Constant Intervention : The norm in India

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Interests and conflicts:

Multiple instances of legislative and interpretative conflict between national laws and international arbitration have been observed in the recent past. Neutrality of the seat of arbitration is one of the prime concerns in an international arbitration proceeding which distinguishes it from domestic arbitration. A foreign state which has no or minimal relation to the native jurisdictions or concerns of any party involved in an arbitral proceeding is often preferred as the seat for such proceeding. Developing nations have spotted the perks of this game and are already working in pursuance of their interests of transforming into an international arbitration hub of this yet proliferating practice. Although international arbitration is an "autonomous" practice, the substantive laws of the state which is the seat of a proceeding and where the award has to be enforced hold immense relevance. Hence, the substantive laws and the general public policy being in accordance with international standards is a requisite for a state that has vested interests in becoming a name in international arbitration.

Arbitration Council of India:

India has been trying to establish itself as a sought destination for international arbitration. It introduced major amendments to The Arbitration and Conciliation Act, 1996 in 2015, 2018 and 2019, where a deliberate attempt to add some sense of internationality to Indian Arbitration scene is evident but it still stands in contradiction with the prevalent standards of international arbitration. The Arbitration and Conciliation (Amendment) Bill, 2019 was a positive step and a major upgrade from the previous amendment but it still rendered India an unfavourable destination for International Arbitration. The aforementioned Bill (1a) seeks to establish an independent body called the Arbitration Council of India (ACI) for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. It has been conferred with the authority of grading arbitral institutions, accrediting arbitrators, making general policies and standards for all kinds of ADR proceedings and maintaining a depository of arbitral awards (judgments) made in India and abroad.

Shortcomings in Arbitration Council of India:

Empowering ACI might fasten the arbitration process substantially by decreasing judicial intervention but it has its own drawbacks. The primary drawback in this regard is the limitation placed on the internationally prevalent practice of autonomous arbitration under the rules of autonomous private arbitral institutions by appointing a government organisation which shall regulate the policies and grade the arbitral institutions in India. The section 11 has empowered the Supreme Court to designate arbitral institution graded by the Arbitration Council of India in international arbitration proceedings. This will restrict the choice of arbitrator(s) and arbitral institution for a foreign party only to the ones listed, graded and accredited by ACI and duly appointed by the Supreme Court of India. It will impose further institutional burden to be accredited and graded by ACI on a foreign arbitral institution which seeks to establish a regional office in India. In arbitration-friendly jurisdictions such as Singapore and Hong Kong, the appointment of arbitrators is designated to the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) respectively but in India the procedures and rules place a limitation on selection of arbitrators.

Limitation to choice

The soul of arbitration is its autonomous nature and neutrality. A country with substantial judicial and state interference is usually not preferred by international parties. The Eighth Schedule has been introduced in Section 43 J which stipulates nine categories of people (such as an Indian advocate or cost accountant or company secretary with certain level of experience or a government officer in certain cases inter alia) and only those are qualified to be an arbitrator, which renders a foreign national disqualified to be an arbitrator in an institutional arbitration proceeding in India. Needless to say, this goes against the basic ethos of neutrality and freedom of choice in arbitration, consequently a foreign party may not choose to have the seat of their arbitration proceedings in a country where choice of arbitrator is restricted by nationality and there is high scope of nepotism, corruption, lack of transparency and institutional burden due to state and judicial intervention.

Absence Of Time Constraints:

The Arbitration and Conciliation Act, 1996 post the last amendment removes any restraining time limit on the announcement of the reward for International Commercial Arbitration which maybe in rhythm with the idea of protection of parties from a hurried and negligent award but the parties usually prefer arbitration due to the speedy judgements. The Arbitration Rules of the International Chamber of Commerce (ICC) include a

deadline of six months from the last signature to the terms of reference and the Arbitration Rules of the Stockholm Chamber of Commerce also set a six month deadline from the date on which the arbitration was referred to the tribunal. Other institutions, like the LCIA, simply provide that an award should be made as soon as reasonably possible from the date of the last submission. Although the newly added section 23(4) stipulates that the statement of claim and defence shall be completed within a period of six months from the date of appointment of the arbitrator(s) which might be a short span in some cases. The prevalent practice in international arbitration is that the arbitrator(s) conduct a case management conference with the parties and during or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties [ICC article 24(2)]. This again is the restriction of a tribunal's autonomy and imposition of state's own concerns. The Sri Krishna committee recommended including 'emergency award' in Section 2(1)(c) which is also ignored in the latest amendments.

Power to Grant Interim Reliefs:

Globally, the power of arbitral tribunals in granting interim measures has been recognized for many years now. There are adoptions of rules and standards by major arbitral institutions that favour application for interim measures to arbitrators, instead of courts, such as Article 28 of ICC Arbitration Rules, and Article 25.3 of the LCIA Rules. In India after an award has been declared an arbitral institution shall not have power to grant interim reliefs, this power has been conferred upon the courts instead. The spirit of an arbitration clause lives even after the contract dies, the courts shouldn't take from the arbitration, the power to grant interim reliefs relating to their awards. Moreover since the whole case has been looked upon by the same arbitrators they might be in a better position to grant interim reliefs (amendment to section 17 of Arbitration and Conciliation Act, 1996).

Conflict in Confidentiality clause

Arbitration and Conciliation Act, 1996 contains a clause for confidentiality but it is very vague stating, "the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except where its disclosure is necessary for the purpose of "**implementation and enforcement** of award", this doesn't comment upon certain issues like if a party wishes to commence criminal proceedings against the other party alongside the arbitration proceedings which doesn't fall under the garb of implementation and enforcement of award but might require breeching of the confidentiality clause. In

similar cases the confidentiality clause might be breached which signifies state's preference of its own laws and disregard of the basic ethos of an arbitration.

Judicial Intervention

Section 11(6A), introduced in the 2015 amendment, ensured that courts shall only decide if a valid arbitration agreement existed or not. This meant that the courts would have to refer the dispute to arbitration as soon as they found that an arbitration agreement existed. The specific repeal of this section in the 2019 amendment means that the court can take their stance and cause the confusion that existed before the existence of this section, i.e. the arbitrability of a dispute. In N. Radhakrishnan v. Maestro Engineers & Ors it was ruled that matters that involved fraud was better suited to be dealt by courts instead of arbitrator. While later the Supreme Court had to clarify in World Sport Group Limited v. MSM Satellite that in a foreign seated arbitration disputes pertaining to fraud are arbitrable. But this has created a void and distinction between domestic arbitration and foreign seated arbitration, so a party in order to have minimal judicial intervention could prefer a foreign seated arbitration over a domestic arbitration. This is also in contention with the larger aim of making India an arbitration hub. It also goes against the global tradition where the authority to adjudge the arbitrability is held by arbitrators and not the courts.

Summary

The practice of International Arbitration in India has been corrupted by the constant intervention of state and judiciary. While the state has taken steps forward, it still retains its own interests each and every time. Parties choose arbitration due to the autonomy and swiftness that it provides and India has not been consistent in imposing these values in its amendments.