement the state's governing private international law scheme where the arbitral award will be implemented is the third and final instance.

#### *7.2.4. Cumulative implementation of the conflict of law frameworks relating to the disagreement*

An arbitration panel looks at all the frameworks that have some association with the dispute rather than always applying one of the conflicts of law systems stated in the preceding parts. It will be possible to determine from this analysis that mentioned frameworks respond to the same remedy: they all choose the same national law as the integral part of agreement.

#### *7.2.5. National Substantive Law without referring any conflict as to legal framework*

There may be different clauses in the substantive conflicting laws, thereby heading to divergent approaches to dispute. A national court will normally enforce its rule of private international law in this situation. Where the objective of the contracting parties is not articulated and couldn't be concluded from the instances with respect to the statute governing the agreement, the agreement is regulated by the legal system that holds the most direct and authentic relationship.

## 8. *Need for International Commercial Arbitration*<sup>4</sup>

### 8.1. *Settlement of disputes with speedy approach:*

The court procedure requires broad procedures and rules that a party must obey. In the event that parties submit their disagreement to arbitration, they demand that strict procedural protocols not be followed. And hence, the disagreement ends up being fair.

### 8.2. *Enforceability of Arbitral Awards:*

When a matter is directed to any court, it involves a complex process in implementing the judgment awarded but on contrary, arbitral awards is applied more effectively and rapidly when the decisions of the court are not.

### 8.3. *Impartial Arbitrator:*

Since arbitrator are selected and appointed by the parties involved into arbitration, the probability of partiality disappears. One arbitrator is appointed by both parties each. Third person is chosen by appointed arbitrators to resolve disagreements.

### 8.4. *Arbitrator might be a specialist:*

In view of the problem of arbitration, parties may choose a professional arbitrator with that particular professional knowledge and proficiency in the matter submitted for resolution through arbitration.

### 8.5. *Efficiency in Cost of Arbitration:*

Since arbitration furnishes a quick resolution, it doesn't require an extensive amount of rigid procedures, as opposed to compound litigation procedures, it is more accessible.

### 8.6. *Secrecy Factor:*

Since, it is a speedy mechanism, high profile contracting parties often prefer this mechanism as they are offered with the option to choose their seat of arbitration outside country so that their reputation isn't harmed and goodwill remains maintained within the country where the deal. Process of Arbitration furnishes them with proper disposal of their disputes with causing no harm to their reputations<sup>5</sup>.

## 9. *Case Laws*

### 9.1. *Bhatia International v/s. Mass Trading*

In *Bhatia International v. Mass Trading* case, it was concluded that courts of Indian jurisdiction can only use their authority to evaluate the reliability of an arbitral award rendered in India, irrespective of fact that law followed in another nation is true law of agreement or not<sup>6</sup>.

#### 9.1.1. *Facts*

In this case the involved parties had referred the case before arbitration tribunal with a single arbitrator in compliance with the rules of the ICC arbitration as per Paris regulations. The foreign party wants an assurance that the Indian party will recover their damages and it has shifted to the Indian court to protect its resources for that purpose. The same was limited by the Indian Party on the premise that no provision under the New York Convention to claim temporary relief by way of court except the one in which arbitration is taking place exists. Thereby, the arbitration is taking place in Paris for this case, so it is not necessary to request temporary relief from the Indian court.

<sup>4</sup> Ragini. R, Prof Dr.A.Sreelatha, *International Commercial Arbitration* (acadpubl.eu).

<sup>5</sup> *Ibid*.

<sup>6</sup> [2002] 4 SCC 105

### 9.1.2. Held

The proceeding of arbitration in this case, if taking place in Paris, so it is not appropriate to seek short-term relief by Indian court.

### 9.2. *Bharat Aluminum v/s. Kaiser Aluminum Technical Services (BALCO)*

This particular matter quashed the principle as laid through the case of *Bhatia International v/s. Mass Trading* case judgment in this particular case<sup>7</sup>.

#### 9.2.1. Facts

The parties agreed to a contract on the supply of machinery, improvement and modernization of manufacturing facilities. The dispute, however, started to arise and the issue was referred to arbitration. The arbitration seat was set up at England and the proceedings took place in England in same manner and the award was rendered against respondent. Dissatisfied by the verdict, the respondent filed an appeal challenging the award in India before bench of High Court of Chhattisgarh pursuant to Section 34 of the Act, that is to say, pursuant to Part I of the Act.

#### 9.2.2. Held

The court decided that the circumstances where the seat of arbitration is beyond Indian geography will not be impacted by Act's Part I. Only those arbitrations which have the seat for arbitration within India boundaries, ought to be impacted. Under Part I, if seat of arbitration selected outside Indian geography, suit can't get referred for seeking immediate redressal within India. This judgement would be applicable to the situations in which the debate has taken place following the decision of the present case. The decision has prospective effect only.

## CONCLUSION

The awarding on cross-border business disputes requires competence of a different nature, particularly when the entities in dispute come from countries involving different legal approaches, such as the common law system and the civil law system. Typically, as a matter of strategy, all agreements performed between companies inter-se, have three agreements, worth stressing, in particular, to bring to fruition a common purpose; one is that of the 'governing statute', the second is the 'jurisdiction clause' and the third is the 'arbitration clause'. The 'governing law' requirement states that, if and when agreements between foreign companies go bad, the law of which country will be used. As far as the applicable law is concerned i.e. which courts will have an upper hand in raised matter is specified through the 'jurisdiction provision'.

The 'arbitration clause' specifies the mechanism for resolving conflicts between the companies that must be settled prior to the situation where they are officially taken to the court of law for adjudication process. The arbitration provision pertains to procedures of nature such as mediation, arbitration, conciliation that imbibe the essence of dispute resolution or settlement out of courts.

International commercial arbitration assures elimination of any kind of prejudice be it actual or anticipatory by enabling the involved parties in international transaction to pick the seat of arbitration in a country having no connections with the business transactions of the participating entities. Commercial arrangements executed among parties typically allow for the institutional code of conduct for arbitration to be applicable. The substantive law that regulates the conflict relating to the transaction in question is most frequently indicated and assertively decided by the parties.

<sup>7</sup> 2012 9 SCC 552