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INTERNATIONAL ARBITRATION
A GROWING PHENOMENON

By Adv. Vivek Aggarwal

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INTERNATIONAL ARBITRATION – A GROWING PHENOMENON

By Adv. Vivek Aggarwal

International Arbitration was introduced in India when the two international instruments- UNICTRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York convention) were adopted by India. These two frameworks were essentially incorporated in the Indian Arbitration and Conciliation Act, 1996.

The Indian Arbitration and Conciliation Act, 1996 forms the basis for cross- border international arbitration. By adopting this measure, India allowed for a efficacious, judicious and enforceable way of easy, flexible, timely way of dispute resolution which gave a push to 'ease of doing business', attracted investments and trade, reduced the pendency of cases, saved corporate time in lengthy litigation, thus brought multi-pronged benefits. It has even reduced the burden of judiciary which currently suffers from high pendency, inordinate delays in delivering results, and a never ending backlog of cases.

The Act is divided into three parts, each for a specific purpose:

PART 1: It deals with the domestic arbitration, that is, the arbitration taking place in India (it includes cases where one party is foreign and one Indian) and the enforcement of the domestic arbitral awards.

PART 2: It exclusively deals with the enforcement of foreign domestic awards arrived at in an International Arbitration which essentially means the arbitration which is seated outside India.

PART 3: Conciliation

In this Article, we will limit the discussion to the first two parts of the Act and try to bring out the present situation on issues in International Arbitration such as:

- Changed situation after the recent Amendments
- Initiation of Arbitration
- If any dispute can be resolved by arbitration
- Seat of Arbitration
- Enforcement of Awards
- Recourse against arbitral awards.

AMENDMENTS TO THE ACT

The Arbitration as adopted in the Statute of 1996 though did the all essential act of introducing the arbitration regime in the country at par with the international practices, but it was only a beginning of the long run to completely changing and reforming the arbitration landscape which as it stands today protects the essence of 'arbitration as an alternative dispute resolution'.

This was done by way of amendments to the Act of 1996. This Act in its aboriginal form suffered from various infirmities such as interference of courts, long time taken to resolve the dispute, issue of jurisdiction, multiple appeals, etc. This acted as counterproductive to the very scheme of the Act and thus kept many people from choosing for Arbitration. The Act has been majorly amended by the two following amendments:

A. Arbitration and Conciliation (Amendment) Act, 2015

This amendment purported to ensure impartiality of the arbitrator, more autonomy to the parties, favorable provision for interim relief pending the arbitral award, and ensuring timely disposal. The provisions in detail are:-

1. The provisions of Interim Reliefs have been made more comprehensive and flexible as per the option of the Party. Applications under this, can be filed directly to High Court. Provision for expeditious disposal after grant of interim award.
2. Time Limit of twelve months has been introduced by adding a new provision.
3. Provisions related to 'recourse against arbitral award' have been made time bound, in case of both domestic and international arbitration. High Court can be approached directly for the same.

B. Arbitration and Conciliation (Amendment) Act, 2019

The major thrust of this amendment was towards institutionalizing the arbitration process in the country. Apart from that the amendment seeked to introduce the accreditation process of arbitrators, more clarification on time-line for disposal of case, the scope and application of some provisions of the 2015 Amendment. The provisions in detail are:-

1. The main aim of this Amendment was to institutionalize the arbitration mechanism by establishing an Arbitration Council of India (yet to be notified). This Council would be responsible for the grading and accreditation of the arbitral institutes and arbitrators.
2. The provisions for time-limit have been made a bit more flexible as per the choice of the Parties, and more confidentiality has

been provided to the proceedings.

3. International Arbitration has been kept out of the purview of time-bound provision in the completion of the proceedings.

HOW TO INITIATE THE ARBITRAL PROCEEDINGS

Initiating of arbitration can be done in two ways, that is, either by sending the Notice to Initiate Arbitral Proceedings to the other party, or by reference to arbitration by the court.

A party, on the arising of the dispute, can send the Notice to initiate the arbitral proceedings to the other party bound by an arbitration agreement. The arbitration is deemed to be started on the date on which the opposite party receives the Notice.

Further the court has the power to refer the parties to arbitration as defined in Section 8 of the Act, 'A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.'

INTERIM RELIEFS

There is a comprehensive provision for Interim measures pending arbitral award which can be provided by Court.— as defined in Section 9 of the Act,[1] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in

accordance with Section 36, apply to a court— for an interim measure of protection in respect of any of the matters such as (b) Securing the amount in dispute in the arbitration; (e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. Many other measures are also provided under this section.

The object behind provision of interim relief as stated by the court in *Sundaram Finance Ltd. V. NEPC India Ltd. A.I.R. 1999 S.C. 565* is that the Court has jurisdiction to entertain an application under S. 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with S. 36 Of the Act. The interim measures are provided so as to protect the right under adjudication before the Arbitral Tribunal from being frustrated.

It helps in making the arbitration process – as well as the outcome of the arbitration – more effective, as they provide parties with the security and or relief that allow them to continue with the process. So a party may request an interim measure such as immediate protection of rights or property pending the arbitration outcome, or upfront payment of part of a claim.

Further, the age old saying Justice delayed is justice denied holds importance here. It has been observed that parties engage in dilatory tactics to delay proceedings or prejudice rights of opposite parties. In such a situation, the final relief granted by a tribunal may be rendered nugatory or meaningless unless the arbitral tribunal or court is able to safeguard the rights of parties during the pendency of the arbitral proceedings.

Who can apply for interim relief by Court after the making of arbitral award?

Any party to the arbitration agreement can make an application for interim measures in the course of the arbitral proceedings. However, after making of the arbitral award, only a successful party which is entitled to seek the enforcement of the award can apply to the court under Section 9.

CROSS-BORDER ARBITRATION

Section 2(1)(f) defines International Commercial Arbitration as arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India, where atleast one of the parties is a foreign national, a body corporate, association or body of individuals. The idea is that the central management or control of such foreign corporate, association, etc must be in foreign hands. So, an arbitration with seat in India, but involving a foreign party as mentioned above, will be regarded as International Commercial Arbitration. However, it will be subject to Part I of the Act. On the other hand, if an International Commercial Arbitration is held outside of India, then the parties would be subject to Part II of the Act which majorly talks about the enforcement of arbitral awards.

The term "International Commercial Arbitration" has a definite connotation. It inter alia means a body corporate which is incorporated in any country other than India. The domicile of a company being an artificial person would depend upon the nature and purport of the statute. The nationality of a company is determined by the law of the country in which it is incorporated and from which it derives its personality.

JURISDICTION AND SEAT OF ARBITRATION

The reforms in the Act and in its interpretations with time have eventually made the act more 'seat-centric'. This position was cleared in historic *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* ('BALCO')in which the apex court unequivocally overruled its earlier position in *Bhatia International v. Bulk Trading* by holding that the PART-1 of the Act will not apply to the foreign seated arbitration proceedings. The Amendment to the Act further clarified that Sections 9, 27 and 37 of the PART-1 are exceptions to the principle stated in BALCO case and these sections will apply unless a contrary intention appears on part of parties in the arbitration agreement.

HOW TO ENFORCE FOREIGN AWARDS

As stated above, the Part II of the Act is applicable to foreign awards which seek enforcement in India and also to refer parties to arbitration which has a seat outside India.

Foreign Award as defined under S.44 means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 and also (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

Therefore, the foreign award should be made in a country signatory to the New York Convention and also should be notified so by the Central Government. Thus, both the conditions need to be fulfilled.

Till now, **48 countries** have been notified so by the Central Government, namely, Australia, Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, China, Cuba, Czech Republic, Denmark, Ecuador, Federal Republic of Germany, Finland, France, Democratic Republic, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Malagasy Republic, Malaysia, Mauritius, Mexico, Morocco, Nigeria, Norway, Philippines, Poland, Republic of Korea, Romania, Russia, San Marino, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, The Arab Republic of Egypt, The Netherlands, Trinidad and Tobago, Tunisia, United Kingdom, United Republic of Tanzania and United States of America.

Further it was clarified in *National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008(3) ARBLR 37* that to test whether an award is a foreign award for the purpose of this Act then the following conditions must be fulfilled

i. the award passed should be an arbitral award,
ii. it should be arising out of differences between the parties;
iii. the difference should be arising out of a legal relationship;
iv. the legal relationship should be considered as commercial;
v. it should be in pursuance of a written agreement to which the New York Convention applies; and,
vi. the foreign award should be made in one of the aforementioned 48 countries .

The foreign award as such can then be enforced in India by fulfilling various conditions in the Act. The party seeking such enforcement has to make an application to that effect by filing an application in the court and along with the following:-

i. The original/duly authenticated copy of the agreement;
ii. The original/duly authenticated copy of the award;
iii. Such evidence as may be necessary to prove that the award is a foreign award.

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