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Issues and Challenges in the Field of International Commercial Arbitration

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Several commercial disagreements have recently been noted to have increased over time around the world. Alternative ways of conflict resolution have been considered appropriate to reduce the pressure on courts. It also promotes the concept of maintaining confidentiality and practices relating to trade around the world. In the current environment, the business community prefers to resolve commercial issues by arbitration instead of litigation. Because of a shift in perspective, the arbitration process has gained popularity due to its numerous benefits. This mode of resolving disputes began when the Indian government introduced the Arbitration and Conciliation Bill in 2003, which was a significant step forward in addressing the flaws of the Arbitration and Conciliation Act of 1996 in terms of domestic arbitration and international arbitration. It was agreed that an improved structure for conducting international arbitration practices was urgently required. Following that, the introduction of globalisation and liberalisation aided the practice of trade and business in India, resulting in an appreciation of the value of international commercial arbitration in resolving commercial disputes. But, there are a few issues that need to be improved or resolved for the betterment of the concept of international commercial arbitration. In this paper, after giving a brief introduction about the topic, the author discusses the identified five major issues relating to International Commercial Arbitration with case laws and gives recommendations to improve these issues, and concludes the paper.

Keywords: *arbitration, interim reliefs, jurisdiction, foreign award.*

INTRODUCTION

The term 'commercial' was not specified in the 1996 act, but the amendment in 2015 made revisions that inserted the definition of the term 'International Commercial Arbitration' under section 2(1) (f).[1] The 1996 Act's goal is to give quick disposal and cost-effectiveness in India. Further, the 2015 revision removed the phrase "company" and replaced it with "international commercial arbitration," which is reserved for groups of persons or associations. International commercial arbitration is a non-governmental method of resolving disputes that result in a definite and binding ruling that can be enforced through national courts.[2] The term 'International Commercial Arbitration' has been defined by Indian arbitration law, and it will be an arbitration relating to issues emerging because of legal relationships (contractual or non-contractual), that will be considered commercial under Indian law and there will be one party at least who is a national or a country's habitual resident other than India.[3]

ISSUES RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION

The following issues are very pertinent to international commercial arbitration as a means of settlement of trade and commercial disputes:

- Issues regarding applicable laws;
- Issues relating to the courts' jurisdiction to order interim reliefs;
- Issues regarding enforcement and recognition of the foreign award;
- Issues concerning fraud as well as malpractices;
- Issue of Institutional arbitration and ad hoc arbitration.

[1] Dr. N. V. Paranjape, *Law relating to Arbitration & Conciliation in India* (7th edn, Central *Law* Agency 2016)
[2] Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* (2nd edn, Kluwer Law International 1994)
[3] Misha Bahmani & Amit Agarwal, 'International Commercial Arbitration in India- Issues and Challenges' (*Jus Dicere*) <https://www.jusdicere.in/international-commercial-arbitration-in-india-issues-and-challenges/> accessed 25 January 2022

Issues regarding applicable laws:

As under international commercial arbitration the parties belong to different nationalities, the contracts between them have become more complex. So, it is important to ascertain the proper laws governing the different aspects of arbitration. Today the tribunals and Courts are busy determining the laws governing the different aspects of arbitration and they have been guided by the principle of objectivity and certainty. In international commercial arbitration, a lot of freedom has been given to the parties, inter alia, in choosing the proper laws of arbitration unambiguously and expressly to avoid complexities, keeping in mind the mandatory rules of law, international public policy objections, and legality. When the parties have failed to choose it, the arbitral tribunals would have been assigned to determine them by selecting systems or rules of law upon which the parties would have agreed under the given circumstances and can apply substantive law directly connected to the dispute or the appropriate rules of conflict of law as there is no universal rule guiding the tribunal in this respect. In *National Thermal Power Corporation v Singer Co. and others*[4], the Supreme Court of India observed that where the parties' intention isn't clearly expressed and the conclusion can't be taken out regarding proper law of contract, Courts try to ascribe an intention through identification of the legal system by which the transaction has its nearest and true connection and courts would apply objective test. But in the case of *Shree Jee Traco (1) Pvt. Ltd v Paper line International Inc.*[5], the legal position is that if the parties submit arbitration proceedings to the arbitral tribunal without choosing the proper law of the contract, the tribunal would have to follow the law of the place of arbitration. However, it is not easy for the other nationals to agree to decide their disputes according to the Indian laws which would have a deterrent effect on foreign nationals who are avoiding India as a seat of arbitration.

Regarding the law governing the agreement to arbitrate, the observation is that when the parties by their agreement have decided the law governing the arbitration agreement, the said law shall govern it otherwise different Courts and arbitral tribunals decide the law of arbitration seat is as the correct law. In *Channel Tunnel Group Ltd. v Balfour Beatty Construction*

[4] *National Thermal Power Corporation v Singer Co. and Ors* (1993), AIR 998, SC 998
[5] *Shree Jee Traco (1) Pvt. Ltd v Paper line International Inc.* (2003) SCC 79

Ltd.[6], the judge noted that there is a greater likelihood of a difference between the application of law to the arbitration agreement and the application of law to the dispute's substance than a difference between the application of law to the dispute's substance and the application of law to the arbitral procedure. In other words, in *XL Insurance Ltd. v Owens Corning*[7], the law governing the contract's substance had a greater gravitational pull over the relevance and analysis of the arbitration agreement than did the procedural law, it was found.[8] Concerning the law governing the conduct and procedure of arbitration(curial law), it is suggested to the parties to specify the procedural law in the arbitration clause that isn't opposed to the public policy or the compulsory necessities of the country's law where the arbitration is conducted. Sometimes the parties only choose the law applicable to the dispute's substance but not this curial law, during which the arbitral tribunal is required to apply the procedural law in an arbitration proceeding.

The curial law is recognized by choice of the parties, otherwise, the curial law is chosen as the law of the arbitration place.[9] In *Union of India v McDonnell Douglas,*[10] the Court observed that the parties have the option of holding the arbitration in one country but subjecting it to another country's procedural law. So far as the 'seat' of arbitration is concerned, it is stated that to avoid difficulties an arbitration should always be conducted in a place within the jurisdiction of the Courts that are expected to control and regulate the arbitral proceedings even if that is not the country in whose courts the award is ultimately going to be enforced; and it is desired that the procedure agreed between the parties should be according to the local laws of that state.

Issues relating to the Courts' Jurisdiction to order Interim Reliefs:

The role of the Courts to grant an interim measure has been recognized nearly to all the legal systems of the world to give justice to the parties. But, too much power of the Courts to order

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[6] *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.* (1993), 152 [NR] 177 [HL]
[7] *XL Insurance Ltd. v Owens Corning* (2001) 1 ALL ER (Comm.) 530
[8] Gary Born (n 2)
[9] *James Miller v Whiteworth Street Estate* (1970) 1 Lloyds Rep 269
[10] *Union of India v McDonnell Douglas* (1993) 2 Lloyds Rep 48

interim relief may frustrate the very purpose of arbitration to have disputes settled privately. The question regarding jurisdiction of the court to order interim reliefs has not been settled till now and has resulted in the framing of various laws and rules by the Court. In *Bhatia International v Bulk Trading S. A.*[11], the court observed that for arbitrations in India, Part I provisions would compulsorily apply and parties have the freedom to diverge to a permitted extent only. In the case of international commercial arbitration, which is out of India, the Part I provisions apply by default except if the parties exclude all or any provisions by express or implied agreement. It is submitted here that in this case, the Supreme Court had removed the differences between Part I and Part II of the 1996 act, expressing that Part I provisions apply to all arbitrations and proceedings related to it. It offered the same benefits to arbitrations governed by the two conventions, viz., the New York Convention and the Geneva Convention under part II of the 1996 Act. But under part II of the Act, the parties have restricted autonomy due to the express regulating provisions stated therein. The decision in the *Bhatia case*[12] attracted sharp criticism by the legal community as it is against the preamble of the 1996 Act which calls for the uniformity of the arbitral procedures law, and it would also lead to too much intervention of Court. Moreover, it is harming foreign investment as it is not conducive to a country like India which is on the path of developing itself as the 'New Economic Power' of the world.

Besides, the autonomy of the party has also sustained a setback because the parties under international commercial arbitration connected with India would have to exclude the 1996 act's part I provisions. However, the Supreme Court has upheld the decision of the *Bhatia International case*[13] in *Venture Global Engineering v Satyam Computer Services*[14] and *Intel Technical Services (P) Ltd. v W. S. Atkins Rail Ltd.*[15] When the parties by their agreement have decided the law governing the agreement as well as the Court to have jurisdiction, then the matter has to be decided accordingly. In *Max India Limited v General Binding Corporation*[16], Court held that

[11] *Bhatia International v Bulk Trading S. A.* AIR 2002 SC 1432
[12] *Ibid*
[13] *Ibid*
[14] *Venture Global Engineering v Satyam Computer Services* AIR 2008 SC 1061
[15] *Intel Technical Services (P) Ltd. v W. S. Atkins Rail Ltd* (2008) 10 SCC 308
[16] *Max India Limited v General Binding Corporation* (2009) 3 Arb.L.R. 162[Delhi] (DB)

when the parties have voluntarily opted to apply Singapore laws, both procedural and substantive, along with the law governing arbitration procedures, Indian law is automatically excluded. In *Yograj Infrastructure Ltd. v Ssangyong Engineering &Construction Co. Ltd*.[17], the court ruled that there will be no application of decisions of *Bhatia International*[18] and *Venture Global Engineering*[19] cases if the parties accepted with the seat of arbitration, as Singapore International Arbitration Centre Rules will be in force when the agreement is being signed. In *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc*.[20], the court overruled the *Bhatia International case*[21] and held that if an arbitration proceeding is held outside India, the courts in India shall not entertain and interfere with it.

The Supreme Court, in this case, observed that Part I and Part II of the 1996 Act which encompasses the New York Convention and Geneva Convention into national law are mutually exclusive and their provisions cannot be applied interchangeably[22]. No section of Part I will now apply to any arbitration held outside of India. The Indian court's powers over foreign arbitration are those in Part II of the Act, which includes the ability to recognise and implement an arbitration agreement in India that refers disputes to arbitration in some other country, as well as the power to implement awards of foreign arbitration in India. Furthermore, the Supreme Court has limited the scope and effect to disputes resulting from arbitration agreements entered into after the ruling's date. The effect of this decision is that it has also rejected the remedy observed in *Bhatia International*[23] for granting interim measures in foreign arbitrations. The court also observed that the gap in the act can be filled only by the Indian Parliament through the amendment of the 1996 act, and till then, the Indian courts do not have the power to order interim measures where the arbitration is conducted outside India. Finally, it is observed that Part I's provisions would not be made applicable to all arbitrations and related actions. If the arbitration takes place in India, the Part I provisions will

[17] *Yograj Infrastructure Ltd. v Ssangyong Engineering &Construction Co. Ltd.* (2011) 4 Arb.LR 82 (SC)
[18] Bhatia International (n 11)
[19] Intel Technical Services (P) Ltd. (n 15)
[20] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 469
[21] Bhatia International (n 11)
[22] Arbitration and Conciliation Act 1996, Part 1,2
[23] Bhatia International (n 11)

be enforced, and the parties will be free to diverge only to the permissible degree. Part I provisions would not be made applicable in international commercial arbitrations. Further, where the parties have agreed upon the seat of arbitration outside India and the law of arbitration institution as governing the arbitration proceedings which also determines the law of arbitration, then the Act's part 1 will not apply including its provision regarding interim measures.

Issues regarding enforcement and recognition of a foreign award:

After the arbitral proceeding is over, the arbitral tribunal gives the decision in the form of an award which finally settles the issues submitted to it. By submission of their dispute to arbitration, the parties generally expect that the award is to be final and binding on both the parties, but very often, the award is subjected to the right of appeal or recourse. After the award is made, the party in whose favour an award is made requires that the award is to be respected and performed by the other party completely and without making any delay on his part. If he does not accept it then the question arises as to its enforcement through the Court. Recognizing and enforcing an arbitral award in domestic arbitration is not very difficult as it is in the same country itself. The problem arises when it is made by the arbitral tribunal in international commercial arbitration where the place of enforcement and recognition is different from the place of arbitration that has different laws, rules, and languages, which pose a big problem to the party enforcing an award. Therefore, the problem regarding recognition and enforcement is of paramount importance. The national courts recognize and enforce the award after the award of arbitral tribunal becomes *functus officio* (the function of the tribunal is over). Thus, the enforcement of an award can only be done through State Courts.

The ultimate object of parties submitting to arbitration is the accomplishment of the arbitral award for its enforcement which is final and binding on the parties and has also to be enforced to not let the previous process go down the drain. It has the same effect and can be enforced like the decree of a court. The arbitral award is conclusive evidence of law and facts between the parties. When the parties to arbitration impliedly agreed, they commit to each other to honour and perform a valid award. If the opposite party fails to abide by the impugned

award, the successful party can enforce it in the Court of law as if it is a court's decree. One of the distinguishing features of international commercial arbitration is that the award made by the arbitral tribunal is recognized and enforceable across national boundaries. Generally, an arbitral award is more easily enforced in a foreign country as there are Geneva and New York conventions whereas, in State Court, there is no international convention to enforce a foreign judgment. Most of the nations have adopted these conventions to recognize and facilitate the enforcement of foreign awards like India has adopted them in the Arbitration and Conciliation Act of 1996 under which the foreign awards are enforceable on a reciprocal basis. The arbitral tribunal is the sole and concluding authority of all questions of law and facts. Although on certain grounds, an award made by an arbitral tribunal can be challenged, it cannot be challenged on the ground that it has reached a wrong conclusion. However, they have to make the award as per principles of equity, justice, and good conscience as observed in *IISCO v Satna Stone*[24].

Like domestic arbitration, under international commercial arbitration also where the place of arbitration is in India[25], the losing party can file a petition to set aside arbitral award before the Court of law, but only on limited grounds given under section 34 of the Act that was taken from Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. Under these grounds, the most controversial ground is the public policy of India to set aside an arbitral award as there is no clear-cut 'public policy' definition that keeps on changing. Thus, public policy at a particular time is a matter always to be decided by the Courts. In *Renusagar Power Co. Ltd. v General Electric Co. Ltd*.[26], the court observed that if the implementation of a foreign award would be adverse to the fundamental policy of Indian law, India's interests, justice, or morality, the court is permitted not to enforce it because it interferes with public policy. In *ONGC v SAW Pipes Ltd*.[27], the court elaborately discussed the meaning of 'public policy of India' and added an altogether new dimension to this expression by including a new head that the award can be challenged based on it being 'patently illegal' and also equated it

[24] *IISCO v Satna Stone* (1989), AIR 1991, Cal 3
[25] Arbitration and Conciliation Act 1996, s. 2(2)
[26] *Renusagar Power Co. Ltd. v General Electric Co. Ltd.* (1994), AIR 860, SCC Suppl (1) 664
[27] *ONGC v SAW Pipes Ltd.* (2003) S SCC 705

with the ground, 'error of law'. Actually, after the *Bhatia case*[28] of application of part 1 of the 1996 act to all arbitrations, the *SAW Pipes* case[29] applied to foreign awards as well. But, after overruling the *Bhatia case*[30] in the *Bharat Aluminium Co. case*[31] which again restricted the scope of the *SAW Pipes case*[32] to domestic awards as it was held by the court that if the arbitration seat is outside India, part 1 of the 1996 act is applicable.[33]

Issues concerning fraud as well as malpractices:

It was held in *N. Radhakrishnan v Maestro Engineer*[34] that cases involving fraud and malpractices must be resolved in court and can't be forwarded to arbitration, but this ruling was overturned in *Swiss timing Ltd. v Organizing Committee, Commonwealth Games, Delhi*[35], where it was vowed that fraud and other malpractices can be dealt by arbitration in India, though the courts need to intervene as little as possible in such cases. Before the 2015 amendment, the Supreme Court held that any allegations of deception or malpractices could not be used as a reason to send a dispute to arbitration between parties based in another country.[36] The Supreme Court, on the other hand, cleared that only simple fraud cases are regarded for arbitration. Furthermore, it is important to note that there is a distinction between the types of fraud addressed in the case: one is easier and can be resolved by the court, while the other is more serious and must be determined by an arbitral tribunal.[37] It is evident from this ruling that it doesn't overturn N. Radhakrishnan's decision.[38]

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[28] Bhatia International (n 11)
[29] *Ibid*
[30] *Ibid*
[31] *Ibid*
[32] *Ibid*
[33] Qazi Mohammed Usman, 'International Commercial Arbitration: Issues and challenges' (2014) 7(1) Legal Journal quest for Justice <https://www.researchgate.net/publication/314512703_International_Commercial_Arbitration_Issues_and_challenges_published_in_Legal_Journal_Quest_for_Justice_Vol_VII_No_1_2014-15> accessed January 26 2022
[34] *N. Radhakrishnan v Maestro Engineer* (2010) 1 SCC 72
[35] *Swiss timing Ltd. v Organizing Committee, Commonwealth Games Delhi* A.I.R. 2014, SC 3723
[36] *World Sport Group (Mauritius) v MSM Satellite (Singapore) Pvt. Ltd.* (2014)
[37] *A. Ayyasamy v A. Paramasivam & Ors.* (2016) 10 SCC 386
[38] Qazi Mohammed Usman (n 33)

Issue of Institutional arbitration and ad hoc arbitration:

Institutional arbitration is a procedure in which the parties appoint an institution to manage the arbitration process as per the rules of arbitration. Ad hoc arbitration, on the other hand, is a procedure in which the parties must choose particular rules, arbitrators, and procedures.[39] In such cases, the parties must determine whether to resolve their disagreement by arbitration by following arbitral institutions or ad hoc arbitration, which both have advantages and disadvantages. The parties in institutional arbitration adhere to the rules of the institution, and it has been noted that it is both cost-effective and beneficial in many situations. Furthermore, it is internationally recognised and has a higher level of reputation all over the world[40] whereas Ad hoc arbitration is not governed by institutional rules. The parties have a better chance of following a method that is tailored to the specific type of dispute. It can be advantageous in cases when one of the parties is a state and the proceedings must be more flexible.[41] As a result, it can be said that it is more flexible, less expensive, and more private than institutional arbitration. For example, ad hoc arbitration rather than institutional arbitration is used in State to State arbitration.[42]

CONCLUSION AND RECOMMENDATIONS

- To avoid complexities in the ascertainment of proper law dealing with different aspects of the arbitration proceeding, it is required that the parties to an international commercial agreement should exercise their autonomy and insert a 'choice of law' clause into their contract or agreement governing the substantive as well as procedural laws apart from the law governing the arbitration agreement.
- To ensure the speedy resolution of a dispute through international commercial arbitration, the arbitrators and practitioners involved in the international commercial

[39] William Hartnell, QC, & Michael Schalfer, 'Ad Hoc v. Institutional Arbitration- Advantages and Disadvantages' (*Adr Perspectives,* September 2017) <http://adric.ca/wp-content/uploads/2017/09/Hartnett-and-Shafler.pdf> accessed January 19 2022

[40] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (3rd edn, Cambridge University Press 2017)

[41] *Ibid*

[42] R. Niek Peters, *The Fundamentals of International Commercial Arbitration* (1st edn, Maklu 2017)

must endeavour to sort out the differences and should expeditiously and pragmatically resolve the dispute with skill and due diligence according to the governing laws and make the award. The parties must have a consensus only on arbitrators who are effective and dynamic managers and have demonstrated an ability to supervise arbitral processes efficiently and economically.

- Courts should expeditiously provide support to the process of arbitration with minimal judicial interference and adopt a pro-enforcement, pro-arbitration interpretation of the law. Judges should resist the temptation to intervene in an arbitration proceeding. It is also required that they must give primacy to arbitral autonomy and freedom of the parties to contract to keep in line with the mandates of Model Law.
- The party against whom the award is made should honour and comply with the award so that the other party does not initiate the enforcement proceeding in the court of law. It is very much essential to preserve and maintain the business relationships between them and prevent animosity of any kind.
- Also, the wide power of arbitrators to determine their jurisdiction is problematic and not acceptable. So, the parties in their contractual terms and conditions should limit the unfettered and arbitrary exercise of power regarding arbitral jurisdiction by arbitrators.