"Transforming Commercial Dispute Resolution - A Quest for Investment & Economic Growth"

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Abstract

Change is the law of nature and is inevitable, likewise a legal system with an absolute certainty of law is clearly a myth. Law is dynamic in nature and is the product of many factors. Idealistic view of strictly functioning in accordance with legislations only can have an adverse effect on the society and will leave the judges as a mere puppet. The best possible way can be a middle path by allowing both procedural as well as substantive amendments to fill the loopholes in any statute and fair interpretation of law by judiciary. In case of commercial arbitration in India the interpretation of the statute by Indian court has not been consistent in nature which sometimes create a problem, the Supreme Court being the sole repository of administration of law has to work in accordance with demand of the society and in the favour of nation's growth along with development. In, recent years the pro arbitration approach adopted by judiciary has been a commendable effort for speedy resolution of some essential economic matters. The scope of Arbitration Agreement in Construction Contracts, Enforcement of Investment treaty Arbitration awards against the Indian State especially after the case of White Industries v. Republic of India has grown exponentially as India lost the case, but the incident has led to the demand of a stronger version of the model BIT for India in which the Indian judiciary has a major role to play along with the laws enacted by the legislature.

Key words: Investment, Commercial, Judiciary.

I. Introduction

August 16, 1996, when the Arbitration & Conciliation Act was enacted and came into force, was definitely a proud moment for the Indian Legal system. It was a declaration by the sovereign Indian state announcing its arrival as an important player in the global trade and the world of business. It was also an attempt to project India as an 'arbitration friendly country' after the adoption of Industrial Policy in 1991 which's main aim was to remove the bottlenecks which acted as obstacles for Industrial Production and to reiterate the readiness of the Indian Legal system in to deal with international commercial disputes with efficiency and expertise.

Nineteen years down the line, there have been phases where the Indian Legal System seems to be on reverse track. After the *Bhatia International v. Bulk Trading*[2], case the purpose of the Arbitration & Conciliation Act was defeated as it discouraged the foreign investors as they felt their substantial and procedural rights were not protected in India in case of any disputes and became reluctant to invest in India as they were not having faith in Indian legal system. Far from becoming established, advanced and certain, it seems to have been fragile and unduly defensive. But thanks to few other judgments rendered by the apex court of India, which have created an arbitration friendly environment and ensured an upbringing that is conducive to arbitration proceedings in India.

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[2] AIR 2002 SC 1432 (hereinafter called "*Bhatia International*")

As, India has huge market along with the population there can be a rise in the rate of economic growth due to a rising share of working age population in accordance with the demographic dividend. In pursuance of its 'ease of doing business' propaganda and an overall attempt to attract investors, the government is set to introduce two bills in the coming sessions of Parliament. The introduction of an Act to amend the Arbitration and Conciliation Act and passing of the Commercial Division of High Courts Bill shall change the regulatory regime of commercial dispute resolution in India.

International Arbitration can be categorically divided into two parts: one, commercial arbitration dealing with private property rights and two, international investment law advancing social objectives and have public interest involved.

II. Methodology

The research methodology adopted for this research is doctrinal in nature.

III. Neutrality of Arbitrator

Socrates said that, "Like natural physical law there is a natural law, Man possesses insight which reveals to him the goodness and badness of things and makes him to know the absolute and eternal moral rules. This human insight is the basis to judge the law[3]." Similarly Principles of natural justice has become an indispensable part of Modern Legal System and Arbitration and Conciliation Act is not aloof of it and therefore, the appointment of arbitrator should be done in accordance principles of natural justice especially the principle of '*Nemo Debet Esse Judex In Propria Causa*'[4]. Generally, the arbitral tribunals are bodies having administrative and quasi judicial functions and therefore, they have to follow the principle of natural justice by having no bias feelings and by appointment as a neutral person to adjudicate upon the matters.

The law of arbitration does not prescribe conditions to recognize the 'circumstances' which give rise to 'justifiable doubts,' and it is clear that there can be many such circumstances, situations and instances. The test is not whether under the given circumstances, there is any authentic or genuinebias for that is setting the bar too high; but, whether the circumstances in question give rise to any justifiable or understandable apprehensions of bias.

The Supreme Court, in *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.*[5], carved out a minor exception in situations when the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute," and this exception was used by the Supreme Court in *Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence*[6], and *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.*[7], to appoint an independent arbitrator under section 11, this is not enough.

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[3]See, R.W.M Dias, Dias on Jurisprudence, 5th Edition 2013, LexisNexis.
[4] See, H.W.R. Wade & C.F. Forsyth, Administrative Law, 10th Edition, Oxford.
A judge is disqualified from determining any case in which he may be, or may fairly be suspected to be biased.
[5] 2009 8 SCC 520 (hereinafter called "*Indian Oil Corporation Ltd.*").
[6]AIR 2012 SC 817 (hereinafter called "*Denel Propreitory Ltd.*").
[7] (2012) 6 SCC 384.

Generally, the Arbitration laws of arbitration tend to preserve the finality of appointment of an arbitrator whether sole or presiding is done with the mutual consent of the parties of an arbitration agreement. Based on this ratio and principle, the Supreme Court of India has held in *Indian Oil Corporation Ltd*Case that the parties in an arbitration agreement are free to appoint an employee of one of the parties as an arbitrator who acts as an expert under the arbitration agreement.

The stability between procedural rights fairness and binding nature of these contracts along with enforceability appears to have been leaning in favour of the latter by the Supreme Court, and the present position of law is far from satisfactory. As the principles of impartiality and free will of arbitrators cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be inappropriate to say that party autonomy and freedom of entering into contract along with its terms can be exercised in complete disregard of these principles even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the party's apparent agreement. A sensible and fairlaw cannot, for instance, allow the appointment of an arbitrator who is himself a party to the dispute, or who is employed or dependent on one party, even if this is what the parties agreed.

However, the Supreme Court observed in *Denel Propreitory Ltd.* that it is a settled law that courts cannot interpose and interdict the appointment or recruitment of an arbitrator whom the parties have chosen wilfully in the terms of the contract except on grounds like legal misconduct or wrongdoing of the arbitrator, fraud, disqualification etc.

The apex Court of India in *Reliance Industries and Anr. v. Union of India*[8],dealt with the issue of neutrality of arbitrator extensively in a petition for the appointment of an arbitrator in an international commercial arbitration. This judicial pronouncement is relevant for couple of reasons, firstly to see what role nationality of arbitrators play when international commercial arbitration is seated in India with pertinent or applicable law of the contract and curial law as India Law, secondly for the effect and inclusion of UNCITRAL Rules in the contract and thirdly, how relevant subject matter and convenience of the parties are. Even though the court emphasised on the importance of the nationality for the purposes of neutrality, it did not accept it as a mandatory or absolute rule as the term used is 'may' and not 'shall.' So, the *ratio decidendi* of the case is that Section 11 (9) of the Arbitration Act, 1996 and UNCITRAL rules, 1976 both provide *discretion* to the appointing authority on the nationality of the arbitrators and the court is free to take into consideration if there will be an advantage to both the parties if arbitrator having knowledge of the applicable law is appointed. But even though neutral nationality is no assurance of lack of prejudice or independence, it is important as a generally followed practice or usage.

IV. Applicability of arbitration in Fraud cases

Fraud under Indian law has been dealt with both under civil and criminal law. In civil matters if Section 17 of Indian Contract Act applies contract becomes voidable at the option of

[8] (2014) 7 SCC 603.

the party as mentioned under Section 19 of the Contract Act. In this any person can invoke the applicability of Section 19 where there is option available at the one of the party in case it is without free consent and fraud happens.

Under Criminal Law Section 24 of IPC, a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. Also other crimes under Section 415 Cheating deals with the subject of fraud.

There was a general perception of courts that fraud is a very serious matter and needs to be solved by the formal methods of courts rather than the informal methods of arbitration and therefore, restricting the jurisdiction of arbitral tribunal under section 16 of the Arbitration & Conciliation Act.

In case of *N Radhakrishnan v. Maestro Engineers & Ors.*[9], the apex court of India had followed a conservative approach and held that serious allegations of fraud were to be determined by either civil courts or criminal courts but not the arbitral tribunals, if the party against whom such allegations were made so desired. In this case the court restricted the scope of arbitral tribunals and further held that all civil disputes under Section 9 of Civil Procedure Code which a civil court is competent to hear cannot be resolved by arbitration.

However, the Supreme Court in its judgment in the case of *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games*[10]&*World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*[11], has held that the judgment in *Radhakrishnan* case was *per incuriam* and, therefore, not good law. The Supreme Court has emphasis that the courts should adopt and follow a least interference policy while dealing with the general principle under Section 5 of the Act. By the collaboration of Section 5 and 16 the court held that all matters including as to whether the main contract was void or voidable can be surely referred to arbitration. But, not the contracts which are *void ab initio* as in the case of having no capacity to enter into a contract and therefore, the arbitration agreement is itself not valid and not have a standing.

V. Judicial Interventions in Foreign seated arbitrations

The serious blunder on the part of parliament was to blindly adopt the Model Law, enacted in the context of international commercial arbitrations, and make it the arbitration law applicable to domestic as well. In several countries there is a separate law for domestic arbitration and another for international commercial arbitration. For instance, both Singapore and Australia have separate statute which governs domestic and international arbitration[12].

Applicability of Part I of the Arbitration and Conciliation Act to arbitrations conducted outside India is a most debatable issue that arises before court many times. In the case of *Bhatia International*, the Indian court jurisdiction was invoked by a party seeking interim measures of protection in relation to arbitration that was conducted in Paris under the ICC rules. The issue raised, in this case, is the provision for the interim measure was in Part I of the Act, whether

[9] (2010) 1 SCC 72 (hereinafter called "*Radhakrishnan Case*")
[10]AIR 2014 SC 3723.
[11] 2014(1) Arb. LR 197 (SC).
[12]Justice R S Bachawat's, Law of Arbitration & Conciliation Vol. I, 5th Edition 2010, LexisNexis Butterworths Wadhwa Nagpur.

applies only to the domestic arbitration. The court held that Part I is to apply also to international commercial arbitrations that take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions.

After the Bhatia case, what constitute an implied exclusion of Part I of the Indian Arbitration Act, become a contentious issue before the Court in several instances. On what constitutes an implied exclusion, it was clear from *Indtel Technical Services private Ltd. v. W.S. Atkins Rail Ltd.*[13], that the parties had only specify the governing law of the contract and does not specify the proper seat of arbitration and the law governing the arbitration procedure, therefore the court went on to exercise their jurisdiction under section 11(6) of the Arbitration and Conciliation Act. There is no exclusion provided in the contract by the parties either expressly or impliedly. This reasoning has been strengthened in the case of *Citation Infowares Ltd. v. Equinox Corporation*[14].

In *Max India Ltd. v. General binding*[15], Delhi High Court held that where the governing law of the contract is foreign, and the seat of arbitration is abroad, then an inference can be drawn that there was an implied exclusion of Part I. However in *National Aluminium Company Limited v. Gerald Metals*[16], Andhra High Court took a contrary view and held that application under section 9 of Arbitration and Conciliation Act is maintainable despite the fact that venue of arbitration was in London, contract was to be governed by English law, disputes out of contract were to be decided by English Courts and English law was applicable to proceedings of arbitration.

In M/*S Dozco India P.Ltd v. M/S Doosan Infracore Co. Ltd.*[17], again a same issue was raised before the Supreme Court and give an opportunity to the court to clear the ambiguity left over in previous case. An application was filed before the court under section 11(6) of the Arbitration Act. Respondent contended that there is express exclusion of Indian Courts and the applicability of the Arbitration and Conciliation Act because the contract between the parties is governed by Korean law and Article 23 of the contract provide that all the disputes shall be settled by arbitration in Seoul Korea, pursuant to the rules of agreement then in force of the International Chamber of Commerce. Supreme Court discarded the law laid down in *Bahtia International, Indtel Technical Services and Citation Infowares* and held that the law governing the arbitration will be Korean law and the seat of arbitration will be Seoul in Korea, therefore an implied exclusion of Part I can be presumed and there will be no question of applicability of section 11(6).

However even after *Dozco* case, the mist on the point of implied exclusion of Part I of the Arbitration and Conciliation Act is not clear. In *Videocon Industries Ltd. v. Union of India & Anr.*[18], the issue regarding the implied exclusion of Part I arise again before the court. In this case the governing law of the contract is Indian law, the seat of arbitration is in Kuala Lumpur Malaysia unless otherwise agreed and English law was the governing law of arbitration agreement. When the dispute arises, the arbitral tribunal was shifted initially to Amsterdam and then to London. An action was brought before Delhi High Court under section 9 of the Arbitration and Conciliation Act, 1996 for a declaration that the seats of arbitration is Kuala

[13] 2008 (10) SCC 308 (hereinafter called "*Indtel Technical Services*")

[14] (2009) 7 SCC 220 (hereinafter called "*Citation Infowares*")

[15] (2009) 3 Arb LR 162 (DEL).

[16] 2004(2) ARB LR 382 (AP).

[17] (2011) 6 SCC 179 (hereinafter called "*Dozco case*").

[18](2011) 6 SCC 161.

Lumpur, Malaysia and issue a direction to the arbitral tribunal to continue the hearings there. Supreme Court following the *Dozco* case held that the Delhi High Court has no jurisdiction because the laws of England governed the arbitration agreement, and there was a clear implied exclusion of the jurisdiction of the Indian court.

The all debate regarding the exclusion of Part I came to end after Supreme Court decision in the *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service*[19]. The Supreme Court overruled the principle laid down in Bhatia International and decided that Part I and Part II of the Arbitration and Conciliation Act are mutually exclusive of each other. The seat of the arbitration is the centre of gravity. Part I would be applicable, if the seat is determined to be in India. If the seat was foreign, Part I would be not apply. If parties expressly include Part I, it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the foreign Procedural Law. *Balco* case marked the beginning of new era in the Indian arbitration regime.

The trend of non-intervention of courts in arbitration proceeding is not new. It is expected that the court would not interfere with the award passed by arbitrators. In BALCO case, the Supreme Court reduces the judicial intervention in foreign arbitrations. Judicial intervention in arbitration proceedings causes the delays in the arbitration proceedings and ultimately negates the benefits of arbitration. In the case of *M/s Sumitomo Heavy Industries vs. Oil & Natural Gas Company*[20], an appeal made before the Supreme Court against the order passed by High Court for setting aside the award made by the umpire in an Arbitration. The Supreme Court had to decide whether the Umpire exceeds its jurisdiction and fail to apply his mind or whether his decision was a possible one, and the High Court had made an error by interfering with it. Appellant contended that the awards given by arbitrator on a question of law is immune from a challenge in a Court only when it is rendered on a specific question of law referred to him. However court not answer this contention and held that the Umpire did not exceed his jurisdiction, and it is a well-reasoned award. The High Court was not expected to interfere with the award.

V. Observations

There are two provisions in the Arbitration and Conciliation Act, section 34(2)(b)(ii) and 48(2)(b) in Parts I and II respectively which provides that enforcement of an award can be refuse on the ground of Public Policy. The Provision in Part I provide for refusal of the domestic award while Provision in Part II provide for refusal of foreign award. In *Renusagar Power Co. Ltd. v. General Electric Co.*[21], the Supreme Court laid down the criteria for refusal of foreign award on the ground of public policy. The Court held that if the enforcement of award is contrary to the, fundamental policy of Indian law; or the interest of India; or the justice and morality, then there is violation of public policy. In *ONGC v. Saw Pipes Ltd.*[22], the Supreme Court had an opportunity to interpret the provision of Part I, and it did so extensively and provided a very broad view. Following *Renusagar* case, Supreme Court added one more ground patently illegal. If an award is

[19] (2012) 9 SCC 552 (hereinafter called "*BALCO*").

[20] (2010) 11 SCC 296.

[21] A.I.R. 1994 SC 860 (hereinafter called "*Renusagar Case*").

[22] (2003) 5 SCC 705 (India) (hereinafter called "*ONGC*").

contrary to the substantive provisions of law or the statutory provisions of the Arbitration and Conciliation Act or terms of the contract, then it is patently illegal and cannot be enforced. In ONGC case court provides a broader standard to the expression public policy in Part I compared to the Renusagar case, which provides narrow standard to the expression public policy in Part II.

The decision of ONGC and Bhatia International case, provide an option to all Indian party involving arbitral awards passed by arbitral tribunal seated outside India, to challenge the awards on ground of patent illegality, as the Part I is to apply also to international arbitrations that take place out of India, unless the parties by agreement, express or implied exclude. In *Phulchand Exports Ltd. v. O. OO. Patriot*[23], the Supreme Court again re-examined the scope of expression public policy. The Supreme Court held that the scope of public policy under section 34 and 48 are the same. Therefore in an action for enforcement of foreign award parties could apply the standard provided to expression public policy by the court in ONGC case for the refusal of that award.

However in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[24], the Supreme Court accepted the criteria of *Renusagar case* to interpret the section 48(2)(b) and overruled the *Phulchand case*. The Court held that the application of both the section is different and the refusal of award on the ground of public policy is limited to the section 34. Under section 48(2)(b) court cannot review the award or enquire as to whether while rendering foreign award some error has been committed. Thus, under section 48(2)(b) enforcement of foreign award would be refused on the ground of public policy only if it is covered by one of the three categories provided in *Renusagar case*. The decision of Supreme Court, in this case, is consistent with the recent trend to reduce the judicial intervention and also provide a stable interpretation to the section 48(2) (b).

VI. Conclusion

Most legal and judicial system in every civilized nation undergo period of high pendency and delay in dispensation of justice which are usually followed by a realisation from within and give rise to wide scale legislative reforms. In India the 20th Law Commission led by Justice A.P. Shah had submitted reports numbered 246 and 253 which could be instrumental in bringing reforms in Indian commercial dispute resolution.

The investment treaty arbitral tribunal in *White Industries v. Union of India* has held that the Indian system does not provide 'effective means' for a foreign investor to enforce its rights. The bills proposed to be introduced in the coming sessions of parliament not only expedite commercial dispute resolution but also can effectively disincentive initiation of frivolous proceedings. However, enacting a law is only part of the solution, implementing it effectively by selecting the right personnel is as important. Efficient execution of the Lord Woolf report resulted in eradicating frivolous commercial litigation in the U.K. statistics suggest that the number of litigations initiated fell by around 80 per cent.

Thus, the jurisprudence behind the Indian arbitration has been evolving since its initiation to suit the requirements and complexities of international trade and investment regime.

[23] (2011) 10 SCC 300 (hereinafter called "*Phulchand Case*").

[24](2014) 2 SCC 433.

Though a chain of judicial decisions in the first decade of the new millennium showed lack of pro-arbitration approach by the Indian judiciary while interpreting arbitration laws with respect to domestic as well as international investors, the tendency has now changed and Indian courts are progressively more adopting a pro-arbitration mindset by supporting informal methodsto resolve commercial disputes.

Further, the Government too is committed to make India into an arbitration friendly country and an environment which could serve as an International Arbitration hub for the world. This can be achieved by amending the existing Act and bringing it to international standards of commercial arbitration. In totality, the path ahead looks very positive for International Arbitration in India and also the credibility of entire dispute resolution system depends on consistency, because a dispute settlement process that produces irregular results shall definitely lose the confidence of the users in the long term and defeat its own target.

Now coming to the recent amendments to the Arbitration and Conciliation Act of 2015 is undoubtedly an affirmative step towards making justice delivery system through commercial arbitration speedy, useful and a cost effective remedy. Through these new amendments the litigants will be more willing to choose arbitration as neutrality, speed and cost have been given more importance but still the objective and goal have not been achieved to its full extent as the implementation of these policies are more important for the ease of doing business in India and to attract investments.