CHAPTER-FIVE

Analysis of conspicuous deficiencies in international Commercial Arbitration in India

Due to rapid growth of international trade amongst the Nations and because of emergence of concept of globalization and ever-changing world of trade and commerce, disputes between contracting parties are inevitable. In International trade and commerce, every commercial activity is generally come first by a contract fixing the responsibility of the parties to avoid legal disputes. But under the arbitration agreement, no matter how carefully a contract is drafted, one party to the contract may understand his right and obligations in a different way. In international trade involves traders belonging to different countries whose legal systems may differ in many ways to that of the other, presenting complicated and even conflicting features. The law courts of each country have jurisdiction only within the territorial limits of the concerned country.

Choice-of-law issues play an important role in international commercial arbitration. It is necessary to distinguish between four separate choice-of-law issues that can arise in connection with an international arbitration: (a) the substantive law government the merits of the parties’ underlying contract and other claims; (b) the substantive law government the parties’ arbitration agreement; (c) the law applicable to the arbitral proceedings (also called the “procedural law of the arbitration,” the “curial law,” or the “lex arbitri”); and (d) the conflict of laws rules applicable to select each of the foregoing laws. Although not common, it is possible for each of these four issues to be governed by a different national (or other) law.

Each of the foregoing choice-of-law issues can have a vital influence on international arbitral proceedings. Different national laws provide different—sometimes dramatically different—rules applicable at different stages of the arbitral process.

The most argued issue for the adaptation and enforcement of International commercial arbitrations are conflict between law of the land and International guidelines for the International commercial arbitration.

5.1. Gray areas of International commercial Arbitration

The growth of international trade is bound to give rise to international disputes which transcend national frontiers and geographical boundaries. For the resolution of such disputes the preference to international arbitration vis-à-vis litigation in national courts is natural because of arbitration being preferred to litigation in courts and the foreign element being preferred in the international arbitration to the domestic element in the national courts. This is also because there are no International Courts to deal with International Commercial Disputes. In situation of this kind, recourse to international arbitration in a convenient and neutral forum is generally seen as more acceptable than recourse to the courts as a way of solving any dispute which cannot be settled by negotiation.

The rationale and purpose of international arbitration should be to provide a convenient, neutral, fair, expeditious and efficacious forum for resolving disputes relating to international commerce.
Basic features which are uniform in the legal framework for resolution of international commercial disputes “can be broken down into three stages: (1) Jurisdiction (2) choice of law and (3) the recognition and enforcement of arbitral Award.

In International Commercial Arbitration, when the parties are of different legal systems, there automatically arises a conflict of laws, and a choice of the substantive law to be applied in a given dispute has to be made. Many a time, the substantive law to be applied in arbitration may be specified by the parties in their original agreement. But problems arise in determining the applicable law in situations when the parties fail to agree upon a choice of law for the settlement of their dispute.

The trend towards growing judicial intervention which tends to interfere with arbitral autonomy as also finality is a significant factor to be kept in view. The need is to reconcile and harmonize arbitral autonomy and finality with judicial review of the arbitral process. The National laws differ on this issue. UNCITRAL Model Law attempts to promote harmony and uniformity in this sphere. In different International commercial issues, the total exclusion of judicial intervention does not match with the current trend but the scope of judicial supervision needs to be reduced to the minimum.

The source of authority of the international arbitral tribunal is the agreement of the parties and not the mandate of the State. The choice of law applicable is also determined by the provision in the arbitration agreement. With the increased arbitral autonomy the requirement of reasons for the award is greater. Apart from transparency in the arbitral process it also acts as an inherent check on the arbitrators and discloses to the party the basis of the award and the logical process by which the conclusion was reached by the arbitrators. The presence of reasons also regulates the scope of judicial supervision.
With all these purposes and increasing International commercial disputes for effective implementation of economic reforms, it is necessary to recognize the demand of the business community in country like India and to expand the Indian foreign trade at global level as well as to attract the foreign investors, the Importance of an effective International arbitration laws for amicable solution for International commercial disputes, is much required. For this vary purposes it is observed by Supreme Court in the case of *food corporation of India v. Joginderpal Mohinderpal*,\(^2\) That, “*We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situations but must be responsive to the cannons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, nut by creating sense that justice appears to have been done.*”

In light of the recent judgment, parties to arbitration are no longer at liberty to either include or exclude the jurisdiction of the Indian courts in cases of international commercial arbitrations. whereas *Bharat Aluminum Co v. Kaiser Aluminum Technical Services Inc*\(^3\) judgment provides much-needed relief to international players and also rightly recognizes the principle of territorial criterion, which is a cornerstone of arbitration. Even than there are so many issues in international commercial disputes, which are raised or may arise in future, due to lack of clear and effective guidelines it cannot resolve through International commercial arbitration mechanisms. Some major issues are as follows:

\(^{2}\) (1989) 2 SCC 347
\(^{3}\) 2012 9 SCC 552;
5.1.1. Issues involve in international commercial arbitration

- Enforceability of Arbitration clause/ Arbitration agreement
- The place of Arbitration and hearing.
- Conflict of laws
- Country to country difference in substantive and procedural laws.
- The selection procedures and numbers of Arbitrators.
- Public policy of different countries.
- Recognition and Enforcement of Award.

There is no doubt that the judgments discussed here have been welcomed in international commercial arbitration domain. But on the same time because of ineffective arbitration laws it has made to revisit the long standing notion of getting foreign awards enforced in India as a time-consuming process with possibilities of judicial interference at various stages.

The latest decisions by the Indian courts wherein the grounds to challenge a foreign award have been restricted will result in faster resolution of disputes through arbitral processes. A hope ensues that with the present judicial scenario on the subject the confidence of the international community in commercial arbitration strengthens as being a plausible ADR mechanism in India.

There are certain gray areas or untouched or unsolved areas which still creates an ineffective impression in the mind of parties to the International Commercial Arbitration. These areas are as follows:

5.1.2. Law Applicable to the Substance of the Parties’ Dispute
The parties’ underlying dispute will ordinarily (ex aequo et bono or as amiable compositeur)\(^4\) be resolved under the rules of substantive law of a particular national legal system. In the first instance, it will usually be the arbitrators who determine the substantive law applicable to the parties’ dispute. As discusses in detail below, international arbitral awards typically give effect to the parties’ agreements concerning applicable substantive law (“choice-of-law clauses”).

The principal exception is where mandatory national laws or public policies purport to override private contractual arrangements.

Where the parties have not agreed upon the substantive law governing their dispute, the arbitral tribunal must select such a law. In so doing, the tribunal will sometimes (but not always) refer to some set of national or international conflict-of-laws rules. These varying approaches to the choice of substantive law in international arbitration are summarizes here and examined in detail below.

Although the historical practice was to apply the national conflict-of-law rules of the arbitral seat, more recent practice is diverse. Some tribunals and commentators adhere to the traditional approach, while others look to the conflicts rules of all states having a connection with the dispute; additionally, some authorities adopt either international conflict-of-laws rules or validation principles.

5.1.3. Law Applicable to the Arbitration Agreement

As discussed elsewhere, arbitration agreements are universally regarded as presumptively “separable from the underlying contract in which they appear. One consequence of this is that the parties’ arbitration agreement may be governed by a different national law than that applicable to

\(^4\) Parties sometimes agree to permit arbitrators to resolve their dispute without reference to law. That is, ex aequo et bono or as amiable compositeur, see in fra pp. 962-63, or by reference to a non-national legal system, see infra pp. 959-61 see also G. Born, International Commercial Arbitration 2227-47 (2009)
the underlying contract of conflict-of-laws rules (which may select different substantive laws for the parties’ arbitration agreement and their underlying contract).

As described below, four alternative for the law governing an arbitration agreement are of particular importance: (a) the law chosen by the parties to govern the arbitration agreement itself (b) international principles, either applied as a substantive body of contract law (as in France) or rules of non-discrimination (as in most U.S authority).

5.1.4. Procedural Law Applicable to the Arbitral Proceedings

The arbitral proceedings themselves are also subject to legal rules, governing both “Internal” procedural matters and “external” relations between the arbitration and national courts. In most instances, the law governing the arbitral proceeding is the juridical place of arbitration.5

Among other things, the law of the arbitral seat typically deals with such issues as the appointment and qualifications of arbitrators, the qualifications and professional responsibilities of parties’ legal representatives, the extent of judicial intervention in the arbitration, the form of any awards, and the standards for annulment of any award. Different national laws take significantly different approaches to these various issues. In some countries, national law imposes significant limits or requirements on the conduct of the arbitration,6 and local local courts have broad powers to supervise arbitral proceedings. Elsewhere, and in most developed jurisdictions, local law affords international arbitrators virtually unfettered freedom to conduct the arbitral process- subject only to basic requirements of procedural regularity (“due process” or “natural justice”).

In some jurisdictions, parties are free to select the law governing the arbitral proceedings (variously referred to as the procedural law of the arbitration, the curial law, the lex arbitri .This

6 The United States, England, Switzerland, France, and Singapore generally fall within this latter category.
include, in many cases, the freedom to agree to the application of a different procedural law than that of the arbitral seal. This seldom occurs in practice, and the effects of such an agreement are uncertain.

### 5.1.5 Choice of Law Rules Application in International Arbitration

Selecting each of the bodies of law identified in the foregoing three sections—the laws application to the merits of the underlying contact or dispute, to the arbitration agreement, and to the arbitral proceeding—ordinarily requires application of conflict of laws rules. In order to select the substantive law governing the parties’ dispute, for example, the arbitral tribunal must ordinarily apply a conflict-of-law is just as different states have different rules of substantive law, they also have different conflict-of-law rules. An international arbitral tribunal must therefore decide at the outset what set of conflicts rules to apply.

### 5.2. Overview of International Commercial Arbitration, through recent Judicial remarks

The current state of conflict-of-laws analysis in international arbitration has not kept pace with the parties’ aim of avoiding the peculiar Jurisdictional, choice-of-law, and enforcement difficulties that attend the litigation of international disputes in national court. None the less, as discussed in greater detail below, recent national court decisions and arbitral awards suggest the way toward development of international principles of validation and non discrimination that hold promise of realizing more fully the aspirations the international arbitral process.
The term ‘International Commercial Arbitration’ and Judiciary

This section is related with the provisions of nature of international arbitration. Section 2(I) (f) of the Act defines an ICA to mean one arising from a legal relationship which must be considered commercial, where either the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under the Indian Law, an arbitration with a seat in India ‘but involving a foreign element, will also be treated as an ICA and hence subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act. Would have no applicability to the parties but the parties would be subject to Part II of the Act.

The scope of this section was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd*\(^7\) that company incorporated in India shall have equal status of Indian citizen.

5.2.1. Arbitrability of International Commercial Arbitration

‘Arbitrability’ is one of the issues where the contractual and jurisdictional facets of international commercial arbitration meet head on. It involves the simple question of what type of issues can and cannot be submitted to arbitration.

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*\(^8\) The Supreme Court observed the concept of arbitrability in minute and held that the term ‘arbitrability’, means disputes referred for arbitration. Generally the dispute having the possibility for outside court settlement shall be consider as the feature of arbitrability. It covers the area of civil disputes which are refer for

\(^7\) 2008(14) SCC271
\(^8\) 2011 (1) SCC 532
arbitration. Non arbitrable disputes means criminal disputes, matrimonial disputes, issues relating to insolvency, guardianship, testamentary etc.

One of the most important and most contentious aspects of any amending statute is its applicability to existing proceedings or the effect it potentially has on vested rights. It is therefore common for amending statutes to clarify this position. However, the Ordinance has completely left the field open, except in the case of section 12, wherein the applicability of the said section has been categorically set out. This is despite the fact that the Law Commission had recommended the inclusion of a transitory provision to clarify the scope of operation of each of the amendments with respect to pending arbitrations. It is unlikely that the omission of this provision is intentional and is simply an oversight. However, while a clarification or correction might see the light of day in future, this is potentially the most important aspect in every litigant’s mind. Therefore, we analyse below the possible view that courts are likely to take with respect to the applicability of each provision on pending and future arbitral proceedings. However, we recognize and accept that these are our best estimates based on principles held in earlier precedents. We must admit that the possibility of courts taking an entirely different view is high – given the nature of this issue – and this analysis should only be viewed as a guide and not as an opinion of any sort.

The BALCO judgment, undoubtedly, is a restatement of international commercial arbitration law as envisaged under the Arbitration and Conciliation Act of 1996. This well-researched decision brought in conceptual clarity and straightened out certain contentious issues that existed for a long time, by declaring that Part I and Part II of the Act are mutually exclusive. However, there are still certain issues that need to be clarified because the Indian Supreme Court
took a ‘hands-off ’ approach by declining to “fill up the void” that existed in the arbitration regime.

The Supreme Court categorically declared that Part I of the Act cannot be applied in an arbitration seated abroad. Thus, no party can make an application to a court in India for interim measures of protection under Section 9 of the Act (which comes under Part I). This decision puts the parties in a more dangerous situation than the Bhatia regime, where they had the freedom of opting out of all or some of the provisions of Part I. Read in the context of interim measures; the Bhatia rationale retained the freedom of the parties to approach the Indian courts under Section 9, unless it is excluded. Hence, the parties are now left remediless, as far as the interim relief is concerned, if the choice of seat is in a foreign country. Nevertheless, this verdict may prove to be a positive step as far as India’s dream to become a hub of international arbitration, because it is now mandatory to select an Indian seat to obtain an interim remedy from the court.

Though the judgment has generally been received positively by the international arbitration community, there remains some reservations particularly with respect to the prospective overruling element of the decision. The concern arises from the fact that this decision will apply only to arbitration agreements which are concluded on or after September 6, 2012.28 The logical implication is that the courts in India still have the option of exercising their long arm jurisdiction to offshore arbitrations, with respect to arbitration agreements executed prior to this date. Given the existence of litigations pending in various Indian courts, this is likely to become a contentious issue in the near future as it envisages the creation of two parallel regimes. There will be anomalous situations when courts supervising arbitrations decide the matter either according to Bhatia doctrine or BALCO rationale depending on the date of formation of the arbitration agreement. However, the court’s decision to apply the BALCO
rationale only prospectively, can also be seen as an effort to balance the interests of the parties and avoid the miscarriage of justice by entirely washing away the possibility of an interim remedy. Nevertheless, the arbitration enthusiasts will have to wait and see how the Indian judges maintain these two parallel regimes in future.