INTERNATIONAL COMMERCIAL ARBITRATION AND LEGAL ISSUES IN INDIA

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Abstract

The Arbitration is a method, useful for the settlement of disputes between parties, contractual or otherwise. Nevertheless, arbitration proceedings are also rule based. The arbitrators are governed by the substantive laws that are applicable to the disputes and procedural laws that regulate the proceedings these may be those of an arbitration institution, national laws or international laws. Further in the event that a party refuses to heed to an award of the tribunal, the courts may be approached for enforcement. It follows therefore that arbitration has strong jurisdictional elements. According to Le Ray Bennet "Arbitration as the application of the legal principles to a controversy within limits previously agreed upon the disputing parties".[1] Likewise "Arbitration has both a contractual and jurisdictional elements."[2] In the same way arbitration performs 'judicial like' functions, like national courts they conduct hearing issue subpoenas, take evidences form witnesses and sometimes award costs. They are also expected to observe the rules of natural justice. In the same way arbitrators perform their functions within a legal framework of laid down rules embodied in national legal systems.

Key words

- *The Jurisdictional Theory: According to this theory, Arbitration is based on state sovereignty and their authority to prescribe laws regulating arbitration.*
- *The Contractual Theory: According to this theory parties approach for arbitration have freedom to enter into contracts and this theory emphasis that arbitrator derive their authorities by virtue of the agreement of the parties, under the auspicious of the national legal systems*
- *The Hybrid Theory: This theory is the combination of jurisdictional and contractual theory*
- *The Autonomy Theory: This theory is relatively new and according to this theory that arbitration is based on norms created by merchants and is therefore an independent legal system.*

Traditionally, the arbitration clause is one of the most neglected clauses, and while drafting and agreement, is often referred as the "mid night" or "last minute clause." The approach usually followed is plain drafting, standard wording irrespective of the type of contract or parties involved. This poor dragging leaves loopholes and scope for

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1 Le Ray Bennet, ; International Organization : Principles and issues 3 ed (1991) 99

2 Fox International Commercial Arbitration 3rd edition (1998) 201

a dispute over the clause itself and jeopardizes the ability of parties to enforce their rights and resolves disputes amicably. Regularly overlooked parameters of the arbitrations clause include the governing law, selection of arbitrator, seat of arbitration, fees and jurisdiction. The past experiences with Indian courts, growing awareness and the benefits of the alternate means of dispute resolution have been key drivers for companies to focus on drafting a comprehensive arbitration clause.

In international trade and commerce, every commercial activity is generally preceded by contract fixing the obligations of the parties to avoid legal disputes. But in this ever changing world of trade and commerce, disputes between parties are investable. No matter how carefully a contract is drafted, one party to the contract may understand his right and obligations in a different way. Often international trade involves traders belonging to different countries whose legal systems may differ in many ways to that of the other, presenting complicated and even conflicting features. The law courts of each country have jurisdiction only within the territorial limits of the concerned country.

HISTORICAL JOURNEY OF ARBITATION AS AN ALTERNATIVE DISPUTE RESOLUTION MECANISIMS IN INDIA

The first arbitration law in India was the Arbitration Act, 1899 which was based on the English Arbitration Act,[3] thereafter, through schedule IInd of the Code of Civil Procedure[4] the provisions relating to the law of arbitration were extended to the other parts of British India later based on the English arbitration system , The Arbitration Act[5] was enacted in India to consolidate and amend the law relating to arbitration effective from 1 July 1940 which is known as Indian Arbitration Act, 1940. In the line of its progress, the another event has been concluded in its development that when India became a signatory country to the New York Convention, which was enforced on 7th June 1959. Accordingly The Foreign Awards (Recognition and Enforcement) Act[6] was enacted by Indian government to give effects the New York Convention. In this Act, there was no provision for challenging the foreign awards on merits similar or identical to the provisions contained in the Indian Arbitration Act, 1940. Thus prior to the enactment of the Indian Arbitration Act, the law of arbitration in India was contained in the Protocol and convention Act 1937, The Indian Arbitration Act, 1940 and the Foreign Awards Act of 1961. Over the period of time, it was generally felt that the arbitration laws in India had failed to keep pace with the developments at the international level. Therefore Arbitration and Conciliation Act, 1996 was enacted, with the aim and the objective to give effect to the United Nations Commission on International Trade Law on 21st June 1985 (UNCITRAL)[7] Model in four parts, which is first part for Arbitration, second is for Enforcement of Foreign Awards, third is for conciliation and for the is for Supplementary provisions.

International commercial Arbitration and legal issues

When the determination of disputes which is of a commercial nature involving an international element falls within the scope of private law, it gets **termed as International Commercial Arbitration.** International commercial arbitration is

[3] The English Arbitration Act, 1899
[4] The Civil Procedure Code. 1908
[5] The Arbitration Act,1940
[6] 1961
[7] United Nations Commission on International Trade Law on 21st June 1985

styled as international, not because sovereign nations participate, but because the parties, the facts, or the legal effects of the dispute extend beyond a single jurisdiction. The expenses, delay and complexity of a court action are normally avoided in the case of arbitration procedure. These problems arises when the parties fails to agree upon a choice of Law and disagreement in procedural aspects of substantive law.

Since the opening up of India's economy, membership of the World Trade Organization (WTO) coupled with near double digit of gross domestic product growth and consequent rapid integration of its economy with the global order, Indian judiciary has increasingly come to deal with diverse commercial issues transnational dimension. India being a signatory of General Agreement on Tariff and Trade, Trade Related aspects of Intellectual Property rights, United Nation Commission on International Trade laws, New York Conventions, Paris Conventions etc.., appropriate amendments have been made in India's domestic Laws to harmonize them with such International standards, keeping, of course, domestic interest as a prime concern. In the midst of such rapid changes, Indian judiciary, more often than not, finds itself at the crossroad of diverse interests, Faced with the daunting task of interpreting India's domestic laws in the light of the fast evolving International Legal Standards. International Commercial Law per se does not automatically become a law in India on its own force without any domestic law legislated by the Indian Parliament. Disputed legal issues in International commercial arbitration, these are the major issues which are normally found; International commercial Litigation, International Commercial Arbitrations and Enforcement of foreign Awards and conflict of laws etc...

INTERNATIONAL COMMERCIAL ARBITRATION UNDER, THE ARBITRATION AND CONCILIATION ACT, 1996

Following are the specific provisions under The Arbitration and Conciliation, Act, 1996 for International commercial Arbitration relating issues.....

- The Arbitration and Conciliation Act, 1996 has accepted the territoriality principle which has been adopted in the United Nation Commission on International Trade model law,1985 . Accordingly, Part I of the Act applies only to arbitrations taking place in India irrespective of whether such arbitrations takes place between Indian parties or between the Indian and foreign parties (domestic award). The domestic awards can be challenged (34) and are enforceable (section 36) under Part I of the Act.
- Part I of the Act has no application to arbitrations seated outside India irrespective of whether parties chose to apply the Arbitration and Conciliation Act, 1996 or not (foreign awards). The grounds to challenge of awards given in Part I (section 34) of the Act are thus applicable only to domestic awards and not to foreign awards.
- The law of the seat or place where law to govern the arbitration is held is normally the arbitration. If the agreement provides for a seat/place outside India, Part I of the Arbitration and Conciliation Act, would be inapplicable to the extent inconsistent with the arbitration law of the seat/place, even if the agreement purports to provide that the Act, shall govern the arbitral proceedings.
- In case domestic awards, Indian laws shall prevail if substantive law conflicts within the laws of India. In case of foreign awards, the conflict of

laws of the country in which the arbitration takes place would have to be applied.

- There is no provision under the Civil Procedure Code 1908 or under the Arbitration Conciliation Act, 1996 in arbitrations which take place outside India, even though the Parties by agreement may have made the Act, as the governing law of arbitration. An inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable in India.
- The said Act, intentionally limits it to awards made in pursuance of an agreement to which the New York Convention or the Geneva Protocol applies. Therefore, remedy is provided for the enforcement of the 'non convention awards' under the said Act.
- Last but most important, these findings of the Apex Court are applicable only to arbitration agreements executed after 6 September 2012, in which the five members constitutional bench of the Indian Supreme court in *Bharat Aluminum Co. v. Kaiser Aluminium Technical Service Inc*[8] after reconsidering its various previous decisions on Indian Arbitration & conciliation Acr 1996 concluded that the Act should be interpreted in a manner to give effect to the intent of Indian Parliament. In this land mark judgment, the apex court also took note of the various foreign judgments, and the guidelines on United Nation Commission on International Trade Law (UNCITRAL) which is a Model Law in international trade law, including commentaries thereon of renowned authors, Geneva Convention and New York convention and thereafter reversed its earlier rulings in cases *'Bhatia International v. Bulk Trading S.A.& Anr*[9] and *Venture Global Engineering v. Satyam computers Services Ltd and Anr*[10] stating that finding in these judgment were incorrect.

The regulation of conduct of arbitration and challenge would be done by the courts of the country in which arbitration is conducted. Accordingly, a foreign award can be annulled by the court of the country in which the award was made, i.e., the country of the procedural law/curial law (first Alternative) and not before the courts of the country under the law of which the award was made, i.e., the country of substantive law (second alternative). It can be challenged in the courts of the second alternative, only if the court of the first alternative had no power to annul the award under its national laws.

Leading Indian cases relating to international commercial arbitration

The most contested issue on Foreign Judgment in India is the issue of 'jurisdiction'. The Supreme Court of India and High Courts have taken a pragmatic stand on this issue. In many cases, the defense against enforcement of foreign judgments in India is to question the As in other Jurisdictions, International Commercial Arbitration – adhoc as well as institutional is gaining popularity in India as well. Just as most domestic arbitrations in India are adhoc, most International Commercial Arbitrations in India are Institutional thanks to such Arbitration Bodies in India like International Court of Arbitration (ICA), Indian Council for Alternate Dispute Resolution (ICADR) etc The present Indian Arbitration and Conciliation Act, 1996, based on the United

[8] Civil appeal no. 7019 0f 2005
[9] 2004(2) SCC 105
[10] 2008 (4) SCC 140

Nations Commission on International Trade Law (UNCITRAL) model, has elaborate provisions on International Commercial Arbitration – adhoc as well as Institutional arbitration held in or outside India. Under the scheme of the Act, Arbitral Awards are enforceable as if such awards were the orders passed by the Courts in India. The almost '90% finality' of such Arbitral Awards is reflected in Section 34, which provides very limited technical grounds for challenging Arbitral Awards. Though the Supreme Court of India in *ONGC Ltd. v. Saw Pipes Ltd.*[11] has enlarged the scope of 'Public Policy' as a ground for challenging Arbitral Awards, the previous Judgment of a larger Bench in Renusagar *Power Co. Ltd. v. General Electric Co.*[12] would have a prevailing effect and hence, the position of very limited grounds for challenging International Commercial Arbitration Awards remains more or less unchanged. Apart from minimum interference with Arbitral Awards, courts in India have also been passing interim orders to protect the interest of o the parties. In *Bhatia International Ltd. v. Bulk Trading, S.A.*[13], the Supreme Court of India held that Part I of the Arbitration and Conciliation Act, 1996, which foreign parties in assets in India. gives effect to the UNCITRAL Model law and which confers power on the Court to grant interim measures, applied even to Arbitrations held outside India. This case pertains to an Arbitration held as per International Chamber of Commerce (ICC) Rules in Paris and it was during the pendency of such Arbitration proceedings that the foreign party applied to a court in India for interim measure for securing its interest in a property in India. Though the contention of the Indian Party was that New York Convention does not leave any scope for grant of interim measure/relief by a Court other than a court of the country in which Arbitration is being held, the Hon'ble High Court as well as the Supreme Court took a contrary view. This is one occasion where the Indian Judiciary has been confronted with interpretation of an International Convention as important as UNCITRAL and it goes to the credit of the Hon'ble Supreme that interim reliefs have been held to be permissible under the said Convention for securing properties in India, even though the place of Arbitration is outside India. Even under the old Arbitration and Conciliation Act, 1940, the Supreme Court of India had an occasion to interpret "what is commercial?" in *R.M. Investments V. Boeing Company.*[14] In this Judgment, the Supreme Court took guidance from UNCITRAL in giving a wide meaning to the expression 'commercial' so as to include all relationships of a commercial nature, whether contractual or not, for the purpose of International Commercial Arbitration. As regards enforcement, the enforcement procedure applicable to Foreign Judgments is more or less applicable to International Commercial Arbitration Awards, which takes us to the next issue of enforcement of Foreign Judgments in India. Enforcement of Foreign Judgments and Arbitral Awards: Under Sections 13 and 44A of the Civil Procedure Code ("CPC"), Foreign Judgments can be enforced in two different ways, depending on whether the country in which the Foreign Judgment is passed is located is a 'Reciprocal Country' or not. While an order passed by a court in a so called reciprocal country can be straightway enforced in India as if the same is a decree passed by a court in India, an Order passed by a Court in a non reciprocating country can only be enforced by filing a fresh suit on the basis of such an Order. Government of India has notified some countries including Singapore and Hong Kong as 'Reciprocating Territories'. However, as per Section 13 of the Civil Procedure Code, 1908, all Foreign Judgments, to be enforceable, should

[11] (2003) 5 SCC 705
[12] 1994 Supp (I) SCC 644
[13] (2002) 4 SCC 105
[14] AIR 1994 SC 1136

have been pronounced by a court of competent jurisdiction on merit, should not be violative of natural justice, should not have been obtained by fraud, should not sustain a claim founded on a breach of a law in force in India and should not have been passed by refusing to recognize the law of India in cases such law is applicable. More importantly, a Foreign Judgment which is founded on an incorrect view of International Law is not enforceable in India.

The most contested issue on Foreign Judgment in India is the issue of 'Jurisdiction'. The Supreme Court of India and High Courts have taken a pragmatic stand on this issue. In many cases, the defense against enforcement of Foreign Judgments in India is to question the Foreign Court's jurisdiction on the ground that the Party has not submitted itself to the jurisdiction of the Foreign Court. In *Andhra Bank ltd. v. R. Srinivasan*[15], a Suit was filed against a guarantor in a foreign jurisdiction but during the pendency of the proceedings, the guarantor/defendant died and the legal representatives of the Guarantor were brought on record. After the decree was sought to be executed, the defence of the legal Representatives was that they had not submitted to the jurisdiction of the Foreign Court. However, the Supreme Court of India held that the material time when the test of the rule of Private International Law is to be applied is the time at which the Suit was instituted. In *Shaling Ram v. Firm Daulatram Kundanmal*[16], the Supreme Court held that filing of an Application for leave to defend a suit in a foreign court amounts to voluntary submission to the jurisdiction of the Foreign Court. In fact, way back in 1914, in *Ramanathan Chettiar v. Kalimuthu Pillai*[17], the Madras High Court stipulated the circumstances in which a Party to a dispute can be said to have submitted himself to the jurisdiction of a Foreign Court Judgment:(a). Where the Party is a subject of the Foreign Country in which Judgments have been obtained against him on prior occasions. (b). Where the Party is a resident of the foreign country at the time of the commencement of Court action (c). Where the Party has selected the Foreign Court/Jurisdiction as the forum for taking legal action in the capacity of a Plaintiff, in which forum he is sued later. (d).Where the Party on summons has voluntarily appeared before the Foreign Court. (e). Where by an Agreement a person has contracted to submit himself to the forum in which the Judgment is obtained.

The above principles are more or less still followed for determining jurisdiction of Foreign Courts. Apart from the 'Jurisdiction' aspect, it is also required that a Foreign Judgment, to be enforceable, should have been passed on merit and after appreciating all the relevant facts and circumstances. In *Abdul Rahman v. Mohd. Ali Rowther*[18], the full Bench of the Hon'ble Supreme Court observed as under:' A decision on the merits involves the application of the mind of the Court to the truth or falsity of the plaintiff's case and therefore though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed ex parte, decision passed without evidence of any kind but passed only on his pleadings cannot be held to be a decision on the merits.' This full Judgment still holds the field, followed later in *International Woollen Millsv v. Standard Wool (U. K.)*[19] *Limited* in which the Supreme Court of India did not accept the view that a decree passed in the absence of the defendant is a decree on merits or

[15] AIR, 1962 SC 232
[16] AIR 1967 SC 739
[17] AIR 1914 Madras 556
[18] 1928 AIR(Rang) 319 : ILR 6 Rang 552,
[19] 2001 (5) SCC 265,

the proposition that the decree was on merits simply because all documents and particulars had been endorsed with the statement of claim. In *Y. Narsimha Rao v. Y. Venkata Lakshmi*[20], the Supreme Court held that a Foreign Judgment to be enforceable in India should have been passed on merit, which means that the decision should be the result of a contest between the parties and this requirement is fulfilled when the Respondent is duly served and he voluntarily submits himself to the jurisdiction of the Foreign Court. Thus, for a Foreign Judgment to be enforceable in India, the Judgment should preferably be not exparte and the matter should have been heard on merit. Section 13 of the Indian Civil Procedure Code also clearly stipulates that Foreign Judgment, to be enforceable, should not have been passed based on an incorrect reading or understanding of an applicable International Law or there should be any refusal to recognize the law of India in case in which such law is applicable. Way back in 1934, the High Court of Madras in *Panchapakesha Iyer & Ors. v. K.N. Hussain Muhammad Rowther & Ano*[21]. refused to allow an Order passed by the Supreme Court of Penang on the ground that the Judgment is not in consonance with International Law.

Thus, though a International Commercial Law does not become a law in India on its own force without any domestic law legislated by the Govt. of India, the Civil Procedure Code of India provides 'incorrect reading of International Law' as a ground for nonenforcement of Foreign Awards in India. This speaks volumes of how important International Commercial Law has been for the Courts in India in evolving commercial law in India.

NEW TREND IN INDIAN INTERNATIONAL COMMERCIAL ARBITRATION LAW AFTER Bharat Aluminum Company Limited ("BALCO") V/s. Kaiser Aluminum Technical Service, Inc. ("Kaiser")[22] CASE

In Bhatia International v. Bulk Trading S.A & Anr. ("Bhatia International")[23] and *Venture Global Engineering v. Satyam Computer Services Ltd & Anr ("Venture Global")*[24], the Supreme Court had held that Part I of the Arbitration and Conciliation Act, 1996 ("Act") setting out the procedures, award, interim relief and appeal provisions with respect to an arbitration award, would apply to all arbitrations held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions. The Supreme Court set aside the doctrine in *Balco v. Kaiser.*

Facts

- An agreement dated 22 April, 1993 ("Agreement") was executed between Bharat Aluminum Company Limited (BALCO) and Kaiser, under which Kaiser was to supply and install a computer based system at BALCO's premises.
- As per the arbitration clause in the Agreement, any dispute under the Agreement would be settled in accordance with the English Arbitration Law and the venue of the proceedings would be London. The Agreement further stated that the governing law with respect to the Agreement was

[20] (1991) 3 SCC 451
[21] A.I.R. 1934 Madras 145
[22] AIR 2005 Chh 21, 2006 (1) MPHT 18 CG
[23] (2002) 4 SCC 105
[24] (2010) 8 SCC 660

Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.

- Disputes arose and were duly referred to arbitration in England. The arbitral tribunal passed two awards in England which were sought to be challenged in India u/s. 34 of the Act in the district court at Bilaspur. Successive orders of the district court and the High Court of Chhattisgarh rejected the appeals. Therefore, BALCO appealed to the Supreme Court ("Court").
- Another significant issue to be adjudged, in the case of Bharti Shipyard (clubbed together with the above petition for hearing), was applicability of section 9 (interim measures) of the Act. The parties had initially agreed to get their disputes settled through arbitral process under the Rules of Arbitration of the International Chamber of Commerce, at Paris, subsequently, mutually agreed on 29 November, 2010 to arbitration under the Rules of London Maritime Arbitrators Association, in London.
- During the pendency of arbitration proceedings in London, an injunction application was made by appellants, Bharti Shipyard Ltd., before the District Judge at Mangalore, against the encashment of refund bank guarantees issued under the contract (u/s 9 of the Act). The applications were allowed and were consequently challenged in High Court of Bangalore. The Bangalore High Court set aside the application so allowed on the grounds that the appellants had an alternative remedy (u/s 44 of the Act, being interim reliefs for international arbitration) in the courts of London and further since the substantive law governing the contract, as well as the arbitration agreement, is English law, the English courts should be approached. This was also challenged in this petition to the Supreme Court.
- The appeal filed by Bharat Aluminum Co. before the Division Bench of the Supreme Court was placed for hearing before a three Judge Bench, as one of the judges in the Division Bench found that judgment in Bhatia International and Venture Global was unsound and the other judge disagreed with that observation.

Principles laid down by the court

The judgment in detail analyses, the provisions of various sections in the Act and applicability of Part I of the Act to international commercial arbitrations. Some significant issues dealt with in the judgment are as follows:

- It was observed that the object of section 2(7) of the Act is to distinguish the domestic award (Part I of the Act) from the 'foreign award' (Part II of the Act); and not to distinguish the 'domestic award' from an 'international award' rendered in India. The term 'domestic award' means an award made in India whether in a purely domestic context, (i.e., domestically rendered award in a domestic arbitration or in the international arbitration which awards are liable to be challenged u/s 34 and are enforceable u/s 36 of the Act).
- It was held that there is a clear distinction between Part I and Part II as being applicable in completely different fields and with no overlapping provisions.
- The Court has also drawn a distinction between a 'seat' and 'venue' which would be quite crucial in the event, the arbitration agreement designates a

foreign country as the 'seat' 'place' of the arbitration and also select the Act as the curial law/ law governing the arbitration proceedings. The Court further clarified that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings. It would, therefore, follow that if the arbitration agreement is found or held to provide for a seat / place of arbitration outside India, then even if the contract specifies that the Act shall govern the arbitration proceedings, Part I of the Act would not be applicable or shall not enable Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Act, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law or curial law. Therefore, it can be inferred that Part I applies only to arbitrations having their seat / place in India.

- The Court dissented with the observations made in Bhatia International case and further observed on a logical construction of the Act, that the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 of the Act would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36 (enforcement of domestic awards). Therefore, the arbitral proceedings prior to the award contemplated u/s 36 can only relate to arbitrations which take place in India.
- The Court further held that in foreign related international commercial arbitration, no application for interim relief will be maintainable in India, either by arbitration or by filing a suit.

Prospective Effects of the judgment

- This judgment shall be applicable prospectively (i.e. to all the arbitration agreements executed after September 6, 2012).
- As a result of this judgment, the seat of arbitration has now gained paramount importance for determining the applicability of Part I of the Act.
- The judgment also draws a distinction between the seat of arbitration and the place of arbitration. It therefore contemplates a situation where even though the parties have provided for a particular place for arbitration, that some of the proceedings themselves may be conducted in other territories as may be convenient to all.
- This judgment also ensures that foreign award (i.e. an award passed outside India) can no longer be challenged by an Indian entity u/s 34 of the Act and that the party which seeks to resist the enforcement of the award has to prove one or more grounds set out in section 48 of the Act.
- No interim relief u/s 9 of the Act or order 39 of the CPC (both pertaining to injunction) would be available where the seat of arbitration is outside India. As interim orders from foreign courts and arbitration tribunals are not enforceable in India such a situation would leave foreign parties remediless.

Universal Legal Traditions for International Commercial Arbitration

The Common and Civil Law systems have guided the enactment of major codes, laws and guidelines that regulate international commercial arbitration. From the doctrine of freedom of contract to the procedural rules governing arbitration hearings, international arbitration has built its legal culture around these two traditions. Codes, laws and guidelines governing international commercial arbitration developed by such organizations as the International Court of Arbitration (ICA), the International Bar Association (IBA) and the International Chamber of Commerce (ICC) have been drafted against the background of Common Law and Civil Law values. In balancing these two great legal traditions, it was assumed that together they represent a composite legal tradition governing international commercial arbitration. The result of that assumption was decades of fine work enshrining international arbitration doctrines, principles, and rules of law and procedures that blend these two important legal traditions. From the doctrine of freedom of contract to specific rules of evidence and procedures that govern arbitral hearings, the international arbitration community has sought to maintain the respected legal traditions that lawyer-arbitrators and counsel find familiar and comfortable.

There are different principles by which to gauge the legal tradition of international commercial arbitration. The **first principle** is consensual, namely, that the parties *choose* arbitration. The parties are free to select the nature, form and operation of arbitration, whether its nature is *ad hoc* or institutional, whether its form is modelled on European, English, American or "other" legal traditions, whether it is conducted primarily through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences. The parties to arbitration presumably exercise their choices for distinctive reasons, such as: because the arbitrators supposedly have commercial expertise beyond that of domestic courts of law, because international commercial arbitration is perceived to be lower cost, more efficient and more "party sensitive" than courts of law, or simply to avoid having to rely on the laws and procedures of the legal system and the courts of one party. These reasons for resorting to international commercial arbitration may be misplaced, but they nevertheless are repeatedly invoked as bases for resorting to arbitration. **second principle** is that parties can make choices that accommodate preferred legal traditions, while still *not* choosing domestic courts. For example, they may adopt a European-centric model of arbitration, such as that of the ICC, because it more closely resembles Civil Law traditions, even though it is international and does not replicate the proceedings followed by the courts in any one Civil Law jurisdiction. Alternatively, parties may choose the English model of the London Court of International Arbitration, or the American model of the American Arbitration Association for much the same reasons, along with local options, such as state arbitration before the Swiss Arbitration Association, the Australian Centre for International Commercial Arbitration, or China's CEITAC. Parties may also choose to "domesticate" arbitration, such as by appealing to local customary laws and procedures. A **third principle** is that the manner in which arbitration is conducted may reflect in varying degrees a particular legal tradition and more broadly, a preferred cultural orientation. **fourth principle** is that particular procedures associated with international commercial arbitration stand out more starkly when they are modelled on a particular legal tradition. For example, all other factors being constant, one may well expect to encounter less reliance on oral testimony before arbitration tribunals like the ICC that before an association like the AAA in which the examination and cross-examination of witnesses, including experts is often extensive. **fifth principle** is that variations in the services provided by international

commercial arbitration inevitably are impacted by the customer. The London Court of International Arbitration crisply states: "Changes in commercial dispute resolution procedures are, quite properly, driven by the end-user. That is, by the international business community."

International Arbitration: (Its features)

Neutrality

An arbitral tribunal consists of arbitrators nominated by the parties, or appointed by an authority selected by the parties, and the choice of the arbitrators is usually ensures a certain neutrality, at least as far as the nationalities of the arbitrators is concerned. In international commercial transaction, neither of the parties usually wants to accept the jurisdiction of the other party's country: this is partly due to the fear that a national judge might be included to decide in favour if the party who is of the same nationality as the judge, and partly due to the awareness that the party in whose country the proceedings take place enjoys the advantage of knowing the applicable law, procedural rules, and legal environment and mentality better than other party. Agreeing on international arbitration allows the parties to avoid this imbalance: the venue of the arbitral tribunal is usually chosen in a country different from the country of each party and the nationality of the arbitrators is also determined so as to avoid the over-representation of one party's nationality.

Expertise

The arbitrators can be chosen according to criteria that can be tailored to the particular dispute, so as to ensure that they possess the necessary expertise to understand and evaluate the matter at stake. If a dispute is submitted to national courts of law, the dispute will be resolved by one or more judges with a general knowledge of private and commercial law; in some circumstances, this general knowledge might not be sufficient to appreciate all the aspects of complicated transactions with technical implications or transactions based on international commercial practices. This might lead to lengthy proceedings to permit the judge to acquire the appropriate knowledge, or to errors in the judge's evaluations due to underestimating the technical aspects or commercial practices. Agreeing on arbitration permits a reduction of these difficulties, by selecting experts in the particular fields as arbitrators.

Confidentiality & goodwill

Arbitration is a way of solving disputes that, as opposed to proceedings before courts of law, permits confidentiality to be maintained with respect to the content, the outcome and even the existence of the dispute. The court hearings has an adversary nature that it usually the publicity brought about by a public trial will usually guarantee that parties to a dispute heard in court will never be able to work together again. Confidentiality can be important in certain situations, for example to avoid damaging the commercial reputation of the parties.

Finality and rapidity

An important characteristic of arbitration is that in most situations the award made by an arbitral tribunal is final and binding upon the parties: either because The parties have agreed this expressly in the arbitration clause, or because the arbitration

rules referred to by the parties exclude any appeal against the award.[25] By excluding the possibility of retrying the case in front of an appeal instance, therefore, the length of the proceedings is considerably reduced as compared to proceedings before courts of law. Moreover, arbitration may ensure that the dispute is solved rather quickly, as opposed to proceedings before courts of law, which in some countries may last for several years due to overloaded judges and bureaucratic proceedings.

Enforceability

International transactions concern the movement or organisation of assets across the borders of two or more countries, and might involve the entities of different countries. In the case of disputes regarding international transactions, it is important to ensure that the decision resolving the dispute is enforceable in all the countries affected by the transaction, preferably in all countries where the losing party has assets that can be attached to satisfy the credit of the winning party. The enforcement of foreign arbitral awards is regulated primarily by the New York Convention on the Recognition and Enforcement of foreign Arbitral Awards (1958), which has been ratified by very many states and therefore ensures, to a great extent, a uniform and effective treatment of arbitral awards' enforceability. The enforcement of foreign judicial decisions, on the other hand, does not enjoy the same uniform treatment: the principles of international cooperation and of economy of judicial proceedings are recognised in a large number of states, but implementation of the principles, which results in the recognition and enforcement of foreign judicial decisions, is left to the internal legislation of the single states or to bilateral or multilateral treaties concerning specific areas. Among treaties of outstanding significance ate the 1968 Brussels and 1988 Lugano conventions on the recognition and enforcement of decisions issued on civil matters by courts in the countries of the European Union and the European Free Trade Area.

As a consequence of the foregoing, the enforceability of foreign judicial decisions is not subject to uniform regulations to the same extent as the enforceability of arbitral awards. Exclusion of the jurisdiction of courts of law. One of the effects of agreeing to submit a dispute to arbitration is that courts of law are deprived theirs jurisdiction on the subject matter and, if an action is raised in them regarding a matter that had been submitted by the parties to arbitration, they are obliged to refer the parties to arbitration. The same effect applies while an arbitral procedure is pending or after an arbitral award has been made: the subject matter is covered by the arbitral agreement, consequently courts of law do not have jurisdiction.

Modern arbitration legislation

The basic principles of the modern arbitration statute may be summarised as follows:

a) a modern arbitration statute expressed the recognition of the parties' *right to settle their disputes in a private forum*. This is done through the obligation of the state courts to refrain from exercising their jurisdiction in matters submitted to arbitration on the basis of a valid agreement of the parties. These are the provisions on the so-called "indirect enforcement" of arbitration agreement that, almost without an exception, form part of any recently enacted arbitration statute.[26]

b) *Party autonomy*, the underlying principle of commercial arbitration, has been

[25] UNCITRAL RULES 1976 Article 32(2)

[26] UNCITRAL Article 8 (1)

widely accepted. Besides the right to agree on a private forum, the acceptance of this principle implies also that the parties are allowed to influence different aspects of arbitration by their agreement. Thus, they may choose the rules of procedure to be applied, to determine the seat of arbitration, to select arbitrators, as well as to choose the applicable substantive law.

c) ***Arbitrators are given wide powers*** to determine the different aspects of arbitration if the parties have failed to do so. Thus, they are free to determine rules of procedure, as they consider appropriate in the absence of the parties' choice thereto[27]. There are, usually, few procedural rules of a mandatory nature in arbitration laws *(lex arbitri)* that have to be respected and where no room for party autonomy is left. These, generally, relate to basic principles of due process, a violation of which would be contrary to the basic notions of justice or international standards of justice. The principle of equal treatment of the parties, namely, the equal opportunity to present a case, is such a principle, which may be considered to be a part of international or transnational *ordre public*. Similarly, the arbitrators will determine the applicable substantive law in the absence of the parties' choice in that respect[28]

d) Arbitration is based on private agreements, but results in a ***decision – an award – which is binding upon the parties***, and which can be enforced in legal proceedings by national courts, if not carried out voluntarily. Under modern arbitration statutes the enforcement may be denied only for a certain limited number of reasons. This is particularly so with respect to the enforcement of foreign arbitral award under the 1958 New York Convention. It lists a limited number of reasons for refusal of the recognition and enforcement of foreign awards[29].

e) Arbitration statutes usually provide solutions for the situations when the parties have failed to determine certain aspects of arbitration: Such provisions are not mandatory, but permissive or discretionary. Their primary and underlying purpose is to provide the possibility for arbitration to commence and to proceed efficiently, to provide the ***necessary assistance and support to arbitration***. Very often the arbitration will not be able to function at all, in the absence of such provisions.

f) From the relevant provisions of arbitration statutes relating to the role of national courts it may be concluded that there is, generally, ***a limited possibility of judicial intervention***[30]. The role of judiciary is mainly one of support and assistance to arbitration before, during and after the arbitral process. Such assistance is provided, for example, in enforcing the agreement to arbitrate, in the establishment of the tribunal, in taking evidence or ordering provisional measures, as well as in the enforcement of arbitral awards. As to the controlling or supervisory role of the judiciary, the general trend is towards a limitation of this function of national courts. Limitation of the reasons for challenge, as well as grounds for refusal of enforcement of the award is one of the common characteristics of recently enacted or amended arbitration statutes, in particular with respect to international arbitration. Indeed, it is not to be concluded that the grounds for challenge are the same in different legal systems. However, the merits of the arbitrators' decision may not, under any circumstances, be the subject of the control and examination by the judiciary, except in the case of violation of public policy. It is a widely accepted principle, which lies in a very heart of arbitration as a method of dispute settlement. Any provision

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[27] UNCITRAL Article 19 (1)

[28] Id Article 28(2)

[29] 1958 NEW YORK CONVENTION Art. V

[30] Art. V UNCITRAL

maintaining a different position is contrary to the very nature and the underlying purpose of arbitration. Control of the award with respect to the substance of the dispute undermines the effectiveness and attractiveness of arbitration and, as such, cannot form part of a modern arbitration law and practice. The need for a greater 'freedom' of arbitration from the supervision of national courts and restrains of national laws has more frequently been emphasised in the context of international commercial arbitration, than in situations, which are purely domestic. Therefore, some arbitration laws provide for a duel regulatory scheme, one applicable to domestic and another to international arbitration. Thereby, the latter usually maintains a system of a more limited control over arbitral awards and may even provide the possibility for the parties to exclude any recourse against the award. On the other hand, some jurisdictions provide for the same favourable legislative framework to apply both domestic and international arbitration (e.g. Germany, England, India). So as we can find there are many similarities between the UNCITRAL rules and national law rules on arbitration, in the same time the national laws on arbitration have similar points with each other.

Ad hoc and institutional arbitration

Once agreement is reached by the parties concerning arbitration as the preferred method for the settlement of their disputes, the second step is the choice between *ad hoc* and institutional arbitration. The distinction between the two alternatives is referred to by the European Convention[31] and has a direct bearing on the subject under examination. The parties to an *ad hoc* arbitration establish their own rules of procedure, which may be made to fit the facts of the dispute between them, whereas the parties to an institutional arbitration must conduct the arbitration in accordance with the procedural rules of the particular institution concerned. *Ad hoc* arbitration is not conducted under the auspices or supervision of an abitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration.

Ad hoc arbitration agreements will often choose an arbitrator or arbitrators, who are to resolve the dispute without institutional supervision or assistance. The parties will sometimes also select a pre-existing set of procedural rules designed to govern *ad hoc* arbitrations. In an *ad hoc* arbitration, in fact, utmost care should be taken as to the drafting of the arbitration clause since the parties, by choosing this alternative, wish to shape the arbitration according to their needs and without reference to the services and, more importantly, to the rules of arbitration of a particular arbitral institution. Both institutional and *ad hoc* arbitration have strengths. Institutional arbitration is conducted according to a standing set of procedural rules and supervised, to a greater or lesser extent, by a professional staff. This reduces the risks procedural breakdowns, particularly at the beginning of the arbitral process, and of technical defects in the arbitral award. The institution's involvement can be particularly constructive on issue relating to the appointment of arbitrators, the resolution of challenges to arbitrators, and the arbitrators' fees. Less directly, the institution lends its standing to any award that is rendered, which may enhance the likelihood of voluntary compliance and judicial enforcement.

On the other hand, *ad hoc* arbitration is typically more flexible, less expensive (since it avoids sometimes substantial institutional fees), and more confidential than

[31] Supra Note 27, Art. V

institutional arbitration. Moreover, the growing size and sophistication of the international arbitration bar, and the efficacy of the international legal framework for commercial arbitration, have partially reduced the relative advantages of institutional arbitration. Nonetheless, many experienced international practitioners prefer the more structured, predictable character of institutional arbitration, at least in the absence of unusual circumstances arguing for an *ad hoc* approach. Should the choice be in favour of institutional arbitration, which is certainly the most widespread form of international arbitration, the drafting problems are to a large extent made easier thanks to the reference to the set of arbitration rules of the institution which has been selected. In fact, by incorporating directly into the contract the said rules, such a reference not only avoids the process of negotiating the arbitration clause, which constitutes an area of potential conflict, but eliminates the risk, inherent in an *ad hoc* arbitration clause, of mistakes, ambiguities or gaps in the drafting process. Suffice it to think of the risk of indicating as appointing authority an institution or a person which, when needed, may decline to act in that capacity with the resulting obstruction of the arbitral mechanism (save to the extent that resort may be made to make the relevant appointment(s) to the competent local court). The relevance of the difference between *ad hoc* and institutional arbitration tends to diminish if reference is made to rules of procedure prepared by an international institution, such as the UNCITRAL Arbitration Rules. Whether the arbitration is ad hoc or institutional, there are still pitfalls to be avoided by the drafter of the arbitration clause.

CONCLUSION

International commercial arbitration has met widespread success as a method of international dispute resolution. The multitude of changes that are occurring in the international plane testify to that fact. The increased acceptance of the autonomy of the arbitration clause and more recently of the competence-competence doctrine is part of this process of evolution of international arbitral practice. Specifically in relation to the latter doctrine, the divide between common law and continental jurisdictions seems to be closing. The principle of autonomy in its broad meaning of full autonomy covers all the grounds on which the arbitration agreement could be invalidated. Its purpose is to ensure the "substantive" effectiveness of the arbitration agreement. The competence-competence principle, also in its broad meaning, including the priority rule, aims to ensure the "procedural" effectiveness of the arbitration agreement. The two principles, as thus understood, ideally constitute a complete international system for the effectiveness of the arbitration agreement.

In general it is believed that the increased independence of international arbitration from the intervention of the national courts is a move in the right direction. It is also consistent with the practice of denationalizing most aspects of arbitral proceedings, ranging from the governing laws to the procedural processes.

India historically followed various means of arbitration or mediation in different forms. It typically used to be a king intervening between a dispute of two people or an official Panchayat intervening and giving their decisions. The Alternate Dispute Resolution (ADR) picked up pace in the country, with the inception of the Bengal Resolution Act, 1772 and 1781, which provided parties an option to submit the dispute to an arbitrator, appointed after mutual agreement and whose verdict would be binding on both the parties. ADR gained further importance in India, post the implementation of the Indian Arbitration Act, 1940, and The Arbitration and Conciliation Act, 1996, which was passed in consonance with the UNCITRAL Model Law of Arbitration. An important International Convention on Arbitration, which enhanced the Indian mechanism, was the New York Convention of 1958 on the

Recognition and Enforcement of the Foreign Arbitral Award.

The growing liberalization in India and extraordinary business growth in the last decade increased the interaction between Indian and international organizations. This has resulted in redefining global frontiers for organizations across industries. Such growth and interaction has considerably increased the number of disputes taking place in the last decades in India.

In India, we have witnessed a noticeable progress in the area of arbitration, particularly after the enactment of "The Arbitration and Conciliation Act, 1996." Today, due to new liberal policies and continuous efforts by the Government, India has opened up to foreign investments in varied industries and sectors, but this has been accompanied by a considerable increase in the number of commercial disputes. The scenario is further complicated with the use of technology in all aspects of business. There is pressure from international companies and various Governments as they are making it mandatory to enforce arbitration clauses in the contract.

All these factors coupled with delays in the traditional Indian litigation system, have led to a considerable increase in the number of arbitration cases. Historically, the awareness and reliance on alternate dispute resolution, as a solution, was very low. However, the recent increase in the number of cases, positive results and Government support has motivated companies to consider arbitration as an approach to resolve disputes

The need for international commercial arbitration and its services at global level is increasing day by day. The Information and Communication Technology (ICT) has given a new meaning to international commercial transactions and business. E-commerce has now become an indispensable part of our daily commercial activities. This has also given rise to both traditional as well as contemporary international commercial disputes all over the world. The scope of international commercial arbitration has also widened due to the disputes arising out of contracts on sale of goods, distributorship, agency and intermediary contracts, construction, engineering and infrastructure contracts, intellectual property contracts, domain name dispute resolutions, online dispute resolutions, joint venture agreements, maritime contracts, employment contracts, medico-legal disputes etc. The list is just illustrative as the business transactions are too many and it is difficult to categorize all of them here.

In a world which is evolving with globalization and Internet, has led in opening up unchartered avenues leading to much consternation in the growth of law. With the push of a button, money can be transferred from one place to another, shares can be bought and sold with ease, and property can be transferred without difficulty. Typically, the extrusion of a country's law occurs through its application by courts, nominally restrained by private international law, a context that is both transparent and subject to contest by the courts of other countries.[32]

Ten years ago, one could barely detect a separate breed of law for the investment industry, either in the courts or in the literature. In the classical system, national courts had very little role to play in the construction of international investment law and issues pertaining to the investment industry. Litigation involved national rights related to consumer based and contractual based claims made by individual people against investment contracting companies. Courts were reluctant even to adjudicate claims involving foreign investment issues and the rights of other countries'

[32] Graeme B. Dinwoodie, The International Intellectual Property Law System: New Actors New Institutions

investment industries, prompting serial national litigation of multinational disputes. National courts are, however, beginning to tackle multinational cases and are thus contributing to the effective creation of international norms. This has occurred most perceptibly in the copyright context in the United States, India and United Kingdom, where courts hear claims under foreign laws, provide multinational relief, and effectively regulate globally by localizing any Internet conduct in the United States.[33]

At the very outset, then the incremental character of common law comes to fore. It can achieve little that is akin to the dramatic rationalizations facilitated by major codification exercises or ratification of major international conventions.[34] The decisions of a court are binding only in a particular jurisdiction, and even within a given jurisdiction, some courts have more power than others. For example, in most countries, decisions of appellate courts are binding on lower courts and have precedential value, but decisions of non-appellate courts only have persuasive value. Interactions between common law, constitutional law, statutory law and regulatory law also give rise to considerable complexity. However stare decisis (the principle that similar cases should be decided according to consistent principled rules so that they will reach similar results) lies at the heart of all common law systems. **After analyzing the above stated problem**, its status and suggested solution, we can conclude it in a manner that, Arbitration can be said to be an amicable way of solving dispute between the parties whereby they parties agree in advance that the decision will be final and legally binding. Arbitration as opposed to court ligation is characterized by neutrality and confidentiality that is to say is a non state involvement process of solving dispute. Arbitration has been used throughout history as an alternative dispute resolution method with great success. Today, arbitration is commonly used in international trade related disputes as one of the most common dispute resolution methods. **Therefore**, keeping in view of all the developments, it is necessary to formulate the procedural rules for the arbitration accordingly. There are still challenges and opportunities in this specialized subject whom Asian countries need to explore and address. Particularly, In India, there is a dire need for the present arbitral setup to recognize and accommodate different cultural and legal traditions. Further, the traditional advantages of arbitration such as cost effectiveness and simplicity of procedure seem to have become redundant. These problems and lack of harmonization in arbitral law and practice have resulted in constant tension with national courts in the recognition and enforcement of foreign arbitral awards. At the same time, there is pressure on the developing countries to make their arbitral and other laws appropriate to attract investments. **Hence,** if arbitration is to continue to be a **preferred means** of resolving international trade disputes, it has to address the realities and specific needs of the developing countries particularly like India. There is also a need for **harmonization of arbitral law** in Asian regions. The above mentioned legal issues are some of the issues, of international commercial arbitration mechanisms, which need a serious consideration by the expert who are working in this field and also requires a universal solution for this global legal problem. So that the disputes relating to international trades may reduce and international business can achieve its objectives, in the name of economic development of a country.

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[33] Jane C Ginsburg, 'The Private International Law of Copyright in an Era of Technological Change', 1998 Recueil Des Cours De L'Academie Internationalle De La Haye (1999; Paul E Geller, 'The Universal Electronic Archive: Issues in International Copyright' (1994) 25 IIC 54.

[34] Considering the development of the Lex Fori Rule as an example- Phillips v. Eyre L.R. 6 Q.B. 1,28-29 (1870); Boys v. Chaplin AC 356 (1971); Red Sea Insurance Co v. Bouygues SA, AC 190 (1995)