

## **INTERNATIONAL COMMERCIAL ARBITRATION (ICA) - INDIAN PERSPECTIVE**

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There is a growth observed in cross border commercial disputes followed by increase in international trade. The in streaming of overseas commercial exchange and vulnerable economic norms play the role, of catalyst, it thus arising to international commercial disputes. Henceforth, international arbitration has come forth as a mechanism to resolve cross border disputes, an also as a preferred tool in the context of an efficient dispute resolution.

The watchdog has been placed on arbitration laws in India by the international community, because of certain disputed decisions by India judiciary. These decisions have been criticized on the ground of interference with international arbitration added with extra territorial means of national laws for awards of arbitration seated outside India. Based on recent judgments, the trend of Indian judiciary has altered its subjectivity towards international arbitration. Supreme court has announced the Indian arbitrational laws as a seat centric, from 2012-2014, it can also be observed that supreme court is inclining towards removing the nature of interfering which is vested a power on Indian judiciary with arbitration seated outside India.

In India, there were mainly three statutes that govern arbitration laws

- I. Indian arbitration act 1940
- II. Arbitration (protocol and convention) act 1937
- III. The foreign award (recognition and enforcement) act 1961

This was the general law that governs arbitration in India and was sort of a replica of English arbitration act 1934. It mostly dealt with: domestic arbitration, reference of dispute to arbitral tribunal, duration of proceedings, intervention of courts required to place the arbitration proceedings in motion prior to arbitral tribunal, validity of existence of an agreement, intervention of court for the purpose of extension of time.

The regulation this act, though seemed to be of sound theoretically but was declared as ineffective in actual operation by all the interested, including lawyers, parties, courts, arbitration, and therefore, was out of date. This act also accrued various opportunities to the litigants to head the court seeking intervention that led in delays. For addressing these concerns and make arbitration as a cost effective for the arrangement in commercial disputes making time efficient in both the spheres of national and international .

The 1996 act as aimed to get an effective and speedy mechanism of dispute resolution in consonance with the Indian judiciary and backlogs of cases. The 1966 act has three significant parts:

- I. Part 1: deals with domestic arbitration and ICA, when seated in India.

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- II. Part 2: deals with foreign award with regard to its enforcement as per the convention on “recognition and enforcement of foreign arbitral award”, New York and Geneva Convention
- III. Part 3: deals with the statutory mechanism of conciliation rules.

### **International commercial arbitration**

A legal association that is taken as commercial where the parties might be a foreign national, a resident or association, a company etc, this concept is explained under section 2 (I),(f) of ICA. Similarly, in Indian law, where the seat of arbitration is in India but also involves a foreign party would be covered under the ambit of ICA and thereby becomes subjected to part 1 of the 1940 act, whereas when an ICA is declared outside India then there is no applicability of these rules on the parties under part 1 and are rather subjected to part 2 of the act.

According to the observation of Supreme Court in the case of TDM infrastructure pvt. Ltd. vs. UE development India pvt. Ltd<sup>66</sup> held that company blended in India can only have Indian nationality for the purpose of the act.

The platform where the jurisdiction and contractual series of international commercial arbitration meet then the issue of “arbitrability” becomes one of the prime importances. In the case of N. radhakrishnan vs. M/s. maestro engineer<sup>67</sup>, the Supreme Court held that where there are allegations with respect to fraud and malpractices, then such matters can only be settled in court and not be transferred to arbitration. The ratio behind the decision was place that such fraud and alleged malpractice are the bones and flesh of criminal repercussions; therefore it is the court which is arrayed in terms of offering broader spectrum of reliefs to the parties.

In the recent judgments given by supreme court in the case of Swiss timing ltd. Vs. organizing committee, commonwealth games, Delhi<sup>68</sup>, in this judgment the view of the supreme court’s verdict held in N. radhakrishnan was overruled and was declared that the allegation of fraud and other malpractices are arbitrable in India, and the courts need to abide by the policy of “least interference”.

In the case of the World Sport Group (Mauritius) Ltd V. MSM Satellite (Singapore) ltd<sup>69</sup> Supreme Court observed that the allegations based on deceit and malpractices could not be a bar to direct parties in a dispute to an arbitration seated in foreign. As per the Supreme Court, the only bar that could arise to refer the parties in dispute in such foreign seated arbitration, as under section 45 of the act are:

- The cases where the arbitration agreement is null and void.
- Inoperative arbitration agreement
- Incapable of being enacted.

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<sup>66</sup> 2008 (14) SCC 271

<sup>67</sup> 2010 (1) SCC 72

<sup>68</sup> AIR 2014 SC 3723

<sup>69</sup> Judgment in Civil Appeal No. 895 of 2014 dated January 24, 2014

Thereby, the year 2014 brought the arbitrability of disputes accepted with International standards of arbitration.

### **ICA, when seated in India**

When the seat of arbitration is in India, then the following laws are applicable to ICA:

#### A. Arbitration notice

Arbitration commences when the party initiates the notice of arbitration under Section 21 of the act to the other party requesting for referring the dispute to arbitration. The notice comprises the following-

- Intention for referring the dispute
- Seeking the commencement of arbitration by other party.

#### B. Referral to Arbitration

Courts can direct the party's dispute to be governed by arbitration as under arbitration agreement. Under section 8 of the act, the court is bound to refer the dispute to arbitration if the party serves an application provided that the application should be furnished before or during the time of first statement regarding dispute accompanied by arbitration agreement.

#### C. Interim Reliefs

Section and Section 17 of the act grants the parties to seek interim relief before the enforcement of the arbitral award. In pursuance of section 17, the tribunal has the power to ask for the security regarding the matter of dispute.

#### D. Appointment of Arbitration

The parties have the power to appoint on arbitration each, and the third arbitrator is chosen by both the arbitration that is designated as presiding arbitration<sup>70</sup> within 30 days, the parties can request the CJI<sup>71</sup> for appointing an arbitrator if the party fails to appoint an arbitrator or the two arbitrators fails to appoint a presiding arbitrator. On the ground of International commercial dispute, it is the CJI who appoints the arbitrator whereas other disputes which are domestic in nature, the applications forwarded to the Chief Justice of High Court according to the jurisdiction<sup>72</sup>. In the case of Enercon Ltd & Ors v. Enercon GmbH & Another, 2014<sup>73</sup>, the Supreme Court under see the scope of interviewing of courts once the parties choose to arbitrate. The concept of Pro-arbitration vision was affirmed, which the Indian Courts have emerged in upcoming years. This measure helps in setting the direction of Indian Arbitration law parallel to International outlines of jurisprudence resulting in arbitration friendly jurisdiction. Section 8, 10, 11 and Section 45 of the act were considered as good as machinery

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<sup>70</sup> Section 11(3) of the Act

<sup>71</sup> Section 11(4) of the Act

<sup>72</sup> Section 11(12) of the Act

<sup>73</sup> (2014) 5 SCC 1

provisions vested to the court to aid Indian Arbitration and the seat of arbitration was decided on the basis of the country whose law has been chosen as substantive law. It was in the case of Reliance Industries Ltd. V. UOI<sup>74</sup>, 2014, the Supreme Court pointed out certain factors which were important for appointing an arbitrator, (I) Impartiality & (ii) Independence. Section 11(9) of the act also affirms that it is not compulsory for the courts for appointing an arbitrator who does not belong to the nationality of either party. In the case of UOI v. UP state bridge Corp Ltd, Supreme court directed that the government can appoint arbitrator where it assumes the authority and power to appoint acknowledging the sight that the government officer are also appointed as arbitrator delegating the other duties. Therefore, it was held that the principle of default procedure shall apply in such situations to perish the kind of behavior showing casual approach and to safeguard the interest of the parties.

#### E. Challenging the Appointments of Arbitrators

The arbitrator is supposed to be independent and impartial, and any circumstances that challenge these two factors need to be disclosed before the arbitrator is appointed. The grounds of challenging the appointment of arbitrator are:

- Doubts regarding its independence and impartiality.
- Lack of qualification

#### F. Mandates of the Appointed Arbitrator

In the case of NBCC Ltd v. J.G Engineering Pvt Ltd<sup>75</sup>, the Supreme Court held that the expiry of mandates once the award does not get delivered with the prescribed time under the arbitration agreement. This judgment has helped as it ensures the party a time bound process of arbitration to deliver its award.

#### G. Challenging the Jurisdiction

Tribunal has the competency to rule on its jurisdiction under section 16 of the act. In the case of SBP and Co v. Patel Engineering Ltd & Anr<sup>76</sup>, It was held that, when the parties without judicial interference constitutes the arbitral tribunal, then the Arbitral tribunal can determine the jurisdictional issues by the virtue of its power under section 16.

#### H. Arbitral Proceedings

The parties are given equal opportunity to represent their grounds on the case. Under the Civil Procedure Code, 1908 and the Evidence Act, 1973<sup>77</sup>, the arbitral tribunal is not limited. The arbitral tribunal can decide the proceedings of the procedure if the parties do not give their consent.

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<sup>74</sup> AIR 2014 SC 2342

<sup>75</sup> 2010 (2) SCC 385

<sup>76</sup> 2005 (8) SCC 618

<sup>77</sup> Section 19(1) of the Act

- i. Flexibility with regard to procedure, place and language - Arbitral tribunal has the power to determine the series<sup>78</sup> to accept the relevancy of any evidences<sup>79</sup>.
- ii. Statement of Claims and Defense – The statement of claims followed by the points of issues and the relief sought is submitted by the claimant who can within a stipulated time be amended or repealed<sup>80</sup>.
- iii. Settlement – The parties are permitted to have a mutual settlement, and efforts can also be made by the arbitral tribunal, further, the settlement gets recorded as an arbitral award on the consent of both the parties and the arbitral tribunal under section 30 of the act.

#### I. Arbitral Award

The decision of the arbitral award is coined as Arbitral award including the interim awards under section 17. It is the duty of the arbitrator to decide the dispute in justice and good faith<sup>81</sup>. On the basis of majority<sup>82</sup>.

#### J. Arbitration Cost

Arbitral tribunal can decide the cost bared and shares of each party<sup>83</sup> and can also refuse to deliver the award if there is a refusal of payments that comprises of legal fees, expenses, administration fees. On the grounds of refusal, the parties can approach the court and the court can further decide the cost and refund he balance to the parties.

#### K. Challenges to Arbitral Award

Parties can challenge the award within the expiry of 3 months from the receipt of award under section 34. On expiry of 3 months, the execution of the award can be applied by award holder. Section 34 gives the following grounds for challenging the arbitral award;

- Incapacitates of the agreement or void in nature
- Beyond the scope of arbitration agreement
- Composition of the arbitral authority not in accordance to arbitration agreement.
- Subject matter that can't be covered under arbitration as per Indian law.
- Contrary to public policy.

Supreme court in the case of ONGC & Ltd v. Western Geco International Ltd<sup>84</sup> gave three principles for fundamental policy of Indian law,

- Judicial approach
- Principles of natural justice

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<sup>78</sup> Section 22 of the Act

<sup>79</sup> Section 19(4) of the Act

<sup>80</sup> Section 23 of the Act

<sup>81</sup> Section 30 of the Act

<sup>82</sup> Section 43(2) of the Act

<sup>83</sup> Section 31(8) of the Act

<sup>84</sup> (2014) 9 SCC 263

- Wedenesbury's principle of reasonableness

#### L. Appeals

As per section 17 of the act, the parties can approach the court after the passing of arbitral award. The grounds are restricted on which appeal to court is permissible. From the given below orders, appeal can be forwarded to the courts;

- Refusal of grant under section 9
- Set aside an award under section 34

Appeal could also happen out of an order on the grounds of refusal to interim measure under section 17.

#### M. Enforcement and Execution of Award

It is governed by the reading of the act with CPC, dealing with the procedural laws with regard to execution of an award. Under section 35, the award gets binding on both the parties and gets enforceable unless challenged under section 34. The award gets enforced under CPC in a manner as if it were a decree delivered by a court of law.

#### **International Commercial Arbitration when seated in other country: Enforcement & Execution**

Part 1 of the act remains not applicable if the arbitration is outside India and only Part II is applicable to all the foreign awards which are sought to be enforced in India when the seat of arbitration was outside India under the New York convention.

In the case of *Bhatia International v. Bulk trading*<sup>85</sup>, Supreme Court explicitly held that if an arbitral award is not been passed in a country under the convention then it will not be considered as a foreign award. Therefore, if a country is a mere signatory in the New York Convention, then it does not mean the award gets enforced in India then there are a total of 47 countries which are notified by Indian Government. Therefore, the given below conditions need to get satisfied to make an award valid as a foreign award<sup>86</sup> ;

- It should be arbitral award
- It must have been arose out a dispute between the parties
- The dispute should come out as a legal relation which should be commercial in nature.
- The award should pursuance of a written agreement on which New York Convention could be applied and should be applied and should have been made in anyone of those 47 countries.

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<sup>85</sup> AIR 2002 SC 1432

<sup>86</sup> National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ARBLR 37

A party is required to make an application in the court under competent jurisdiction, if it seeks enforcement of an award of a New York Convention. The application is accompanied by the following other document;

- Authentic copy of award
- Authentic copy of agreement
- Necessary evidence that could ascertain that it is a foreign award.

Other need to make a foreign arbitral award enforceable under the act is as follows;

- i. Commercial Transaction: The concerned award should be as a difference between the parties out of commercial disputes. In the case of *RM investment trading v. Boeing*<sup>87</sup>, Supreme Court held that the interpretation of the word commercial should be constructed liberally as it is an integral part of international trade.
- ii. Written Agreement: The arbitral agreement (foreign) should be in writing as prescribed under the Geneva Convention, though the format is not specifically mentioned.
- iii. Validity: The foreign arbitral award must arise out of a commercial agreement and must be valid. In the case of *Kehardale Co. v. Raymon & Co*<sup>88</sup>, it was held by the Supreme Court that any arbitration clause cannot be eligible to be enforceable if it is illegal.
- iv. Unambiguous: In the case of New York Convention award, under section 48 of the act, a court can deny to enforce such award if it comes under the scope of the following:
  - Incapacities of the parties
  - Void agreement
  - Award passed on matters beyond scope of arbitration
  - Non-compliance of arbitration agreement
  - The competent authority has set aside the award
  - Prejudice to public policy under section 48 (2) (b),

As held in the case of *Renusagar Co. Ltd. V. General Electric Co*<sup>89</sup>, Supreme court held that directed three factors prejudicing the public namely; I) fundamental policy ii) public interest iii) justice and moral. In the case of *Racquet Sport v. Mayor Ltd*<sup>90</sup>, the petitioner was an Arizona based company that sought to enforce the ICC award in India. The award was challenged by the respondent on the ground that it is contrary to the Indian public policy, the Delhi High court refused the objection raised by the respondent and allowed the enforcement of the foreign award because the award against an Indian Co. is not sufficient enough to act as a public policy of India. Under Section 50 of the Act, the parties can file an appeal against the order passed by the virtue of section 45 & 48, without any relief of second appeal. In the case of *Skin Chemical Co. Ltd. V. Aksh optifibre*, it was held that though a second appeal is barred under section 50, but appeal under Article 13 of the Constitution of India has not been taken away as it is a description to the Supreme Court which it can exercise.

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<sup>87</sup> AIR 1994 SC 1136

<sup>88</sup> AIR 1962 SC 1810

<sup>89</sup> (1994) 2 Arb LR 405

<sup>90</sup> 2011 (1) ArbLR 244

## Findings & Conclusion

Difficulties against Indian parties in an ICA:

- i. Applicability of Part 1 of the act – The purpose of the act can be understood by the virtue of bifurcation of the acts in two parts, hence an addition of judicial interference in ICA. The upcoming trend of pro-arbitration perishes the difficulties because of judicial interventions.
  - a. Interim Reliefs –

In the case of *Bhatia International*, it was observed that provision of part 1 should be made applicable to ICAs outside India. The court followed a broader interpretation of section 9 that relates to interim reliefs and directed that IC, as explained under section 2(f) does not differentiate between ICA in India or outside India. In the eyes of court, the provision of interim reliefs were not under Part II and therefore, the arbitration held outside India were inevitable and thereby remediless. This judgment was over rules in the case of *BALCO* Wherein Supreme court held that Part I was applicable only if the seat of arbitration was India, for the matter of arbitration after September 6, 2012.

*Separate Opinion* – This over ruling of judgment, ruled out the chances of seeking help of Indian courts with regard to interim reliefs which were enacted post September 2, 2012 with seat of arbitration held outside India.

- b. Challenging foreign awards in India –

Abiding the principles laid in *Bhatia International*, the Supreme court followed the same ratio with regard to interim reliefs in the cost of venture global engineering v. Satyam computer service, Thereby the analogy of supreme court made part I of the act applied to ICA and thereby, permits the challenge of foreign award under section 34.

- ii. Public Policy – In the case of *Renusagar*, the Supreme Court gave a narrow construction for understanding the public policy with regard to foreign award in India. With the cases of *BALCO* and venture Global, the possibility to challenge a foreign award in India saw an opening under section 34. In 2011, deciding of the case of *Phulchand Export Ltd. V. OOO Patriot*, the matter subsequently got worse, as the supreme court held that under public policy of India, the patent illegality was needed to be looked for examining the foreign award under section 42(2), thus examining the validity of a foreign award

*Separate Opinion* – With this judgment, the Supreme Court hit a heavy undesire on narrow construction that was sought to be propagated in the case of *Renusagar*. The aid to secure the sanctity of foreign award was seen by the Supreme Court's decision in the case of *Mahal* that helped in removing hurdles. Supreme Court over ruled *Phulchand's* observation and shortened the scope of the term public policy under section 48(2), that eventually limits the scope to challenge the foreign award seated outside India.

- iii. Positive trends in India assisting ICA – With the difficulties seen in ICA that have been slowly decreasing , amendments were proposed to make India as a preferred seat of



international courts took the ground that the intervention has hampered the proceeding of arbitration emerging as a rescue, the pro-arbitration helped in removing many obstacles. The measures taken to remove these hurdles are:

- a. 246<sup>th</sup> law Commission report:
  - It aimed to make India , a hub for international arbitration
  - It sleeked amendments in Arbitration and Conciliation Act, 1996 that could connect the bridges and bequeath belief and efficiency in Indian arbitration, giving a boost to international arbitration in India.
- b. World sport group v. MSH satellite, ltd
  - Supreme Court held that the allegations related to fraud and severe malpractices were not a bar when it comes to an arbitration seated outside India under section 45 of the act.
- c. Enercon ltd. V. Enercon GmbH & Anr
  - It uplifted the Indian arbitration to meet the international standards
  - It affirmed the concept of pro-arbitration trend in the past years by bringing the Indian arbitration parallel with international jurisprudence.
- d. Reliance Industries & Ors. V. Union of India
  - The factor of independence and impartiality was considered at the time of appointment of arbitrator.
- e. Swiss Timing ltd. V. Organizing Committee, commonwealth,2016
  - It over ruled the rational of N. Radhakrishnan case, and Supreme Court held that fraud is arbitrable under Indian law.
- f. Union of India v. State body corporation ltd
  - It gave rules on independence and conduct
  - Supreme Court directed that the cases were government finds the authority and power to appoint the arbitral tribunal; it can with due vigilance and responsibility.
- g. Associate builders v. Delhi development authority
  - The narrow scope of public policy for the purpose of challenging Indian award was clarified under section 34 of the act and the extent of judicial intervention was permissible to the effect as prescribed by drawing the difference between error of law and error of fact.
- h. Bharat Aluminum CO. v. Kaiser Aluminum Technical Service
  - Supreme Court observed the interference by Indian courts when the arbitration was seated outside India.

The jurisprudence of Indian arbitration has always been evolving from the time of its inception for the purpose of matching the needs and complexities of international trade. With the help of case laws as discussed above, it can be seen that during first decade there was lack of pro-arbitration mechanism by Indian judiciary on the interpretation of arbitration laws.

Since past half a decade, the Indian courts have taken the consideration and are setting a new trend in adopting pro-arbitration approach. The view of the government as also been on the process of making India an arbitration friendly nation that could act as the hub for international

arbitration. These reforms have been aimed to be attained by amending the existing act and matching it to run parallel with international standards. Therefore, it would be inappropriate, if we do not trust the government with its roads ahead that is seen to be promising for international arbitration in India.