INTERNATIONAL COMMERCIAL ARBITRATION FOR PARTIES IN INDIA AND UK

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This article examines the core components of International Commercial Arbitrations between Indian and overseas parties, where the seat of arbitration is in London[1]. It further discusses the issues faced by foreign companies trying to obtain relief and remedies in India and England, as well as addressing enforcement mechanisms.

For context, a clause providing for a London seat and an Indian-law governed arbitration might look as follows:

"*Any disputes arising out of or in connection with this contract, including any question regarding the existence, validity or termination, shall be referred to and finally resolved by arbitration to be conducted by a Sole Arbitrator under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause.*

The seat of arbitration shall be London

The language to be used in the arbitral proceedings shall be English

The governing law of the contract would be the substantive law of India"

A growing number of international contracts provide for disputes to be referred to arbitration. In light of this trend, several countries (including India) have undertaken a rapid expansion and development of their arbitral law to make it more accessible and flexible for foreign investors. Since one of the purposes of arbitration is more or less to provide for greater party autonomy, parties are generally more free to agree the procedures governing their arbitrations, including the seat of that arbitration.

Principally, arbitrations are either institutional (i.e. adhering to institutional rules), or ad-hoc (i.e. governed by the statutory regime of the arbitral seat). Certain mandatory (statutory) rules still apply to an arbitration governed by institutional rules. Popular institutions that provide a procedure for international arbitration are the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and the Singapore International Arbitration Centre (SIAC).

This article addresses the basic procedural framework in India and England.

[1] References to London-seated arbitrations throughout this article are a shorthand for England and Wales. In the United Kingdom, there are two principal (and distinct) legal systems: England and Wales (which also applies in large part to Northern Ireland), and Scotland. This article does not address questions of Scottish law.

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PROCEDURAL LAW GOVERNING AN ARBITRATION

The seat of arbitration carries with it certain implications regarding the procedural law which governs the arbitration proceedings. It is therefore important to understand the procedural framework in both India and England.

London

Statute

Where the seat of arbitration is London, the Arbitration Act 1996 (The English Act) will apply certain rules to that arbitration. These are split into three main elements:

1. The governing law of the dispute:
    a. International parties to sophisticated commercial contracts typically choose the law that governs their dispute (which can be a different law to that of the seat). The English Act requires that the arbitral tribunal determine these disputes under the law chosen by the parties. If the parties have not chosen a governing law, a London-seated tribunal will apply conflicts of law rules to determine the governing law. It is therefore strongly advisable to provide for the governing law in the agreement.
    b. The parties can also agree that the tribunal decides the dispute under '*Lex Mercatoria*' (a body of transnational trade and commercial principles) or *ex aequo et bono*(where the tribunal considers solely what would be a "fair and equitable" resolution). However, these two governing law choices are rare due to their inherent uncertainty, and are generally not recommended.

2. The procedural law of the arbitration:
    a. The English Act enables parties to determine the applicable procedural rules to govern the arbitration. This is often done by reference to the rules of an arbitral institution.
    b. In the absence of agreement between the parties on the procedural rules, certain "default" rules will apply. In short, the tribunal: (i) shall act fairly and impartially, giving each party a reasonable opportunity of putting their case and dealing with that of his opponent; and (ii) shall adopt procedures suitable to the particular case, avoiding unnecessary delay and expense so as to provide a fair means to resolve the dispute.

3. "Mandatory" rules: despite having the freedom to choose both the governing and procedural law applicable to the dispute, certain mandatory rules under the English Act will still apply to London-seated arbitrations (which is limited, England being an arbitration-friendly jurisdiction). These relate primarily to the powers of the English Courts to intervene in an arbitral dispute, the immunity of the arbitrator, and enforcement.

India

In the Indian legal system in an arbitration containing a foreign element, there are three different systems of law which govern the arbitration[2]:-

1. The law governing the substantive law of the contract. This is also referred to as “substantive law”, “applicable law”, or “proper law of the contract”.

[2] Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. & Anr. (2015) 9 SCC 172

2. The law governing the existence and proceedings of the arbitral tribunal, which is the law governing the conduct of the arbitration proceedings. It is also referred to as the "curial law" or the "lex arbitri". This is the law which is derived from the seat of arbitration.

3. The law governing the recognition and enforcement of the award is the law which governs the enforcement, as well as filing or setting aside of the award.

In the absence of any other stipulation in the contract, the proper law is the law that the arbitral tribunal itself will apply. The same applies to the *lex arbitri* and the law governing recognition and enforcement, in absence of an intention/stipulation to the contrary. The seat of the arbitration specified in a contract generally determines the seat of arbitration, unless clear contrary intention is apparent from the contract.

In the Indian legal system, under the Arbitration and Conciliation Act 1996 (the Indian Act) an International Commercial Arbitration is defined as an arbitration arising from a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is exercise in some other country, or a government of a foreign country.

An International Commercial Arbitration may either be seated in India, or be seated in a foreign country. For London-seated arbitrations, the provisions of Part I of the Indian Act are excluded for such arbitrations, barring certain exceptions.

INTERIM RELIEF FROM THE COURT

In certain circumstances, in London-seated arbitrations interim relief is available from the English courts or the presiding institution.

London

In England, a court can only intervene in arbitration proceedings to the extent expressly permitted by the English Act.

The English Act sets out the English court's powers that may be available in support of arbitration. Unless otherwise agreed by the parties (for example by choosing institutional framework), the court has the power to make the following orders:

1. Taking evidence from witnesses
2. Preserving evidence
3. Relating to property which is the subject of the proceedings –
    a. For the inspection, photographing, preservation, custody or detention of the property, or
    b. Ordering that samples be taken from, or experiment conducted upon, the property;
4. In relation to the sale of any goods the subject of the proceedings
5. Granting an interim injunction or the appointment of a receiver

One of the most important powers of the Court is the granting of a freezing order in respect of assets, to avoid dissipation prior to the award being granted and as an aid to enforcement.

India

In India, the Indian Act governs the power of the courts to grant interim relief. It is based on Article 9 of the UNCITRAL Model Law[3]. Under Section 9 of the Indian Act, a party is permitted to apply to an Indian court for certain interim measures in support of an Indian (or, to a more limited extent, London-seated arbitration), before, during or after making of the award by a tribunal. The law in this area has recently changed[4] to expand the scope of interim relief to foreign-seated arbitrations. Under the terms of the amended Indian law, interim relief is only available if the arbitration has commenced after 23 October 2015.

The types of interim relief sought under Section 9 are similar to those in the English Arbitration Act, namely the protection, preservation or interim custody of goods, assets, properties, securing the amounts in dispute, and the appointment of interim receivers.

This is a huge step forward, and should give commercial parties more comfort, especially in cases where assets of parties to a London-seated arbitration are located in India and there is a fear of disposal.

APPLICATION FOR APPOINTMENT OF ARBITRATORS

The procedure for appointment of arbitrators in both territories is once again dependent upon the seat of arbitration.

London

The parties to an arbitration are free to agree on the procedure for appointing arbitrators. In the absence of such a choice, the English Act provides default appointment provisions as follows:

1. The parties will jointly a sole arbitrator (if the parties wish to have a sole arbitrator)
2. If the parties wish to have two arbitrators, each party will appoint one arbitrator
3. If the parties wish to have three arbitrators:
    a. Each party will appoint one arbitrator
    b. The two appointed arbitrators will appoint a third arbitrator as the chairman of the tribunal

Unless the parties agree otherwise, if one party fails to appoint an arbitrator, the other party may give notice in writing to the other party to propose to appoint their arbitrator to act as sole arbitrator.

If the processes to appoint an arbitrator fail for any reason, the parties are free to agree what is to happen. In the absence of such agreement, any party to the arbitration agreement may apply to the English court for the following:

1. Directions as to making any necessary appointments to the tribunal
2. Directions that the tribunal must be constituted by the appointments that have already been made
3. To revoke any appointments already made
4. For the court to make any necessary appointments itself

By way of comment, the better course is to provide for the number of arbitrators, time frame and process for appointment. Delay may otherwise occur to the disadvantage of one or other of the parties.

[3] United Nations Commission of International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.
[4] Arbitration and Conciliation (Amendment) Act, 2015

India

The appointment of Arbitrators in India is governed by Section 11 of the Indian Act. As far appointment of arbitrators in a London-seated arbitration is concerned, English procedural law applies (as explained above). There are only very limited exceptions to this rule under Indian law.

APPLICATION FOR ENFORCEMENT / CHALLENGE OF THE AWARD

The law governing the enforcement/challenge to the award is extremely relevant, and especially so in international commercial arbitration. This is because an award remains a mere "dead letter" until it can be enforced in the relevant country and compliance with its terms can be ensured.

London

England, along with another 156 countries, is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention). Enforcement of arbitral awards internationally under the New York Convention is said to be one of the significant advantages of international arbitration as a means of dispute resolution.

Section 66 of the Arbitration Act governs enforcement of arbitral awards. With the court's permission, any award made by a tribunal pursuant to an arbitration agreement may be enforced in the same manner as a judgment or order of the English court. Where the court gives permission, judgment can be made in the terms of the arbitral award. Therefore, the party wishing to enforce an award must apply for permission. The court may refuse permission if the person against whom the award is sought to be enforced can show that the arbitral tribunal lacked "substantive jurisdiction" to make the award.

Under S.101 of the Arbitration Act, an award made by an arbitral tribunal within a New York Convention state (which includes India) shall be recognised as binding on the parties to the arbitration. A New York Convention award may, with the permission of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

An arbitration award can be challenged in three ways:

1. Under S.67 of the Arbitration Act, the "substantive jurisdiction" of the tribunal can be challenged. Under a S.67 application, a court may confirm the award, vary the award of set aside the award in whole or in part
2. Under S.68 of the Arbitration Act, an award may be challenged on the ground of "serious irregularity affecting the tribunal", the proceedings or the award. The court may send the award to the tribunal for reconsideration, set the award aside in whole or in part, or declare the award to be of no effect in whole or in part.
3. Under S.69, a party to the arbitration may appeal on a question of law arising out of an award made in the proceedings. The agreement of all parties and permission of the court is needed to appeal under S.69. The court may confirm the award, vary the award, remit the award for reconsideration by the tribunal or set aside the award in whole or in part.

A party may lose its right to object before the tribunal or the court on objections if a party takes part, or continues to take part, in the arbitration without making such an objection. The party will not lose this right if they can show at the time of taking part, or continuing to take part, in the arbitration, they did not know and could not "with reasonable diligence" have discovered the grounds for the objection.

Institutional rules, such as the LCIA and ICC rules, preclude appeals except to a limited extent, and research suggests that challenges to awards are infrequently upheld.

India

In an arbitration seated in a foreign territory, Part II of the Indian Act is applicable. Part II of the Act deals with enforcement of certain foreign awards in India. These awards are either awards passed in New York Convention Territories, or Geneva Convention Territories, England being a New York Convention Country. Section 44 of the Indian Act

provides that in order for a foreign award to be recognized as such under Part II, Chapter I (New York Convention Awards) certain conditions need to be fulfilled, which are as under:-

i. The territory should be signatory to the New York Convention
ii. The Indian Central Government should have notified in the Official Gazette that it has reciprocal provisions with such a territory.

Since, in the case of England, both of these conditions are met, the awards are recognized as Foreign Awards in India and the enforcement mechanism provided under Part II of the Indian Act needs to be followed.

Section 47 of the Indian Act provides that a party must produce such evidence as is necessary to prove that the award satisfy the above conditions.

Furthermore, Section 48 of the Indian Act provide the grounds to challenge the enforcement of a foreign award which include party incapacity, invalidity of agreement under the law of the seat, absence of proper notice to the party regarding appointment, or inability of a party to represent his case, non-arbitrability of the dispute, matters beyond the scope of the arbitration, the wrong composition of tribunal, or that the award has not become binding as per the law of the seat, or is against Indian public policy.

Once the award has survived any challenge and the Indian court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court[5] and executed in the customary manner.

APPEALS ARISING FROM ORDERS OF INTERIM RELIEF OR ORDERS OF ENFORCEMENT OF FOREIGN AWARDS

London

As discussed above, Section 44 of the Arbitration Act provides that the courts have the same powers in relation to arbitration proceedings, for certain matters, as it has in legal proceedings. An order for interim relief may only be appealed at first instance with the court's permission.

There are several grounds to resist enforcement of a New York Convention award, namely that:

1. a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
2. the agreement to arbitrate itself was not valid under the governing law;
3. the party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
4. the award deals with matters beyond the scope of the submission to arbitration;

[5] Section 49 of the Indian Act

5. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the procedural law of the; or
6. the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

The party seeking to resist enforcement of the award under these grounds bears the burden of proof before the court. However, successful challenges to New York Convention awards are rare, as the courts are generally supportive of the arbitration process.

India

If interim relief is granted by an Indian court under Section 9, there is an automatic right of appeal to the higher Indian court. This also applies to enforcement challenges.

However, where the Indian courts have not been approached for an execution, enforcement or other challenge arising from an English award, then the Indian courts will not play a role in the appeal process.

Conclusion

India is moving towards becoming an arbitration and foreign investor-friendly country. Indian and English courts play different roles in support of London-seated arbitrations, depending on the make-up of the arbitration procedure. The starting point is for the parties to choose the seat of arbitration, following which the established frameworks described above can be built. The critical point to remember is that a comprehensively drafted clause, taking into account the relevant advantages and disadvantages of respective legal systems, is paramount.

Firms Profile[6]

Singhania & Partners LLP

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