

INTERNATIONAL COMMERCIAL ARBITRATION- SPECIAL EMPHASIS ON INTERPRETATION AND RECOGNITION, BASED ON PRINCIPLES

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INTERNATIONAL COMMERCIAL ARBITRATION

Abstract: In the new arena the traditional practice of dispute settlement within the Court having territorial jurisdiction has been shifted and the paradigm has inclined towards the more flexible procedures, namely the Alternative Dispute Resolution techniques. Moreover, it is crystallized that arbitration mechanism is a choice and naturally preferred mechanism, when it comes to arbitration, there are various means and types of it but within them all the International Commercial Arbitration is the one which has gained maximum instances of solutions.

It is also due to the exponential increase in the growth of international trade and commerce that yields such regimes which are necessary for the smooth administration and regulation of international trade. It is essential to know what is meant by international nature of arbitration, as that is central to the regime of private international law governing arbitration and to the associated ambiguities arising out of the methodologies and controversies. From application of law, recognition to interpretation and then execution of the award is a long process stemming between internal laws and international laws and maintaining the comity of nations. Rooting from the ancient practices and strengthening over time, arbitration has been always a flourishing practice in India, in some or the other way.

Keywords: Arbitration, International, Commercial, Globalization, Law

INTRODUCTION

It is not a new product of modern globalization but rather a practice which dates back before the War periods, dating as late as 1918. One of the instances during doctrinal study from various Books indicated no mechanism or Treaty concluded in India, it was mostly between Great Britain, Switzerland, USA, Denmark, Sweden, Austria, Netherlands and several others. Assuming it had not been, then the Republic, but it is noteworthy to mention this. Therefore the developmental recourse of India in the field of International Arbitration is, undoubtedly praiseworthy. Though Manu, who is known as the lawmaker in ancient India wrote in his book, Manav-Dharmashastra (Manusmriti) that Arbitration is a common method of resolving disputes regarding caste differences, it was used by the local adjudicatory bodies like the panchayats, to settle rural disputes.¹ The constitutional recognition to the village council in village for settling disputes between parties is enshrined in the grundnorm under Directive Principles of State Policy² It is consensual in nature and therefore remains far away from the constraints of the court procedures. The universality and principles of international law dilute the chances of any weaknesses in the mechanism.

INDIAN CONTEXT

India's 1940 Arbitration Act aged badly, particularly as a result of a number of Courts decision hostile to international arbitration, then it adopted a new legislation based on the UNCITRAL Model, in its Arbitration and Conciliation Ordinance, 1996³ which gradually governed the domestic and international arbitration, limited the interference of the court and allowed the arbitrators to rule on their own jurisdiction. Adopting such legislation was definitely reflective for favoring the arbitration in the sub-continent. This was prevalent in the case of MPMC Ltd. V. Sterlite Industries(India)⁴.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is arguably the most successful instruments, not only limiting to the area of private dispute resolution in presence of an agreement but also extending to the areas of private law and commercial law in general. With the composition of about 154 countries as Member-States with increment in the numbers since 2014 and 2015 of Palestine, Burundi, Bhutan including the British Virgin Islands .

This Convention brings together different legal cultures and levels of economic development together heralding to a subsequent product of globalization.

HISTORICAL BACKGROUND

The growth of international commercial arbitration has grown partly as a natural and obvious consequence of the expanding of the international trade and commerce.

¹ Nathuni Lal, *Law of Arbitration in India*, 1(1983).

² Indian Const, art.51d.

³ The Arbitration and Conciliation Ordinance, 1996 (No.8 of 1996).

⁴ MPMC Ltd. V. STERLITE Industries 10 SC 390 (1996).

Arbitration is not a modern conception, the Bolivia-Columbia: Treaty of Arbitration was signed at Bogota on November 13, 1918, ratifications exchanged on February 19, 1923. Article II states:

*“The High Contracting Parties shall submit to the decision of the arbitrators specified in Article II of this Treaty all disputes of whatever nature they may exist or may arise between them, if such disputes cannot be settled through direct diplomatic channel. The sole exception shall relate to questions the settlement of which falls within the ordinary jurisdiction of the Bolivian or Columbian courts of justice.”*⁵

Likewise, Germany and Switzerland also concluded a Treaty called Treaty of Conciliation, Arbitration, And Compulsory Adjudication, signed at Berne December 3, 1921; ratifications exchanged on April 25, 1922. Astonishing aspect of this treaty is implied in Article II of the Treaty states:

“At the request of one of the parties, disputes regarding the following subjects shall, unless otherwise provided in Article III and IV, be submitted to arbitration:

Firstly, the contents, interpretation and application of any Treaty concluded between the two parties;

Secondly, any point of international law;

Thirdly, the existence of any fact which, if established, would constitute a violation of an international engagement;

Fourthly, the extent and nature of reparation due for such violation.

*In case of disagreement as to whether the dispute falls under one of the above categories, this preliminary question shall be referred to arbitration”*⁶

The principle of Ex aequo et bono prevailed during post war treaties which means in opposition to the decisions based on law, like the Statute of the Permanent Court, provided that the tribunal may render a decision ex aequo et bono. The Treaty concluded by Germany and Switzerland in 1924, for instance states: If both parties agree, the tribunal, instead of basing its decision on principles of law, can decide “nach billig em Ermessen” i.e. ex aequo es bono(No.28, Article V) In this case the arbitrators or the judges will decide according to what they consider to be “equitable and right”. The tribunal will not base its decision on rules of law, but on what it believes to represent justice in the particular case.⁷

In the year, 1953 the International Chamber of Commerce (ICC) suggested a new change in form of a Treaty which would look after the modernization of the International Commercial Arbitration which gradually were replacements of the earlier regimes, the Geneva Protocol of 1923 and the Geneva Convention of 1927, as they certainly were distinguished with enforceability of arbitration agreements and arbitration awards. It is noteworthy to state that the problem was of a certain nature of ‘double exequatur’, which means that the award was enforceable in one State and the leave for enforcement was made in some other State. Fortunately, things have turned the other way and this issue has been addressed by the New York Convention.

10th June 1958, the Convention adopted by a diplomatic conference, prepared by the United Nations prior to the establishment of UNCITRAL initially imposed an international law obligation upon the member states, so that the mechanism could be administered and practiced with precision and fluidity, to adapt to the modern techniques and legal standards.

LITIGATION V.ARBITRATION

An obvious distinction is that the judges undertaking litigating matters of disputes are independent, also that they are paid through taxes. Judges are available without charge to the parties since they are government employees. The process is public and therefore, there is a right to appeal. However, there are various other factors which militate the choice of litigation for international commercial disputes. Volume number, Author(s), Title pinpoint (edition name of editor, year of publication).

Before bifurcating the differentiation, it is important to note that the national courts of original jurisdiction must have arbitration-friendly judges who would understand the pro-ethos of the New York Convention. The Judge must have a well-developed understanding of the gatekeeper role they play in the enforcement process⁸. The strong assumption that the award should be enforced, a critical, if not cynical eye on the application to resist enforcement of the awards are a few hallmarks of an arbitration friendly judge, as was reflected in the J.J.Agro Industries (P) Ltd. V. Texuna International Ltd.(1994) HKCU 0184.

- The outcome of litigation is always uncertain but when it is conducted in the adversary’s home country, it is even more up in the air because of the possibility that the adversary could enjoy a “home court advantage”.
- Another disadvantage includes the inflexibility of litigation proceedings plus they cannot determine the judge who shall hear the case, while Arbitration is flexible because of its consensual nature.
- International arbitration awards are enforceable in almost all the countries around the world due to the fact that government of most of the countries, have signed the Convention (New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards), hence the need to resort to national Courts is completely eliminated, therefore it is the process of choice.
- Since it is a creation of a Contract, the process can be customized to meet the needs of the parties.
- The parties can select arbitrator, a privately appointed arbitrator, this indicates that they can select an expertise in the subject matter of the dispute, or person with legal experience or both.
- The scope of interference by the national courts is limited.

⁵ Max Habicht, *Post-War Treaties For The Pacific Settlement Of International Disputes* 5(1931).

⁶ Max Habicht, *Post-War Treaties For The Settlement Of International Disputes* 21(1931).

⁷ Benjamin N. Cardozo, *The Nature of the Judicial Process* 89(1921).

⁸ Anne Secomb & Matthew Secomb, *The JJ Agro Decision: What makes a Judge ‘Arbitration-Friendly’?*, International Arbitration : Issues, Perspectives and Practices (Hong Kong International Arbitration Centre)(2019).

- The parties, under the aegis of a well-established arbitral institution, can attain assistance, in managing and maintain neutrality in the process as well as the appointed arbitrator.
- Arbitration is quicker in comparison to the process of litigation.

Principles of international law provide for the guidelines and therefore it is said to be the “most effective instance of international legislation in the history of commercial law”⁹

SCOPE UNDER CONVENTION

As per the Article 1 of the Convention which elaborates the scope of Application, a criterion was a pre-requisite of dispute settlement, rather International Arbitration and the determination of a criteria has been settled by the imposition of a “territorial criterion” which applies to the State where the award has been rendered and the other State where the enforcement is sought. It was also during the Convention that the application of an alternative criterion was discussed but the consensus was reached for the mentioned territorial criterion since it was in proximity with the degree of detachment from domestic laws, as an objective standard.

The determination as to which law arbitral award should not be considered as a domestic award, was left on the domestic legislations where the recognition and enforcement were sought, in this fashion the Convention allows for the delocalized or denationalized arbitration and the recognition and enforcement of awards rendered under such regimes. The discretion mentioned above can be seen in certain case laws, including the BG Group V. Argentina (USA). In some specific jurisdictions, such as China in *Duferco*, an award made within the jurisdiction but pursuant to international arbitration rule is considered non-domestic¹⁰, the annulment of New York Award refused. In some cases the application of ‘non-domestic’ criterion is also made applicable, in order to determine whether the award falls within the scope of the Convention.

Interestingly the definition of “Arbitral award” can nowhere be found in the Convention but it is submitted that to be within the scope of the Convention, an arbitral award should –

- Be issued in the means of dispute resolution genuinely alternative to the jurisdiction of domestic courts (also referred as ‘alternativity test’)
- Finally settle one or more of the issues submitted to the jurisdiction of an arbitral tribunal (also referred as ‘finality test’)

The national jurisprudence is consistent that in order to determine whether an ‘award’ falls within the scope of the Convention regard is to be had to the objects and purposes of the Convention, as is reflected in the decided arbitration cases of *Comitas V. SOVAG*(Germany) and *Merck9Columbia*. Courts take a look on the nature and the content of the arbitral decision rather than the nomenclature employed by the arbitral tribunal, to determine whether the decision is an award, certain instances have been visible in the cases of *Publicis*(USA), *BGH 2007*(Germany)

And *Brasoil* (France), where the national Courts have found that the decisions made by the arbitration tribunal would qualify as awards if they determine all or parts of dispute, in a final and binding manner, as held in *Opinter* (France) and the UNCITRAL Guide.

An intriguing aspect in the International Arbitration field is that of –Commercial reservation which is made available in order to facilitate the signing of the Convention by countries whose national legal systems only allowed referral to arbitration of commercial disputes, in practice, 45 States have used it in some or the other way.

The test to determine whether the matter is to be considered ‘commercial’ has to be carried out using *lex loci* of the place where enforcement of the award is to be sought. The example of *RM Investment & Trading Company* in India is suitable to mention where the local High Court had held that the rendering by a company of a consultancy services for promotion of a related commercial deal should not be regarded-pursuant to Indian Law- as a commercial transaction, the decision was ultimately reversed by the Supreme Court of India which held that:

“While construing the expression commercial, it has to be borne in mind that the aim of the Convention is to facilitate International trade by means of facilitating suitable alternative ways of settlement of international disputes and therefore, any expression adopted in the Convention should receive, consistent with its literal and grammatical sense, a liberal construction. The expression commercial should therefore be construed broadly having regard to the manifold activities which are integral part of international trade nowadays.”

RECOGNITION AND ENFORCEMENT

For the purpose of the recognition and enforcement one has to distinguish between domestic and foreign awards. The enforcement of domestic awards is regulated by the national arbitration laws, foreign awards are enforced under the New York Convention.

Enforcement is a judicial process which ultimately gives effect to the mandate of award, ‘enforcement may function as a sword’¹¹. Pursuant to Article I of the Convention, it applies to the awards which are covered by the Convention. It is not defined in the Convention but in certain cases it is developed, one Court clearly held in *Drummond V. Ferrovias* (Colombia) that the ‘recognition’ gives legal force and effect to an award while ‘enforcement’ is the forced execution of an award which has been previously recognized. Courts from different jurisdiction held that recognition can be sought separately from enforcement and this is also the view expressed in the decisions of *Brace Transport* (India), *Yusuf Alghanium* (USA) and *Evora Court of Appeal* (Portugal).

Article II of the Convention states about the ‘arbitration agreements’, it is significant to mention that this was the last-minute addition to the Convention’s text. Therefore, some of the uncertainties connected to this provision are blamed to the comparatively less time devoted to the negotiation of Article II.

⁹Mustill, *Arbitration: History and Background*, 692 J Int’l Arb 43 49(1989).

¹⁰ Loukas A. Mistelis, *Concise International Arbitration*, 4.

¹¹ Redfern and Hunter, *International Commercial Arbitration*, para 10-12 (2015).

Frequently the public international obligations are supplemented by the autonomous provisions of the national arbitration law which is provided for the enforcement of foreign awards.

Some of these instruments are as following:

- i. The New York Convention, 1958- Is one of the most widely accepted regimes and is actually an improvement of the 1927 Geneva Convention. The New York Convention has received praise as the “the pillar on which the edifice of international rules rests”¹²
- ii. Other Multilateral conventions like
 - The 1961 European Convention
 - The 1965 Washington Convention
 - The 1972 Moscow Convention
 - The Inter-American Convention on International Commercial Arbitration, 1975, also referred as the Panama Convention.
 - The 1987 Amman Arab Convention on Commercial Arbitration
- iii. Bilateral Conventions, the first recorded being The Grand Duchy of Baden and the Canton of Aargau which was concluded on 28th September 1867.
- iv. Model Laws and National Laws

ARBITRATION IN INDIA

Regarding commercial matters, the High Court of India in the case of RM Investment¹³ held that the consulting services by the company promoting a commercial deal should not be regarded as a commercial transaction, which was rightly reversed by the Supreme Court of India which suggested that the expression ‘commercial’ should be construed widely having regards to the manifold activities which are integral to contemporary international trade.

Supreme Court of India in the case of Venture Global Engineering case of 2008 held that the provisions of Part I of the Arbitration Act, 1996 would apply to all the arbitrations including international commercial arbitration and all the related proceedings. Therefore, if an international arbitration is held in India, part I of the 1996 Act will be applied compulsorily, however parties are free to deviate to the extent permitted by Part I, in international commercial arbitrations held outside India, the provisions of Part I would still be applicable until and unless the parties by agreement expressly or impliedly exclude all or any of its provisions.¹⁴

The decision of Venture Global Engineering was affirmed by the Supreme Court in the case of Bhatia International V. Bulk Trading S.A. & others¹⁵, whereby, under the provisions of Part I of the Act, interim relief was to be made available to parties under general provisions with respect to the enforcement of a foreign arbitration award in India.

According to the hierarchy of the Courts the claims amounting to Rs. 1 – Rs. 2,000,000 shall lie before the district courts and the claims over Rs. 2, 000, 000 lie before the High courts, it is important to pay attention that the amount as specified under the pecuniary jurisdiction is different for different High Courts, given that the decisions of the High Courts can be challenged in the Supreme Court, whether it stands with confirmation or setting aside the arbitration award. In the matters of domestic arbitration, the Chief Justice of High Court has the authority conferred from Section 11 of the Act, 1996, to appoint an arbitrator whereas the Chief Justice of Supreme Court holds the authority to appoint arbitrators in international commercial arbitration. In case the appointment procedure fails, the judges of the High Court or the Supreme Court can be requested to take necessary measures as mentioned in Section 11 of the Act 1996, this dictum has been confirmed in the leading case of Patel Engineering Ltd.¹⁶

THE APPLICABILITY OF THE INDIAN ARBITRATION ACT TO INTERNATIONAL ARBITRATION

The judicial pronouncement of the Videocon case¹⁷ sufficiently propagates clarity in the field of international arbitration and that of the domestic arbitration. The agreement was carried out by Indian parties, the proper law of the agreement was Indian law, despite this the courts in India had no jurisdiction to pass an interim order under section 9 of the act 1996. The matter was concerned to Product Sharing Contract (PSC), parties being – Government of India along with a consortium of four companies for the purpose of exploring, mining and producing hydrocarbons in India. The governing law Indian law, the arbitration was to be held in Kuala Lumpur but the arbitral tribunal shifted to Amsterdam and then to London, subsequently the parties agreed for this shift and eventually on March 2005; a partial award was given by the tribunal. The Government of India challenged the award in the Court of Malaysia and the consortium contended that only the courts of England had the jurisdiction to entertain any challenge. Eventually, the Government of India approached to the Delhi High Court seeking a declaration under Section 9 of the 1996 Act to the effect that Kuala Lumpur is the contractual and juridical seat of arbitration. The foremost question put before the Supreme Court was that – whether the Delhi High Court had the jurisdiction for the same?

The apex Court replied the question in negative and held that the law of England is the governing law of the agreement, also there is a, implied exclusion of Part I of the Indian Arbitration Act, 1996.

Several arbitral institutions have been established in India over the years, some of them are:

- Indian Council of Arbitration
- The International Centre for ADR

¹²Wetter, *The Present Status of the International Court of Arbitration in the ICC: An appraisal*, 1Am Rev Int'l Arb 91(1990).

¹³RM Investment & Trading Co. Pvt. Ltd. V. Boeing Company 1 Supreme Court Journal 657 (1994).

¹⁴ Venture Global Engineering V. Satyam Computer Services Limited MANU/SC/0333(2008).

¹⁵ Bhatia International V. Bulk Trading S.A. & Another, 4SCC 105 (2002).

¹⁶ SSBP & Co. V. Patel Engineering 8 SCC 618 (2005).

¹⁷ Videocon Industries Limited V. Union of India, civil Appeal No.4269 of 2011(Arising out of the SLP No. 16371 of 2008), decided on 11-05-2011

- The Council for National and International Commercial Arbitration
- The Indian International and Domestic Arbitration Centre
- The Indian Institute of Arbitration and Mediation

THE ARBITRATION AGREEMENT

The term arbitration agreement has been defined under Section 7 of the Arbitration Act 1996, as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them with respect to a defined legal relationship, whether contractual or not.

- There must be an arbitration clause in the agreement/contract
- It should be in writing
 - It can also be contained in a document signed by the parties or in an exchange of statements of claim and defenses in which the existence of an agreement is alleged by one party and not denied by the other party.
 - It is also considered in writing if it is contained in an exchange of any means of telecommunication including fax, exchange of letters and email where it provides a record of the agreement¹⁸.
- It should be between the parties to the dispute
- It should relate to or be applicable to the dispute.

Under Section 11 of the 1996 Act, parties may apply to the Chief Justice for him to determine whether there is an arbitration clause or not¹⁹. The dispute about the existence of an arbitration agreement is also open for the arbitrators, to decide²⁰.

In the New York Convention, there is no reference as to which arbitrations are covered under the ambit of Article II (3), the only perspective behind it is to formulate uniform rules regarding it²¹.

It is immaterial to have an express mention of the term 'arbitration', 'arbitrators' or 'arbitrator', the intention of the parties to refer to the dispute to arbitration can be ascertained from the word/terms of the agreement²².

JUDICIAL APPLICATION OF ORDORE PUBLIC INTERNATIONAL (PUBLIC POLICY)

Section 34 of the 1996 Act provides for manner and grounds for challenge of an arbitral award in harmony with the UNCITRAL Model Rules, which provide grounds for setting aside an arbitral award, one of which is public policy.

The Public policy exception is set out in Article V (2) (b) as an acknowledgement "of the right of the State and its courts to exercise ultimate control over the arbitral process" as mentioned beautifully in the ILA Committee on International Commercial Arbitration, the London Conference Report of 2000 which was published in 2002 after the presentation at New Delhi Conference.

The General Electric Company (US) V. RenuSagar Power Company (India) is a landmark authority with respect to the distinction between domestic and international public policy. A party sought enforcement of an ICC award, the Supreme Court observed that the concept of public policy was incapable of a precise definition. It did confirm that-

'Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what is injurious or harmful to the public good or public interest has varied from time to time.'²³

The national courts while interpreting the Arbitration Act, 1996, found the ground of public policy as a means to resist or refuse the enforcement of the arbitral awards. An explicit lack of attention to inter-discursive and inter-textual factors in the construction and interpretation of the arbitration law encouraged the Courts to adopt more innovative interpretation²⁴.

The enforcement process violating the public policy, in fact the only violation of the State's public policy with respect to the international relations policy is a valid defense to resist enforcement, where the enforcement would violate the forum state's most basic notions of morality and justice. It is often said that public policy "is never argued at all but where other points fail" as was held in Richardson V. Mellish²⁵ case.

The public policy doctrine in the context of annulment actions is derived from the, and related to, applications of the public policy doctrine in other private international law context, including choice of law and recognition of foreign judgments.²⁶

ICC

The Court is not a "court", as that word is normally understood, but the administrative body charged with responsibility for overseeing the ICC arbitration process²⁷.

¹⁸ M/S Tvc Sky Shop Limited V. Sahara Airlines Ltd. (1) ArbiLR 498 (2010).

¹⁹ National Insurance Company Ltd. V. Boghara Polyfab Pvt. Ltd. 2008 X AD(S.C.) 526,(2009) 1SCC 137.

²⁰ M/s Indus Airways Pvt. Ltd. V. Jet Lite (India) Ltd., Arbitration Petition No. 297/2008.

²¹ Ashwini Kumar Bansal & Abhishek Kumar Bansal, *Arbitration in India*, chapter 5, (International Commercial Arbitration in Asia, 173, (3rd ed. editor-Shahla F. Ali and Tom Ginsburg)

²² M. Dayanand Reddy V. A.P. Industrial Infrastructure Corporation Limited & ors. SCR (2) 629 (1993).

²³ General Electric Company V. RenuSagar Power Company 92 BOMLR 70(1990).

²⁴ Bhatia, Vijay .K, Critical Genre Analysis: *Investigating Interdiscursive Performance in Professional Communication*, London, Routledge (2017).

²⁵ Richardson V. Mellish (1824) 2 Bing 229,252,peer Borrough J.

²⁶ Gary b. Born, *International Commercial Arbitration*, 3313(Vol III, 3rd ed.)

²⁷ Yves Derains and Eric A. Schwartz, *A guide to the ICC Rules of Arbitration* 11 (2nd ed.2005).

In the recent shift of the paradigm, the increasing harmonization of the international law and practice inclusive of the provisions of International arbitration rules, the ICC Rules have maintained their distinctive feature, amongst which the most unique is the scrutiny applied to the arbitral awards by the ICC Court, as per the Article 27 of the ICC Rules.

The other outstanding feature is called as the “Term of References”, which assists the Courts as well as other participants in the process, in ensuring that the award ultimately serves to all the issues involved in the dispute, prepared by the Arbitral Tribunal at the outset of the arbitration. Such a document is not required in any major international arbitration rules, including ad hoc or institutional arbitration. The incidents following the ONGC V. Saw Pipes is a critical example of the above mentioned scenario, where the Indian arbitral award was challenged on the basis of public policy, it is important to emphasize on the fact that precedents suggested it to be interpreted in a narrow sense but the Court interpreted it in the broadest terms possible.

Eventually, to mitigate the blunder set out by Saw Pipes case, the Supreme Court was successful in maintaining the integrity of arbitration as an alternative to litigation. The very first is the case of Bharat Aluminium Co. V. Kaiser Aluminium Technical Service which rectified anomaly, effectively reversing the damage done in Saw Pipes by clarifying that Part I of the Act only applies to Indian-seated arbitrations. This decision limits the power of the Court to set aside a foreign award. The second development was that of the 246th Law Commission of India Report, which introduced the amendments in the Arbitration and Conciliation Act, 1996; seeking a balance between judicial intervention and judicial restraints, as recommended to be incorporated with Section 34(2A) to deal with purely domestic awards, which may also be set aside if the Courts find that the award was vitiated by patent illegality, prima facie on the award.

POWERS OF THE ARBITRAL TRIBUNAL ON DISCOVERY AND PRODUCTION OF DOCUMENTS

The Act of 1996 is silent on specific provisions which empower the Tribunal to issue directions for discovery and production of documents, questions have been raised that the power is vested only with the Courts under Section 27 of the Act of 1996, in order to maintain the highest standards of equity, fairness and justice with facilitating the effectiveness of the arbitration proceedings have held that the tribunals do have the power to issue directions for production of documents to the parties who are involved in the proceedings. In the model of separation of powers, the role of the judiciary is to fill the lacunae under a specific legislation and thus the judiciary had an opportunity in the case of Hindustan Petroleum Corporation²⁸, where it had to examine the role of the arbitral tribunal while adjudicating an application moved under Section 27 of the Act of 1996, held that –“Section 27 envisages an application to be made to the court for seeking assistance to take evidence. Such an application can be made either by the arbitral tribunal or by a party with the approval of the arbitral tribunal. Thus in the case of an application by the party, the legislature itself, envisaged an approval of the arbitral tribunal. This in turn puts an obligation on the arbitral tribunal to apply its mind and to not mechanically direct an application to be filed before the court.

Later the Delhi High Court in one of the verdicts of Thyssen Krupp Werkstoffee GMBH V. Steel Authority of India²⁹ stated –“There is nothing in the Act which suggests any limitation or any curtailment of this power, though there is no specific provision in the Act of 1996 which specifically confers power on the Arbitrator to direct discovery, the Arbitrator has absolute powers and flexibility by the virtue of Section 19 of the Act of 1996, to conduct the proceedings in the manner it considers appropriate without being bound by the rules of Indian Evidence Act, 1872 and the Code of Civil Procedure, 1908. Section 27 in my view, only deals with third party discovery, and not with regard to discovery of parties before the arbitral tribunal involved in the proceedings. This inherent power of discovery, in my view, found in Section 19(3) of Act of 1996”.

The apex court in the Delta Distilleries³⁰ case held: ‘It cannot be ignored that the tribunal is required to make an award on the merits of the claim placed before it. For that purpose, if any evidence becomes necessary the tribunal ought to have the power to get the evidence’.

Consequently it is evident that the discovery, inspection and production of document by the party, at the request of the opposite party, a matter of procedure. It is for this reason that the same has been dealt with in Order XI Rule 12 to 15 and 21, and Order 16 of the CPC. Thus the arbitral tribunal is not powerless to direct the production of the documents, considered to be relevant evidence by it by one or the other party of the proceedings. It is statutorily conferred on the tribunal by Section 19 of the Act³¹.

AWARDS

Despite of great significance, there is no precise definition of an Award or an express definition as to what constitutes an ‘arbitral award’ or what distinguishes an award from ‘arbitral decision’.

Article I of the Convention³² provides that the Convention applies to “the recognition and enforcement of arbitral awards”. Further Article II of the Convention also deals with ‘arbitral award’. Though there is an essential differentiation between Arbitral awards and ‘Procedural order’, the tribunal deals with administrative or logistical matters, scheduling of hearing or submissions, disclosure or discovery, constitute to ‘procedural order’.

Consistent with the framework of the international law and its framework most of the parties oblige to the awards awarded in the proceedings, given that they are the ones who have carried out the whole procedure of the arbitration on consensual terms. The legal effects of the arbitral awards and the post-award proceedings are open to challenge or enforce such award which is, subjective to the complex framework of international and national laws. The Conventions and framework of the international commercial

²⁸ Hindustan Petroleum Corporation V. Ashok Garg (1) ARBLR 368(2007).

²⁹ Thyssen Krupp Werkstoffee GMBH V. Steel Authority of India(2010).

³⁰ Delta Distilleries Limited V. United Spirits Limited (2014).

³¹ Ashok Kumar Singh, *Production and discovery of documents in arbitration in India-a comparative analysis, International Arbitration Discourse and Practices in Asia*, Routledge, 183.

³² United Nations Convention the Recognition and Enforcement of Foreign Arbitral Awards (New York 10 June 1958).

arbitration addresses various substantive and procedural aspects of annulment, recognition, enforcement and preclusive effects of the arbitral awards. Since the regime reflected in the New York Convention is motivated to promote a 'pro-enforcement' legal regime.

The Award must be reasoned as per Article 31(2) UNCITRAL Model Law and Article 25(2) of the ICC Rules. It must include the following credentials-

1. Summary of the procedural history of the process
2. Summary of the issues in disputes between the parties
3. Summary of positions adopted by the each party
4. Summary of relief sought by the parties
5. Tribunals reasoned conclusion on each issue
6. Tribunals decision on the relief
7. Tribunals decision on whether to grant interest on any of the damages claimed by the parties
8. Tribunals decision on how the costs of arbitration, including the party's legal fees should be allocated
9. Any additional opinion or dissenting opinion from the dissenting arbitrator

Since the Tribunal enjoys discretion in granting reliefs, the relief granted can be of the following types-

- a. Declaratory
- b. Damages
- c. Injunctive relief
- d. Rectification
- e. Adaptation of contracts and fillings lacunae
- f. Interest and costs

Parties have an obligation to comply with the international arbitral award-where many national arbitration statutes provide that awards are binding on the parties and also possess res judicata effect from the moment that they were made. The ICC Rules are representative, providing that "every Award shall be binding on the parties"³³, that, "by submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay".

Post Award Proceedings-Once the award is made, the tribunal becomes 'functus officio' and its mandate comes to an end, if the proceedings are necessary, these are the matters for the parties and if necessary, the national courts having jurisdiction in proximity with the application of the international arbitration conventions.

Making of an Award- Refers to the tribunal which is rendering its decision, in a manner satisfying the formal requirements of the arbitration legislation in the arbitral seat-where the pre-requisite is the completion of a written, signed and dated award and then the delivery of the award to the parties.

Correction, Supplementation and further Interpretation

Recognition (Confirmation) of the Arbitral Award in the arbitral seat

Recognition of the Award outside the Arbitral Seat

CONCLUSION

The ambiguity is stating that the arbitral tribunal is powerless in absence of a specific provision must be cleared out and made crystal clear.

The Centers established as mentioned above must be propagated and people should be made aware of them in order to have more exercise within India, rather than migrating to other countries like Hong Kong, Singapore or Paris.

The practice and academic significance of International Commercial Arbitration must be duly reinforced so that the culture of Arbitration grows and develops in India.

The interpretation of the Arbitration Act must be in consonance with the International Conventions, on the basis of harmonious construction doctrine; as to give effect to the objects of International Arbitration.

³³ ICC Rules 2012, Article 34(6).