EFFECT OF INTERNATIONAL COMMERCIAL LAW IN INDIA: AN ANALYTICAL STUDY

Shreyanshi Pathak[*] Dr. Rajeev Kumar Singh[*]

ABSTRACT

The globalization of commercial law is a process by which commercial laws, regulations, and practices become increasingly interconnected and uniform on a global scale. It has been driven by the growth of international trade and investment, the proliferation of international treaties and agreements, and the increasing influence of transnational organizations. These agreements can have a significant impact on commercial law in the countries that are parties to them. The globalization of commercial law has had a significant impact on India, facilitating its integration into the global economy and bringing challenges. This has included adopting new laws and regulations, participating in international organizations, and adapting to new rules and standards.

Keywords: WTO, International Trade, Commerical Law, Arbitration Law.

INTRODUCTION

Human conflicts are an inseparable part of society because where there are two minds, there will be three opinions. Furthermore, where there is no *consensus ad idem*, there will be conflicts. Disputes are a result of these human conflicts. With the growth of society, the number of disputes is also on an alarming rise. As human relations become more complex, so do the disputes that arise in a civilised society.[1] However, these disputes need not remain unresolved and the resolution is to be judicious, and indeed such resolution of disputes is essential for societal peace, amity, comity and harmony and easy access to justice.[2] It is also vital for society's smooth functioning to resolve these inevitable disputes at the earliest. Nevertheless, a civilised and welfare society must find an effective dispute-resolution mechanism. Since resolving these matters was vested on the judiciary alone, it caused an

[*]LLM, AMITY UNIVERSITY, LUCKNOW.
[*]ASSISTANT PROFESSOR, AMITY UNIVERSITY LUCKNOW.

[1] Borba, Igor M. "International Arbitration: A comparative study of the AAA and ICC rules", Master's Theses, Marquette University, (2009), 1

[2] Jitendra N. Bhatt, "Round Table Justice through Lok Adalat (People's Court) – A Vibrant ADR in India", 1 SCC (Journal) 11 (2002).

overburden on it. Another method of dispute resolution to supplement and supplant the traditional court system will definitely reduce the same. Moreover, years of litigation were costly and time-consuming, which made litigants become frustrated. So for these reasons, people started to find out ways to resolve their matters outside the court amicably.

Arbitration is an adjudicatory form of alternative dispute resolution mechanism whereby, the parties entrust the dispute resolution process and the result of which to a private neutral third party (i.e., the arbitrator or the arbitral tribunal) and decision (i.e., the arbitral award) rendered after hearing and considering the merits of the dispute will be of binding nature.[3] The parties are free to agree as to how their disputes are to be resolved and interventions by the courts are restricted.[4] The most popular kinds of arbitration include ad-hoc, domestic, and international arbitration. International Arbitration is the kind of arbitration where one of the parties belongs to a foreign country or where the subject matter of arbitration is situated or registered or regulated by an authority of a foreign national. The laws applicable in International Arbitration are governed by the contracting parties. At international levels, a lot of institutions were created to provide a framework for the conduct of international arbitration.[5] The most notable is the International Court of Arbitration of the International Chamber of Commerce (Paris, France). Hong Kong International Arbitration Centre is another leading arbitral institution and is one of the most prominent arbitral institutions in Asia.

The Arbitration Act 1940 was the first and foremost consolidated law governing arbitration in India. This Act was based mainly on the English and Welsh Arbitration Act 1934. In 1992, with the introduction of LPG (Liberalization, Privatisation and Globalisation), India opened its market for the first time to foreign players. It has led to a surge of MNCs and a drastic increment in foreign investments in India. This was also accompanied by a huge growth of cross-border commercial disputes. Therefore, it was apparent that India would never be a hub for foreign nations unless it had implemented a proper and effective cross border dispute resolution mechanism. Moreover, the 1940 Act was ineffective in dealing with the post 1990s

[3] See Joanne Goss, "An Introduction to Alternative Dispute Resolution", 34 (1) Alta. L. Rev. 1 (1995) (Can.).
[4] P. C. Rao, "Alternatives to Litigation to India", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 24 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997); K. Jayachandran Reddy, "Alternative Dispute Resolution", in P.C. Rao and William Sheffield (Eds.), Alternative Dispute Resolution 79 (Universal Law Publishing Company Pvt. Ltd., Delhi, 1997).
[5] Adhipati, Sandeep. "Interim Measures in International Commercial Arbitration: Past, Present and Future", Master Dissertation, University of Georgia, (20003), 3.

disputes[6] raised due to drastic changes brought out by the LPG policy. And also this Act was primarily designed to deal with cases of domestic commercial arbitration in mind and therefore it was only of limited assistance in India.

India to become a global hub for international commercial arbitration, the international stakeholders should not feel reluctance in choosing the Indian Law.[7] So for this, the three (i.e., the legislative, the executive and the judiciary) should create the right turf and on-field conditions, much like cricket, for achieving its dream of becoming "an arbitration hub". A cost effective and time saving dispute resolution mechanism guaranteed along with minimal court intervention will build up the confidence in potential foreign investors. In an era of globalisation, it is so crucial for a developing nation like India to remain active in international trade. For that, transnational commercial disputes are to be resolved most effectively with minimal court intervention. India also needs to have separate legislation for ICA for this.

Undoubtedly the tone has been set right and a step in the right direction (via amendments) has been taken by our government. However, much more spadework has to be done for India to hold the "arbitration trophy" and become a Singapore-or-London-esque-hub. This research primarily deals with the issues that India is facing in the area of International Commercial Arbitration. Our arbitration regime is still not able to answer the demands of the global world. It then analyses the legislative and judicial approach towards this area by the so-called "global hub of ICA" and India (the to-be global hub of ICA). The key concern lies in understanding the approaches of the judiciary and legislative of Singapore and Hong Kong toward International Commercial Arbitration proceedings. The research also focuses on the drawbacks that the 1996 Act and its Amendments are having. It also deals with the need of having a robust legislative and institutional framework to deal with International Commercial disputes.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternate Dispute Resolution[8] is a mechanism of resolving a dispute between two parties with the help of a neutral and independent third party. It is a dispute resolution mechanism

[6] The Law Commission of India also examined the working of the 1940 Act in its 176th Report; Vide M/s Fuerest Day Lawson Ltd v. Jindal Exports Ltd., 2001 (3) SCALED 708(India).
[7] Loukas A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations", International Lawyer, vol. 34, no. 3 (2000), 1056.
[8] Hereinafter referred to as ADR.

alternative to the traditional litigation process. All the ADR procedures have emerged as distinct alternatives to the courts established under the writ of the state and hence the epithet 'alternative' has been coined.[9] But it is not an alternative 'court' system, rather it was developed with an aim to supplement and supplant the traditional court system. According to the Black's Law Dictionary ADR is a procedure for settling a dispute by means other than litigation.[10] The National Alternative Dispute Resolution Advisory Council, Australia defines ADR as "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them."[11] ADR processes are conducted with the assistance of a neutral, unbiased, independent and impartial third party in no way connected with the dispute. She/he helps the disputant parties to resolve their disputes by the use of the various well established dispute resolution processes.[12]

INTERNATIONAL INSTRUMENTS GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION

Various international conventions and protocols were introduced to govern the realm of ICA. Among these, the most notable are the New York Convention, 1958, European Convention, 1961, Washington Convention, 1965 and the Model law 1985, UNCITRAL. Most of the nations (both developed and developing), including India, have become signatories to these instruments so as to sync the rules governing ICA. Being signatories, they have also enacted various legislations to govern ICA law and have thereby restricted the negative interference of national courts into international arbitral proceedings.

ARBITRATION LAW IN INDIA – A BRIEF HISTORY

In India, the concept of "Arbitration" has a very long history[13] and needs no introduction in the modern era of the system of dispute resolution. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community—called the panchayat[14]—for

[9] Sarvesh Chandra, "ADR: Is Conciliation the Best Choice" in P. C. Rao and William Sheffield.
[10] Bryan A. Garner (Ed.), Black's Law Dictionary 112-113 (West Publishing Company, St. Paul, Minnesota, 8th Edn., 2004)
[11] Available at http://www.nadrac.gov.au
[12] Ashwanie Kumar Bansal, Arbitration and ADR (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).
[13] The Law Commission of India in its Seventy Sixth Report on Arbitration Act of 1940 stated that Indian Arbitration practices dated back to the time of ancient smritis (legal texts) and digests. Apart from the decisions taken by the King Courts, other tribunals were recognized for dispute resolution, available at https://lawcommissionofin-dia.nic.in/51-100/Report76.pdf
[14] The Panchayati Raj System is recognised as the earliest form of arbitration in India.

a binding resolution.[15] While describing the concept of arbitration, Chief Justice A. Marten in the case, Chanbasappa Gurushantappa v. Baslinagayya Gokurnaya Hiremath[16] observed as.

"*It is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a panch is one of the natural ways of deciding many a dispute in India. It may be that in some cases the panch more resembles a judicial Court because the panch may intervene on the complaint of one party and not necessarily on the agreement of both, e.g., in a caste matter. But there are many cases where the decision is given by agreement between the parties."*[17]

During British rule, it was the Bengal Regulations of 1772[18] created the modern arbitration law.[19] The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.[20]

JUDICIAL APPROACH

Hebei Import & Export Corp v. Polytek Engineering Co Ltd[21]

The Court of Final Appeal held that the public policy exception to the enforcement of an award must be construed narrowly. And further held, enforcement would only be denied where such enforcement would be **"contrary to the fundamental conceptions of morality and justice"** of the forum.[22]

[15] K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, www.iccindia.org. at p 2.
[16] AIR 1927 Bom. 565 (FB).
[17] The Privy Council in the case Vytla Sitanna v. Marivada Viranna AIR 1934 PC 105 has observed that the disputes which were referred to the Panchas and the courts have been duly recognised and have received credence to the awards passed by them, available at https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india/
[18] The 1772 Regulation was later promulgated to the other presidency towns such as Bombay (Bombay Regulation Act, 1799) and Madras (Madras Regulation Act, 1802).
[19] S.K. Dholakia, Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003, INDIAN COUNCIL OF ARB. Q., Jan.-Mar. 2005, at 3, available at www.ficci.com/icanet.
[20] K Ravi Kumar, 'Alternative Dispute Resolution in Construction Industry', International Council of Consultants (ICC) papers, www.iccindia.org. at p 2.
[21] Latest nominations are Lord Sumption, Madam Justice McLachlin and Lord Hodge.
[22] Aditya Kurian, "Arbitration Reform in India: A Look at the Hong Kong Model", *International Arbitration Asia* (21 July 2015) http://www.internationalarbitrationasia.com/articles/arbitration-reform-in-india-a-look-at-the-hong-kong-model/ site visited on Sept 20 2021.

Lin Ming v. **Chen Shu Quan**[23]

The Hong Kong Court of First Instance, in this case, granted a stay of a court proceeding in favour of a Hong Kong International Arbitration Centre's arbitration. It took a restrained approach and refused to grant an anti-arbitration injunction in parallel proceedings.

Grand Pacific Holdings v. Pacific China Holdings[24]

The Hong Kong Court of Appeal has held, in this case, that an award could be set aside on procedural grounds only if the violation was sufficiently egregious or serious so that one could say a party has been denied due process" refusing to set aside an ICC arbitration award made in Hong Kong. On 19 February 2013, the Court of Final Appeal refused to leave to appeal against the judgment of the Hong Kong Court of Appeal, underlining once again what has been deemed – *"The jurisdictions' arbitration friendly credentials and the reluctance of its courts to interfere with the arbitral process and the awards."*[25]

Gao Haiyan v. Keeneye Holdings Ltd.[26]

The Hong Kong Court of Appeal's decision in 2011 overturned the lower court's order refusing to enforce a PRC arbitral award on the ground of public policy. The lower court's order was on the basis of alleged bias arising from the way a "med-arb" process was conducted. The Court held that just because the procedure adopted would give rise to a fear of bias if that proceeding is carried out in Hong Kong, that did not necessarily amount to a breach of public policy. If the procedure is acceptable as a practice in the jurisdiction in which it took place, it will not amount to a breach of public policy in Hong Kong unless it is so severe as to contradict the very fundamental conceptions of justice and morality. The judgment emphasizes that the Hong Kong courts will not readily refuse to enforce arbitral awards, whether rendered in China or elsewhere. It will interpret the public policy ground for refusal of enforcement only narrowly. It also noted that, while determining whether to deny an award's enforcement, more weightage will be given to the decisions rendered by the courts of the seat as to whether to set aside the award.

[23] H.C.A. 1900/201.
[24] (2012) 4 H.K.L.R.D. 1.
[25] Justin D' Agostino and Herbert Smith Freehils, Hong-Kong Court of Final Appeal refuses leave to appeal in the Grand Pacific v. Pacific China case, Kluwer Arbitration Blog. February 20, 2013, http://kluwerarbitrationblog.com/blog/2013/02/20/hong-kong-court-of-final-appeal-refuses-leave-to-appeal-in-thegrand-pacific-v-pacific-china-case/- site visited on September 22, 2021.
[26] [2012] IH.K.L.R.D. 627 (C.A.C.V.79/2011).

ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2021 – FRIEND OR FOE TO INVESTORS

India has always aimed to attain pro-arbitration status among the global stakeholders, which is evident in its successively amending the 1996 Act. However, the very recent Amendment, i.e., the Arbitration and Conciliation (Amendment) Act 2021, had become a retrogression to this aim. The Statement of Objects and Reasons reflects that it aimed at making India a hub of international commercial arbitration by openly inviting foreign arbitrators to India and eliminating routine corrupt practices in obtaining arbitral awards. That was done by amending Sec 36[27] and eliminating the 8th Schedule of the 1996 Act.[28] A new section was also substituted for Sec 43J[29] of the 1996 Act. However, these changes seriously altered what the previous amendments had introduced.

CONCLUSION

Along with these issues, India also faces some other issues such as a lack of full-time arbitration lawyers. Moreover, there are no specific rules as to regulate the ethics of these arbitrators. We also lack an arbitral institution that can be put at par with the global arbitral institutions. The author tried to suggest some solutions for this issue also.

In conclusion, the author believes that by introducing a new legislative framework adhering strictly to international standards and practices will help India resolve the current issues present in the arbitration regime. Taking regressive steps will tarnish the "arbitration-friendly" image of India. No other pro-arbitration legislations and UNCITRAL Model Law, 1985 contains provisions offering "unconditional stay" of arbitral awards at the enforcement stage. If India starts to amend and introduce provisions of regressive nature, then it will defeat the very purpose of an alternative dispute resolution mechanism. In the final chapter of this dissertation work, the suggestions to resolve these issues will be discussed in detail.

[27] Vide Sec 2 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).
[28] Vide Sec 4 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).
[29] Vide Sec 3 of the Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021 (India).

REFERENCES

1. Dharmendra Rautray, Wolters Kluwer Principles of Law of Arbitration in India (2018).
2. Fali Nariman, Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture, Arbitration International, Volume 27, Issue 2, 1 June 2011.
3. Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge University Press, (2008).
   - ✓ Devika Khanna, "Arbitrator's recent adventures and misadventures in India" 15(6)International Arbitration Law Review 203 (2012).
   - ✓ Dr. Leena Moudgil, Judicial Response to International Commercial Arbitration with Specific Reference to Venue of Arbitration.
   - ✓ F.S Nariman: East Meets West: Traditions, Globalization and the Future of Arbitration, LCIA Arbitration International Vol 20, Issue 2, pp.123.
   - ✓ Gary B. Born, International Commercial Arbitration in the United States: Commentary & Materials (Deventer; Boston: Kluwer Law and Taxation Publishers, 1994). 1041p. xxKF9085.A7B670 1994