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Comparative Analysis of Arbitration Award and Compliance - India v USA

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The world is turning towards arbitration. Avoiding lengthy, time-consuming court proceedings to make transactions or trades between people easier, is what everyone now wants in case of a dispute. Delving briefly into the concept of arbitration and how it is conducted, this paper is an insight into the difference in arbitration between India and the USA. Using the backing of various prominent case laws acts, and agreements, the concepts of emergency arbitration, arbitrability of oppression and mismanagement, and the way forward in this rising era of arbitration have been touched upon. The enforcement of such awards is seen through in India through the Arbitration and Conciliation Act 1996 and the Code of Civil Procedure 1908. Similarly, international arbitral awards are seen through and carried out by the rules of the New York, or Geneva Convention. With an outlook into various concepts that have been set forth by Courts such as the four-step test for determination of non-arbitral matters, herein there is a discussion on arbitration referring to concepts, case laws, and ideologies that shaped it into what it is today.

Keywords: *arbitration, awards, effectiveness, compliance.*

INTRODUCTION

Arbitration, a mode of alternative dispute resolution (ADR) is an amicable settlement, wherein two parties in dispute decide to resolve the matter by avoiding litigation, by involving an

authorized third party, who is called the 'arbitrator' to assist them with the same. The Arbitration and Conciliation (Amendment) Act, of 2015, bestowed the freedom upon the parties in dispute to pick an arbitrator by themselves. To resolve such disputes, the arbitral tribunal was formed. According to section 2(a)[1] of the act, "arbitration" means any arbitration whether or not administered by a permanent arbitral institution. A favorable aspect of arbitration as compared to the litigation process is the flexibility and better accommodation. In terms of accommodation, it is a comparatively easier affair for transnational disputes to be resolved through the mode of arbitration[2].

There are primarily six kinds of arbitration[3]; Domestic Arbitration, International Arbitration, International commercial arbitration, Ad-hoc Arbitration, Fast track Arbitration, and Institutional Arbitration. As can be inferred by the name, domestic arbitration, is a dispute settlement that takes place when both parties belong to the same nation and decide upon settling their disputes in coherence with the law of land of that nation. International arbitration, in contrast, is when either of the parties is based in a foreign nation, or if the subject of the dispute is foreign.

International commercial arbitration, according to Nani Palkhiwala 'is a 1987 Honda car, which will take you to the same destination with far greater speed, higher efficiency, and dramatically less fuel consumption'[4]. It means that International Commercial Arbitration, is one wherein disputes arise from legal relations that can be construed as commercial based on the law of the land, and at least one of the contestants or parties is a citizen or resident of a foreign nation, foreign incorporated corporate, a government of any nation other than India and an association wherein the primary control is held outside the country. Further, Ad Hoc arbitration refers to the process wherein, an arbitral institution is excluded and arbitrators independently determine and influence the procedure. While fast track arbitration is simply a speedy process of solely

[1] Arbitration and Conciliation Act 1996, s 2(a)
[2] Christopher R. Drahozal, 'Commercial norms, commercial codes, and International Commercial Arbitration' (*KU ScholarWorks*, 1970) <https://kuscholarworks.ku.edu/handle/1808/11315> accessed 30 January 2023
[3] 'Types of Arbitration' (*Law Times Journal*, 10 August 2019) <https://lawtimesjournal.in/types-of-arbitration/> accessed 30 January 2023
[4] Nani Palkhiwala, *We, The Nation: The Lost Decades* (USB Publishers' Distributors Ltd 1994)

written pleadings that are to be mandatorily carried out within the period of six months. Lastly, institutional arbitration refers to mediation that is supervised by arbitral institutions, and the rules followed are those set out by the same.

ARBITRAL AWARDS

The decision that is given by the arbitrator is known as an arbitral award. This is considered to be binding, and to enforce it, it is moved to the court. The end decision may be inclusive of consideration in terms of payment or exclusive of it. It can be concluded as a non-monetary award when there is a failed claim and the arbitrator decides that neither party will be required to pay or compensate the other. Some of the key components of an arbitral award include that; it must essentially contain the cause of the dispute, must be in writing along with the date and time, as well as the signature of the mediator/ arbitrator. Diving into a brief of further classification, arbitral awards can be split into domestic awards and foreign awards. As the name suggests, domestic awards arise out of arbitral disputes within the territory of India and are regulated through the Arbitration Conciliation Act 1996; whereas foreign awards entail foreign elements, in terms of dispute and origin of parties.

ARBITRATION IN INDIA VS USA

The American Dispute resolution process is governed by the Federal law of the nation. The principal place of such a law in arbitration is to implement the New York and Panama convention[5] and make decisions upon the award in terms of converting them into judgments upon satisfaction, or declining the award so proposed, succeeding the process of ensuring the validity of the arbitration agreements drafted.

In the U.S., section 1[6] of the Federal Arbitration Act, exempts maritime operations and commerce from operation within the title. It suggests that maritime operations which mean bills of lading water carriers, agreements over wharf age, supplied vessel collision, or other matters of foreign

[5] Daniel Schimmel et al., 'Arbitration procedures and practice in the United States: Overview' Practical Law <https://uk.practicallaw.thomsonreuters.com/0-502-1714?contextData=(sc.Default)> accessed 30 January 2023
[6] Federal Arbitration Act 1925, s 1

commerce, would fall within the Admiralty jurisdiction. Similarly, it also exempts contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce from operation within this title.

In the case of Southwest Airlines Co. v Saxon,[7] the question arose as to whether the ramp workers of airlines fall within the ambit of workers engaged in foreign or interstate commerce according to section 1 exemption of the FAA. In brief, Latrice Saxon was an airline ramp agent, whose primary job was to load and unload cargo in airplanes, and agreed to arbitrate wage disputes against Southwest airlines. While she pursued a class action in pursuit of overtime wages, while the airlines moved to compel arbitration. Her primary argument against the same was that she was exempt from the FAA rules because her occupation fell under section 1 of the Act. The court's decision was in the affirmative, wherein it held that a ramp agent plays a pertinent part in the transportation of goods across borders, and hence they do as rightly stated, fall under the ambit of section 1 of FAA.

While India follows the Arbitration Conciliation Act, of 1996, there are various kinds of disputes that are categorized as non-arbitrable. The Supreme Court in the case of Booz Allen and Hamilton Inc v SBI Home Finance Ltd. & Others[8] ventured into the question of non-arbitrability and tried to simplify the process of its determination. In the process, the Supreme Court claimed that this issue is to be determined based on the 'nature of rights' that are involved in the dispute. In simpler terms, a dispute over a right in rem is not arbitrable, whereas that over a right in personam is. Right in rem is simply a person's right against the entire world, and right in personam is the right of a person against specific individuals. To make the determination more accessible. The case was concluded with a categorization of six specific types of disputes that will be considered non-arbitrable disputes in India:

- Disputes arising out of, or giving rise to criminal offenses;
- Matrimonial disputes;
- Guardianship or custody matters;

[7] *Southwest Airlines Co. v Saxon* [2022]
[8] *Booz Allen and Hamilton Inc v SBI Home Finance Ltd. & Ors* (2011) 5 SCC 532

- Insolvency and winding up;
- Testamentary matters;
- Eviction or tenancy matters.

Later on, the Supreme court led the world of arbitration to more clarity, about non-arbitrable matters, by coming out with a four-step test for its determination, in the case of Vidya Drolia & Others v Durga Trading Corporation[9]. These steps to decide whether a dispute was arbitrable or not were:

- Relating to disputes involving rights in rem, and do not pertain to rights in personam that have arisen from right in rem;
- Affecting third-party rights, wherein mutual adjudication would not be in the best interest and central adjudication would be required, having an erga omnes effect;
- The subject matter of the dispute involves inalienable public interest functions of the state, due to which mutual adjudication would not be enforceable;
- When the issue of a dispute is expressly or impliedly non-arbitrable based on mandatory statutes.

Treading into a brief history of arbitration in the USA, initially the agreements to arbitrate were not enforceable, based on the dictum passed in the Vynor's Case, which contended that arbitration agreements could be revoked by either party at any time. This was starkly revolted against, with the claims that it damaged cordial relations and hampered trust among tradesmen or business people, as a contravention of such an arbitral agreement will require the involvement in lengthy and expensive court proceedings thereby reducing the ease of business. This led to the implementation of the New York Arbitration Act of 1920, and later, the United States Arbitration Act of 1925, which is now widely known as the Federal Arbitration Act, or FAA. These laws clarified that arbitration agreements were enforceable about relevant exceptions. UNCITRAL, the United Nations Commission on International Trade Law was a

[9] *Vidya Drolia & Others v Durga Trading Corporation* (2019) SCCOnLine SC 358

framework that was implemented to facilitate trade on a global scale. It promotes harmony in international trade about laws by way of legislative and non-legislative facilities.

EFFECTIVENESS OF ARBITRATION IN INDIA AND THE USA

In the 2020 World Bank Report of Ease of Doing Business Report, India was noted to have made significant improvements as compared to the previous year in terms of facilitating, welcoming, and incubating businesses. The report also mentions that a higher level of efficiency of the judicial system significantly influences the efficiency of firms or the corporate world. The same report also provided that in India, the process of settlement of commercial disputes via judicial process would take up an average of 1,095 days. Herein, it proves that stringent laws and effective judicial processes lead to more entry of firms and their growth, acting as a significant contributor to the progress of the economy and welfare of the dwellers of the country.

As given in the Nation Judicial Data Grid (NJGD) of the District and Taluka courts of India, there are up to 57,381 pending Arbitration Main and Miscellaneous cases[10]. Given additional information notwithstanding the arbitration cases alone, the total number of pending civil suits throughout these courts in India sums up to a figure of 1,07,98,908. Though in comparison, the number of civil cases in the High courts of India that are pending amounts to 42,97,802.

Arbitration is deemed often the most efficient way of settlement of legal disputes as it is considered to save a lot of time that would be spent on the alternative method of litigation and is also cost-friendly as compared to the latter. The hub of Arbitration is considered to be Singapore, which adopted the New York Convention in 1986 and became the most chosen and common preference for International Commercial Arbitration. This is the most preferred hub as the Judicial Supreme Court of Singapore ensured efficiency time and again in various forms, such as the upholding or enforcement of agreements and awards and providing facilities and

[10] 'Welcome to NJDG - National Judicial Data Grid' (*National Judicial Data Grid*) https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> accessed 20 January 2023

competent infrastructure for mediation between the two parties in a dispute, whether domestic or international.

An efficient model of the arbitrative process being carried out in a nation significantly attracts investors, contributing to a rapidly growing nation with constant development, and upgrading the standard of living on a multifold level. Some of India's well-known and resourceful Arbitration centers are; the Delhi International Arbitration Centre (DIAC), Nani Palkhivala Arbitration Centre (NPAC), and the Mumbai Centre for International Arbitration. Though there are others available, the process of arbitration in India is often delayed due to the lengthy judicial process in the event of the dispute leaving the arbitration spectrum and getting entangled in courts. Further, as a part of a distinct feature between India and other countries, India appoints retired Judges as arbitrators. There are two sides to this coin, and some may support this practice, claiming that it is a better method as the retired Judges are not only more learned and experienced but also helps avoid the overburdening of the younger arbitration lawyers. The opposing side may claim that it is this practice that is making the arbitration process slower and redundant, as the younger lawyers must be appointed as arbitrators to ensure not only a speedy and efficient system but also to improve the quality of the awards.

While some nations mandate the process of arbitration agreements formed before the arising of disputes, the United States, in light of the MeToo laws voted towards the FAIR Act of 2022 (Forced Arbitration injustice Repeal) to scrape any kind of mandate upon pre-dispute agreements for arbitration in the categories of employment, civil rights, consumer and antitrust disputes. Similarly under the MeToo Laws, if mandatory agreements are signed to resort to arbitration in the case of sexual harassment claims, such mandates will not be considered valid as they are now unlawful and void. The repealing of the process of mandatory arbitration was imposed with the view that such a mandate may end up concealing the unfair practices or wrongdoings of companies, and tying down the hands of those who wish to rise against them; the repealing of the same will act as an incentive for companies to consciously work towards minimizing the risk of a dispute arising by way of improved policies, exemptions, and reasonable benefits.

According to the 2020 World Bank Report of Ease of Doing Business Report, the United States ranked 6th place, with New Zealand at rank 1. In the detailed report, it was studied and provided that the enforcement of contracts had been made simpler in the United States with the much-needed introduction of electronic filing and payment of court fees, thereby significantly speeding up the process and simplifying it. In light of the study by the FMCS (Federal Mediation and Conciliation Services) it was estimated that the average time taken in arbitration cases extends up to 475 days. Some of the well-known international bodies that facilitate arbitration on an international level are the; International Chamber of Commerce (ICC), the International Centre for Dispute Resolution of the American Arbitration Association, and the London Court of International Arbitration.

In an interesting turn of events, a foreign commercial award, if the losing party falls within the jurisdiction of the courts of the United States, may be enforced in the U.S. by simply presenting an original and authentic copy of the award, following which it will be enforced. This comes except non-recognition of the award, provided that the party towards whom an unfavorable decision was given, establishes a certain basis for such non-recognition.

In the case of Al- Qarqani v Chevron corporation No. 19-17074 (9th Cir. 2021); In the U.S district court for Northern California, Saudi Arabian petitioners brought a claim to enforce an arbitral award of 18 billion dollars, rendered by the International Arbitration Centre, Cairo, Egypt. The U.S. respondents argued against the same, and the court tried to determine whether there was an arbitration agreement between the parties. Upon finding that the primary ground of such arbitration was a concession agreement in 1933 between the Saudi Arabian government and a Standard oil Affiliate, it was held that the claimants could not invoke such arbitration clauses as they had never been parties to the mentioned convention, along with the arbitral tribunal deciding outside the purview of the agreement.

ARBITRABILITY OF OPPRESSION AND MISMANAGEMENT

Section 241(a)[11] deals with oppression and states that applications can be made to the tribunal in the case of oppression. Though oppression has not been defined in the companies act 2013, under article 241, a shareholder, owning considerable shares in the company has the power to file a suit before NCLT with the claims of the prejudicial manner of operation jeopardizing public interest, prejudice against a specific party, or that which is biassed in terms of the interest of the company.

In an interesting judgment of the case of Tata Consultancy Services v Cyrus Investments Pvt Ltd[12] It is relevant to point out that once upon a time, the provisions for relief against oppression and mismanagement were construed as weapons in the armory of the shareholders, which when brandished in terrorism, were more potent than when used to strike with. 'While such a position is certainly not desirable, they cannot today be taken to the other extreme where the tail can wag the dog'. In the case of Shanti Prasad Jain v Kalinga tubes[13], it was held that for a case of oppression and mismanagement, there needs to be conduct amounting to misconduct by the majority towards the minority. The court further went on to state that this conduct cannot be in one isolated instance but rather, it needs to be a continuous act.

The arbitrability of oppression is widely understood by the noteworthy case of Vikram Bakshi v McDonald's[14]; Herein, Connaught Plaza Restaurants and McDonald's entered into a joint venture, wherein they each had 50% of the equity, and Vikram Bakshi became Managing Director of this joint venture, along with holding the same position in Connaught Plaza Restaurants Pvt Ltd. In the agreement for the Joint Venture, there was a list of conditions that needed to be met to become the MD. These were:

- NCR residence;
- Substantial and significant time must be devoted to the company;

[11] Companies Act 2013,s 241(a)
[12] *Tata Consultancy Services v Cyrus Investments Pvt Ltd* Civ App No 440-441/2020
[13] *Shanti Prasad Jain v Kalinga Tubes* (1965) AIR 1535
[14] *Vikram Bakshi v McDonald's* (2017) 143 SCL 37

- The person must hold 50% of the company's shares;
- Responsibilities must be discharged with faith and competence.

McDonald's India Pvt ltd. had sent a proposal of 5 million USD upon 50% of the shares that Vikram Bakshi had initially invested. When he rejected the offer, the amount was raised to 7 million USD, which he once again declined. Later on, a board meeting decided that Vikram Bakshi would be expelled and will have to clear office within 15 days, as McDonald's India contended that Vikram Bakshi was not qualified to be the Managing Director of the joint venture, as he did not ensure faithfulness or even devote significant time as required, to the venture.

This led to Vikram Bakshi's Suit under sections 397,399 and 402 (3) in the Company Law Board, alleging oppression and mismanagement. While the Company Law Board stated that the status quo over shareholding must be maintained, the matter was later transferred to NCLT (National Company Law Tribunal) under sections 241 and 245 (4) of the act. NCLT held that, under Vikram Bakshi's tenure of solely managing the Joint Venture, the business had expanded from 0 branches to 154 in India. It is a clear case of oppression, as from 1996 to 2013 the company never had any complaints against him. This removal was to acquire 50% of the equity shares and therefore was unreasonable.

In the case of Haryana Telecom Ltd. v Sterlite Industries Ltd.[15]; the Supreme Court stated that, under section u of ACA, only a dispute that an arbitrator is competent and empowered to decide can be referred to the arbitrator. Further, it was also stated in the Booz Allen case[16] that questioned whether a dispute ought to be or ought not to be referred to arbitration, held that it was not a rigid or inflexible rule. Therefore, as per ACA 1996, there is clarity on the fact that arbitration is undoubtedly allowed for disputes that are civil and commercial, although a civil court is barred under section 430 of the Companies Act 2013 from entertaining any issue that relates to oppression and mismanagement, and exclusive jurisdiction to hear the same has been bestowed upon the National Company Law Tribunal. Therefore, it can be ascertained from the

[15] *Haryana Telecom Ltd. v Sterlite Industries Ltd* Special Leave Petition (Civil) 3695/1999
[16] *Booz Allen case* (2011) 5 SCC 532

above that the issue of oppression and mismanagement cannot be referred to the arbitral tribunal, as it is not empowered for the same.

EMERGENCY ARBITRATION

Emergency Arbitration in India refers to a situation wherein the parties require urgent interim relief before the assigning of an arbitral tribunal. Herein, similar to the relief of ad-interim injunction, the aim of both parties predominantly is to preserve the issue in status quo until the matter of the dispute is heard and adjudged based on merits. This form of arbitration is enforceable and applicable only to the parties who have been signatories to an arbitration agreement.

In case the parties wish to resort to emergency arbitration, they may settle their disputes via an emergency arbitrator, without relying on a tribunal. In the situation that the parties are unable to come to a common agreement regarding the arbitrator to be appointed or if there is a failure to appoint an arbitrator, there will be no option but to fall back on the court system for the appointment. The origin of this form of arbitration can be traced back to 2006, wherein it was adopted by the International Centre for Dispute Resolution (ICDR). The same was also later adopted by the International Chamber of Commerce (ICC), the Netherlands Arbitration Institute (NAI), and various others.[17]

With its most important benefit being that of being able to maintain the status quo, it is also considered a time-efficient measure, not only for the disputing parties but also for the courts. Therefore, while it is highly useful and economic, the greatest challenge it faces is that it is still not recognized by most countries in terms of its enforceability. Emergency arbitration provisions that a sole arbitrator be appointed once requested by either party as soon as possible, to provide interim relief at the earliest. Such an arbitrator must be appointed by an arbitral institution.

[17] Shivam Kumar, 'Emergency Arbitration — Its Advantages, Challenges and Legal Status in India' (*SCC Blog*, March 26, 2022) <https://www.scconline.com/blog/post/2022/03/26/emergency-arbitration/> accessed 20 January 2023

The renowned case of Amazon.com NV Investment Holdings LLC v Future Retail Ltd.: The court observed that, if the parties to a contract were allowed to incorporate institutional rules in their arbitration agreement, and if the orders of the emergency arbitrator are being enforced, then it would leave the entire concept of emergency arbitration otiose. Therefore, if such institutional rules are being incorporated, there must be utmost importance given to ensuring that such rules provide for the emergency arbitrator's orders and that the same will be covered within the act.

The popularity of Arbitration is primarily due to the enforceability of an arbitral award arising out of international trade, in a foreign nation as compared to that of foreign court judgments. The enforcement of such awards is seen through in India through the Arbitration and Conciliation Act 1996 and the Code of Civil Procedure 1908. Similarly, international arbitral awards are seen through and carried out by the rules of the New York, or Geneva Convention. Although the process of arbitration is chosen for its ease and simplicity as compared to litigation, certain problems may make the process of executing a foreign arbitral award in India complex. In the instance that one party was unable to enforce his or her arbitral award in India, following a favorable Foreign award, the only solution that lay ahead, would be to enter into litigation, thereby taking the parties back to exactly what they avoided in the first place.

THE WAY FORWARD

India is ambitious to facilitate arbitration on an international level. With its amendments in the Arbitration Act, it is quite evident of India's efforts in accommodating arbitration and making it more feasible and accessible. With the de-automation of challenging arbitral awards, there was a significant impact on its efficiency after the amendment of the act. Several amendments to the Arbitration and Conciliation Act were done to keep up with the international playing field and standards. About the autonomy of the arbitrating parties, in the case of Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.[18] In this landmark case, the Apex court elaborated on part I and part II of the Arbitration Conciliation Act 1996 and stated that there is

[18] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc*. Civ App No 7019/2005

a clear difference between part I and part II, as they apply to completely different fields and do not encompass any overlapping provisions. The court further read that, the arbitration clause referring to the party's autonomy as the 'grundnorm' in International commercial arbitration intends to avoid tedious or inconvenient procedures.

The United States is a party to the New York Convention, the inter-American convention on International commercial arbitration, and various others in the form of conventions or treaties, thereby making the process of arbitration both domestic and international more standardized, regulated, and compliant with the international norms. While the Forced Arbitration of Sexual Assault and Sexual Harassment act 2021 was repealed, a noteworthy controversial act called the Forced Arbitration Injustice Repeal Act (FAIR Act) 2022 was passed. The criticism of the same was that it would lead to an invalidation of various agreements entered into between various parties such as employers and employees, consumer disputes, antitrust, and civil rights disputes which were made before the occurrence of the dispute. The repealing of this act would result in the prohibition of arbitration agreements and class action waivers in a plethora of agreements.