

INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

International Commercial Arbitration (ICA) means a lawful relationship which is considered commercial, where both of the parties or either of the parties is a resident or foreigner or is a body corporate outside India or is an organization, affiliation or group of people whose main administration or control is in the hands of foreign body. Therefore, under Indian law, an arbitration with a seat in India, however including a foreign element like foreign parties or foreign transactions will also be considered as an ICA, and consequently subject to Part I of the Arbitration and Conciliation Act, 1996. Where an ICA is held outside India, Part I of the Act is not applicable on the parties yet the parties would be liable to Part II of the Act. International Commercial Arbitration is an arbitration where the issue included is a cross-fringe question and the parties would prefer not to get into filing of case in national courts. International Commercial Arbitration, in this way enables the parties to dispose of the long and complicated method of the courts. International Commercial Arbitration, not like the previously set up laws and procedures, deals with the terms and the way already chose by the parties in the arbitration agreement. The entire method of arbitration spins around the arbitration agreement already entered by the parties. This paper attempts to study about the concept of International Commercial Arbitration and its applicability in India.

KEYWORDS: *arbitration, conciliation, commercial, foreign transactions, arbitration agreemen*

The rapid development of Globalization, liberalization and evolution in International commercial connections, it is progressively relevant to have an adaptable and speedy technique for settling disputes. Arbitration is a favorable procedure chosen by the parties for settling the disputes between them, wherein parties willfully consent to present their case to an impartial third party and consent to be bound by his/her choice. Section 2(1)(f) of The Arbitration and Conciliation Act, 1996, characterizes an International Commercial Arbitration which implies: an arbitration relating to matter in dispute emerging out of legal relations, regardless of whether legally binding or not, considered as commercial under the law in India and where either of the parties is—

- (i) A person who is a national of, or routinely resident in, any nation other than India; or
- (ii) A body corporate which is consolidated in any nation other than India;
- (iii) An organization or an association or a group of people whose main administration and control is in any nation other than India;
- (iv) The Government of a foreign nation

The extent of this section was decided by the Supreme Court in the case of TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.², where disregarding organization having an outside control, the Supreme Court inferred that, "an organization consolidated in India can just have Indian nationality with the end goal of the Act."

However the Act only perceives organizations controlled by foreign nationals and a body corporate situated outside India, the Supreme Court has not barred its application to organizations enlisted in India also, having Indian nationality. Thus, in such a case the company has double nationality, one based on foreign administration and other in view of enlistment in India, for this purpose such company would not be considered as a foreign corporation under the Act. The aim of this paper is study the enforcement of foreign arbitral awards in India.

RESEARCH QUESTION

P: Why it is difficult to enforce foreign arbitral awards in India?

I: The Arbitration and Conciliation Act, 1996, Newyork Convention, Geneva Conventions

C: Comparison between foreign and domestic arbitral awards

O: Provide proper guidelines facilitating the enforcement of foreign arbitral awards

Whether enforcement of foreign arbitral award in India is against public policy or not?

² 2008 (2) UJ SC 0721

OBJECTIVES

1. To study the concept of International Commercial Arbitration
2. To examine the concept of objective arbitrability
3. To summarize the position of international commercial arbitrations under Indian Laws.
4. To study the advantages and disadvantages of ICA.
5. To study about the arbitral proceedings in ICA.

HYPOTHESIS

H₀: The enforcement of foreign arbitral award is against the public policy.

H_a: Though the enforcement of foreign arbitral awards is difficult, international commercial arbitration is the effective way to resolve the international commercial disputes.

RESEARCH METHODOLOGY

This is a doctrinal research. Only secondary sources have been referred for this study. The primary sources which include interviews with people were not possible. Secondary sources include books related to the International Commercial Arbitration and research articles on enforcement of foreign arbitral awards were referred. Ample websites and blogs have also been referred for the study.

ARBITRABILITY

Objective arbitrability is nothing but determination of the subject matters which can be resolved by arbitration. An arbitral award may be set aside due to non-arbitrability of the subject-matter of the dispute. There are various disputes which cannot be brought before arbitration. The non-arbitrable include:

1. matter regarding rights and liabilities which emerge out of criminal offenses;
2. marital disputes (regarding divorce, judicial separation, restitution of matrimonial rights and child custody);
3. guardianship matters;
4. indebtedness and winding up issues;
5. matters regarding the public charities or public trusts under the Public Trusts Act;
6. testamentary issues (grant of probate, letters of administration and succession authentication); and
7. eviction or tenancy disputes.

ARBITRATION AGREEMENT

According to section 7 (1) of The Arbitration and Conciliation Act, 1996 (altered in 2015) "arbitration agreement" is an assent that is agreed by the parties for arbitration of all or any of the matter in controversy between the parties. The connection between the parties must be a lawful relationship, which shall or shall not be a contractual relation. According to section 7 (2) of the act, there can be an entire separate agreement for the arbitration or it can be as an arbitral clause in a arbitration agreement.

According to section 7 (3) of the act, the arbitration agreement must be in writing. According to section 7 (4) a arbitration agreement is thought to be in composing in the event that it is contained in-

- A document authenticated by the parties to the arbitration;
- An exchange of letters, messages, data through electricity, which also involves telecommunication;

If a contract contains an arbitration clause, then such agreement is also regarded as arbitration agreement, provided that the agreement should be in writing and the aim is to include the arbitration clause as part of the assent.

NEED FOR INTERNATIONAL COMMERCIAL ARBITRATION

- 1 .Speedy method of settling disputes: Court process includes broad methods and laws, which a party needs to take after. In the event that parties allude their dispute to arbitration, they require not take after stringent procedures of law. Consequently, the dispute ends up expedient.
2. Enforceability of Arbitral Awards: It is more promptly and quickly implemented when rather than the court judgments.
3. Impartial Arbitrator: Neutral third person is chosen resolve disputes. This third person is chosen by both the parties to dispute mutually.
4. Arbitrator might be a specialist: In light of the issue of arbitration, parties may select a particular arbitrator having that specific specialized experience and mastery in the matter which is brought for arbitration.
5. Arbitration is cost efficient: since arbitration is a speedy remedy, does not include an excessive number of complicated procedures, it is more affordable when compared with the complex litigation procedures.

INTERNATIONAL COMMERCIAL ARBITRATION – THE INDIAN PERSPECTIVE

International commercial arbitration is an arbitration that deals with commercial matters, wherein the parties might be of a foreign country or a resident there or an affiliation or an organization registered there.

A similar relationship is trailed by Indian law. In a case when the seat of arbitration is in India however no less than one of the parties is a foreigner, at that point such issues would come under the purview of ICA and is dealt with Part I of "The Arbitration and Conciliation Act". In any case, if the seat of arbitration is outside India, at that point Part I would not be pertinent and such issues would go under the ambit of Part II of the act.

SEAT OF INTERNATIONAL COMMERCIAL ARBITRATION INSIDE INDIA

The accompanying laws would apply to ICA (International Commercial Arbitration), when the case falls under Part I of the Arbitration and Conciliation act, 1996, i.e., when the seat of the arbitration is in India.

Notice of the Arbitration

It is the initial phase in any arbitration proceeding, one party sends notice to the opposite party, requesting the settlement of the dispute through arbitration. Hence, the following elements must be present:

1. There ought to be an intention of the party presenting the notice to allude the issue to arbitration.
2. The party telling ought to request that the other party settle the question through arbitration

Court's reference for arbitration

According to section 8 of "The Arbitration and Conciliation Act, 1996", if the party before the judiciary, applies for alluding the case to arbitration by presenting an application with the original copy of the arbitration agreement to the date of presenting its first statement itself, at that point the judicial authority shall acknowledge such application and allude the parties to arbitration. If the requisites are conformed then such judicial authority shall not pass any negative judgment, i.e., it can't deny the parties to allude to arbitration disregarding any judgment, declaration or request of the Supreme Court or any Court, unless the court feels that at first sight there is no arbitration agreement. But if the party neglects to present the first copy of arbitration agreement or an appropriate date, at that point such application can be rejected.

However if the first arbitration agreement or the affirmed copy isn't present with the party or is held by the other party, in such a circumstance the party applying will present the application with the copy of the agreement and shall file a petition to the court to direct the other party to present the first copy of arbitration agreement to the court. Where the application that has been submitted before the court is pending, the parties may start or proceed with the arbitration and an arbitral award shall also be made.

Reliefs in Arbitration

Interim relief is accessible to the parties under section 9 and section 17 of The Arbitration and Conciliation Act, 1996. Under section 9, relief is to the parties by the court and under section 17, relief is conceded by the arbitral tribunal. The intention of this proviso is to give protection to the party until final decision is given.

Appointment of Arbitrators

Section 11 of the act accommodates the appointment of arbitrators. The arbitrator can be of any nationality unless consent is given by the parties. The parties need to appoint one arbitrator each and both the arbitrators need to additionally name a third arbitrator, within a period of thirty days, since the authorities are required to be an odd number. Nonetheless, if there are even number of arbitrators, for instance there are two arbitrators and both the authorities give a similar choice, at that point, all things considered, they are not bound to have a third arbitrator.

Challenging the appointment of arbitrator

An arbitrator is required to act in an autonomous and unbiased way. These are the essential two necessities that must be there in a person appointed as an arbitrator. But if he is biased or partial, his appointment shall be challenged. Besides, if he doesn't have the capabilities that are consented by the parties then in that case his appointment shall be challenged. The arbitrator is also required to settle the within the prescribed period.

Cost of the Arbitration

The arbitral tribunal determines the cost of the arbitration and that how much sum each party is required to pay. However if the party declines or neglects to pay the lawful and administration expenses, at that point the court shall decline to give the award. After declining to pay, the parties can approach the court and the court can additionally give its decision on the cost.

Setting aside arbitral award

If the party isn't satisfied with the decision of the arbitral tribunal then he can make an application to the court under section 34 of the act to set aside the arbitral award. For instance, if the party making the application was not given legitimate notice of the appointment of arbitrators, or if a party was under some insufficiency, or if the arbitration agreement isn't substantial, or if the arbitral award isn't identified with the question, or is against the terms of arbitration, or the issues that shall not be determined by arbitration. According to section 34 (2-A), an arbitral award emerging out of arbitrations other than International commercial arbitration may likewise be set aside, if the award made is illicit in nature.

The application to set aside the award must be made within a period of three months from the date of getting of the award, unless there is an adequate reason because of which the party couldn't have any significant bearing inside the required time. In such a case the court can engage the application to set aside the arbitral award for a further extended period of thirty days.

Appeals

An appeal can be petitioned under the following circumstances:

1. Refusal to give interim relief under section 9 and section 17 of the act.
2. To set aside the arbitral award under section 34 of the act.

Enforcement of arbitral award

The arbitral award is binding on both the parties under section 35 of the act and is regarded to be the same as that of a decision of a court the Code of Civil Procedure, 1908.

SEAT OF INTERNATIONAL COMMERCIAL ARBITRATION OUTSIDE INDIA**Bhatia International v/s. Mass Trading³**

In Bhatia International v/s. Mass Trading case, it was held that Indian courts can only utilize their jurisdiction only to test the certainty of an arbitral award made in India, regardless of whether the actual law of the agreement is the law of another nation.

Facts

In this case the parties had alluded the case to arbitration according to the principles of the ICC of arbitration in Paris, with a sole arbitrator. The foreign party need a guarantee that they get the recuperation of their claims from the Indian party and for that reason it moved to Indian court to secure its property. The same was restricted by the Indian party on the ground that according to the New York (Convention on Recognition and Enforcement of Foreign Arbitral Awards, finished up on tenth June, 1958), there is no proviso to assert interim relief through a court, other than the one where arbitration is occurring. Therefore, for this situation the arbitration is occurring in Paris, hence the Indian court can't be sought to grant the interim relief.

Held

The High Court set aside the request of the Indian party. The issue went to Supreme Court. The Supreme Court upheld of the High Court.

Bharat Aluminum v/s. Kaiser Aluminum Technical Services (BALCO)⁴

The principle set down in Bhatia International v/s. Mass Trading case was overruled by the judgment of Bharat Aluminum v/s. Kaiser Aluminum Technical Services.

Facts

The parties consented to an agreement concerning the supply of gear, modernization and up-gradation of production facilities. But the dispute began emerging and the matter was alluded to arbitration. The seat of the arbitration was in England and in this manner the procedures occurred in England and the award was made for the Respondent. Disappointed with the decision, the litigant documented application against the award in India, before the Chhattisgarh High Court under Section 34 of the act, i.e., under Part I of the act.

Held

The court held that Part I of the act would not make a difference to the situations where the seat of arbitration is outside India. It should be pertinent to just those arbitrations where the seat of the arbitration is India. No suit can be petitioned for interim relief in India under PartI, when the seat of arbitration isn't

³ (2002) 4 SCC 105

⁴ Civil Appeal No. 7019 of 2005

in India. This judgment will be appropriate to the cases in which debate occurred after the decision of this case. The judgment has only prospective effect.

CONCLUSION

Due to modernization there is a huge development in International business and international transactions. Such a development has led to many disputes with regard to the commercial transactions on an international level. To resolve this types of disputes arbitration is preferred rather than an ordinary litigation process since it speedy and cost efficient. Thus, where two parties consent to resolve their dispute arising out of commercial transactions by way of arbitration is known as International Commercial Arbitration. It also gives a sense of safeguard to the parties to enter into agreements at International level. The judgment of the BALCO case holds significance with the view that parties while entering into arbitration would prefer not to confront any complex procedures. It is essential that the judicial procedure is followed in the nation where the arbitration is occurring for the purpose to simplify the procedures for the parties in case of International commercial arbitration. Thus the international commercial arbitration is the best method to resolve international commercial disputes though its enforcement is difficult in India. Therefore separate legislations has to be brought for the effective enforcement of the awards.

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