Emergence of Arbitration in India as a robust mechanism of dispute resolution

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Indian courts, burdened by an immense caseload and complex procedures, have been unable to keep pace with the growth and development of global trade and commerce and the consequent cross border disputes. Arbitration has fast emerged as a robust mechanism to bolster the process of dispute resolution.

The Indian judiciary, led by the Supreme Court, has emerged in recent times as the strongest advocate of alternate dispute resolution and has seized every opportunity to strengthen the arbitral process, resulting in greater references to arbitration. In particular the courts have been both:

- Curbing excessive judicial intervention.
- Decisively ruling in favour of the arbitrability of fraud and broadly interpreted arbitration clauses.

Taking its cue from the judiciary, the Law Commission, in its 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996 (246th Report) has codified the precedents laid down by case law to address these issues. On 26 August 2015, the Union Cabinet gave its approval to the Arbitration and Conciliation Bill 2015 (Bill) to be tabled in Parliament, which essentially adopts the amendments proposed by the Law Commission. However, given the recent washout of the monsoon session of the Parliament and reports of a joint session of Parliament being convened to pass key laws to address these issues. On 26 August 2015, the Union Cabinet gave its approval to the Arbitration and Conciliation Bill 2015 (Bill) to be tabled in Parliament, which essentially adopts the amendments proposed by the Law Commission. However, given the recent washout of the monsoon session of the Parliament and reports of a joint session of Parliament being convened to pass key legislation in relation to the introduction of goods and services tax, it remains to be seen when the Bill will eventually be tabled before Parliament.

THE EVOLUTION OF THE LEGISLATION

The Arbitration Act 1940 (Act X of 1940), inspired by the English Arbitration Act 1934, the Arbitration (Protocol & Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961, were notorious for the wide scope of judicial intervention during the entire arbitral process, before the reference to arbitration, during arbitration and after the award was delivered.

The situation was considered so unsatisfactory that the Supreme Court observed that “the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep” (Guru Nanak Foundation v Rattan Singh, (1981) 4 SCC 634, 635). In addition, the Arbitration Act 1940 was limited in its application to domestic arbitrations and fell short of the desired aim.

With the advent of liberalisation and globalisation in 1991, the need for an environment conducive to trade, development and speedy, cost-effective dispute resolution precipitated the enactment of the Arbitration and Conciliation Act 1996 (Act XXVI of 1996). The Arbitration and Conciliation Act adopted the UNCITRAL Model Law (UNCITRAL Model Law, 24 ILM 302 (1985); Adopted on 21 June 1985), intended to govern international arbitrations, and applied it to domestic arbitrations, international commercial arbitrations and foreign arbitrations. The primary purpose of the Act, as set out in the Statement of Object and Reasons, was to minimise the supervisory role of courts in the arbitral process and to ensure enforcement of awards as if they were decrees of courts of law.

THE ARBITRATION AND CONCILIATION ACT


The law governing arbitration was, until 2012, to be interpreted in light of the judgment of the Division Bench of the Supreme Court in Bhatia International v Intertek Trading SA (2002) 4 SCC 105. This held that Part I of the Act applies to all domestic arbitrations and also to international commercial arbitrations (conducted outside India), unless its application was expressly or by implication excluded. This rationale was similarly extended to the application of sections 11 and 34. In consequence, the courts were called on to grant interim relief, appoint arbitrators and set aside awards, even when the arbitration was conducted outside India. This position has now been amended by the Supreme Court in Bharat Aluminium and Co vs Kaiser Aluminium and Co (2012) 9 SCC 552 (BALCO), which held that the intention of the legislature was that Part I applies only if the place of arbitration is within India, while Part II applies when the arbitration takes place outside India.

Arbitral tribunal independence

The legislature’s intention to minimise judicial intervention manifests itself through various provisions of the Arbitration and Conciliation Act and most significantly in section 5, which unequivocally limits judicial intervention to matters explicitly provided for under the Act. Sections 8, 10, 11 and 45 of the Act are enabling and machinery provisions for the Court to support and aid arbitration, and ought not to be construed as provisions to usurp the jurisdiction of the arbitral tribunal.

Power of the arbitral tribunal to rule on its jurisdiction

The power of the arbitral tribunal to rule on its own jurisdiction, set out at section 16 of the Arbitration and Conciliation Act, serves to (theoretically, at the very least) fortify the independence of the arbitral process and eliminate judicial interference. (See HP Gupta v Delhi Development Authority and Anr, 2002(1) ARBLR 542 (Delhi); The State of Jharkhand, through the Executive Engineer, Swarnrekha Multipurpose Project, Kharkait Link Canal Division v RK Construction (Pty) Ltd and Anr A IR 2006 Jhar 98; and Wellington Associates Ltd v Mr Kirit Mehta AIR 2000 SC 1379.)

When an arbitral tribunal is constituted by parties without judicial intervention, all issues concerning jurisdiction can be determined by the tribunal. However, in SBP and Co v Patel Engineering Ltd and Anr (2005) (8) SCC 618 an exception was carved out for cases where judicial intervention has been sought under section 8 or 11 of the Act. Essentially, the competence of the arbitral tribunal to rule on its jurisdiction must always defer to any orders of the court passed before the reference to arbitration.

JUDICIAL DEVELOPMENTS STRENGTHENING THE ARBITRAL PROCESS

In recent times, there has been a spate of judgments of the Supreme Court and various High Courts, broadly interpreting the provisions of the Arbitration and Conciliation Act and arbitration
agreements to give effect to the intention of parties to arbitrate and to strengthen the hands of arbitrators.

**Courts’ assistance**

Courts are now quick to provide assistance to arbitral tribunals in taking evidence, whether it is evidence of parties to the proceedings or third parties. Section 27, read with section 25(c), was clarified by the Supreme Court in *Delta Distilleries Ltd v United Spirits Ltd & Anr* (2014) 1 SCC 113 to be an enabling provision that was intended by the legislature to remove difficulties and ensure smoother trials in arbitration.

**Evaluation of evidence at the discretion of the tribunal**

Section 19 of the Arbitration and Conciliation Act grants the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight accorded to any evidence led in an arbitration.

**Liberal interpretation of the arbitral clause or agreement**

It is well settled in Indian and international jurisprudence that an arbitration clause or agreement is separable from the main contract or agreement. In a chain of judgments including *Enercon (India) Ltd & Ors v Enercon Gmbh & Anr* (2014) 5 SCC (Enercon) and, more recently, *Ashapura Mine-Chem Ltd v Gujarat Mineral Development Corporation 1* 2015 (5) SCALE 379, the Supreme Court has laid down that unenforceability or invalidity of the underlying contract does not render the arbitration agreement contained within it void. (See *Reva Electric Car Company Pvt Ltd v Green Mobil* (2012) 2 SCC 93 and *Today Homes & Infrastructure Pvt Ltd v Ludhiana Improvement Trust & Anr* (2014) 5 SCC 68). In *Enercon*, the Supreme Court comprehensively considered the scope of intervention by the courts when parties have exercised their right to refer the dispute to arbitration, and has intensified the recent pro-arbitration trend by ruling that an arbitration agreement will remain valid and binding in the absence of ambiguity regarding the parties’ intention to arbitrate.

In relation to international commercial arbitrations, it has also been made clear that an arbitration clause is enforceable by not just parties to an arbitration agreement but also by any person claiming through or under a party to an arbitration (*Chloro Controls India Pvt Ltd v Severn Trent Water Purification Inc & Ors* (2013) 1 SCC 664).

**Court jurisdiction**

The seat of arbitration, that is, the country whose law is chosen as the applicable law, must be the jurisdical seat and only courts from the country of the seat can exercise supervisory jurisdiction (*BALCO*). Courts exercising jurisdiction in the place where the cause of action arises also exercise supervisory jurisdiction over the arbitration. Should there be any dispute as to the nationality of the company, the place of incorporation determines the residence of the company, and not the place of management or control (*Kонkola Copper Mines v Stewart & Lloyds of India Ltd*, 2013(5)RomCR29. TDM Infrastructure Pvt Ltd v UE Development Pvt Ltd (2008) 14 SCC 27).

**IMPARTIALITY AND INDEPENDENCE**

The Arbitration and Conciliation Act does not enumerate or list exhaustively circumstances that give rise to justifiable doubts over an arbitrator’s impartiality or independence. Even in government contracts, arbitration clauses can provide for arbitration by a departmental authority. However, principles of natural justice must be given due regard, and no authority can adjudicate on any decision or subject that has been within the domain of that authority or its direct superior (*Union of India v UP State Bridge Corp Ltd* (2015) 2 SCC 52). The courts must bear in mind the impartiality and independence of arbitrators appointed in their jurisdiction under section 11 of the Act (*Reliance Industries Ltd & Ors v Union of India AIR 2014 SC 2342*).

Numerous amendments are forthcoming, subject to Parliamentary approval, to bring about a higher standard of neutrality of arbitrators, including amendments to sections 11, 12 and 14 of the Act. The Bill has proposed new schedules setting out grounds that give rise to justifiable doubts as to the independence or impartiality of arbitrators. The disclosures to be made by arbitrators, as envisaged by the Law Commission and adopted in the Bill, are radical and reformist, and address core concerns, such as the availability of arbitrators, their experience, relations with the parties, and so on. While it remains to be seen whether Parliament will pass such provisions into law, it demonstrates a progressive and encouraging trend in Indian arbitration.

**SPEED OF ARBITRAL PROCEEDINGS**

The Arbitration and Conciliation Act provides parties with various ways to secure a speedy arbitral process. Section 11(5) permits parties to agree on a defined mechanism for the appointment of one or more arbitrators in the event of a deadlock or the failure of one of the parties to appoint an arbitrator, so that recourse to the courts may be entirely avoided. The arbitration agreement can be drafted to provide for a procedure to challenge an arbitrator; and in the event the challenge fails, parties may allow for the arbitral tribunal to expeditiously proceed to pronounce the award. Section 13 empowers the parties to provide for a mutually agreed challenge procedure to ensure speedy arbitral proceedings. Even the approach to courts can be drastically curtailed under the Act, as agreed between the parties. In some cases, if an objection is raised by the party, the decision on that objection can be pronounced by the arbitral tribunal itself.

Sections 23 and 24 enable parties to provide for strict timelines as regards the filing of claims and replies, and do away with oral hearings. The Act also allows for *ex parte* hearings, should parties default on the provisions relating to timelines.

Recent trends indicate that parties are increasingly inclined to refer disputes to sole arbitrators, as opposed to a tribunal, to reduce costs and secure more effective timelines for dispute resolution.

The Law Commission’s 246th Report and more recently, the Bill proposed specific provisions to inhibit the regularity of adjournments sought and to encourage the use of video and teleconferencing to meet strict timelines.

Interestingly, the Bill seeks to incentivise the arbitral process by empowering parties to agree to pay additional fees to the arbitral tribunal on the completion of proceedings within timelines and granting courts the discretion to reduce arbitrators’ fees up to 5% per month when timelines are not met because of the arbitrators’ delay.

In addition, several timelines are proposed to be imposed, including a strict timeline of 12 months for passing the award. Parties can extend this timeline by a maximum of six months and any further extensions can be granted only by a court of law.

Further, challenges under Section 34 will now be disposed of within one year and applications for the appointment of arbitrators within 60 days. The filing of an appeal will no longer serve as an automatic stay on execution of the award.

**FAST-TRACK ARBITRATION**

Parties can now agree to fast-track proceedings, in which case, an award must be passed within six months.

**INTERIM RELIEF**

Ideally, judicial intervention would form no part of the arbitral process. The cornerstone of arbitration is the choice offered to litigants in relation to the arbitrators, the seat of arbitration and even the procedure adopted during arbitration. However, the arbitral process is often rendered toothless due to the lack of any statutory provisions to ensure enforcement of interim relief awarded by the arbitral tribunal under section 17 of the Arbitration and Conciliation Act. The Supreme Court has lamented that no power is conferred on the arbitral tribunal to enforce its orders and that there is no provision for judicial enforcement (see *MD Army Welfare Housing Organization v Sumangal Services Pvt Ltd*, (2004) 9 SCC 679; *Inter toll ICS Cecons O&M Co Pvt Ltd v National Highway Authority of India*, I LR (2013) 2 Del 1018; *Indiabulls...* global.practicallaw.com/arbitration-guide
Financial Services Ltd v Jubilee Plots and Housing Pvt Ltd, 2009 SCC OnLine Del 2458 and BPL limited v Morgan Securities & Credits Pvt Ltd, 2008 (101) DRI 188.

This omission is attempted to be addressed by section 9 of the Act, which permits litigants to approach courts not just before the reference to arbitration, but also during the arbitral process and after the award, to ensure that an award granted in arbitration is not rendered ineffectual by the dissipation of assets. The Supreme Court observed “though Section 17 gives the Arbitral Tribunal the power to pass orders, the same cannot be enforced as orders of a court. It is for this reason that Section 9 admittedly gives the court power to pass interim orders during arbitration proceedings” (Sundaram Finance v NEPC India Ltd (1999) 2 SCC 429).

Pending legislative action in this regard, the judiciary has attempted to supply a solution, albeit inadequate. The Delhi High Court has in Shri Krishan v Anand (2009) 3 ArbLR 447 (Del) and in Indiabulls Financial Services v Jubilee Plots OMP Nos. 452-453/2009, Order dated 18 August 2009, held that the failure of parties to comply with the interim orders of an arbitral tribunal would fall within the category of “any other default” and would therefore be “guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings” under section 27(5) of the Act, and be liable to be penalised appropriately.

This rationalisation is arguably questionable in view of the fact that the intention of the legislature at section 27 appears to be limited to providing the arbitral tribunal such assistance as may be required in taking evidence. It is arguable that section 27 ought not to be construed so widely as to provide all manner of assistance in the enforcement of interim relief, as in fact, section 9 of the Act amply provides for this eventuality.

A more viable solution, envisaged in the UNCITRAL Model Law, as amended in 2006, would be to empower the arbitral tribunal with powers akin to a civil court of law in respect of the grant and enforcement of interim relief. The proposition has also found favour with the Law Commission, which has proposed an amendment to Section 17 along these lines in its 246th Report. It is hoped that this amendment will be passed into law when the Bill is tabled in Parliament.

ARBTRABILITY OF ISSUES AND JUDICIAL INTERVENTION

Reference to arbitration

The arbitrability of various issues, including fraud, has been the subject matter of extensive debate. In 2011, the Supreme Court, in Booz Allen and Hamilton Inc v SBI Home Finance Ltd (2011) 5 SCC 532, held that all such issues are arbitrable if they are capable of being adjudicated through arbitration, are the subject matter of the arbitration agreement, and are referred to arbitration.

Allegations of fraud in arbitration

In deciding a reference to arbitration, the courts must concern themselves only as to the existence and validity of the arbitration agreement and whether parties seeking the reference to arbitration are parties to the agreement, in the case of domestic agreements, or are claiming through or under parties to the agreement, in the case of international commercial arbitration. In applications for reference to arbitration or appointment of an arbitrator, the courts must refrain from adjudicating on the jurisdiction of the tribunal, on whether a claim falls within the scope of the arbitration clause, or on any other merits of the case.

The Supreme Court has broadened the horizons and enlarged the scope of arbitration by adopting a liberal and pro-arbitration approach. In N Radhakrishnan v Maestro Engineers & Ors 2009 (13) SCALE 403 (N Radhakrishnan), it was laid down that an issue of fraud ought to be tried by a court of law as it requires elaborate evidentiary hearings that arbitrators are not competent or adequately empowered to adjudicate on. In so deciding, the Supreme Court relied on its judgment in Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak AIR 1962 SC 406 (which was decided under the Arbitration Act 1940) and the judgment of the Madras High Court in Oomor Saif v Aslam Saif 2001 (3) CTC 269 (which was arguably a departure from the letter of the Act). The position in N Radhakrishnan had set back progress in the arbitrability of fraud in India until several encouraging judgments of the Supreme Court and Bombay High Court. In Avitel Post Studioz Limited & Ors v HSBC PI Holdings (Mauritius) Ltd Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 the Division Bench of the Bombay High Court upheld the single judge’s ruling that allegations of fraud do not render the subject matter of the dispute incapable of settlement by arbitration.

Shortly after Avitel v HSBC, a new lease of life was granted to the arbitrability of fraud in international commercial arbitrations, when the Supreme Court distinguished N Radhakrishnan in World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd AIR 2014 SC 968 (World Sport) when it was declared that:

• Merely raising allegations of fraud did not render an arbitration agreement inoperative or incapable of being performed and/or null and void under section 45 of the Act.

• A reference to arbitration could not be refused on this ground under Part II of the Act.

World Sport will assuage parties in international commercial arbitrations’ fears of excessive court intervention in this regard.

While considering the issue of the arbitrability of fraud in Swiss Timing Ltd v Organizing Committee, Commonwealth Games 2010 AIR 2014 SC 3723 (Swiss Timing) the Supreme Court held that N Radhakrishnan was decided without reference to section 16 of the Act (which permits an arbitrator to rule on objections as to his jurisdiction) and/or notice of the judgments of the Division Benches of the Supreme Court in Hindustan Petroleum Corporation Ltd v Pinkity Midway Petroleum (2003) 6 SCC 503 (Pinkity Midway) and in P Anand Gajapathi Raju & Ors v PVC Raju (Dead) & Ors AIR 2000 SC 1886 (PAG Raju). The judgment was therefore deemed to have been passed per incuriam. Swiss Timing quotes Pinkity Midway and PAC Raju with approval and states that, in view of the mandatory and peremptory language of section 8 of the Act, should a valid arbitration agreement exist, courts ought to refer parties to arbitration.

Given that Swiss Timing was decided by a smaller bench than N Radhakrishnan, it remains to be seen, however, whether it will truly have the effect of overturning the line of authorities following N Radhakrishnan. However, it is clearly a heartening pro-arbitration view, bringing the Indian position in line with international standards. Assuming that the amendment to section 16 proposed by the Law Commission in its 246th Report is included in the final bill passed into law by Parliament, the debate on fraud will conclude definitively in line with the ruling in Swiss Timing.

SETTING ASIDE AN AWARD

The Arbitration and Conciliation Act envisages very limited grounds for setting aside a domestic award or an award in an international commercial arbitration under section 34. The grounds for refusing enforcement of a foreign award under section 48 must be read in conjunction with this. Much of the judicial intervention in relation to foreign awards or awards in international commercial arbitration has been brought about because of the similar treatment of all three types of awards by the Act. The Supreme Court has, to a great extent, laid to rest the conflict regarding the scope of interference in domestic awards and foreign awards.

While section 34 of the Act sets out a series of grounds that warrant judicial interference to set aside an award, the inclusion of “conflict with the public policy of India” at section 34(2)(b)(ii) has opened the floodgates to conflicting judicial interpretation as to what constitutes public policy.

In RenuSagar Power Co Ltd v General Electric Co (1994) 2 Arb LR 405 (Renusagar), the meaning of “public policy” was considered and interpreted to include the fundamental policy of Indian law,
the interests of India, and justice or morality. While the scope of “interests of India” has been repeatedly tested by litigants, this interpretation has proved to be a sound elucidation of the intention of the legislature.

In 2003, the Supreme Court broadened the scope of interference, by declaring patent illegality to be in conflict with the public policy of India in its judgment in Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd 2003 (2) ARBLR 5 (SC) (Saw Pipes). Seemingly innocuous, this judgment, which was passed purely in the context of domestic awards, had the presumably unintended consequence of being extended in its application to foreign awards under section 48 by the Division Bench of the Supreme Court in In Phulchand Exports Limited v OOO Patriot 2011 (10) SCC 300 (Phulchand).

While distinguishing from Saw Pipes, the Supreme Court in Shri Lal Mahal Ltd v Progetto Grano Spa 2013 (3) ARBLR 1 (SC) (Shri Lal Mahal) upheld the earlier trend of minimal court intervention, particularly with regard to enforcement of foreign awards. The Supreme Court held that the wider meaning given to the expression “public policy of India” under section 34(2)(b)(ii) in Saw Pipes was not applicable where an objection was raised against the enforcement of the foreign award under section 48(b)(ii), particularly when the objections related to defects such as the arbitral tribunal’s rulings on evidence or procedure. The courts’ rationale of refraining from re-examining the merits of a dispute, whether on the facts or evidence or legal analysis of the law, was recognised and upheld in Shri Lal Mahal, which has secured the sanctity of foreign awards and effectively overruled Phulchand.

The purpose of the incorporation of Article 24 of the UNCITRAL Model Laws in section 34 of the Act was to ensure that courts restricted themselves to the grounds set out in section 34 and did not go into the merits of a case, re-appraise or re-examine evidence or facts, or look into the insufficiency of evidence when the arbitrators appear to have applied their minds to these. To the relief of international market participants, it was held that the courts will not sit in appellate jurisdiction when considering a foreign award. Shri Lal Mahal played a crucial role in restoring the faith of the international legal fraternity in the future of arbitration in India.

However, in the recent Oil and Natural Gas Corporation Ltd v Western Geco International Ltd (2014) 9 SCC 263 case (Western Geco), the Supreme Court has, through an elaborate consideration of the scope of the term “fundamental policy of India” reverted to, and enhanced, the Saw Pipes ruling by granting courts greater latitude to interfere in arbitral awards. The Supreme Court, while upholding Saw Pipes, considered the scope of judicial interference in awards under the head “fundamental policy of India” and identified three non-exhaustive distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law:

• adopting a judicial approach while adjudicating on a dispute.
• adhering to principles of natural justice.
• Shunning perversity and irrationality by abiding by Wednesbury principles of reasonableness.

Arbitral perversity must survive the test of these three principles, failing which, courts are free to rectify the perversity, illegality or conflict, as the case may be. This ruling in Western Geco will regress the law to the Saw Pipes standard of judicial interference. In fact, despite the overruling of Phulchand, Western Geco may open the floodgates to regressive orders permitting greater interference with not just domestic, but also foreign awards or awards passed in international commercial arbitrations.

Subsequently, in November 2014, the Supreme Court in Associate Builders v Delhi Development Authority 2014 (13) SCALE 226 (Associate Builders) discussed and extensively examined the issues and concerns affecting a challenge to an arbitral award with its seat in India, looking at recent landmark judgments including Renusagar, Saw Pipes, McDermott International Inc v Burn Standard Co Ltd (2006) 11 SCC 181 and Western Geco. The Division Bench defined the scope of interference under each of the sub-heads of public policy:

• Fundamental policy of Indian law, including disregard for orders of superior courts and violation of the principles of natural justice.
• Interests of India, including its interplay with the global community.
• Justice or morality, which may be cited for interference only when the award shocks the conscience of the court.
• Patent illegality, such as fraud or corruption or other errors of law.

While Associate Builders has to a great extent undone the adverse impact of Western Geco, the law, in the absence of a clarification by a larger bench, remains fraught with potentially abstruse lines of authorities. The wide censure received by Western Geco, on account of the regressive nature of the ruling, has spurred the Law Commission of India to publish a report to supplement the 246th Report in the public policy debate (Law Commission of India, Supplementary to Report No. 246 on Amendments to the Arbitration & Conciliation Act, 1996, “Public Policy” Developments port – Report No. 246, December 2016). This report echoes the rationale of Associate Builders: The Law Commission has proposed an amendment to section 34(2)(b)(ii) of the Act (which the Arbitration and Conciliation Bill 2015 appears to adopt) to restrict the grounds of interference under public policy to such cases where the award is:

• Induced or affected by fraud or corruption.
• In contravention of the fundamental policy of Indian law.
• In conflict with the most basic notions of morality or justice.

The implementation of these restricted grounds of appeal may not prove to be effective until they are crystallised in legislation, as the scope of “fundamental policy” will continue to be subject to judicial interpretation.

The amendment proposed by the Law Commission is desirable to bring to a close the debate on public policy and to unambiguously codify the law pronounced in Renusagar, Saw Pipes, Shri Lal Mahal and Associate Builders, to name a few. However, the Bill is yet to be tabled before Parliament; and the next few sessions of Parliament will determine the course of the public policy debate in arbitration law. Automatic stay of an award on filing a section 34 application was hitherto the norm. Litigants may no longer enjoy the automatic stay under the proposed amendments and may be required to specifically seek an order of the court staying the award.

Appropriate amendments to section 48 are also proposed by the Law Commission and adopted in the Bill to consciously exclude the incorporation of patent illegality as a ground to refuse enforcement of an award.

BOOST TO ARBITRATION AND OTHER ALTERNATE DISPUTE RESOLUTION MECHANISMS

Arbitration has been widely employed by courts and litigants as a means to bypass complex and interminable court proceedings, particularly since the advent of the Legal Services Authorities Act 1987, and, subsequently, the Arbitration and Conciliation Act. A significant step towards promotion of alternate dispute resolution was taken when section 89 of the Code of Civil Procedure 1908 was amended in 1999 to impose a mandatory obligation on civil courts to refer consenting litigants to alternate dispute resolution (Altcons Infrastructure Ltd Vs Cherian Varkey Construction Co (P) Ltd (2010) 8 SCC 24 see also, Law Commission of India, 258th Report on Amendment of Section 89 of the Code of Civil Procedure, 1908 and Allied Provisions, December, 2017).
FUTURE PROSPECTS
Despite the great strides in the law governing Indian arbitration, there continue to be myriad glitches that arbitrators and litigants alike must grapple with. These range from practical issues such as exorbitant fees for arbitrators (particularly in ad hoc arbitration, which is the popular form of arbitration in India) to more deep-rooted problems, such as excessive judicial intervention.

It has been a concern of the legal fraternity that institutional arbitration, such as through the LCIA or the SIAC, for instance, has failed to keep pace with the meteoric rise in the popularity of ad hoc arbitration. The issue of exorbitant fee structures of ad hoc arbitrators and the delays in obtaining timely hearings in arbitration can be traced to the absence of an institutional set-up and the establishment of a well-tested procedure. The option of choosing from an empanelled class of arbitrators who operate within the established procedure prescribed by the institution may possibly offer a workable alternative to ad hoc arbitration. In addition, the Delhi International Arbitration Centre, established by the Delhi High Court, has responded by promoting short timelines and minimal procedural requirements and is indicative of measures undertaken to promote institutional arbitration.

The Law Commission has in its 246th Report proposed amendments to the Arbitration and Conciliation Act ranging from the radical to the necessary. Towards the end of 2014, the Press Information Bureau of the Government of India put out a press release on a proposed Ordinance to amend the Act. Within a few hours, however, the press release was withdrawn, perhaps signifying the Union Cabinet’s intention to table a Bill before Parliament, rather than bring about amendments via the Ordinance route. As anticipated, a brief Press Release was published on 26 August 2015 to notify the Union Cabinet’s approval to the Bill and it appears that most of the amendments proposed by the Law Commission have been adopted.

In addition to the routine and essential codification of well-established principles of law supplied by the judiciary to bridge omissions in the law, the Bill seeks to:

- Introduce a new regime to govern costs, including a cap on the fees payable to arbitrators and administrative fees of arbitration institutions.
- Impose strict timelines for delivery of awards and appropriate amendments discouraging adjournments.
- Curb the dilatory tactics adopted by parties who obtain interim reliefs from courts under section 9 of the Act. The Law Commission has proposed that interim measures must cease to operate 60 days (or such other time as may be granted by the court) from the date of securing relief, unless arbitration proceedings are commenced within this time period.

These are clearly welcome measures, and it is hoped the arbitral process will inch closer to the goal of time-effective dispute resolution.

The increasing popularity of arbitration as a means of dispute resolution has not been, thus far, complemented by legislative reform. Judicial enthusiasm to address the omissions in the law, while laudable, has proved to be grossly inadequate to combat the issues faced by arbitration in India. If the Law Commission’s 246th Report and the Arbitration and Conciliation Bill 2015 are any measure of current trends, the future of Indian arbitration is optimistic. Decisive measures, both systemic and reformist, are forthcoming, and will serve to bring arbitration law in India in line with international trends and the UNCITRAL Model Law standard.

Glitches are inevitable and the implementation of the reforms by the judiciary will not be without setbacks, but the measures will assuage the concerns of international market players and foreign investors alike.
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Recent transactions

- Advising and representing Sandeep Raheja to thwart proceedings in relation to the control and management of the K Raheja Constructions Group including disputes with the Estate of GL Raheja.
- Advising and representing Enercon GmbH in transborder corporate, intellectual property related disputes in diverse Courts and Tribunals across India and UK valued at over US$5 billion.
- Advising and representing Ferani Hotels in proceedings by and against Nusli Wadia for land at Malad in excess of 400 acres, valued at over US$2 billion in the Supreme Court of India and Bombay High Court.
- Advising and representing Cellular Operators Association of India (COAI) to challenge the Maharashtra Cellular Regulations.
- Advising and representing Godrej Group of Companies in diverse disputes relating to realty development, consumer matters, EPF claims, employee disputes, white collar crimes and so on.
- Advising and representing Idea Cellular Ltd, one of India’s largest telecom providers, in diverse proceedings including 2014 and 2015 spectrum auctions before the Supreme Court of India; indirect tax related litigations in the Bombay High Court and Supreme Court of India; spectrum allocation disputes, IPR disputes/claims.
- Advising and representing JSW Ltd in relation to diverse disputes, including Al-Ghuriar LLC emanating from a challenge to an Arbitral Award.

Professional associations/memberships. Member, Bar Council of Maharashtra and Goa; Member, Bombay Incorporated Law Society; Member, Bombay Bar Association; Advocate on Record, Supreme Court of India.

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