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CHAPTER 1

ARBITRATION LAW IN INDIA: A CRITICAL ANALYSIS

Amit Verma, Associate Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- amitverma2@gmail.com

ABSTRACT:

When India passed the Arbitration and Conciliation Act (also known as "the Act" or "new Act"), a new era in its arbitration rules began. The Act's key characteristics are highlighted in this article, which also examines how it has operated for almost ten years. 1940 Act oversaw the nation's arbitration legislation prior to 1996. This Act gave litigants numerous opportunity to ask the court for involvement and was partly based on skepticism of the arbitral process. Due to delays caused by this and a slow judicial system, arbitrations became ineffective and undesirable. A Supreme Court decision from 1981 contains a telling remark by Justice DA Desai about the operation of the old Act: "The way in which the proceedings under the (1940) Act are conducted and without a single exception challenged in Courts, has made lawyers laugh and legal philosophers weep. The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration and the Arbitration Rules of the United Nations Commission on International Trade Law 1976 served as the foundation for the new Arbitration Act that India (along with a number of other countries) implemented. In January 1996, this occurred. The ineffectiveness of the previous legislation was explicitly stated the Statement of Objects and Reasons for the Act. It was stated that the current act had "become outdated" and that a new act "more responsive to contemporary requirements" was needed. "Our economic reforms may not become fully effective," it continued, If the law governing the resolution of both domestic and foreign commercial disputes remains out of harmony.

KEYWORDS:

Arbitration, Arbitral Process, Conciliation Act, Commercial Disputes, International Trade Law, International Commercial Arbitration.

INTRODUCTION

The Act is a piece of combined law. It includes provisions for domestic arbitration, foreign award enforcement, international commercial award enforcement, and conciliation (the latter of which is based on the UNCITRAL Conciliation Rules of 1980).The Act's Parts I and II contain some of the more important sections. The provisions for both domestic and foreign business arbitration are found in Part I. Regardless of the nationalities of the parties, Part I would apply to any arbitration to be held in India. Foreign awards can be enforced under Part II[1].The Model Law's broad provisions are found in Part I, which is more thorough. It stipulates, among other things, the arbitrability of disputes, the absence of court interference, the makeup of the arbitral panel, its jurisdiction, how the arbitration will be conducted, the right to appeal the arbitral judgment, and its enforcement. The enforcement of foreign awards covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Convention on the Execution of Foreign Arbitral Awards, on the other hand, is primarily the focus of Part II.

As a result, Part II is (by its very nature) incomplete. In the case of Bhatia International v. Bulk Trading, the Supreme Court innovated the law as a result of this. In this case, a party seeking protective measures under the rules of the International Chamber of Commerce International Court of Arbitration8, which will be held in Paris, asserted the jurisdiction of the Indian court. Part I is the sole part of the agreement that addresses temporary measures, and it only deals with domestic arbitration. As a result, the court was in a position where there was no propriovigore legal provision that it could use to impose temporary protection orders. The Supreme Court concluded that the "general provisions" of Part I of the Act would apply to offshore arbitrations as well, unless the parties expressly or implicitly restrict their applicability. Therefore, by using judicial innovation, the Supreme Court added foreign arbitrations to the broad terms of Part I[2].

This was based on the presumption that the Indian courts would otherwise have jurisdiction over the dispute (in the sense of an international court). This was established in a later Supreme Court ruling in the case of ShreejeeTraco (I) Pvt Ltd v. Paperline International Inc. In this case, the court was asked for help in selecting an arbitrator for a foreign arbitration. Section 11 of Part I of the Act (which only relates to domestic arbitration) grants the court the authority to choose arbitrators. The court turned down to utilize its authority. It was determined that the arbitration would take place in New York and that the law of the arbitration's seat would control the proceedings. Therefore, the Bhatia-sanctified expansion of Part I regulations to foreign arbitrations would not be used in every circumstance. First, the Indian courts would need to decide if they have international jurisdiction.The only requirement is that the dispute must be arbitrable in order for the Act to apply, whether the arbitration is institutionally conducted or ad hoc, statutory or non-statutory, etc. The key elements of the Act are covered here.

1. **Definition of Arbitration Agreement**

A written arbitration agreement is required, and it may even be included in a letter exchange or other kind of communication that serves as a record of the agreement. The arbitration agreement need not be in writing; instead, it can be upheld by the parties' actions without being signed. If there is an exchange of a statement of claim and defense in which the existence of the agreement is stated by one party and not rejected by the other, the agreement would also be deemed to be in writing.

2. **Disputes that Can Be Arbitrated**

The Act specifies that there is no requirement for a contract between the parties. Consequently, a tort issue may also be referred. In Renu Sagar Power Co. v. General Electric Co., the Supreme Court made the following ruling:

i. The concern is not whether the claim falls within the category of tort, but rather whether it "arises out of" or is "related to" the contract, that is, whether it is caused by a breach of the contract's terms or follows from one. The court in Renu Sagar I also agreed with an English ruling in Woolf v. Collis Removal Service, where the Court of Appeal determined that even though the negligence claim was a tort claim and not a contract claim, there was still a sufficiently close connection between the claim and the transaction to bring the claim within the arbitration clause. The court in Renu Sagar continued, citing this:
ii. This case law demonstrates unequivocally that an arbitration clause will apply even if a claim does not directly originate from a contract that contains one if there is a close enough link between the claim and the transaction covered by the contract.Therefore, whether a claim arises out of a contract or a tort, it would be brought before an arbitral tribunal unless it could be shown that the claim arises outside of the contract that contains the arbitration clause[3].

The question of whether arbitrators would have the authority to require the precise fulfilment of a contract sparked debate. According to the Delhi High Court's ruling, the Specific Relief Act of 1963 gives civil courts the legal authority to order specific performance. As a result, an arbitral tribunal would lack this authority. The High Courts of Punjab, Bombay, and Calcutta, on the other hand, adopted the position that arbitrators could award specific performance. In Olympus Superstructures Pvt Ltd v. Meena Vij ay Khetan, the Supreme Court put an end to the debate by ruling that arbitrators do have the authority to mandate the specific performance of a contract. The court cited Halsbury's Laws of England, which stipulates that a "justifiable issue triable civilly" must be present in any disagreements or disputes that can be addressed to a court. If the issue can be resolved legally through agreement and satisfaction, that is a fair test[4].

In the matter of Hindustan Petroleum Corporation v. Pink City, the respondent objected to arbitration on the grounds that the claimant's cause of action (short delivery and tampering with weights, measures, and seals) amounted to a specific statutes-based crime[5]. It was argued that only officers authorized by law to do so could look into the respondent's actions, and that only a court with appropriate jurisdiction, not an arbitrator, could determine whether or not an offense had occurred. The Supreme Court rejected this

argument, ruling that the claimant's contractual rights may be enforced through the arbitration procedure since they are independent of any statutory provisions: According to Indian jurisprudence, "the existence of dual procedure, one under the criminal law and the other under the contractual law, is a well-accepted legal phenomenon."

DISCUSSION

However, the Supreme Court has ruled that a claim for winding up is not subject to arbitration and, as a result, a court action for winding up cannot be thrown out on the grounds that the parties had signed an arbitration agreement.The sanctity of an arbitration agreement has suffered significantly as a result of the Man Roland v. Multicolour Offset case. In this case, the Supreme Court decided that the Monopolies and Restrictive Trade Practices Commission of India (the "Commission") would have the authority to consider a claim for damages resulting from an alleged "unfair trade practice" (in this case, the alleged sale of defective goods and a lack of services). An arbitration clause stipulating arbitration in Paris under the ICC Rules with German law in effect was included in the parties' contract. The Monopolistic and Restrictive Trade Practices Act of 1969 (the "MRTP Act"), according to the Supreme Court, offers statutory remedies for statutorily defined offenses in addition to the typical remedies provided to parties under the Contract Act. Therefore, despite the parties' agreement to arbitrate their dispute, the complaint for damages under the MRTP Act would be upholdable. This case gains significance because the MRTP Act's definition of a "unfair trade practice" is so broad. Any "unfair or deceptive practice" in the sale of goods or services is included. By modifying the MRTP route, the Indian claimant in this case was able to get around the arbitration agreement and file a lawsuit for damages in India (with Indian law applying)[6].

Distinguishing Expert Determination from Arbitration

In the case of KK Modi v. KN Modi, the Supreme Court had the opportunity to thoroughly consider this. Citing Mustill & Boyd's Commercial Arbitration25 and Russell on Arbitration26, it came to the conclusion that there were, for the most part, no conclusive tests one could use to determine whether the agreement was simply to refer an issue to an expert or whether the parties had actually agreed to resolve disputes through arbitration. It was concluded that because of this, our courts have placed a strong emphasis on the following:

a. The existence of disputes as opposed to trying to prevent future disputes;
b. The intended role of the tribunal or forum chosen; and
c. The intended binding nature of the decision.

The parties' nomenclature may not be definitive. The agreement's genuine objective and purpose must be examined.

Arbitration in International Business

As was already established, Part I of the Act regulates both domestic and foreign business arbitrations. Only two circumstances give domestic arbitration a different treatment from international business arbitration under Part I. One relates to the court's designation of an arbitrator, and the other relates to the choice of the applicable law; these are explored below.An arbitration is considered to be "international commercial arbitration" if at least one of the parties is a national or habitual resident of a nation other than India, a company or organization that is incorporated in a nation other than India, or a group of people whose "central management and control"28 is exercised in a nation other than India[7].

The Courts Should Not Intervene Principle

The Act's essential tenet is that the courts shouldn't become involved in arbitral procedures. In fact, only three scenarios are allowed by the Act for court intervention in arbitral proceedings. Which are:

i. Appointment of arbitrators in cases where the parties' intended method for doing so is unsuccessful (section 11).

ii. Determination of whether the arbitrator's mandate is terminated for failure to perform his duties or failure to proceed without undue delay (section 14(2)); and. assistance with gathering evidence (section 27).
iii. Contrary to the Model Law, Indian law is noticeably more restricted when it comes to authorizing court action.

A non-obstante clause in Section 5 of the Act states that, unless otherwise provided for, no judicial authority may intervene in matters controlled by Part I.A corresponding section is Section 8. It specifies that the parties shall be sent to arbitration by the judicial body before which an action is launched in a matter covered by an arbitration agreement. The only requirement is that the party who wants to challenge the legal process must do so before making a substantive argument. The arbitration process may begin, continue, and result in the rendering of an award during this time.The first is a non-obstante clause in section 5 (departing from the Model Law). Additionally, Section 8 deviates from the Model Law. According to the corresponding clause in the Model Law (Article 8), the court may consider an objection that the arbitration agreement is "null and void, ineffective, or incapable of being performed." The legislative goal was to keep the courts out and allow the arbitral stream to flow freely, as evidenced by the deviations made by Indian law.

The Indian courts have, for the most part, a solid understanding of the spirit and purpose behind the principle of nonintervention. As a result, in the case of CDC Financial Services (Mauritius) Ltd v. BPL Communications, the respondent was granted an anti-arbitration injunction by the High Court on the grounds that the pledge of shares that was being sought to be enforced through arbitration would allow the claimants to seize control of a telecom company, which would be illegal under Indian law given that it was a foreign company. The Supreme Court rejected this argument on appeal, claiming that it was a merits-based argument that was outside the exclusive purview of the arbitrators. It's interesting to note that in addition to vacating the injunction, the court also prohibited the respondent from submitting any additional petitions "which would have the effect of interfering with the continuation and conclusion of the arbitration proceedings." However, in Sukanaya Holdings v. Jayesh Pandya, the Supreme Court declined to stop the legal proceedings on the grounds that the arbitration agreement's subject matter was distinct from that of the civil lawsuit. Additionally, the parties to the two actions were not the same. The court determined that in order for the mandatory provisions of s. 8 to be applicable, the full subject matter of the lawsuit must be the topic of the arbitration agreement[8].

Selecting Arbitrators

The Act gives the parties complete discretion when choosing their arbitrators. The Chief Justice of a High Court in the case of a domestic arbitration or the Chief Justice of the Supreme Court of India in the case of an international commercial arbitration may be approached for this purpose, though, if the parties' agreed-upon mechanism for appointment is unsuccessful. This is the first situation where the Act contemplates using the court system in connection with arbitration procedures.

The Act indicates its consideration for a foreign claimant involved in an Indian arbitration. Therefore, parties to an international commercial arbitration would be able to access the highest judicial authority of the nation, namely the Chief Justice of India, whereas parties to a domestic dispute would have to approach the Chief Justice of the High Court of the state. (In contrast, the Model Law envisions a court making the appointment.The function has been delegated to the Chief Justice or his designee with a view to ensuring that the nomination of the arbitrator is made by a person occupying high judicial office or his designee, who would take due care to ensure that a competent, independent, and impartial arbitrator is nominated, the Supreme Court stated in Konkan Railway Corporation v. Rani Construction Pvt Ltd.

It was questioned whether the Chief Justice must fulfill his appointment-related duties in a judicial or administrative capacity. A certain protocol would need to be followed in order for the Chief Justice to operate in a judicial capacity, which would inevitably cause delays[9]. The judgment may also tend to cast doubt on the arbitrator's ability to decide matters of merit or jurisdiction on their own. Also possible are

decisions that disagree with one another. After some disagreement, the Supreme Court's Constitution Bench (i.e., a bench made up of five judges) in the Konkan case ultimately took the lead in the issue. In this case, the court ruled unanimously that the function of appointment is administrative and not judicial in nature. It was decided that one of the goals of the statute is to form the arbitral tribunal as soon as is practical. The opposing party just needs to be informed "so that it may know of it and may, if it so chooses, assist the Chief Justice or his designate in the nomination of an arbitrator"; formal pleadings are not even necessary for this purpose.

This important decision ensures that the arbitration procedure won't be slowed down by the need to ask the court for help setting up the arbitral tribunal. Therefore, in a particular case, the arbitral tribunal alone must decide whether there is a dispute regarding the existence or legality of the arbitration agreement; the Chief Justice should not become involved in this matter. The Supreme Court made it clear in the ensuing case of Nimet Resources v. Essar Steels that the arbitral tribunal must be consulted in order to resolve any "doubt" that the Chief Justice or his designee may have regarding the existence or legality of an arbitration agreement. The power of appointment under Section 11 may only be rejected if the Chief Justice "can be absolutely sure" that there is no existing arbitration agreement between the parties.

Dispute Before an Arbitrator

The Act also mandates that the arbitrators (including party-appointed arbitrators) be independent and impartial and make complete disclosure in writing of any circumstance likely to give rise to justified doubts about the same, similar to Art. 12 of the Model Law and Art. 10 of the UNCITRAL Arbitration Rules.At this point, one can draw attention to a strange practice in India that calls for arbitration by an owner's employee or nominee (for example, arbitration by the managing director or engineer of the business) in some government and public sector building contracts. Through repetition, this practice has gained sanctity and is maintained throughout the new administration. Although the issue hasn't been put to the test under the 1996 Act, it's feasible that this appointment practice would still be upheld[10].

Only two circumstances allow for the challenge of an arbitrator. First, if circumstances exist that raise legitimate concerns about his independence or impartiality; second, if he lacks the credentials recognized by the parties. The petitioner must file a challenge within 15 days after learning of the arbitral tribunal's composition or the events that give rise to a challenge. In addition, the arbitral tribunal (and not the court, as was the case under the previous regime), subject to the parties' consent, shall decide on the challenge. If the challenge is unsuccessful, the tribunal will proceed with the arbitration and issue the award, which will then be subject to dispute by the party who felt wronged. This is yet another substantial deviation from the Model Law, which calls for going to court if the arbitral tribunal dismisses the case.

CONCLUSION

In conclusion, India has implemented a progressive piece of law that largely draws inspiration from the Model Law and the UNCITRAL Arbitration Rules. Any deviation from that is essentially intended to prevent court intervention. Witness, for instance, a constitution bench of the Supreme Court ruling that the Chief Justice of India or the Chief Justice of the High Court (as the case may be) would exercise administrative and not judicial functions in the matter of appointment of arbitrators. The courts of the land (by and large) are in tune with the spirit of the law. Without a doubt, the Saw Pipes decision represents a step backward. However, it is hoped that the choice will be revisited when the time is right.India has a functioning legal system. The culture of arbitration needs to be ingrained in the legal profession, the judicial system, and the arbitral community. To truly offer an appealing arbitration structure, India needs to let go of the baggage from the past.

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CHAPTER 2

ARBITRATION AND SIGNIFICANCE OF ARBITRATION AGREEMENT: AN OVERVIEW

Sourabh Batar, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-battarsourabh@gmail.com

ABSTRACT:

Arbitration is primarily thought of as a way to settle disputes between certain parties. Old communities actively adopted it to put an end to member disputes because it had been known since antiquity. These days, both national and international legal regulations completely accept it. In other words, arbitration unquestionably plays a crucial role in defining various types of interpersonal business relationships, which in turn encourages the inclusion of arbitration clauses in contracts to resolve conflicts brought on by these relationships. In some way or another, arbitration also seeks to shield disputants from going to court. Instead, litigants should be fully dedicated to referring their conflicts to an arbitrator they can trust to resolve their actual or potential disagreements, as well as to enforcing the arbitrator's decision.However, some legal experts consider arbitration to be a legal issue. Given that arbitration is seen as a means of resolving a dispute and taking into account any contractual requirements, an arbitration clause must be unavoidably legal and have a significant impact even if the original contract is voided. Such a method is necessary because, notwithstanding any attempt on the part of one of the litigants to challenge the original contract, the arbitrator's power must always be available throughout the arbitration act. This paper provides some insight into how to choose an arbitration clause's authority when creating an original contract. It explains the meaning of the term, what it means conceptually, and how it works legally.

KEYWORDS:

Arbitration,Arbitration Agreements, Juridical Responses, International Commercial Arbitration, Power Of Attorney.

INTRODUCTION

Undoubtedly, arbitration plays a significant part in defining many types of interpersonal business relationships. As a result, contracts often contain arbitration clauses to resolve conflicts brought on by these agreements. It attempts to discourage litigants from turning to the legal system in some way. Instead, litigants should be fully dedicated to referring their conflicts to an arbitrator they can trust to resolve their actual or potential disagreements, as well as to enforcing the arbitrator's decision[1]. This paper provides some insight into how to choose an arbitration clause's authority when creating an original contract. It explains the meaning of the term, the idea behind it, and the legal basis for arbitration agreements.

The Arbitration Agreement Concept

Giving in to an agreement reached by several parties in relation to international trade contracts typically results in resorting to international commercial arbitration. These parties' consent to submit their dispute to arbitration as opposed to a court of law. The arbitration agreement may be included as a clause in the original contract or it may take the form of a separate agreement. However, there are two ways to discuss the arbitral agreement: the first focuses on the idea of an arbitration provision, while the second discusses the arbitration clause itself.

On the condition that a clause mentioned in a contract state that they agree to consult a specific arbitrator or arbitrators in the event of a dispute, two disputing parties may agree to accept arbitration; this two-conflicting parties' agreement is typically referred to as an arbitration clause. In other words, an arbitration provision is an agreement established by many contractual parties on how to resolve a certain future dispute that will be resolved by arbitration. In this way, whether or not a dispute is primarily a result of the terms of

the original contract, it fulfills the aims of resolving a prospective dispute or is usually implemented. A clause requiring arbitration may be included in the original contract itself or in a subsequent agreement reached before any issues arise[2].According to some jurists, an arbitration provision is an agreement that requires two parties to ratify it without first going to court. In order to put an end to future conflicts between the parties when the initial contract goes into effect or is construed, the arbitration clause is frequently incorporated into its terms.The arbitration provision need not be a part of the original language of a contract; it may instead be put on a separate piece of paper. Because it was widely accepted prior to any potential disagreement, this, in turn, does not distort its natural aspect as an arbitration clause.

Any language that is recognized by all parties can readily be used to write an arbitration clause. It doesn't matter what kind of language is used as long as it is ultimately understood to reflect the parties' willingness to submit their dispute to arbitration. It is common practice to write arbitration clauses in the same exact terms as the original contract, nonetheless. Importantly, arbitration clauses are taken into account as agreements stated in contracts that future conflicts will be arbitrated, and they must be viewed as either independent agreements or as part of the contract.On a national level, the 1969-issued Iraqi Procedures Law, item (252) states: "An agreement is not put down unless it is codified." According to Article 144 of the French Procedures Law, which was published in 1991, an arbitration provision is an agreement that requires two parties to submit all disputes to arbitration (via a contract). As a result, arbitration may be required as a condition of a possible dispute in order to resolve it outside of a court of law. In essence, it is seen as an agreement between parties to forgo the use of a court of law to resolve possible conflicts. Regarding Egyptian law, the 1991 (item 12) Arbitral Law, number (27) was quite thorough. "Arbitration precondition must be written," it states. If not, it ceases to be true. It shall be regarded as written if it comprises a deed that has been signed by two parties or if it involves letters, telegrams, or any other written form of communication between the two parties.

Arbitration Agreement

A stipulation of arbitration (also known as an arbitration document) is an agreement signed between two parties in the event that they have a disagreement and that the dispute must be arbitrated. The Egyptian Arbitritation's item (10) which states that an arbitration agreement is one in which two parties agree to submit their disputes to arbitration in an effort to resolve most, if not all, de facto or potential disputes resulting from a specific legally contractual or non-contractual relationship, has been used to legitimize the requirement of arbitration. The agreement to arbitrate may also be enforceable if the disagreement has already been the subject of legal action[3].

It is possible for an arbitration clause to come before or after one that has already been authorized, thus unless the parties agree otherwise, the authorisation of the arbitration clause has not completely rendered the earlier arbitration clause void. Stipulation of arbitration is distinguished by the fact that it is established as soon as the alleged conflict manifests itself.However, it ceases to be true when the arbitration clause is agreed to before a dispute develops, and this is a crucial element in its validation.The phrase "a dispute arises" might mean one of two things: either two parties actually engage in conflict, or the conflict is still ongoing. Basic concerns that should be included in an arbitration clause are as follows:

1) Identifying the reason why a dispute was submitted for arbitration.
2) Identifying the parties involved in a dispute and, if known, their addresses.Because most contracts in Iraq are established in advance, such as insurance contracts and business contracts, arbitration clauses are frequently taken for granted. Conversely, in both Egypt and France, the stipulation of arbitration has typically been made when parties submit their disagreement to a court of law. However, parties may agree to end the dispute whenever the conditions are appropriate for stipulation of arbitration.
3) The arbitrators are freely chosen by the parties.

The fact that parties are not constrained in their ability to choose arbitrators is one of the key issues when dealing with arbitration clauses. Item of the International European Agreement states that parties are

entirely free to select the arbitrators who will try to settle a current dispute.Arbitrators would be recognized as specialists after they were selected. On the other hand, it is possible that parties won't always agree on who will be responsible for arbitration; in these situations, other authorities will take on this responsibility. The European Agreement has designated the chamber of commerce (of the nation that the two parties have chosen) as the arbitrator and the arbitration venue. In other words, this agreement addresses the issue of identifying a court of law that is in charge of adjudicating a dispute through organizational texts.

Power of arbitration refers to the idea that even if an agreement is thought to be fraudulent or inaccurate, it can nevertheless be adopted and be effective. Arbitration clauses can occasionally be seen as independent contracts having adequate features of their own because they are not primarily based on the original contract. The power of arbitration agreement is described in item of the Iraqi International Commercial Law of Arbitration as a situation in which the arbitration clause is regarded as an independent agreement separate from other contractual provisions and, above all, any attempt to void the contract in which it is contained does not significantly affect it. It's important to note that this definition fits in perfectly with what the law has said about what constitutes a power of arbitration agreement. It has been somewhat extended, but suffices to say that there is an instance where the arbitration clause stands fully apart from the original contract. Also, when referring to legal words, item was expected to include this definition.

One of the significant pieces of legislation that adopted an arbitration clause in place of the original contract in which it was originally inserted is Egyptian law. A contentious legal dispute had already begun on the subject of whether arbitration clauses are independent of the original contract before Egyptian Arbitral Law was published in 1994. Arguments are made that the arbitration clause's authority should be expressly separated from the original contract.According to certain jurists, the arbitration clause cannot exist separately from the contract. Because of this, when a claim is made that the contract is invalid, the arbitral tribunal cannot take that claim into account. As a result, it must stop the proceedings as soon as a decision is made to declare the contract null and void. According to some lawyers, the arbitration agreement is what causes an arbitrator to eventually rise to the position of becoming a leading authority[4]. The arbitration clause will undoubtedly be impacted by the parties' acrimonious disagreements over the contract, demonstrating the subordination of the latter to the former. Although the arbitration clause is referenced repeatedly in the contractual clauses, some legal experts believe it has little impact on the original agreement

According to Al-Jammal , the following significant outcomes are obtained regarding how to implement a power of arbitration agreement to a contract:The relevant arbitration clause stays true and extremely effective whether or not the contract is void owing to a specific reason, such as having an incompetent party[5]. Because both parties must be authorized by complete competence and an obligatory power, the original contract and arbitration clause would be irreparably distorted if one of the parties was incompetent. Additionally, a contractual annulment or determination is not a roadblock in the way of an arbitration clause, making it impossible for a court of law to decide whether the original contract should be upheld or declared invalid.

DISCUSSION

Importance of an Arbitration Power of Attorney Agreement

There is an increasing trend to save time and minimize procedures when an arbitration clause is to be independent of the original contract in which it is placed. However, if an arbitration clause is included in the original contract, it becomes independent on its own and offers the potential for arbitrators to determine whether the original contract is still legal or not. It is important to note that unless a dispute is resolved by the national court of law, it would be difficult for arbitral proceedings to be put into operation since de facto or possible arbitration would be directly tied to the original contract. In other words, even if one of the parties to the contract declares the contract itself void, the relationship between the arbitration clause and the original agreement does not give the arbitrator the authority to proceed with arbitration[6]. The validity of the original contract and the arbitration provision should both be taken into account at the same time by

the arbitrator. Arbitration would be governed by a court of law in the event that the validity of the original contract is questioned, and the arbitral processes would not be implemented until the court of law verified the validity of the original contract. In addition to the litigation being sent to the national court of law to determine whether the original contract and arbitration clause are legitimate or not, it is unacceptable that the arbitration authority refuses to entertain a lawsuit if the original contract is dissolved. If a court of law rules that the arbitration clause and the contract are legal, the arbitration authority may then proceed according to its rules. Otherwise, the authority of arbitration would be pointless. To ensure that arbitration stays mandatory and effective, a power of arbitration agreement should be implemented at the time a contract is signed. This would prevent the arbitration clause from becoming inextricably attached to the original contract.

The UNCIRAL has described an arbitration agreement or arbitration provision as "a two-sided agreement in which some contractual and non-contractual disputes must finally be settled. On the other hand, arbitration agreements or arbitration clauses are viewed as actual contracts. Others define an arbitration agreement as a pact requiring the parties to resolve any actual or potential disputes through arbitration.According to the terms of the arbitration agreement in question, when two parties are involved in a financial dispute, they must resolve it through arbitration rather than a court of law. The laws of Egypt and Jordan also stipulate that the two parties may and must enter into this arbitration agreement. Notably, an arbitration agreement must be drafted in compliance with the following requirements:

1) A written arbitration agreement is required. If not, it ceases to be true. It is written if it contains a document that both parties have signed, or if it contains two parties' shared methods of communication that serve as an agreement document.
2) If the referral thinks that the terms of a model contract or an international agreement apply, every contractual matter may be seen as containing a written arbitration agreement.

The original contract is a matter of systemizing parties' rights and organizing their legal centers, and if arbitration is agreed upon at the time a court of law considers the two parties' dispute, the court has to decide on referring the dispute to arbitration and this decision is looked upon as a written arbitration agreement. The basis for arbitration is that the parties are ready to refer disputes to arbitration judgment rather than state (governmental) judgment. It is believed that the initial contract is what caused the parties to establish such a contract, and it is typically estimated using personal standards that differ greatly from one person to another.

Despite being a special judge, an arbitrator actually has judicial authority comparable to that of a government because he resolves disputes by binding laws that must be followed by all parties. As a result, this trait gives the arbitrator a status that should never be lower than that of a court of. The three main theories that form the foundation of the power of arbitration agreements are the theory of the extrinsic effects of the contractual annulment, the theory of the differentiation between the arbitration agreement and the original contract, and the theory of the juridical specialty of arbitration.

Theory of the Contractual Annulment's Extrinsic Effects

According to some legal experts, an arbitration agreement may be created by a contract formed after a dispute has arisen, without a specific agreement being specified in a separate document. According to the original contract, an arbitration agreement may also be created through a contractual provision. Here, we might ask what principles underlie the application of an arbitration agreement and whether we can gain anything from the theory of contractual transformation or the theory of contractual depreciation. People can exchange their commitments through the theory of contractual transformation. It will become valid once the conditions are met. If not, it stops being true.

The contract would be declared invalid and have no bearings based primarily on this invalidation. However, there might be some extrinsic impacts if a lawmaker tries to find out what negative implications an invalidation might have. The contract may be completely void, according to the evidence, but it is said

to have some independent parts that allow for the creation of a new contract with all of its desired consequences, which are referred to as "contractual transformation" effects[7].Due to the fact that a contract cannot be transformed into another one unless the preceding legal disposition is wholly invalid, it is therefore impossible to utilize and, more importantly, activate the theory of contractual transformation in the context of the power of the arbitration agreement in relation to the original contract.The legal disposition, however, cannot be changed and necessitates some sort of annulment if a portion of the original contract is inaccurate.

The principle of contractual depreciation states that even though a contract may overlap with other concerns, it is still generally regarded as legitimate. If some of these issues are untrue, the contract may still be enforceable as long as it still addresses the other true ones. A single contract must be split into two pieces, one of which must be valid in order for the theory of contractual depreciation to apply. The latter may be treated as a distinct contract if so, provided in the applicable contractual provisions.

What has been said thus far is accurate in the context of arbitration since any legal relationship involving two parties must be expressed in the form of a contract or agreement that is made or reached when those parties are embroiled in a dispute. This can be expressed through the arbitration clause in the original contract because it is not just a clause in the contract but also a separate agreement. Moreover, while closely examining this topic, we can observe that one document, at first glance, appears to be in the form of one contract: its main body is devoted to establishing the legal relationship between the two parties, while the following section represents an arbitration agreement.

Arbitration Agreement: The Difference in the Original Contract

One of the factors that has not altered in some of the positive laws that are directly related to international commercial arbitration is the power of arbitration agreements. This principle has been modified by legislative requirements or judicial standards.For instance, the French Court of Cassation passed judgment in 1963 regarding GOSST. It was declared that the arbitration agreement is completely independent under the principles of international commercial arbitration, regardless of whether it is included in or excluded from any initial legal disposition. To protect an arbitration agreement from being impacted by any potential annulment, however, some exceptional conditions with complete legal independence may arise.The English Law strives to define arbitration agreements as follows: parties, when entering into a specific disputeover contracts, proceed to arbitration as long as disputes have already arisen and will continue to do so in the future. It also emphasizes the need for an arbitration clause to be documented in the form of a document that contains some sort of arbitration agreement principle.

In other words, the principle of the independence of the arbitration provision says that the arbitration clause and the original contract are two distinct variables. In that it is self-contained, particularly autonomous and independent in accordance with its contractual conditions, regulations, and norms, the arbitration clause is an internal contract that is similar to the original one. It typically addresses matters and situations that are not covered by the original contract and seeks to resolve any potential conflicts that may have resulted from it.The English Arbitration Law of 1996, which states in item that if parties do not agree on anything different from the agreements they have already made, then an agreement that is consciously a part of another written or unwritten agreement must not be regarded as untrue, nonexistent, or inactive and must instead be a fully independent agreement[8].

It is impossible for an arbitration agreement to exist without also being included in the initial contract. In the absence of an arbitration agreement, the contract is out of consideration and is therefore expected to be void. When we say that the arbitration agreement and the original contract should be closely related, we mean that they should be physically rather than legally possible. Even if the contract to which the arbitration agreement is connected is void for whatever reason, the arbitration agreement may still be made and upheld. This is commonly known as the power of arbitration agreement of the contract principle, and several Arab laws have incorporated it.

Contractual parties are prohibited from going to a court of law to resolve their disagreement when arbitration is agreed upon, which calls for some form of arbitration. Additionally, while the arbitration agreement is still fully enforceable, the parties are not permitted to withdraw it voluntarily. Although parties agree that this arbitration clause is destined to the original contract, some academics believe that accepting the arbitration clause is something that is required. International treaties and international business institutes of arbitration both commonly adopt the notion of the power of arbitration clause as one of their core tenets. In actuality, such a principle is involved with other rules of setting up legally binding commercial arbitration, and contractual parties are not allowed to fringe them for the simple reason that the arbitration agreement would be void. It should be noted that notwithstanding the parties' agreement that the arbitration clause is incorporated into the original contract, we do not agree with the opinion that the arbitration clause must be admitted automatically. Despite the parties' desires, the power of arbitration clause may not necessarily be guaranteed when the initial contract is made.

Additionally, the resolution of disputes brought about by the termination of the contract would not, in a secondary manner, result in the termination of the arbitration agreement[9]. As a result, even though it was mentioned in the original contract, the arbitration agreement will no longer be in effect.Therefore, if the power of arbitration agreement is legitimate on its own, it is crucial to activate the entire agreement. But if it is flawed from the start, it won't have an independent principle. Lack of the independence principle renders an arbitration agreement void and prevents it from even existing as an agreement.

Theory of Arbitration Juridical Specialization

Even if one of the contractual parties contests the validity of the arbitration agreement for reasons that are directly related to the arbitration clause or stipulation of arbitration rather than the possibility of annulling the original contract, the fact that a juridical specialist is permitted to resolve disputes based on his or her own specialized field authorizes a court of arbitration to carry out its own mission.It is typical for the original contract's arbitration clause to interpret circumstances of invalidation, but this does not take into account how an arbitrator can continue to carry out his or her duties if the contract is void due to the arbitration clause. This is actually a crucial point, and the arbitrator's consideration of specialty may have had an impact. Additionally, the same point grants the arbitrator a sort of license to consider, if necessary, the annulment of the arbitration agreement: he delivers specific decrees indicating that this is not covered by his authority[10].

The outcomes indicated above actually run counter to reports produced by an arbitrator with the intention of invalidating the arbitration agreement. How is it feasible for someone to serve as both an arbitrator and a contractual party at the same time? Is the question that is put forth in this situation. As a result, the arbitration agreement is void for the arbitrator in this situation. The simplest way to deal with the issue of a party-arbitrator duality is to ask whether another basis may be established under which an arbitrator can resolve conflicts based on his or her area of expertise. The principle of an arbitrator's expertise in conflict settlements cannot be the true basis of such a situation, according to the arbitration agreement. This notion can be included into the arbitration legislation of any country or any other country so that the arbitrator's decision may be submitted to the court for consideration.

CONCLUSION

The simplest way to deal with the issue of a party-arbitrator duality is to ask whether another basis may be established under which an arbitrator can resolve conflicts based on his or her area of expertise. The principle of an arbitrator's expertise in conflict settlements cannot be the true basis of such a situation, according to the arbitration agreement. This notion may be incorporated into a specific nation's arbitration law or into the laws of any other nation so that an arbitrator may submit an arbitration award for judicial acceptance.For instance, if a court of arbitration in a country like Egypt or France decides to file a lawsuit because the arbitration agreement is deemed invalid, the decision is made on the basis of Egyptian or French law rather than the arbitration agreement itself, which is the basis for the lawsuit. The principle of a dispute-resolution arbitrator's speciality hasn't totally meant that the arbitrator is free to engage in a legal

assessment of his or her specialization up to this point. Instead, governmental jurisdiction oversees his or her specialization in dispute resolution. The fact that arbitrators are believable and completely trusted to make choices on community members' service explains why the arbitrator is in charge of resolving disputes based on his or her own speciality. Because it permits arbitrators to independently consider their specialization in resolving parties' disputes, the principle of an arbitrator's specialization in dispute settlements has a positive impact. This is because there is a strong consensus among international treaties on this topic. On the other hand, this theory also has a disadvantage in that it enables arbitrators to prioritize conflicts in addition to resolving them in accordance with their various areas of expertise. This is why it is proposed since the issue of priority is given a chronological idea rather than a stepping-stone concept.

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CHAPTER 3

INTRODUCTION TO INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA: A CRITICAL ANALYSIS

Bhirgu Raj Maurya, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- brmourya.mourya321@gmail.com

ABSTRACT:

The globe has become a global village as a result of globalization. Cross-border transactions have increased in real time as a result of business organizations expanding across national boundaries. Due to the "cross-border" nature of the transactions, agreements and contracts negotiated between commercial organizations frequently turn sour, giving rise to conflicts that are outside the purview of local law in a given nation. Cross-border commercial issues necessitate a distinct kind of knowledge when they involve organizations from countries with different legal systems, such as the common law and civil law systems. All agreements entered into by companies acting alone typically have three covenants that are particularly important to note: the first is the "governing law" provision, the second is the "jurisdiction clause," and the third is the "arbitration clause." The "governing law" clause specifies which country's law will be applied in the event that an agreement between two multinational businesses fails. The "jurisdiction clause" specifies which country's courts will have a "say" in the currently disputed topic. The "arbitration clause" outlines how disputes between corporations are to be settled before they are formally brought before a court of law for adjudication; it refers to mechanisms that are in the nature of "out-of-court-settlement-of-disputes," such as: mediation, conciliation, and arbitration.

KEYWORDS:

Arbitration Conciliation Act, Arbitration Clause,Cross-Border Transactions,Governing Law, International Commercial Arbitration.

INTRODUCTION

Parties to international business transactions frequently choose the "seat" of arbitration in a nation that has nothing to do with the commercial activities of the entities involved in order to ensure the lack of "actual" and "anticipatory" biasness. Commercial agreements that are executed between the parties individually typically provide that institutional codes of behavior for arbitration shall apply. The substantive law that shall govern the disagreement relating to the in-question transaction is most frequently indicated and assertively determined by the parties[1]. "The essence of the theory of 'transnational arbitration' is that the institution of international commercial arbitration is an autonomous juristic entity which is independent of all national courts and all national systems of law," wrote Sir Michael John in his well-known book Transnational Arbitration in English Law.

Breaking the ties between the arbitral procedure and the courts of the nation where the arbitration is held is one of the main goals of the transnationalist movement. Regarding India, international commercial arbitration: The Arbitration and Conciliation Act of 1996 governs arbitration law in India. The UNCITRAL4 Model Law is the foundation of the 1996 Act. 'Part I' and 'Part II' are the two major sections of the 1996 Act.Domestic arbitrations are covered by Part I of the 1996 Act, whereas international commercial arbitrations are covered by Part II. International commercial arbitration is defined as arbitration dealing to disputes arising out of legal relationships, whether contractual or not, which are regarded as commercial under the legislation in force in India under Section 2(1)(f) of the 1996 Act.

The foundation for the arbitrators' authority to resolve the issue is the parties' assent.[2] The arbitrator's authority is further constrained by the parties' assent since, with limited exceptions, the arbitrator can only render judgment on matters that fall under the ambit of the parties' agreement. In addition, arbitrators are

supposed to follow the laws, rules, and regulations decided upon by the parties. Normally, a written agreement that is a clause in the commercial contract between the parties expresses the parties' agreement to submit any future disagreement to arbitration[3]. But even if their contract doesn't contain an arbitration clause, they might nonetheless agree to arbitrate a disagreement after it has already occurred. An agreement for submission is what is used here.

Non-Governmental Decision-Making Entities

Arbitrators are unemployed individuals. They are not a part of any official hierarchy. Because they perceive their primary job as resolving the one dispute the parties designated them to decide, they will likely give public policy and interest considerations less weight than judges do. Additionally, unlike some judges, arbitrators frequently show great consideration for the parties and manners when speaking with them. The parties select the arbitrators, and naturally, they would prefer to be chosen once more. They want to come across as cool-headed, considerate, fair-minded, and rational. Arbitrators are not required to be attorneys. Because of their technical expertise, engineers and architects are frequently chosen as arbitrators in several fields. When there are three arbitrators, it is common for each party to choose one arbitrator, with the third arbitrator who will serve as the chair being picked by the other two. However, impartiality and independence are requirements for all international arbitrators.In the event that there is proof that they are not independent and impartial, they may be contested either before the arbitral institution or a court.

The fact that an arbitration ruling is final and binding and, in most cases, cannot be appealed to a higher court is one of the reasons why parties opt for arbitration. Although there are occasionally chances to appeal in some jurisdictions, a party can often only contest an award if there was an error in the procedure. A party may attempt to have the award vacated in court. For instance, unless the parties have agreed otherwise, a party to an arbitral procedure may appeal to the court on a legal issue under the English Arbitration Act in certain restricted circumstances. Article 69(1) of the English Arbitration Act of 1996.

Arbitration's seat

However, under the majority of arbitration statutes, there are only a few very limited reasons for annulling an award, such as a procedural error or a situation in which the arbitrators overstepped their bounds and made a decision on a matter that was not presented to them. The losing party may voluntarily comply with the terms of the award once the arbitrators issue their decision. If not, the victorious party will seek to have the award upheld and enforced by a court in a country where the loser holds property. The losing party may also contest the award in the enforcing court, but only on extremely limited grounds. Basically, the award cannot be contested on the basis of its merits; therefore, even if the arbitrators made legal or factual errors, this will not prevent the award from being executed. A party's award is typically regarded as having the same legal effect as a court judgment once it is recognized in the enforcing jurisdiction and can be enforced in the same manner as a judgment in that jurisdiction. International commercial arbitration has many advantages[4].

The New York Convention, a treaty to which at least 156 countries are parties4, and the neutrality of the forum (being able to avoid the other party's court), according to an empirical study of the reasons why parties choose international arbitration to settle disputes, were found to be the two most important factors. Because courts are compelled to uphold awards under the New York Convention unless there are substantial procedural flaws or issues that affect the integrity of the process, an arbitration award is typically simpler to enforce globally than a national court verdict. Since most courts interpret the acceptable grounds for non-enforcement relatively narrowly and the New York Convention is thought to have a pro-enforcement bias, the vast majority of awards are enforced[5].

DISCUSSION

The opportunity to maintain the confidentiality of the procedures and the award that results is another benefit. Some institutional regulations guarantee confidentiality; however, this protection may be extended to include, for example, witnesses and experts if the parties agree to bind them to a confidentiality

agreement. Because they don't want information about their firm, its operations, the types of disputes it is involved in, or a potentially damaging dispute outcome to become public, many businesses choose confidential procedures. The option for parties to select arbitrators with specific subject-matter expertise is also popular. They also prefer that arbitration typically involves less discovery than full-scale litigation, or at least less discovery than is typical of litigation conducted in the United States. Another appealing feature is the lack of the ability to appeal the decision on the merits many times. Businesspeople prefer resolving a dispute quickly so they can continue operating their company[6].

Although it has been claimed in the past that arbitration is less expensive than litigation, many businesses today do not believe this to be the case. As the quantity and value of business arbitrations have increased, parties have increasingly incorporated many litigation strategies into arbitration. These strategies frequently increase the process's expense, delay, and adversarial aspect. However, despite the fact that arbitration has started to resemble litigation in a few areas, due to the numerous benefits it offers, parties typically still believe arbitration is well the expense. The harmed party must establish a violation, which it can only do if it has adequate access to the documents controlled by the violator. Less discovery means a claimant has a lower likelihood of proving its case in this type of lawsuit.

Furthermore, while the lack of a significant right of appeal in most arbitrations may be advantageous for resolving the conflict, it can be frustrating for a party if an arbitrator made a decision that was obviously incorrect on the law or the facts. Due of this, a few parties in the United States stipulated in their arbitration agreements that any award would be open to judicial review on the merits. However, the U.S. Supreme Court declared in 2008 that parties cannot agree to judicial review of an award's merits in a contract. Instead, the Federal Arbitration Act's list of grounds is the sole basis for reconsideration. These reasons provide for judicial review of issues including an unfair procedure or issues with bias or misconduct on the part of the arbitrator, but they do not allow for review of arbitrator mistakes of law or fact.

Another drawback is that arbitrators lack the ability to impose sanctions on parties that disobey a tribunal's request since they lack coercive authority. For instance, if a person disobeys a court order, the court may punish them for contempt[7]. On the other hand, arbitrators are not permitted to impose sanctions, although they are permitted to draw negative conclusions if a party disobeys a tribunal order. However, new rules issued by the London Court of International Arbitration (LCIA), an arbitral institution, provide the arbitrator broader authority to regulate counsel behavior. However, arbitrators typically have absolutely no authority over nonparties. As a result, when coercive powers are required to enforce compliance with the tribunal's rulings, it may be necessary for the parties or the tribunal to request court intervention.

Furthermore, even though each party may be interested in a different aspect of the same dispute, an arbitral tribunal typically lacks the authority to include all relevant parties in multiparty disputes. Because the tribunal's authority arises from the parties' cooperation, a party who has not consented to arbitrate typically cannot be added to the arbitration. In general, a tribunal does not have the authority to combine similar claims from different parties, even if doing so would benefit all parties.Since they apply "unless the parties have agreed otherwise," many of the provisions in the Model Law are essentially default provisions. The arbitration rules will typically apply if the parties have chosen arbitration rules that offer a procedure or rule that differs from the Model Law because they represent the parties' choice of how to conduct the arbitration, i.e., they show how the parties have "agreed otherwise." The national law selected by the parties as the substantive law will be applied to interpret the contract, assess the merits of any dispute, and resolve any other substantive questions. The tribunal will select the applicable substantive law if the parties have not already done so.

International arbitration practice, which is typically used to varying degrees in all arbitrations, is the next level above national legislation in the regulatory pyramid.This comprises different customs that have emerged in international arbitration, some of which have been codified as extra laws or regulations. Examples include the Rules on the Gathering of Evidence (see Appendix E) and the Rules of Ethics (see Appendix F) developed by the International Bar Association (IBA). Additionally, the IBA has prepared

Guidelines on Party Representation (see Appendix I) and Guidelines on Conflicts of Interest for Arbitrators (see Appendix G). A Code of Ethics for Arbitrators was also created by the American Bar Association and the American Arbitration Association (see Appendix H). Case Management Techniques have been included by the ICC to Appendix IV of its revised Arbitration Rules.Notes on Organizing Arbitral Proceedings, published by UNCITRAL, "provides an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings to assist arbitration practitioners."18 The Notes may help to harmonize arbitration practice even though they do not impose any obligations on the parties or the trilateral.

These international standards may be adopted by arbitrators and parties, or arbitrators may choose to merely utilize them as recommendations[8]. Due to the small number of international arbitrators, international practices both those codified by various international organizations or institutions and those simply recognized and shared among arbitrators as good practices encourage a comparatively uniform set of procedures. Any relevant international treaties are placed at the summit of the inverted pyramid. The New York Convention will be the applicable convention for the majority of international commercial arbitrations because it regulates the execution of both arbitration agreements and awards and because so many nations are party to the Convention. The Inter-American Convention on International Commercial Arbitration (often known as the "Panama Convention") and the European Convention on International Commercial Arbitration are two other significant conventions in addition to the New York Convention.

The New York Convention is comparable in goal and impact to the Panama Convention, which has been ratified or endorsed by seventeen South or Central American nations as well as the United States and Mexico. It has contributed to the increased acceptance of arbitration in Latin American nations. In the Contracting States, the European Convention complements the New York Convention. It addresses a number of general concerns pertaining to parties' rights in arbitration and stipulates specific, constrained explanations for when the annulment of an award under the national law of one Contracting State can serve as a justification for another Contracting State's refusal to recognize or uphold that award. The impact of the European Convention on awards that have been put aside will be covered in further detail.

As can be seen from the foregoing, private agreements, agreed-upon rules, international practice, national legislation, and international conventions all form part of the regulatory framework for international commercial arbitration[8]. Although parties have a great deal of power over the arbitration process, both national and international legislation supplement and strengthen the procedure to help ensure that it is fair and efficient.When parties choose arbitration as their method of conflict resolution, one decision they must make is whether they want the arbitration to be conducted by an arbitral institution or on an ad hoc basis. Each option has pros and cons. The institution's performance of crucial administrative tasks is viewed favorably in an institutional arbitration. Institutional regulations make sure that the arbitration proceeds reasonably, that the arbitrators are appointed on schedule, and that the parties pay all fees and expenses up front. Not having to negotiate fees with the parties is advantageous from the arbitrators' perspective. Additionally, the institution's arbitration rules have been around for a while and are typically fairly adept at handling the majority of unforeseen circumstances. Another benefit is that an award issued by a reputable institution may be more respected by the legal system and the wider international community. This might persuade a loser to accept an award without protest and even offer to pay the money out of pocket.

There is no administrative body in an ad hoc arbitration. The parties are spared from covering the costs and fees of an administering institution, which is one benefit of the outcome. Additionally, the parties have a greater opportunity to precisely design a method to the specific type of dispute.The UNCITRAL Arbitration Rules, which are usually used in ad hoc arbitrations, are one option, or they may choose to create their own rules. (UNCITRAL is not an arbitral institution and neither does it manage arbitrations.) When there is a need for extra flexibility in the processes and one of the parties is a state, ad hoc arbitrations can be especially helpful. The decision that neither party is the respondent, for instance, can be made when both sides have claims against one another[9].The burden of proof for the claims made against the opposing party will then rest solely on each side. But if one or both of the parties purposefully obstructs

the process, it could be detrimental to an ad hoc proceeding. In that case, since there would be no administering body, the parties might need to ask the court for help in advancing the arbitration.

Arbitrations under Commercial and Treaties

State-owned or state-controlled businesses are typically exempt from lawsuits brought by people or corporations. The state or state entity will, however, typically be deemed to have waived immunity and be held to its obligation to arbitrate if it enters into a commercial arrangement, and particularly if it does so with the other contractual party and enters into an arbitration agreement. In accordance with the terms of a bilateral investment treaty, a state may also be required to arbitrate. An agreement known as the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States may have been signed by a state. Instead of commercial arbitration, this treaty deals with investor-state arbitration. Because the Convention established the International Center for the Settlement of Investment Disputes (ICSID), it is also known as the ICSID Convention.54 The World Bank developed the ICSID Convention in order to boost investment in developing nations. Investors had to rely on their own governments to take up their lawsuits against foreign governments in the past because they were unable to bring any form of action against governments[10]. The ICSID Convention gives the investor and the nation the option to arbitrate any disagreement directly, either in accordance with a contractual arbitration clause or under the terms of a bilateral investment treaty that specifies that the state agrees to arbitrate with investors covered by the treaty. There is no right of appeal to a court for Contracting States that agree to arbitrate under the ICSID Rules of Arbitration, and local laws do not apply to the proceedings.

CONCLUSION

Every way of resolving disputes has drawbacks and issues. International dispute resolution through international commercial arbitration is commonly referred to as the "least ineffective" technique. Many participants, though, present a more optimistic viewpoint. The environment in arbitration is significantly different from that in litigation, according to Ingeborg Schwenzer, a professor and arbitrator in Switzerland. She considers it to be "more professional, less nasty.

One benefit of arbitration, according to American arbiter David Wagoner, is that "you can take the best practices from civil and common law, use them in arbitration, and keep the process improving. Undoubtedly, the aim of international arbitration is to enable individuals from many nations and cultures to settle their disputes in ways that leave all parties with a sense that the private system of dispute settlement serves a common sense of fairness.

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CHAPTER 4

AD HOC OR INSTITUTIONAL ARBITRATION IN INDIA: A CRITICAL ANALYSIS

Yogesh Chandra Gupta, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-cognitor.yogesh@gmail.com

ABSTRACT:

There are two primary types of arbitration: ad hoc and institutional. This is widely acknowledged in both arbitration theory and practice. Rarely has this long-standing dichotomy been challenged, and in the majority of cases, it has served international arbitration practice well. The current addition examines "borderline cases," or constellations that are difficult to categorize into one of these two categories, in greater depth to examine the traditional divide between ad hoc and institutional arbitration. There are four categories of questionable cases discussed:Uncitralarbitrations, especially those handled by arbitral institutions; cases where the parties have chosen the institutional rules but not the issuing institution (and vice versa); the modification of institutional rules by the parties and the identification of a potential "mandatory" core of institutional rules; and "mix and match" (or "hybrid") arbitrations where one arbitral institution's rules are combined with the case being handled by a different arbitral institution. The study attempts to obtain insight into the fundamental qualities underlying each arbitration category by examining the criteria that were crucial in determining whether these borderline situations were classified as institutional or ad hoc. It creates and discusses a fresh definition of "institutional arbitration" based on these discoveries.

KEYWORDS:

Arbitration Conciliation Act,Arbitral Institutions, HybridArbitration, UNCITRAL Arbitrations, International Commercial Arbitration.

INTRODUCTION

Without the aid of a certain institution, an ad-hoc arbitration can be defined as an arbitration procedure that is entirely selected by the parties to the dispute and on their own terms. To be more precise, it is a procedure in which the tribunal conducts the arbitration proceeding between the parties in accordance with the terms that have been previously decided by the parties themselves or that have been set by the tribunal at the beginning of the proceeding in a meeting with the parties [1]. Ad-hoc arbitration systems do not include any institutions, thus the parties are free to make any decisions they want on things like the method for choosing the arbitrators, the number of arbitrators, and even how the arbitration will be conducted. Since this is an ad hoc arbitration procedure, the parties are allowed to apply the arbitration rules as they see fit and even select the applicable legislation. Due to these facts and the lack of a formal procedure for paying any procedural fee to conduct the course, there is some flexibility in the conduct of this arbitration.

Institutional arbitration: An institutional arbitration is one in which the proceedings are managed by a fixed arbitration tribunal, are governed by a set of rules that are solely executed by such tribunal, and are subject to a defined fee schedule. Actually, it serves as a conduit between the parties and the arbitrators. As a result, the arbitrators of the institution make decisions with better objectivity and expertise. The institutional arbitration is now such a well-known type of arbitration that it is incorporated into contracts and is added beside the arbitration clause. Institutional arbitration is all about the institutions that will conduct the arbitration proceedings. To name a few, these institutions include the International Center for Dispute Resolution (ICDR), the InterAmerican Commercial Arbitration Commissions (IACAC), and the International Chamber of Commerce (ICC). In addition to these, there are other regionally established arbitration institutes, such as those in Singapore, Switzerland, Vienna, etc.

The arbitration process is not an exception to the rule that not everything is flawless. Both institutional arbitration and ad hoc arbitration have their own benefits and drawbacks. The discussion that follows compares the benefits and drawbacks of institutional arbitration to those of ad hoc arbitration[2].

An Ad-Hoc Arbitration often offers a number of benefits to the parties who are ready to carry out the arbitration procedure under it. The fact that the rules and laws of this arbitration are adaptable based on the demands of the parties concerned is the first benefit of an ad-hoc arbitration that garners the most attention. As a result, a key factor in making this more advantageous is frequently the ability to make such measures in accordance with the wishes of the parties to the dispute. The parties also feel that they have some influence over an ad hoc procedure due to the fact that parties can establish their own standards and regulations and have the power to decide when the arbitration will begin.Additionally, because it is not required to follow institutional norms in order to settle a dispute, the ad hoc arbitration method is quick and might end the case sooner. Ad hoc arbitrations are also seen to have the advantage of taking less time.Another feature that has undoubtedly opened the road for Ad-Hoc arbitration is the existence of pre-made sets of rules under the UNCITRAL Model Law.

However, when compared to the benefits of institutional arbitration, which seem to be much more in-depth, the drawbacks of an ad-hoc arbitration process start to become apparent. Starting with the ad hoc arbitration's cost effectiveness, it is apparent that it is less expensive than institutional arbitration, despite not having a set charge. While ad hoc arbitrations may wind up charging extra hidden fees that weren't previously revealed, institutional arbitration fees are actually rendered justifiable by moving the process along quickly under the institute's rulesInstitutional arbitration also makes every effort to ensure that the proceedings move without a hitch by offering the arbitrators guidance on how to reach a decision. Unlike the Ad-Hoc Proceeding, the institutional one also double-checks the prize issued to make sure it fits with the institute's basic criteria. In contrast to an award granted by an ad hoc arbitration, such award granted by an institutional arbitration also has some weight when the winning party seeks to enforce it in court [3]. Additionally, the parties do not need to negotiate the arbitrators' fees with their judges because the institution handles this for them. The arbitrators may wind up demanding fees that are larger than those they would have gotten from an institutional arbitration in cases of ad hoc arbitration, as can be shown from this.

Although the ad hoc arbitration process may occasionally have a tiny edge over institutional arbitration, it is clear from the comparison above that, if it is a matter of dispute as to which one is relatively superior type of arbitration based on comparison of advantages and disadvantages, institutional arbitration[4]. Due to its flexibility, ad hoc arbitration initially seems like an easy decision for the parties to the dispute, but in reality, things are not quite that simple.

There are a few additional factors that could support this assertion. The flexibility of arbitrator fee settlement, which is regarded as a system to be proud of, itself may run the risk of being out of balance. Due to the lack of a defined price that the parties must pay in an ad hoc arbitration, this fact and the lack of institutional backing are related. As a result, the parties can wind up going to court, which is what they initially intended to avoid by choosing the arbitration option. Another significant problem with this is that, because it depends entirely on how the rules and the tribunal have been set up, the flexibility of creating an ad hoc tribunal is not always an advantage. Ad-hoc arbitration's main flaw might be characterized as its reliance on the parties' collaboration, as once a conflict begins, getting the parties to collaborate becomes a difficult undertaking [5].Ad-hoc arbitrations face the potential of failing under certain conditions if their initial structure is faulty. As was the situation in A v. B 2007, when disagreements between the parties forced an English court to order the parties to engage in a demanding and expensive ad hoc arbitration procedure on three separate occasions.

DISCUSSION

In light of the lessons learned, a novel definition of "institutional arbitration" could be as follows: "An arbitration is institutional if the parties have granted the arbitral institution the authority to make binding

decisions on specific procedural matters by agreeing to the arbitral institution's arbitration rules." Any arbitration that does not meet these requirements or does not do so any longer is an ad hoc arbitration.

Power of Arbitral Institution to Issue Binding Decisions: The ability of each arbitral institution to render legally enforceable judgments, or its "gatekeeper function," is a key component of institutional arbitration.

The definition takes into account the lessons learned from case law on party agreements excluding "mandatory" (non-derogatable) institutional rules and on "mix and match" arbitration agreements by putting an emphasis on the institution's decision-making authority rather than the administrative services provided by the institution. In addition, it eliminates the challenges associated with determining the kind and extent of administrative services a certain institution provides. In other words, the current definition places more emphasis on how an administering institution manages its arbitrations (a qualitative approach) than on the tasks that it does. The "gatekeeper function" of an institution, which comes from its ability to render binding rulings, enables it to stop party deviations from the fundamental provisions of its institutional arbitration rules, safeguarding the distinctive elements of institutional arbitrations.

The gatekeeper role limits party autonomy in institutional arbitration more so than it does in ad hoc arbitration, but it also benefits parties, arbitrators, supervising State courts, and the general public in addition to serving the institution's self-interest by safeguarding its "brand" Each institution's institutional arbitrations are partly standardised by this, which ensures the predictability of their essential features and establishes a trustworthy benchmark for institutional awards.The right of the parties to be heard and the arbitrators' impartiality, on the other hand, are not principally protected by the gatekeeper duty in an arbitration. Ad hoc arbitration must adhere to comparable minimal requirements;therefore, these criteria are guaranteed by the lexarbitri's mandatory regulations and upheld by the appropriate State courts. Although a gatekeeping institution's actions may give an extra layer of protection, that is not the main goal of its gatekeeping role[6].

As such, focusing on the authority of an arbitral tribunal to make decisions is not wholly novel in the current setting. Professor Lalive deemed it essential for institutional arbitration in 1967 that the institution "ne se contente pas of putting at the parties' disposal its regulation of procedure, its locations, and its administrative services, but that it se reserves itself an expertise in application of said regulation arbitral. His definition deviated from the method proposed here by appearing to allow any institutional competence ("une competence") to pass as meeting the criteria instead of having the ability to make legally binding decisions. The institution's decision-making authority has lately been viewed as vital by another author, but their attention has been drawn to whether or not using this authority is "outcome-determinative

The institution's gatekeeper role, as indicated here, presupposes a decision-making power that goes beyond the legal authority to bind just one of the parties by requiring an arbitral institution to have the ability to make "binding" rulings. Any institution acting as an appointing authority under institutional arbitration rules, the UNCITRAL Arbitration Rules, a specially designed ad hoc arbitration agreement, or local arbitration laws has the (insufficient) power of the latter type: For instance, an appointing authority's decision to appoint an arbitrator in cases where a party has failed to do so in a timely manner is binding on the inactive party; an appointing authority's decision regarding a challenge to an arbitrator is binding on the party that appointed the arbitrator and has not consented to the challenge; and an appointing authority's decision to appoint a substitute arbitrator is binding on a party But in each of these situations, both parties theoretically have the capacity to jointly depart from the appointment authority's choice byChoosing a different arbiter, however implausible this may appear in reality.

Therefore, the decisions rendered by an arbitral institution acting in the capacity of an appointing authority are only binding on the party whose inaction gave birth to the decision in the first place[7]. According to Article 7(2) of the 2010 UNCITRAL Arbitration Rules, where the parties had not agreed on the number of arbitrators, it could be argued that the same was true when an appointing authority decided to name a sole arbitrator because the parties could later come to a different (and prevailing) agreement. In contrast, the gatekeeper role proposed here calls for more, specifically the power to compel both parties to arbitrate even

when they cooperate. To put it another way, even if both parties agree to a divergence from the arbitral institution's ruling, it must nonetheless be binding on the parties. This interpretation of the institution's gatekeeper role limits procedural party autonomy in institutional arbitrations and ensures that specific distinctive elements of the institution's arbitration procedure are always retained. It is not often clear whether and to what extent a specific arbitral institution has the decision-making authority envisioned here.

Rarely do institutional arbitration rules provide a clear answer, but in the case of Article 29.1 of the 2014 LCIA Rules, they do so. The 2014 LCIA Rules specifically give the institution the authority to make decisions that are binding on both parties by stating that "[t]he determinations of the LCIA Court with respect to all matters relating to the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal, unless otherwise directed by the LCIA Court." Other institutional regulations leave the matter up for interpretation, with non-derogatable ("mandatory") clauses serving as a key guiding principle in this regard. On a few procedural issues the subject of the necessary decision-making authority of the arbitral institution has purposefully been stated in a general way ("on certain procedural matters"). In this regard, imposing a minimum content seems both unnecessary and inappropriate, as the decision-making authority of a specific institution only protects the essential elements of the proceedings that are overseen by that institution, not the characteristics of institutional arbitration in general[8].

To be clear, it should be noted that an institution's authority to select the arbitrators or set their own administrative feesThe compensation, which is frequently cited as one of institutional arbitration's key advantages over ad hoc arbitration, is insufficient for the current goal. The rationale is that these rulings do not address the parties' relationship to each other procedurally, but rather their connection to the arbitral tribunal or administrative body. Put another way: The setting of the administrative costs for the arbitral institution and the compensation of the arbitrators isn't a matter of the parties' autonomy in the first place because the institution (and the arbitrators, respectively) must always agree to the fees proposed by the parties. Therefore, rules created for ad hoc proceedings, most notably the UNCITRAL Arbitration Rules, which permit the appointing authority to make changes to the arbitral tribunal's proposal regarding the determination of its fees and expenses and/or the arbitral tribunal's subsequent determination of fees and expenses, also contain decision-making powers with regard to this issue decisions that, without mentioning the parties, Articles 41(3) and (4)(c) of the 2010 UNCITRAL Arbitration Rules expressly proclaim to be "binding upon the arbitral tribunal".

It is made clear that there is no institutional decision-making capacity necessary with regard to the dispute's substance by the definition's reference to "procedural" considerations. Naturally, the arbitral tribunal alone is responsible for this responsibility in both ad hoc and institutional arbitration (however defined). The Parties' Delegation of Decision-Making Authority According to the current definition, the parties' delegation must come before the arbitral institution's authority to make legally binding decisions on procedural issues. As much as international arbitration in general and the decision between ad hoc and institutional arbitration in particular, it is therefore a product of party autonomy. The parties can only give their arbitration an institutional feel by giving an institution this kind of authority. The lexarbitri, as opposed to the parties' delegation, is what gives arbitral institutions designated as statutory appointing bodies in some jurisdictions the authority to make decisions. The arbitrations in question will not become institutional in nature if such an arbitration statute grants them the authority to give procedural rulings that are binding on all parties. The parties' delegation of authority should be taken into consideration rather than how those powers were actually used by the arbitral tribunal in the relevant proceedings[9].

This is required so that the parties can predict the nature of their arbitration at the time they finalize the arbitration agreement.The issue of whether such a delegation of decision-making authority necessarily needs to take place in accordance with institutional arbitration procedures in order to qualify the arbitration as "institutional" or whether a delegation through other contractual agreements would also be acceptable is difficult to answer. In order to reflect the Singapore courts' position in Insigma, where the parties' "mix and match" arbitration agreement's delegation of authority to the SIAC was seen as an insufficient basis for an institutional arbitration, leading to the SIAC-administered arbitration under the ICC Rules being labeled as

ad hoc, the definition proposed here adopts the first approach. An individual agreement of this kind is an equally acceptable (and, given its unique nature, possibly much stronger) delegation of decision-making power, therefore this condition might be questioned from the standpoint of party autonomy. However, the institutional arbitration category is restricted to processes conducted in line with an institution's customary, off-the-shelf procedures, which is supported by foreseeability considerations.

The decision-making authority must have been given through institutional arbitration rules to the exact institution that has produced these rules ("have delegated to this arbitral institution") and not to another institution, according to a similar criterion that also stems from the Insigma decisions. Effects of an Arbitration that is not in Compliance with the Definition.It is not an "institutional" arbitration but rather an ad hoc arbitration if a particular arbitration does not meet the specified description as presented below[10]. The same is true if the arbitration was started as an institutional arbitration but the parties persist in the process in violation of a binding decision made by the arbitral institution: In such a circumstance, the arbitration is no longer institutional and is instead ad hoc. (Whether the parties' arbitration agreement requires the arbitration to continue ad hoc is a different topic that is not to be covered in depth here; it largely depends on how the arbitration agreement is interpreted.

CONCLUSION

A fundamental reality of arbitration theory and practice is the dichotomy between institutional arbitration and ad hoc arbitration. The exact boundaries of these two classic arbitration categories are mostly used for descriptive purposes and are not frequently examined. The following article has looked at four categories of borderline situations in an effort to gain some understanding of the elements that distinguish an arbitration as "institutional" or "ad hoc": Arbitrations conducted in accordance with a preexisting set of arbitration rules, but without or with only limited participation of an arbitral institution acting as the presiding authority or providing administrative services; isolated party selections of only institutional rules or only an arbitral institution; modification of institutional arbitration rules by the parties (and the limitation of "mandatory" provisions in those rules); and "mix and match" arbitrations combining one institution's rules with another. The study of these gray areas in case law and by academics sheds some light on the nature of the various arbitral procedures. The insights reached have led to the creation of a fresh definition of "institutional" arbitration that centers on the "gatekeeping function" of specific arbitral institutions. According to this definition, only arbitrations in which the parties have granted an arbitral institution the authority to issue binding decisions on certain procedural concerns qualify as "institutional" arbitrations. The definition provided here, which is the outcome of a comparative analysis of international arbitration law and practice, cannot necessarily be utilized to build domestic and international rules addressing institutional arbitration.

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CHAPTER 5

PARTY AUTONOMY IN ARBITRATION LAW IN INDIA: A DETAILED DESCRIPTION

Pradip Kumar Kashyap, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-pradiprgnul@gmail.com

ABSTRACT:

Today, arbitration is a very common approach for resolving conflicts in international business. Since the court that hears cases in an international commercial contract may be foreign to one side, the parties do not wish to litigate their differences. The parties also don't want to deal with formalities related to the legal process. As a result, the parties opt for arbitration as a private dispute resolution method. As such, they are free to manage all aspects of the arbitration process according to their needs and preferences, including setting up hearing schedules and selecting any arbitrator with the necessary expertise to handle the particulars of the dispute. Arbitration is a private conflict resolution process based on the parties' will, which is the primary distinction between arbitration and litigation. In this view, the autonomy of the parties means that they are free to determine the applicable laws, manage the arbitration process, and decide on all other aspects of arbitration. Due to the parties' ability to opt out of court jurisdiction and select arbitration as their preferred way of resolving disputes, arbitration is anchored in the notion of contract freedom. Furthermore, the freedom of contract gives the parties complete control over the arbitration process. These reasons make it abundantly evident that the parties' autonomy is a manifestation of contract freedom and a "key principle"of arbitration. The sovereignty of the parties guarantees that the arbitration will proceed in line with their goals. The parties have complete latitude to choose the dispute resolution process of their choice when they create an arbitration agreement. Ad hoc or institutional arbitration can be provided for, and the parties can specify the number of arbitrators, their backgrounds, and other pertinent details on the process to be followed. The parties may change their agreement in any way they see fit after the arbitration agreement is finalized and before arbitration begins.

KEYWORDS:

Arbitration, Arbitration Agreement, Court Jurisdiction, International Commercial Contract, Party Autonomy.

INTRODUCTION

Because they choose an unbiased and mutually agreeable means of dispute resolution, parties elect to submit disputes to arbitration. Additionally, by selecting an arbitration institution from the commencement of the agreement, parties can eliminate ambiguity and guarantee predictability and impartiality in the event that a disagreement does occur. According to what will best serve their shared interests, parties usually decide which agreements and which conflicts under those agreements should be arbitrated. Parties have the option to create a mutually advantageous agreement to which both parties will willingly agree whether they have the choice to arbitrate and how the arbitration will be conducted[1]. However, these advantages are lost if the tribunal disregards the parties' intentions by going beyond the authority granted to it because the jurisdiction exercised may be different from what the parties agreed to and freely would have chosen. The advantages of predictability and certainty will be lost, and parties will no longer be motivated to choose arbitration, if parties cannot rely on arbitral tribunals to follow the jurisdictional boundaries established by the parties. Arbitration tribunals must ascertain the parties' intent and act accordingly in order to maintain the role that arbitration serves in the field of international commerce.

Nearly all international arbitration laws, rules, and treaties now recognize the fundamental notion that party autonomy underpins arbitration. Today, many agreements between parties have arbitration clauses with an express choice of law, and in accordance with the idea of party autonomy, the arbitrators "always" apply

the parties' choice of law. The majority of international arbitration rules confirm the parties' right to select the law that would govern their dispute [2].

A logical extension of party autonomy to agree to submit to a favorable dispute settlement procedure is freedom to select the applicable law. As a matter of fact, "few principles are more universally recognized in private international law" than the one allowing parties to agreements to choose the applicable law. By choosing acceptable and advantageous laws to apply to their dispute, parties are better equipped to manage the dispute resolution process and are able to prevent being subjected to improper or unfavorable laws in the future.Although the parties' ability to select the substantive law that would apply to their dispute is "undisputed, there are certain limitations on the parties' ability to select the procedural rules. Even if the parties chose a different procedural law to be applied, if mandatory public policy or legislative constraints applicable to arbitration exist in the legislation of the location of arbitration, those laws will apply to the dispute.

Beyond any applicable required provisions of the arbitral situs, which will only affect the parties' choice of law in cases where it directly conflicts, it is generally acknowledged that parties are free to choose the procedural law that would apply to their disputes. Today's international commercial arbitration is based on the parties' broad discretion to select the rules governing their arbitration. The New York Convention, the UNCITRAL Model Law, the Swiss Law on Private International Law, and numerous national arbitration acts all explicitly acknowledge this unique freedom. Furthermore, because parties to international agreements have the freedom to choose the location of arbitration as well, they can ensure that favorable mandatory provisions apply as well by carefully choosing the arbitral location even in cases where mandatory rules may enter the picture to limit the parties' explicit choice of procedural rules.

The parties communicate their common will and intend for how the arbitration will be conducted by specifying which procedural rules are relevant to a dispute inside an arbitration clause in a contract. The parties to an agreement may specify the process for arbitrating disputes in a number of ways at the time of contracting. Parties may "direct or "indirect provide the arbitrators authority by "agreeing expressly upon the powers they wish the arbitrators to exercise" or by agreeing to arbitrate "according to rules of arbitration, whether institutional or ad hoc.Little opportunity left for changing the parties' initial choice if they expressly define the boundaries of a tribunal's jurisdiction and the format of arbitration in the agreement[3]. If the parties decide to arbitrate a dispute in accordance with a particular set of institutional rules, they are subject to a higher level of uncertainty since the rules they depended on may be significantly changed before issues develop. Even yet, parties frequently choose institutional arbitration over stipulating specific arbitration rules in arbitration agreements, notwithstanding the risk for uncertainty. Starting with the ease of using the norms of an established arbitral institution rather than going through the laborious process of defining the specifics of the proceedings within an arbitration agreement, institutional arbitration provides a number of advantages.

Additionally, institutional arbitration has the advantage that its rules "have demonstrated their effectiveness in practice" and are routinely updated "to take account of new developments in the law and practice of international commercial arbitration." Therefore, parties choose institutional rules in the intention that they will evolve over time to keep up with emerging trends in the field rather than despite the possibility that they may alter[4]. Parties are "entitled to expect that institutional rules will be reviewed, and if necessary, revised at regular intervals," in addition to expecting that modifications in the applicable arbitration rules may be made before disputes arise [5]. The fact that the institution's rules are periodically "altered to reflect" changes in the practice of international commercial arbitration, "both nationally and internationally," is in reality one of the fundamental criteria that parties seek for when choosing an arbitral institution.

DISCUSSION

The implementation of updated rules is advantageous to the parties as well as the institution itself as disputes can occur years after the conclusion of an arbitration agreement. While more recent rules may be

advantageous to the parties to an agreement, arbitration institutions must ensure that one set of updated rules is consistently applied. Arbitral institutions must be able to modify their rules when necessary because "procedural provisions can easily become out of date and, therefore, become incapable of implementation. Arbitral tribunals might be forced to apply numerous modifications of the institutional rules over the course of a particular time period if parties to any dispute might claim that the rules in effect at the time of contracting apply. Such demands would be hard to meet and ineffective since standards would need to be revised based on what was relevant at the time of contracting for each dispute[6].

This result might make institutions less likely to update their procedural rules on a regular basis, which would impede the development of international commercial arbitration as a whole. Furthermore, if an institution were to fail to update its rules so as to keep them unchanged from the rules to which the current clients agreed, the institution would cease to be a viable professional institution as its procedures become outdated, making it more challenging to conduct arbitration effectively. Therefore, a reference to institutional norms in an arbitration agreement must be read to imply the application of the rules in effect at the time of arbitration in order to benefit present and future customers, arbitral institutions, and the development of international arbitration in general.

International arbitration is firmly grounded in the idea that the institutional rules that apply are the ones that are in effect at the time of arbitration. The texts of several institutional arbitration rules specifically mention it. "Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed thereby to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement," the International Chamber of Commerce's (ICC) Rules of Arbitration state. The London Court of International Arbitration's Rules of Arbitration have comparable clauses. American Arbitration Association Resolution Procedure. Although such clauses typically do allow parties to expressly agree to anything else, the de facto rule is that the rules in effect at the time arbitration proceedings commence will be followed [7].

This concept is adhered to even where the applicable arbitration rules do not contain a clause specifying that the applicable rules to apply to a dispute are those in force at the time of arbitration. Unless the parties have agreed otherwise, it is generally accepted that even in the absence of a provision in the rules establishing this standard, "the rules in force at the time of commencement... will be applicable when the parties refer in their agreement to arbitration rules of an institution and this institution has amended its rules at the time of commencement of the arbitration procedure." Before the 1998 modifications that introduced the paragraph explicitly articulating this concept, the ICC already held this stance.

This idea has also constantly been represented in a number of judicial rulings from different jurisdictions. The code included, according to the Queen's Bench Division (Commercial Court) of Great Britain, is the one that is in effect at the time that the procedural procedures in question need to be invoked and followed. Furthermore, it is irrelevant what kind of rule change is made. In a case in Hong Kong, the judge ruled that although the new rules were "more 'liberal' than those they replaced," that improvement in the arbitral institution's rules between contract and arbitration was insufficient to justify withholding enforcement of an award made under the new rules. The risk of any modifications to the institution's rules before the start of arbitration is expected to be borne by the parties since they have mutually agreed upon institutional rules to regulate future conflicts.

Although there is some limited case law that suggests the nature of a rule change is irrelevant when considering whether to apply only the updated rules, this authority is both scant and unpersuasive when it comes to the application of radically new provisions like Article 21(5) of the Swiss Rules. The importance of party liberty in arbitration should compel a tribunal to take the parties' likely intentions into account more often when these unexpected clauses apply to a dispute as a result of an organization adopting a new set of rules. Respecting party intentions has, in fact, always been the main consideration whenever large and unanticipated modifications to arbitral institutions have occurred in the past. This section demonstrates

how the promotion of party will and intent at the time of contracting was the focus of how modifications were implemented into subsequent arbitration processes using the experiences of arbitral institutions in the wake of German reunification and the collapse of Yugoslavia [8].

This strategy is not unexpected given that it is similar to how different countries handle the issue of combining multi-party and multi-contract claims. This strategy is used in an effort to respect parties' intentions in the resolution of commercial disputes. The advancement of party autonomy and intent is the main concern in each of these scenarios. However, applying a case-by-case approach to regional harmonization, as is done with multi-party and multicontract claims, would be contrary to the objective of uniformity in general and of the Swiss Rules specifically, as it would significantly reduce the effectiveness and predictability of arbitral proceedings and result in the long-term recurrence of disputes arising from agreements made before the Swiss Rules.

The experience of the succession of arbitral institutions in recent European history can be instructive, even while there is little information about what happens when a set of arbitration rules is replaced by another set through regional consolidation of rules, as happened with the Swiss Rules.The only international arbitration institution in the German Democratic Republic until the country's 1990 reunification, the Berlin-based Arbitration Court at the Foreign Trade Chamber, was dissolved by its members, who also established the Association for Promotion of Arbitration and transferred all of the former institution's authority to the new.

The Federal Court of Justice in Karlsruhe, Germany's highest court, decided that these clauses were rendered ineffective by the dissolution of the institution to which they granted authority. This is despite some appellate courts in Germany affirming the arbitration clauses referring to the old institution as valid consent to arbitrate under the new institution. The legal status given by means of the arbitration agreement, according to the Karlsruhe court, "is not transferable to another organization without the consent of the contracting parties."Based on the finding that there was insufficient continuity between the two arbitration tribunals, a court in Brussels reached the same decision, holding that the authority under an arbitration provision was not transferable without the assent of the parties.

Numerous people have criticized this logic, but its flaw is that it does not sufficiently respect the parties' wishes. It may be argued that arbitration under the new institution, which is practically operationally identical to the old institution, would be more in accordance with the parties' intentions than court-based litigation. Therefore, one cannot infer that parties to an agreement transferring jurisdiction to an arbitral institution are inevitably bound by changes imposed by that institution after the agreement is formed, following either the rationale of the Karlsruhe court or that of its opponents. Instead, the parties' will and intent must be taken into consideration. Id. is crucial in figuring out how to implement an arbitration agreement after such changes.

Similar issues sprang up when the Yugoslav federation fell apart in the early 1990s. The Foreign Trade Arbitration Court (FTAC) in Belgrade, which was run under the authority of the Yugoslav Chamber of Economy, was mentioned in numerous arbitral clauses around the region. Early in the 1990s, open conflicts made it difficult, if not impossible, for parties outside of Serbia to comply with such accords.Arbitration clauses referencing the FTAC, according to the Zagreb High Commercial Court in Croatia, were no longer legally binding because the Yugoslav Chamber of Economy no longer existed or, even if it did, it was now a foreign arbitration organization. There was no reason to believe that the parties would have agreed to arbitration clauses integrating a foreign arbitral institution given this significant shift in the FTAC's circumstances [9].

The Croatian court's ruling demonstrates a major focus on upholding the parties' initial intents and expectations at the time of the contract. Similar to this, the Karlsruhe court in Germany gave party permission and intent precedence over decisions made by the arbitral institution regarding the parties' ensuing rights under arbitration agreements. Even with the Karlsruhe decision being criticized, the question was not whether or not to consider the parties' wishes when dealing with institutional change, but rather

how to best carry out their wishes. No justification may exist to bind the parties to the modified terms if evidence suggests that they would not have agreed to arbitrate under those terms in the first place. Binding the parties to those modifications, however, will not violate party autonomy so long as the factors on which the parties relied remain true despite altered circumstances. This norm ensures that arbitral tribunals act in accordance with the parties' intended intent and protects party autonomy even in the face of unforeseen circumstances.

In routine arbitration decisions, the aforementioned factors are not without merit. Some critics contend that in order to prevent significant changes in circumstances after a contract from improperly impinging on party autonomy, examination of the parties' intentions at the time of contracting is required. Parties typically decide which arbitral institution to use for their disputes based on a variety of considerations, such as the institution's arbitration procedures, reputation, and the possibility of an award being upheld in the jurisdiction in question. According to some observers, if one of these characteristics or another important feature changed after the parties' agreement was finalized, it would be important to determine whether or not they would still have agreed to arbitrate under the new conditions.

When there is a considerable difference between what the parties were initially subjected to under their agreement and what the parties are subjected to under subsequent amendments, the earlier agreement cannot be used to imply assent to the subsequent changes. Recent commentary suggests that, in the case of Article 21(5) of the Swiss Rules, a tribunal may have a basis for "revisiting the old rules" if the new rules contain a provision that was completely unexpected by the parties, despite the general principle that the rules in effect at the time of arbitration apply regardless of changes made after the parties' contract was signed.

According to fundamental arbitration principles, party autonomy must still be respected when a material change in the rules chosen by the parties to govern arbitration under an agreement takes place[10]. Therefore, the question is whether or not the parties would have agreed to arbitration in accordance with those changes. The importance of this factor is in fact affirmed by the rule that the arbitral tribunal's rules must not conflict with the parties' reasonable expectations based on the mutually agreed-upon parameters of the first agreement. The tribunal may use arbitration rules that have changed after the agreement, as was mentioned above, or even a different set of arbitration rules.

CONCLUSION

Both institutions and parties involved in international commercial arbitration would benefit from a drive toward more standardization of procedural norms in institutional arbitration. However, in the interim term, party autonomy must not be sacrificed in order to reap the benefits of enhanced predictability brought about by increased consistency and harmonization of international arbitration procedures. The initial intentions of the parties should not be abandoned in the event of unforeseeable changes, as party autonomy is the entire foundation of arbitration. Within reasonable expectations, the parties must still be able to depend on the decisions made during the contracting process.

An exception must be established from the general norm that the applicable procedural rules automatically apply in order to protect party autonomy. Consideration should be given to the parties' reasonable expectations and intentions at the time of contracting when an arbitral institution adopts a new set of rules with significantly different provisions, and new provisions which adversely affect those expectations and intentions should not be applied in subsequent disputes.

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CHAPTER 6

WAIVER OF RECOURSE AGAINST ARBITRAL AWARD: A DEBATE

Dal Chandra, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-degautambahjoi@yahoo.co.in

ABSTRACT:

This paper looks at the situations in which a party to an arbitration agreement may be regarded to have relinquished that right by taking part in litigation over a dispute covered by the agreement. The common law countries with a particular emphasis on Australia and the United States of America are the subject. The law of the United Kingdom will also be briefly examined. The Australian Federal Court's Comandate Marine Corp v. Pan Australia Shipping Pty Ltd ruling from 2006, which gave the subject extensive consideration, is the primary focus of the article. Analysis is done on the theoretical justifications for upholding waiver claims, including waiver as a separate doctrine, abandonment, estoppel, election, repudiation of contract, and contract variation. The principles for testing waiver submissions are developed with consideration of the underlying policies.This paper looks at the situations in which a party to an arbitration agreement may be regarded to have forfeited that right by taking part in litigation over a dispute covered by the arbitration agreement. This involvement could take the form of starting the relevant action or responding to it. The focus will be on how courts in three representative common law countries Australia, the United States of America (where there is a significant body of case law), and the United Kingdom have responded to this challenge.

KEYWORDS:

Arbitration Conciliation Act, Commercial Disputes,Common Law Countries, International Commercial Arbitration,UNCITRAL Model Law,

INTRODUCTION

We will specifically look at the recent Comandate Marine Corp v. Pan Australia Shipping Pty Ltd decision of the Australian Federal Court, which gave the subject substantial treatment. The ruling specifies the situations in which Australian courts will acknowledge whether a party to an international commercial dispute has relinquished their entitlement to have the matter arbitrated in accordance with an arbitration agreement by participating in litigation. Other jurisdictions might find it interesting. Below, the choice will be discussed in more detail. Usually, when a party requests a judicial stay and a referral of the relevant dispute to arbitration, the topic of waiver will come up[1]. The issue typically arises in the context of international commercial disputes, but cases of alleged waiver in the context of domestic arbitration are generally governed by the same principles. It will be handy to comment on the notions of waiver and related (and frequently overlapping) concepts like abandonment, election, and estoppel before going into the case law. All of these doctrines, if they have in fact developed into doctrines, may be useful in describing how a party may be barred from exercising their right to arbitration in a jurisprudential sense.

General Principles for Waiver, Abandonment, Election, and Estoppel

It has been noted that the term "waiver" is frequently used imprecisely in common law jurisdictions. According to some reports, the majority of cases that pretend to apply the doctrine of waiver are actually ones involving contracts, estoppel, or elections. At common law, there might not be a consistent concept of waiver. There are numerous circumstances in which the general law, a legislation, or a contractual clause may be used to determine that someone has relinquished a legal right. For instance, the UNCITRAL Model Law on International Commercial Arbitration's Article essentially states that a party may renounce a right that otherwise would have accrued under the Law by being silent. This waiver may be brought up in court at any stage of the litigation process, from a party's request to invoke arbitration to actions taken to enforce the decision. By extending the period for performance, for example, a party can waive the other party's

execution of a contractual right. In theory, a waiver would have to be deliberate.In this situation, as in others, there is a separate waiver concept that exists apart from the theories of election and estoppel. Waiver is defined as "the deliberate, intentional, and unambiguous release or abandonment of the right that is later sought to be enforced" in its most basic sense.The Victorian case of La Donna Pty Ltd v Wolford AG is one instance where a party to an arbitration successfully argued that the other party had waived the arbitration right[2]. A Supreme Court trial judge held that a party to an arbitration agreement had waived its arbitration right by participating in litigation regarding the dispute covered by the arbitration agreement. The key action was this party's request for security for costs.

The definition of abandonment is the unconditional giving up or giving up of a legal right or claim, like in this instance where a party proves by extrinsic evidence that a contract that purports to be entirely in writing has actually been abandoned through the actions of the parties. There may not be a universal notion of abandonment, similar to the case of waiver, as opposed to a variety of circumstances where a specific legal principle, statute law, or contract term bestows legal significance on abandonment. In theory, a waiver would have to be deliberate. Usually, the terms "waiver" and "abandonment" are used interchangeably.

The common law recognizes the idea of election, which states that a party may be forced to choose between two legal rights that are mutually exclusive and have contrasting legal ramifications. An illustration would be the requirement that, in the event of a condition being broken, a party to a contract in a common law country must decide within a reasonable amount of time whether to terminate or uphold the contract. As will be seen in the analysis of Comandate Marine Corp v Pan Australia Shipping, below at Part III, the doctrine of election was used in a decision that held that for a party to initiate litigation collateral to the dispute covered by the arbitration agreement, did not amount to an election to litigate and not to arbitrate. The common law and other legal systems recognize a number of estoppel concepts.

These doctrines all have in common the idea that a litigant may be barred (estopped) from relying on a legal right on the grounds that to do differently would result in injustice. Estoppel and prejudice are the primary tests for determining a waiver submission, according to United States case law on the subject of arbitration waivers. As a result, a party who refused arbitration and forced the other party to completely litigate the relevant matter was barred from seeking post-litigation arbitration on the grounds that doing so would be unfair to the other party[3].These doctrines or principles overlap, but they have in common that a party must give up or abandon a legal claim or right in order for their actions to be binding. A combination of two or more of these categories may apply to the subject behavior.

Another reason for waiver could be that one of the parties violated or anticipated violating a fundamental term (condition) of this agreement by litigating a dispute covered by an arbitration agreement, giving the other party the right to withdraw. Applying this technique would require caution because it might indicate a rather low threshold for waiver. In the English case of Downing v. Al Tameer Establishment8, the Court of Appeal found that one party had violated the arbitration agreement through its actions, making the other party eligible to revoke it and bring a lawsuit[4]. By engaging in this behavior, the first party waived its right to arbitration.

Another theoretical foundation for concluding that an arbitration waiver has taken place is contractual - can it be said that the parties, by litigating, agreed to modify or void the arbitration clause or agreement? This methodology was used in the English decision of The Elizabeth H, where a party submitted a waiver a year and a half after one of the parties started the case. The court concluded that the parties had consented to accept the court's jurisdiction and to modify the arbitration provision by their conduct.

Pan Australia Shipping Pty Ltd v. A Comandate Marine Corp. The Trial's Progress

The question of whether a party to an arbitration agreement had waived its right to have the subject dispute arbitrated because it had turned to litigation prior to the start of arbitration was at the heart of the 2006 decision in Comandate Marine Corp v Pan Australia Shipping Pty Ltd (Comandate v Pan). A contract for the time charter of a ship, the Comandate, was entered into by Pan Australia Shipping (Pan) and

Comandate Marine Corp (Comandate Marine). This ship was rented by Pan from Command Marine. Pan had also hired a ship from a different party, called the Boomerang I. The Comandate Marine - Pan charter stipulated that any issues relating to the charter would be arbitrated in London. Later, both sides claimed that the charter had been violated. Pan detained the Comandate and filed in rem proceedings against it in the Australian Federal Court[5]. The conflict was to be arbitrated in London, per Commandate Marine. Pan wished to file a lawsuit in Australia. An order (an anti-anti-suit injunction) prohibiting Comandate Marine from starting anti-suit proceedings in an English court was obtained by Pan from the Federal Court. Comandate Marine started arbitration proceedings in London and asked the Federal Court to halt Pan's injunction. In parallel, in rem proceedings were started.

DISCUSSION

A judge of the Federal court rejected Comandate Marine's request for a stay of Pan's injunction. Pan argued that the injunction should not be withdrawn, citing a number of arguments, one of which was that Command Marine had, through its actions, waived or chosen to abandon the London arbitration. The other reasons are irrelevant for the current situation. The anti-anti-suit injunction was dissolved after it was determined on appeal that the primary judge had erred in concluding that Comandate had waived or chosen to abandon its right to have the matter referred to arbitration. As a result, Comandate was free to have the arbitration take place in London.

By initiating in rem proceedings against Boomerang I without indicating on the writ its intention to seek a stay under section 29 of the Admiralty Act 1988 (Cth) or otherwise indicating on the writ that the action was commenced solely for the purpose of obtaining security for the London arbitration, the trial judge determined that Command Marine had elected not to arbitrate. He also believed that both parties' litigation strategies indicated a desire to terminate the arbitration[6]. In light of this, the arbitration agreement was "inoperative" or "incapable of being performed" in accordance with section 7(5) of the International Arbitration Act of 1974(Cth) (This provision replicates Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration). There were two factors considered when deciding that there was no election to forego arbitration.

An election must be made with intention, yet this intention must be judged impartially. If there is no intention, there won't often be an election (unless the law, a contract, or another legal requirement results in a constructive election after the passing of some time, such a fair amount of time). Prima facie, the action was not inconsistent with an intention to invoke the arbitration clause if the evidence was indeed consistent with Comandate Marine's claim that its in rem action was for the purpose of obtaining security for the London arbitration in a situation where the other party was opposed to arbitration. There have been numerous instances where a party seeking arbitration has sought court intervention to facilitate the arbitration.

The decision to litigate rather than arbitrate was not, strictly speaking, a legal one. It was not a choice between rights that were at odds with one another that determined the method of conflict resolution [7]. Rights are only incompatible if neither can be exercised without the other ceasing to exist (for as when a party cancels a contract becauseinfringement of a provision under common law results in the party's loss of the right to affirm). The filing of the writ may or may not have constituted, or formed a part of, an inconsistent course of conduct, and it may or may not have amounted to a breach of contract, but it did not cause or presuppose the extinction of rights under the arbitration agreement.This means that the other party's legal right to arbitrate (had it been willing to do so) was not terminated by the in rem action. According to Allsop J, there must be a scenario in which the elector "has the power to change the legal rights and duties of himself and another with a corresponding liability in that other to submit to the change" for there to have been an election.

Comandate Marine had constantly maintained its desire to arbitrate, according to Allsop J's analysis of the evidence, which was inconsistent with its intentions to elect differently or to waive or renounce its right to arbitrate. Comandate Marine had requested guarantees that Pan would submit to arbitration nine days

before to boarding Boomerang I, failing which it would have filed a request for an anti-suit injunction at the London High Court of Justice.Comandate Marine had requested a stay of Pan's anti-anti-suit order in the Federal Court two days prior to this arrest. Nothing in the conversations between the parties' evidence "suggested that Command Marine ever indicated a desire to withdraw from the arbitration... "It was possible to pursue the action against Boomerang I in order to secure security for the arbitration. The parties had spoken about Pan providing security, and Comandate Marine had acquired maritime attachment orders in New York specifically for that reason. Comandate Marine's insistence on arbitration was made clear by a resounding, even belligerent, body of communication. The in rem case was started in the context of a persistent demand for arbitration. At most, the filing of this writ can be seen as a tactical move to gain an advantage in a litigation landscape that was developing and uncertain; take note of the statement that the litigation landscape was less than clear and that the in rem action "can be seen as one designed to advance its position regardless of the outcome of the interlocutory debate in this Court.It was not crucial that the writ had not been endorsed with the goal of requesting a stay of the anti-anti-suit. It was only significant as evidence and did not change the viewpoint that had been continuously held (in favor of arbitration) in any way.

The role of estoppel in prejudice

Although Pan had already begun in rem proceedings against Comandate Marine, the question of whether Pan had been so harmed by Comandate Marine's in rem action as to assert an estoppel against the latter was not brought up in the case. However, Allsop J stated in an obiter comment that a case "may be conducted to such a point that the only conclusion is that the party can be taken to have waived or abandoned the right to arbitrate." According to this analysis, even if a party does not choose between rights that are mutually exclusive, it may be prevented from arbitrating the issue by its actions in the future. be a result, what has generally been referred to be a waiver of the right to arbitrate may result from an estoppel or an election between rights that are in conflict [8]. The party asserting waiver in the latter scenario will unavoidably need to provide evidence of its harm. The approach acknowledges that an estoppel can serve as the basis for a waiver; nevertheless, it also implicitly acknowledges that something other than an estoppel, such as an operative election (with or without proof of prejudice), will serve as the basis for a waiver.

The in rem Action: Did it obstruct the election by nature?

Pan argued that the start of in rem proceedings constituted Comandate Marine's waiver of its right to arbitrate. Technically, the in rem proceedings were against the ship and not Pan; as a result, the arbitration agreement's two parties were not parties to this litigation. According to one interpretation, Comandate Marine had no justification for choosing to sue Pan rather than negotiate the dispute. Allsop J thought it unnecessary to emphasize the in rem nature of the case because, in his opinion, the litigation initiated did not amount to an election between mutually incompatible rights (although he did make long obiter comments on this topic). Even if Pan individually and Comandate Marine were the parties to the dispute, there was no election between their conflicting claims. The right of the other party to use arbitration is unaffected if one party to an arbitration agreement chooses to litigate a dispute.

Bringing together Comandate v. Pan

Comandate Marine had not intended to elect in favor of litigation and had not renounced or abandoned its right to arbitration, according to the consolidation of this part of the Comandate v. Pan ruling. This judgment was strengthened by the in rem action's discrete and distinct nature, but this was not a requirement for it. According to the ruling, a waiver may be granted even though the party requesting it suffers no harm significant enough to give rise to an estoppel claim. Additionally, it acknowledges that an estoppel may serve as the basis for a waiver, while none did so in the particular set of circumstances.

La Donna Pty Ltd v. Wolford AG was decided in 2005, and the court determined that the defendant had waived its right to arbitrate after taking part in portions of the proceedings brought by the other plaintiff in the Supreme Court of Victoria. Both parties had engaged in pre-trial motion practice and mediation at the

court's invitation. Certain court orders had been accepted or agreed to by the defendant. Furthermore, the defendant claimed that the plaintiff's financial situation justified its request for security to cover its litigation costs. When submitting its application, it had not reserved its position. The application for security, in the opinion of the court, was significant. None of the earlier actions would have amounted to a waiver, but the security application showed a determination to carry the case to trial in the absence of a settlement. A stay application and subsequent arbitration were "an unequivocal abandonment of the alternative course." This wording hints at the idea of choosing between rights that are incompatible with one another. It asserts that a waiver may take place at an early stage of the legal process. (A case from Alberta holding that after a side files a defense to an action, both parties are presumed to have waived arbitration is Millennial Construction Ltd v 1021120 Alberta Ltd.)

The facts in La Donna coincide with those in the ruling in ACD Tridon v Tridon Australia from 2002. In order for the matter to be arbitrated in accordance with an arbitration agreement, the defendants requested a stay of the lawsuit that had been filed against them. They had taken part in pre-trial activities. The problem of estoppel was avoided because the plaintiffs did not allege any prejudice (apart from what may be compensated through expenses). According to Austin J, there had not been an election between rights that were incompatible with one another. The choice of an adjudication procedure could not, in and of itself, constitute such an election. Accordingly, the case was to be decided as one of an alleged waiver, which is defined as the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is subsequently asserted, either expressly or implicitly through conduct. Although unlike estoppel, waiver must always be a purposeful act done with understanding[9]. It may occasionally resemble a form of election and other times be based on conventional estoppel principles.There had not been an "irrevocable abandonment" of the right to arbitration in the current case. Contrary to the ruling in La Donna, the parties' participation in early-stage litigation did not prevent the use of arbitration.Austin J impliedly argued for a strong theory of waiver that - despite the restrictions on its broader role is applicable in the context of arbitration waiver given his judgment that no estoppel was raised in this case and that the defendants did not make a choice. This doctrine was independent of any underlying estoppel requirement.

In Zhang v. Shanghai Wool and Jute Textile Co Ltd. in 2002, the Victorian Supreme Court of Appeal also rejected a claim of arbitration waiver. The primary judge was overturned by the court. The conflict centered on the fulfilment of an agreement for the Australian appellants (who will be referred to as "Zhang") to purchase worsted fabric from the Chinese respondent ("Shanghai"). The agreement called for disagreements to be arbitrated in China. Zhang favored arbitration in the conflict. Shanghai filed a lawsuit at the Victorian County Court because it wanted to litigate the issue. The trial court found that Zhang had renounced its right to arbitration through its actions in the litigation[10]. The submission of Zhang's defense without reserving its position or its request for security for costs were among the issues deemed noteworthy. Similar to ACD Tridon, the Court of Appeal (Chernov JA, with whom the other judges of the court agreed) believed that a distinct doctrine of waiver, applicable in this type of case, working independently of the doctrines of election and estoppel, existed. To be considered a waiver, a right must be "deliberately, intentionally, and unequivocally released or abandoned" The relationship between the right-holder and the party who could be harmed by the exercise of the right determines when a waiver takes place. Finally, regardless of the methodology used (waiver, abandonment, or variation of contract), and regardless of how far the dispute has advanced along the litigation spectrum, a determination of waiver should be made where each of the disputants has on the evidence clearly and unequivocally waived their right to arbitration. Their agreement produced the arbitration process, thus they must have the authority to change or revoke it. To stress, this conclusion of a purpose to waive, however, should not be made hastily.

CONCLUSION

The current balance established by case law throughout the various countries is accurate. A waiver of arbitration should not be assumed too quickly. A waiver finding shouldn't be easily based on involvement in the early stages of litigation. There is potential merit in configuring waiver with a requirement of

detriment in the manner of US authority, to the extent that Australian law permits this (as shown by La Donna). On the other hand, a waiver should be justified if the case has advanced to an intermediate or mature stage with the willing participation of both parties. Allowing one of them to subsequently refer the case to arbitration provides a clear risk of harm to the other party, putting them at risk of compounding expenses and delays as well as an opportunistic change of venue from a party unhappy with the litigation's progress. The prohibition of such a strategy is well supported by authority. The sole theoretical justification for it is that it would be quicker and less expensive to arbitrate the disagreement after a mature lawsuit has been abandoned than to continue the lawsuit. This may be the case in some instances, but in order to prevent abuse, any reference to arbitration in this situation should be made voluntarily rather than through a waiver.

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CHAPTER 7

ARBITRATION AND COURTS: REDUCING JUDICIAL INTERVENTION THROUGH AMENDMENTS

Amit Verma, Associate Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-amitverma2@gmail.com

ABSTRACT:

Instead of going to court to resolve a disagreement, arbitration uses a process that is guided by an agreement between the parties. It is a practical and different approach to settling conflicts amongst disputants.The Arbitration and Conciliation Act, 1996 (hereafter "Arbitration Act") governs this technique of conflict resolution in India and makes it legally binding. The primary goal of arbitration is to settle conflicts amicably and without the need for Court involvement. The very foundation of the arbitration procedure is governed by the ideal of party autonomy and minimal court involvement, and in order to maintain this ideal, significant revisions took place in the years 2015. The Arbitration Act has provisions that require court participation for a variety of reasons, but these provisions have been minimized with each amendment. In this study, the author has looked at some of the most important provisions that call for court involvement as well as changes that have been made in relation to the same, highlighting how these changes have helped to reduce the need for court involvement under such provisions of the Arbitration Act.

KEYWORDS:

Arbitration Conciliation Act, Arbitral Proceedings, Interim Reliefs, Judicial Intervention, Model Law, International Commercial Arbitration.

INTRODUCTION

The Arbitration and Conciliation Act of 1996's Section 9 authorizes the courts to take temporary measures in arbitrated disputes. Before the arbitration proceedings begin, during them, or at any point after the arbitral award has been made but before it is put into effect under section 36 of the Act, the parties to the arbitration agreement may ask the court for an intermediate measure. This indicates that section 9 can be used at three different times: before, during, and after the arbitral procedures[1]. Prior to the start of the proceeding, a party may apply to the court for interim relief pursuant to Section 9(2) of the Act. If the court grants an order of interim relief prior to the formation of the arbitral tribunal, the arbitral proceedings must begin within ninety days of the date of the order. The remedy granted to the party will expire if the arbitral proceedings are not started within the reasonable time frame specified in an order made pursuant to this provision.

Section 9(3) of the Act states unequivocally that once the arbitral tribunal is constituted, the courts shall not consider any application for interim relief under subsection unless they determine that the remedy under section 17 may not be effective. The court may then step in, consider the claim further, and grant the temporary relief. In the case of Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd, the Supreme Court addressed the conundrum regarding the interaction of sections 9 and 17 by determining whether the court can entertain an application for the interim measure after the arbitral tribunal has been established. The Supreme Court made the following two interpretations of Section 9(3) clear: The first is the restriction on Section 9(1) applications being considered after an arbitral tribunal has been established. When the court determines that conditions exist that may prevent the remedy from being effective, the second can be interpreted as an exemption to the prohibition specified above.

If the provided under Section 17 is effective, the court may take the application into consideration and issue the judgment. In this context, the word "entertained" simply refers to considering the application. A situation where an application for temporary relief is still being considered by the court and an arbitral

tribunal is still being created during the case may frequently appear before the court. The issue here is whether the court will proceed and provide the temporary relief or whether the subject will be referred to the arbitral tribunal[2]. The Supreme Court stated in response to the same in the case of Arcelor Mittal Nippon Steel (India) Ltd. vs. Essar Bulk Terminal Ltd.: "On a combined reading of Section 9 and Section 17 of the Arbitration Act, the court would not entertain and/or in other words take up for consideration and apply its mind to an application for an interim measure, unless the remedy under Section 17 is ineffective, even though the application may ha Once an application has been accepted and taken up for consideration, as in the present case, where the hearing has been completed and judgment has been reserved, the bar of Section 9(3) would not apply.

The Supreme Court has clarified that even if the court has entertained the application prior to the constitution of the arbitral tribunal, it always has the discretion to instruct the parties to approach the arbitral tribunal to seek the relief once it is for which relief is sought. This simply means that once a court has applied its mind to some extent to grant or not to grant the interim relief to the parties, it does not matter whether the arbitral tribunal is formed or not.

Relief Requested:

Under Section 9, a party may petition the court for an interim measure, which may be any of the following: The appointment of a guardian for a minor or person not of sound mind. Arbitration has been widely used in India from the late eighteenth century. Initial formal acceptance of arbitration as a dispute-resolution strategy came from the Indian Arbitration Act of 1899, but its application was restricted to the three presidency towns of Madras, Bombay, and Calcutta.The arbitration rules were then inserted into Section 89 and Schedule II of the Code of Civil Procedure in 1908 to broaden the scope of arbitration to various British Indian districts that were not covered by the 1899 Act.

However, it soon became clear that due to their extreme technicality and impracticality, both the 1899 Act and the 1908 Code of Civil Procedure rules were deemed inadequate. The 1899 Act and pertinent sections of the Code of Civil Procedure were replaced by the 1940 Arbitration Act in response to these flaws.The English Arbitration Act of 1934 served as a model for the English Arbitration Act of 1940, which attempted to address arbitration in its entirety but lacked measures for enforcing foreign judgements. The 1940 Act therefore exclusively covered domestic arbitrations.The Arbitration Act of 1940, despite its best intentions, fell short of its goals and had a number of practical problems, which made its performance less than ideal. Justice D.A. Desai drew attention to the ongoing problems in Indian courts and the inefficiency of the Arbitration Act of 1940 in the case of Guru Nanak Foundation v. Rattan Singh He said, succinctly conveying his worries about this situation:

"Endless, drawn-out, complicated, and expensive court procedures compelled jurists to look for a different forum that was ending formal, more efficient, and quick to settle disputes while avoiding procedural claptrap, and this is what led them to the 1940 Arbitration Act. Lawyers have laughed and legal philosophers have wept over the manner in which Act proceedings are conducted and, without exception, contested in Courts. The 1940 Act was not altered, despite several criticisms[3]. Only in 1991 were moves taken to encourage foreign investment in the nation, and as a result, the Arbitration and Conciliation Act, 1996, which repealed the Arbitration Act of 1940, was introduced. It is interesting to note that the UNCITRAL Model Law on International Commercial Arbitration, which was created in 1985, served as the basis for the 1996 Arbitration Act. The Act of 1996, in contrast to its predecessor, had a broad scope and included both domestic and foreign arbitration procedures.

When the Supreme Court of India ruled in the case of Bhatia International v. Bulk Trading S.A. and Another that Part I of the Act would be applicable to arbitrations held outside of India unless expressly or implicitly excluded, controversy arose during the implementation of the Arbitration Act of 1996. Similar reasoning was used by the Supreme Court in Venture Global Engineering v. Satyam Computer Services Ltd., which resulted in a decision. Due to the perception that their choices were retrograde, they received harsh criticism.

The Supreme Court, in the case of Bharat Aluminium and Co. v. Kaiser Aluminium and Co made it clear that Part I of the Act does not apply to Part II of the Act, and this issue was ultimately resolved. In foreign-seated arbitrations governed by Part II of the Act, Indian courts are not permitted to hear interim applications under Section 9 of the Act, according to the decision in BALCO. This decision put an end to the earlier debate over the matter by taking a more firm stance on the applicability of certain provisions of the Arbitration Act.

A ruling on a particular issue in the dispute that has been assigned to arbitration is the subject of an interim award. Prior to the issuance of the final award, it is provided during the continuing arbitration processes[4]. The method used to issue interim awards must be the same as the one used to issue final awards. They must be prepared and delivered in accordance with the same procedural guidelines that govern the final award, in other words. While the arbitration process is still ongoing, interim awards are important in helping to resolve some concerns and provide partial resolution, which ultimately aids in the speedy and successful resolution of the entire dispute

In the case of Deepak Mitra v. District Judge, Allahabad the Honorable Supreme Court ruled that the Arbitral Tribunal has the power to make interim awards for disputes that are covered by the arbitration agreement between the parties. The Tribunal may also make interim awards on any matter over which it has the authority to make final awards[5]. These interim decisions, which can be given at different phases of the arbitration procedure, focus on particular topics or facets of the dispute. The ability to make interim awards gives the Tribunal the ability to settle disputes in an orderly and impartial manner while maintaining control of the processes until the final award is made.

DISCUSSION

Under Section 17 of the Act, a party may ask for interim relief during the arbitration process. The following situations are listed in Section 17(1)(ii) when a party may ask the Arbitral Tribunal for temporary safeguards:

1. To forbid, tempoarily take possession of, or sell any goods covered by the arbitration agreement.
2. To guarantee the sum at issue in the arbitration.
3. Any object or material that is the topic of the arbitration dispute to be held, preserved, or examined.
4. To provide someone permission to visit any property owned by any party's land or building for the aforementioned uses, including taking samples, making observations, or doing experiments to gather relevant data or proof
5. To request the appointment of a receiver or temporary injunctions.
6. To ask for any additional temporary safeguards that the arbitral tribunal finds just and suitable.

The Arbitral Tribunal may utilize its authority to grant interim measures only after it has been properly constituted, and not earlier, in accordance with Section 17(1) of the Act. This rule does have one exception, though. The Institution may appoint an Emergency Arbitrator to address interim measures prior to the Arbitral Tribunal's formal establishment if the parties agree to have the proceedings conducted in accordance with the rules of a particular institutional Arbitral Tribunal and if those institutional rules permit the conduct of Emergency Arbitration prior to the constitution of the Arbitral Tribunal[6].

The Supreme Court of India decided that the interim measures granted by the Emergency Arbitrator under the Singapore International Arbitration Centre Rules ("SIAC Rules") would be covered by Section 17 of the Arbitration and Conciliation Act, 1996, in the case of Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd. Through this historic ruling, it was made clear that any interim orders issued by an Emergency Arbitrator prior to the formation of the main Arbitral Tribunal would be valid and enforceable in accordance with Indian law. This made it possible for parties involved in arbitration proceedings to request and receive temporary redress from Emergency Arbitrators appointed in accordance with the SIAC Rules, temporary redress that would be regarded as legal and enforceable under the Indian Arbitration Act.

The Arbitral Tribunal may only award temporary restraining orders against the parties to the arbitration under Section 17(1)(ii) of the Arbitration and Conciliation Act, 1996. The Arbitral Tribunal does not have the authority to impose interim remedies against third parties pursuant to Section 17 of the Act, as confirmed by the Supreme Court of India in the case of MD Army Welfare Housing Organisation v. Sumangala Services (P) Ltd. The Arbitral Tribunal's power, in accordance with the court's decision, is limited to issuing temporary orders that directly impact the arbitration agreement's signatory parties. Because of this, even if they have a link to the dispute's subject matter, it is outside the scope of the arbitrator's authority to provide interim relief against people or organizations that are not parties to the arbitration. Therefore, pursuant to Section 17 of the Act, any interim measures necessary against Third Parties shall be requested from the competent judicial authorities through separate legal actions [7].

An interim award granted by an arbitral tribunal under Section 17 of the Act has the same legal standing and ability to be enforced as an interim award granted by a court under Section 9 of the Act, according to Section 36 of the Arbitration and Conciliation Act, 1996. In other words, the legal authority and worth of both forms of temporary awards are recognized equally.A person found guilty of contempt of the Arbitral Tribunal during the arbitration processes may also be subject to suitable disadvantages, penalties, or punishments, according to Section 27(5) of the Act. This clause gives the Court the authority to punish people who resist or impede the legal process, displaying a parallel to the repercussions of disrespectful behavior in a traditional court trial. The Act essentially assures that interim judgements made by the Arbitral Tribunal are enforceable and legally binding, and it gives the Court the power to take appropriate action against anyone acting in contempt of court or making an attempt to obstruct the arbitration process. A party would be deemed "guilty of contempt of the Arbitral Tribunal" under Section 27(5) of the Arbitration and Conciliation Act, 1996, if they disobeyed the interim award made by an arbitral tribunal pursuant to Section 17 of that Act. In the case of Sri Krishan v. Anand the Delhi High Court upheld this position.

The Delhi High Court ruled that disobeying an interim award amounted to disobeying the authority of the arbitral tribunal, and that the party disobeying such an award might be subject to penalties similar to those for contempt as if it were a regular court proceeding[8]. This view highlights the value of interim awards, their enforceability, and the significance of following the Arbitral Tribunal's rulings throughout the arbitration process. The Supreme Court of India established that anyone who disobeys an interim award issued by the Arbitral Tribunal pursuant to Section 17 of the Arbitration and Conciliation Act, 1996, will be deemed to have committed contempt during the arbitration proceedings in the case of AlkaChandewar v. ShamshulIshrar Khan. As a result, under the terms of the 1971 Contempt of Courts Act, civil contempt actions could be brought against that person.

The low bar for establishing jurisdiction prima facie is also clear in actual usage. In Pey Casado, President Allende Foundation v. Chile, a former publisher of a left-leaning newspaper sued Chile in 1998 for the seizure of the publication's equipment following the overthrow of the Allende administration and the start of the military dictatorship in Chile. The claimant sought the ICSID Tribunal to grant an interim measure ordering the Chilean Minister of National Assets to rescind Decision No. 43, which would have barred the claimant from receiving any judgment, in order to assist the case [9]. The tribunal first evaluated whether a prima facie case could be made that the tribunal had jurisdiction before deciding whether to grant the interim relief. The Pey Casado tribunal looked to the criteria established by the ICJ to meet this requirement. According to the majority and generally accepted opinion, the tribunal stated that "[i]f its lack of competence is not apparent and the texts invoked by the Claimant upon which the competence of the Court is founded confer upon it prima facie competence." By applying this criteria, the Pey Casado panel found that it had already made a prima facie case for jurisdiction, and hence had the authority to make interim orders.

According to ICSID, "all requests, in accordance with Article 36 of the Convention, are subject to preliminary examination by the Secretary-General, of the Centre's jurisdiction (co-called "screening")," the tribunal added. The Centre registers the request unless it determines that the dispute is obviously outside its

jurisdiction, a standard that, in some ways and notwithstanding the variations in each case, is comparable to the "prima facie" standard used by the International Court of Justice. In other words, because the Secretary-General had determined that it had jurisdiction, the Pey Casado tribunal concluded that it did have prima facie finding of authority.This judgement underlines the gravity of abiding by the Arbitral Tribunal's decisions, even interim awards, and the significance of respecting the Tribunal's authority at all times during the arbitration[10]. The enforceability and significance of interim awards in arbitration processes are further emphasized by the possibility of legal repercussions similar to those generally applied to people who disobey court orders when interim awards are not complied with.

CONCLUSION

The efficacy and success of arbitration proceedings conducted in accordance with the Arbitration and Conciliation Act heavily depend on interim measures. These provisions, as expressed in Section 17 of the Act, give the Arbitral Tribunal the authority to resolve pressing matters and grant temporary relief while the arbitration is ongoing. Such procedures cover a wide range of remedies, allowing the Tribunal to maintain control and guarantee fairness throughout the dispute settlement process. These measures include injunctions, asset preservation, and the appointment of receivers, among others. The Act's acceptance of interim awards on par with those made by the Court strengthens their legal significance and encourages the parties' adherence to them. The Act's provision that sanctions disregard for interim awards through contempt proceedings further emphasizes the need of deferring to the Tribunal's authority and rulings.

The implementation of the UNCITRAL Model Law principles in the Act and its amendments significantly simplifies the recognition and enforcement of temporary injunctive relief on a worldwide scale, fostering consistency and effectiveness in international commercial arbitration. The importance of interim measures cannot be emphasized as arbitration is still favored as a means of resolving disputes. These procedures give parties a way to safeguard their rights and interests while preserving the effectiveness, timeliness, and fairness of the arbitration process. Arbitrators can strike a balance between defending the parties' views and speeding up the resolution of disputes by using interim measures appropriately. This eventually helps to strengthen and build the reputation of arbitration as a reliable alternative to conventional court processes.

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CHAPTER 8

CONCEPT OF EMERGENCY ARBITRATION IN INDIA: A STRATEGY FOR THEFUTURE

Sourabh Batar, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- battarsourabh@gmail.com

ABSTRACT:

Let's start with the phrase "Emergency Arbitration," which, as its name suggests, refers to a problem that must be resolved through arbitration as soon as possible while taking into consideration its urgency. We can express it in a more straightforward manner by saying that urgent pro bono services are provided to the party or parties who truly cannot wait until the official arbitral tribunal is established to hear them out. This idea is based on two key tenets: first, the parties must request an emergency arbitration, and second, there is a chance that the parties could win on the merits of the dispute. Another option is to present the situation's facts in such a way that, should the request for emergency arbitration not be granted, the resulting loss cannot be made up for through any kind of damages or compensation.Technically, emergency arbitration proceedings involve the issuance of temporary measures, conservatory relief, or other interim relief for a predetermined amount of time. It may also be seen as a judgment, award, or order made to protect one or both parties.

KEYWORDS:

Arbitral Process, Commercial Disputes, Emergency Arbitration, International Commercial Arbitration, Law Commission of India.

INTRODUCTION

To understand the interface and interactions necessary for the Emergency Arbitration to be carried out and to be aware of how they have been carried out. Let's first comprehend the definition of the term "interim measures" and its significance. As was already said, these are the measures that are now being employed by the parties to provide them with a space or state of respite in order to safeguard their rights with regard to the merits of the case. When there is a disagreement, the parties usually resolve it through litigation or alternative dispute resolution[1]. But regardless of the strategy they adopt, in an emergency they also look for a temporary solution. If ADR is delayed, the parties must ultimately resort to litigation; nevertheless, this is perhaps the main reason why they chose arbitration in the first place. But as soon as the tribunal is established, the parties' wealth starts to disappear. The term "Emergency Arbitration" was created with the aforementioned situation in mind. To define it, we can say that it is one of the methods that enables the disputing parties to request urgent interim relief before an arbitration tribunal has been properly established.

For those who desire to safeguard their assets and evidence before they might be changed or destroyed, emergency arbitration can be seen as one of the guises in an emergency relief that is sometimes portrayed as a protection rather than a prior protection. In both domestic and international arbitrations, such arbitration is typically set up by the parties themselves with their mutual consent and as stated in their arbitration agreement. The main reason for holding an emergency arbitration is to provide pro bono services to parties that cannot wait for the creation of an arbitral tribunal in order to meet their needs. The primary function of emergency arbitration is based on two factors: the first is the probability that the parties will prevail on the merits of the case; the second is the possibility that, in the event that relief is not granted, the parties may suffer severe losses that may not be made up even through monetary compensation. When no arbitral tribunal can be established, the effectiveness of "Emergency Arbitration" comes into action.

rather need more time than is necessary to build themselves up. Other factors, such as inflated litigation costs and the possibility of secret information leakage, may also be present. However, requesting an

emergency arbitration cannot simply be viewed as a calm procedure; it also necessitates the submission of proof of the necessary emergency arbitration's evidences, including the fee structure that has been decided upon based on the location of the arbitration; further, it will be limited to the signatures of the parties or their successors in accordance with the arbitration agreement [1].

Conceptual Summary:

An emergency arbitration is one that has the power to provide the parties temporary relief only for the duration of the emergency. We can alternatively define it as the creation of a temporary arbitral institution or joint venture that dissolves as soon as its intended goal is achieved. These days, when it comes to the Emergency Arbitration procedure, an established set of procedures, sometimes known as "opt-out" procedures, are also followed when applying Emergency Arbitration. This basically means that the Emergency Arbitration procedure will only be omitted from the rules in full if the parties explicitly state in their agreements that they do not require its implementation.

A person designated as an Emergency Arbitrator is responsible for carrying out any emergency arbitrations. He first uses his powers before becoming functus office. When carrying out the Emergency Arbitration process, several methodologies are taken into account: Within two business days after the request being made, the Emergency Arbitration must proceed. As the procedure with respect to Emergency Arbitration carries the paucity of time, the major decisions are made or given on the basis of written statements received and all other necessary documents placed before him. Additionally, it is coupled by the procedure of Natural Justice where both parties need to be heard formally, which can be done both in the physical basis or through telephone conversation.

The Emergency Arbitrator has the same authority as any arbitrator appointed by an arbitral tribunal in terms of the powers granted and the scope of the arbitrator's jurisdiction. Any temporary order that is issued in a hearing by an emergency arbitrator may be of any character, including the freezing of assets, the prohibition of the disclosure of any sensitive information, or any other orders that the acting emergency arbitrator thinks appropriate[2]. In accordance with all of the aforementioned powers, even though the emergency arbitrator's orders are not legally binding, they must be discharged or revoked, in whole or in part (as required), whenever the arbitral tribunal is subsequently established to continue the case in order for his own award to be enforceable by any party or on its own initiative

Application of the Law's Due Process Clause:

Regarding the formal recognition of any norms, regulations, or policies, one important factor is always taken into account. The 246th Law Commission Report did address the recognition of emergency arbitration under the institutional rules of SIAC, ICC, etc. in order to recognize emergency arbitration. This was mentioned when the 1996 Arbitration and Conciliation Act underwent amendments. These improvements were supposed to be implemented as part of the 2015 amendment, but those recommendations were not included in the amendment that year [3]. The majority of the laws governing arbitration mandate procedural fairness and regularity standards for arbitrations that take place on a country's soil. The majority of contemporary arbitration laws merely mandate that arbitral processes that take place on local soil adhere to basic due process norms rather than imposing complex procedural frameworks on locally seated international arbitrations.

Some of them can be seen as falling under the UNCITRAL Model Law's Articles 1(2), 18 and 19, as well as other well-known arbitration statutes, who try to adopt this strategy. However, in some jurisdictions, local law (usually out-of-date) purports to enforce more specific procedural frameworks and a structured framework or to oblige arbitrators to adhere to therules applied in local court cases [4]. Due process is thus upheld in all arbitration jurisdictions and formats. As of right now, EA has been charged with violating the rules of due process. Ex-prate orders, joinders, or third-party orders and enforceability are something that influences the due process, which is something to think about even though speed, confidentiality, and costs are reasons why parties choose to EA instead of local courts.

All of the emergency arbitrators are chosen by the institution or as a single emergency arbitrator. Unquestionably, the appointment made resolves the issue at hand, but once again, the major change that will be made will be in party autonomy with regard to the number of arbitrators appointed, as there are only one or two available for emergency arbitration, and the orders issued by them also have a kind of wagering effect. As a result, we may also state that the orders issued by emergency arbitrators are of a transitory character and may be further cancelled or modified by any arbitrator's judgment[5].

DISCUSSION

Classification and Application of an Arbitrator's Decision in an Emergency

Various arbitral organizations refer to EDs as "awards", whereas the ICC refers to them as "orders"and the Stockholm Chamber of Commerce calls them "emergency decisions". There are some jurisdictions, meanwhile, that focus on the decision's substance rather than its wording. The courts in the latter, the jurisdiction where enforcement is sought, look at the parties' agreement, the lexarbitri, and the local laws. Regarding the former, the parties opted to be regulated by the institutional rules, therefore regardless of the nomenclature, the decision has a binding effect on them. The enforcement of a "reasoned emergency decision" under the New York Convention or national laws must therefore be taken into account in addition to its recognition as any other arbitral judgement.In the Indian context, the designation of an ED as a "Interim Order" or "Interim Award" would have consequences because they are contested under different legal provisions, namely section 37 and section 34 of the Act, respectively. Additionally, the Act only defines awards (including interim awards) and international awards (under Sections 44 and 53 of the Act), not orders. So long as the courts acknowledge the discussion that came before, they must rely on their judicial wisdom to interpret the decision as an award or order based on how this seemingly procedural order affects the substantive rights of the parties and the case's merits[6].

The New York Convention (NYC) requires that a decision be both "final" and "binding" in order to be enforceable. In his study, Akash Srivastava makes the case that an ED satisfactorily satisfies both requirements. He bases his argument on U.S. law, which holds that an interim order should be considered "final" even though it has "temporary binding effect"18 because it "resolves" the dispute between the parties once and for all. As a result, it should be enforced. Regarding whether or not ED is "binding," he contends that since parties, acting in the exercise of their party autonomy, decided to submit their dispute to institutional arbitration rules, which include a provision for an EAr, it would constitute a part of their arbitration agreement and the EAr would have the power to render a binding decision. Additionally, UNCITRAL Model Law Article 17 allowed for interim measures; however, Article 17 underwent a major revamp in the 2006 revision. Article 17H (1) is the significant modification that should be taken into account first.The author claims that its legal significance and enforceabilityEAr are also covered by an interim order because they are considered "traditional arbitrators" under the law.

The issue of enforcement of international agreements was just mentioned. But there are jurisdictions that have passed specific legislation to permit ED enforcement, with support from and without interference from national courts. His observation that Singapore, New Zealand, Malaysia, and Fiji have explicitly included EAr in the definition of "arbitrator" and have made ED's enforceable like arbitral rulings is based on authors and reports. He points out that Hong Kong has advanced by changing its national legislation and declaring that the ED would be enforced as a court order regardless of where the EA is seated [7].Due to the fact that many nation states have not passed specific legislation, the aforementioned advances are focused in a small number of jurisdictions. For those who have approved the model legislation revisions, ED enforcement still requires court intervention. The following discussion will show how special India's position is.

India's attempt to make executive orders enforceable

As was previously said, neither India nor the 2006 changes to the UNCITRAL Model Law officially and formally recognize EA through national law. As a result, India's ability to implement ED's at the moment

depends on its ability to exercise sound judgment and its desire to become an arbitration-friendly jurisdiction. The enforcement of EDs, however, is mired in controversy due to the lack of a standard, particularly in light of conflicting and inconsistent judicial rulings.

When arbitration is conducted in India, Part I of the Act lays out the process for an arbitral tribunal's rulings and awards to be enforced in a way similar to court orders. Promod Nair and Shivani Singhal, authors, contend that although though EAr isn't specifically mentioned in the Act, the concept of "arbitral tribunal" is inclusive enough to include which continues that an EAr's decision justifies enforceability like the decision of an arbitrator if EAr is recognized as an arbitrator in the legal system, lends further credence to this line of reasoning. From the foregoing, it follows logically that the EAr's "order or interim award should be enforced similarly to a court order under S. 17(2) and an interim award under S. 36 (1) of the Act.

The Indian Supreme Court (SC) ruled in the case of Amazon v. Future Retail29 (hence referred to as "Amazon"), in which the arbitration was held in New Delhi, that the Indian Act covered emergency arbitration within the ambit of the arbitral tribunal and that EAr's were covered under its purview. This conclusion was reached by a fair interpretation of Sections 2(1)(d), 2(6), 2(8), Section 19(2) of the Act, and Sections 2 and 8 of the SIAC Rules (which, under Section 2(8), were included in the Arbitration Agreement).According to the court, EO was comparable to an interim arbitral tribunal order under Section 17(1) and was therefore enforceable under Section 17 (2) of the Act. The SC heard an appeal of this ruling,

Where the place of arbitration is not India

Since India is a signatory to the NYC and it has been established before that the ED is enforceable under the NYC, the ED may be enforced in India in accordance with Part II of the Act. Even then, where India has commercial and reciprocity reservations, EDs may not be enforced.The parties file a lawsuit in the Indian Courts after obtaining an ED to seek enforcement of a foreign seated EA because enforcement by resort to NYC is not guaranteed. This is known as the "indirect method," and it does not enforce the ED in the true sense; instead, the party requests "fresh interim relief" from the Court[8]. However, this does not prevent the Courts from taking the merits into account or acknowledging the merits of the ED in the course of coming to its own conclusions.

In the case of Avitel Post, the use of the "indirect method" may be seen in action. In this case, the party instead of requesting direct enforcement sought interim remedy under Section 9 of the Act after obtaining a favorable ED in a SIAC arbitration with a Singapore-based seat. The Bombay High Court (BHC) ruled that the party had the right to request interim measures under the Act because immediate enforcement of the ED was not sought and interim relief had been requested. Additionally, Section 9 was relevant because it was explicitly agreed upon by the parties that it would apply in a dispute. As a result, before deciding whether to grant the requested relief, the Court considered both the application and the case separately. This justification led the Delhi High Court (DHC) to rule in Raffles Design that a party to an arbitration with a foreign seat may not request the ED's enforcement under Section 17 of the Act. However, it might submit a section 9 application for temporary relief, in which case the court would make a decision based only on the merits without acknowledging or relying on the EAr's decision. In spite of the parties having an ED in their favor, the Indian Courts have evaluated the requests for interim relief. Due to the absence of a statutory provision that would have made EDs enforceable as court orders, the arbitral procedure became mired in litigation once more.

The Court adopted a different stance in Ashwini Minda but this case's factual landscape was also unique from the two cases that came before it. The parties in this case specifically agreed to exclude the application of Part I of the Act when they submitted their dispute to the JCAA Rules, thus an application under Section 9 was not conceivable. In this case, the applicant requested interim remedy despite having gotten a reasoned negative ED in a Japan-seated arbitration. According to the single judge bench of DHC, it would not let a "second bite at the cherry" and hence denied the application made pursuant to Section 9. While supporting the single judge's judgment, a division bench of the DHC concluded that once parties have selected and agreed upon a tribunal, the procedural rules, the location, and the forum from which they

shall seek the interim measures, they are unable to reverse their decisions and engage in forum shopping later on. This DHC ruling was upheld by the SC. In this case, the courts effectively acknowledged the ED and supported the denial of the applicant's request for interim relief made before the EAr rather than analyzing the ED on its merits.

In India, the 20th Law Commission of India ("Law Commission"), established in 2012, was given the responsibility of examining the provisions of the Arbitration Act due to a number of deficiencies found in the Act's operation. In its Report, the Law Commission provided suggestions, among other things, to promote institutional arbitration in India and to address the institutional and systemic ills that have negatively impacted the development of arbitration in the nation [9].The Report recommended expanding the definition of "arbitral tribunal" under Section 2(1)(d) of the Arbitration Act to include a "emergency arbitrator" in order to give emergency arbitration legislative status in India. The Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act, 2015"), which otherwise generally included the recommendations made by the Law Commission, did not, however, contain this definition

After that, in 2016, the Government of India established a High-Level Committee to Review Institutionalization of Arbitration Mechanism in India (the "Committee") to pinpoint obstacles to the growth of institutional arbitration and look into specific problems affecting the Indian arbitration landscape. The task of creating a plan for turning India into "a robust centre for international and domestic arbitration" was delegated to the Committee. The Committee observed that the recognition and enforceability of awards made by Emergency Arbitrators are subject to significant uncertainty under Indian law. The Committee stated that India should allow emergency awards to be enforced in all arbitral processes and recommended adopting the Law Commission's suggestions to formally recognize emergency arbitrators under the Arbitration Act. The Arbitration and Conciliation (Amendment) Act, did not include any provisions for emergency arbitrators, as the Government of India once again chose to disregard the Committee's proposal.

As a result, despite the Law Commission's recommendations and the Committee's support, neither Emergency Arbitrators nor the awards or orders they issued have received any statutory recognition. As a result, there was still some doubt as to whether the decisions made by the Emergency Arbitrators would be enforceable in India, particularly in light of the Law Commission's and the Committee's rejected recommendations.Invoking Section 9 of the Arbitration Act, the Delhi and Bombay High Court nevertheless granted temporary reliefs while alluding to the limitations on India's ability to enforce emergency awards in an arbitration with a foreign seat [10]. It is important to highlight that all of the cases mentioned above were decided in the context of orders or awards made by an emergency arbitrator in arbitrations with foreign seats. The Courts issued such reliefs by using their authority under Section 9 of the Arbitration Act in the absence of any statutory provision authorizing enforcement of interim orders rendered in arbitrations with foreign seats.

The parties had to experiment and utilize alternative methods, such as invoking Section 9 of the Arbitration Act, to obtain the exact same reliefs as granted by the Emergency Arbitrator because there is no enabling provision for enforcement of interim orders in a foreign seated arbitration. In such a case, the Courts in India adopted a liberal and experimental approach to grant interim reliefs (based on such Emergency Arbitrators' award/order) within the legal framework of the Arbitration Act, even though the award passed by an Emergency Arbitrator could not be directly recognized due to the legislative void. This, however, cannot be seen as the best alternative because the Emergency Arbitrator's decision had to be reviewed by the Courts, which added to the already heavy workload of the Courts and caused unnecessarily long delays for people who sought these reliefs.

CONCLUSION

Given that India has not yet received a formal mandate for it and that some countries have discretion over whether to include the provisions of emergency arbitration in their national and international courts, the adoption of emergency arbitration as a whole can be seen as a turning point for both the global and Indian scenarios. Nearly 46% of the population wants to go to court for emergency relief rather than an arbitrator,

according to a 2015 international arbitration survey conducted by Queen Mary University. However, 79 percent of respondents state that their main concern still is the lack of enforceability, which is what again leads them to choose domestic courts as their preferred option. As a result, there is currently a divide-and-conquer strategy among the stakeholders that can be used as a talking point regarding the applicability of emergency arbitration. This strategy either works against the EA procedure or gives it the moniker of a quick recovery forum. To sum up the position regarding the conceptual analysis of "Emergency Arbitration," it can be said that rather than the fast-track regime in which our society is evolving, ideas like the emergence of the provisions of Emergency Arbitration should be given the opportunity to be heard as well as acknowledged globally.

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CHAPTER 9

PERSPECTIVES FROM INDIA AND BEYOND REGARDING MULTI-TIER ARBITRATIONS IN LIGHT OF THE CENTRO TRADE MINERALS DECISION: A CRITICAL ANALYSIS

Bhirgu Raj Maurya, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- brmourya.mourya321@gmail.com

ABSTRACT:

On December 16, 2016, the Supreme Court of India issued a landmark decision in the case of M/S Centro trade Minerals and Metal Inc. v. Hindustan Copper Ltd. regarding the admissibility of two-tier arbitrations in India, holding that such a system was acceptable in that country. A larger bench of the Honorable Supreme Court reviewed the case that had previously been determined in 2006 and ultimately concluded that two arbitration cases might be deemed legal in the nation. The parties in the aforementioned case had two choices at their disposal, namely, they could exercise their right to appeal to the International Chamber of Commerce (ICC) if they were dissatisfied with Indian arbitration regulations. The main question that arises here is whether this actually is a good step, or whether there is a chance that the proposition set forth in this judgment will further complicate arbitration proceedings, even though this judgment represents a welcome change in the arbitration regime in India by giving parties a second opportunity to arbitrate the dispute for a second time.

The verdict was handed down at the same time as the new Arbitration Amendment Act of 2015, which aims to promote greater foreign direct investment by expediting the resolution of international business disputes. Therefore, it is yet uncertain if this decision will streamline India's ADR process or make it more difficult by involving many arbitral tribunals. By examining the Centro trade ruling and international viewpoints, the writers will analyze the effects of permitting multi-tier arbitrations in the Indian context in this study.

KEYWORDS:

Arbitration Process, International Chamber of Commerce, Foreign Direct Investment, Multi-Tier Arbitrations, Supreme Court of India.

INTRODUCTION

Humans are social animals, and as such, they interact constantly with others throughout their lives. Our survival depends on exchanges like this, and interactions like these inevitably lead to disagreements and disputes. Many other sorts of dispute resolution methods, including litigation, arbitration, mediation, negotiation, and conciliation, are used by us to handle these internal problems. This paper focuses mostly on arbitration as one such dispute settlement method. Through a private process called arbitration, two parties can come to an agreement in front of one or more arbitrators. The arbitrators will then issue a binding arbitration award or verdict. Arbitration has been practiced for a while now. The Arbitration and Conciliation Act, 1996, which was updated in 2015, governs arbitration in India. Our daily transactions and the environment in which we live are nearly entirely based on contracts[1]. There is always a possibility of a conflict when there is a contract involved between two contractual parties. The conventional course of action is to resolve this disagreement in the manner described in the contract itself, as stated in the form of provisions, Therefore, a two-tier or multi-tier arbitration is a very useful instrument. The parties are urged to settle their disagreement outside of court to save both time and money. This is one of the key explanations for why multi-tier arbitration clauses have become increasingly common in commercial contracts.

The use of such clauses in India and their applicability in Indian arbitration will be discussed in this paper. The two-tier arbitration system was established by a three-judge Supreme Court bench in the Centrotrade Minerals case, which is explained below. The focus of this paper is on the Indian position regarding this system, and the authors will also be examining the perspectives and effects of multi-tier arbitrations from other countries.

Evaluation of the Decision

Facts

In this instance, Hindustan Copper Ltd. (Party B) and Centrotrade Minerals (Party A) had a contract for the sale of Copper Concentrate to Party B. Clause 14 of this contract stated that "All disputes or differences of any kind between the parties arising out of, or relating to, the construction, meaning, operation, or effect of the contract, or the breach thereof, shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration." According to the International Chamber of Commerce's rules for conciliation and arbitration in effect as of the date hereof, either party may request a second arbitration if it disagrees with the decision of the first arbitration in India[2]. The decision of the second arbitration will be binding on both parties.

When a disagreement between Party A and Party B emerged, Party A invoked this clause. The arbitrator issued a NIL award in the first arbitration they conducted before the Indian Council of Arbitration (ICA). After that, Party A referred to Section 2 of Clause 14 of their contract and filed an appeal with the International Chamber of Commerce (ICC) in London for arbitration. On September 29, 2001, the arbitrator in London issued a decision favoring Party A. Then, in accordance with the ICC's Rules of Conciliation and Arbitration, Party A sought to enforce the award. Party A filed an application under Section 487. Ultimately, a single judge bench of the Calcutta High Court ruled favorably on this application, but a division bench of the same High Court later overturned their decision. Following that, there were appeals to the Supreme Court, which were initially considered by a Division Bench and subsequently determined in this instance by a three judge Bench because the Division Bench had different opinions.

Primary concerns that the Court had outlined

1. Is the two-tier arbitration system allowed under Indian law as it is described in Clause 14 of the parties' agreement?
2. Assuming it is legal under Indian law, can Party A request the enforcement of a foreign award under the terms of Section 48 of the Arbitration and Conciliation Act? What kind of relief, if any, will Party A be eligible for?

According to the Supreme Court's Bench, a straightforward reading of the arbitration clause in the contract revealed that the parties desired a provision that gave them two chances to resolve their dispute(s) through arbitration. Every argument presented by the attorneys for both parties was examined by the court.

First, the court held that the arbitrator's decision in the first arbitration should be regarded as an arbitration award rather than just a decision that cannot be upheld in a court of law. The Judges had a lengthy discussion on the subject and came to the conclusion that the first arbitration's ruling contained all the necessary components to qualify as an arbitral award. A 'legal vaccum' would be created after such an award if it is not recognized as an arbitral decision, it was further claimed, because it would not be enforceable[3].

Second, the Court made a decision regarding the issue of whether the second arbitration, which was an appeal to the first arbitration, violated Indian law. The Court examined the Third Session Report of the Working Group on International Contract Practices, of which India was a State Member. The Court also took into consideration various comments and earlier rulings, including Dedhia Investments Pvt. Ltd. v. JRD Securities Pvt. Ltd., Dhansukh K. Sethia v. Rajendra Capital Services Ltd., and Dowell Leasing &

Finance Ltd. v. Radheshyam B. Khandelwal. Following this mention, the Court declared that two-tier arbitration has historically been a sound norm[4].

The Court also established a distinction between statutory appeals and appellate arbitration by declaring that the right to appeal is a substantive right and not just a question of procedure. According to the Court, appellate arbitration is a substantive right established by concord at the time of contract. The Arbitration and Conciliation Act, 1996's prohibition on such an appeal was also a topic of discussion in court. The Court came to the conclusion that even while an arbitral ruling is "final and binding," this does not necessarily preclude the possibility of an appeal. The Court also rejected Party B's attorney's argument, claiming that there was no part of the case that would compromise India's national policy as a whole. The Arbitration and Conciliation Act, 1996, is not in any way violated by the arbitration clause, which was freely agreed upon by Party A and Party B. Additionally, the Court strongly affirmed that party autonomy is "virtually the backbone of arbitration" in India and everywhere else .It is not the intention of the Arbitration and Conciliation Act, 1996 to throttle the autonomy of parties or to preclude their adoption of any other acceptable method of redress, such as an appellate arbitration [5].

DISCUSSION

Situation before the Decision

Up to the Centrotrade Minerals case18, which has been extensively examined in this paper, the law relating to two-tier arbitration or even multi-tier arbitration provisions was mostly silent. In India, this idea has only recently gained acceptance. Prior to the 1996 Act, the 1940 Arbitration Act controlled arbitration law.19 As evidenced by the decision in M.A. Sons v. Madras Oil and Seeds Exchange Ltd. and Another21, there existed a provision in the Arbitration Act, 1940 that permitted the parties to appeal to a private body. HeeralalAgarwalla and Co. v. JoakimNahapiet and Co. Ltd. is another instance in which it was determined that there was no provision in Indian law that precluded the parties from agreeing to appeal against an arbitral verdict.Several High Court decisions were the only ones to address this issue; there were none from the Supreme Court. However, numerous High Court decisions from various High Courts in India had determined that two-tier arbitration is a viable system, given that the parties had consented to it. Even now, there is no law that forbids the same.

Overall Analysis and Judgment's Impact

Following the 2016 Centrotrade case verdict, much consideration needs to be given to the idea of an India-specific two-tier or multi-tier arbitration system. It is encouraging that India's position on arbitration is being strengthened by the Supreme Court's decision to allow an arbitration appeal[6]. Without a doubt, this ruling will increase the confidence of foreign participants in international business deals and contracts. Additionally, this will increase parties' confidence and belief in India's judicial system.

The fact that the Apex Court has kept party autonomy as its top priority when it comes to arbitration demonstrates its willingness to uphold the overall goal of establishing a proper system of arbitration in India that complies with international best practices and is recognized around the world. Additionally, the parties will feel more confident and relieved knowing that they have the opportunity to appeal if there is an issue or misrepresentation during the initial arbitration because they will be able to correct any mistakes they did in the past. Knowing that an appeal is not forbidden will help to ensure that the initial arbitration is completed quickly and within a reasonable amount of time.

Even while this decision has generated a lot of joy, there are still certain issues that require investigation. There is no question that parties must be permitted to file an appeal if doing so serves their interests and is something they have both agreed upon, but doing so will also leave a hole. Because there is no time limit set for filing an appeal, this situation is void. This will make it even more difficult to enforce the first arbitral award. The appeal procedure should technically be rendered ineffective once enforcement is requested and approved. The idea of a two-tier arbitration system is more challenging to implement because, once enforced, an arbitral ruling is final and enforceable[7].

Additionally, a lot of parties choose arbitration to achieve a final settlement to a specific problem once and for all while avoiding prolonging the dispute resolution process. It won't be conceivable if a two-tier system is allowed because finality won't come into play until after the second arbitral judgement is rendered. So, theoretically, it will make the procedure take longer.When the parties have the choice of using a two-tier arbitration system, it is in fact quite beneficial and fruitful. Existence of such a mechanism will put an end to any doubts that international investors or contracting parties may have. They will no longer shy away from doing business with Indian parties, assisting in the development of the nation. But until the gaps and gaps in the implementation of the same are filled, none of this will be achievable. To fully applaud or fully condemn the system is still very early in the process. Only time will tell if arbitration in India has positively adapted to this development.

Multi-Tier Arbitrations and Dispute Resolution Mechanisms Using a Cross-Jurisdictional Approach

The idea of two-tier or multi-tier arbitration clauses is not new; it is one aspect of arbitration that is recognized not only in India but also in other jurisdictions around the world as being effective, in order to give parties the option of choosing different arbitration processes in the same case or legal proceedings conducted in accordance with the same contract.23The majority of multi-tier arbitrations not only have multiple arbitration dispute resolution articles, but they may also include a mediation or negotiation clause at the outset, prior to the start of the arbitration procedures between the parties.

According to the UNCITRAL working group's 2015 report, parties are free to contest an arbitral award in the first instance and then file an appeal; if they are dissatisfied with the outcome of the appellate arbitral proceedings, they may seek redress in a court of law.The main goal of this is to give parties another chance to resolve their dispute amicably before taking it to court. Multi-tier arbitration or dispute resolution agreements are taken into consideration, usually in relation to business transactions when a prompt settlement of issues is desired. In order to carry out mutual dispute resolution and prevent the needless and time-consuming court proceedings that could cost both parties time, money, and energy, parties are encouraged to either include multi-tier dispute resolution clauses or multi-tier arbitration clauses in their contracts. The English laws, from which the arbitration laws of India are derived, allowed two-tier arbitration clauses in commercial contracts without specifically mentioning them in order to deter parties from engaging in time-consuming court battles over cross-border business issues. Before going to a court of law with jurisdiction, the alternative conflict resolution process must be properly mentioned according to English law. Additionally, it has also been ruled that when arbitration or discussion is obviously required for the goal of amicably resolving a disagreement, that action should be taken before resorting to the legal system. The following guidelines have been set by English law to promote multi-tier conflict resolutions. (a) The dispute resolution procedures should be laid out so that no consent is required before moving forward with the case; (b) the arbitral procedure and the person presiding over the proceedings must be defined; and (c) the parties should agree on a detailed model of the procedure to aid in their decision-making regarding the various dispute resolution options[8]. The parties should be fully aware of their rights and obligations under the contract's dispute resolution or arbitration clause, according to Australian legislation on multi-tier arbitrations. Even if the negotiation clause were found to be unenforceable, it was decided that failure to reach an agreement through discussion or the initial arbitration round could result in a second arbitration round under the laws chosen by the contracting parties. Additionally, Singapore, which is the nation with the best business infrastructure and is regarded as Asia's center for arbitration and conflict resolution, allows for numerous dispute resolution clauses and several arbitration proceedings. As a result, it is clear that two-tier arbitration or multiple dispute resolution is not only admissible under Indian law but has also historically been permitted in many nations that are important commercial hubs outside of India.

The benefit of having several arbitration and dispute resolution clauses is undoubtedly the fact that it gives parties a variety of alternatives to settle their problems outside of court, postponing the start of court proceedings as has already been stated. When it comes to Indian law and commercial conflicts, there is a constant worry that businesses may become embroiled in unnecessary legal hiccups, which would further stall procedures given India's protracted legal system . Due to the way the Indian judicial system operates,

wherein court cases are unnecessarily delayed because the proper hierarchy of courts is followed, two-tier arbitrations or other alternative conflict resolution methods are thought to be preferable.

It is important to highlight that while "HCL" was a government-sponsored enterprise and whose business included buying copper concentrate, "Centrotrade" was a company that was incorporated in the United States of America and dealt with the sale and acquisition of non-precious metals, including copper. "Centrotrade" filed an application under Section 48 of the Arbitration and Conciliation Act, 1996, before the Court of District Judge, Alipore, after the arbitral decision was made in its favor by the appellate arbitrator, Mr. Jeremy Cooke. The execution case was then moved to the High Court of Calcutta, where the petition for the execution was approved by the Learned Single Judge of the High Court of Calcutta[9]. "HCL" filed an appeal with the High Court of Calcutta's Division Bench after being upset with the Learned Single Judge's decision. The Division Bench overturned the Learned Single Judge of the High Court of Calcutta's decision and remanded the case to the International Chamber of Commerce for further consideration. Both parties "Centrotrade" and "HCL" came before the Honourable Supreme Court of India in cross-appeals after being upset by the decision of the Division Bench of the High Court of Calcutta.

Although multi-tier arbitrations or other dispute resolution processes offer a successful means of resolving disputes without going to court, there are issues with the enforcement of the specific article or clauses in connection to contractual disputes. In many cases, the main issue that arises when there are various provisions of an arbitral tribunal is which specific arbitration instance should be enforceable. There have been several instances where parties have appealed a favorable arbitral ruling in the first place, followed by arbitration, and if it didn't work out in their favor, they went to court to settle the dispute. In addition to this, arbitration processes are extremely expensive. Even one arbitration session is pricey, and adding further arbitration or dispute resolution clauses just drives up the cost, which is burdensome for both parties.44 The process becomes even more complicated if there are two arbitral awards that are in favor of both parties, such as one award in favor of Party A and the other in favor of Party B. This is because it is unclear which tribunal's decision should be considered authoritative for the purposes of the dispute. The dispute resolution processes between the contract's parties will be further delayed if there are many dispute resolution clauses and no time limit specified in the contract's terms regarding the various conflict resolution processes. Furthermore, even if a deadline is set, failure to resolve individual dispute resolution provisions, such as those requiring negotiation, mediation, or even multiple arbitration proceedings, within that deadline will drive up costs and put the parties to the dispute through unneeded trouble and inconvenience. Because of this, even though allowing two-tier arbitrations in India is a positive development for the country's arbitration system and is intended to encourage investors to adhere to Indian law when resolving disputes even when those investors are from other countries, only time will tell if the Supreme Court's decision will have any positive effects on FDI in the nation[10].

CONCLUSION

After carefully examining the Centrotrade Minerals case, the situation before the judgment was handed down, and the notion of multi-tier arbitrations from a global viewpoint, it can be conclusively said that it is a very common practice elsewhere in the world. In the modern world, having a variety of dispute resolution choices available is a useful approach to settle business issues, especially when parties from many jurisdictions and nations are involved. With relation to the applicability of two-tier arbitrations, the Centrotrade Minerals verdict has created clarity and established its legitimacy in the Indian arbitration system. The verdict alone, however, does not prove conclusively that two-tier arbitration will promote foreign investment and swiftly settle conflicts.

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CHAPTER 10

ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2015: A CRITICAL ANALYSIS

Yogesh Chandra Gupta, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-cognitor.yogesh@gmail.com

ABSTRACT:

The Arbitration and Conciliation Act, 1996 (the "Arbitration Act") has finally been changed, after great clamor. The President of India gave his assent to the Arbitration and Conciliation (Amendment) Act, 2015 (the "Amendment Act") on December 31, 2015, and it is presumed that it entered into force on October 23, 2015. The Amendment Act has suggested significant modifications to the Arbitration Act. The road to the Amendment Act was somewhat difficult. In order to facilitate quick and efficient conflict settlement through arbitration or conciliation and lessen the burden on courts, the Arbitration Act was passed in 1996. The parties must decide whether to include arbitration clauses in light of the tremendous criticism India's arbitration practice has faced over the years. The Law Commission of India ("Law Commission") had presented its Report No.246 in August 2014 ("Law Commission Report"), which included various recommendations for amendments to the Arbitration Act in response to concerns of the previous arbitration regime. A number of these revisions to the Arbitration Act were put into effect on October 23, 2015, when the President of India promulgated an ordinance (the "Arbitration Ordinance"). Since the revisions were implemented through an ordinance, there was still confusion and doubt, and it was unclear whether the amendments would be applied prospectively or retroactively. The Amendment Act is unquestionably a positive step and has been praised for giving the Indian arbitration process the much-needed boost. The Amendment Act mostly complies with the Law Commission Report and the Arbitration Ordinance, except a few exceptions. However, there were mistakes made in the new law's formulation, and the legislators should have done more to guarantee that India does actually become the next hub for arbitration. With recommendations to improve the effectiveness of the Arbitration Act, this paper attempts to offer insights and critically analyze the Amendment Act.

KEYWORDS:

Arbitration Ordinance, Commission Report, Interim order,International Commercial ArbitrationLaw.

INTRODUCTION

Following the Supreme Court's ruling in Bharat Aluminium and Co. v. Kaiser Aluminium and Co.2 ("BALCO"), Indian courts were not permitted to take part in arbitrations that were held in foreign countries. After BALCO, if a party's assets were in India and there was a chance they would be lost, the other party could not ask the Indian courts for temporary injunctions. It posed significant obstacles for parties who had decided to arbitrate outside of India because interim orders issued by arbitral tribunals outside of India could not be implemented there. With the addition of Section 2(2), which makes the provision for interim relief(s) also applicable in situations where the site of arbitration is outside of India, the Amendment Act has addressed this problem, subject to an agreement to the contrary[1]. There are, however, not many worries. Only parties to "international commercial arbitration" with a seat outside of India are eligible to use this option. This indicates that two Indian parties who decide to arbitrate outside of India will not be covered by the protection.

According to the Amendment Act, arbitration proceedings must begin within 90 (ninety) days of the date of the court's interim order, or within the period of time that the court specifies. The purpose of this modification is to stop the practice of the parties intentionally obtaining exparte or ad interim orders in order to avoid arbitration and abuse this provision.However, it is unclear whether the 90 (ninety) day period would start on the date of the final order in the Section 9 proceedings or the date of the exparte or interim

order. This point needed to be clarified. Perhaps the preferable course of action would have been to state that the 90 (ninety) day timeframe begins on the date the petition is filed in order to force the parties to arbitrate[2].

The changes to Section 17 provide the arbitral tribunal the same authority as a court under Section 9 thanks to those changes. The Amendment Act stipulates that once the arbitral tribunal has been established, courts cannot consider requests for interim measures, unless there are exceptional circumstances that might prevent the remedy of obtaining interim orders from the arbitral tribunal from being effective[3]. This is intended to make it easier for the parties to approach the arbitral tribunal and minimize the intervention of courts. The Amendment Act also makes it clear that any temporary relief awarded by the arbitral tribunal would function in the same way as an order issued by a civil court in accordance with the Civil Procedure Code of 1908 ("CPC"). This is a significant shift because, under the previous arbitration regime, the arbitral tribunal's interim orders could not be legally enforced, thereby rendering them useless. However, the Single Judge in a recent decision by the Kerala High Court in Writ Petition (Civil) No. 38725 of 2015 has taken the position that under the Amendment Act, the arbitral tribunal cannot pass an order to enforce its own orders and the parties will instead need to approach the courts for such enforcement, making the enforcement of arbitral awards difficult. It will be fascinating to see how the other courts view this decision and whether it withstands closer judicial examination [4].

Under the new system, interim measures may be ordered by the arbitral tribunal even after the arbitral award has been made but before it is put into effect. This, however, conflicts with Section 32, which states that an arbitral tribunal's mandate expires after issuing the final judgement. It is incomprehensible how the arbitral tribunal might have the authority to impose interim measures after passing the final judgement if it loses jurisdiction after doing so. Section 32 should have been appropriately amended to address this problem. Unless it determines on the basis of prima facie evidence that there is no valid arbitration agreement, the modified Section 8 gives the judicial authority the authority to submit the parties to arbitration when there is an arbitration agreement[5]. Although Section 8(1) refers to "judicial authority," for whatever reason, Section 8(2) instead uses the word "Court," which seems to be an oversight.

DISCUSSION

Part I of the statute applied when the location of arbitration was India, according to the version that was promulgated in 1996. However, the Supreme Court ruled in Bhatia International v. Bulk Trading SA(2) that Part I of the act applies to international commercial arbitrations held outside of India unless the parties have specifically or implicitly agreed to exclude all or any of its provisions. This is true when a foreign party seeks interim relief against an Indian party under Section 9 of the act, which is covered by Part I of the act. As a result, the court started to evaluate the application's merits[6].

Arbitrations have always been drawn-out and difficult processes in India. Due to a lack of formal norms and the fact that the majority of arbitrations were conducted ad hoc rather than by arbitration institutions, the arbitral process was also mainly relied on individual arbitrators. Numerous judicial rulings that broadened the range of challenges to awards and judicial interference in the arbitral process further added to the ambiguity surrounding arbitrations. Due to this ambiguity, protracted court cases resulting from arbitrations were brought about, and there was additional confusion over how final verdicts could be carried out. When awards in arbitrations with foreign seats were contested in Indian courts or sought to be performed there, the situation was similar. These shortcomings made arbitration a less efficient method of resolving disputes.

The Arbitration and Conciliation (Amendment) Act was passed by Parliament on December 17 and obtained presidential assent on December 31 to address these problems. As a result, on October 23, 2015, significant modifications to the Arbitration and Conciliation Act 1996 went into effect.The modification aims to increase the speed and efficiency of arbitration in India, lessen court involvement, increase India's appeal to international investors, and enhance the convenience of conducting business there. Despite the good and unquestionably laudable objectives behind the amendment, there are still some problems with it.

In this update, the impact of the modification on international commercial arbitrations held outside of India is examined from the standpoint of a foreign party[7]. Understanding the definition of "international commercial arbitration" is prudent before analyzing the impact of the amendment. According to Section 2(1)(f) of the act, "international commercial arbitration" is an arbitration that relates to disputes arising out of legal relationships, whether contractual or not, that are considered to be commercial under Indian law and where at least one of the parties is Not indian.

Notably, prior to the modification, an arbitration was classified as an international commercial arbitration if it involved a corporation that had its central management and exercised its control outside of India. The words "a company or" have been removed from the start of Section (2)(1)(f)(iii) in order to bring the act into compliance with the Supreme Court's ruling in TDM Infrastructure Private Limited v. UE Development India Private Limited (1), which stated that the legislature intended to determine a company's residence based on its place of incorporation and not its place of central management or control. However, foreign corporations that were established outside of India are still protected by Section (2)(1)(f)(ii) (i.e., body corporations established outside of India).

A number of later cases, most notably Venture Global Engineering v. Satyam Computer Services Limited, broadened the application of this ruling.(3) In this instance, a foreign award was contested in a petition submitted under Section 34 of the Act by a party to an international commercial arbitration. According to the Supreme Court's ruling in Bhatia International(4), a party may challenge a foreign award under Part I of the act, namely Section 34, since Part I of the legislation extended to foreign seated arbitrations and, consequently, foreign awards[8].

In the end, a constitutional bench of the Supreme Court overturned the ruling in the Bharat Aluminium Company v. Kaiser Aluminium Technical Service, Inc. (5) case in 2012, declaring that Part I would not apply to international commercial arbitrations with foreign seats. But this ruling only applies to contracts signed after September 6, 2012. Agreements made before to this date would remain in effect during the Bhatia administration. Due to this, two parallel regimes emerged: the Bhatia regime's arbitration agreements on the one hand, and the BALCO regime's agreements, which were inked after September 6, 2012. The parties to foreign-seated arbitration under the BALCO regime had no way to access interim relief from the Indian courts under the act as a result of these parallel regimes, which left a significant gap in the law.

The amendment added a clause to Section 2(2) that states that, in the case of international commercial arbitration, Sections 9, 27, 37(1)(a), and 37(3) (all of which are found in Part 1 of the Act) will apply to foreign-seated arbitrations unless the parties have agreed otherwise. However, Part II of the statute provides for the enforcement and recognition of international arbitral judgements. Insofar as it applies Section 9 to arbitrations with foreign seats and ensures that a foreign award cannot be contested under Section 34, the change effectively reinstates the Bhatia decision.

By virtue of this proviso, a foreign party may, unless the parties have agreed otherwise, seek interim relief against a party in India and therefore preserve its products or assets while the arbitration is pending. This relief may be requested prior to the start of the arbitration, during the arbitration, or following the passage of an award up until the execution of the award. This option should be a relief to parties because they can now apply directly to the high courts for temporary protection orders to protect their in-country property that is the subject of arbitration or to settle financial disputes. According to the newly added Section 9(2), the arbitral procedures must begin within 90 days of the date of the order or from the date specified by the court if temporary relief is requested before the start of arbitration and is granted. However, it is not yet clear what happens if arbitration is not started within the allotted 90 days.

Court support and appeals provisions

A party to an international commercial arbitration with a foreign seat may now apply to a court under provision 27 in order to request its assistance in obtaining evidence, excluding any agreements that would

prevent the application of this provision. This is because of the new proviso to Section 2(2). This should be especially helpful for international parties seeking to summon Indian witnesses or submit Indian-based documentation. The penalties for disobeying an order issued under this provision are likewise described in this section.

A party that disagrees with an order made under Section 9 may also appeal under Section 37(1)(a), unless there is a clause in the agreement that excludes the use of Section 9 or Section 2(2). However, it appears that the change in this regard has a typographical error. The right to appeal decisions made in accordance with Section 9 of the act was outlined in Section 37(1)(a) of the unamended legislation. However, as a result of the revision, this appeal provision has been renamed Section 37(1)(b), and a new Section 37(1)(a) has been added to provide for appeals against orders made under Section 8, which does not apply to international commercial arbitrations with foreign seats. Therefore, Section 37(1)(b) should have applied instead of Section 37(1)(a) under the proviso to Section 2(2). Hopefully, Parliament will soon correct this mistake. Additionally, as Section 37(3) also applies to foreign commercial arbitrations, Section 37(1)(b) cannot be used to file a second appeal. But Section 37(1)(b)(3) makes it clear that the ability to appeal to the Supreme Court will not be altered or eliminated.

Limited grounds for refusing to carry out awards

Under Sections 48 or 57 of the act, parties may seek the execution of foreign judgments made in nations that are parties to the New York Convention or the Geneva Convention. When an award has been passed in a nation that is a signatory to the New York Convention and has a reciprocal arrangement with India, Section 48 is applicable. When an award is made in a nation that has ratified the Geneva Convention, Section 57 is applicable. The foreign award was issued in violation of India's public policy, which was not previously established, according to one of the reasons for denial. In an effort to clarify what "public policy of India" means, the amendment added two identical explanations to Sections 48(2) and 57(1). The justifications aim to limit how widely "public policy" has been construed by the judiciary in the past, which has led to practically all awards being contested on the grounds that they go against Indian public policy. In accordance with Explanation 1, an award only violates India's public policy if one of the following conditions is true: "i. the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 or Section 81; or ii. it is in contravention with the fundamental policy of Indian law; or iii. it is in conflict with the most fundamental notions of morality or justice." Explanation 2 makes it clear that the courts will not consider the case's merits when evaluating whether there has been a violation of public policy [9]. Although attempts have been made to define public policy, the definitions may not actually be helpful since they are ambiguous and poorly written.

Potentially applicable amendments

The question of whether the amendment will take effect prospectively or retroactively has been addressed in Section 26 of the amendment. According to Section 26, the modification will be effective going forward for arbitrations initiated after October 23, 2015. However, it is up for debate and is now being taken into account by numerous courts around the nation as to whether the amendment applies to ongoing court cases that were brought after the passing of an award. In fact, the top courts have already expressed divergent opinions on this subject. However, this debate will impact issues relating to past domestic arbitrations and international arbitration verdicts that have already been subject to challenges under Section 34 of the act, not new foreign-seated arbitration.

Some of the amendment's salient characteristics are:

Automatic hold on arbitral awards: According to the 1996 amendment, a party had the right to request the reversal of an arbitral award, but the 2015 amendment clarified that this would not be done automatically. Regarding the amendment, it has laid down the prerequisites for processing the automatic stay. These occur when a judge determines that an agreement is significant or when fraud or corruption has been reported. A minimum of 10 years of experience is required, as stated in the amendment's Section 43J. Additionally, the

appointment required the application of the Eight Schedule. The Eight schedule was now removed by the amendment, which replaced it with Section 43J, allowing the parties to choose arbitrators without regard to their credentials and stating that the rules for the arbitration will be outlined by regulations [10]. The amendment used terms like "fraud" and "corruption" without providing a comprehensive definition of the situations that would qualify as such. It is becoming more subjective to the point that its various meanings could lead to misinterpretations in various situations. Furthermore, it is uncertain what the so-called prima facie evidence will actually amount to. In addition to having the potential to draw foreign arbitrators, the modification to Section 43J also carries the risk of prolonging the process.

The Act's advantageous effects

The commission has been given some latitude to consider the selection of the foreign arbitrators in accordance with the UNCITRAL Model Law by revising Section 43J. The measure would also stop the parties from profiting from receiving an award that was obtained by deceit or fraudulent means.

CONCLUSION

By focusing on its effectiveness and efficiency, the arbitration system in India has always been designed to be a friendly one. Over the years, arbitration has evolved significantly, and there are now numerous arbitration clauses in contracts and agreements. The original Act was put into effect in 1899, but 120 years later, India is still condemned for its unfriendly regime. Nevertheless, the revision was primarily focused on it and was somewhat successful in attracting foreign arbitrators.The Legislature's commitment to work on changing the arbitration sector and dispel the idea that India has an antiquated system of arbitration rules is evident in the most recent modifications. Instead of continuously modifying the same gray areas and disregarding the larger obstacles preventing India from becoming a center for international arbitration, a broader perspective on the challenges is required.

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CHAPTER 11

SETTING ASIDE OF ARBITRAL AWARDS UNDER SECTION 34 OF INDIAN ARBITRATION AND CONCILIATION ACT 1996

Pradip Kumar Kashyap, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id- pradiprgnul@gmail.com

ABSTRACT:

In the area of legal interpretation of the grounds for annulling arbitral awards, the subject of "Sec.-34 of the Arbitration and Conciliation Act: An Ambiguity of Legal Interpretation" is one of real concern and relevance. The clause discusses the court's ability to intervene during the consideration of any challenge to an arbitral decision reached by the arbitral tribunal. The Arbitration Act of 1940 and the Arbitration and Conciliation Act of 1996, when used in this context, somehow failed to give the term "Public Policy" a specific dimension along with the other grounds for setting aside Arbitral Awards. As a result, it provided a wide opportunity and example for inducing the Judiciary to interfere with the arbitral process. The definition of "Public Policy" has been somewhat narrowed by the various amendments made to the Arbitration and Conciliation Act of 1996, but further changes are still needed to make the practice of setting aside arbitral awards an exception rather than a common occurrence. This article evaluates the many changes made to Section 34 of the Arbitration and Conciliation Act of 1996, identifying its shortcomings and stressing the ways in which they allow for the non-execution of arbitral rulings.

KEYWORDS:

Arbitration Conciliation Act, Arbitral Awards, Legal Interpretation,Patent Illegality, PublicPolicy.

INTRODUCTION

A dispute involving any agreement between the parties is proposed for resolution through arbitration, a private dispute resolution process or procedure that is a component of alternative dispute resolution. One or more arbitrators then make binding decisions regarding the dispute after reviewing the relevant facts and evidence. The decision made by the arbitrator through the arbitration tribunal is known as a "award" and is similar to the judgment or decision made. Recent times have seen the rapid growth of industrialization and globalization, as well as the excessive burden on the judiciary brought on by the large number of cases that are still pending as a result of drawn-out court procedures. This has led to arbitration becoming a trusted and time-efficient method for resolving disputes, not just in India but around the world. Additionally, arbitration creates a considerably larger and more flexible space for negotiation between the disputing parties by allowing for flexibility in the dispute settlement process[1]. The fundamental goal of establishing arbitration as a dispute resolution mechanism was to make it more affordable than traditional court processes while also offering a quick and efficient dispute resolution procedure. The basic goal of arbitration, which is the quick and efficient resolution of disputes outside of Court, has, however, been impeded in recent years due to the influence of Courts in situations connected to the setting aside of arbitral verdicts. The Arbitration and Conciliation Act of 1996 contains the following provisions for setting aside arbitral awards: "Section 34. Application for setting aside arbitral award.

Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with subparagraphs (2) and (3).

The Court may only reverse an arbitral award if the party making the application provides evidence that

(i) A party was incapacitated;
(ii) The arbitration agreement is invalid under the law to which the parties have subjected it; or
(iii) The party making the application was not given adequate notice of the appointment of an arbitrator or of the arbitral procedure.

(iv) If decisions on matters submitted to arbitration can be distinguished from decisions on matters not so submitted, only the portion of the arbitral award that contains decisions on matters not submitted to arbitration may be revoked; or

(v) If the composition of the arbitral tribunal or the arbitral procedure did not comport with the parties' agreement, unless such agreement conflicted with a provision of this Part from which the parties may not deviate [2].

The dispute's subject matter cannot be resolved through arbitration under the current applicable law, or the arbitral ruling is against Indian national policy.Explanation 1 For the avoidance of doubt, it is clarified that an award is in violation of India's public policy only if: it was made in violation of section 75 or 81, or was influenced or affected by fraud or corruption; it violates the fundamental policy of Indian law; or it violates the most fundamental principles of morality or justice. For the avoidance of doubt, Explanation The evaluation of the merits of the dispute is not required to determine whether there is a violation of Indian law's essential policy.The Court may also nullify an arbitral award that resulted from a dispute other than an international commercial dispute if the Court determines that the award is clearly unlawful on its face. However, an award cannot be nullified solely because the law was applied incorrectly or the evidence was evaluated differently.

A private tribunal's ability to be controlled by the Court of Kings bench was originally proposed by the English Parliament in the early 18th century as a result of the first Real Bills of Rights, which were passed in England in 1689. It was also suggested that, going forward, only corruption and fraud would be grounds for overturning arbitral awards made by the bench. As time went on, the need for law also changed, and as a result, in the latter 20th century, different provisions were adopted for the setting aside of arbitral awards, including the ground of "award carrying an error of law apparent on its fact, which was essentially an administrative law principle[3].

The difficulty in interpreting the term "public policy" has greatly contributed to the failure of arbitral awards to be implemented. The idea of Public Policy was added by the Act of 1996 under section 34 (2) (b) (ii) of Chapter VII, Recourse against Arbitral Awards. Additionally, the Indian court was faced for the first time with the issue of how to define the term "public policy" in the context of this Act's clause on the revocation of an arbitral judgement. The so-called narrow view of the definition of public policy was established in the case of Renusagar Power Corporation Ltd v. General Electric Company3 (i.e., two years prior to the 1996 Act) as an award that is against the following: a) Fundamental Policy of Indian Laws b) Interest of Law c) Contrary to Justice and Morality (which covers a wide aspect of both justice and morality as it comprises of essentially everything that falls under the ambit of justice).

Later, in 1996, the Act was amended to include this interpretation of the Renusagar Power Co. Ltd v. General Electric Co. case as a provision for annulling an arbitral judgement on the basis of public policy. The drafters of the Act of 1996 physically lifted Article 5 of the New York Convention and added it as Sections 34 and 48 of the Arbitration Act 1996 in context to both Domestic and International scenario, respectively, when the Act of 1996 entered into force. As a result, the Renusagar era began, during which the terms "Fundamental Policy of Indian Law" and "Justice and Morality" were used to define and interpret public policy[4]. The Renusagar case, which established the criteria to distinguish between legal errors (as defined by the 1940s Act) and fundamental principles of Indian law, was also noted for failing to specifically distinguish between the public interest and other interests, despite the fact that it is quite possible and obvious that there can be differences between the public interest and that of government interest or individual interest in some circumstances[5].

A portion of the definition of "public policy," which dealt with justice and morality, was changed later and in accordance with the recommendation made in the 246th law commission report, which was presided over by Hon.

Justice A.P. Shah.The term "fundamental policy of Indian laws" was interpreted under Explanation 2 as "for the avoidance of any doubt, the test as to whether there is a contravention with the fundamental policy

of Indian law shall not entail a review on the merits of the disputes4". Given a close end and limited to basic notions of justice and morality, i.e., something that has shocked the entire notion of the legal system.

DISCUSSION

The ambiguity surrounding the term "patent illegality" has also led to an expansion of the parameters for annulling arbitral awards. In ONGC Ltd. v. Saw Pipes Case, the Hon. Supreme Court expanded the definition of "public policy," holding that it should be interpreted both narrowly and broadly depending on the facts and circumstances of the case. In addition, the court added a new heading called "Patent Illegality" rather than addressing the word's inconsistency with the fundamental policies of Indian law, justice, and morality. By amending the arbitration and conciliation act in 1996, the phrase "patent illegality" was added as section 2A of the Act, creating yet another reason to set aside an arbitral award. However, the phrase "patent illegality" was only made applicable to arbitration proceedings held in India, not in the context of international commercial arbitration, as can be seen from section 2A's language, which reads, "an arbitral award". Additionally, an award that violates the terms of the 1996 Arbitration and Conciliation Act is seen as obviously illegal and cannot be implemented since it is deemed to be void[6].

The Supreme Court clarified the aspect of patent illegality in Associate Builders V. Delhi Development Authority in 2014 and stated that patent illegality includes: Conciliation Act of 1996, failure to consider the terms of the contract and customs of trade as required by section 28(3) of the Act, and failure to provide reasons for the arbitrator's decision. Another barrier to limiting the scope of the provisions relating to annulling an arbitration ruling is the false impression generated by Section 28(3), According to page number 1750, "while deciding and making an award, the arbitral tribunal shall in all cases take into account the terms of the contract and trade uses applicable to the transaction," which means that by virtue of the aforementioned provision, any arbitration is constrained and limited by the laws of contracts and trade usages. An arbitrator cannot decide any matter in accordance with what he or she believes to be right and just because the arbitration is not given the authority to decide any arbitrational matter ex aequoet bono (according to what is just and good), only where the parties have expressly authorized the arbitrator to do so. As a result, it once more provides and broadens the grounds for annulling an arbitral award because, under Section 28(3) of the Arbitration and Conciliation Act of 1996, when an arbitrator makes a decision based on what it considers to be right and just, that decision may be contested on the grounds of contract validity[7].

An arbitrator isn't allowed to make decisions in accordance with the contract in an arbitrary, unreasonable, or capricious manner. His sole responsibility is to resolve contract disputes. Apart from what the parties have granted him under the contract, he has no other authority. He behaved without authority if he ventured outside the parameters of the agreement. The award is voidable if the recipient intentionally violates the law or the terms of the contract that gave rise to his authority. "Since the arbitrator, as stated in section 20(3), is bound by the provisions of the contract, in situations where the court and the arbitrator have divergent opinions regarding the legality of the contract, it leads in dispute with regard to the announced award and, thus, outweighs the award.

As a result, the above-mentioned mandatory provision has left a significant gap in the country's enforcement of arbitral awards, which causes awards to be annulled far more frequently than they otherwise would. The Amendment to the Arbitration and Conciliation Act 1996 also added a provision regarding conflicts or restrictions on the part of arbitrators by incorporating Schedule VIII. According to the current status of arbitrations, the recent amendment's provision for the qualification and experience in case of arbitrator appointment, where the entire panel is made up of arbitrators who are Indian nationals for both domestic and international arbitrators, is a significant flaw or gap in the act. If India is planning to establish itself as an arbitration hub in order to draw people with foreign seats to this country, it will b Therefore, it appears that the Schedule VIII clause is increasing the likelihood that an award will be revoked.

The Arbitral Tribunal's members must put the Award in writing and sign it.An Award is therefore not complete and binding until it has been signed by the arbitrators[8]. In SatwantSingh Sodhi v. State of Punjab, it was decided that an arbitrator becomes functus officio after he signs an award. It is not required that it be also given, pronounced, or submitted to the court. Unless the parties have agreed that no justification for the Award should be given, it must describe the reasons for the Award.

Reasons are the connection between the data that underlies particular conclusions and the conclusion itself. According to the 1996 Act, the reasoned Award is highlighted in order to help the parties and reviewing Courts understand the facts and the general reasoning that led the arbitrator to determine that this was the decisive point, as well as to understand the facts and then consider the position with respect to reviewing the Award on any other issue that came up before the arbitrators. The Supreme Court of India stated in AK Kraipak vs. Union of India that the need for explanations in all judicial, quasi-judicial, and arbitral rulings is becoming more and more important.The date of the Award and the location where it was made must be stated. Each party should receive a copy of the award.

In the case Union of India v. Tecco Trichy Engineers and Contractors, it was decided that Section 31(5) requires that "a signed copy of the arbitral Award shall be delivered to each party after the arbitral Award is made." A "party" is defined in Section 2(1)(h) as "a party to an arbitration agreement." The term "party" as used in Section 2(1)(h) read with Section 34(3) must be understood to mean a person who is closely related to a significant organization like the Railways.

The Indian arbitration system and laws have always used a meandering strategy with numerous forward and backward thrusts. The Renusagar case in 1994 can be credited with the forward push, whereas the Saw Pipe Case in 2002 was responsible for the retrograde drive. However, the significant revisions made to the 1996 Act by and in accordance with the recommendations of the 246th Law Commission have a bright outlook on arbitration. The amendment to Section 34, wherein the scope of justice and morality was interpreted to include the most fundamental principles of justice and morality, managed to close the gap left by the undefined scope of public policy and to fill it, but the field still requires numerous changes in order to become an undisputed conflict resolution mechanism.

(1) The most significant recommendation made by Justice B. N. Krishna in his report, is the establishment of an arbitrational counsel, a body that would oversee India's arbitration laws.
(2) In order to handle the arbitration matter in a much more technically equipped fashion, it is still necessary to develop a specialist arbitration bar and to give judges unique and specialized training.
(3) I won't skip this crucial recommendation, which is to form a permanent committee under the purview of the APCI (Arbitration Promotion Council of India) to examine changes in Indian arbitrational law and practices and make timely legislative and other change recommendations to the government.
(4) Leading arbitrators, arbitration practitioners, arbitration institutions, judges, representatives from business associations, and foreign jurisdiction experts must all be on the commission.
(5) A fourth suggestion was that the government take proactive steps to ensure that the arbitration counsel and act keep up with the growth of arbitration rather than waiting for the court to interpret ambiguities in the law through case laws.

The power to impose conditions mentioned in subsection includes the power to issue ad interim measures against third parties or in respect of property that is not the subject of the Award, insofar as it is required to protect the interests of the party in whose favor the Award is passed, as well as the power to grant ad interim measures not only against the parties to the Award or in respect of the property that is the subject of the Award[9]. The court may confirm, modify, or vacate the ad interim measures ordered under subsection with the stipulations, if any, as it may judge appropriate after hearing from the parties involved.

Part VIII of The Arbitration and Conciliation Act of 1996 regulates the finality of arbitral Awards in arbitral proceedings. When an Award is made, the successful party is no longer permitted to pursue the claim on which he previously prevailed. Additionally, it forbids the losing side from bringing up the

argument it lost on simply because it thinks the second time around, he may have a more sympathetic jury, more convincing witnesses, or a better advocate. Conflicts must come to an end. Accordingly, Section 35 stipulates that an arbitral Award shall be conclusive and bind the parties and the persons making claims pursuant to them, respectively. Before 1940, an Award may be carried out in the same way, to the same degree, and with the same restrictions as a court order.An Award may be enforced by submitting it with the court and getting a judgment and decree on it under section17 of the Arbitration Act of 1940. When the deadline for filing an application to set aside the arbitral Award under Section 34 has passed or the application has been filed but denied, the Arbitration and Conciliation Act of 1996's Section 36 states that the Award shall be enforced in accordance with the Code of Civil Procedure, 1908 (5 of 1908), just as if it were a judgment of the Court. Because the majority of the purposes of arbitration would be undermined if a claimant who wins in arbitration had to once again wait in line for legal actions to be taken to enforce their agreements, this section lays out the quick procedure for excluding court participation at the enforcement stage. The arbitral proceeding is not treated as a lawsuit just because an arbitral Award is enforceable as though it were a decree. It also doesn't turn an arbitration into a lawsuit[10].This clause only states that an arbitral Award can be enforced as if it were a decree for the purposes of enforcement.

CONCLUSION

Finally, it can be said that in order to make India a hub for arbitration and to lighten the burden on the courts, it is crucial that the arbitration laws in India be amended and modified to change the award-making panel and to establish the award as a legally binding resolution of any dispute that can only be questioned or reviewed on a clearly defined basis. This will prevent arbitration from unduly stepping into the territory of litigation. Since there is no clear-cut definition of public policy that encompasses concepts like "basic notion of justice and morality" and "fundamental policy of Indian laws," along with obvious illegality and the provisions of Sec. 23(3), there is a significant gap in how arbitral awards are to be implemented. The aforementioned terms should be interpreted in a way that makes the practice of overturning arbitral awards an exception rather than a normal practice, and it must be extremely obvious that the award is impartial and free of any form of fraud in such a situation. In addition, the grace period of one year to resolve a case brought against an award and the limitation periods of three months and one month (in cases where sufficient justification is demonstrated in cases of delay) as stated in Section-34(3) are clearly lengthening the time limit for resolving an arbitrational dispute and undermining the primary goal of arbitration, which was to provide swift dispute resolution. Therefore, it can be said without a shadow of a doubt that India's arbitration law requires a much more technical modification in relation to both provisions, including restricting or narrowing the scope of annulling an arbitral award and building an equipped and specialized panel of arbitrators that both domestic and foreign parties can rely upon.

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CHAPTER 12

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA: AN IN-DEPTH REVIEW

Dal Chandra, Assistant Professor
College of Law, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh, India
Email Id-degautambahjoi@yahoo.co.in

ABSTRACT:

Commercial disputes have increased as a result of trade and economic liberalization, globalization, and a boom in international business transactions. One of the most universally regarded methods of resolving disputes, especially on an international scale, is international business arbitration. Since India's liberalization began in the 1990s, luring foreign investment has significantly boosted the domestic economy. Even though businesses are turning to arbitration to speed up international trade and reduce judicial interference, the issue of dispute resolution is still only partially resolved in India due to procedural barriers to the recognition and enforcement of foreign arbitral awards. These judicial interventions could have significant effects on foreign arbitration decisions made by international business experts as well as on international business transactions. A number of lawsuits challenging foreign awards have been filed over the past three decades, but a recent court decision in Bharat Aluminium Company Limited ("BALCO") v/s. Kaiser Aluminium Technical Service, Inc. ("Kaiser") has given arbitration a second chance and increased trust in the Indian judicial system. The different ways that "public policy" is interpreted in India is the second barrier to the enforcement of foreign judgments there. The purpose of the article is to critically assess whether foreign arbitral judgements are enforceable in India.

KEYWORDS:

Arbitration Conciliation Act, Commercial Disputes, Foreign Awards,International Business Arbitration, Parties' Agreement.

INTRODUCTION

One of the main benefits of ADR over litigation is the use of confidential settings to resolve disputes. Additionally, ADR has a lot of versatility. Arbitration is one of the most frequently utilized alternatives to litigation where parties can agree on the procedural rules to regulate the execution of the contract and is now frequently used to resolve a disagreement outside of Court giving cost and time efficiency. The parties' agreement to adopt arbitration as a method of dispute resolution. Instead of a national court of law, which would have jurisdiction unless the parties agreed to exclude it, disputes are settled in arbitrations by one or more parties acting in a judicial capacity in private[1]. Award refers to the arbitral tribunal's judgment. The use of ADR as a conflict resolution method in India has improved the administration of justice. ADR, such as Lok Adalat, has made a considerable contribution to clearing the backlog of cases. Although the arbitration system appears to be in its infancy, the seeds of arbitration were planted as early as 1772. The Arbitration and Conciliation Act, 1996 (hereafter 1996 Act) currently provides the foundation for the execution of foreign arbitral awards in India under Part II of the Act, and even Article 51 of the Indian Constitution favors arbitration.As was already said, the main goal of the New York Convention was to facilitate the enforcement of international arbitration agreements. In line with this goal, Article II.1 of the Convention established a fundamental standard for the formal and substantive legality of such agreements:

"Each contracting state shall recognize a written agreement between the parties committing them to arbitrate all or any disputes arising out of or relating to a specific legal relationship, whether contractual or not, concerning the subject matter capable of arbitration." The contracting states must submit parties to an international arbitration agreement to arbitration unless they claim that the agreement is void and unenforceable, as stated in Art. II.3 of the Convention. In Art. II, the additional conditions are listed[2]. The 1996 Act's Part II addresses the enforcement of foreign awards. Awarded made in accordance with a

contract to which NYC applies and made in the region to which NYC applies on a reciprocity basis constitutes a foreign award under Section 44. According to Article 1 of the NYC, which reads: This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where such recognition and enforcement are sought, and arising out of differences between persons, whether physical or legal, this Convention shall apply to the recognition and enforcement of such awards [3]. It also applies to arbitral awards that are not recognized and enforced in the state where they were made since they are not domestic awards.

One of the most significant pillars supporting the entirety of NYC is this article. The awards made in the territory of a state other than the state where enforcement is sought are specifically excluded from the scope of application of NYC. Regarding how the word "made" should be interpreted for the purposes of Art 1, the convention remains silent. How should "where the award is made" be determined? Is it the arbitration venue chosen by the parties, the site of the hearing, or the location where the arbitrator actually penned and signed the award? This issue is demonstrated in the case of Hiscox v. Outhwaite, where the arbitrator lived in Paris at the time the award was made despite London being specified as the place of arbitration in the arbitration provision[4]. The award's signature line was "dated at Paris, France," according to the arbitrator. The English High Court concluded that London is the location where the award is "made" at the time of enforcement because the location of the award's signing is not significant. Paris was seen as the location where the award was "made" by the court of appeals, which overturned the original ruling.

Even if an award is undoubtedly the conclusion of an ongoing process, it is not a process in and of itself. It's only a piece of writing, so I don't see why we should deviate from what I believe to be the normal, accepted, and natural construction of the word "made." When a document is finished, it is created there. When an award is signed, it becomes complete. The English Arbitration Act of 1996, Section 53, overturned this decision after it was criticized[5]. Unless the parties agree otherwise, any award made in the proceedings where the seat of the arbitration is in England and Wales or Northern Ireland shall be treated as made there, regardless of where it was signed, sent, or delivered to any of the parties.

DISCUSSION

The law that regulates the contract was the legislation in effect in India in National Thermal Power Corporation Ltd v. Singer Co, and the courts of Delhi had jurisdiction over all matters arising under the Contract. There is no explicit declaration regarding the legislation controlling the arbitration agreement, hence the question that must be answered is "whether or not an award made in London by the arbitrator appointed by ICC is domestic or foreign Award." The respondent's legal counsel argued that because the arbitration was procedural in character and a collateral contract, it was not necessarily subject to the contract's appropriate law; rather, the law that applied to it had to be evaluated in light of other criteria[6]. The court ruled that because the parties explicitly and categorically stated that their contract, made in India to be performed in India, is to be governed by the "laws in force in India" and that the Delhi courts "have exclusive jurisdiction in all matters arising under this contract," there is no need to infer or assume anything about the parties' intentions.

In response to the question of "Conflict of Laws," the court explained that if the parties to an arbitration agreement had stipulated that procedural issues should be governed by a different system of law, the court would give effect to their decision. However, if there is no express statement regarding the law governing the arbitration agreement and Indian Law governs the contract, Indian Law would undoubtedly apply. Thus, Dicey's cardinal test outlined in Rule 180 is entirely satisfied. The Supreme Court ruled that an award made under an arbitration agreement subject to Indian law, even if it was rendered abroad, was covered by the saving clause in Section 9 of the 1961 13th Act and was not regarded as a "foreign award" in India.The relevant presumption established in NTPC v. Singer in this regard is that: The proper law of the contract and the proper law of the arbitration agreement shall be presumed to be that of the law of the seat of arbitration, if the parties have only chosen the seat of arbitration and have not designated the proper law of the contract and arbitration; and In most cases, the proper law of the arbitration agreement shall be the same

as the proper law of the contract (presumption 1) (Supposition 2). Following the ruling in Sumitomo Heavy Industries Ltd. V. ONGC, it was decided that even if an award was made abroad, it did not fall under the definition of a foreign award under an agreement covered by Indian law.

The court further stated that the 1961 Act will be relevant if a contract with a foreign firm contains an arbitration clause in Gas Authority of India V. SPIE CAPAG. Reference to arbitration was not permitted to be claimed in relation to subjects not covered by the arbitration clause in a future lawsuit between the same parties. The arbitration was a domestic arbitration, not covered by the Foreign Award (Recognition and Enforcement) Act of 1961, the court ruled, and it was also its prerogative to halt legal proceedings in the foreign country in this case[7]. When the 1996 Act went into effect, it appears that the enforcement of foreign awards would be less difficult because there was no provision similar to Section 9(b) of the 1961 Foreign Award (Recognition and Enforcement) Act. As of right now, the only requirements for Part II are:

(1) The award must be rendered abroad;
(2) The award must not be regarded as a domestic award; and
(3) The award must be rendered in a nation designated by the Indian Government as having reciprocal rules for the implementation.

The arbitration in Bhatia International v. Bulk Trading S.A.16 took place in Paris under ICC guidelines. There was no mention of the arbitration agreement's proper law or the contract's proper law. The court came to the conclusion that, unless clearly and implicitly excluded, Part I of the 1996 Act applies to arbitrations that are concluded outside of India. The Supreme Court adopted the stance that Part I is not simply applicable when the place of arbitration was in India, but rather that the language of section 2(2) states that Part I will apply where the place of arbitration is India. This resulted from the word "only" being missing from 1996 Act section 2(2). The court cited section 2(7), which reads, "That award, made under part I shall be considered as domestic award." The court has also established the legislation, declaring that part I of the 1996 Act will be relevant unless the arbitration agreement clearly excludes it. The resulting inference is that any arbitration award made outside of India in a nation that is a signatory to NYC and Part I is not excluded is regarded as a domestic award.

The following three guidelines can be used to summarize the findings from Bhatia International:

The following principles govern the application of Part 1: (1) Part 1 must be followed when the arbitration is conducted in India (Principle 1); (2) Part 1 must be followed when an arbitration is conducted outside of India (Principal 2); (3) Part 1 must be followed when neither the proper law of the contract nor the proper law of the arbitration agreement is specified (Principle 3).Due to art. 2(7) and sec. 44, international awards can simultaneously be domestic and foreign awards, which has led to a more complicated and ambiguous picture of the arbitration regime in India. Additionally, because each section is placed in a different section of the Act, the methods of enforcement are distinct. When a domestic award is enforced, it does so automatically, but in future cases, the award only becomes enforceable when it is challenged in court[8].

In Venture Global v. Satyam Computer Services Ltd, the court broadened the application of Principle 2 in cases where the arbitration was conducted by the London Court of International Arbitration and Michigan state law applied. Another clause in the agreement indicates that the parties must always behave in line with the Companies behave and any other laws and regulations that are currently in effect in India. According to the court, the transfer of "ownership interest" must be affected in India in accordance with Indian law based on this clause and other relevant conditions, such as the establishment of the firm in India. According to Venture Global, under Part 1's Section 34, an Indian court may hear and rule on a challenge to a foreign arbitration award.

Later, in Tamil Nadu electricity board v. Videocon power Ltd, where the contract was governed by Indian law and the arbitration agreement was governed by English law, the court did not follow the Bhatia criteria and instead interpreted the test for determining a foreign award as (i) the parties' relationship had to be commercial; (ii) the award had to be made in accordance with a written agreement; and (iii) the award had

to be made in a foreign language. One can infer that section I applies to both domestic and overseas awards by comparing the two judgements. The SC recently ended this see-saw exercise by redefining the goal and scope of Indian Courts in the enforcement of foreign awards in India in Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc[9].

Bharat Aluminium Company Limited ("BALCO") v. Kaiser Aluminium Technical Service, Inc. ("Kaiser"): Defining the 1996 Act on Arbitration and Conciliation. On September 6, 2012, the Supreme Court's Constitutional Bench handed down a significant decision. The Supreme Court's ruling has been greatly welcomed by foreign companies doing business with Indian rivals. This decision provides confidence to agreements that provide for arbitration with a foreign seat and is likely to promote arbitration as the preferred method of dispute resolution. Most of the provisions that are fundamental to the execution of foreign awards have been redefined by the court.

The Court stated that the purpose and justification for the enactment of the Act clearly took into consideration the UNICITRAL model law, as seen in the purposes and justifications for the enactment, in order to consider the debate on comparison between Article 1(2) of UNCITRAL and Section 2(2), which resulted in the formation of the question, Does the missing 'only' indicate a deviation from Article1(2) of the Model Law? As the 1940 Act is not fully effective and is out of step with global acceptance, the Law Commission proposed amendments to the 1940 Act to make it more responsive to modern requirements. The Model Law was accepted in light of the need for uniformity in the law of arbitral procedures and the unique requirements of international commercial arbitration practice. In order to take into account, the UNCITRAL Model Law and Rules, the 1996 Act was enacted to codify and reform the law relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral relating to conciliation. Additionally, section 2(2) stands alone as "if the intention was to specifically include foreign awards under section 2(2), it would have been specified exclusively." The exclusion of exceptions from Art. 1(2) of the Model Law in Indian Act is the cause of the discrepancy.

Additionally, rigorous territorial principles were introduced by UNCITRAL. In cases where the word "only" is absent but the "territorial principle is applicable," as in the Swiss Private International Law Act of 198725 and UK law, the Court has also taken these provisions into consideration. These are the reasons Bhatia and Venture were not adopted. Interpretation of section 2(2) generally at this point. The interpretation in Bhatia on sections 2(4) and 2(5), which provides that application of Part I to all arbitrations regardless of the seat of the arbitration, has indirectly expanded the jurisdiction of Part I to international arbitration. This interpretation resolves the conflict between sections 2(2) and sections 2(4) and 2(5). According to the bench, subsection 2(4) must be read in its entirety, making Part I applicable.

"Subject matter of the arbitration" is referred to in Sec. 2(1)(e) in order to establish the courts' authority to hear arbitration cases. When the arbitration location is neutral for the parties to the arbitrations, the point of jurisdiction of courts might help explain the significance of this phase. The courts of that location will have jurisdiction over the arbitration if it takes place at a neutral location in India. Sec. 47 of Part II, on the other hand, deals with the enforcement of some foreign awards, and by "court" is meant the court with "jurisdiction over the subject matter of award."

The court that has subject matter jurisdiction over the award is the court under whose jurisdiction the asset is located, and international arbitration is being sought to prevent execution.

When viewed in the context of section 2(2), section 20 provides that when the arbitration is to take place in India, the parties are free to choose any location inside India. The tribunal has the authority to choose the location and seat of such arbitration under Section 20(2).

The tribunal may convene at any location to conduct proceedings at a time and place that is most convenient for it, as long as it complies with the requirements of Section 20(3). Sec. 20 demonstrates that under the 1996 Act, the seat is the center of gravity and that the extraterritorial concept is not applicable under Part 1 because the seat of arbitration plays such an important role.

The court has ruled that because arbitration is governed by four steps, both components are mutually exclusive of one another and there is no overlap between them. The beginning of the arbitration, its conduct, a challenge to the decision, and d the acceptance or enforcement of the decision. In our opinion, Parts I and II of the Arbitration Act, 1996 make the aforementioned distinction clear-cut. All four stages of arbitration are governed by Part I of the Arbitration Act, 1996. However, only the beginning of arbitration proceedings and the recognition or enforcement of the award are governed by Part II. Sections 3, 4, 5, 6, 10, 26, 28, and 33 of Part I govern the conduct of arbitration, Section 34 governs the appeal of the decision, and Sections 35 and 36 govern the recognition and execution of the verdict. Section 8 governs the beginning of arbitration in India. The supplementary clauses in Sections 1, 2, 7, 9, 27, 37, 38, and 43 either complement the arbitral procedure or are structurally necessary. As a result, it is clear that Part I covers every level of the arbitrations that take place in India. On the other hand, neither the conduct of the arbitration nor the contesting of the judgment is governed by any provisions in Part II.

Later in September 1996, the steel mill workers' nationwide strike prevented the responders from providing the required raw materials; as a result, they asked to have the supply period extended by 45 days. The appellant agreed to the motion under the proviso that the respondents pay liquidated damages. The amount of $3, 04,970.20 and Rs. 15, 75,559 has now been subtracted by the appellant as liquidated damages. The dispute was brought before the arbitrator by the respondent. As a result, the 1996 Act will be used to resolve the dispute. The arbitration panel sided with the respondent on the basis that the appellant had not experienced damages as a result of the raw material delivery delay. The arbitration panel determined that the appellant had improperly subtracted the money.

The award was challenged by the appellant in court. The appellant's counsel claimed that the award violates section 28(3) of the 1996 Act, which directs the tribunal to settle the dispute in accordance with the provisions of the contract (because the contract stipulates a penalty of 1% for delivery delays that go past the agreed-upon time [10]. In light of the case's merits, the court overturned the award after determining that it might be overturned if it violated the terms of the contract. The court held that where a contract's terms are clear, the court has no power to intervene. The tribunal found no justification for requesting that the purchaser demonstrate his loss if the parties had already agreed on a certain amount as pre-estimated true liquidated damages. The choice is heavily criticized for a number of reasons:

1. The two judges' judgment The ONGC Bench disregarded the Renusagar case judgement of the Supreme Court's three-judge Bench. That demonstrates both judicial indiscipline and a breach of a larger Bench's legally binding precedent. While the Bench in the Renusagar case ruled that the phrase "public policy of India" should be interpreted broadly, the Division Bench ignored the earlier ruling and broadened the term to the point where arbitral decisions might now be reviewed on the basis of their merits. In the age of globalization, this represents a significant step backward in the laws governing alternative conflict resolution.
2. The judge outlined the law first before retelling the case's exceptional and uncommon facts.
3. The judges cited a number of decisions that had nothing to do with arbitration law, such as M.V. Elisabeth v. Harwan Investment and Co. Ltd.,Dhannalal v. Kalawatibai, and central Inland water Corp. Ltd. v. BrojoNathGanguly which dealt with public policy as it related to labor law and involved the termination of an employee's employment without due process.

CONCLUSION

Based on the UNCITRAL Model Law, India adopted the Arbitration and Conciliation Act of 1996 with the goal of modernizing arbitration, upholding its obligations to the global mercantile community, and enhancing its reputation as a potential forum for the resolution of international commercial arbitration disputes. The Supreme Court's recent decision to rule that foreign prizes violate Indian public interest has drawn criticism from a number of quarters.The fact that parties participating in India-related transactions now have the much-needed certainty that international awards won't be overturned by Indian courts is therefore to be applauded. Finally, it would be interesting to examine how the Indian High Courts and

lower judiciary implement the non-interventionist strategy outlined by the Supreme Court. However, the Balco decision creates a favorable atmosphere for investment in India.

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