Role of Socio Economic Factors Affecting International Commercial Arbitration

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Abstract: International commercial arbitration and arbitrators have enticed the interest and criticism of researchers from all over the world, especially for determining the productivity of arbitration and the professionals involved in this community. Being a developing country, India has gained popularity in the global business environment and entices a need for efficient arbitration reform, for which having a comprehensive knowledge about influential socio-economic factors is highly imperative.

The objective of this paper is to identify and determine the influence of socio-economic drivers on the international commercial arbitration and arbitrators of India. The research further delves into determining the efficacy of the current arbitration system in international commercial business of India and the shortcomings concerned with the same.

Secondary data collection is utilized as the method for meeting the defined objectives in the current research, where critical exploration of the literature is performed.

The social, cultural and legal factors have a profound influence on the decision-making of arbitrators in the international commercial arbitration. The current arbitration system of India is found to be flawed in terms of professionalism, institutionalism, impartiality and independency.

Key words: International commercial arbitration, arbitrators, socio-economic factors

1. Introduction

The concept of resolving issues without litigation has piqued interest of several parties with diverse legal and cultural credentials, thus increasing the acceptability quotient of arbitration1. Tracing back to the history, arbitration was practiced among elders, who were accountable for resolving the impending community disputes and were known as arbitrators. Now the process of arbitration has evolved into a complicated phenomenon with refined rules and procedures, as the resultant of political and economic conditions2. Arbitration is seen as an efficient alternative method against disputes pertaining to domestic, commercial and cross-border backgrounds by converging new practices and common laws3. It serves as a meeting point of an international arbitration culture that provides speedier settlement of commercial and other international disagreements4. The practice of arbitration involves the disputing parties and an arbitrator (third party) who deliberates on the facts of the disputing case and renders a final decision known as an award. Some argue that arbitration and the convergence of practices is a resultant of competition among various players for gaining benefits in the evolutionary spectrum of international commercial arbitration5. Also, the economic, social and cultural factors are believed to be the drivers of this convergence and interchange between practitioners in arbitration.

The acceleration of international trade due to the predominance of globalisation and liberalization has enticed the growth of international commercial disputes, and with it arbitration6. The preference of arbitration over the judiciary processes has been fuelled by the unwillingness of the international communities in resolving their matters within the premises of the unfamiliar law and culture of the disputing party. In the international commercial realm, numerous superfluous factors might affect the quick resolution of disputes in the legal systems that hinders the development of international businesses7. Regulatory compliance, high time-consuming and expensive processes and eccentric legal rules are some of these deterring factors. Thus, the popularity of arbitration against national courts is not only

4 N K Sasan, ‘Arbitration as a Method of Dispute Resolution in India’ 2012 Global research Analysis, 1 (5).
facilitated with its effective resolution against disputes but also the elasticity it offers to the parties in dispute. The advantage of flexibility regardless of the differences in legal cultures and languages given to the involved parties provides an edge to the process of international commercial arbitration. However, with development, more complex and practical issues have emerged in arbitration pertaining to the implementation of arbitral awards in different legal systems and the decision-making of arbitrators. The shortcomings of the international dispute resolution mechanism ranges from the variation in the cultural perception of the arbitration practice in different countries to jurisdiction and diversity levels. The latent frailties in arbitration practice can be a consequence of poor synchronization and convergence of legal and social attributes related with laws.

In India, the arbitration practice was instigated and followed in accordance to the English Arbitration Laws, which were then replaced by the first Indian Arbitration Act 1899. The refined arbitration law in India was then specified in the Arbitration and Conciliation Act 1996. Arbitration practice is a constitutional right that can be initiated for solving disputes without any prohibition from the Indian government. The disputing parties can settle for a contract with flexible arbitration clauses to reach an agreement. Separate agreements can be formed for individual parties determining their disputes that have emerged over time or can arise in future regarding their legal or contractual relationship. The court is under obligation to not intervene the validity of the agreement and refer the parties to arbitration as per the clauses in their arbitration agreement. Being one of the developing countries, India has shown tremendous potential in terms of foreign investment incursion, overseas commercial transactions and advancing economic policies that have further fuelled the rise of disputes and the need for preserving business relationships. Thus, the emphases on the India’s international arbitration regime has acquired high attention from the international communities. Also, the basis and fairness of arbitrators’ decisions are highly questioned, which has motivated several researches in this domain. The major requirements demanded from an arbitrator is impartiality and independent decision. The process of the neutrality of the arbitration choice is the most important factor which has to be solved in dispute of commercial international policy. The impact of the international commercial arbitration is concerned with the community of arbitration which has called “arbitration is found to be good only with arbitrators” and the impartiality issues are highly interested in the minds of the legitimacy. The impartiality which always moves along with the issues of the arbitrators independency are the challenging requirement in arbitration rules, institutional rules and model law. In the last few decades, international arbitration and arbitrators have enticed the interest and criticism of researchers from all over the world, especially for determining the process of arbitration and the professionals involved in this community. Law, being a highly prominent entity in the legal system of any country, research of socio-economic factors affecting it are limited. Moreover, none of the studies have addressed the impact or relationship between socio-economic factors and international commercial arbitration and arbitrators. This work therefore, reviews the role of arbitration is resolving the international business disputes in India and the efficiency of the current arbitration system. Secondary data exploration is conducted to estimate the relationship between socio-economic factors and the international commercial arbitration in India. The present study will delve into the accomplishments and efficacy of the Indian arbitration system, its inadequacies and weaknesses while noting socio-economic factors which may contribute to either, thus investigating its significance in the international commercial dispute resolution platforms. The research will conclude on this note and recommendations will be given for the way forward.

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2.1 International Commercial Arbitration

This alternative process for dispute resolution among multinational parties has emerged with the acceleration of globalization and liberalization that has furthered the growth of cross-national business partnerships. Independent arbitrators, being the substitutes for national courts, have driven transnational litigation and arbitration.

International commercial arbitration happens between individuals and corporate firms in different states. Main reason for employment of such specific type of extra-judicial proceeding is to settle the corporate arguments such that the current process saves the affected parties from the tribulations and trials, which are not favourable to the local judicial events that are participated in litigations. Unlike court proceedings, arbitration is a method for reaching a prompt and effective resolution from an impending dispute between two parties. This method allows a faster solution to the disputing parties without any room for perpetuation, while resolution of disputes via the means of court might take a number of years.

The UNCITRAL Model Law aims at enforcing a just, productive and focused arbitral procedure for the betterment of the international commercial arbitration. This law emphasizes on achieving the following goals:

- Providing superiority to the disputing parties in acquiring flexibility regarding the arbitral process and without the intervention of national courts.
- Enforcing justness by generating awards within few provisional steps, which are to be carried out by the disputing parties.
- Irrespective of not reaching a harmonious agreement within the disputing parties, the rules will be based on advancing arbitration.
- The settlement agreement between the disputing parties through conciliation proceedings will equate the status of an arbitral award.

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23 Aparajita, “International Commercial Arbitration (Ica) - Indian Perspective” 2015 International Journal for Legal Developments and Allied Issues Volume 1 Issue 3 [ISSN – 2454-1273].
After the process of arbitration, the arbitrator generates and award and leads to the final and binding decision that determines the legal rights and obligations of the disputing parties. If the parties submit to arbitration, then they are obligated to follow the final verdict and carry out the award without any delay.

2.2 Current International Commercial Arbitration System in India

The international commercial arbitration in India has shown remarkable increase due to the swelling cross border commercial disputes among the concerned business parties commencing international trade. India is a significant international business target and as in most developing nations, the litigation is a time consuming and costly process, the companies have shown the preference of arbitration over legal proceedings. The different economic standards in the overseas commercial trade has fuelled the international disputes and thus the corresponding method of resolution i.e., arbitration in India. This field, which is relatively new yet overpowering, requires definitive provisions of determining the nation’s dispute resolution that are in alignment with the international regime. An optimal system is not only beneficial for the disputing parties but also for the effective instigation of economic reforms.

The arbitration legislation in India, alternative dispute resolution (ADR), is contained in the Arbitration and Conciliation Act, 1996. Undergoing several modification, this act is developed on the grounds of UNCITRAL Model Law, 1985, on the international commercial arbitration. The intended goal of this arbitration act is to provide speedy and just process for dispute resolution, which lies in alignment with the Indian judiciary system, where retired judges acts as arbitrators. Apart from these, the aforementioned goals of UNCITRAL Model Law are followed by the act of Arbitration and Conciliation. This law provides an in-depth legal basis for arbitral procedure, while meeting the needs of international regime. The Arbitration and Conciliation Act, 1996 is concerned with the following components:

i. The act deals with the domestic and international commercial arbitration, when placed in India
ii. The act handles the statutory mechanism of resolution rules
iii. The act handles the requirements related with foreign award pertaining to its execution

It is noteworthy that in India, the average time taken for instigating the arbitral proceedings and reach to a decision and award, is suggested to be less than three years by the organizations who have delved into this process.

2.2.1 Challenges Encountered

The alternative dispute resolution in India plays a detrimental role in the economy when it is inefficient in serving the goals within the constraints of law. The most prominent shortcoming of the Indian commercial arbitration system is the complexity and range of ADR processes and methods that are incomprehensible and creates chaos in the resolution procedure. The system lacks in placing an adequate, appropriate and efficient legal framework of arbitration as the current system fails address pervasive injustice, discrimination and human rights. The Indian litigation system has failed to apply arbitral awards on time with no reconsideration of arbitral decision on the merits. The current system is unable to improve the administration of justice and the clearance of specific disputes. Few studies have also determined that the settlement between the disputing parties through arbitration takes 3-5 years. Such delay of cases raises concerns with development objectives such as economic restructuring, regulation of conflicts, and barrier in foreign investments. Also, the judges are believed to efficiency and ability in terms of taking impartial decisions. Moreover, the low fees paid to the institutional arbitration and arbitrations imposes a challenge to the commercial arbitration system. Apart from these concerns, biasness and fraud in dispute resolution may also lead to arbitration outside India, where the fixed procedural rules and

31 UN Doc. A/39/9,248, 21 May 1996. India is one of the countries which have adopted the UNCITRAL Model Law, as it is.
costs imposes additional challenges. To summarize in a concise manner, the arbitration system in India lacks the optimal level of professionalism and institutionalism, which needs to be optimized in terms of foreign awards and impartial decision-making of arbitrators.

The purpose of Indian arbitration system is not only to meet the defined goals and solve the international commercial disputes in an alternative manner but also to provide a stable and optimized litigation system of arbitration through efficient modification. Comprehending the socio-economic factors that affects the complete system and arbitrators is the most crucial step in the process of acquiring an optimal international arbitration system.

2.3 The Socio-Economic Drivers of International Commercial Arbitration in India

The socio-economic factors are referred as the social and economic experiences of an individual that shapes and affects one’s personality and attitude. In the context of law, the socio-economic factor of poverty is regarded as a catalyst for the higher rates of crime. When concerned with the international arbitration, it is an alternative means of speedy, professionalism of arbitrators, confidentiality and independency of choice pertaining to the arbitral procedure and location of process. However, the efficiency of this method is requires a strong understanding of the variant culture, social, religious and legal factors that may impact the integrity of the arbitral decisions and awards. The socio-economic drivers related to international commercial arbitration ranges from culture, nationality and religion, to politics and monetary have potential impact on the international commercial arbitration and arbitrators.

2.3.1 Cultural Drivers

Globalization has resulted into a higher rate of cross-national interaction that has further exerted external pressures on the national legal cultures of the countries. Culture is attributed to play a prominent role in the decision-making scenario of professionals involved in the process of arbitration. Few researchers have established that due to cultural endowments of different parties, certain decisions and choices are biased and subjected to partial preferences or priorities. The behaviour of the involved legal actors is dependent on their national culture and legal tradition background. The legal choices taken in the process of arbitration is constrained due to such factors, where culture commands unfavourable and partial outcomes.

Another idea of culture emerges from the training and practice of the legal actors, where certain set of expectations and behaviour is evolved. Different practices inculcates different cultures and thus affects the legal choices. Such a culture can however, be shifted with the commencement and practice of different norms. Nonetheless, the private structure of arbitration imposes difficulties in understanding the extent of the impact of culture on the arbitral decisions and the role it plays in the expectations of the involved legal actors.

The shift in the arbitral procedure evolves from the rules of institutions and national law, and therefore, it is difficult to attain the same as there is little evidence regarding how extensively these laws are enforced in the complete arbitration process.

2.3.2 Legal drivers

The decisions of arbitrators are grounded on the basis of laws, and in case the specified laws are followed yet the efficiency lacks, then the fault is of the law and not the decision makers. The legal rules and regulations are the crux of an arbitration system that guides and directs the decisions of arbitrators. Therefore, the outcome of an arbitration case, if affects the society or legal parties is a concern of law and not the arbitrators. A legal culture is considered as a set of procedure and actions that builds a network wherein an interactive behaviour is witnessed that professes shortened usage of resources and costs. The legal tradition in the realm of international commercial arbitration comprises of the specific arbitration institutions such as in the Indian context, the Arbitration and Conciliation Act has an

37 Raghavan, supra n. 3, at 7-29 (detailing the Indian Arbitration Acts of (1940 and 1937).
40 N K Sasau, “Arbitration as a Method of Dispute Resolution in India” 2012 Global research Analysis, 1 (5).
42 Babak Hendizadeh, ‘International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award’ 2012 Queen’s University, Canada.
influence on the evolution of modern international commercial arbitration. The legal and customary legal systems of different countries influences the overall arbitration tradition and the process of international commercial arbitration as reaching the common ground becomes difficult\textsuperscript{48}. The legal traditions also comprises of the institutionalization of arbitration in international environment where commercial arbitration is performed.

The laws in arbitration are comprehensive in nature, all the legal concerns and queries can be resolved with mechanical deductions by the legal actors or judges by implementing the law to the facts or any material interests to make any decisions component of the arbitrator in the circumstances of fact or any material interests to make any decisions\textsuperscript{48}. Also, the impartiality which always moves along with the issues of the arbitrators independency are the challenging requirement in arbitration rules, institutional rules and model law\textsuperscript{49}. In the international commercial arbitration, the formal logic and rationality overrules the actual practice of decision making. In simplification, the law influences the decision-making, constraints it and directs it, however, it does not overpower the final decision.

2.3.3 Social Drivers

The social network plays a crucial role in determining the dominators of arbitration system, where arbitrators are selected by depending on their social statue and networking capabilities\textsuperscript{50}. The process of arbitrator appointment is dependent on the risk averse culture and categorises the arbitrators into “power-brokers”, “elite arbitrators”, “repeat players” and “single-shoters”\textsuperscript{51}. The appointments are made by the disputing parties on the basis of their desired outcomes, thus fuelling biasness and unfairness in the arbitration system\textsuperscript{52}. Similar to the judiciary system, the professionals in arbitration are preferred and selected on the basis of their frequency. Risk aversion, time and heuristics biases are the factors that forms the crux of the arbitration network and results into the appointment of desired arbitrator. The selection of arbitrators is dependent on the experience of the legal actor, his reputation, prior relationship with the parties and the cost demanded by him\textsuperscript{53}. Therefore, the social network of the arbitrators plays a significant role in the efficient process of arbitration.

2.4 The Socio-Economic Factors Affecting the Decision-Making of Arbitrators

The identity and role of players involved in the process of international commercial arbitration, especially those who are appointed as arbitrators, are unclear due to the lack of empirical evidence pertaining to the same\textsuperscript{54}. The resolving of the disputes can be effectively maintained by the dispute resolution method (ADR) by members who are voluntarily setting in the parties in international commercial arbitration. The disputes in any matter of concern when economic relationship of the adjudicating arbitrators with dispute parties, lack of impartiality with party aspects which can be challenging to national courts judgement. The key component of the arbitrator in the circumstances of facts or any material interests to make any decisions thoroughly needs the independency and impartiality\textsuperscript{55}. When considering the decision-making or arbitrators and their fair or impartial judgement, some arbitrators who are non-challenged do not face any disqualification standardisation after the commencement of the administrative services\textsuperscript{56}. New outcomes starts appearing when the legislation acceptances is neutralised by promotion of resolving various disputes and developing economy with commercialising arbitration. The impartiality manifestation is the commercial standardisation of the committee president with high probability to analyse justified doubts due to various circumstances and relevant facts\textsuperscript{57}. The opinion differences among the arbitrators with the arbitration law and differences in face of their national jurisdictions respectively can never be faulted. The challenges of the arbitrators’ jurisdictions are not much possibly changeable with the impartiality procedures with the


\textsuperscript{53} PricewaterhouseCoopers Private Limited (PWC), ‘Corporate Attitudes & Practices Towards Arbitration In India’ 2013


\textsuperscript{55} K Nathan, ‘The Independence of the Arbitrators, Amicus curiae’ 2006 68, pp. 18-22


\textsuperscript{57} N Gandhi, “The Double Requirement that the Arbitrator be Independent and Impartial” 2014 International Academy for Arbitration Law, pp.1-8.
The principles of their impartiality governing of the arbitrators is the main goal to be assisted by the parties, courts, arbitrators and other members of the association in arbitration.

The conscience of the arbitrators cannot be overridden by any professional judgement with an aspect of disqualifying with partiality. The most socio-economic factors of the arbitrators, who are appointed by the parties are, namely, interest in financially relevant projects which ever is significant, the counsel are maintained with a closely knit family relationship, the dispute is being non financially involved, dispute interests the public position at a specific topic or matter, parties settlement discussion is shown involvement. The others categories of the arbitrators disqualifying factors are substantive views, personal sympathies, organizational sympathies and procedural questions.

The reality of the inclination of the understandable parties would be either actual fairness or may be the perceived fairness in which arbitrators go beyond their achievements by biasing the mannerism of prejudicial party.

When considering the international arbitration and trading with high efficiency and saving the costs with ensuring the arbitrator impartiality in newly formed procedures, the arbitrators are faced with certain socio-economic factors. The low values of the procedures that are expedited with the arbitration concerns have expensive and effective disputes which must be resolved. The challenges of arbitrator's independence with the raise in doubtfulness in the arbitrator’s impartiality with concern of genuine by having a tribunal change which won’t be penalised. The complexity of the business relationship is that the rules of the arbitrators with the International Expedited Procedures introduction have simplified with the reduction of complexity in processing, cost and time. The parties of the arbitration agree the meditation and the centres require the member of arbitrators to be always impartial. The entire proceedings of the arbitrators found nationally and internationally want their main obligation of their arbitrators to be impartial. The doubted impartiality is the challenging attributes of the centres being uphold by the centre of the arbitration. The fairness perception of the arbitral process cannot be managed by the proceeding members of centres like board members, council or court members, employees and officers as they are incompatible.

Impartiality and also independence in the international arbitrators with the justifiable doubts which gives rise to the impartiality of the arbitrators with challenging circumstances in the arbitration are essential to comprehend. The parties of the arbitrators are generally impartial and the principle of the arbitration in this condition cannot be interchanged and should be distinguished clearly with their subjective norms or character with rules

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enacted for arbitration\textsuperscript{63}. No parties are essential with arbitrators in dispute with the issues faced in international arbitration. The partial arbitration can be biased by knowing the case with backgrounds of legal attributes, religion, social factors etc. the arbitrators can never be excluded by any persons due to nationality or with party identical to stay neutrally attributed. The actual partiality may be significantly difficult to get proved as it happens very rarely, but the claims of the party can be passed with the lack of impartiality that can be arbitrator’s disqualification. Arbitrator parties move towards the obligation of the impartiality and the settlement of the jurisdiction of the arbitrations. The arbitrators may not be person working under the contract of employment equity regulations 2003 to work with inheritance of impartiality\textsuperscript{64}. One party can be nominated by an initiative member or co arbitrators by relating the arbitration and arbitrators with the bilateral source which can be deduced by appointment from arbitrators. The arbitrators who are independent are called impartial arbitrators typically\textsuperscript{65}.

The arbitrator impartiality is stated as the apparent factor of the arbitrators mind in the parties of the arbitration. The justifiable doubts are immediately related to the arbitrators impartiality with the circumstances if their independency\textsuperscript{66}. The governmental arbitration proceedings are subsequently replaced by the successfully functioning arbitrator’s impact in the impartiality requirement. The probability of the partiality of arbitrators can be challenging tasks with enough doubts with the independence of the arbitrators or lack of impartiality which could be highlighting in the parties.

3. Conclusion
With rapid economic development in India, the commercial conciliation is predominant throughout the country. The purpose of this investigation was to assess the current international commercial arbitration system of India and identify the role of socio-economic factors in affecting the system and the decisions of arbitrators. Arbitration, the alternative process for dispute resolution among multinational parties has emerged with the acceleration of globalization and liberalization that has furthered the growth of cross-national business partnerships. In this scenario, the independent arbitrators, being the substitutes for national courts have driven transnational litigation and arbitration. The present research reveals that arbitration is highly beneficial of resolving international disputes across all the sectors. The arbitrators are believed to play the most significant role in the procedure of arbitration and are liable for either its efficiency or inefficiency. After the review of existing studies, the current study implies that the arbitration system in India lacks the optimal level of professionalism and institutionalism. Also, the social, legal and cultural factors have rendered the Indian international commercial arbitration system as biased and plagued with fraud. Even in the arbitral institutions such as International Cricket Council need an adjudicatory role of arbitrators with independence and impartiality as a main requirement. The functions of the arbitrators are to determine the proclaimed victory of the parties as an observer with “negotiating advocates” as a main role to have impartiality in arbitrator’s final judgement. Allowing the disputing parties to select their arbitrator is one of the reason that causes biasness and impartiality of the arbitrator. Thus, the present study professes the need of improved reforms. Also, the popularity of India in the global business environment has revealed a higher need to consider modifications in the current arbitration system.

4. Limitations and Recommendations
The study is limited by the fact that it is grounded on the previous researches for sighting its conclusions, which may have, at their end, included only a part of the views on the concerned topics. This also implies, that the study findings and results would have been completely different, if the study would have involved a direct data collection process, which however, did not seem feasible and reliable for the present study given the delicacy of the information needed from the executives of the arbitrators in India.

However, the present review significantly brings to the forefront, the urgent need for a detailed study emphasizing on the socio-economic factors influencing the decisions of arbitrators in the realm of international commercial arbitration. With the evolution of globalization and modern international commercial arbitration, the demand for a common culture has emerged to satiate an optimized and fair arbitration system. As established earlier, here is a need to inculcate a more professional culture of arbitration in India. This is possible with the alteration and modification of the norms in Indian commercial arbitration system.

\textsuperscript{63}K Chovancova, ‘Independence and Impartiality of International Arbitrators’ (nd) Institute Of International And European Law, Pp. 1-6.
5. Limitations and Recommendations


[12] PricewaterhouseCoopers Private Limited (PWC), ’Corporate Attitudes & Practices Towards Arbitration In India’ 2013


Foundations of Arbitration Law in India’ 2013 29
Arbitration International
[38] UN Doc. A/CN.9/428, 21 May 1996. India is one of the countries which have adopted the UNCITRAL Model Law, as it is’ 1996
[44] ‘Development and Practice of Arbitration in India – Has it evolved as an Effective Legal Institution’
[48] Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ 1992 46 INT’L ORG. 1, 3