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Hurdles of International Arbitration in India

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Introduction

International Arbitration is a legal process aimed at resolving disputes between parties by an arbitrator of their own choice and and seat of jurisdiction. Arbitration is a form of alternative conflict resolution (ADR) mechanism which parties may resort to instead of litigation. Parties involved in international transactions resulting in disputes, are provided a neutral forum for conflict resolution through international Arbitration. The Enforcement of arbitration is made possible by the United Nations Convention on the recognition and Enforcement of Foreign Arbitral awards, New York 1958, which is commonly referred to the New York convention. The key advantage of arbitration is the ease of enforcement of arbitral awards in all signatory countries, which todate count 161 countries. Through this convention arbitration awards are binding, therefore all contracting states must recognize and enforce them in a manner that conforms to its procedural rules. The contracting states have their own version model law enacted and that brings us back to the arbitration seat. The seat is the home jurisdiction of the arbitration - not to be confused with the venue of the arbitration where some hearings may take place. In practice hearings may well be held at the seat. Usually parties use a seat of utmost neutrality. The seat has a unique specific legal meaning. It determines which country's procedural laws will apply to many practical aspects of arbitration, including any rights of appeal, the availability of interim remedies and the extent to which the local courts will support or supervise the arbitration. To be perfectly clear, the seat determines in which jurisdiction an award is made. This has significant consequences for the purposes of recognising and enforcing the award. The Modi government of India has made it a priority to establish India as a Seat jurisdiction for international arbitration.

The Status Quo of international Arbitration in India

On the face of it India has effectively evolved and incorporated best practices of international Arbitration and its procedural rules into its own regulations. The UNCITRAL model law has been incorporated in the laws and regulations of most signatory countries, including India. The Indian Arbitration and Conciliation Act 1996 well represents UNCITRAL Model Law and embraces universally accepted standards for arbitration proceedings. The model law stated goals, which envisioned an arbitration process that is efficient, fair and focused and to keep at a minimum the custodial role of the judiciary, where the process of arbitration is institutionalised with that institutions rules and regulations and away from the traditional court process. The enactment of

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the arbitration act 1996 has proven large success to this extent, even though notable problems still continue to exist in providing interim measures of protection and enforcements. A fundamental issue through the arbitration reform is the extent of the participation of the Indian judiciary, that threatens the autonomy that the Arbitration Act 1996 sought to push forward. Various concerns about India's alteration into a reliable forum for international commercial arbitration which still fail to meet international quality have been raised because of the involvement of the judiciary and thereby the loss of the very purpose of arbitration, namely speed and efficiency of an award, as a commercially orientated and separate path to the legal process. The basis to these issues is the courts' continuing difficulty with giving up jurisdiction and giving supremacy to the arbitral process. Indeed in India it is fairly common for advocates and retired judges to become arbitrators, which is another cause for the vested interest to prevail. In other arbitral jurisdictions there is a better representation of industry and sector experts and legal professionals. Such industry and sector experts are insiders and can bring an immediate understanding to the business implications of the parties in the disputes and do not require extensive and costly explanations by both parties at court. Having the courts interfere with the arbitration process is considerably counter effective to its very purpose. In India over 4 million cases are pending before court and many are over 30 years old.

It is therefore a well known fact that the Indian justice system is struggling to keep pace of its own affairs, bringing Arbitration oversight into this struggle is nonsensical, and in any event in breach of the very purpose of the UNCITRAL model law and its respective implementation into the Indian Arbitration and Conciliation Act 1996 . Currently no proper and fit-for-purpose reform is in sight. In order to repair the damage done by judgements in breach of the Indian Arbitration and Conciliation Act 1996 , and resurrect arbitration as an efficient method of dispute resolution, the Modi Government has embarked on a programme to introduce significant improvements to the arbitration landscape in India. The law reform process has gained considerable traction with the formulation of a Union Law Ministry consultation paper which proposes significant amendments to the 1996 Act. Indian Arbitration and Conciliation Act 1996. This Consultation Paper is outspoken in stating that the Indian judiciary have interpreted the provisions of the Act in such a way which defeats the very purpose of the the model law. Thus, the primary goals of the proposed amendments are to rectify the problems created by unnecessary and excessive judicial intervention and ringfence the arbitral process from unconstructive (not to say haphazard) judicial interference. In June 2019 the Central Government of India has proposed an independent Institution to be created, namely the "New Delhi International Arbitration Centre '' and for this to be headed by a chairperson, who has been a judge of the Supreme Court. It seems the judiciary has railroaded the Central Government yet again and the required ringfencing of Arbitration is

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hampered. Until the independence from the judiciary for the Arbitration process is not a given, we have not suitably paved the way for India to earn it's rights to become a center for international commercial arbitration.

Analysis comparing India's arbitration law to other jurisdictions

International Arbitration in Singapore compared to India

Singapore law follows UNICTRAL model law which is also the case in India. A similar course is also traced by Singapore's switch to the model law as was traversed by the law governing commercial arbitration, both national and international. In spite of having a repeated normative basis, there is a notable distinction separating India's and Singapore's legal systems that governs arbitral agreements, which is an expansive flexible and accessible to parties to pick a legal system of their choice, which is not the same for India. Singapore's institutional arbitration has become an acceptable means of arbitrating disputes with the establishment of SIAC and SAC regulations. It's clear institutional methodology and process with a total separation from it's judiciary has made it resilient and strong and now is widely recognised as getting the job done. Singapore's approach to international Arbitration is clear and unhampered and secures its independence. It is recognised as efficient, particularly in the areas of finance, trade and shipping. Singapore's global viability has increased due to an expedited and definitive dispute resolution mechanism making it a popular commercial arbitration platform.

International Arbitration in the United Kingdom compared to India

English arbitration methodology is more similar to the Indian arbitration, unlike the methodology used in the United States. They are both based on the UNCITRAL model law. The Arbitration Act 1996 is an Act of Parliament which regulates arbitration proceedings within the jurisdiction of England and Wales and Northern Ireland. This Act establishes a wide reach of judicial reviews enforcing the arbitration process: consequently the arbitrator's prescriptive authority is correctly reinforced relevant to English law. The grounds for an appeal opposed to an arbitral award is comparable to US, though their implementation is more progressive. Ensuring accuracy of arbitral awards is a fundamental basis of the English system when the law governing arbitration is English

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law. The emphasis in the arbitral act 1996 is on party autonomy. This is seen in a judgment in the Supreme Court in Jivraj v. Hashwani. The court of appeal order which stated that arbitrators were liable to same anti-discrimination law relevant to employees in the UK was challenged hence making it unenforceable for any arbitral agreement, or stipulation requiring a conciliator to be of a specific affiliation or belief. This decision was reversed by the Supreme Court ratifying that authenticity of such arbitral agreement imposing nationality or faith qualification on the choice of conciliators therefore underpinning the doctrine of "party autonomy". The legislative of reserving an award in regards to threshold of judicial intervention because of an error of law is the main difference between systems of US and the UK. For an arbitral award to be successfully challenged only three grounds are allowed by the arbitration act 1996. Although the judiciary has been given a substantial reach to intercede in the arbitral process (particularly in securing interim measures and speedy enforcement), the English system prioritizes conserving the nature of arbitration as a swift way to dispute resolution. Therefore the London Court of International Arbitration (LCIA) is one of the most recognised and used forums for international Arbitration and is universally recognised as one of the world's leading arbitral institutions.

Conclusion

International commercial arbitration is obtaining popularity, although there are diverse views, factually the Arbitration and Conciliation Act, 1996 has achieved little in successfully, efficiently and independently administering foreign awards in keeping with the New York Convention and the spirit of UNCITRAL Model Law. The proposed amendment act is a step in the direct direction to enhance the seat of International Arbitration in India. To achieve more merit a more radical perspective in establishing judicial independence, true impartiality of expert arbitrators, party independence and achieve efficiency in time span provided by the Convention, is paramount.

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