A COMPARATIVE ANALYSIS OF INDIAN, ENGLISH AND MODEL LAW ON VALIDITY OF ARBITRAL AWARDS AND RECOURSE AGAINST AN ARBITRAL AWARD

Umika Sharma

University School of Law and Legal Studies, GGSIPU, Delhi

Introduction

With the rapid advancements in technology, the face paced development of economies has naturally led to unprecedented commercial growth. One of the outcomes of such growth is the clash of interests which leads to disputes. These conflicts need a robust and fast resolution mechanism so that businesses do not suffer the consequences of a lethargic legal system. This is where dispute settlement mechanism like arbitration steps in. However, in a country like India, arbitration has not received its due credit as an efficient method of conflict resolution. The field of arbitration lies at the intersection of internationally followed principles of law and tailor-made national legislation. It is one of the most dynamic fields today with constantly evolving policies. India recently came up with organic amendments so that its domestic law come in consonance with internationally set standards of arbitration. The plurality with which international and national communities look at the interpretation of the same core principles is an interesting area of private international law. The multi-faceted approach of the UNCITRAL Model Laws to be able to accommodate different legal systems of the world has resulted in the formulation of various definitions for the same terms. This marriage of laws has produced enough commotion to confuse even the best legal experts across jurisdictions.

This article makes an attempt to draw a comparison between the UNCITRAL Model Law, the English law, and the Indian law with respect to essentials of a valid arbitral award and also the recourses available against an arbitral award. The UNCITRAL Model Law can be considered to be the central law, based on which various countries have adopted their domestic arbitration laws. The jurisdiction of England has been chosen because the English system is considered one of the best arbitration systems in the world. Furthermore, it is one of the few jurisdictions that has not blindly adopted the Model Law and is known for giving its individualistic take on interpretations of principles. Furthermore, the fact that England being a common law jurisdiction, its comparison with another common law jurisdiction like India is a logical outcome. Finally, India is also a part of this tripartite comparison to facilitate meaningful interaction between the Model Law, English legislation and the Indian laws.

Essentials of a Valid Arbitral Award

Despite the importance of the concept of an 'arbitral award', neither international arbitration conventions nor national arbitration legislations contain express definitions of what constitutes an arbitral 'award', nor what distinguishes an "award" from other arbitration decisions. Thus, it becomes all the more essential to take the aid of various international conventions to be able to formulate any definition of the term 'arbitral award'.

As per Russell[1], in principle, an award is the final determination of a particular issue or claim in arbitration. An award can be out in comparison with orders and directions which address the procedural mechanisms that can be easily adopted in the reference.[2] There is no internationally accepted definition of the term 'award.'[3] Redfern and Hunter observe that no exact definition can be found in the main international conventions dealing with arbitration, including the Geneva treaties, the New York Convention, and the Model Law.[4] The nearest the New York Convention comes to a definition is in the form of Article I(2) which states that:

The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

Furthermore, one can refer to the various international conventions for grasping the form and contents of an arbitral award to be able to ascertain a definition. As per Article 31 of the UNCITRAL Model Law on Arbitration which provides that:

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

[1] Russel on Arbitration by David St. John Sutton, Sweet and Maxwell, 24th Edn., 2015, para 6-002, p. 290.

[2] Law Relating to Arbitration and Conciliation by Dr. P.C Markanda, Lexis Nexis, Buttersworths Wadhwa, Nagpur, 8th Edn., 2013, p. 37.

[3] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 9.05, p. 502.

[4] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 9.05, p. 502.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Here, it can be pointed out that the requirements are that firstly, the award must be in writing and signed by the arbitrators. Secondly, there should be a statement of reasons on which the award is based. This particular provision contains two exceptions. These are:

i. The parties may "agree otherwise," apparently implying that the decision can be given in another form or no reason can need to be given at all.

ii. The second exception applies in the case of an award on agreed terms under Article 30.

An award on agreed terms only means that the award was passed by the consent of both the parties.

Coming back to the third requirement under the Model Law, it clarifies on the date and place of the award of the arbitration. The second sentence of Art. 31(3) concludes that the award shall be deemed to have been made at the place stated in the award.[5] The fourth requirement concerns itself with the delivery of award. It states that the signed award is then delivered to each party.

Furthermore, under English Law, Section 52 of the Arbitration Act, 1996 provides:

Form of award.

(1) The parties are free to agree on the form of an award.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.

(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

(5) The award shall state the seat of the arbitration and the date when the award is made.

The main contention as per the above section is that the award must comply with any requirements as to the form agreed between the parties and in the absence of agreement, the statutory provision under Section 52(2) to (5) will come into play. It needs to be pointed out that this section is quite similar to the Model Law. However, there is no requirement that the document comprising the award must be of a particular type or that it even describes itself as an award.[6]

[5] International Commercial Arbitration and Conciliation In UNCITRAL Model Law Jurisdictions by Dr. Peter Binder, Sweet and Maxwell, 3rd Edn., 2010, para6-064, p. 355.

[6] Russel on Arbitration by David St. John Sutton, Sweet and Maxwell, 24th Edn.,2015, para 6-045, p. 309.

Under the English Law, certain substantive requirements of an award can also be enumerated as under:[7]

i. The award must comprise a decision by the tribunal.

ii. It must be a complete decision with respect to its finality when it comes to the issues or claims it deals with.[8]

iii. The award must be certain in the sense that the tribunal's decision must be clear along with the nature and extent of duties imposed on the parties.

In India, Section 31 of the Indian Arbitration and Conciliation Act, 1996, comes in handy when it comes to the form and contents of an arbitral award. The section does not prescribe any particular form of passing an award, but it clearly states that the award must be in writing and also needs to be signed. This particular section covers all the requirements as enumerated under the Model Law.

Redfern and Hunter[9] candidly state that the best awards are short, reasoned and simply written in clear, unambiguous language. Furthermore, the arbitral tribunal should aim at rendering a correct, valid, and enforceable award. It needs to be done so because of a legal duty to parties under some systems of law, or it can be an obligation under rules of arbitration. For instance, Article 35 of the ICC[10] states that:

In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.

As a matter of practice, the requirements of the form of an award are dictated by the arbitration agreement (including the rules of any arbitral institution chosen by the parties) and the law governing the arbitration (the lex arbitri).[11] As noted by Redfern and Hunter, the only arbitration institution that sets out the specific obligations for an arbitrator when writing an award is ICSID under Rule 47, which states:

(1) The award shall be in writing and shall contain:

(a) a precise designation of each party;

[7] Ibid.

[8] Ronly Holdings Ltd. v. JSC Zestafoni G. Nikoladze Ferroallow Plant [2004]B.L.R. 323.

[9] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 9.139, p. 549.

[10] Rules of Arbitration of the International Chamber of Commerce (in force as from 1 January 1998)

[11] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 9.142, p. 550.

(b) a statement that the Tribunal was established under the Convention, and a description of the method of its constitution;

(c) the name of each member of the Tribunal, and an identification of the appointing authority of each;

(d) the names of the agents, counsel and advocates of the parties;

(e) the dates and place of the sittings of the Tribunal;

(f) a summary of the proceeding;

(g) a statement of the facts as found by the Tribunal;

(h) the submissions of the parties;

(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and (j) any decision of the Tribunal regarding the cost of the proceeding

It also has to be kept in mind that the contents of an award are majorly dependent on the arbitration agreement and the lex arbitri.[12] As per Redfern and Hunter, the contents can be quickly enumerated as unambiguity, determination of issues and a reasoned award.

Recourse against an Arbitral Award

After the passing of an award, there are two ways forward. Either the parties can accept the award and get it enforced or such an award can be challenged in national courts. The challenge of an arbitral award can be based on very limited grounds that are more or less the same across jurisdictions. The problem arises with respect to the interpretation of the scope of these particular grounds.

Gary Born notes that if parties are not bound by the results of the awards made against them, then such awards do not achieve their intended purpose.[13] He further notes that one of the fundamental objectives of international arbitration is to provide a final and binding resolution of the parties' dispute(s).[14]

As per Article 35(1) of the Model Law and as in most legal systems, awards made in the arena of international commercial arbitration are accorded the same preclusive effects that national court judgments receive under the domestic law. Furthermore, Article 6 of the Model Law, provides for each State to designate the court, courts or other authority competent to perform the functions laid down by the Model Law, which includes the

[12] Ibid.

[13] International Arbitration Cases and Materials by Gary B. Born, Wolters Kluwer, 2nd Edn., 2015, p. 1113.

[14] Ibid.

setting aside of award under Article 34. As per the Article, each State is to specify the body which will have the competence to deal with matters specified in the Article.

There are numerous grounds on which an arbitral award can be challenged in a national court or a 'competent court' as per the Model Law.[15] In India, the High Courts are considered as the relevant court for the purpose of challenging international commercial arbitration awards.[16] Similarly, in England, the Commercial Court of the Queen's Bench Division in the High Court of Justice serves the same purpose.[17]

As per Article V(1)(e) of the New York Convention, recognition and enforcement of an award may be refused on the ground that the award has been 'set aside by the competent authority of the country in which, or under the law of which, that award was made.' Many countries, including India read this provision to imply that their courts can set aside awards made in arbitrations where the substantive law was theirs. The Bhatia Case[18] was a glaring example of such an interpretation. Though, this position was later on changed by the Indian Supreme Court in the BALCO Case[19] where the Court held that Indian courts would no longer be able to vacate international arbitral awards not seated in India or issue interim measures concerning ongoing international arbitrations seated abroad. As of now, post the amendments done to the Arbitration and Conciliation Act, 1996, the position again stands modified. Now, Indian courts can interfere in international arbitrations only in certain cases [e.g.,. Section 9, 27(1)(a) and 37(3)] provided that there is no agreement to the contrary between the parties.

As per Redfern and Hunter, each State has its own concept of what measure of control it wishes to exercise over an arbitral process that takes place in its territory, and, in particular, whether it wishes in this respect to distinguishing between 'domestic' and 'international' arbitration.[20] Thus, it becomes necessary to consult the law of individual States to ascertain the grounds on which an award can be challenged in a national court. Broadly, the grounds of challenge may be categorised into three parts:[21]

i. Grounds that relate to the adjudicability of the claim in question. These can be further categorised as:

    a) Issues of incapacity

[15] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 10.24, p. 577.
[16] As per Section 2(e)(ii) of the arbitration and Conciliation Act, 1996 (26 of 1996).
[17] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 10.25, p. 577.
[18] Bhatia International v. Bulk Trading SA, (2002) 4 SCC 105.
[19] Bharat Aluminium Co. (Balco) v. Kaiser Aluminium technical Services, (2012) 9 SCC 552.
[20] Law and Practice of International Arbitration by Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides, Sweet and Maxwell, 6th Edn., 2015, para 10.34, p. 581.
[21] Ibid at para 10.41, p. 583.

b) Invalid agreements to arbitrate

c) A tribunal's excess of powers

d) Issues of the arbitrability of subject matter of the dispute

ii. Procedural grounds, which can be issues related to the composition of the arbitral tribunal

iii. Substantive grounds, which can be enumerated as follows:

a) Mistakes of law

b) Mistakes of fact

c) Public policy

It can be seen that Article V of the New York Convention sets out the grounds on which recognition and enforcement of an arbitral award may be refused. Further, Article 34 of the Model Law provides almost the same grounds on which an award can be set aside. These grounds can be briefly enumerated as:[22]

i. Lack of capacity to conclude an arbitration agreement or lack of a valid arbitration agreement;

ii. The aggrieved party was not given proper notice of the appointment of the arbitral tribunal, or the arbitral proceedings, or was otherwise unable to prescribe its case;

iii. The award deals with matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted;

iv. The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself;

v. The subject matter of the dispute is not capable of settlement by arbitration under the law of the State in which the arbitration takes place; and/or

vi. The award (or any decision within it) is in conflict with the public policy of the state in which the arbitration takes place.

These grounds are almost identical to those that are available in India under Section 34 (for domestic arbitrations) and Section 48 (for international arbitrations). The latest amendment has narrowed down the grounds of a challenge with respect to public policy when it comes to the case of international arbitrations. Under arbitration law, 'public policy' appears under Sections 34 and 48 of the Arbitration and Conciliation Act. Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an

[22] Ibid at para 10.38, p. 582.

international commercial arbitration. On the other hand, Section 48 deals with conditions for enforcement of foreign awards. As the Act is currently drafted, the grounds for setting aside (under Section 34) and conditions for refusal of enforcement (section 48) are *pari materia*. The Act, therefore, treats all three types of awards which include entirely domestic awards, domestic awards in an international commercial arbitration and foreign awards on the same footing.

Under the English Law, parties can only challenge or appeal an arbitration award on three grounds:[23]

(i) a challenge on the grounds that the tribunal lacks substantive jurisdiction under Section 67,

(ii) a challenge on the basis of serious irregularity causing substantial injustice under Section 68, and

(iii) an appeal on a point of law under Section 69.

Under the Act, only Sections 67 and 68 are mandatory provisions.[24]

Concluding Remarks

Conclusively, arbitration is one such field where every individual country is given leeway to mold and interpret their laws as per their legal systems. The UNCITRAL Model Law is drafted in such a manner that be it a common law or a civil law country or a country with any legal system. The Model Law can be tailor-made to suit the individual requirements of the countries and at the same time, also ensure that at least a certain level of uniformity can be maintained across jurisdictions. It can be clearly seen above that when it comes to some basic aspects of arbitration; different jurisdictions have differing requirements. Though most of the countries have followed the Model Law, they have also modified this law to suit their respective legal systems. A comparison between these three proves the hypothesis that arbitration is a truly global law along with the ability to be molded as per country needs.

[23] English Courts Set Aside Award on Grounds of Serious Irregularity under Section 68 of the Arbitration Act 1996 by Maguelonne de Brugiere, March 24, 2015, Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/2015/03/24/english-courts-set-aside-award-on-grounds-of-serious-irregularity-under-section-68-of-the-arbitration-act-1996/, (last accessed on 3rd August, 2016).

[24] Ibid.