



Party Autonomy in International Commercial Arbitration

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Anurag K. Agarwal*

Abstract

As global business expands, the number of business disputes is also on the rise. It is extremely difficult or rather impossible to get all these disputes resolved through the conventional method of courts. Moreover, for international business disputes issues of jurisdiction, law, language, culture, etc. pose additional problems. As the courts all over the world are loaded with unresolved cases, delay in getting justice is inevitable. In such a scenario, businesses have to search new methods of resolution of business disputes and arbitration is one of them. Arbitration is a private court by a private judge. The decision of the arbitrator is called an award, which is binding on the parties. When the business dispute is international in character and is to be resolved with the help of arbitration, it is known as 'international commercial arbitration.'

The arbitration is a creation of contract between the parties. Hence, party autonomy is the heart and soul of each and every arbitration contract. However, this autonomy is not unbridled. The applicable law and public policy provide the boundaries to this autonomy. Rules of arbitral institutions also curtail the autonomy of parties. Moreover, intervention of courts becomes necessary in cases of bias of arbitrators, misconduct of proceedings, etc. Courts also intervene in setting aside or enforcing an award. It is not uncommon to find courts grappling with issues of party autonomy and in such a process, unfortunately, it takes the back seat.

Issues of party autonomy have been discussed in several judgments of American, English and Indian courts. As the "party autonomy" or the "will of the parties" is central to arbitration proceedings - whether domestic or international, whether

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commercial or non-commercial - I have a strong view that party autonomy should be given due importance and place vis-à-vis public law. The contours of public law are generally stretched to accommodate any reasonable private law and commercial arbitration is one of them.

This research focuses on a catena of judgments of various courts, primarily the U.S. Supreme Court, the House of Lords and the Supreme Court of India in determining the trend towards acknowledging party autonomy as one of the most important aspects of international commercial arbitration. It shall also look into related issues dealt by the New York Convention and the UNCITRAL (United Nations Commission on International Trade Law) Model Law.

Key Words: International commercial arbitration, Party Autonomy, UNCITRAL Model Law

Party Autonomy in International Commercial Arbitration

Introduction

In the domestic context, parties who seek a binding method of resolving disputes through third-party intervention have the choice between a national public court and private arbitration. In the international context such a choice does not exist because there are no international public courts that handle international commercial disputes involving private parties. Therefore, the choice for international private parties is between recourse to a national court (that is, litigation) and recourse to private international dispute resolution, namely 'international commercial arbitration' or so-called alternative dispute resolution (ADR) techniques, such as conciliation and mediation. Commercial arbitration has been hailed as the most efficient form of dispute settlement available to participants in international trade. Palkhivala in his book, "We, The Nation: The Lost Decades" expressed his views about the international commercial arbitration in the following words,

"When the International Chamber of Commerce at Paris started offering the services of its Court of Arbitration, businessmen in different countries found it convenient to avail themselves of that facility. In course of time that 'convenience' became a 'preference' and the preference has now ripened into a necessity."

He further stated,

“If I were appointed the dictator of a country, in the short period between my appointment and my assassination I would definitely impose a law making international arbitration compulsory in all international commercial contracts.”¹

Recognition has been given to international commercial arbitration and the ‘will of the parties’ is its heart and soul. In this article, I would deal with the issues of party autonomy in Model Law and then examine some recent decisions by the courts in India and the U.S.

Party Autonomy

The crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to procedural norms of a state or of an international convention. This is one of the greatest advantages of arbitration. The parties are free to choose the law, procedure, venue, arbitrators and almost everything related to the resolution of the dispute. The parties are also free to decide whether they would like to go for arbitration or not. No one can compel them to resort to arbitration. Although the right to arbitration is not as yet recognised as a fundamental human right, it is time that arbitral freedom – freedom of parties to refer commercial disputes to arbitration – is proclaimed as a universally acceptable principle of dispute resolution.² In other words, the whole pattern of decision making depends on party agreement. The freedom of the parties to shape the arbitral

¹ Palkhivala, Nani A., 1994 “We, The Nation: The Lost Decades”, U B S Publishers’ Distributors Ltd., New Delhi, 1994, pp. 205-9.

² Nariman, Fali S. 2004 “Recent Developments in the World of International Commercial Arbitration” Indian Council of Arbitration Journal Vol. XXXIX/No. 3 October – December, 2004, pp. 4-8.

tribunal and the arbitral process though not unlimited, is certainly very wide. Some limits are posed in mandatory procedural norms of particular countries and in a number of international agreements.³

Model Law

Since its inception in 1966, the United Nations Commission on International Trade Law (UNCITRAL) has worked to improve the effectiveness of international commercial arbitration. In particular, UNCITRAL has sought to improve the enforceability of arbitral awards and to remove obstacles to their recognition and enforcement. In 1976, UNCITRAL adopted a set of 'rules' to guide contracting parties resorting to arbitration and to streamline the arbitration process. Today, the UNCITRAL rules have been widely accepted and are considered to have 'world-wide' significance. In 1985, UNCITRAL produced the final draft of a 'Model Law' on International Commercial Arbitration (Model Law). The Model Law process involved the creation of uniform rules to eliminate local peculiarities which make international consistency impossible in certain areas of law. The promulgation of the Model Law was consistent with UNCITRAL's general mandate 'to promote the progressive harmonisation and unification of the law of international trade.' The Model Law is a comprehensive work governing the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduct of arbitral proceedings, and making of and recourse against the award. On December 11, 1985, the General Assembly of the United Nations recommended that all Member States adopt the Model Law as their domestic law regulating the conduct of international commercial arbitration.

³ Varady, Tibor, Barcelo III, John J. and von Mehren Arthur T., 1999 "International Commercial Arbitration: A Transnational Perspective", West Group – American Casebook Series, St. Paul, Minn., U.S., Preface

Party Autonomy in Model Law

The Model Law does not, and was not intended to, grant absolute autonomy to parties over the conduct of arbitration. It was meant to promote general autonomy to parties but balanced with safeguards in the form of mandatory provisions that could not be contracted out of on the basis that these were considered to be essential to the arbitration regime. There is, however, no express listing or delineation of which provisions are considered to be mandatory provisions of the Model Law. A couple of provisions which appear to be mandatory are:

Article 7(2): arbitration agreements be in writing

Article 18: parties be treated with equality and that each party be given a full opportunity of presenting his case

Article 24(2), (3): party be given notice of any hearing and be sent any materials supplied to the arbitral tribunal by the other party

Article 31(1), (3), (4): award be in writing, stating its date and place and that it be delivered to the parties

A large number of articles of the Model Law include phrases such as “unless otherwise agreed by the parties”. Such phrases describe the non-mandatory nature of these articles. However, it does not mean that all other articles are mandatory. Thus, it is not possible

for parties to determine with certainty which provisions of the Model Law are non-derogable.

Article 4 of the Model Law reads:

Waiver of right to object: “A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”

This article provides for waiver of the right to object to non-compliance with any provision, which apparently would refer to non-mandatory provision. As the Model Law does not contain a list of mandatory provisions, to which provisions exactly would Article 4 apply? Waiver of a party’s right to object goes to the root of the legal strategy of the party and it is more disturbing as the article mentions that this happens with the knowledge of the party that the provision is derogable.

Article 19 of the Model Law reads:

Determination of rules of procedure:

“(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The

power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Parties can only agree to rules of procedure to the extent that they do not conflict with mandatory provisions of the Model Law. Hence, there has to be clarity as to which provisions are mandatory and, therefore, non-derogable.

Article 34 (2) of the Model Law reads:

“An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

...

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law...”

There is practical restriction on the autonomy of the parties as the lack of clarity of issues which parties are unable to derogate leads to uncertainty. And, if the parties are uncertain about the future of the agreement on procedure – whether it would be affected by a mandatory provision or not – they would in all probability be abundantly cautious. More uncertainty leads to more curtailment of party autonomy.

View taken by American and Indian Courts: Recent Decisions

I. The American Courts

Of late in the U.S., following the trend set in 1974 in the *Scherk* case⁴, the American Supreme Court in the *Green Tree* case⁵ has decided in favour of party autonomy though the decision was narrowly split 5–4. In the *Green Tree* case, Green Tree Financial Corp. (“Green Tree”) was accused of violating certain loan disclosure procedures required under South Carolina law. The arbitration provision in Green Tree’s contracts did not explicitly forbid class arbitrations. A South Carolina court allowed two separate but similar arbitrations to go forward as class action proceedings, and the same arbitrator ultimately awarded the claimants a whopping total of over \$20 million against Green Tree. The South Carolina trial court eventually confirmed the awards at the claimants’ request, essentially converting them into enforceable court judgments. Green Tree appealed both awards claiming, among other things, that the administration of the proceedings as class arbitrations was improper.

The case made its way through the South Carolina court system, the claimants prevailed, and then the United States Supreme Court agreed to review the case. In its opinion, the Supreme Court did not discuss the numerous cases previously relied upon by franchisors for the proposition that class arbitrations are forbidden unless specifically authorized in the parties’ arbitration clause, apparently accepting that class arbitrations may go forward (at least under South Carolina law) even if an arbitration clause does not explicitly

⁴ U.S. Supreme Court 1974; *Scherk v. Alberto-Culver Co.*; 417 U.S. 506 (1974)

⁵ U. S. Supreme Court 2003; *Green Tree Financial v. Bazzle*; 2003 (123) Supreme Court 2402, Docket no. 02 – 634; Decided on June 23, 2003

authorize them. The Supreme Court found, however, that the question of whether the parties' arbitration agreement forbade class arbitrations should have been decided by the arbitrator rather than the South Carolina court. The Supreme Court, therefore, sent the cases back to the arbitrator for a decision on the issue.

In February 2006, the U.S. Supreme Court in another landmark judgment – *Buckeye Check Cashing v. Cardegnà*⁶ – held that regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. Unlike the *Green Tree* decision (which was narrowly split 5–4), *Buckeye* is not narrowly split. It is a 7–1 decision with one of the judges (Justice Alito) not taking part in the consideration of the decision, and Justice Thomas giving a dissenting judgment. Here the Supreme Court relied on the established body of federal substantive law relating to arbitration that is applicable to both federal and state courts. The basis of which was formed by combining the opinions of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*⁷ and *Southland Corp. v. Keating*.⁸

This decision is going to leave a very favourable mark on the business dispute resolution landscape for decades to come. The Supreme Court could not have been any clearer in stating that the “authority to resolve disputes vested with the arbitrators and not with judges for all cases”. It gives a shot in the arm to the autonomy of parties. This judgment finally puts to rest the notion that an attack on the underlying agreement containing the

⁶ U.S. Supreme Court 2006; *Buckeye Check Cashing, Inc. v. Cardegnà et al.*, Docket no. 04 – 1264; Date of decision: February 21, 2006

⁷ U.S. Supreme Court 1967; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*; 388 U.S. 395 (1967)

⁸ U.S. Supreme Court 1984; *Southland Corp. v. Keating*; 465 U.S. 1, 12 (1984)

arbitration provision based on alleged illegality is for the court rather than the arbitrator to decide.

Courts in the U.S. have started following the *Buckeye* case as is evident from the following decisions.

In April 2006, the Seventh Circuit Court of Appeals has ruled in *Wausau* case⁹ that an arbitrator, not the court, should decide whether an arbitration agreement prohibits consolidated arbitration. According to the Court, the issue is a question of procedure rather than a question of arbitrability. This case represents another appellate court decision that favours the use of arbitration and entrusts decisions to arbitrators.

The District Court of Southern District of New York rejected the distinction between void and voidable contracts in *Rubin* case¹⁰ to hold that the arbitrator, not the court, should decide the enforceability of an arbitration agreement.

In *Feil* case¹¹, the District Court of Kansas ordered the parties to refer the entire matter to arbitration – instead of the court – as they had agreed to submit all their claims to binding arbitration.

⁹ United States Court of Appeals For the Seventh Circuit, *Employers Insurance Company Of Wausau v. Century Indemnity Company*, No. 05-3437, decided on April 4, 2006

¹⁰ District Court of Southern District of New York, *Rubin v. Sona International Corp.*, C.A. No. 05 Civ. 6305 (SAS), (SDNY Mar. 3, 2006)

¹¹ District Court of Kansas, *Lee C. Feil v. MBNA America Bank*, Case No. 05-2459-JWL, decided on March 3, 2006

II. The Indian Courts

The Supreme Court of India has also given due recognition to an arbitration agreement between the parties and not allowed one party to take refuge in litigation. The arbitration agreement depicts the 'will of the parties' and it is welcome that the Supreme Court is honouring party autonomy. It sends a positive signal to the business community that barring exceptional circumstances, the courts shall not interfere in arbitration proceedings. As the parties had reposed faith in arbitrators, they are the best judge and the arbitral tribunal shall decide the fate of even the arbitration agreement.

The Supreme Court in *Rodemadan* case¹² decided in favour of the arbitration agreement and appointed the Chairperson / Presiding Arbitrator upholding the validity of the arbitration agreement. Similarly, in *Sedco Forex* case¹³ the Supreme Court upheld the invocation of arbitration clause and appointed the arbitrators.

In the *Kamdhenu Cooperative* case¹⁴, the Delhi High Court made the following observation:

It is not a case where the respondent was not aware of the Arbitration proceedings but for the reasons best known to the respondent, respondent chose not to contest the matter.....In my considered view the respondent deliberately

¹² *Rodemadan India Limited v. International Trade Expo Centre Limited*, Supreme Court of India, Arbitration Petition 25 of 2005, decided on April 17, 2006

¹³ *Sedco Forex International Drilling Inc. v. Oil and Natural Gas Corporation Limited*, Supreme Court of India, Arbitration Petition 1 of 2006, decided on April 20, 2006

¹⁴ *Kamdhenu Cooperative Group Housing Society Limited v. Messrs Vardhman Contractors and Builders Private Limited and Another*, Delhi High Court, Cs (Os) No.2458A of 1996, decided on February 16, 2006

took an uncooperative stand in deciding to stay away from the Arbitration proceedings and must bear the consequence thereof.

Thus, the Court made it amply clear that the party which takes arbitration proceedings lightly shall be made to face the music. The message is loud and clear: ‘once you have agreed to get disputes resolved through arbitration, the courts shall see to it that the disputes are resolved through arbitration and only arbitration.’

The Delhi High Court in *A – One Alums* case¹⁵ went the whole hog for party autonomy and held:

This court cannot re- appreciate evidence as it is not an appellate authority. It is not the function of this court to differ with the award even if this court was to come to a different conclusion on the same set of facts. The parties have chosen the forum of arbitration and the arbitrator is the designated person to decide the disputes.

¹⁵ *Messrs A-One Alums Private Limited v. Messrs Chemcon Fabricators (Delhi) Private Limited*, Delhi High Court, Cs (Os) No.930A of 1997, decided on February 16, 2006

Conclusion

These decisions reflect the pro-arbitration policies of the U.S. and Indian courts and make it clear that parties to an arbitration agreement should seek the resolution of their dispute before the arbitrator and not a court. Promotion of party autonomy does not mean advocating absolute freedom of the parties in deciding the conduct of arbitration. Also, the control of courts over arbitration cannot be so tight so as to defeat the very purpose of arbitration – of having the disputes resolved in a private court. It is a tight rope walk of providing sufficient autonomy to parties as well as providing enough control of courts over the conduct of arbitration. As regards Model Law, uncertainty is not going to server any purpose. What the instruments – whether domestic or international – aim at achieving, should not be left for the courts to be interpreted. The grey areas concerning party autonomy need to be addressed lest the parties face practical limitation in choosing and using arbitration as the dispute resolution method by choice.