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INTERNATIONAL COMMERCIAL ARBITRATION UNDER INDIAN LAW

Pancy Singh Soni

Research Scholar

Department of Law

Raffles University

Neemrana, Rajasthan

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1.1 Introduction

The Arbitration and Conciliation Act, 1996 (hereinafter the Arbitration Act, 1996 or the Act, 1996), which governs Indian arbitration, went into effect on January 25, 1996. This Act is a unification act in the sense that it was designed to give effect to India's many international commitments, including the Model Law of 1985 (the ML, 1985), the New York Convention, and others., 1958 (the NYC, 1958) and the like. The 1996 Act not only consolidates, but also unifies Indian law on domestic and international commercial arbitration (ICA).

The existing Indian law of arbitration merits a thorough assessment, first and foremost because an analysis of the ICA in India is impossible without a thorough understanding of Indian arbitration law in general. Second, the Arbitration Act of 1996 applies not just to domestic arbitration but also to international arbitration that takes place outside of India, provided that the disputant parties choose the Act as the relevant law. Other Indian statutes, such as the Indian Contract Act, the Foreign Awards (Recognition and Enforcement) Act, 1961, and others, are significant to arbitration, especially international arbitration. When relevant, the older Arbitration Act (the Arbitration, Act 1940) is also covered. The Act of 1996 regulates the enforcement of foreign court judgments and decrees, as well as the method for carrying out enforcement orders of domestic and foreign sentences and arbitral awards. It is mentioned in the chapters on arbitral award enforcement in India.

1.2 The Statement of Objects and Reasons

The following are the primary goals of the 1995 Arbitration and Conciliation Bill, as stated in the declaration of objects and reasons:

- i) To cover international and commercial arbitration and conciliation, as well as domestic arbitration and conciliation, in depth;
- ii) To provide for a fair, efficient, and capable arbitral procedure that meets the needs of the specific arbitration;
- iii) To provide that the arbitral tribunal gives reasons for its arbitral award;
- iv) To ensure that the arbitral tribunal remains within the limits of its jurisdiction;
- v) To minimize the supervisory role of courts in the arbitral process;
- vi) To allow an arbitral tribunal to use mediation, conciliation, or other techniques to encourage the settlement of disputes during the arbitral proceedings;
- vii) To ensure that every final arbitral award is enforced in the same way that a court decree would be;
- viii) To provide that a settlement agreement reached by disputants as a consequence of conciliation proceedings has the same validity and effect as an arbitral award delivered by an arbitral tribunal on agreed terms on the substance of the dispute.; and,
- ix) to provide that any arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards, to which India is a party, applies will be treated as a foreign award for the purposes of enforcement.

1.3 Arbitration in India: General Features

The purpose of the Act of 1996, it might be claimed, is to stimulate and facilitate arbitration. It introduces arbitration as a trustworthy technique of dispute settlement that produces binding and enforceable results. It's presented as a well-defined procedure that can't be thwarted by stalling tactics.

1.3.2 International Arbitration under Indian law

For disputants seeking to take advantage of ICA rules, how arbitration law characterises an international dispute becomes critical.

The ML considers an arbitration 'International' if:

- a. The place of business of the disputants is in different States;
- b. The place of arbitration is outside the State of which the disputants have their places of business;
- c. The place where a substantial part of the obligations of the commercial relationship is to be performed is outside the State in which the disputants have a business;

- d. The place with which the subject matter of the dispute is most closely connected is in a State other than the one in which the disputants have their places of business; or
- e. The subject matter of the arbitration agreement is related to more than one State.

It is a main feature of the Act, 1996 that it makes a crystal clear distinction between International and Domestic arbitrations. Overlooking such as distinction has been a shortcoming of most legal systems in the world, leading to a uniform treatment of both types of arbitration.¹

1.4 Arbitration Tribunal

The arbitral tribunal is the result of a dispute resolution agreement between disputants. It is up to the disputants to confer on it whatever authorities and powers they see fit and to prescribe whatever procedure they see suitable, as long as they do not go against the law. The arbitration agreement must follow the statute's mandatory rule of law. The arbitral tribunal must also act and make its award in line with the general law of the country and the agreement, according to the Supreme Court ruling in Irrigation Deptt, Govt. of Orissa v. G.C. Roy.

The arbitration panel shall be formed in accordance with the arbitration agreement, according to Article 10 of the Arbitration Act of 1996. The number of arbiters can be set by the disputants under Article 10 of the ML (1985), but if they fail to do so, the number will be three; I would have suggested an odd number in order to address disputes involving more than two parties. Indeed, there is no limit to the number of arbiters, but the total must be odd and controllable in order for a result to be attainable. However, there are some exceptions, such as the Contracts (Regulation) Act, 1952, which adopted the By-Laws of the East Indian Cotton Association for arbitral purposes, allowing for an even number of arbiters, which is lawful under Sub-Section 2 of Section 3 of the Act in Chapter II of aforesaid Act.

1.5 Arbitration Procedure

For the first time in India, the Act of 1940 established procedural standards for arbitration. Oral hearings were required under the Act, and disputants had the right to legal representation. It was also permissible to summon a witness, who might be penalised if he refused to appear at a hearing. Cross-examination was permitted with the permission of the arbiters, as was the nomination of an umpire. The parties may agree to choose arbiters to serve as amicable compositeur. Unless otherwise agreed, the award must have been issued within a reasonable time after the competent court received the request for arbitration. The Act of 1996, which replaced the Act of 1940, introduced a set of procedural norms that were more in accordance with international standards.

¹ Saleh, Samir. "The Settlement of Disputes in the Arab World, Arbitration and Other Methods: Trends in Legislation and Case Law", Arab Quarterly Law, vol. 1, No. 2 (Feb 1986), 198.

1.6 Substantive Law of Arbitration

The Act of 1996 stipulates that the parties to an arbitration agreement can choose the law that the arbiters will apply to their disputes. If the two disputants to the arbitration agree to make the legal relationship between them subject to the provisions of a model-format contract, an international treaty or convention, or any other text, the provisions of that text, including any provisions relating to arbitration, will be given effect under Article 7 of the Act, 1996.

In terms of the substantive law of arbitration, Article 28(1) I of the Act of 1996 states that the arbiters must apply the terms and conditions agreed upon by the disputant parties to the subject-matter of the dispute. As a result, the "autonomy" granted by this sub-section would encourage ICA in India. As a result of the Act of 1996, disputants can submit their disputes to foreign law. In this sense, India follows England's lead in enabling foreign laws to be applied to issues referred to arbitration in India without being designated a foreign arbitration.

Allowing the contractual parties to choose a foreign law to govern their agreement as long as it is not in violation of public policy. The fact that the Indian Law of Arbitration does not stipulate a situation in which the disputants' choice of relevant law is implicit can be deemed a weakness.

The arbitration tribunal will apply the law that it finds "very much relevant to the dispute" if the disputants cannot agree on the applicable law to the content of the dispute. The tribunal must evaluate the provisions of the agreement as well as the commercial customary laws that are relevant to the subject-matter when determining on the content of the dispute. The latter criterion can be construed as a necessity for the agreement to follow current trade practises and usages in transactions of a comparable nature. The Indian Contract Law plays an important role in determining the appropriate law to apply to a contract, as well as indicating the type of contract, which can include the sale of goods or real property, employment terms, and ownership of intellectual property developed as part of a work for hire, among other things.

Following the ML, the Indian Law of Arbitration allows the tribunal to decide *ex aequo et bono* or as *amiable compositeur* (its historical origins in French law, specifically in *Amicabilis Compositor* of Common Law) and to facilitate conciliation between the disputants if the disputants expressly authorise it to do so.. Though the terms *ex aequo* and *ex bono* are not defined in subsection (2), the disputants may tell the arbitral tribunal to do so. The disputants are permitted to seek an amicable resolution through arbitration on their own, but they cannot impose their will on India's national policy. To put it another way, if approved, the tribunal may resolve the disagreement on the basis of equity, fairness, and proportionality, rather than being bound by the law's provisions. On such occasions, the tribunal can "*take a lenient view of the legal rules, but cannot totally disregard them.*" This opens the door to non-lawyer arbitrators who can bring their professional expertise and experience to the table without having to adhere to rigorous legal norms. This is significant since the law is crafted by politicians who are unfamiliar with the intricacies of the industry in question.

One common misunderstanding about amicable composition arbitration is that it is sometimes mistaken with mediation or conciliation by a nominated third party in some countries. This is especially true in India, and

even in jurisdictions where the two modalities of settlement are defined and provided for separately. The Indian law permitting the arbiters to settle a dispute as amiable compositeur is worded in such a way that it adds to the above-mentioned ambiguity. It indicates that if the disputants specifically authorise the arbitration tribunal to find a settlement between them, the arbitration tribunal may resolve the dispute on the basis of equity and fairness, without regard to the applicable law. As a result, arbitration resembles a conciliation process. However, there are significant variations between arbitration and conciliation, as we all know. The least of these differences is that arbiters acting as amicable compositeurs can make binding decisions, whereas conciliators can simply make recommendations.

As a result, it is said that the Western concept of friendly composition arbitration has not yet entirely absorbed into Indian legal systems, and that the concept of equity in Indian legal theory is tied to mutual concessions rather than adjudication. Modifications to the legislation and the extension of doctrinal writings can solve the aforementioned issues.

1.7 Arbitral Awards

When the arbitration panel issues an award, the procedures come to a close. Unless the disputants agree differently, the arbitration panel must make its award on the basis of a majority vote if it consists of more than one person. As a result, it's possible that the disputants will agree that the award must be made unanimously or by the tribunal's chairman. The circumstances, where, despite the disputants' agreement, a majority vote is not achieved, such as when each arbiter casts a different vote, are one possibility concerning which Indian Law is silent. The legislation should provide proper provisions for such a scenario. One method to get around this problem is to give the presiding arbiter the authority to make the final decision. The Act of 1996 stipulates that the arbitration award, in whole or in part, may not be published without the consent of the disputants. This is due to the fact that arbitration is a private means of resolving disputes. When an arbitration matter is brought before a court, whether for enforcement or dismissal, it may become public and open to debate and citation.

1.8 Arbitration Costs

Sub -Section 8 of Article 31 of the Arbitration Act, 1996 which is replaces Clause 8 of the First Schedule of repealed Act of 1940, empowers the arbiter to determine and arbitral award costs of arbitration including the fees and expenses of arbiters and witnesses, legal administering arbitration and other fees incurred in connection with the arbitral proceedings and the arbitral award. In *Mohd.Akbar v. Attar Singh*² case the Privy Council emphasized that arbitral award of costs is at the discretion of the arbitral tribunal.

The Government of India has comprehensive provisions in the Rules of the Indian Council of Arbitration dealing to fees and expenditures expended for arbitration hearings and awards. The Indian Council of Arbitration's Rules 28 and 29 state that incidental costs and charges of referral, arbitral award, and the like are at the arbitral tribunal's discretion. The scale of fees chargeable for administrative work and arbiter's fees is given in Rule 30.

² AIR 1945 PC 170

There is no regulated fee structure for arbiters in an Ad hoc arbitration.

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