

Law of Arbitration in Western Europe and India: A Comparative Study

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Abstract

This paper comparatively analyzes the salient features of arbitration law in Western Europe by providing examples of some mixed jurisdictions that are being influenced by more than one legal tradition. In doing so, it tries to examine the procedure pertaining to arbitration, and finally compares the Indian Arbitration and Conciliation Act, 1996 with the arbitration laws in Western Europe.

Introduction

“Arbitration is a mechanism of adjudicative dispute resolution, whereby the parties refer their case to a private arbitral tribunal and are bound by the award (i.e. the decision of the arbitral tribunal)”.¹ Arbitration plays a significant role in most of countries. The law of arbitration is generally composed of all provisions governing the arbitration in a given country, particularly the formal validity of the arbitration agreement, the arbitrability of the dispute, the constitution of arbitral tribunal, fundamental procedures and judicial review of the award. However, for the purpose of current study, this article is limited to some important facets of arbitration law in Western Europe jurisdictions like England, Germany, France, the Netherlands etc., and India in South Asia.

Arbitration laws in Western Europe

Usually the laws applicable to arbitration involve the laws of one or more countries connected to proceedings or connected to the parties to dispute. Apart from that, the 1958 New York Convention and several other international and transnational sources of law serve as arbitration norms. However, the cornerstone of any arbitration is the national law where

¹ Tony Cole, Ilias Bantekas, Federico Ferretti et al., *Legal Instruments and Practice of Arbitration in the EU*, (Nov., 09, 2017, 09.52 AM), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf).

the “seat” of the arbitration is legally constituted.²This rule is universally applicable in most countries around the World. Since the current study is limited to Western Europe, it is interesting to note the legal situation pertaining to arbitration in some of the major countries.

The English Arbitration Act, 1996³ extending to England, Wales and North Ireland, and most importantly the case laws regarding arbitration, has been very influential world over.⁴On the other hand, traditionally, Germany has not been one of the leading international centres for arbitration. However, this situation changed with the adoption of a new national arbitration law based on the UNCITRAL Model Law in 1998. Although Germany has not yet achieved the level of international recognition of the traditional leading arbitral nations (England, France, Sweden and Switzerland), it has now clearly a significant presence on the international arbitration scene.⁵Denmark’s current Arbitration Act, adopted in 2005, is also based upon the UNCITRAL Model Law and is very supportive of arbitration.⁶However, Belgium is of the opinion that the parties can choose independent arbitration law, and in such case they can agree to the court’s jurisdiction over any disputes that may arise.⁷In contrast to Germany and Denmark, with the adoption of new arbitration law in 2013, Belgium departed from the UNCITRAL Model law. In doing so, it supported arbitration by significantly limiting the indulgences of Belgian courts in arbitral proceedings.⁸ Austria is another country that requires mention. The country has achieved tremendous progress in the field of arbitration. It has gained prominence in Eastern Europe as an arbitral seat, in many cases being preferred by Eastern European practitioners to their own country.⁹Similar to Germany and Denmark, the Austrian legislation is based on the UNCITRAL Model law, and thus focuses on contemporary views on how arbitration should be regulated.¹⁰ Since 2013, appeals against arbitral awards are heard directly by the Austrian Supreme Court. This has helped reduce possible delays in the resolution of disputes.¹¹Further, the French Arbitration law

² See, German Arbitration Act(1998), (Nov., 09, 2017, 09.28 AM),<http://www.sccinstitute.com/media/29988/german-arbitration-act.pdf>.

³ See, English Arbitration Act (1996), (Nov., 09, 2017, 09.52 AM),
<http://www.legislation.gov.uk/ukpga/1996/23/data.pdf>.

⁴ *supra* note 1.

⁵ See, Danish Arbitration Act, (2005), (Nov., 09, 2017, 09.25 AM),http://voldgiftsinstitutet.dk/wp-content/uploads/2015/01/danish_arbitration_act_2005.pdf.

⁶ *supra* note 1.

⁷ JEANFRANÇOISPOUDRET&SEBASTIENBESSON,COMPARATIVE LAW OF INTERNATIONAL ARBITRATION87(Sweet & Maxwell, 2007).

⁸ *supra* note 1.

⁹ *Id.*

¹⁰ See, Austrian Arbitration Act as amended by SchiedsRÄG(2013), (Nov., 09, 2017, 09.32 AM),<http://www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013#FirstTitle>.

¹¹ *supra* note 1.

makes provisions for both, domestic and international arbitration matters.¹² On 1 January 2015, replacing the former Dutch Arbitration Act of 1986, the new Dutch Arbitration Act entered into force.¹³ The new act does not make a distinction between national and international arbitration. At European Union level, a uniform regime has been created by the Brussels I Regulation regarding jurisdiction and recognition of judgments in civil and commercial matters. The Regulation expressly excludes arbitration and the ability to enforce arbitral awards abroad from its scope of application by the parallel regime set forth by the 1958 New York Convention.¹⁴

Jurisdiction Matters

Generally, in matters of international commerce, a contracting party to an agreement is bound by the local arbitration procedure and by the supervisory jurisdiction of the courts to the seat of the arbitration. By this agreement, it agrees not only to refer all disputes to arbitration, but also that the conduct of the arbitration should be subject to that particular supervisory jurisdiction.¹⁵ This means that the law applies to arbitral proceedings taking place in the country in question. This legal framework is accepted without any reservations by English law, German law, French law, Swedish law, Swiss law, and Italian law,¹⁶ with the Netherlands serving as an exception. Further, modern communication methods have confronted arbitration with possibilities of holding hearings elsewhere than in the country of origin. Additionally, electronic arbitration have made it possible for parties to agree to arbitration “online” or by videoconference or by telephonic conferences.¹⁷ The parties can even transfer the seat of the arbitration during the arbitral proceedings.¹⁸ As per the International Chamber of Commerce (ICC), the transfer of the seat involves two steps, firstly, the arbitrator has to decide whether the initially chosen seat remains binding upon the parties under the given circumstances, and secondly, if not, it is for the ICC Court of Arbitration to determine a new seat as per the ICC Rules.¹⁹

¹² See, Aceris Law, French Arbitration Law, (Nov., 09, 2017, 09.40 AM), <https://www.acerislaw.com/french-arbitration-law-2/>.

¹³ Nautadutilh, *The New Dutch Arbitration Act and the new NAI Arbitration Rules*, (Nov., 09, 2017, 09.45 AM), <https://www.lexology.com/library/detail.aspx?g=32745dfa-99b2-42f3-b691-c0cecb75328f>.

¹⁴ *supra* note 1.

¹⁵ *Minmetals Germany GmbH v. Ferco Steele Ltd*, YCA, 749 UK 53 (1999).

¹⁶ JEANFRANÇOISPOUDRET & SEBASTIENBESSON, *supra* note 7.

¹⁷ *Id.* at 100-115.

¹⁸ *Id.* at 100.

¹⁹ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 276-277 (Sweet & Maxwell, 2004).

Standard Form of Agreement

With regard to the form of the arbitration agreement, the international conventions and the law²⁰ of the European countries require that the agreement must be in writing. Austria, Germany, Italy, Luxemburg, the Netherlands, Portugal, Scotland, Spain and Switzerland require agreements to be in writing. However, France, Denmark, Sweden, Norway do not have any formal requirements, and England assimilates oral agreements to a written one.²¹ Further, Belgium provides that the documents to be binding on parties must originate from the parties or from those authorized to act on their behalf when the documents are not signed. Also, these documents must reveal the intention or will of both parties to submit to arbitration, which seems to exclude the possibility of oral acceptance.²²

Significantly, it is interesting to understand the influence of the principle of separability in Western Europe. When parties conclude a contract containing an arbitration clause, it must be independently assessed from the main contract or the legal relationship of which it forms a part.²³ This principle not only implies that the validity of the contract and of the arbitration agreement must be determined separately, but also that they can and are often governed by different laws.²⁴ The principle of separability is widely recognized in Spain, U.K, Portugal, France, Germany, Switzerland, Belgium and Italy.²⁵

Apart from that, France, Switzerland, and Sweden provides that the arbitration agreement is valid only if it fulfils the requirements either of the law chosen by the parties and the law applicable to the main agreement or the national law.²⁶ However, the German law gives full priority to the parties to choose the law applicable to the arbitration agreement and in the absence of such choice, the courts apply the law to the arbitral proceedings taking place in the country in question. Belgium applies similar rule but in England, common law governs.²⁷

²⁰International Law/Treaties, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (1958), UNCITRAL Model Law on International Commercial Arbitration, (1985).

²¹*supra* note 7, p.148.

²²*Id.* at 148-150.

²³*Id.* See also, AytenMustafayeva, *Doctrine of Separability in International Commercial Arbitration*, BAKU STATE UNIVERSITY (Nov., 09, 2017, 10.24 AM), <http://lr.bsulawss.org/en/wp-content/uploads/2015/06/bsu-lr-vol1-mustafayeva.pdf>.

²⁴*supra* note 7, at 133-134.

²⁵*Id.* at 136-140.

²⁶*supra* note 7, at 257-262.

²⁷*Id.*

Furthermore, many countries even recognize the capacity of the state to act as a party to arbitration. Switzerland,²⁸ England,²⁹ Italy,³⁰ Sweden,³¹ Germany,³² France, Belgium and the Netherlands have recognised the state as a party to arbitration without any restrictions.³³

Legal Status of an Arbitrator

After examining the law, jurisdiction and standard form of arbitration agreement, it is necessary to understand the legal status of the arbitrator in the respective jurisdictions. In practice, arbitrators are individuals. However, a legal entity can also be designated as an arbitrator. Belgium and Germany accept legal entity as an arbitrator, whereas the French, Dutch, English and Italian law require arbitrators to be individuals. Almost in all countries, the rule stands the same that parties have freedom to appoint arbitrators or to agree on the appointment procedure of the competent court.³⁴ Replacement of an arbitrator is also possible if the parties opt for his removal, and in case if the arbitrator resigns, the contract between him and the parties terminates, making it impossible for the parties to claim specific performance. This practice is followed in Germany, England, France and Sweden. Whereas, as per Dutch law parties can claim compensation for the damage suffered. Further, it is the case of Switzerland and Belgium where parties can sue him for damages.³⁵

Arbitral Procedure

There is no single consistent arbitration procedure across Europe. The regional as well as the international arbitration procedure differ depending on the country background and individual preferences.³⁶

The arbitration procedure is defined by the parties or by the arbitrators in case if the parties fail to do so. It is also subjected to certain mandatory fundamental principles. Thus, the arbitration procedure is governed by specific rules, without the application of national

²⁸See PILS, Art.177 (2).

²⁹Sect. 106 Arbitration Act.

³⁰Handbook II, Italy-Bernardini, Ch.II.2.b.

³¹Handbook III, Sweden-Franke, Ch.II.2b.

³²Handbook II, Germany-Böckstiegel, Ch.II.2.b.

³³*supra* note 7, at 183-184.

³⁴*Id.* at 327-332.

³⁵*Id.* at 362-364.

³⁶*supra* note 7.

procedural rules thereby giving wide autonomy to the parties. There is also a court support mechanism for arbitration to ensure that there is a smooth conduct of arbitral proceedings without any delay.³⁷

With respect to the “confidentiality” of arbitration proceedings, that varies significantly between States, with some adopting a rule that arbitration is inherently confidential, while others treat arbitration as not confidential unless it is covered by a confidentiality agreement between the individuals/entities involved.³⁸ For instance, the German arbitration law has no provision on confidentiality.³⁹ The English law is silent on confidentiality issue, but the case law imposes this duty on the parties.⁴⁰ However, in France and Belgium arbitration proceedings are confidential, unless the parties have agreed otherwise. The ambit of confidentiality is not specifically defined but concerns the arbitrators and the parties at a minimum. Mostly this provision is applicable only to domestic arbitration.⁴¹ The Dutch Arbitration Act makes no provision regarding confidentiality. However, it is generally accepted that the proceedings are confidential.⁴² The Austrian⁴³ situation is similar to the Dutch.

Arbitral Award

With respect to the arbitral award, majority of the Western Europe countries provide for written and signed award.⁴⁴ Further, the awards are generally subject to a judicial control and can be challenged before the Court on the grounds of irregularities.⁴⁵ There is also a

³⁷*Id.*

³⁸*Id.*

³⁹Stephan Wilske&David Quinke, Gleiss Lutz, *Arbitration procedures and practice in Germany:*

overview, (Nov., 06, 2017, 10.15 AM), [https://uk.practicallaw.thomsonreuters.com/3-502-0949?source=relatedcontent&_lrTS=20170916000631100&transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/3-502-0949?source=relatedcontent&_lrTS=20170916000631100&transitionType=Default&contextData=(sc.Default)).

⁴⁰See *Emmott v Michael Wilson and Partners EWCA Civ 184* (2008).

⁴¹Elizabeth Oger-Gross and Anaïs Harlé, *Arbitration procedures and practice in France: overview*, (Nov. 6, 2017, 10.21 AM), [https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)), see Alexander Hansebout and Liesbeth Fierens,

Arbitral Proceedings in Belgium, (Nov., 10, 2017 10.16 AM),

<https://www.lexology.com/library/detail.aspx?g=e779b8e5-c92c-4896-8dd7-c779df3baaca>.

⁴²N J Margetson and N H Margetson, *Arbitration procedures and practice in The Netherlands: overview*, (Nov., 10, 2017 09.54 AM),

[https://uk.practicallaw.thomsonreuters.com/4-542-6425?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-542-6425?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

⁴³Graf and Pitkowitz, *Arbitral Proceedings in Austria*, (Nov., 10, 2017 09.58 A.M), <https://www.lexology.com/library/detail.aspx?g=8b340bb3-937e-48aa-a164-07ba9a05e688>.

⁴⁴*supra* note 7, at 663.

⁴⁵*Id.* at 706.

possibility for revocation of the award, which means to reconsider or set aside a final award due to new facts unknown to either parties.

Indian Arbitration Act

India's situation is not much different from Western Europe. In fact, in arbitration matters India stands at par with Western Europe. The Indian Arbitration and Conciliation Act, 1996 is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. It covers international and commercial arbitration and conciliation, as also domestic arbitration and conciliation. The Act is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention.⁴⁶

Concerning the international commercial arbitration, the Supreme Court in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*⁴⁷ held the view that "international commercial arbitration" meant arbitration between parties where at least one of it is a body corporate incorporated in a country other than India. Although this applicability was extended by the Supreme Court to off-shore arbitrations,⁴⁸ the Court in *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*⁴⁹ refused to resort this approach in every case.

Concerning the conduct of arbitration proceedings, the arbitrators are free to conduct the proceedings in the manner they consider appropriate subject to parties agreement. There is also no express or implied provision concerning confidentiality in the Arbitration Act, but the parties may agree to do so.⁵⁰ In this respect India's position is similar to that of Belgium and France.

Further, there is no procedure for setting aside a foreign award. A foreign award can only be enforced or refused to be enforced but it cannot be set aside.⁵¹ However, the Supreme Court in the case of *Venture Global Engineering v. Satyam Computer Services Ltd.*⁵² (*Venture*

⁴⁶Sumeet Kachwaha and Dharmendra Rautray, *Arbitration in India: An Overview*, (Nov., 09, 2017, 13.08 PM), <https://ipba.org/media/fck/files/Arbitration%20in%20India.pdf>.

⁴⁷2008 (2) Arb LR 439 (SC).

⁴⁸*Bhatia International v. Bulk Trading*, (2002) 4 SCC 10.

⁴⁹(2003) 9 SCC 79.

⁵⁰Sameer Parekh, *Arbitration procedures and practice in India: overview*, (Nov. 10, 2017 10.09 AM), [https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)).

⁵¹*supra* note 46.

⁵²(2008) 4 SCC 190.

Global) held that even though there was no provision in Part II of the Act providing for challenge to a foreign award, a petition to set aside the same would lie under Section 34 Part I of the Act (i.e. it applied the domestic award provisions to foreign awards). The Court held that the properties in question (shares in an Indian company) are situated in India and necessarily Indian law would need to be followed to execute the award.⁵³ However, the *Venture Global* case verdict is severely criticised as erroneous since it “largely rendered superfluous the statutorily envisaged mechanism for enforcement of foreign awards and substituted it with a judge made law.”⁵⁴

Conclusion

Most countries mentioned above directly or indirectly apply the same law to both domestic and international arbitrations; however some countries, including leading arbitral States like France and Switzerland, have different laws for domestic arbitrations and international arbitrations. In contrast to this, the Indian Arbitration Act is quite modernized. Although some of the Supreme Court decisions are not in accordance with the intent of the Act, nevertheless one can hope for better judicial activism in the near future.

⁵³ *Id.*

⁵⁴ *supra* note 46.