THE FINANCIAL EXPRESS

Column: Making Indian arbitration effective

Amendments to the Arbitration Act could boost investors' confidence in India

By: Alipak Banerjee and Vyapak Desai | January 15, 2016

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Due to certain controversial decisions made by the Indian judiciary in the last decade—especially in cases involving a foreign party—investors have kept a close watch on the development of arbitration laws in India. They have often criticised the judiciary for its interference in international commercial arbitration and extraterritorial application of domestic laws to awards obtained outside the country. Foreign investors and corporate entities considered it as a major risk factor for doing business in India. In fact, the delay in the judicial process led to the first investment arbitration claim against the country in the White Industries vs the Republic of India case, where the Republic of India was directed to pay a hefty sum by the arbitral tribunal.

In 1996, the Arbitration and Conciliation Act, 1996, was passed with the optimism that it would bring in winds of change, but fell into a chasm of its own. A number of decisions from the courts slowly but surely ensured that the preferred seat in any cross-border contract was always a heavily negotiated point and, more often than not, ended up being either Singapore, New York or London—the established global arbitration centres.

However, developments in arbitration jurisprudence through recent court decisions have now

shown the support of the judiciary in enabling India to adopt international best practices. Never before has one seen so many pro-arbitration rulings by the Indian courts. From 2012 to 2015, the Supreme Court delivered various landmark rulings showing a much-needed pro-arbitration approach, such as declaring the Indian arbitration law to be seat-centric; removing Indian judiciary's power to interfere with arbitrations seated outside the country; referring non-parties to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy in foreign-seated arbitration; and determining that even fraud is arbitrable.

In furtherance to measures taken by the Indian government in support of the 'ease of doing business', after two aborted attempts in 2001 and 2010 to amend the arbitration law, on October 23, 2015, the President promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015. The amendments incorporated the essence of major rulings passed in the past two decades, including most of the recommendations of the 246th Law Commission Report, and clarified the major controversies that arose in recent years.

Thereafter, on January 1, 2016, the Arbitration and Conciliation Amendment Act, 2015, was notified in the official gazette, which amended the provisions of the 1996 Act prospectively. The amendments are aimed at taking drastic and reform-oriented steps to bring the Indian arbitration law on a par with global standards and provide an effective mechanism for resolving disputes with minimal court interference. The amendments came into effect keeping in mind the objective of the Act to provide a speedy and cost-effective dispute resolution mechanism which would give finality to the parties.

In tune with arbitration-friendly jurisdictions, the amendment Act has introduced a fast-track procedure where arbitrations can be completed expeditiously. The arbitral tribunals have been given a 12-month time-line for completion of arbitrations seated in India, which can be extended by six months with the consent of the parties. This time-line is stricter than the average time taken for an arbitration in any other jurisdiction, which is usually about 18-24 months. The amendment Act has gone a step further by prescribing time-lines for expeditious disposal of arbitration applications which are required to be filed before courts, in aid of the underlying arbitration.

The amendment Act has also introduced significant changes by giving the parties the flexibility to approach Indian courts for interim relief in aid of foreign-seated arbitrations, which reverses the position rendered by the ruling in Bharat Aluminum Co vs Kaiser Aluminum Technical Service Inc on this issue. In accordance with international standards, the 'costs follow the event' regime has been introduced, which will help in reducing filing of frivolous claims. In addition, the tribunal's power to grant interim protection has been made akin to the powers of the court, thereby encouraging the parties to take recourse before the arbitral tribunal. It will, in effect, reduce the burden on the court which, in any case, is suffering from a huge backlog of cases. In order to streamline the process, interim orders passed by tribunals seated in India will be deemed to be the order of court and thus enforceable.

Arbitration thrives on the principle of integrity, independence and impartiality of the arbitrators. To that effect, guidelines and detailed schedules on ineligibility of arbitrators have been introduced by the amendment Act, which is undoubtedly commendable and brings Indian law on

a par with international standards.

As India was viewed as a jurisdiction which offered excessive judicial interference, the grounds on which awards arising out of international commercial arbitrations seated in the country may be challenged has been limited. In addition, contrary to the previous position, the amendment Act has mandated no more automatic stay on filing a challenge to an arbitral award in absence of a specific order from court.

The amendments are salutary with an aim to make India an attractive investment destination, but it may not be possible to adhere to all the strict standards prescribed. For example, in a complex arbitration, it may not be possible to complete the entire arbitration within 12 months and, therefore, we will see more applications being filed before the courts for extension of time. Further, by giving the amendment Act prospective effect, the amendments would not be applicable on the existing arbitrations which have commenced before October 23, 2015; it thereby reduces the immediate impact of such amendments. The appointing authority for arbitrators (i.e. in absence of party-nominated arbitrators) is still the court and any recourse to the courts adds on to their burden, which, in any event, are suffering from pendency of cases. Instead, a nationwide institution could have been established to administer and also act as appointing authority from a larger pool of practitioners who have experience in dealing with complex disputes. Independent of the amendments, there is also an urgent need to introduce a change in the mindset and culture in the way arbitrations are conducted in India to make it an efficient and effective alternate dispute resolution mechanism.

The year 2015 saw a huge rise in cross-border transactions in the country. The Competition Commission of India saw a record filing of 115 merger and acquisition cases—the highest registered in a calendar year—and even foreign direct investment went up by 40%. Therefore, the amendment Act is a step towards the right direction and will help promote ease of doing business in India, thereby boosting investor confidence.

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