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International Commercial Arbitartion and Indian law in Present Senario :- A Review of Indian laws

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Abstract

In modren times commercial contracts cross the teritorial jurisdiction of a nation. They no more bounded with the law on one nation. New world is E-world all the commercial transection are formed with the use of new electronic technologies. Parties are no more sitting to gether to aproach a commen minimum program based on contract. So in this reasech paper we are trying to rewiew indian laws on Commercial arbitration.

Key words, commercial contracts, E- world, electronic technologies,

Introduction

In India we have Indian contract Act, and Arbitration and Conciliation Act 1996. Beside this we have International treates and Convention in which India is a signatory party. There is a growth in cross-border com- mercial disputes Due to the reason of Increas in international trade and foreign direct investment in market . There is need for an efficient dispute resolution mechanism, for preserving business relationships and resolving cross-border commercial disputes the international arbitration has emerged as the preferred option. The role of Indian Judiciary in this area is welcommed by indian but the same is critisised by international community. Inernational community has a close watch on judicial legislation in this area.

Limitation

The present Study is limited to the secondry sorces available and the judicial pronouncement of Indian Courts.

Recent developments in the arbi- tration jurisprudence shows that the indian court has adopted pro-arbitratio napproach. This has been clearly reflect from the judicial pronouncement that the Indian judiciary is in support of adopting best international practices. From 1996 to 2018, the Supreme Court and High Courts delivered various landmark judgements taking a much needed pro-arbitration approach i.e.[i]

(a) declaring the arbitration law of India to be seat-centric;
(b) defining and brodning the scope of public policy in foreign-seated arbitration;
(c) removing the power of Indian judiciary's to interfere with arbitrations seated outside India;[ii]
(d) referring non-signatories to an arbitration agreement to settle disputes out of court through arbitration;;
(e) Defining and determining that even fraud is arbitrable.

Progressive Steps Taken by Govt. of India

In furtherance of judicial pronouncement some measures has been taken by the Indian government in support of the 'ease of doing business in India'[iii].The President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015. The Ordinance incorporated the essence of major judgement passed by the Indian courts in the last two decades and incorporated the recommendations of 246th Law

Commission Report. Thereafter, on December 17, 2015 and December 23, 2015 respectively, the Arbitration and Con- ciliation (Amendment) Bill, 2015 was passed by the Lok Sabha and Rajya Sabha respec- tively.

Salient feature of Arbitration and Conciliation Amendment Act, 2015

The modifications which are introduced by the Amendment Act 2015 have made significant changes to the present Act and amendment are in the right direction to clarify several issues wich relating to the objectives of the Act. [iv]

A. Pre-arbitral proceedings[v]

i. Independence and impartiality Arbitrators

(a) Applications for appointment of an arbitrator should be endeavored to be disposed of within a period of (60) sixty days from date of service of notice on the opposite party.

(b) Detailed schedule on ineligibility of arbitrators have been put in place. [vi]

ii. Interim reliefs [vii]

(a) Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitration;

(b) Section 9 applications to be made directly before High Court in case of international commercial arbitrations seated in India as well as outside. [viii]

(c) Interim reliefs granted by arbitral tribunals seated in India are deemed to be order of courts and are thus enforceable in the new regime. [ix]

(c) Post grant of interim relief, arbitration pro-ceedings must commence within 90 days or any further time as determined by the court.

B. Arbitral proceedings[x]

i. Expeditious disposal

(a) A twelve-month timeline for completion of arbitration seated in India has been pre- scribed.

(b) Expeditious disposal of applications along with indicative timelines for filing arbitra- tion applications before courts in relation to interim reliefs, appointment of arbitrator, and challenge petitions;

(C) Incorporation of expedited/fast track arbi- tration procedure to resolve certain disputes within a period of six months.

ii. Costs

Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India; introduction of 'costs follow the event' regime.

C. Post-arbitral proceedings [xi]

i. Challenge and enforcement

(a) In ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed;

(b) Section 34 petitions to be filed directly before High Court in case of international commercial arbitrations seated in India.[xii]

(c) Section 34 petition to be disposed of expedi-tiously and in any event within a period of one year from date on which notice is served on opposite party.

(d) Upon filing a challenge, under Section 34 of the Act, there will not be any automatic stay on the execution of award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings

Indian Law and Arbitrability

Arbitrability is one of the issues which involves the issues of contractual and jurisdictional facets of international commercial arbitration. It involves question such as what type of issues can and cannot be submitted to arbitration. Some land mark Judgments of Indian courts are discussed as,

In Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.[xiii]the Supreme Court while discussing the concept of arbitrability in detail and held that the term 'arbitrability' had different meanings in different contexts: [xiv]

(a) All disputes capable of being adjudicated through arbitration,

(b) All disputes covered by the arbitration agreement, and

(c) All disputes that parties have referred to arbitration.

Court further stated that in principle, any dispute can also be resolved through arbitration which can be decided by a civil court. However, certain disputes may, by necessary implication, stand excluded from resolution by a private forum. Such non-arbitrable disputes include:[xv]

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) matri- monial disputes relating to divorce, judicial sep-aration, restitution of conjugal rights, or child custody;
(iii) guardianship matters;
(iv) insol- vency and winding up matters;
(v) testamentary matters (grant of probate, letters of administra- tion and succession certificate); and
(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Also, the Supreme Court has held in N. Radhakr- ishnan v. M/S Maestro Engineers[xvi] observation of the court was, where in a contract either fraud or serious malpractices or both are alleged, the matter can only be settled and resolved by the court and such a serious legal situation cannot be referred to an arbitrator. The Supreme Court also observed that fraud, ,financial fraud financial malpractice and collusion are allegations with criminal repercussions in nature and as an arbitrator is related to nature and creature of the contract, with limited jurisdiction.[xvii] The courts are more equipped with jurisdiction to adjudicate serious and complex allegations and are competent by law in offering a wider range of reliefs(award and

punishment) to the parties in dispute as compared to arbitrator. But the Supreme Court in Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi[xviii] and World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.[xix] held that allegations of fraud are not a bar to refer parties to a foreign-seated arbitration and that the only exception to refer parties to foreign-seated arbitration are those which are specified in Sec tion 45 of Act. For example.in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed.[xx] Thus, it seemed that though allegations of fraud are not arbitrable in ICA's with a seat in India the same bar would not apply to ICA's with a foreign seat.[xxi]

The decision of the Supreme Court in A Ayyasamy v. A Paramasivam & Ors,[xxii] has clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In A Ayyasamy , the Supreme Court held that:[xxiii]

(a) allegations of fraud are arbitrable unless they are serious and complex in nature;

(b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud;

(c) the decision in Swiss Timing did not overrule Radhakrishnan. The judgment differentiates between 'simplicitor fraud' and 'serious fraud', and concludes while 'serious fraud' is best left to be determined by the court, 'simplicitor fraud' can be decided by the arbitral tribunal.[xxiv]

However, in Vimal Shah & Ors. v Jayesh Shah & Ors,[xxv] the Supreme Court has held that disputes arising out of Trust Deeds and the Indian Trusts Act, 1882 cannot be referred to arbitration.[xxvi]

Conclusion

The fast-growing Indian economy in order to attract foreign investment requires a fast,reliable and stable dispute resolution process. Due to the extreme backlog of cases before Indian courts, commercial bussines players in India and abroad have developed a strong preference to resolve disputes via arbitration instead of regular courts.

In spite of India government being one of the original signa- tories of the New York Convention, arbitration in India has not always kept up with international best practices. However, during the last five years we have seen a significant positive change in approach. Courts and legislators have acted with a view to bringing Indian arbitration law in line with international practice.[xxvii] With the pro-arbitration approach of the courts and the Amendment Act in place, there is cause to look forward to best practices being adopted in Indian arbitration law in the near future. Exciting times are ahead for Indian arbitration jurisprudence and our courts are ready to take on several matters dealing with the interpreta- tion of the Amendment Act.[xxviii]

Suggestion

Fallowing are the main suggestion of this research

(1) As we know there is negligible awareness about commercial arbitration amoug small busseness co. So for the benefit of indian govt. should start compain for awareness.

(2) Cost and fees of arbitration are very high so it can be suggested that like free legal aid, free commercial arbitation centers be framed.

(3) More or less the investers are always in better position to affect government and arbitrators so there is always a chance of malpractice. In such a situation it can be suggested that independence and impartial nature of the arbitator be maintained. This can be possible only when cout has watch eye on the arbitration proceedings.

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