International Commercial Arbitration

(ICA) – Fostering India's Growth

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Distress Advisory through 3R Approach

RE STRUCTURE BUILD GROWTH

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International Commercial Arbitration – A Detailed Analysis

Arbitration is a widely used alternative dispute resolution (ADR) method where parties in a dispute agree to submit their case to a neutral third party, called an arbitrator (or a panel of arbitrators), instead of going to court. The arbitrator hears evidence and arguments from both sides and then issues a binding decision, known as arbitral award.

International commercial arbitration (ICA) is a widely used method for resolving international commercial disputes between parties located in different countries. International commercial disputes refer to legal disagreements or conflicts that arise between two or more parties that are located in different countries whereas the subject matter of the dispute is of a commercial nature. ICA is crucial in the current arena of globalization because it provides a neutral, enforceable, and flexible dispute resolution mechanism for cross-border trade and investment. It builds trust between parties from different legal systems, offers global enforceability via the New York Convention, ensures confidentiality, and allows for specialized expertise, collectively reducing risk and fostering global economic integration.

> “International Commercial Arbitration offers a neutral, confidential, and enforceable mechanism for cross-border dispute resolution, driven by parties' consent. It promotes certainty, efficiency, and global trade by avoiding national court biases.”

Under the Indian Arbitration and Conciliation Act, 1996 read with the provisions of Section 2(1)(f) (which is largely based on the UNCITRAL Model Law), an arbitration is defined as "international commercial arbitration" if at least one of the parties is:

- An individual who is a national of, or habitually resident in, any country other than India;
- A body corporate which is incorporated in any country other than India;
- An association or a body of individuals whose central management and control is exercised in any country other than India;
- The Government of a foreign country.

Therefore, the nationality of the parties is the essence of the matter in determining international arbitration. It is submitted that if the subject matter of the dispute relates to assets &/or its case of action outside India and in the matter both the parties are resident in India, it will not be treated as International Arbitration.

However, the enforceability of such domestic award can still be enforced in accordance with New York Convention for enforcement of foreign arbitral wards, 1958

Need For Promoting International Arbitration – An Essential For Economic Development For India

India's economic growth and the promotion of international arbitration are intrinsically linked. India had already enacted the Arbitration Law based upon UNCITRAL model laws in 1996. A robust arbitration framework instills investor confidence, crucial for attracting Foreign Direct Investment (FDI). Foreign businesses are more willing to invest in India when assured that commercial disputes can be resolved efficiently, neutrally, and with globally enforceable outcomes, rather than facing potentially lengthy domestic litigation in a court of law.
By strengthening its arbitration laws (e.g., through amendments to the Arbitration and Conciliation Act) and fostering a pro-arbitration judiciary, India signals its commitment to a predictable and fair business environment. This not only enhances its "Ease of Doing Business" ranking but also facilitates smoother cross-border trade and commerce, reducing commercial risks for both Indian and international parties. Ultimately, a reliable international arbitration ecosystem is a vital catalyst for sustaining India's economic ascent and positioning it as a preferred global investment and business hub.

- **International Element:** This signifies that the parties involved in the dispute are from different jurisdictions (e.g., a company in India and a company in Germany, or an individual from the UK and a firm in the USA).
- **Commercial Nature:** This means the dispute stems from business activities, transactions, or relationships. Common examples include:

- Breach of international sales contracts (e.g., non-delivery, defective goods, non-payment).
- Joint Ventures and Shareholders Disputes
- Investment Disputes
- Conflicts concerning intellectual property rights (patents, trademarks, copyrights) in cross-border contexts.
- Disagreements related to international finance, loans, or payment terms.
- Breaches of construction contracts for international projects.
- Disputes relating to Intellectual Property rights

These disputes are inherently complex because they often involve different legal systems, languages, cultural norms, and sometimes even a lack of trust between the parties. Due to these complexities, national court litigation can be problematic (e.g., issues of jurisdiction, enforceability of judgments, unfamiliarity with foreign laws), which is why international commercial arbitration has become the preferred method for resolving them.

Even Two Indian Parties Can Enter Into A Contract Of International Arbitration

SC Decision in PASL Wind Solutions Private ltd and Ans.

The Indian Supreme Court, in the landmark PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited (2021) case, held that even two Indian parties can participate in "international arbitration" by choosing a foreign seat of arbitration in their contract.

The Key Break-Away of Supreme Court decision in the matter is given as under

Party Autonomy is Key: The Court prioritized the freedom of parties to decide their dispute resolution mechanism, including the arbitration seat.
Seat, Not Nationality, Defines "Foreign Award": An award is considered "foreign" (and thus enforceable under the New York Convention via Part II of India's Arbitration Act) based on the place where it's made (the seat), not the nationality of the parties involved.

No Public Policy Violation: Choosing a foreign seat, even by two Indian parties, does not inherently violate Indian public policy.
Limited Indian Court Supervision: With a foreign seat, Indian courts will generally not have supervisory jurisdiction over the arbitration proceedings (e.g., cannot set aside the award).
Interim Relief Available: Indian courts can still grant interim measures (e.g., freezing assets) to support such foreign-seated arbitrations.

In essence, by opting for a foreign seat, two Indian parties transform their arbitration into one that operates under the laws of that foreign seat, and any resulting award is treated as a "foreign award" for enforcement purposes in India.

The SC decision did not amend Section 2(1)(f). It simply clarified that the criteria for an arbitration to be considered "international" for the purposes of enforcing a foreign award (under Part II) are different from the criteria for an arbitration to be considered "international commercial arbitration" for the application of certain provisions of Part I (when the seat is in India).

Therefore, even if both parties are Indian (and thus don't fit the Section 2(1)(f) definition for a domestic "international commercial arbitration"), if they choose a foreign seat, the award becomes a "foreign award" because it was rendered in a foreign jurisdiction, making it "international" for enforcement under Part II.

Importance of Arbitration Seat in the Matter of International Arbitration

The "seat" of arbitration is paramount in international arbitration, serving as the legal domicile of the proceedings. It dictates the "lex arbitri," the procedural law governing the arbitration, which encompasses crucial aspects like the validity of the arbitration agreement, the appointment and challenge of arbitrators, and the conduct of the arbitration itself. It is also submitted that the chosen seat in international arbitration may be different from the nationality of the arbitrator / arbitration tribunal and also actual hearing of the matter in question.

Crucially, the courts of the chosen seat exercise exclusive supervisory jurisdiction over the arbitration. This means they are the only courts empowered to hear applications to set aside or annul the arbitral award. The grounds for such challenges are determined by the law of the seat. Therefore, selecting a seat with a robust, predictable, and "arbitration-friendly" legal system is vital to minimize the risk of a successful annulment.

Furthermore, the seat significantly impacts award enforceability. The New York Convention, central to international enforcement, allows for refusal of enforcement if an award is set aside at its seat (Article V(1)(e)). Thus, a seat in a Convention signatory state with a track record of upholding awards enhances the award's global recognition. Finally, choosing a neutral seat fosters trust, impartiality, and party autonomy.

Key Requirements With Respect to Conducting the Process of International Arbitration Under Uncitral Model Law

The international laws of arbitration are primarily based on the UNCITRAL Model Law, adopted by many countries. This Model Law balances party autonomy with due process and judicial support. Key provisions include:

- **Arbitration Agreement (Article 7):** Requires a written agreement to arbitrate, including electronic communications.
- **Composition of the Arbitral Tribunal (Articles 10-15):** Parties can determine the number of arbitrators and the appointment procedure. Challenges to arbitrators are allowed under specific grounds.
- **Jurisdiction of Arbitral Tribunal (Article 16):** The tribunal can rule on its own jurisdiction, including the validity of the arbitration agreement.
- **Conduct of Arbitral Proceedings (Articles 18-27):** Ensures equal treatment, fair hearing, and procedural rules agreed upon by parties.
- **Arbitration Award and Termination of Proceedings (Articles 28-33):** The tribunal decides the dispute based on the chosen law, and the award must be in writing and signed.

The UNCITRAL Model Law emphasizes limited judicial intervention and robust enforceability of awards, aligning with the New York Convention.

Types of International Arbitration Awards

An international commercial arbitration award can either be domestic award or foreign award. Both types of awards if made by Arbitration Tribunal constituted in accordance with the provisions of Indian Arbitration and Reconciliation Act, 1996 may be binding upon the parties

- **Domestic Award:** An arbitral award made in the same country where its recognition and enforcement are sought. Its enforcement is governed by the national arbitration law of that country (e.g., Part I of the Arbitration and Conciliation Act, 1996 in India).
- **Foreign Award:** An Arbitration Award made in a country different from the country where a party seeks to have it recognized and enforced (the "enforcement forum") the same is known as foreign award. The steps to enforce the arbitration award in a country different from its origin includes recognition of such award in the country wherein its enforceability is sought.

The New York Convention provides a limited and exhaustive set of grounds on which a signatory state's court can refuse to recognize or enforce a foreign award. These grounds are generally procedural or related to public policy, ensuring that the merits of the dispute are not re-examined.

Step by step procedure for conducting the process of international arbitration

Sr. No.	Steps	Details
1	**Initiation of Arbitration (when a dispute arises)**	A claimant sends a formal "Request for Arbitration" to the respondent and institution (if any), outlining the dispute and claims. The respondent replies, often raising counterclaims.
2	**Determining the Seat of Arbitration**	Ideally, the parties agreed on the seat (the arbitration's legal home) in their contract. If not, the chosen arbitral institution will typically determine it. Failing both, the arbitral tribunal, once formed, decides the seat, considering neutrality, arbitration-friendliness of the jurisdiction, and practical convenience. The seat dictates the supervisory law and court for the arbitration, distinct from where hearings physically occur (the "venue").
3	**Tribunal Constitution:**	Arbitrators are nominated (often by parties, then the presiding arbitrator by the party-appointed ones). If deadlocked, the institution assists. Arbitrators must disclose conflicts and confirm impartiality.
4	**Jurisdiction Challenge (If Any)**	The tribunal determines its own jurisdiction and the validity of the arbitration agreement, adhering to the "competence-competence" principle.
5	**Procedural Roadmap**	The tribunal issues a "Procedural Order No. 1," outlining the arbitration timeline for submissions, evidence exchange, and hearings
6	**Written Submissions:**	Parties exchange detailed claims, defence and replies, supported by documents.
7	**Document Production:**	Parties exchange relevant documents, often through targeted requests.
8	**Witness/Expert Evidence:**	Written statements and reports are submitted, with witnesses and experts available for cross-examination during hearings.
9	**The Hearing:**	Oral arguments and cross-examinations take place in a private setting.
10	**Deliberation and Award:**	The tribunal deliberates and issues a final, binding, and reasoned arbitral award.
11	**Post-Award:**	Limited requests for corrections or interpretations of the award are possible.

What Happens if a State Forbids the Enforcement of ICA Award in their Country

Refusing to enforce an international arbitration award can have severe consequences for a state. It breaches international obligations, especially under the New York Convention of 1958, leading to reputational damage and reduced investor confidence. This can deter foreign investment and increase borrowing costs. The aggrieved party may seek diplomatic pressure or pursue asset seizure abroad. Additionally, other nations might reciprocate by refusing to enforce awards from the non-complying state, undermining the global arbitration system.

Position of India in Terms of its Emergence as Preferred Seat in International Arbitration

Current Status: India is gaining recognition for its pro-arbitration stance and improved legal framework. However, the volume of international arbitrations seated in India is still growing compared to established hubs 1.

Key Points for India's Traction:

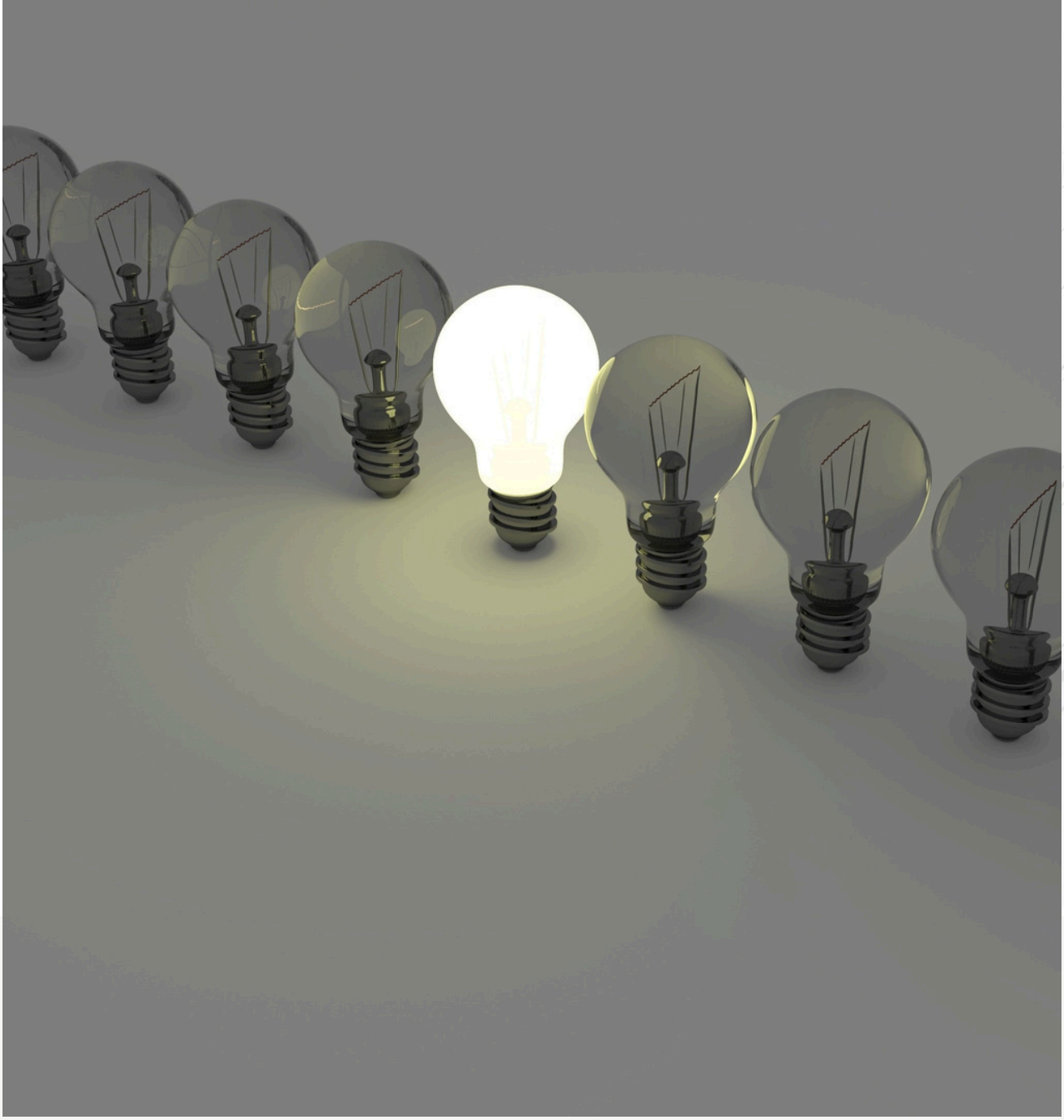
- **Legislative Reforms:** Amendments to the Arbitration and Conciliation Act, 1996, in 2015, 2019, and 2024 (draft bill) align it closer to the UNCITRAL Model Law. Key changes include limiting judicial intervention, introducing timelines, clarifying "seat" vs. "venue," and proposing emergency arbitration.
- **Judicial Support:** The Indian judiciary, especially the Supreme Court, has shown a significant shift towards a pro-arbitration stance, emphasizing limited judicial interference and upholding arbitral awards.
- **Emerging Institutional Infrastructure:** Institutions like the India International Arbitration Centre (IIAC), Gujarat International Finance Tec-City (GIFT City), and the Permanent Court of Arbitration (PCA) office in New Delhi are promoting India as a hub for international arbitration.
- **Cost-Effectiveness:** Arbitration costs in India, particularly legal fees, are significantly lower compared to traditional seats like London or Singapore.
- **Skilled Legal Professionals:** India has a large pool of English-speaking, common law-trained legal professionals with growing expertise in international arbitration.

Challenges:

- **Perception of Judicial Intervention:** The historical perception of excessive judicial intervention still lingers for some foreign parties.
- **Enforcement Delays:** Practical delays can still occur despite the law aiming for faster enforcement.
- **Awareness and Training:** Continued efforts are needed to build a stronger "arbitration culture" and ensure a broader pool of arbitrators specializing in complex international commercial matters.

Conclusion:

India is making significant strides and is increasingly considered a viable and attractive seat for international arbitration, especially for disputes involving Indian parties or those with a nexus to the Indian subcontinent. International Commercial Arbitration (ICA) is playing a pivotal role in fostering global economic integration by providing a neutral, enforceable, and flexible dispute resolution mechanism. Ongoing reforms and growing institutional support indicate a clear trajectory towards becoming a prominent global arbitration hub.



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