ICCA
INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

By

Hon'ble Mr. Justice P. Sathasivam
Chief Justice of India

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"Judicial Dialogue on the New York Convention"

Organised by ICCA

Brother and Sister Judges, Shri Fali Nariman, Honorary President, International Council for Commercial Arbitration, Professor Jan Paulsson, President, International Council for Commercial Arbitration, invitees and guests, Ladies and Gentlemen:

I am happy to be present here for the inaugural session of the New York Convention Roadshow in India. I have learnt that the International Council for Commercial Arbitration (ICCA) have initiated this roadshow on the convention in various signatory countries primarily to launch a healthy judicial discussion focusing on the implementation and application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards among Supreme Court Judges, leading academicians and experts in the field of international arbitration law. It is an applaudable effort as in spirit the success of the New York Convention depends on the approach adopted by the national courts.

India as a nation always favored arbitration both at domestic as well as at international level as an established method of resolving disputes. The significance of arbitration has enhanced more along with the growth of international trade and commerce and the conflicts springing from these pursuits. Consequently, India has always been arbitration friendly since the availability of effective dispute-resolution mechanisms has become the pre-condition for attracting investors and at the same time for maintaining the confidence of parties who are already involved in commercial transactions. Further, the resolution of international commercial disputes by arbitration is a constitutional imperative – Article 51 of

the Constitution of India provides that State shall endeavor to encourage settlements of international disputes by arbitration.

The distinctive nature of International commercial arbitration is that it is governed by hybrid of laws. It begins as a private agreement between the parties. It continues by way of private proceedings in which the wishes of the parties play a significant role. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most of the countries of the world will recognize and enforce. In short, this essentially private process has a public effect, implemented with the support of the public authorities of each State and expressed through the State's national law. This interrelationship between national law and international treaties and conventions is of vital importance to the effective operation of international arbitration.

The giant framework of modern international commercial arbitration stands on the twin pillars of the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration of l985. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards has been an incredible multilateral instrument, possibly the most successful ever in the field of international trade law. While it is believed that the majority of arbitral awards are satisfied through the voluntary compliance of the parties involved and for few which are not, this convention provides the mechanism to do so. The Convention is based on a pro-enforcement concept. It secures acceptance of arbitral awards and arbitration agreements, and facilitates their enforcement. It provides an extra measure of commercial security for parties entering into cross-border transactions. With significant provisions like such, the Convention is indisputably the foundation of international commercial arbitration which is central to the consistency of international business transactions.

We all acknowledge the fact that overwhelming success of an international instrument involves contribution of all stakeholders, especially those organizations that meticulously work for the development of a specialized area of interest. In international commercial arena, the International Council for Commercial Arbitration has earned a big name as a global non-governmental organization committed to promote the use of the processes of resolving international commercial disputes. It actively convenes international arbitration conferences, sponsors authoritative publications, promote the harmonization of arbitration and conciliation laws and standards. Today's event is another significant landmark in ICCA's momentous journey.

India is one of the first signatories to the New York Convention, which it signed on 10th June 1958, and gave effect on 11th October 1960 by way of comprehensive enactments, which was timely amended to cope up with emerging challenges. Presently, the legislative framework provided for recognition of the New York Convention awards consists of Part II, Chapter I of the Arbitration and Conciliation Act, 1996 in India. This recognition incorporates India's two reservations to the Convention. Firstly, the Convention applies to the recognition and enforcement of awards made only in the territory of a state, that is, party to the Convention, and, secondly, it applies only to the differences arising out of the legal relationship, whether contractual or not, that are considered as commercial under the laws of India.

Mr. Fali Nariman, in one of his speeches in ICCA's conference has inferred that the New York Convention was drafted in an imperfect world of sovereign nation States. Taking the lead from his statement, certainly 55 years back, the Convention was drafted in an imperfect world of sovereign nation States, where state sovereignty was a major barrier to the advancement of any universal rule of law. And today, it still remains the same imperfect world. So long as the concept of state sovereignty enjoys phenomenal existence, decisions in respect of any transnational dispute can only be enforced through sovereign national courts, a fact clearly stressed in the provisions of the Convention. This is so because

even a unanimous decision of an international forum has no greater force than a gracious appeal, sovereign nations still being really sovereign.

Thus, it will not be an exaggeration to say that the effective existence of international commercial arbitration is entirely dependent on the tolerance of the Convention obligations by the member states. Though the executive and legislative wings of the member states definitely have some role to play in the light of their peculiar municipal setup; the entire mechanism of the Convention and other prominent arbitration law instruments requires the cooperation of national courts. Reciprocal confidence lies at its core. If a court extends favor to its own nationals, this reciprocity is damaged, and a bad precedent is set. Thus, the eventual growth of the rule of law, the increasing utilization of international arbitration for resolving cross-border disputes and enforcement of arbitral awards depend on the genuine spirit and efforts of sovereign national courts.

Fortunately, we are witnessing that courts around the globe have been implementing the Convention in an increasingly cohesive and synchronized manner; and in doing so they serve global trade and commerce. With respect to the Convention, there are indications that an international standard has emerged at numerous points. All this has contributed greatly in securing the harmonization of international arbitration law, which in turn, assists in achieving certainty, the quality much desired by the international trading community.

Accordingly, in our country, any discussion on the New York convention is not complete without appreciating the mosaic of judicial pronouncements by the Apex Court. Learning from a few past mistakes, we have made all endeavors to make India an arbitration-friendly jurisdiction. Recent decisions pertaining to international commercial arbitration, for illustration, ***Bharat Aluminium Co.*** *vs.* ***Kaiser Aluminium Technical Services Inc.*** (2012) 9 SCC 552 are consistent with the ethos of the New York Convention and UNCITRAL Model Law.

The forthcoming sessions, which are chaired by eminent brother Judges of the Supreme Court of India, will throw further light on the jurisprudence adopted by the Indian Judges to interpret and implement the New York Convention. I am certain the vigorous discussion in these sessions will give a new perspective to the thought process and definitely will have a bearing on the potential judicial pronouncement.

The New York Convention reflects the realities of international arbitration of the 1950s, and it is still a surprisingly modern instrument. However, nothing is perfect in this world. After a long span of experience with the Convention, its text could certainly be improved. This forum must also be used for deliberation on those points on which the Convention's application and interpretation falls back.

To begin with, uniform rules for the procedure of enforcement may be introduced. The Convention only provides that the award and arbitration agreement shall be supplied to the court (Article IV) and that no more onerous conditions or fees should be imposed than what enforcement of a domestic award is sought (Article III). The rest is left to national arbitration law.

Further, we may consider the possibility of a central jurisdiction for the enforcement of the Convention awards as has been suggested by several luminaries in recent years. Global convergence and harmonization in international commercial arbitration are particularly evident in the area of judicial regulation of a foreign arbitral award. In most jurisdictions, the possibility to bring before a court an action for annulment of an arbitral award rendered abroad is excluded. However, some countries may adopt a very stern attitude in

deciding international arbitration disputes. This imbalance may be dealt with guidance emanating from the extensive practical and academic experience of stakeholders.

Needless to say, India has in place an efficient Arbitration Act. It should be the endeavor of the judges to bring the Indian law and practice in conformity with the international practice and standards for furthering international commercial arbitration. At the same time, we must strictly distinguish between the right to court proceedings and the right to legal protection. The right to court proceedings can be waived on the basis of the principle of the autonomy of will for instance, by means of an arbitration agreement entered into in compliance with the *lex arbitri* whereas the right to legal protection cannot be waived. Thus the judges must not be hesitant to take judicial notice of cases wherein legal protection of the concerned person is at question.

Hopefully, we can move on to further fine tuning Indian arbitration law to the demands of the transnational economic order. With these words, I would like to thank the International Council for Commercial Arbitation (ICCA) and Shri Fali Nariman for inviting me to address this inaugural session.

Thank You!

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