THE ROLE OF NATIONAL COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION WITH SPECIAL REFERENCE TO INDIA

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# INTRODUCTION

Alternate Dispute Resolution (ADR) system has come into existence as the present courts are not able to handle the piling up cases by day. The dispute resolution mechanism through courts is expensive and time taking and hence everyone cannot afford litigation, in order to address these problems new legal procedures needed to be evolved and this task was addressed by U.S.A., by evolving new procedures of dispute resolution mechanism through settlement of disputes through ADR systems which were later on adopted by majority of the countries worldwide. In ADR systems parties themselves can resolve the disputes, i.e. they themselves can become judges in their own cases and can resolve the dispute according to their own terms and conditions.

 By introducing these systems the State is fulfilling its promise of speedy justice as provided and interpreted under Article 14 of the Constitution of India which guarantees equality before law and equal before law. As there is a famous saying “Justice delayed is Justice denied”, which means that in spite of having an established justice delivery system in the form of courts, if timely justice is not provided to the citizens then the promises made by the Constitution in the form of fundamental rights amount to farce promises on paper and hence States must adopt novel mechanisms of dispute resolution in light of globalization and global commercialization. Such speedy justice among other ADR methods like gram panchayat systems, ombudsman systems etc., is provided under mechanisms like Arbitration, Conciliation, Mediation and Negation which are rampantly used for the simple reason that they are less cumbersome, easy to operate and cost effective.

Arbitration is an alternative to litigation and contemplates an imposed decision, i.e. a third person/s as agreed by the parties is appointed as an arbitrator who adjudicates on behalf of the parties, whereas the other methods of ADR propagate dispute resolution through settlement, i.e. an unexposed decision by the parties to the litigation, the settlement is arrived through only with the consent of the parties. Arbitration and Conciliation have been recognized under the Arbitration and Conciliation Act of 1986

Indian Legal System in medieval periods was governed by social sanctions as there was no codified law in place. With the advent of Britishers, the East India Company which took over the administrative control and enacted regulations as laws in Madras, Bengal and Bombay Presidencies. The Bengal Regulations of 1772 made a provision for submission of disputes to arbitrator in cases of disputed accounts etc., the 1793 regulation expanded the scope to matters of accounts, partnership, debts, non-performance of contracts etc., these rules were modified up to the year 1822, later Bombay Regulation 1827 and Madras Regulation 1816 were also introduced. All these regulations were in force until Civil Procedure Code, 1859 was introduced.

The first statutory enactment on Arbitration was introduced in the year 1899 which continued concurrently with Civil Procedure Code, 1908. The Comprehensive Act of Arbitration was introduced in the year 1940, which provided only for national arbitration and was in force till the Act of 1996 came into force. For implementation of foreign awards Arbitration (Protocol & Convention) Act 1937 was introduced under Geneva Convention 1927. The Arbitration and Conciliation Act 1996 came into existence on the recommendations of 76th Law Commission of India in the year 1978 to meet new challenges of the modern developing economy of the country. The Arbitration and Conciliation Act 1996 was introduced on the basis of UNCITRAL model Law on International Commercial Arbitration 1985 and Conciliation Rules 1980.

# MEANING AND DEFINITION OF ARBITRATION

The general understanding of the term Arbitration is that the resolution of the dispute through a person/s other than a court in a judicial manner. Arbitration is similar to litigation method wherein the disputing parties appoint a person or an institution of their choice, who sometimes may be an expert in the subject of the dispute, resolves the dispute by applying relevant law to the dispute.

The Act of 1996 does not define the term Arbitration but gives meaning to the term u/s.2 (1)(a) which says that “arbitration means any arbitration whether or not administered by permanent arbitral institution”.

According to Halsbury “Arbitration means “ the reference of dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction”.

Hence it is well understood that Arbitration is submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award-a decision to be issued after a hearing at which both parties have an opportunity to be heard.

Arbitration can be National or International, in case of National Arbitration the parties to the dispute should be Indian, the arbitrator should be of Indian origin and the Law applicable to the dispute is relevant National Law. In case of International Commercial Arbitration one of the parties should be of foreign origin, whether it is a natural person or a body corporate or a foreign government. In later type of arbitration, the proceedings are sometimes conducted outside the country and is known as Foreign Arbitration and the decision given by such foreign arbitrator is known as Award, which is enforced as Foreign Award in India.

International Commercial Arbitration:It is a process of resolving disputes between transnational parties by appointing one or more arbitrators rather than through courts. The proceedings are conducted if there is an arbitral agreement/clause between the parties through business contract /agreement, and the decisions of the arbitral tribunal are generally binding. Arbitration could be Institutional or Ad hoc.

Understanding the term Commercial: As far as the term “commercial” is concerned it is not defined anywhere and can be understood in terms of judgments of the courts.

In Orient Ltd. vs Brace Transa Corporation[[1]](#footnote-1) the court observed that the term ‘commercial’ suggests that it pertains to commerce and therefore ultimately nothing else than money.

The Supreme Court in R.M.Investment and Trading Co.Pvt.Ltd., vs Boeing Company[[2]](#footnote-2) ruled that consultancy services by RMI to Boeing Company for promoting commercial transaction of sale of Boeing aircrafts is commercial in nature and hence the two companies stand in commercial relationship with each other.

In Atiabari Tea Company Limited vs State of Assam[[3]](#footnote-3) the Supreme Court observed that activities such as exchange of commodities for money or other commodities, carriage of persons and good by road, rail or waterways, contracts of banking, insurance, transaction in stock exchange, supply of energy, postal and telegraphic services etc., may be called as commercial intercourse within the meaning of Article 301 of the Constitution which relates to freedom of trade, commerce and intercourse.

In Kamani Engineering Corporation Limited vs Societie De Traction Et D’Electricity Societie Anonyme[[4]](#footnote-4) The Bombay High Court observed that the agreement between the parties was that the defendants agreed to provide technical assistance to plaintiffs for construction of overhead equipment of railway electrification, tramway system and trolley buses in India, Burma, Ceylon and Nepal and hence it is an agreement for providing professional assistance to the plaintiffs and hence cannot be considered as a commercial agreement. Whereas the Supreme Court observed it otherwise in the context of Article 301 which was brought to the notice of the Bombay High Court, but it did not pay heed to the same.

International Commercial Agreement: In Gas Authority of India Ltd. vs SPIE Capag S.A**.**[[5]](#footnote-5) the parties in their arbitration agreement agreed to apply rules of American Arbitration Association and that the purpose of the rules was to “achieve orderly, economic and expeditious settlement of controversies in accordance with the federal and State laws” the Delhi High Court held that it is Foreign Award. It further observed that for an arbitration to be considered as International Commercial Arbitration, either of the following conditions is/are fulfilled:

1. One of the parties has business located abroad or
2. Agreement has to be performed abroad or
3. Subject matter of transaction is located abroad or
4. One of the parties to the transaction is a foreign national.

International Commercial Arbitration has been defined u/s 2(1)(f) of the Arbitration and Commercial Act, 1996 as an arbitration relating to disputes arising out of legal relationships, whether contractual or not considered as commercial under the law in force in India and where at least one of the parties is:

1. An individual who is a national of or habitually resident in any country other than in India or
2. A body corporate which is incorporated in any country other than India or
3. A Company or an association or a body of individuals whose central management and control is exercised in any country other than India or
4. The Government of a foreign country.

## FOREIGN AWARDS

The general understanding of the term Foreign Award means where Arbitration is held in foreign lands by foreign arbitrators by applying foreign law and where one of the parties to the dispute is a foreign national. Section 44 of the 1996 Act define Foreign Award as “an arbitral award on the differences relating to the matters considered as commercial under the law in for in India”. Such an award will be considered as a decree of the court.

The Supreme Court in M/s.Kosh Navigation Co.Inc. vs M/s. Hindustan Petroleum Corporation Limited[[6]](#footnote-6) observed that meaning of the foreign award should be interpreted in the light of New York Convention and its implementing legislation in India. The award must be executed as it is and can be refused on the grounds of ambiguity.

National Thermal Power Corporation vs. Singer Company[[7]](#footnote-7) an interim award was made in London, which arose out of an arbitration agreement governed by the law of India, the Supreme Court rejected to consider it as a foreign award because it was governed by the Indian Laws both in respect of the contract and arbitration. Hence it should be well understood by the parties just because the proceedings of the arbitration take place outside India, the award does not become a Foreign Award.

Enforcement of Foreign Awards before 1937

Section 19 of Indian Arbitration Act 1889 conferred some discretion to court to grant stay of local action in foreign award cases as the act of 1889 and Code of Civil Procedure 1908 did not have any provision regarding implementation of foreign awards. On the basis of Section 19 of Act of 1889 the Judicial Committee of the Privy Council upheld the maintainability of a suit of enforcement of foreign award in some cases.

Enforcement of Foreign Awards After 1937

To give effect to Geneva Protocol and Convention 1923, India enacted Arbitration Protocol and Convention Act 1937 and to give effect to New York Convention 1958, India passed Foreign Awards (Regulation and Enforcement) Act 1961. The 1937 Act does not govern the awards made after 11th October 1960 in countries which are signatories to the New York Convention 1958.

The Act of 1961 enjoins the duty on the defendant to prove that award is not enforceable, whereas 1937 Act imposes duty on party seeking implementation of Foreign Award to prove validity and finality of the award. Apart from the above requirements the Foreign Award cannot be implemented in India u/s.57 (2) of the act (a) if the subject matter is incapable of settlement by arbitration under Indian Law or (b) Such an award is opposed to public policy (c) if the award has been declared null and void by courts in the courts in which it was made.

Enforcement of Foreign Awards under Act of 1996

A Foreign Award in India can be implemented under Sections 36-74 of Arbitration and Conciliation Act, 1996, and Order XXI of CPC, 12 years is the limitation period for enforcement of the Award. Further the Award becomes implementable if none of the parties raises an objection to the award within 3 months of the final Award.

An application shall be made to the relevant Court by the party in whose favor an award has been u/s.47 of the 1996 Act, and a defense shall be raised against by the party against whom the award has been made u/s.48 of the Act, on the basis of evidence presented by the parties the court shall decide upon the enforceability of the Award.

Further Section 47 provides that the courts have to arrive at a satisfaction for enforcing foreign awards after perusing the required evidence and validity and existence of a foreign award. Under this section no separate applications are required for challenging execution of awards.

In Fuerst Day Lawson vs Jindal Export[[8]](#footnote-8) the Supreme Court held that no separate application under section 47 is necessary for the Court to first satisfy itself that the award is enforceable before entertaining application u/s.49 of the Act for execution.

If the subject matter of the Foreign Award is money, Commercial Division of the High Court where the assets of the opposite party lie, will have the jurisdiction otherwise Commercial Division of those High Courts depending on the subject matter of the Award.

Section 58 of the Act provides that if the Indian Court upholds the Foreign Award and enforces it, then such an award shall be deemed to be decree of the court but if the High Court refuses to enforce the Foreign Award then the appeal shall lie to the Supreme Court.

Section 49 of the Act of 1996 states that where the Court is satisfied that the foreign award is enforceable under this chapter, the award shall be deemed to be a decree of that Court.

In Euro-Asia Chartering Corporation vs Fortune International Limited[[9]](#footnote-9) the Apex Court observed that where foreign award has been certified and attested as a foreign award, such an award can be directly enforced without taking out proceedings for determination of its enforceability.

In Koch Navigation Inc. vs M/s.H.P.C.L.[[10]](#footnote-10) the Supreme Court of India had held that “The award must be executed as it is and there is no scope for addition to, or subtraction from the award.’’

In Global Company vs National Fertilizers, (1999) Supp. Arb.LR392 (Del), the court held ‘ a foreign award could be enforced as a decree on expiry of the 90 days period prescribed for filing an application for setting aside an award.

Section 48 of the Act provides for conditions for refusal to enforce Foreign Awards: The court may refuse to implement a Foreign Award if the parties furnish that:

1. The law in the agreement is non-applicable to them
2. The agreement is invalid under the law to which the parties are subjected to
3. The party against whom the award was made was not given notice of appointment of arbitrator, arbitral proceedings or was unable to present his case.
4. Award not falling within the terms of submission to arbitration.
5. Matter beyond scope of Arbitration.
6. Composition of Arbitral Tribunal or Arbitral Procedure not in accordance with the agreement of the parties.
7. The award is yet to become binding upon the parties.
8. The award is suspended by a competent authority in the country in which the award was made.
9. The award cannot be implemented under the law of the land in which it was made.
10. Subject matter of the award is not capable of settlement by arbitration under the law of the land.
11. The award if implemented would be contrary to public policy of India.

Section 50 the Act provides for appeal:

1. for refusing to refer the parties to arbitration as per section 45 of the act or
2. For refusing to enforce a foreign award u/s.48 of the Act to the court authorized by law.
3. There shall be no second appeal against such an order from relevant courts, but right to appeal to the Supreme Court cannot be taken away from the parties.

Arbitration is private in nature, as such parties will need courts to enforce the arbitration agreement and also enforce arbitral awards. The reality therefore is that without courts support, the arbitral process cannot be effective. Hence from the above discussion it is clear that the Role of the National Courts is properly defined in Arbitration and Conciliation Act 1996, New York Convention 1958 and Geneva Protocol & Convention 1923 for implementation of Foreign Arbitral Award. In the light of rampant growth in international investments and trade among Private Companies and States, International Commercial Arbitration shall be made more effective, one of the ways to do so is to reform national statutes on arbitration and sensitizing national courts to support the arbitral process, without which arbitration will remain ineffective, particularly in developing economies.

1. AIR 1986, Gujarat 62 [↑](#footnote-ref-1)
2. AIR 1994 SC 1136 [↑](#footnote-ref-2)
3. AIR 1961 SC 232 [↑](#footnote-ref-3)
4. AIR 1965 Bombay 114 [↑](#footnote-ref-4)
5. AIR 1994, Delhi 75 [↑](#footnote-ref-5)
6. Air 1989 SC 2198 [↑](#footnote-ref-6)
7. AIR 1993, SC 998 [↑](#footnote-ref-7)
8. 2001, 2 Arb.LR 1 SC [↑](#footnote-ref-8)
9. AIR 2002, Bom 447 [↑](#footnote-ref-9)
10. AIR 1989,SC 2198 [↑](#footnote-ref-10)