International Journal on Arts, Management and Humanities **9**(1&2): 30-33(2020)

ISSN No. (Online): 2319–5231

Developments in Indian Arbitration Regime

Vivek Tyagi[1] and Nitu Nawal[2]
[1]LLM, CS, MBL, DIPR, PGDLL, DCL, NLSIU Bangalore, ILS Pune University, India.
[2]Dean, School of Legal Studies & Governance, Career Point University, Kota, Rajasthan India.

(Corresponding author: Vivek Tyagi)
(Received 02 July, 2020, Accepted 30 October, 2020)
(Published by Research Trend, Website: www.researchtrend.net)

ABSTRACT: Arbitration is one of the most feasible and efficient dispute resolution mechanisms even better than judiciary. In India, after 1991 LPG policy there was a need of an efficient resolution mechanism as many MNCs was approaching India for investment and globalization was on peak. So India enacted Arbitration and Conciliation Act, 1996 for the betterment of economic and social environment in the nation but it wasn't enough there is a need for continuous development in the arbitration regime. This study deals with the development and evolution of arbitration regime in India through case laws and case studies.

Keywords: Arbitration, mechanism, economic and social environment.

I. INTRODUCTION

There is a misconception or you can say unawareness among the people regarding the dispute resolution mechanism. They believe that there is only one type of mechanism through which the dispute or issues can be resolved i.e. judiciary but there is some other alternate dispute resolution mechanism such as arbitration, conciliation, mediation, etc. These alternate mechanisms are much more convenient and efficient than litigation as litigation in courts has disadvantages like the delayed decision, stringent rules, inflexibility, etc.

If we talk about arbitration it is a process to resolve the dispute outside the courts. It is a mechanism in which disputes are submitted by the parties by an arbitration agreement (between the parties) which is submitted to an arbitration tribunal that consists of arbitrators who deliver an arbitration award. It is more effective and efficient than litigation in courts and the rules are pretty flexible, parties can choose their own tribunal, applicable laws, arbitrators, unlike the judicial system.

The law in India related to arbitration has been gradually evolving to satisfy the needs of the Indian economy. The main intent of the Indian legislature while implementing arbitration laws in India is to elevate arbitration as the preferred mode at both the international and national levels. There is a catena of pro-arbitration judgments and legislative amendments in Indian arbitration law to make India a pro-arbitration regime. In this literature, we will discuss the evolution of arbitration law in India, recent changes in the law both through landmark judgments and amendments in the 'Arbitration and Conciliation Act, 1996' (hereinafter 1996 Act) [1].

II. EVOLUTION OF ARBITRATION LAW IN INDIA

In India, the first statute related to arbitration was enacted in 1899 (colonial period) after the first legislative council of India was formed- The Indian Arbitration Act, 1899 [2]. This act has some unique provisions because it was fundamentally based on the British Arbitration Act, 1889. The authority of the act was confined to only three major presidency towns at that time- Bombay, Madras, and Calcutta. One of the salient features of the act was that the parties have to choose the arbitrators at the time of the arbitration agreement i.e the names should be mentioned in the agreement itself. As the time evolved the needs of the society also started increasing as the trade and commerce were also increasing there was a need for a proper arbitration act so that the disputes can be resolved easily so in the year 1940 under the British regime a new act was passed The Arbitration Act of 1940 [3].

It wasn't that effective and efficient as expected, although it was more arbitration-centric and was applied to every part of India but it faced a lot of criticism. It lacked clear interpretation of rules and provision; lacked proper implementation when it comes to real sense; silent about the shortcoming that might occur in private contracts; Obstruction of the judiciary at any phase of procedures of Arbitration; the act didn't restrict the parties from raising any dispute identifying with procedures however parties have willfully chosen arbitration as the preferred mode; there were numerous grounds on which the awards can be challenged. Because of this foreign parties were not intrigued by arbitration procedures with any party in India rather these parties feel comfortable to obtain the award

in some other state who was a member or the states who had ratified the New York Convention Enforcement of Foreign Award and would authorize the equivalent in India as India was also the part for New York Convention. Such obtained foreign awards are easily recognized in India and accommodated their implementation under the Foreign Award (Recognition and Enforcement) Act 1961 [4]. But the important element that it brought was the uniformity in arbitration law across the nations. In 1991, after the LPG policy India opened the doors for investors and this led to huge pressure on the legislature to modernize the arbitration law in India and the act of 1940 needed many amendments and reforms so a new act was enforced in 1996- the Arbitration and Conciliation Act [5].

The 1996 Act is based on 'UNCITRAL Arbitration rules', and 'Model Law on International Commercial Arbitration'. This act is much more advanced and in tune with international and national regime, it provides for both international and national commercial arbitration as it had provisions for enforcement of foreign and local awards. The main object of the act is to provide a speedy trial and solution to the disputes through an alternate mode i.e arbitration and also to limit the judicial intervention. It reduces the role of the judiciary, and because of that, it mitigated many disadvantages which one faces through judicial courts. According to the evolving need of the society, the act was amended two times one in 2015 and then in 2019.

The 2015 amendment has encouraged in mitigating the lacunae brought about by the milestone judgment by the Apex Court of India in the BALCO case [6]. Wherein courts were barred to provide interim relief. To explain the issues emerging with the goal of the Act, the 1996 Act was amended in 2015. Some of the amendments are - Setting of the fixed time for resolving the disputes; procedure for the appointment or selection of arbitrators; The acts provide the grounds to challenge the selection of the arbitrators; Amendment accommodate help from the Indian Courts even in 'foreign seated arbitration' in the form of relief before the commencement of the proceedings; Introduction of the new concept - "Cost follow function" in the Act.

Anyway, these changes were insufficient as this amendment didn't address numerous lacunas present in the act. Consequently, in 2019 a new amendment was made to the Act [7].

2019 change presented section 11(3A) by which the Supreme court of India and High courts will have the power to assign arbitral institutions which have been evaluated by the Arbitration Council of India under section 43- I (presented by revision act 2019). Amendment act 2019 presented PART 1A: Arbitration Council of India through section 43A to 43M; Introduced section 23(4) for opportune direct of procedures, inside a time of a half year from the date of the arrangement of arbitrator(s) in domestic issues and 12 months in the event of international arbitration; Introduced Section 42A which expresses that the judge, arbitral organizations and parties to an arbitration agreement will keep up secrecy of every single arbitral proceeding aside from in the event of an award, as it must be uncovered for its implementation. (The ICC as of late with impact from 1 January 2019 presented a standard that any party may at any time object to the rendering of an award or solicitation that the award is cleaned or redacted, in such case the award won't be rendered) [8].

III. LANDMARK CASES

1. Hindustan Construction Company Limited & Anr. V. Union of India (2019)

In 2019 the Supreme Court of India passed a profoundly foreseen judgment in *Hindustan Construction Company Limited and anr. v Union of India* resolving the problem of the automatic stay on the enforcement of awards [9]. It struck down Section 87 of the Arbitration and Conciliation Act 1996 as being "manifestly arbitrary".

Disputes related to costs rise in various Hindustan Construction Company Limited ("HCCL") ventures resulting in various arbitral proceedings. The awards delivered in support of HCCL were challenged by the UOI under Section 34 of the 1996 Act. Following the difficulties, the awards consequently stayed under the un-altered Section 36 of the 1996 Act. In the 2015 Amendment, Section 36(3) was incorporated, in which it is given that an award would not automatically be stayed on filing a challenge by anyone. There was, nonetheless, some disarray with respect to the use of Section 36(3) to challenges existing at the hour of the 2015 amendments. In *BCCI v. Kochi Cricket Private Limited* the Supreme Court of India explained that the altered Section 36 would likewise apply to awards that are pending under Section 34.

Section 87 was then incorporated into the 2019 amendment. It adequately turned around the judgment given in the BCCI case, by giving that the 2015 amendment would just apply to arbitral procedures and court procedures started on or after the compelling date of the 2015 amendment.

HCCL challenged Section 87 that was introduced in 2019 amendment on the premise that it violative, inter alia, the right to equality under Article 14 of the Indian Constitution by removing the vested right of enforcement of an arbitral award without eliminating the premise of the BCCI judgment, making Section 87 preposterous, extreme and discretionary.

The Supreme Court of India struck down the inclusion of Section 87 and the cancellation of Section 26 of the 2015 and 2019 amendments, noticing that Section 36 was corrected by the 2015 revisions. It explained that according to the BCCI case, the effect of the 2015 revisions implied that enforcement of an arbitral award would not consequently be stayed upon the filing of the challenge by anyone under section 34 and that the alterations in 2015

would apply to all forthcoming challenges under section 34 of the Act regardless of whether the procedures were initiated before or post the 2015 Amendment. Section 87 and the subsequent re-presentation of the automatic stay "turn[ed] the clock in reverse to the object of [the Arbitration Act] and [the 2015 amendments]" and "result[ed] in manifest arbitrariness".

2. Vinod Bhaiyalal Jain v. Wadhwani Parmeshwari Cold

The Supreme Court of India put aside a local award for arbitrator bias in the case of *Vinod Bhaiyalal Jain v Wadhwani Parmeshwari Cold* [10]. The arbitrator was also a counsel for one of the parties and wouldn't pull back (even after complaints were raised), offering ascend to questions about his fairness.

The agreement between the parties relating to arbitration contained in the receipt for the acquisition of cold storage named a specific individual as the only arbitrator in case of any dispute. It later rose that this individual was counsel for the respondent, in a different, inconsequential dispute. Section 12(1) of the Act "*provides that an arbitrator must disclose any circumstances likely to give raise to justifiable doubts as to his/her independence or impartiality"*. The court noticed that, at the hour of appointment of the arbitrator, the authority was at that point going about as guidance for Wadhwani, the respondent, for another situation, and was put on lawful notification by Vinod filed complaints against the appointment. The arbitrator dismissed those complaints as irrelevant and rendered an award against Vinod. This prompted the court to concur with Vinod that the arbitrator was not unbiased.

In setting out the significant test, the court noted: "*what is to be seen is that there has been a reasonable basis for the appellants to make a claim that in the present circumstance the learned Arbitrator would not be fair to them even if not biased*" [11].

3. BALCO

The parties to the dispute entered into an arrangement corresponding to the supply of hardware and equipment for the modernization of infrastructures. Few disputes started to rise and were alluded to arbitration that to be seated in England and awards were rendered in favor of the Respondent. The Petitioner had filed applications to put aside the award under the watchful eye of the Chhattisgarh High Court under Section 34 of the 1996 Act.

The Chhattisgarh High Court held that Article 22 of the 1996 Act is clear in giving that the best possible law of the agreement is Indian law. They further gave the decision that Article 17(1) accommodated English law to be the law pertinent to the agreement and hence it would be impracticable to decipher Article 22 to imply that Indian law would be the considerable and substantive law administering the agreement however in the event of arbitration, English law would be governed. In this way, the court found that English law was the law material to the agreement. Considering the equivalent, the court maintained the choice upheld the judgment of the High Court dismissing the Section 34 applications.

IV. ANALYSIS

The court deciphers the arbitration proviso considering "party autonomy" being the "grundnorm" of international commercial arbitration and expressed that when deciphering such an understanding, it must be remembered that parties would have planned to dodge impracticable procedures. The court in this manner found that the best possible law of agreement was obviously Indian law while English law was just the law administering the agreement.

This judgment is additionally significant considering deciphering arbitration provisions in contracts signed into before sixth September 2012. The inquiry consequently was whether Part I of the Act had been impliedly avoided. The court referred to *Union of India v. Reliance Industries* where the Supreme Court held that Part I of the Act would be viewed as impliedly excluded when the seat is outside India or where an unfamiliar law (foreign law) is picked as the law administering the agreement. So saying the court excused the Section 34 application filed at the High Court to put aside the awards [12].

V. CONCLUSION

"While the Amendment Act, 2019 and the judicial pronouncements in the past few years instill confidence amongst the international community towards an arbitration-friendly India, the real test would lie in executing the vision which has been floated. India is eyeing to reduce judicial intervention in the arbitration proceedings and the Amendment Act 2019 is a step in the same direction however, it will largely depend upon the implementation of the ACI and Arbitral Institutions."

REFERENCES

[1]. Arbitration and Conciliation Act, 16 August, 1996.
[2]. The Indian Arbitration Act, 4th March 1899.
[3]. The Arbitration Act, 9th Nov. 1940.
[4]. Award (Recognition and Enforcement) Act, 30th Nov. 1961.
[5]. Bhimrajka, H. (2020). Critical Analysis of Some Key Provisions of the Arbitration and Conciliation Amendment) Act, 2019. Ipleaders.

[6]. Bharat Aluminium Company vs Kaiser Aluminium Technical Services, 6th sep. 2012.
[7]. Mehra, D., and Kapoor, V. (2019). India: Evolution of Arbitration Regime Through 2019 – A Recap. Mondaq.
[8]. Begum, F. (2020). Commercial arbitration in India and recent developments. *International Journal of Law,* **6**: 14-15.
[9]. Hindustan Construction Company Limited and anr. v Union of India, 27 Nov. 2019.
[10]. Vinod Bhaiyalal Jain and Wadhwani Parmeshwari Cold, 4th Sep. 2019.
[11]. Freehils, H. S. (2018). Recent Developments in India- Related Arbitration.
[12]. Gandhi, N. and Desai, V. (2016). What Finally Happened In Bharat Aluminium Co. ["BALCO"] v. Kaiser Technical Services. Nishith Desai Associates.