SPEECH OF HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE, PUNJAB & HARYANA HIGH COURT, CHANDIGARH (INDIA) AT MAURITIUS ON 03.06.2008 ON KEY ISSUES ON 'INTERNATIONAL ARBITRATION'.

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In the recent decades, arbitration as a mechanism of dispute resolution has gained global acceptability. It is evolving as a principal method of settlement of commercial disputes. Technical advancement and world economic growths taken together has rendered Arbitration an efficacious mechanism of dispute resolution. Fortunately, on account of the efforts made by the United Nation Commission on International Trade Law (UNCITRAL), some nationals have fallen in line with the model law made available by the UNCITRAL. This was pursuant to the recommendation of the General Assembly of the United Nations to the member nations to go in for legislation in conformity with the aforesaid model law. Arbitration, in a sense, is securing "private justice" through a chosen adjudicatory mechanism that has appropriate legislation sanction.

Prior to 1996, arbitration in India was governed substantially by three enactments:

(1) The Arbitration Act, 1940;

(2) The Arbitration (Protocol and Convention) Act, 1937; and

(3) The Foreign Awards (Recognition and Enforcement) Act, 1961.

Thereafter, with the advent of the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on Arbitration in 1985 and with a view to further the process of reforms undertaken, the Indian Parliament passed the Arbitration & Conciliation Act, 1996 ('the Act of 1996'). The said Act encompasses the principles laid down under the UNCITRAL Model Law.

Since the past 50 odd years, there has been an upraise of this so-called international body which is a set up to settle disputes from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is abroad, as well as dispute arising between enterprises with

the foreign investments, international associations and organizations etc.

International Commercial Arbitration is one of the several forms of dispute resolution for international commercial agreements. The use of Arbitration has increased alongwith the growth of International Trade and Commerce and the accompanying disputes springing from these pursuits. In a broader sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (s) to present their dispute for a legally binding ruling. Arbitration is often selected for the reasons of confidentiality, and to eliminate the uncertainties in the choice of arbitrator and forum. Parties from different national origins may also be reluctant to accept National Court litigation with the potential for National bias. Arbitration offers the parties more control over how proceedings will be conducted.

In International Commercial Arbitration, it is important to characterize the nature of the underlying transaction and whether or not the relevant dispute is

commercial; the involvement of commercial persons may be of relevance but should not be guiding principle.

Commercial Arbitration has several defining characteristics:

1. Arbitration is consensual, the parties must agree to arbitrate their differences.
2. Arbitrations are resolved by non-governmental decision makers, arbitrators do not act as government agents, but private persons selected by the parties.
3. Arbitration produces a definitive and binding award, which is capable of enforcement through national courts.

International commercial arbitration is similar, in important respects, to domestic arbitration. As in domestic matters, international arbitration is a consensual means of dispute resolution, by a non-governmental decision maker that produces a legally binding and enforceable ruling. In addition, however, international arbitration has several features that distinguish it from domestic arbitration. Most importantly, international arbitration is often designed and

accepted particularly to assure parties from different jurisdiction that their disputes will be resolved neutrally. Among other things, the parties seek a neutral decision maker. In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transitional litigation, by designating a single, exclusive dispute resolution mechanism for the party's disagreements. Moreover, international arbitration is often seen as a means of obtaining an award that is enforceable in diverse jurisdiction.

Section 2(1)(f) of the Arbitration and Conciliation Act, 1996, defines International Commercial Arbitration as:

> "International Commercial Arbitration: means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-
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> (i) an individual who is a national of, or habitually resident in, any country other than India; or
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> (ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;

The expression "International Commercial Arbitration: has been defined to mean, in short, an arbitration relating to a commercial dispute which has at least one of the parties belonging to a foreign country. Such party may be an individual, firm or a company. It has been noticed that Public Sector Undertakings (PSUs) i.e. state-owned corporations in India and other business entities normally do not object to the arbitration in an International Contract to take place outside India. Corporations such as Oil & Natural Gas Commission (ONGC), the National Hydro Power Corporation (NHPC), Steel Authority of India Ltd. (SAIL), Food Corporation of India (FCI) in their international contracts agree to arbitration being held outside India as Government of India and/or state-owned corporations are amenable to subscribing to an arbitration clause making arbitration

subject to the rules of an internationally recognized Arbitral Organization.

The International or Domestic character of Commercial Arbitration may result in the application of a different set of rules. Several legal systems have special rules for domestic and international arbitration while other systems opt for a unified regulation. There are three ways of establishing the international character of arbitration. Arbitration may be international because:

a). its subject matter or its procedure or its organization is international; or

b). the parties involved are connected with different jurisdictions; or

c). there is a combination of both.

The objective criterion focuses on the subject matter of the dispute and the international or national character of the underlying transaction. Hence, the international commercial interest, or the cross border element of the underlying contract, or the fact the dispute is referred to a genuinely international arbitral institution, such as the ICC, the ICLA or ICSID, would be sufficient

for the arbitration to qualify as international. To the subjective criterion, the focus is on the different nationality or domicile or place of business of the parties to the arbitration agreement. It follows that parties, individuals or companies, should come from different jurisdiction. The modern combined criterion, a third approach combines both the subjective and objective criteria.

The rapid development of International Commercial Arbitration has forced national legal systems not only to tolerate international commercial arbitration, but also to provide for favourable, legal regimes within which it can flourish. It has been rightly suggested that in the 1980s and the 1990s we have experienced a period of competition amongst Legislature and Judiciary, they all tried to attract more international arbitration. The two main effects of this competition were the modernization and liberalization of arbitration regimes and the transfer of the favourable treatment of international arbitration onto the domestic level. This was also reflected in the new trend for unified regulation of International and Domestic arbitrations. The principle that what is good for international arbitration is also good for domestic

arbitration was adopted by Sweden, Germany and other countries. In England, although different systems were anticipated in the Arbitration Act, the domestic rules were not put into effect. The modern unified arbitration system minimizes the importance of the distinction of the national and international arbitration.

It appears that unified regulatory model, which is often referred to as Monism, is the emerging trend. The internationalization of Arbitration appears to be a welcome move globally. There is a gradual convergence of National Arbitration systems, greatly enhanced by modern arbitration laws, the revised international and institutional arbitration rules and the increased acceptance of party autonomy, which can be found in the vast majority of International Commercial contracts.

In order to make India the Global Hub for Arbitration, certain obstacles have to be overcome by taking proper remedial measures.

1. A separate law for domestic and international matters

- An intrinsic mistake in the 1996 law is that there is a common law for both Domestic and International matters. There should be different laws for both as done in Singapore. There is a need for separation of law for domestic and international matters.
- Bills which encourage Domestic and International arbitration should be brought up so that India would become the arbitration hub of the world.

2. Parties to arbitration should ensure that there is no delay in the process of arbitration.
   - While preparing the contract, parties need to be very clear what all they want regarding arbitration like venue of arbitration, composition of arbitral tribunal etc.
   - Delay by parties on various accounts like scope of jurisdiction should be avoided.
   - Language in the contract should not be erred. It should be very clear what kinds of matters are open for arbitration, whether any dispute or a

particular dispute. Generally, the arbitration agreement / clause says, “matters arising out of the contract”. Sometimes, there is a dispute whether there is something arising from the contract.

•Appointment of arbitrators is really important and so the parties should be very careful while appointing the arbitrator and both parties should be satisfied as to the impartiality of the arbitrator.

3. A separate tribunal for monitoring the arbitration process

•There is a need of a tribunal whose main function would be monitoring the process which ensures quality arbitration.

•Both parties should be allowed to plead. If a party fails to plead, the arbitral tribunal should go on with the arbitration process. For this, the arbitral tribunal has to be given more authority and power.

4. Efforts should be made to Reduce Costs

- Cost of arbitration is very high and so first of all efforts should be made to bring the costs down. 82% of the cost is constituted by the fees of the arbitrators and counsels of both the parties. The arbitrators should discuss with the counsel what steps should be taken to resolve the dispute so that both the parties are satisfied with the procedure.
- The time for resolving the dispute should be reduced, which will further help in reducing the cost of arbitration. This can be done by fixing the time for arbitration in the arbitration agreement itself for by agreement between the parties in the preliminary hearing the arbitral tribunal.
- Reduction in costs will allow matters of small claims to come for arbitration which will enlarge the scope of International Commercial Arbitration and even parties who are not financially capable of going for arbitration in case of disputes (at the present costs), will be able to get the benefit of the Arbitration process.

International Commercial Arbitration has proved to be a very effective mechanism for resolving disputes but it faces certain obstacles which can be overcome by adopting certain measures such as reducing costs, avoiding delay, setting up a separate monitoring institution and making separate laws for Domestic and International matters. By adopting the aforesaid measures, International Commercial Arbitration will not only enlarge its scope but also promote arbitration for small claims. Especially, in Developing countries like India, where the economy is developing at a very high rate and also with the advent of globalisation, the economy has expanded a few notches. A dispute resolving mechanism such as International Commercial arbitration can help in fostering the growth of the economy.

On the other hand, most of the time countries, such as Singapore have opted for arbitration as they have separate laws for domestic and international matters and the courts interference is minimal. India can also become the arbitration hub of the world, if proper arbitration mechanisms are developed International Commercial Arbitration in India should be made much easier and

accessible or else the main purpose of its existence will be deprived. It should also be less technical and more responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence not only by doing justice between the parties, but by creating the sense that justice appears to have been done, and this being emphatically done. So are we ready for the next global arbitration hub Incredible India!

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