PANEL DISCUSSION

International Dispute Resolution - Perspectives from key stakeholders

2nd May at Taj Palace, Delhi

@ 10.00 a.m.

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International Dispute Resolution - Perspectives from key stakeholders

- ***Why arbitration should by preferred over litigation?***
- ***Should mediation precede arbitration?***
- ***Why institutional arbitration should be preferred?***
- ***Types of law applicable to arbitration***
- ***How to choose the right institution for your agreement***
- ***Which seat of arbitration is most suitable for your agreement***
- ***How to ensure arbitration remains inexpensive and time bound?***
- ***Drafting a suitable arbitration clause***
- ***Key considerations in international arbitration***
- ***How to make India the preferred venue of International Arbitration?***
- ***Why Singapore, London, Paris, Dubai, Hong Kong are emerging areas of arbitration venue?***

Litigation or arbitration?

ADVANTAGES OF ARBITRATION

- **Avoids Hostility**
- **Faster than Litigation**
- **Usually Cheaper than Litigation**
- **Flexible**
- **Private**

That is one of the first questions that lawyers new to the field of international dispute resolution grapple with. Is it preferable for parties to submit their disputes to the courts of a state, or to an arbitrator, or panel of arbitrators, sitting in a neutral jurisdiction?

In practice though, how often do parties negotiating international contracts really spend debating the respective merits of litigation or arbitration?

- First, international arbitration benefits from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). Despite its title, the Convention provides for the enforcement of both international arbitration awards and international arbitration agreements. 148 countries are presently party to the Convention, making it one of the most successful and influential treaties in the field of international commerce. Although enforcement of European court judgments within Europe is relatively straightforward, and certain countries (such as the United Kingdom) have entered into a network of treaties for the reciprocal enforcement of court judgments, the enforceability of arbitration awards, pursuant to the Convention, is one of the

principal reasons for arbitration's popularity. The Convention is not perfect: it was drafted half a century ago in a world which bore little resemblance to today's globalised and interconnected economy, and the record of compliance with the Convention in certain regions is mixed. But it remains the case that a party with an international arbitration award is often in a far better position to enforce than a party with a court judgment.

- Second, arbitration offers dispute resolution in a neutral forum. Although the courts of the "seat" where the arbitration is situated may have some role to play in supporting and policing the arbitration, it is generally left to the arbitrators to determine the merits of the dispute. Parties worried about the sophistication, or partiality, of national courts can have their dispute resolved by neutral arbitrators in a neutral forum.
- Third, arbitration proceedings are generally private and the parties can agree that the fact of the arbitration, any information exchanged during it, and the outcome of the process are kept confidential. This makes a stark contrast with litigation, which is invariably public, and involves the parading of "dirty laundry" through the press in high profile proceedings. There is some evidence that the confidentiality of arbitrations is being progressively chipped away, but the nature of arbitration is that it is consensual: parties can seek to agree watertight confidentiality provisions when they agree to arbitrate.
- Fourth, one of the reasons why litigation is unpopular is the perceived opportunity to frustrate the enforcement of any judgment with lengthy appeals. By contrast, arbitration awards are generally final and, where scope exists to challenge them, this is on narrower grounds than that found in national court systems. Arbitration is often more efficient, with "one stop" adjudication substituting for trials and extensive appellate reviews.

- Finally, there are the factors that provided the motivation behind the origins of arbitration: flexibility of the process, speed and efficiency and the ability to select a specialised tribunal of arbitrators with technical experience. Although these remain the reason why, in certain sectors (such as shipping and insurance), arbitration is the preferred choice, their value has diminished as the development of arbitration as a forum for resolving high-value international disputes has resulted in a more formulaic, time-consuming and expensive disputes process. This is a common criticism of arbitration and is an issue that institutions are grappling with.

There are, of course, other countervailing factors in favour of litigating, rather than arbitrating.

Should mediation precede arbitration?

The arbitration may be preceded by mediation if agreed with by both parties. However, mediation may happen at any time during negotiations if agreed with by both parties.

Institutional arbitration

There are a number of benefits to conducting arbitration under the auspices of one of the major institutions. Firstly, the arbitration institution will supervise the conduct of the arbitration. It will assist in the appointment of arbitrators and will give practical guidance on how to interpret its procedural rules. Some institutions (notably the ICC) will review the arbitration award and recommend any changes to the tribunal. This adds another layer of protection against errors in the arbitration award – of particular importance when the ability to appeal an award has been curtailed through the arbitration clause, the procedural rules or procedural law.

Secondly, the institution can act as an appointing authority. Arbitration clauses can provide that the institution is responsible for appointing the chair arbitrator after the parties have each nominated one arbitrator on a three-person panel or that the institution appoint the entire panel of one or three arbitrators. The institution can also appoint an arbitrator if one party fails to nominate an arbitrator. In this respect, arbitration institutions can act as a form of quality control, appointing arbitrators with appropriate experience and a proven track record.

A third benefit in using institutional arbitration is that it can make the recognition of an award more straightforward, since the procedures adopted by the institution will be well known and less open to challenge. Arbitration institutions charge a fee for the administration of the arbitration and this can make administered arbitrations more expensive. However, the predictability of institutional rules and the assistance of the institution in administering the arbitration can lead to fewer procedural difficulties, which may reduce time and costs. It is important to consider the way in which the institution's fees are structured, as the proportion of fees required at an early stage in the arbitration varies.

Types of law applicable to arbitration

By far the most important international instrument on arbitration lawis the 1958 **New York Convention on Recognition and Enforcement of Foreign Arbitral Awards**. Some other relevant international instruments are:

- **The Geneva Protocol** of 1923
- **The Geneva Convention** of 1927
- **The European Convention** of 1961

- **The Washington Convention** of 1965 (governing settlement of international investment disputes)
- **The UNCITRAL Model Law** (providing a model for a national law of arbitration)
- **The UNCITRAL Arbitration Rules** (providing a set of rules for an ad hoc arbitration)

The Applicable Arbitration Law**India**

The Indian Arbitration and Conciliation Act, 1996 the governing arbitration statute in India. It is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985.

Previous statutory provisions on arbitration were contained in three different enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration and Conciliation Act, 1996 has repealed the Arbitration Act, 1940 and also the Acts of 1937 and 1961.

International Conventions on Arbitration

India is a party to the following conventions:

- the Geneva Protocol on Arbitration Clauses of 1923
- the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and
- the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961.

There are no bilateral Conventions between India and any other country concerning arbitration.

The Types of Arbitrations

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

1. an individual who is a national of, or habitually resident in any country other than India; or
2. a body corporate which is incorporated in any country other than India; or
3. a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or
4. the Government of a foreign country.

How to Draft an Arbitration Agreement?

A good arbitration agreement is one which minimizes complications when a dispute arise. However, many a times people neglect to pay attention while drafting an arbitration agreement.

Before finalizing an arbitration agreement, the terms should be thoroughly discussed and negotiated to avoid any misunderstanding at a later stage. **Arbitration lawyers from all applicable jurisdictions must be consulted before finalizing any arbitration agreement.**.

Before signing an **Arbitration Agreement** the following must be properly addressed:

- Applicable law to arbitration
- Location of Arbitration
- Number of Arbitrators
- Language of Arbitration
- Discovery procedure
- Limitation to arbitration powers
- Interim measures/Provisional Remedies
- Privacy
- Rules Applicable
- Appeal & Enforcement
- Be aware of local peculiarities
- Survival after Termination of the main agreement.

The arbitration agreement should be modified as applicable under different circumstances. One brush should not paint all the painting.

HOW TO CHOOSE THE RIGHT INSTITUTION

Selecting an Institution for resolution of dispute is one of the most important decision which is to be taken by the Parties. Some organizations welcome any type of dispute. In contrast, there are organizations that specialize in particular types of disputes, such as those involving investments (e.g. ICSID) or that focus on a particular topic, such as intellectual property disputes (e.g. WIPO Arbitration and Mediation Center), sports-related disputes (e.g. Court of Arbitration for Sport). Some arbitral bodies also specialize in disputes in particular industries (e.g. Society of Maritime Arbitrators).

Another factor in selecting an institution is the nature of the party: One institution may be open only to states or member governments (e.g. WTO Dispute Settlement System), while another may be available to states or private parties (e.g. Permanent Court of Arbitration).

SEAT OF ARBITRATION - The choice of the seat is important in an international arbitration because its law will be the procedural law deemed applicable to the arbitration. By contrast, the rights and obligations of the parties will be governed by the substantive law applicable to the dispute.

Most parties consider legal considerations important in selecting a seat for arbitration that a place be chosen that has a judicial system that is free from corruption; that has an arbitration regime that permits no interference in the process itself; and that generally upholds awards that are rendered in its jurisdiction. The United States, the U.K., France, The Netherlands, Germany, Switzerland, Sweden, Canada, Australia and Hong Kong are popular venues because they enjoy reputations as jurisdictions favorable to arbitration and where awards are rarely set aside.

There are also non-legal reasons why some places are better than others. Questions that a contracting party should ask include:

- What place offers to you and your team the best logistics?
- What is the availability of hotels?
- Will they accommodate your needs?
- Will you have easy access to videoconferencing facilities, copying facilities, court reporters?

While all of this may seem obvious at first glance, in fact in some countries these facilities may not be readily available. For Example, finding English language court reporter in some places in Europe outside of the UK at a reasonable cost can sometimes be a challenge.

To sum up, in determining where to arbitrate, following things must be taken into consideration:

- The place under consideration be a country that is signatory to the New York Convention.

- Whether the country has a friendly regime. That is one that will not tamper with an award once it is made or interfere with the process while it is underway.

- Ensure that the seat has logistical support for the effective and efficient resolution of complex disputes that an international arbitration generates.

- Finally, it is important to consider whether the chisen arbitration provider has an office, a Resolution Centre, or other place to conduct the arbitration. As important as the legal considerations are, these non-legal factors and others such as easy access and the availability of hotel and logistical facilities for attorneys, executives, witness and experts are also critical.

The United States measures up well to all these criteria. But, it also offers something more; an environment conductive to the mutual and cost effective resolution of disputes with trained and experienced arbitrators.

By latest judgment of Supreme Court in **Yograj Infrastructures Limited v. Ssang Yong Engineering and Constructions Company Limited** (AIR 2011 SC 3517). Supreme Court has made it clear that Part 1 of the Act will not be applicable as arbitration seat is outside. It will be bound by Singapore International Arbitration (SIAC) Rules.

Therefore, keeping in mind the stringent arbitration laws in India, best seat would be the United States Seat.

SUITABLE ARBITRATION CLAUSE

While drafting an Arbitration Clause, parties should take into consideration following things,

- Appointment of the arbitral tribunal
- Place where the arbitration is to be held.
- Procedural rules that will be applied in the arbitration
- Law governing the contract
- Language of the arbitration
- Exclusion of the right to recourse.
- Consolidation
- Appointment of the arbitral tribunal.

InInternational Arbitration Clause:

- The speed with which decision is required.
- The location of relevant parties, and their assets.
- The language to be used in arbitration.

- Whether the resolution if the dispute is likely to require an oral or written evidence.
- Whether, pre arbitration ADR, i.e. Mediation is desired.
- Whether there are any particular types of disputes which would be more suited to expert determination rather than Arbitration.

MAKING INDIA A PREFERRED VENUE OF INTERNATIONAL ARBITRATION

Although the huge influx of overseas commercial transactions spurred by the growth of the Indian economy has resulted in a significant increase of commercial disputes, arbitration practice has lagged behind. The present arbitration system in India is still plagued with many loopholes and shortcomings, and the quality of arbitration has not adequately developed as a quick and cost-effective mechanism for resolution of commercial disputes.

An examination of the working of arbitration in India reveals that arbitration as an institution is still evolving, and has not yet reached the stage to effectively fulfill the needs accentuated with commercial growth. Viewed in its totality, India does not come across as a jurisdiction which carries an anti-arbitration bias. Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards.61 However, there are still inherent problems that hindered in the working of successful arbitration in India which are multifold – starting from requirement for amendment of certain provision of law to changing the mindset of the stakeholders who are judges, arbitrators, lawyers and parties involved.

The government should disseminate knowledge of the benefits of alternate dispute resolution mechanisms to foster growth of an international arbitration culture amongst lawyers, judges and national courts. The real problem in enforcing foreign awards around the globe despite the enabling provision of the New York Convention, 1958, is not a legal one; but it is a lack of awareness particularly, amongst lawyers and judges, of the benefits of international arbitration and of its true consensual nature.

There is an emerging trend to go for settlement of business disputes by institutional arbitration, provided such institutions maintain quality standards in conducting proceedings. The standards are evaluated in terms of professional arbitrators, infrastructure facilities, time and cost saving procedures and uniformity of laws - standards that will make the ADR system more sound and acceptable among the business community. Independent institutions should impart training for nurturing competent professionals who are trained to delve into the crux of the dispute for its resolution.

SINGAPORE, LONDON, PARIS, DUBAI AND HONG KONG, EMERGING AREAS OF ARBITRATION VENUE

These are the nations which have recently emerged as leading venues for international Arbitration across the globe. Following are the few reasons describing the sudden emergence of these nations as prime venues for International Arbitration.

- Excellent geographic location. For example, Singapore situated in the heart of South-East Asia it is surrounded by the countries of the region, including Indonesia, Malaysia and Thailand. Further afield there are the giant countries of China to the east and India to the west.

- These are modern, clean and extremely efficient countries with an excellent infrastructure and world class communications.

- Government and courts of these Countries have a reputation for integrity and competence when it comes to resolving Arbitration disputes.

- The courts have proven to be very knowledgeable on international arbitration and are extremely supportive of it. There are many recent decisions of the Supreme Court of Singapore striving to uphold arbitration agreements, enforcing foreign awards and expressing a public policy that the decision of contracting parties to arbitrate their disputes should be upheld and given effect except in the most extreme situations.The physical manifestation of the emergence of Singapore as a leading venue for international arbitrations is the establishment of Maxwell Chambers, undoubtedly the leading arbitration facility in the world.

These were few of the many reasons as to why and how these Countries have emerged as areas of arbitration venue at an International Level.