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The Rise of Arbitration in India: Is India Ready to Become a Global Dispute Resolution Hub?

~Saksham Bhardwaj

1. Introduction

Due to neutrality, privacy, and the ease of being enforced by the New York Convention,[1] commercial parties are choosing arbitration more frequently than litigation as the preferred method of resolution, particularly with regard to cross-border disputes. India had previously been viewed by international legal practitioners as a "troublesome" jurisdiction and had a reputation of experiencing lengthy court delays before 1996.[2] Since 1996, India has made considerable efforts to align itself with internationally accepted standards through the enactment of the Arbitration and Conciliation Act, 1996, which was developed based primarily on the UNCITRAL Model Law.[3] This article explores whether the reform in India has resulted in developing an organisation to the same level of trust as organisations located in Singapore and London.

2. From Interventionism to Restraint: The Judicial Turn

The interpretation of Part I during the early years of the 1996 Act was broad; thus, the courts in India were able to intervene in cases of foreign-seat arbitration, such as in Bhatia International.[4] In Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.,[5] the Indian Supreme Court clarified that Part I of the Act would only apply to arbitrations taking

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 38.

[2] Arbitration and Conciliation Act, No. 26 of 1996, India Code (1996).

[3] UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I (1985, as amended 2006).

[4] Bhatia Int'l v. Bulk Trading S.A., (2002) 4 S.C.C. 105 (India), overruled by Bharat Aluminium, (2012) 9 S.C.C. 552.

[5] Bharat Aluminium Co. v. Kaiser Aluminium Tech. Servs., Inc., (2012) 9 S.C.C. 552 (India).

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place in India. This decision was significant because it aligned the Indian arbitration regime with the territoriality principle outlined in the Model Law.

Subsequent decisions continued this trend of limiting the scope of Part I. In BGS SGS Soma JV v. NHPC Ltd.,[6] the Court reinforced that a clause designating where "the arbitration will take place" can only refer to an arbitration seat and, as a result, will eliminate a large portion of the litigation surrounding the determination of a seat versus a venue. In Ssangyong Engineering & Construction Co. v. NHAI,[7] the Court narrowed the scope of review for a party seeking to set aside an award based on "public policy" or due to "patent illegality" after the 2015 Amendment, thus restricting the number of awards subject to review based on merit and, therefore, restoring finality to arbitration.

3. Legislative Reform: Substance or Symbolism?

The enactment of the 246th Law Commission Report[8] led to the 2015 Amendment of the Indian Arbitration Act,[9] where the main amendments were adding Section 29A (timelines for delivering an arbitral award), limiting automatic stays on the enforcement of an arbitral award, and enhancing the neutrality standards for arbitrators. The 2019 Amendment established the creation of the Arbitration Council of India to evaluate and accredit arbitration institutions in India, which was part of an effort to transition India from ad hoc arbitration to institutional arbitration.[10] However, the Council is still under-resourced for its mandate, and the grading criteria are not sufficiently transparent to create the level of confidence in them that bodies such as the Singapore International Arbitration Centre generate.

[6] BGS SGS Soma JV v. NHPC Ltd., (2020) 4 S.C.C. 234 (India).
[7] Ssangyong Eng'g & Constr. Co. v. Nat'l Highways Auth. of India, (2019) 15 S.C.C. 131 (India).
[8] Law Commission of India, Report No. 246, Amendments to the Arbitration and Conciliation Act 1996 (Aug. 2014).
[9] Arbitration and Conciliation (Amendment) Act, No. 3 of 2016, India Code (2015).
[10] Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, India Code (2019).

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The 2021 Amendment[11] created the ability for a party to obtain an unconditional stay of enforcing an arbitral award where there is proof that the contract or award was obtained by fraud; this amendment was clearly intended as a reaction to high-profile arbitration controversies but could also be interpreted as introducing discretion at the very stage of enforcement when predictability is of utmost importance to foreign investors.

4. Party Autonomy and Procedural Fairness

Party autonomy has been greatly enhanced; the Perkins Eastman Architects DPC v HSCC (India) Ltd.[12] case invalidated the unilateral appointment of a sole arbitrator by an interested party, thus aligning India with international standards regarding the independence of arbitrators; also, the Vidya Drolia v. Durga Trading Corporation case broadened the range of disputes that can be referred to arbitration and refined the prima facie test for referral under Section 8,[13] thus limiting the opportunities for making dilatory objections; the PASL Wind Solutions v. GE Power Conversion India case ruled that two Indian companies can validly agree to have their arbitration seated outside India.[14] This represents a substantial concession in favour of contractual freedom. Most recently, the Cox & Kings Ltd. v. SAP India Pvt. Ltd.[15] case has ruled that the doctrine of extending the group of companies applies to bind non-signatory affiliates in appropriate circumstances a practical, and controversial extension of the consent-based theory of partition.

Courts have demonstrated practical support for parties seeking relief, as Courts have granted Section 9 relief pending the establishment of arbitration tribunals.[16] Also, the Supreme Court,

[11] Arbitration and Conciliation (Amendment) Act, No. 33 of 2021, India Code (2021).
[12] Perkins E. Architects DPC v. HSCC (India) Ltd., (2020) 20 S.C.C. 760 (India).

[13] Vidya Drolia v. Durga Trading Corp., (2021) 2 S.C.C. 1 (India).
[14] PASL Wind Sols. Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd., (2021) 7 S.C.C. 1 (India).
[15] Cox & Kings Ltd. v. SAP India Pvt. Ltd., 2023 SCC OnLine SC 570 (India).
[16] Sundaram Fin. Ltd. v. NEPC India Ltd., (2018) 18 S.C.C. 371 (India).

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in Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.,[17] has declared that emergency arbitrator awards are enforceable in India. This fills a gap left by the 1996 Act. However, through this judicially-created solution, a major structural weakness in the arbitration system has become clear: The predominant means by which India's arbitration system continues to progress is the courts filling in interpretive gaps in the statute based on their understanding of the legislature's intent.

5. Institutional Infrastructure: The Missing Link

The India International Arbitration Centre was created to provide alternative conflict resolution through an (IAAC) similar to Singapore’s (SIAC) or Hong Kong’s (HKIAC),[18] but unfortunately, the use of institutional arbitration within India is still quite low, with the majority of domestic commercial disputes being settled through Ad Hoc arbitration with higher cost and longer resolution timeframe. Also, unlike Singapore or Hong Kong where there is a critical number of skilled arbitrators/counsels, retired judicial members and a case management, institutionally, India has a very thin base of institutional arbitrators, and because of heavy judicial backlogs in India (even though the courts support arbitration), there are considerable delays of many years on both Section 34 and Section 37 proceedings, destroying resolution of awards intended by the awarding authorities (to be final).

6. Comparative Positioning

India's structural disadvantages relative to Singapore's specialised commercial courts, the ICC in Paris, London's depth of arbitrators under the LCIA and English Arbitration Act, and the dual-qualification of Hong Kong's bar are evident in their respective case administration processes at SIAC, the ICC, and the LCIA, while India has inconsistent enforcement timelines,

[17] Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., (2022) 1 S.C.C. 209 (India)
[18] New Delhi International Arbitration Centre (Amendment) Act, No. 20 of 2022, India Code (2022) (renaming the institution as the India International Arbitration Centre).

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contrary to the Convention, SIAC and HKIAC's detailed institute case management processes, and foreign counsel still prohibited from appearing in India-seated arbitration. India's strength is in its newly-structured jurisprudential architecture and a judiciary that, in light of the BALCO decision, largely adheres to a minimal-intervention approach.

7. Way Forward

India's system of arbitration has gone through a significant transformation since before the BALCO ruling in 2012, shifting away from an interventionist excess to a jurisprudence that largely respects party autonomy and the finality of awards. Although this has been an important improvement in our system, we still need to achieve other things in order to establish ourselves as a true hub for arbitration.

To that end, we need the establishment of dedicated arbitration benches to help eliminate enforcement delays, an independent and adequately funded India International Arbitration Centre, more liberalised rules for foreign lawyers, and legislative rather than merely judicial solutions to recurring issues (e.g., enforcing emergency arbitrators' awards) related to our procedures. Without addressing these structural shortcomings, the reforms to India's arbitration regime will remain an impressive set of theoretical advancements rather than a full-scale transformation of our arbitration system.