ARBITRATION PROCESS – GROUNDS OF CHALLENGING ARBITRAL AWARDS

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ABSTRACT

When nothing seems to work out, the organ which leads the forefront is judicial wing of the state. The basic purpose of arbitration is to bring about cost-effective and expeditious resolution of disputes and further preventing multiplicity of litigation by giving finality to an arbitral award. The arbitration proceedings are in themselves requiring a judicial process by producing the evidence and giving the parties opportunity of hearing, why should the court at this level impede with the decision forestall the very purpose of arbitration? If disputes are going to end up in courts anyway, there is meagre incentive for parties to bother to arbitrate in the first instance. In limited circumstances, it may be possible to challenge the arbitral award, even where the relevant rules or procedure provide that the award is final and binding. If an award is successfully challenged, in whole or in part, then it usually is treated as being invalid and therefore not enforceable by the courts of the seat of arbitration but also by national court elsewhere. This essay is an attempt to find out whether, where, when and how an award may be challenged and the effects of a successful challenge.

Key Words: Arbitration Process, Challenges

Introduction

"When will mankind be convinced and agree to settle their difficulties by arbitration?"[i]

– Benjamin Franklin

Arbitration is the alternate dispute resolution mechanism, which aims at resolving commercial disputes between parties at an affordable cost and to save time. Main difference between a court and Arbitrator is that the former is creation of the State the latter is appointed by private parties (If after agreeing to submit the commercial dispute to an Arbitrator, the

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parties fail to appoint an arbitrator, the arbitrator may be appointed by intervention of the Court). Arbitration in India is governed by the Arbitration and Conciliation Act, 1996.

The Arbitration and Conciliation Act, 1996 was designed essentially to implement the UNCITRAL Model Law on International Commercial Arbitration and create a pro-arbitration legal regime in India. The purpose was to minimize the supervisory role of courts, fortify finality of arbitral awards and expedite the arbitration process. Arbitration Award is a determination on the merits by an arbitration tribunal in arbitration, and is analogous to the judgments in the Court of Law. Arbitration is markedly a means of dispute resolution in the commercial sphere. National laws on arbitration have been modernized on all continents. The Arbitration and Conciliation Act, 1996 is one such step by India to make the arbitration law more responsive to contemporary requirements, taking into account the Model law and Rules adopted by the United Nations Commissions on International Trade Law (UNCITRAL). Arbitration is a legal process, which takes place outside the courts, but still results in a final and legally binding decision similar to a court judgment. Arbitration is a flexible method of dispute resolution, which can give a quick, inexpensive, confident, fair and final solution to a dispute. It involves the determination of the dispute by one or more independent third parties rather than by court. The third parties, called arbitrators, are appointed by or on behalf of the parties in dispute.[ii] The arbitration is conducted in accordance with the terms of the parties' arbitration agreement, which is usually found in the provisions of a commercial contract between the parties. For an arbitration to take place, the disputing parties must agree to take their dispute to arbitration. In practice, this agreement is often made before the dispute arises and is included as a clause in their commercial contract. In signing a contract with an arbitration clause, the parties are agreeing that their dispute will not be heard by court but by a private individual or a panel of several private individuals. If parties have agreed to arbitration, they will generally have to go to arbitration rather that court as the courts will normally refuse to heat their case by staying is to force the reluctant party to honour their agreement to arbitrate. The entire rational behind this Act was that there should be minimum interference by Courts. Arbitration was meant to be a speedy, expeditious and cost-effective method of dispute reconciliation. So, the primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice". The Supreme

Court in the case of *R.M. Investments Trading Co. Pvt. Ltd. v. Boeing Co. & Anr.35 (1994) 2 CALLT 300 HC, 99 CWN 1* while constructing the expression "commercial relationship" in context with International Commercial Arbitration held:

"The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."

With the gradual removal of political and trade barriers and the rapid globalization of the world economy, new challenges have been created for arbitration institutions in response to the growing demand of parties for certainty and predictability, greater rapidity and flexibility as well as neutrality and efficacy in the resolution of disputes.

Challenge to Awards Or Grounds for Setting Aside Awards

Domestic arbitral award

Part I of the 1996 Act is modelled on the UNCITRAL Model Law [iii] and the UNCITRAL Arbitration Rules[iv] with few departures. The relevant provisions are briefly outlined below. Section 13 of the 1996 Act, corresponding to Art 13 of the Model Law, provides for challenge to an arbitrator on the ground of lack of independence or impartiality or lack of qualification. In the first instance, a challenge is to be made before the arbitral tribunal itself[v]. If the challenge is rejected, the tribunal shall continue with the arbitral proceedings and make an award[vi]. Section 13(5) of the 1996 Act provides that where the tribunal overrules a challenge and proceedings with the arbitration, the party challenging the arbitrator may make an application for setting aside the arbitral award under s34 of the 1996 Act (corresponding to Art 34 of the Model Law).

Hence, approach to a court is only at the post-award stage. This is a departure from the Model Law which provides for an approach to the court within 30 days of the arbitral tribunal rejecting the challenge [vii]. The second departure from Model Law (relevant to enforcement) is to be found in S. 16 of the 1996 Act (corresponding to Art 16 of the Model Law). Section 16 incorporates the competence-competence principle and enables the arbitral tribunal to rule on its jurisdiction, including with respect to the existence or validity of the arbitration agreement. If the arbitral tribunal rejects any objection to its jurisdiction, or to the existence or validity of the arbitration agreement, it shall continue with the arbitral proceedings and make an award.[viii]

Section 16(6) of the 1966 Act provides that party aggrieved by such award may make an application for setting aside the same in accordance with S.34. Article 16 of the Model Law, in contrast, provides that where the arbitral tribunal overrules any objection to its jurisdiction, the party aggrieved with such decision may approach the court for resolution within 30 days. The Indian Act permits approach to the court only at the award stage (and not during the pendency of the arbitration proceedings). Hence, Section 13(5) and 16(6) of the 1996 Act furnish two additional grounds for challenge of an arbitral award (over and above the ones stipulated in S. 34 of the 1996 Act referred to below). Section 34 of the 1996 act contains the main grounds for setting aside the award. It is based on Art 34 of the Model Law and, like Art 34, states that the grounds contained therein are the 'only' grounds on which an award may be set aside. However, in Indian context the 'only' prefixing the grounds is a bit of a misnomer as two additional grounds have been created by the Act itself as mentioned above. Besides, another ground is to be found in an 'Explanation' to the public policy ground in S.34. The same reads as follows:

It is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award is induced or affected by fraud or corruption or was in violation of Section 75 or Section 81. Section 75 referred to above is part of the conciliation scheme under the Act and states that the conciliator and parties shall keep confidential all matters relating to the conciliation proceedings. Section 81 prohibits any reference in arbitral or judicial proceedings to view, suggestions, admissions or proposals, etc. made by parties during conciliation proceedings.

Procedure for challenging the arbitration award

In terms of Section 34(1) of the Act an arbitration award can be challenged in the appropriate court by way of an application for setting aside of the award. Under Section (2)(1)(e), Court has been defined as the District Court or the High Court having Original Jurisdiction for the purpose of the Act. Sub Section (3) prescribes the time limit within which an application has to be moved to the court, which is three months of receipt of the award under Section 34 or Section 33, which is later by the party challenging of the award. In terms of the provision to sub section (3) the court may extend the period by a further maximum period of thirty days if the court is satisfied that the applicant was prevented by sufficient cause from making the application.

HOW DIFFICULT IS IT TO CHALLENGE AN AWARD

There are three methods whereby an Award can be challenged:

1) Absence of jurisdiction.

2) Serious irregularity.

3) Error of Law

Jurisdiction

Absence of jurisdiction, for example if there is no arbitration agreement, is normally challenged prior to the stage where the arbitrator is getting close to the giving of an Award. This is because of the effect of section 73 of the Arbitration Act 1996. That requires that objections to jurisdiction must be made promptly.

The requirement for promptness in relation to the challenging of an Award which deals with the question of jurisdiction is specifically dealt with in section 73(2). That provides that challenge must be made "within the time allowed by the arbitration agreement…" Article 32 of the LCIA Rules requires such objections to be made "promptly" otherwise the party will be treated as "having irrevocably waived its right to object".

Section 67 of the 1996 Act provides that a party can apply to the court challenging the substantive jurisdiction of the tribunal.[ix] Firstly the party must exhaust all available arbitration remedies of appeal or review and any recourse under section 57 to correct the Award – see section 70 (2) of the 1996 Act and within 28 days of an Award.

The requirement for promptness under section 73 applies to the next category, serious irregularity. If a party takes no part in proceedings, then section 73 applies and permits the party to seek declaratory or other relief in relation to jurisdiction. The party keeps its rights under sections 67 and 68, but need not exhaust its arbitral remedies as provided for under section 70(2).

Serious Irregularity

The old law suggested that there was a species of objection to an Award called "procedural mishap". The 1996 Act effectively disposes of that and provides for the challenging of an Award on the grounds of a "Serious Irregularity". What is a serious irregularity is set out in section 68 (2)(a)-(i) of the 1996 Act of the 1996 Act.

A section 68 application must be made promptly, see sections 70(2) and (3) and section 73.

Appeal on a point of law

This is governed by section 69. The parties may enter into an agreement at any time excluding such a right of appeal. The decision must substantially affect the rights of the parties.

Public Policy

It is clear that, The Arbitration and Conciliation Act, 1966 was conceived by the compulsion of globalisation leading to adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law. This Act is by and large an integrated version of the 1940 Act which governed the domestic arbitration, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Award (recognition and Enforcement) Act, 1961, which governed international arbitral awards.

Apparently, Chapter I to VIII of the UNCITRAL the provisions are called 'Article' whereas under the Act they are called 'Section'.[x] The main objectives set out in the Statement of Objects and Reasons Of the 1996 Act are "to minimise the supervisory role of courts in the arbitral process" and "to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court".[xi] Public policy is that principle of law which holds that no subject can lawfully do, which has a tendency to be injurious to the public or against the public good, which may be termed, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law. Public policy connotes some matter which concerns public good and public interest.

The concept of public policy varies from time to time.[xii] The UNCITRAL Model Law Commission stated in its report[xiii] that the term "public policy" comprises "fundamental principles of justice". It was understood that the term public policy which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery, or fraud and similar serious cases would constitute a ground for setting aside an award.

In the case of Renusagar Power Plant Co. Ltd v. General Electric Co., [xiv] the court in view of the absence of a workable definition of "international public policy" found it difficult to construe the expression "public policy" in Article V (2)(b) of the New York Convention to mean international public policy as it could be, construed both in narrow or wide sense. In the Renusagar case, it has been observed: "It is obvious that since the Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction.

CONCLUSION

"Finality is a good thing but justice is better"

- Lord Atkins, House of Lords

For arbitration to remain a preferred form of dispute resolution, the party autonomy and finality of awards must be well balance. In the context of the arbitrators' application of the wrong substantive law, party autonomy means that the arbitrators must respect the parties' choice of law and finality means that award not too easily should be set aside. The Parliament has enacted the Arbitration and Conciliation Act with a view to provide speedy remedy by arbitration and to achieve this objective, section 5 of the Act puts a complete bar on the intervention of the courts in matters where there exists an arbitration clause. As our nation moves towards increasing litigiousness, alternative methods of dispute resolution might just provide the key to resolving the problems of overburdened case loads, long pendency of cases and an all too frequent case of justice being delayed.

Bibliography:

[i] Quote taken from a letter Benjamin Franklin to Joseph Banks in 1783.

[ii] The Arbitration and Conciliation Act, 1966 (No 26 0f 1966) ('the 1966 Act').

[iii] I.e. the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, General Assembly Resolution 40/27, adopted on 11 December 1985 ('the Model Law').

[iv] Arbitration Rules of the United Nations Commission on International Trade Law ('UNCITRAL'), General assembly Resolution 31/98, adopted on 15 December 1976 ('the UNCITRAL Arbitration Rules').

[v] The Arbitration and Conciliation Act 1996, s 13(2).

[vi] The Arbitration and Conciliation Act 1996, s 13(4).

[vii] The Model Law, Act 13(30).

[viii] The Arbitration and Conciliation Act 1996, s 16(5).

[ix] Section 72 deals with what happens when a party decides to take no part at all.

[x] Vikrant Tyres Ltd. V. Export Foreign Trade Co. Ltd., 2005(3) RAJ 612 (Ker).

[xi] Para 4 (v) and (vii) of the Statement of Objects and Reasons of the Arbitration and Conciliation act, 1996.

[xii] Central Inland Water Transport Corporation Ltd. V. Brojo Nath Ganguly, AIR 1989 SC 1571. For a very fine and detailed statement of Sir William Holdsworth on public policy please refer History of English Law, Vol. III, p. 55

[xiii] UNICTRAL Report on the work of its 18th session, June 3-21, 1985, para.296.

[xiv] Renusagar Power Plant Co. Ltd. V. General Electric Co., AIR 1994 SC 860.