ARBITRATION IN INDIA: AN OVERVIEW

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Background to arbitration legislation:

The Indian law of arbitration is contained in the *Arbitration and Conciliation Act 1996* (Act).[1] The Act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. The Statement of Objects and Reasons of the Act recognises that India's economic reforms will become effective only if the nation's dispute resolution provisions are in tune with international regime. The Statement of Objects and Reasons set forth the main objectives of the Act as follows:

"i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;

ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;

v) to minimise the supervisory role of courts in the arbitral process;

vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;

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[1] Full text of the Act can be viewed at: http://www.kaplegal.com/statutes/index.html.

viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and

ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

Scheme of the Act:

The Act is a composite piece of legislation. It provides for domestic arbitration; international commercial arbitration; enforcement of foreign award and conciliation (the latter being based on the UNCITRAL Conciliation Rules of 1980).

The more significant provisions of the Act are to be found in Part I and Part II thereof. Part I contains the provisions for domestic and international commercial arbitration in India. All arbitration conducted in India would be governed by Part I, irrespective of the nationalities of the parties. Part II provides for enforcement of foreign awards.

Part I is more comprehensive and contains extensive provisions based on the Model Law. It provides inter alia for arbitrability of disputes; non-intervention by courts; composition of the arbitral tribunal; jurisdiction of arbitral tribunal; conduct of the arbitration proceedings; recourse against arbitral awards and enforcement. Part II on the other hand, is largely restricted to enforcement of foreign awards governed by the New York Convention or the Geneva Convention. Part II is thus, (by its very nature) not a complete code. This led to judicial

innovation by the Supreme Court in the case of *Bhatia International v. Bulk Trading*[2]. Here the Indian courts jurisdiction was invoked by a party seeking interim measures of protection in relation to an arbitration under the ICC Rules to be conducted in Paris. The provision for interim measure (section 9) was to be found in Part I alone (which applies only to domestic arbitration). Hence the Court was faced with a situation that there was no *proprio vigore* legal provision under which it could grant interim measure of protection. Creatively interpreting the Act, the Supreme Court held that the "general provisions" of Part I would apply also to offshore arbitrations, unless the parties expressly or impliedly exclude applicability of the same. Hence by judicial innovation, the Supreme Court extended applicability of the general provisions of Part I to off-shore arbitrations as well.

It may be stated that this was premised on the assumption that the Indian Court would otherwise have jurisdiction in relation to the matter (in the international sense). This became clear in a subsequent decision of the Supreme Court in *Shreejee Traco (I) Pvt. Ltd. v. Paperline International Inc.*[3] Here the Court's assistance was sought for appointing an arbitrator in an off-shore arbitration. The power of appointment by court exists under Section 11 of Part I of the Act. The Court declined to exercise jurisdiction. It found that the arbitration was to be conducted in New York and that the law governing the arbitration proceedings would be the law of seat of the arbitration. Hence, the extension of Part I provisions to foreign arbitrations sanctified by *Bhatia*[4] could not be resorted to in every case. The Indian Courts would have to first determine if it has jurisdiction, in the international sense.

[2] (2002) 4 SCC 105 (*'Bhatia'*).
[3] (2003) 9 SCC 79.
[4] Supra.

Subject matter of arbitration:

Any commercial matter including an action in tort if it arises out of or relates to a contract can be referred to arbitration. However, public policy would not permit matrimonial matters, criminal proceedings, insolvency matters anti-competition matters or commercial court matters to be referred to arbitration. Employment contracts also cannot be referred to arbitration but director - company disputes are arbitrable (as there is no master servant relationship here)[5]. Generally, matters covered by statutory reliefs through statutory tribunals would be non-arbitrable.

Role of the court:

One of the fundamental features of the Act is that the role of the court has been minimised. Accordingly, it is provided that any matter before a judicial authority containing an arbitration agreement shall be referred to arbitration (Section 8 provided the non - applicant objects no later than submitting its statement of defense on merits). Further, no judicial authority shall interfere, except as provided for under the Act (Section 5).

In relation to arbitration proceedings, parties can approach the Court only for two purposes: (a) for any interim measure of protection or injunction or for any appointment of receiver etc.[6]; or (b) for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator. In such an event, in the case of domestic arbitration, the Chief Justice of a High Court may appoint an arbitrator, and in the case of international commercial arbitration, the Chief Justice of the Supreme Court of India may

[5] Comed Chemicals Ltd. v. C.N. Ramchand 2008 (13) SCALE 17.

[6] This can be even prior to the institution of arbitration proceedings, provided that it is clear that the applicant intends to take the dispute to arbitration.

carry out the appointment[7]. A court of law can also be approached if there is any controversy as to whether an arbitrator has been unable to perform his functions or has failed to act without undue delay or there is a dispute on the same. In such an event, the court may decide to terminate the mandate of the arbitrator and appoint a substitute arbitrator.

Jurisdiction of the arbitrator:

The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by as party at the first instance, i.e., either prior to or along with the filing of the statement of defence. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order, it is open to the aggrieved party to challenge the award.

In *SBP & Co. v. Patel Engg Ltd.*[8] the Supreme Court of India (in a decision rendered by a Bench of Seven Judges) held that the nature of power conferred on the Court under Section 11 of the Act is judicial (and not administrative) in nature. Accordingly, if parties approach the Court for appointment of arbitral tribunal (under Section 11) and the Chief Justice pronounces that he has

[7] Section 11 of the Act.
[8] (2005) 8 SCC 618

jurisdiction to appoint an arbitrator or that there is an arbitration agreement between the parties or that there is a live and subsisting dispute to be referred to arbitration and the Court constitutes the Tribunal as envisaged, this would be binding and cannot be re-agitated by the parties before the arbitral tribunal.

In *S.B.P & Co.* case the Supreme Court has defined what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. The Chief Justice has the power to decide his own jurisdiction in the sense whether the party making the motion has approached the right court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. He can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

The Court in *SBP & Co* case, inter alia, concluded as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the judgment. These will be, his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) The District Judge does not have the authority under Section 11(6) of the Act to make appointment of an arbitrator.

(vi) The High Court cannot interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act (appealable orders) or in terms of Section 34 of the Act (setting aside or arbitral award).

(vii) Since it is a judicial order, an appeal will lie against the order passed by the Chief Justice of the High Court or by the designated Judge of that Court only under Article 136 of the Constitution to the Supreme Court.

(viii) No appeal shall lie against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) Where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

Challenge to arbitrator:

An arbitrator may be challenged only in two situations. First, if circumstances exists that give rise to justifiable grounds as to his independence or impartiality; second, if he does not posses the qualifications agreed to by the parties. A challenge is required to be made within 15 days of the petitioner becoming aware of the constitution of the arbitral tribunal or of the circumstances furnishing grounds for challenge. Further, subject to the parties agreement, it is the arbitral tribunal (and not the court - unlike under the old Act of 1940) which shall decide on the challenge. If the challenge is not successful the tribunal shall continue with the arbitral proceedings and render the award, which can be challenged by an aggrieved party at that stage. This is another significant departure from the Model Law, which envisages recourse to a court of law in the event the arbitral tribunal rejects the challenge.[9]

The Indian courts have held that "the apprehension of bias must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.

[9] Article 13 of Model Law

Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regulate our vision."[10]

Conduct of arbitration proceedings:

The arbitrators are masters of their own procedure and subject to parties agreement, may conduct the proceedings "in the manner they consider appropriate." This power includes- "the power to determine the admissibility, relevance, materiality and weight of any evidence".[11] The only restrain on them is that they shall treat the parties with equality and each party shall be given a full opportunity to present his case,[12] which includes sufficient advance notice of any hearing or meeting.[13] Neither the Code of Civil Procedure nor the Indian Evidence Act applies to arbitrations.[14] Unless the parties agree otherwise, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for arguments or whether the proceedings shall be conducted on the basis of documents or other material alone. However the arbitral tribunal shall hold oral hearings if a party so requests (unless the parties have agreed that no oral hearing shall be held).[15]

Arbitrators have power to proceed exparte where the respondent, without sufficient cause, fails to communicate his statement of defence or appear for an oral hearing or produce evidence. However, in such situation the tribunal shall not treat the failure as an admission of the allegations by the respondent and shall decide the matter on the evidence, if any, before it. If the

[10] International Airports Authority of India v. K.D. Bali & Anr; (1988) 2 SCC 360.
[11] Section 19 (3) and (4)
[12] Section 18
[13] Section 24 (2)
[14] Section 19 of Act and Section 1 of the Evidence Act.
[15] Section 24

claimant fails to communicate his statement of the claim, the arbitral tribunal shall be entitled to terminate the proceedings.[16]

Taking of evidence in arbitral proceedings:

The Indian Oath's Act 1969 extends to persons who may be authorized by consent of parties to receive evidence. This Act thus, encompasses arbitral proceedings as well.[17] Section 8 of the said Act states that every person giving evidence before any person authorized to administer oath "shall be bound to state the truth on such subject." Thus, witnesses appearing before an arbitral tribunal can be duly sworn by the tribunal and be required to state the truth on oath and upon failure to do so, commit offences punishable under the Indian Penal Code.[18] However, the arbitrators cannot force unwilling witnesses to appear before them and for this court's assistance is provided for vide Section 27 of the Act. Under this provision the arbitral tribunal or a party with the approval of the tribunal may apply to the court seeking its assistance in taking evidence (this is also provided for in the Model Law). However, Section 27 of the Indian Act goes beyond the Model Law as it states that any person failing to attend in accordance with any order of the court or making any other default or refusing to give evidence or guilty of any contempt of the arbitral tribunal, shall be subject to like penalties and punishment as he may incur for like offences in suits tried before the court. Further, the court may either appoint a commissioner for taking evidence or order that the evidence be provided directly to the arbitral tribunal. These provisions extend to any documents to be produced or property to be inspected. Section 26 provides for appointment of experts by the arbitral tribunal for any specific issue. In such situation a party may be required to give the expert any relevant information or produce any

[16] Section 25
[17] Raipur Development Authority v. Chokhamal Contractors, (1989) 2 SCC 721.
[18] Section 191 and 193 of the Indian Penal Code.

relevant document, goods or property for inspection as may be required. It will be open to a party (or to the arbitral tribunal) to require the expert after delivery of his report, to participate in an oral hearing where the parties would have an opportunity to put questions to him.

Governing Law:

In an international commercial arbitration, parties are free to designate the governing law for the substance of the dispute. If the governing law is not specified, the arbitral tribunal shall apply the rules of law it considers appropriate in view of the surrounding circumstances. For domestic arbitration, however, (i.e., between Indian parties), the tribunal is required to decide the dispute in accordance with the substantive laws of India.

The Supreme Court in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.*[19] held that irrespective of where the 'central management and control is exercised' by a company, companies incorporated in India, cannot choose foreign law as the governing law of their arbitration. The nationality of companies incorporated in India being Indian, the intention of the legislature is that Indian nationals should not be permitted to derogate from Indian law as it would be against public policy. The Court was of the view that "international commercial arbitration" meant an arbitration between parties where at least one of it is a body corporate incorporated in a country other than India. Where both companies are incorporated in India (and thereby had Indian nationalities), then the arbitration between them cannot be said to be an international commercial arbitration (even though the central management and control of the company may be exercised from a country other than India).

[19] 2008 (2) Arb LR 439 (SC)

Form and content of awards:

The arbitrators are required to set out the reasons on which their award is based, unless the parties agree that no reasons are to be given or if it arises out of agreed terms of settlement. The tribunal may make an interim award on matters on which it can also make a final award. Indian law provides for a very healthy 18% interest rate on sums due under an award. Thus, unless the arbitral tribunal directs otherwise, the award will carry interest at 18% per annum from the date of the award till the date of payment. The tribunal is free to award costs, including the cost of any institution supervising the arbitration or any other expense incurred in connection with the arbitration proceedings.

Setting aside of awards:

The grounds for setting aside an award rendered in India (in a domestic or international arbitration) are provided for under Section 34 of the Act. These are materially the same as in Article 34 of the Model Law for challenging an enforcement application. An award can be set aside if:

a) a party was under some incapacity; or
b) the arbitration agreement was not valid under the governing law; or
c) a party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or
d) the award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or
e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or
f) the subject matter of the dispute is not capable of settlement by arbitration; or

g) the arbitral award is in conflict with the public policy of India.

A challenge to an award is to be made within three months from the date of receipt of the same. The courts may, however, condone a delay of maximum 30 days on evidence of sufficient cause. Subject to any challenge to an award, the same is final and binding on the parties and enforceable as a decree of the Court.

Considerable controversy has been generated as to whether an award is liable to be challenged under Section 34 on merits. The earlier view, as expounded by the Supreme Court in *Renu Sagar Power Co. Ltd. v. General Electric Co.*[20] was that an award could be set side if it is contrary to the public policy of India or the interests of India or to justice or morality – but not on the grounds that it is based on an error of law or fact. The Supreme Court in that case was faced with the issue to determine the scope of public policy in relation to proceedings for enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961. The Court also held that in proceedings for enforcement of a foreign award the scope of enquiry before the court in which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits.

However, in a later Supreme Court of India decision in *Oil and Natural Gas Corporation vs. Saw Pipes*[21] the Court added an additional ground of "patent illegality", thereby considerably widening the scope of judicial review on the merits of the decision. In *Saw Pipes* case the court accepted that the scheme of Section 34 which dealt with setting aside the domestic arbitral award and Section 48 which dealt with enforcement of foreign award were not identical. The court also

[20] (1994) Supp (1) SCC 644
[21] (2003) 5 SCC 705

accepted that in foreign arbitration, the award would be subject to being set aside or suspended by the competent authority under the relevant law of that country whereas in domestic arbitration the only recourse is to Section 34. The Supreme Court observed:

> "*But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside.*
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> *……. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of 'patent illegality*'."

The court in *Saw Pipes* case although adopted the wider meaning to the term 'public policy' but limited its application to domestic awards alone. The *Saw Pipes* case has generated some controversy, and it remains to be seen if it will stand the test of time.

The position of a foreign award has also undergone some recent controversy. A foreign award is enforceable under Part II of the Act if it is rendered in a country that is a signatory to the New York Convention or Geneva Convention and that territory is notified by the Central Government of India. Once an award is held to be enforceable it is deemed to be a decree of the court and can

be executed as such. Under the Act 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.

This fundamental distinction between a foreign and a domestic award has been altered by the Supreme Court in the recent case of *Venture Global Engineering v. Satyam Computer Services Ltd.*[22] *(Venture Global)*. Here the Supreme Court was concerned with a situation where a foreign award rendered in London under the Rules of the LCIA was sought to be enforced by the successful party (an Indian company) in the District Court, Michigan, USA. The dispute arose out of a joint venture agreement between the parties. The respondent alleged that the appellant had committed an "event of default" under the shareholders agreement and as per the said agreement exercised its option to purchase the appellant's shares in the joint venture company at book value. The sole arbitrator appointed by the LCIA passed an award directing the appellant to transfer its shares to the respondent. The respondent sought to enforce this award in the USA.[23] The appellant filed a civil suit in an Indian District Court seeking to set aside the award. The District Court, followed by the High Court, in appeal, dismissed the suit holding that there was no such procedure envisaged under Indian law. However, the Supreme Court in appeal, following its earlier decision in the case of *Bhatia International v. Bulk Trading*[24] 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 property in question

[22] (2008) 4 SCC 190.

[23] A somewhat strange move considering that the shares were in an Indian company and various Indian regulatory steps and authorities would be involved for transfer of shares. The Respondents move was perhaps influenced by the fact that the governing law under the Agreement was the law of the State of Michigan and the appellant was situated in the USA. The Respondent thus attempted to bypass the natural forum (India) hoping to enforce the award through the contempt of court mechanism of the U.S. Courts. This did not go well with the Indian Supreme Court.

[24] (2002) 4 SCC 105.

(shares in an Indian company) are situated in India and necessarily Indian law would need to be followed to execute the award. In such a situation the award must be validated on the touchstone of public policy of India and the Indian public policy cannot be given a go by through the device of the award being enforced on foreign shores. Going further the Court held that a challenge to a foreign award in India would have to meet the expanded scope of public policy as laid down in *Saw Pipes* (supra) (i.e. meet a challenge on merits contending that the award is "patently illegal").

The Venture Global case is far reaching for it creates a new procedure and a new ground for challenge to a foreign award (not envisaged under the Act). The new procedure is that a person seeking to enforce a foreign award has not only to file an application for enforcement under Section 48 of the Act, it has to meet an application under Section 34 of the Act seeking to set aside the award. The new ground is that not only must the award pass the New York Convention grounds incorporated in Section 48, it must pass the expanded "public policy" ground created under Section 34 of the Act. In practice, the statutorily enacted procedure for enforcement of a foreign award would be rendered superfluous till the application for setting aside the same (under Section 34) is decided. The statutorily envisaged grounds for challenge to the award would also be rendered superfluous as notwithstanding the success of the applicant on the New York Convention grounds, the award would still have to meet the expanded "public policy" ground (and virtually have to meet a challenge to the award on merits). The *Venture Global* case thus largely renders superfluous the statutorily envisaged mechanism for enforcement of foreign awards and substitutes it with a judge made law. The Judgement thus is erroneous. Moreover, in so far as the Judgment permits a challenge to a foreign award on the expanded interpretation of public policy it is *per incuriam* as a larger, three Bench decision in the case of *Renu Sagar*

(supra) holds to the contrary. Further *Saw Pipes* (on which *Venture Global* relies for this proposition) had clearly confined its expanded interpretation of public policy to domestic awards alone (lest it fall foul of the *Renu Sagar* case which had interpreted the expression narrowly). The Supreme Court in *Venture Global* did not notice this self-created limitation in *Saw Pipes* nor did it notice the narrower interpretation of public policy in *Renu Sagar* and therefore application of the expanded interpretation of public policy to foreign awards is clearly *per incuriam.*

The decision thus needs to be reviewed.

Conclusion:

India has in place a modern, an efficient Arbitration Act. There have been some decisions which are not in tune with the letter or spirit of the Act. Hopefully, these would be addressed by the judiciary in the near future and continuing popularity of arbitrations would be served by a truly efficient ADR mechanism.

[The law as stated herein is as on April 2009]