International Legal Arbitration During COVID-19

By Ankit Malhotra, student, Jindal Global Law School, India.

Introduction to International Commercial Arbitration

The beginning of the evolution of international commercial arbitration can be traced back to the sixteenth century when arbitration rules were made in consultations with all the nations. It is imperative to look upon the roots of the commercial transactions and the body which gave wings to this phenomenon. International trade, as well as the commercial transaction both, are connected to one stem.

The concept of trading and all the business transaction was first adopted by Greek dynasty, and it is before the Romans arrived. However, the country started realising the importance after world war II when the great depression occurred and led to economic disparity which gave incentivisation for conducting arbitration rules and formation of the United Nations. The UN formation was endorsed after the failure of the league of nations which was formed for establishing international cooperation and peace after the World War I. The situation became adverse when the league of nations became a weak organization and its members retaliated by not following the rules and indulging in the intense feeling of nationalism by discrediting the other countries.

It was replaced by the United Nations on October 24 in 1945 and with the endeavor to promote international cooperation[1]. This led to the timely formation of GATT and arbitration rules as well as the model UNICITRAL rules that made way for transparent arbitration enforcement. On the other hand, historical examination of arbitration was conducted in the middle age, and since 1900, various provisions were made which approved mediation to help in commercial disputes. As time passed, commercial transaction started occurring between different nations, and it became imperative to regulate trade. Giving rise to economic growth which was having a negative slope due to turbulent ecosystem.

The progress of international commercial arbitration started in 1923.[2] Initially, more heed was given to domestic arbitration agreement and the development to include foreign nationals in arbitration gave more pertinence to Geneva and New York convention which eliminated roadblocks. The parties who were member also gave permission and were ready to enforce an arbitral award, which was imparted after the resolution of the dispute in conformity of Geneva and other convention. As without rules and uniformity in regulations, no conflict can be

[1] History, *The Day in History*, available at: https://www.history.com/this-day-in-history/league-of-nations-instituted, (last visited on Apr. 18, 2020).

[2] UNCTRAD (2005), *History of International Commercial Arbitration*, P.19, available at: https://unctad.org/en/Docs/edmmisc232add38_en.pdf (last visited on Apr. 18, 2020).

resolved with any ease, and it was dire need to provide a written document which can be followed by parties and in arbitration.

The main reason to undergird the use of arbitration in the commercial transaction was to eradicate the absurdity of court rules, and there was no uniformity concerning the applicability of laws. Earlier, the hoary concept of law of merchant was also prevalent, which gave rise to formation and enforcement of its rules in arbitration. The idea of Lex Mercatorian gave rise to the use of usage and customs which merchants followed and were earlier prevalent in Europe[3].

Once Hugo Grotius said in his book that there are two types of an arbitrator, one who is acting in the capacity of a judge and allowing every rule of law with the procedure. The other kind of arbitrator is who follows the concept of equity principle and the same can be linked to the law of merchant which can be further connected to the arbitration by using the rules of custom as well as trade.[4]

II. Arbitration- The Status Quo

One of the critical aspects of arbitration is the conflict between transparency and confidentiality. Both are complementary to each other but create a weak pillar for arbitration, if not followed with proper rules.

To lay down an environment for transparency, the ICC rules mandate that the name, occupation, and every other information of arbitrator is in the revelation mode. The transparency rule is framed by UNCITRAL concerning investor-state arbitration which provides the procedural rule for this type of arbitration. The arbitral award, as well as other information related to the dispute and its stages, are shown on the website to provide better transparency and eliminate even an iota of apprehension regarding injustice.

In 2016, the international chamber of commerce started a website to publish the names of arbitrators and provide the case title.[5] General public interest, credibility, and predictability are the three most essential exponent to support a need for arbitration and reduces the risk of conflicting decisions[6]. About commercial arbitration, transparency is a prerequisite. Even the process is duly followed by making confidential agreements, and national legislation such as Arbitration and Conciliation act provide provision regarding confidentiality. This is done by emphasising the responsibility of arbitrator's obligation to deny providing the information which is rejected by the party to be disclosed and other information that holds no ground of resolving a dispute between parties. It is evident from the practices mentioned above that at the international level, there is an immense need felt for

[3] Trans-Lex, *Examples* available at: https://www.trans-lex.org/11/_/examples/ (last visited on Apr. 18, 2020).
[4] Hugo Grotius, *"De Arbitris"* (book III- chapter – 20).
[5] ICC, *ICC Arbitral Tribunals, available at:* https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/ (Last visited on Apr. 18, 2020).
[6] The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration, *Esmé Shirlow: Dawn of a new era?*, ICSID Review 2016, p. 625.

arbitration and even resolving, and further transparency should always be maintained at the highest standards. But are the same requirements met nationally or not, is the essential question to be asked.

The answer is no, but gradually some progress has been made through the arbitration and conciliation act. There was significant interference of courts in arbitration agreements before 2006 at every state high courts, and the Supreme Court also started giving decisions even if those matters were on international commercial arbitration and had the consent of parties. After 2011, with the coming of Phulchand Exports v OOO Patriot[7], in which the Supreme Court declined to interfere with the international commercial arbitration as it was not against public policy. Further, the amendment act of 2015 gave a drastic change in accountability as well as non-interference of courts in a narrow sense.

Moreover, some crucial judgments followed which rendered wings to the applicability of arbitration agreement and arbitration and conciliation act such as,

Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd ("Kochi Cricket")[8] in March 2018, which held that section 34 would apply to arbitration even if the dispute were before October 2015. In another celebrated case, Kandla Export Corporation v OCI. Corporation[9], the award debtor, sought to rely on a right of appeal under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Act 2015 Act against an order allowing the enforcement of a London-issued award, in circumstances where no right of appeal was available under the Arbitration Act. The Court decided that, on a proper construction of the relevant legislation, there was no right of appeal, as to grant a right of appeal would be contrary to the purpose of the Arbitration Act.

III. ICC Force Majeure Clause 2003 & ICC Hardship Clause 2003

All the business entities work with a single vision that is to create profit and with the only mission to eventually grow out and record even better presence in its targeted market. However, certain events or occurrences are beyond the control or which cannot be reasonably presumed to have disoriented the commercial trade. This is known as the Act of God and legally recognised as Force majeure clause.

The International Chambers of Commerce propounds in the ICC. Force Majeure Clause 2003 and in the ICC. Hardship Clause 2003 a well-stitched model to accommodate all the eventualities which may so arise from this principle and hence, maybe rightfully included in their contracts.

It lays down a general force majeure formula following a list of force majeure events enumerated in the ICC. Force Majeure Clause 2003. It considers various events in and out of the record which renders predictability in

[7] (2011) 10 SCC 300.
[8] AIR 2018 SC 1549.
[9] Civil Appeal No. 1661-1663 of 2018.

an uncertain turn of events. Thereby, helping businesses to overcome such situations amicably using this clause where incorporated explicitly or implicitly. Though it is desired that this clause is included as it adequately helps in the arbitration process, but if there is a passing reference to this clause even then it is considered to be well-accepted as a part of the contract.[10]

The ICC. Hardship Clause 2003 balances businessman's legitimate expectations of performance with the harsh reality that circumstances do change to make the performance so hard that the contract simply must change to remain workable.[11]

IV. Force Majeure Clause and Party's Performance in a Pandemic

Given the pandemic, can a party get exempted from its contractual duties under the New York or Delaware Law in a Pandemic?

The COVID-19 was declared a pandemic on March 11, 2020, by the World Health Organisation.[12] Hence, amidst such distressing times of lockdown, the business entities may not find themselves in a position to perform their contractual obligations, and so the force majeure clause becomes imperative.

In contracts such as supply contracts, leases, construction contracts, and loan agreements, the Force majeure clauses find a dominant presence. However, they cannot be incorporated in all contracts and more so in those which are considered as essential commodities.

New York and Delaware law often completely exempts the obligation or defers the performances under the ambit of force majeure clauses. However, the detail of exempted performance finds the genesis in the contract itself where the circumstances such as fire, flood, war, or acts of God are mentioned with the degree of exemption. Since there is no uniform rule for it apply and hence, the force majeure details are of utmost importance.

The New York law takes a narrow interpretation of the Force Majeure Clause as it only applies and excuses a party's performance in only certain events that are specially listed. On the other hand, Delaware law takes a broad interpretation of force majeure provisions according to their literal meaning. [13]

If a force majeure clause includes specific public health-related terminology like "flu, disease, epidemic, plagues, emergency or outbreak" and only then the force majeure clause covers the danger emanating from COVID-19 pandemic.

[10] ICC, *ICC Force Majeure Clause 2003/ICC Hardship Clause 2003, Available at*: https://iccwbo.org/publication/icc-force-majeure-clause-2003icc-hardship-clause-2003/, (last visited on Apr. 18,2020).
[11] Ibid.
[12] WHO, *available at:* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020, (last visited on Apr. 18, 2020).
[13] *Stroud v. Forest Gate Dev. Corp.*, No. Civ.A 20063-NC, Civ.A 2064-NC, 2004 WL 1087373, at P. 4 (Del. Ch. May 5, 2004).

When an illness reaches the highly concerning stage of being called a pandemic, and this is when such interpretation becomes imperative to provide scope for an amicable resolution of any dispute arising out of non-performance of contractual duties due to unprecedented restrictions like perpetual lockdowns.

At times we can't say its Act of God. Still, it can also be an "Acts of government" which may not have been anticipated such as the preventive measures taken like cancelling international or domestic travel, the flow of goods, etc., Thus, this would also be accounted for as force majeure events due to its close nexus with an illness. Therefore, the language of the force majeure clause must contain an all-inclusive approach.

This approach under the doctrine of ejusdem generis bars such as all-inclusive language and instead promotes that only those kinds of events mentioned to be a part of the force majeure clause.

The Court in a celebrated case[14] held that the clause only prescribed "strikes, boycotts, Acts of God, labour troubles, riots, and restraints on public authority" as "for any reason" in the catch-all phrase was not acceptable concerning any changes or rescheduling of the events. However, It is totally upon the parties to mutually agree when they desire to include a specific catch-all language such as "any cause whether similar or dissimilar to the foregoing," which further helps to understand the scope of the force majeure provision in the contract.

In Delaware law, it is rather easy to broaden the ambit of force majeure clauses through specific usage of words and terminology. For instance, the Court held in a case that the force majeure clause, which included the catch-all phrase "any reason *whatsoever* beyond the control of [defendant]," was inclusive of any "delays" that have been crept in. However, such delays must have been a resultant of "fire, strikes, and acts God" since these incidents were listed. Also, it was held, the suspension was foreseeable, and hence, the defendant's performance cannot be excused.[15]

To cover COVID-19, the parties are obligated to mention any similar event to a pandemic or an act of Government in the persuasion of the same. So far as a broad catch-all phrase such as 'all event likely to cause pandemic' are considered. It would come under force majeure for Covid-19 under the Delaware law.

V. Missing Force Majeure Clause

The contractual obligations are paramount, but sometimes it is utterly impossible to perform a contract beyond the control of parties. Hence, under the New York law, the defence of impossibility is still available but to the extent that "the destruction of the means of performance by an act of God" made the performance of the contract utterly non-viable.[16] In other words, the defence of impossibility can be raised when an unforeseeable event and it is impossible to have been guarded against in the contract by a prudent mind due to its rare of rarest occurrence.

[14] *Team Mktg.USA Corp. v. Power Pact LLC*, 839 N.Y.S. 2d 242, 246 (3d Dep't 2007).
[15] *Supra* Note, *14 at 6*.
[16] *Kolodin v. Valenti*, 979 N.Y.S. 2d 587, 589 (1st Dep't 2014).

Moreover, under Delaware law, the requirement is both the performance must be rendered impossible due to an act of God or law. But the same must be eloquently demonstrated by the aggrieved party by any legal means.

The other option that is available to a party through Delaware law is the doctrine of commercial frustration. This defence can be sought when the party's primary purpose is derailed wholly or partially by the other event which a prudent man cannot anticipate at the time of contracting. Thus, the commercial contract is said to frustrate.

An unanticipated and unforeseen event like that of COVID-19 can be used to employ the doctrine of impossibility. Still, it would only be said to apply only when the performance is utterly impossible to conduct. Just financial viability or complications would not render the party's performance to be excusable even if the party declares itself insolvent or bankrupt. Similarly, the disruptions caused in supply or value chains by government regulations because of COVID-19 will not in itself cause the process as valueless ultimately. Thereby, this cannot be per se a reasonable ground for commercial frustration to be invoked.

The ongoing global outbreak of COVID-19 has adversely affected international business and cross-border commercial operations significantly. The future looks very dicey and gloomy as to when the commercial activities would normalise again as usual.

Further, the supply chains are being affected as containers are docking up in COVID-19 affected hotspots. Some factories are getting to no work mode with no signs of opening. The citizens are working from home, but productivity is low as product or service is not be able to be rendered. Medical supplies are depleting or are running low with countries requesting India for assistance. Further, agencies are predicting a zero or negative India's GDP for this quarter as the lockdown extends.[17]

The parties seeking to avail the defence of the Act of God event must suffice formal written notice as the earliest when the potential event comes to the knowledge of the party. The inability of a party to notify the other on time and prescribed form may jeopardise the ability to invoke such provision. All the requisite evidence may be documented and supplied regarding the event, its inability, and the nexus between them. A party cannot use COVID-19 as an excuse to escape liability for a breach that would have occurred regardless of the virus.

VI. Circumstances that favour Non-National Standards

When parties opt for a domestic law over non-national standard law viz. general principles of law, *lex mercatoria*, or the law of international trade, the arbitral tribunal strictly adheres to it. Whereas non- national standards without

[17] The Hindu, *Barclays slashes India growth in calendar 2020 to 0 sharply revises lockdown losses*, https://www.thehindubusinessline.com/economy/barclays-slashes-india-growth-in-calendar-2020-to-0-sharply-revises-lockdown-losses/article31340890.ece, (last visited on Apr. 16, 2020).

reference to any national law provide the arbitral tribunal broader discretion concerning the applicable law. However, they lack the guidance of the national standards, which are clearer to comprehend.

This demands a broad inquiry into the nature of the general principles invoked by the parties Hence, the arbitrator is forced to make a broad inquiry into the nature of the general principles invoked by the parties and has to find the principles from scratch.

Therefore, the arbitrator exercises an array of options when it transits from a national conflict-of-laws system to the General Principles.[18] The arbitrator must employ various other conflict-of-laws standards which further leads to establishing an indirect foundation in domestic law. The transition from national conflict-of-laws is not easy as the concept of general principle isn't crystal clear and hence, to counter that various conflict of law systems to dispute needs to be employed. Also, this is considered the most consistent approach to international commerce by arbitrators.

The third alternative in a pursuit to do away with national laws is an application of a basic conflict-of-laws rule derived from a comparison of competing systems.[19] This is done by referring to non-national standards like *lex mercatoria*, standard rules or some substantive national law.[20] So, this comparison helps the parties initiate an effort to reach consensus after listing all the possible rules to eliminate any vagueness that may persist in general principles of law since it must be adopted for international commercial arbitration.

The consistency of results in international commercial arbitration is highly dependent on the consensus achieved and ensures certainty for the contracting parties. Therefore, this process promotes the usage of general principles of law for bringing uniformity in international commercial law. This further assists parties to create a neutral forum for regulating the language and procedure. A cue can be taken from this process to avoid any hurdle that may hinder the resolution of disputes when it reaches a national court system.

Since, the arbitration system which regularly tends to fall back on national laws and hence, to establish stability and certainty, the list of general principle is necessary. The general principles take its natural form when some rules are relied upon by arbitral forums recurrently and cited by the scholars in the same breath. The sovereign Government is free to make any rules pertaining to a contractual agreement with foreign private parties which forms as a general principle of law having deep interrelation and hence, cannot be disregarded. The paramount objective that sets international commercial arbitration is the total satisfaction of parties. If the domestic legislation is capable enough to achieve it, then it becomes the general principle of law.

[18] B. Brown, *General Principles of Law in International Commercial Arbitration*, 101 Harv. L. Rev. 1824 (1988).
[19] Clive Schmitthoff, *Choice of Law in International Commercial Law*, 6 J.B.L. 169 (1987).
[20] Ole Lando., *The Lex Mercatoria in International Commercial Arbitration*, p. 110, 34 J.Int'l. Art. 28 (1985).

The sovereign Government must give due regards to an international commercial agreement into which it enters as per the guiding principles of the 1969 Vienna Convention on the law of Treaties. Whenever there is a conflict between the Government's power to amend domestic statutes and the contractual obligation to foreign investors is concerned, the latter stand out. Hence, this assists the investors of foreign origin to stay assured regarding their investment without any apprehension of internal policy changes.

The events which can't be anticipated by a reasonable person and hence, it would be safe to conclude the person would lose any control over such situations quickly. Therefore, in such circumstances, it would be justifiable to apply the Force majeure clause like in a pandemic like COVID-19.

However, if the nexus between the force and the non-performance of contractual obligation could not be built then it would instead be considered as a breach of contract, no relief can be sought in such a matter since it is reasonable to expect that defaulting party would have to remedy the damages that have been inflicted upon the other contracting party as there has been a breach of duty.

This practice of equitable compensation for damages has become a general principle of universal application. This principle very well applies in the context of international commercial arbitration, but the issue is those do not rock solid. There always remains ambiguity as the policies lack enough codification. Therefore, it is the need of the hour to mention these principles with greater clarity for better application at the international commercial arbitration stage.

VII. Conclusion

Health cataclysm that has emerged in recent times is COVID-19. The business entities must ensure that adequate measures have been taken under the ICC arbitration Guidance note. This is to ensure post, and during the COVID-19 period, the business entities are self-sufficient to mitigate and adapt to the adverse effects.

Since this pandemic has caused widespread destruction to human life and businesses alike, it is all set to increase the contractual disputes between contracting parties and delay the existing arbitration matter. There is undoubtedly travel restrictions that have further caused unprecedented troubles for parties, councils and tribunals and to tackle that parties must remain extremely diligent in streamlining their processes—also, the ICC. Arbitration Rules may be used for the smooth and efficient disposal of arbitration cases. The way forward is the usage of technology abundantly in saving ailing businesses and through videoconference assisting in International commercial proceedings for a better economy and financial growth.

The business entities have suffered the most from the pandemic and the worst times are yet to come with regards to disputes arising out of non-fulfilment of contractual obligations between parties. However, International

commercial arbitration gives a ray of hope that humans can achieve infinite possibilities even when there are unprecedented times like COVID-19.

The international stage envisages an unbiased dispute resolution mechanism that ensures that remedy can be efficiently and effectively realised without the need to rely on one's territorial legal system for justice delivery which is provided by the international commercial arbitration.[21] Hence, it assists the contracting parties to avoid the multiplicity of legal proceedings and thereby dodge the complexity through review, revision, etc.

There are various reputed organisations viz. International Chambers of Commerce (ICC), London Court of Arbitration, Chamber of Commerce in Stockholm, etc. which render their services for arbitration involving parties of foreign origin.

Predominantly, the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) regulates the standard practices in International Commercial Arbitration and lays down the latest arbitral rules and procedures as it necessitates. The code is a comprehensive set of rules that considers the methods which are adhered to, in various arbitration stages across the globe. This is done to make the arbitral award acceptable to parties by providing a universal approach to the dispute resolution process instead of through arbitration.[22]

However, there is a classic dichotomy that arises with arbitral awards in India, i.e. when one of the parties invoke the public policy provision thus resulting in foreign parties usually set to lose the case as all nations have sovereignty. No state would like to compromise with its public policy. However, if in case the domestic party is on the losing side, it generally goes into reviewing the arbitral award, which causes unnecessary hardship to the foreign party. Hence, it curtails the chances of future foreign investment on account of the restrictions put forth by the Indian courts. This overall harm the trade, economy, and commercial activities with companies in India.[23]

Hence, the pertinent issue is whether and how can we allow the force majeure clause to be invoked during arbitration awards are imparted? The prevailing conditions of COVID-19 might lead to multiple breaches of

[21] Francis J. Higgins et al. *Pitfalls in International Commercial Arbitration*, p. 1035,1036 (The Business Lawyer, April 1980).

[22] *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006,* (UNCITRAL), *available at:* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, (last visited on Apr. 18, 2020).

[23] Sameer Sattar, *Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?*, *available at:* https://www.ela.law/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf, (last visited on Apr. 18, 2020).

obligations. Further, it could have possibly incapacitated parties to undertake their contractual duties due to unforeseen reasons.