

## International Commercial Arbitration

With the growth of globalization, liberalization regimes and rapid advancement in international business relationships, it is increasingly pertinent to have a flexible and quick method of resolving disputes. Arbitration is a preferred process of dispute resolution chosen by parties, wherein parties intentionally agree to submit their case to a neutral third party and agree to be bound by his/her decision.

Section 2(1)(f) of The Arbitration and Conciliation Act, 1996, defines an International Commercial Arbitration which means: an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

- (i) An individual who is a national of, or habitually resident in, any country other than India; or
- (ii) A body corporate which is incorporated in any country other than India;
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India;
- (iv) The Government of a foreign country

The scope of this section was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd*<sup>1</sup>, where in spite of company having a foreign control, the Supreme Court concluded that, “a company incorporated in India can only have Indian nationality for the purpose of the Act.”

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<sup>1</sup> 2008 (2) UJ SC 0721

## When Arbitration is Deemed to be International

In the United Nation Commission on International Trade Law (UNCITRAL) Model Law, arbitration is deemed to be international if any one of four different situations is present:

### Article 1 (3)

- (a) The parties to the arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different States.
- (b) One of the following places is situated outside the State in which the parties have their places of business:
  - (i) The place of arbitration, if determined in or pursuant to, the arbitration agreement, is situated outside the State in which the parties have their places of business
  - (ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected
  - (iii) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Meaning of Commercial: The word commercial includes the day to day international business activities that have become part of the international trade nowadays. In *Koch Navigation Inc v Hindustan Petroleum Corp Ltd*<sup>2</sup>, it was held that "liberal construction is to be given to any expression or phrase used in the Act".

In *Atiabari Tea Co. Ltd v State of Assam*<sup>3</sup>, it was held that "trade and commerce in India has a wide meaning."

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<sup>2</sup> (1989) 4 SCC 259

<sup>3</sup> (1961) 1 SCR 809

## Applicability of Part 1 of the Act in International Commercial Arbitration:

In *Bhatia International v Bulk Trading S.A*<sup>4</sup>, it was held that Part I of Arbitration and Conciliation Act, 1996 would equally apply to International Commercial Arbitrations having seat outside India, unless any or all the provisions have been expressly excluded. In *Bharat Aluminium v Kaiser Aluminium*<sup>5</sup>, the Court decided that a constitutional bench of the Court would reconsider the Court's own ruling in *Bhatia International* case. The Supreme Court gave following ruling in the above mentioned case:

1. *"Part I not applicable to International Commercial Arbitrations having seat outside India: Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India.*
2. *No Interim Injunction: No suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.*
3. *Section 9 i.e. Interim Relief cannot be granted if seat is outside India: In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India.*
4. *Law to be applied prospectively: In order to do complete justice, we hereby order, that the law now declared by this Court shall*

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<sup>4</sup> (2002) 4 SCC 105

<sup>5</sup> (2012) 9 SCC 552

*apply prospectively, to all the arbitration agreements executed hereafter."*

### Why Arbitration preferred in solving International Disputes

1. **Speedy dispute solving mechanism:** Court process involves extensive procedures and rules, which a party needs to follow. If parties refer their dispute to arbitration, they need not follow strict procedures of law. Hence, the dispute solving becomes speedy.
2. **Enforceability of Arbitral Awards:** It is more readily and swiftly enforced as compared to the court judgements.
3. **Arbitrator is impartial:** Neutral third party is chosen to decide disputes. This third party is chosen mutually by both the parties to dispute.
4. **Arbitrator chosen may be an expert:** based on the issue of dispute, parties may choose a specific arbitrator having that particular technical experience and expertise in the area disputed.
5. **Arbitration less expensive:** since arbitration is a time effective remedy and does not involve too many procedures, it is less expensive as compared to litigation procedures.

### Conclusion:

In recent years there has been a significant increase in international businesses operating out of India. This has led to an increase in international arbitrations having its seat of arbitration in India. Both arbitration and litigation perform the same function i.e. effective delivery of justice but the fact is that arbitration has few characteristics which makes it a more viable option as compared to its counterpart. Thus, the degree of protection that it guarantees is far reaching.