

AN ANALYTICAL STUDY OF ARBITRAL AWARDS IN INDIA

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Abstract

With around 47 million pending cases at various stages of Indian judiciary and one of the lowest levels of judges per million of population in the world, India's arbitration regime presents a ray of hope for millions of Indians who face the prospect of justice being denied to them due to inordinate delays caused by a clogged judicial pipeline. The enactment of the Arbitration and Conciliation Act, 1996 was presented as a viable alternative to resolve commercial disputes in a timely manner. This paper uses a case study to discuss how arbitration in India has not fulfilled the timeliness promise and in turn, has detrimentally affected trade and investments, making the system an inefficient alternative to the contentious and long drawn litigations.

KEYWORDS: Arbitration, Infrastructure, Arbitration and Conciliation Act 1996

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INTRODUCTION

ARBITRAL AWARD

The decision of the Arbitral Tribunal is termed as 'Arbitral Award'. Arbitrator authorized in this behalf, can decide the dispute between parties to the arbitration *ex aequo et bono* (in justice and in good faith)¹. Section 28 of the Arbitration and Conciliation Act, 1996 grants autonomy to the parties to choose the substantive law to be applied to "Arbitration other than an international commercial arbitration" as well as to an "international commercial arbitration", where the place of arbitration is in India. The Supreme Court of India in *Sumitomo Heavy Industries Vs Oil and Natural Gas Co Ltd*² held that, where the parties had made an express choice of Indian law as proper law of the contract, then it would follow that the proper law of the arbitration agreement is also Indian Law. It was held as the arbitration agreement is part of the substance of the underlying contract and terms of arbitration clause are held to be clear in that respect³. The provisions have made a vital improvement in making international commercial arbitration

considerably more user-friendly and flexible⁴. In the arbitral proceedings with more than one arbitrator, the decision of Arbitral Tribunal will be by majority.

In the *Shin-Etsu Chemical Co Ltd. Vs. Akash Optifibre Ltd. and anr.*⁵ Case it was held that, in an application for reference rejected on the ground of invalidity of agreement under Section 45 of the Act, the judicial authority is required to pass reasoned order after hearing parties. Impugned order is liable to appeal under Section 50(1) (a) of the Act.

KINDS OF AWARDS

The Arbitration and Conciliation Act, 1996 contemplates four types of Awards, namely the definition of Award under Section 2(c) includes an **interim Award**. Section 31(6) authorizes an arbitral tribunal to make an interim Award on any matter with respect to which it may make final arbitral Award at any time during the arbitral proceeding. Interim Award deals only with some of the matters referred, so that the remaining matters will be dealt with later. As in case of **additional Award**, Section 33 (4) provides that, in the absence of an agreement by the

¹ Section 28(2), The Arbitration and Conciliation Act, 1996.

² 1998 (1) 1 SCC 305.

³ *Channel Tunnel Group Ltd Vs Balfour Beatty Construction*

Ltd. 1993 (1) ALL ER 664.

⁴ Section 29, The Arbitration and Conciliation Act, 1996.

⁵ (2005) 7 SCC 234

parties to the contrary, a party with notice to the opposing party may, within 30 days from the receipt of the Award, request the arbitral tribunal to make an additional Award as to claims presented in the arbitral proceedings but omitted from arbitral Award. If the tribunal considers such request to be justified, it shall make the additional Award within 60 days from the receipt of the request⁶. If the parties settle their dispute during arbitration proceeding, the arbitral tribunal shall terminate the proceedings and if request by the parties and not object to by the arbitral tribunal, it shall record the settlement in the form of an arbitral Award on agreed terms⁷. Rule is that an Award must dispose of all the issues in dispute, unless parties have agreed otherwise. There is the residuary power in the arbitral tribunal to terminate proceeding where it finds that a continuation thereof has for any other reason, become unnecessary or impossible. If the situation develops where the arbitration proceedings become in-fructus, or with the continuation of the proceedings becomes impossible, the tribunal shall order termination of the arbitral proceeding.

⁶ 2005 (1) RAJ 506 (SC)

⁷ Section 30(2), the Arbitration and Conciliation Act, 1996.

⁸ Section 32(2) c, The Arbitration and Conciliation Act, 1996; see also Maharashtra State Electricity Board Vs Datar Switchgears Ltd, 2003 (Supp) Arb LR 39, 63 (Bom).

Likewise, if the subject matter of the dispute is not arbitrable, or the contract has been frustrated or become impossible of performance and so on the tribunal shall terminate the arbitral proceedings⁸. In the Bhatia International Vs Bulk Trading S.A case,⁹ it was held that **foreign Awards** are those where arbitration takes place in a convention country; Awards in arbitration proceedings, which take place in a non-convention country, are considered neither as foreign Awards nor as **domestic Awards** under the Act. The Court also stressed that 'Domestic Awards' include all Awards made under Part I of the Act. Awards made in an international commercial arbitration held in a non-convention country will also be considered to be a 'domestic Award'.

FORM AND CONTENTS OF ARBITRAL AWARD

The Award must be in writing and signed by the members of Arbitral Tribunal¹⁰. Therefore, an Award is complete and final only when the arbitrators sign it. In Satwant Singh Sodhi Vs State of Punjab¹¹. It was held that once an arbitrator has signed an

⁹ 2002 AIR SC 1432

¹⁰ Supra Note 8, Section 31(1)

¹¹ 1999 (3) SCC 487

Award, he becomes *functus officio*. It is not necessary that it should also be delivered, pronounced, or filed in the Court. It must state the reasons for the Award unless the parties have agreed that no reason for the Award is to be given¹². Reasons are the link between the material on which certain conclusions are based and the actual conclusion. The reasoned Award is emphasized under the 1996 Act in order to enable the parties and the reviewing Courts to understand the facts and the general reasoning which led the arbitrator to conclude that this was the decisive point, and to understand the facts and so consider the position with respect to reviewing the Award on any other issue which arose before the arbitrators¹³.

In *AK Kraipak Vs Union of India*¹⁴ the Supreme Court of India held that there is increasing emphasis on the requirement of reasons in all judicial, quasi-judicial and arbitral decisions.

The Award should be dated and place where it is made should be mentioned. Copy of Award should be given to each party¹⁵. In the *Union of India Vs Tecco Trichy Engineers and Contractors*¹⁶, it was held

that, according to Section 31(5), 'after the arbitral Award is made, a signed copy shall be delivered to each party'. Section 2(1) (h) defines a "party" as meaning 'a party to an arbitration agreement'. In a large organization like the Railways, "party" as referred to in Section 2(1) (h) read with Section 34(3) has to be construed to be a person directly connected and involved in the proceedings and who is in control of the proceedings before the arbitrator. The delivery of an arbitral Award, to be effective, has to be 'received' by the party and this delivery by the tribunal and receipt by the party sets in motion several periods of limitation, therefore it is an important stage in the arbitral proceedings.

Mcdeemott International Inc vs Burn Standard Co Ltd¹⁷

31(6) contemplate an interim Award. It may be final Award on the matters governed thereby, but made at an interim stage. The arbitral tribunal is empowered u/s 31 (6) to make an interim Awards at any time during arbitral proceedings. However, the power is expected to be exercised by the arbitral tribunal normally after the parties have

¹² Section 31(3), the Arbitration and Conciliation Act, 1996.

¹³ Russell on Arbitration, 22nd Ed, 2003, p 238, para 6-028.

¹⁴ 1969 (2) SCC 262

¹⁵ Section 31(5), the Arbitration and Conciliation Act, 1996.

¹⁶ 2005(1) RAJ 506 (SC)

¹⁷ 2006 (11) SCC 181.

crossed the stage of filing the claim statement and defence statement.¹⁸

An arbitral Award given under Arbitration Act requires registration u/s 17 (1) of the registration act, if Award affects partition of immovable property exceeding value of Rs.100. an unregistered Award creating rights in immovable property is inadmissible in evidence and cannot be enforced.¹⁹ The 2010 Amendment bill provides that the interest at the rate of 18% per annum, in the present economic scenario appears to be too harsh, 2010 amendment bill proposed to substitute clause (b) of Sub-Section (7) of Section 31 as follows:

“(b) A sum directed to be paid by arbitral Award shall carry interest at the rate of one percent higher than, the current rate of interest from the date of Award to the date of payment.

SETTING ASIDE OF AN ARBITRAL AWARD

The arbitration Award made by the arbitral tribunal is open to challenge on the grounds mentioned in section 34 of the 1996 Act. These grounds include incapacity of a party,

invalidity of the arbitration agreement, improper notice of appointment of the arbitrators, dispute not contemplated by or not falling within the terms of the arbitration, composition of the arbitral tribunal not in accordance with the agreement of the parties, dispute incapable of settlement by arbitration under the law for the time being in force and the Award being in conflict with the public policy of India. It was held by the Supreme Court in P. Anand Gajapathi Raju Vs P.V.G. Raju²⁰ case that, the Court to which the party shall have recourse to challenge the Award would be the Court as defined in Section 2 (e) and not the Court to which an application under Section 8 of the Arbitration and Conciliation Act, 1996.

The Supreme Court of India in, Union of India Vs Popular Construction Co.²¹ Court held that, by virtue of Section 34(1), recourse to the Court against an arbitral Award cannot be made beyond the prescribed period. The time limit prescribed under Section 34 to challenge an Award is absolute and unextendible by Court under Section 5 of Limitation Act.

¹⁸ D. Rautray, Master Guide to Arbitration In India, CCH India Wolters Kluwer (India) PVT LTD, pg 359, para 1.

¹⁹ Markanda.p.c.. Law Relating To Arbitration And Conciliation, Commentary On Arbitration And Conciliation

Act 1996, pg 602., Lexis Nexis Butterworths Wadhwa Nagpur.

²⁰ AIR 2000 S.C 1886

²¹ 2001 (8) SCC 470.

In *ONGC Vs Saw Pipes Ltd*²² case, the Supreme Court interpreted the meaning of 'public policy' in a wide sense in case of a domestic arbitration. It held that an arbitral Award could be challenged on the ground that it is contrary to fundamental policy of Indian law, the interest of India; or justice or morality, patently illegal; or so unfair and unreasonable that it shocks the conscience of the Court. Illegality of a trivial nature, however, can be ignored. Under the 1996 Act, Awards that have become final and binding are enforceable in the domestic Courts system in India and are deemed to be decrees of the Court.

FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

By filing an application to set aside the Award, even in cases where there is no substance in the application, there is an automatic stay of the Award till such time the application is rejected. Thus, an application can be filed to delay the proceedings. Hence, party challenging Award must be compelled to deposit Award amount or furnish Bank guarantee, which may be seized in case of misuse of section

36 for delaying enforcement of Award.

Law commission of India in its report²³ suggested complete replacement of section 36 with following provision, Stay of operation of Award or its enforcement

“36. (1) Where the time for making an application to set aside the arbitral Award under sub-section (1) of section 34 has expired then, subject to the provisions of sub-sections (2) to (4), the Award shall be enforced under the Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were a decree of the court.

(2) Where an application is filed in the Court under sub section (1) of section 34 to set aside an arbitral Award, the filing of such an application shall not by itself operate as a stay of the Award unless, upon a further application made for that purpose, the Court grants stay of the operation of the Award in accordance with the provisions of sub section(3).

(3) On the filing of the application referred to in sub section (2) for stay of the operation of the Award, the Court may, without prejudice to any action it may take under sub section (1) of section 37A and

²² 2003 (5) SCC 705.

²³ Law Commission of India, 176th Report On the Arbitration And Conciliation (Amendment) Bill, 2001, Para2.29.7, pg.

subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral Award for reasons in brief to be recorded in writing,

Provided that, the Court, while considering the grant of stay, shall keep the grounds for setting aside the Award in mind.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant ad interim measures not only against the parties to the Award or in respect of the property which is the subject matter of the Award but also to issue ad interim measures against third parties or in respect of property which is not the subject matter of the Award, in so far as it is necessary to protect the interests of the party in whose favour the Award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified or vacated, as the case may be, by the court subject to such conditions, if any, as it may deem fit, after hearing the affected persons.”

The finality of arbitral Awards in an arbitral proceeding is subject to Part VIII of The Arbitration and Conciliation Act 1996. An

Award becomes final it prevents the successful party from subsequently raising a claim on which he has succeeded. Likewise, it prevents the losing party from raising the issue on which it has lost „just because he believes that on the second occasion, he may have a more sympathetic tribunal, more convincing witnesses, or a better advocate. There must be an end to disputes²⁴. Thus, Section 35 provides that an arbitral Award shall be final and binding on the parties and persons, claiming under them respectively. Prior to 1940 an Award could be executed in the same manner, to the same extent and subject to the same limitation as a decree of the Court²⁵. Under the Arbitration Act 1940, under section 17, an Award could be enforced by filing it in the Court and obtaining a judgment and decree on it. The Arbitration and Conciliation Act, 1996 under Section 36, provides that, where the time for making an application to set aside the arbitral Award under section 34 has expired, or such application having been made, it has been refused, the Award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

²⁴ Mustin and Boyd, Commercial Arbitration, second edn, 1989, p 413

²⁵ Kanhaya Lal Gauba Vs People's Bank of Northern India Ltd AIR 1935 Lah 49

This section provides for the summary procedure for excluding Court intervention at the enforcement stage, because most of the object of arbitration would be defeated if a claimant who succeeds in an arbitration has again stand in the queue of litigations seeking to enforce their agreements. The fact that an arbitral Award is enforceable as if it were a decree does not render the arbitral proceeding as proceeding in a suit. Nor does it render an arbitration a suit. All that this section provides is that for the purpose of enforcement, an arbitral Award can be enforced as if it were a decree²⁶.

The Supreme Court of India in *Fuerst Day Lawson Ltd Vs Jindal Exports Ltd*²⁷ it was held that, as the object of the Arbitration and Conciliation Act, 1996 is to provide speedy and alternative solution to the dispute. Thereby, for the enforcement of a foreign Award there is no need to take separate proceedings, one for deciding the enforceability of the Award to make it a rule of the Court or decree and other to take up execution thereafter. In one proceeding, the Court enforcing a foreign Award can deal with the entire matter.

²⁶ Saurabh Kalani Vs Tata Finance Ltd 2003(Supp)Arb LR 217,238 (Bom).

²⁷ AIR 2001 SC 2293.

²⁸ Law Commission of India, 176th Report on the Arbitration

RECOURSE AGAINST ARBITRAL AWARD

Sec. 34. Application for setting aside arbitral Award.

Applications under section 34(1) to set aside Awards and appeals under sec. 37(1) are to be disposed of within six months and appeals under sec. 37(2) within three months from the date of commencement of the amending Act. A similar procedure is envisaged for future applications and appeals.

Though, under section 28 the substantive law has to be followed, no provision is made in section 34 if there is an error of law apparent on the face of the Award. The courts in India, including the High Courts and the Supreme Court, are to decide disputes in accordance with law. There is, therefore, no justification in placing the arbitral tribunal on a higher pedestal and allowing it to decide according to its own whims and fancies.²⁸

Renusagar Power Co. Ltd. Vs. General Electric /Co.²⁹

While treating “error of law” as being

and Conciliation (Amendment) Bill, 2001, Para2.26.2, pg. 141.

²⁹ AIR 1994 S.C. 860

distinct from “public policy”, the New York Convention, 1958 referred only to “public policy” as a ground of challenge and not error of law. The only exception was that, under the head of “public policy”, the violation of certain fundamental policies was brought in. Supreme Court therefore, refused to include “error of law” as part of “public policy”.

Hence, additional ground of error of law may be included in section 34.

The Courts have already indicated that delay in passing an award can lead to such an award getting set aside.³⁰

Absence of reasons

Section 31 (3) requires reasons to be given in the Award (except in cases where parties otherwise agree that reasons need not be given or the Award is one by settlement), no adequate provision is made in Section 34 in this behalf, if reasons are not given in the Award.³¹

The ground of misconduct was incorporated under the old Act of 1940 in sec.30 (a) – “the arbitrator must have misconducted himself or the proceedings”. The ground is absent in 1996 Act.

The period of three months after passing of Award u/s 34 (3), leads to undue delay to arbitral proceedings. The period may be reduced to 45 days, subject to further extension by court.

In **Madan Mohan Agarwal Vs. Suresh Agarwal**,³² a Bench of the Madhya Pradesh High Court held that if the arbitrator, on such request under sec.34 (4) passed a fresh Award, it must be taken that both Awards have merged. Otherwise, the Award cannot be executed. The court felt once an order was passed under sec.34 (4) by the court, the first Award must be deemed to have suspended.

Section 34(4) states that, the Court may, when it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by its order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral Award.

Writ is not maintainable for getting an ex-parte Award set aside. The proper remedy in such case would be to file an application

³⁰ see for instance the decisions of the Delhi High Court in *Oil India Ltd v Essar Oil Ltd* OMP No 416/2004 dt17.8.2012 at paras 30-40

³¹ Law Commission of India, 176th Report on the

Arbitration and Conciliation (Amendment) Bill, 2001, Para 2.26.4, pg. 144.

³³AIR 1998 (MP) 212

u/s 34 for setting aside Award.³³ Arbitration act does not provide for registration of Award passed by the tribunal. However, such an Award, if related to the immovable property cannot be enforced and would not be admissible in evidence because of section 49 of Registration Act.³⁴

PUBLIC POLICY

Section 34 (2) (b) (ii) provides that arbitral Award can be set aside on the ground that it is “in conflict with public policy of India.” However, what amounts to public policy is not from the scheme of the Act.

Oil & Natural Gas Corporation Ltd. v/s SAW Pipes Ltd,³⁵ Court held that the term “public policy of India” should be given wider interpretation. The Award could be set-aside on the ground of public policy if the Award is made in contravention to:

- Fundamental policy of India
- Interest of India
- Justice or morality; Or,
- If it is patently illegal.

The Court further held that the term “Public

Policy” is not defined under the Act. It has to be constructed in the context it has been used and its definition may vary from generation to generation. In Arbitration Act this term has to be given meaning in the light and principal underlying Arbitration and Conciliation Act, 1996, Contract Act and Constitution of India.

Section 34 of the Act.³⁶

The 2010 amendment bill seeks to add a substantive provision in Section 34 for providing separate ground for challenging the arbitral Award, by adding sub-clause (iii) in clause (b) of Sub-section (2) of Section 34-

“(iii) the application contains a plea questioning the decision of the arbitral tribunal rejecting –

- (a) a challenge made by the applicant under sub-section (2) of section 13; or
- (b) a plea made under sub-section (2) or sub-section (3) of section 16,”

CHALLENGE TO AWARD LEADING TO DELAY

³³ Markanda P.C., Law Relating To Arbitration And Conciliation Commentary On Arbitration And Conciliation Act, 1996, pg666, Lexis Nexis Butterworths Wadhwa Nagpur.

³⁴ Ibid, pg. 670.

³⁵ AIR 2003 SC 2629

³⁶ Seth. J. C., Corruption & Miscarriage Of Justice In Arbitration, Indian Council of Arbitration quarterly, Vol.XLIX / January - March 2011.

Whenever Award is challenged in court of law, it leads to delay in process of Arbitral Award, as the courts in India are having heavy pendency of cases. Keeping this point in mind, the Law Commission of India recently suggested

“Addition of sections 34 (5) and 48 (4) which would require that an application under those sections shall be disposed-off expeditiously and in any event within a period of one year from the date of service of notice.”³⁷

The Act, as it is presently drafted, therefore, treats all three types of awards – purely domestic award (i.e. domestic award not resulting from an international commercial arbitration), domestic award in an international commercial arbitration and a foreign award – as the same. this results in frequent judicial intervention in Foreign Awards. To avoid this, the Law Commission suggested, the addition of section 34 (2A) to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by “patent illegality appearing on the face of the award.” In order to provide a balance and to

avoid excessive intervention, it is clarified in the proposed proviso to the proposed section 34 (2A) that such “an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.”³⁸

CONCLUSION

The judicial intervention in Arbitral Awards is expected to reduce substantially after the landmark pronouncement of Supreme Court in BALCO³⁹. However, many changes in law are still required (as suggested above) to make India an Arbitration hub of the world. Implementation of suggestions made 246th Law Commission may be the Positive step in this regard.

³⁷ 246th Report of Law Commission of India on Amendments to the Arbitration and Conciliation Act, 1996, 2014, para. 25

³⁸ Ibid, Para. 35

³⁹ Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552. (no “challenge”

proceedings or proceedings to annul the award can be brought against a foreign award in India under the Act notwithstanding the governing law of the contract is Indian law)