Now arbitration friendly?

Recent rulings in India seem to be making it a more attractive venue for arbitration, say Shafaq Uraizee Sapre and Gautam Dembla of Nishith Desai Associates

The Indian economy has rapidly transformed into a global destination for international business. It is imperative for India to have an atmosphere conducive to foreign corporations seeking to invest in India. Efficient dispute resolution machinery is therefore paramount.

A benefit of conducting arbitration in India is that the scope of enforcing a foreign award is wider than enforcing a judgment of a foreign court. India has more reciprocal arrangements with other countries for the enforcement of foreign arbitration awards than for foreign judgments.

In order to reduce the burden on courts and provide an alternative to litigation, *The Arbitration and Conciliation Act* was enacted in 1996. The Act was intended to create a pro-arbitration legal regime with minimal judicial intervention. Section 5 of the Act provides: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." The intention of the legislature is clear – a judicial authority will only intervene as provided by the Act. As per the provisions contained in the Act, a judicial authority can intervene in (1) the event the parties cannot reach a consensus on appointment of arbitrators, (2) where a party moves an application for interim measures of protection or (3) when a party seeks to enforce or set aside an arbitral award. The extent to which such judicial protection is available is also defined in the Act. However, the manner in which the Act has been interpreted in some of the landmark judgments has expanded the extent of judicial intervention.

This article provides an analysis of the prevailing arbitration regime in India in light of certain landmark judgments: *Oil & Natural Gas Corporation v Saw Pipes, (2003) 5 SCC 705* (Saw Pipes), *Bhatia International v Bulk Trading SA, (2002) 4 SCC 105* (Bhatia International), *Venture Global Engineering v Satyam Computer Services Limited, (2008) 4 SCC 190 (*Venture Global*), SBP & Co v Patel Engineering, (2005) 8 SCC 618 (*Patel Engineering*)*. Although these decisions determined how the courts interpreted the Act, they were widely criticised by jurists and practitioners because they curtailed party autonomy and allowed parties to approach courts in matters that could have been resolved by the arbitral tribunal.

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The Arbitration and Conciliation Act

The Act is based on the Uncitral Model, and with a few significant additions, adopts the Model Law in its entirety. The Act governs both domestic and international commercial arbitrations held in India. Pursuant to the decision of the Supreme Court in *Bhatia International*, discussed below, it has been held that the Act is also applicable to international commercial arbitrations held outside India, unless the parties have expressly or impliedly excluded its applicability. The Act also contains provisions for the enforcement of arbitral awards that are passed in reciprocating territories notified by the Government of India that are either a party to the New York Convention or the Geneva Convention.

Saw Pipes – Conflict with public policy

In *Saw Pipes*, the Supreme Court considered the grounds on which an arbitral award can be challenged. Section 34 (2) (b) (ii) of the Act provides that an award can be set aside on the ground that it in is conflict with the public policy of India. The Court opined that the meaning of the expression "public policy of India" should be given a broader meaning than the one ascribed in earlier decisions and accordingly held that an award can be set aside if it is patently illegal. The decision was criticised because it allowed losing parties to an arbitration to seek judicial review of the award.

However, an often ignored aspect of the decision was that the Supreme Court had held that illegality must go to the root of the matter and should not be of a trivial nature, thereby indicating that there would be no judicial review of arbitral awards on trivial or inconsequential grounds.

Bhatia International – arbitrations outside India

The *Bhatia International* case addresses whether a party to arbitration can approach an Indian Court under Part 1 of the Act, if the seat is outside of India. Part 1 of the Act applies to arbitrations that are held in India while Part II of the Act provides for recognition and enforcement of arbitral awards that are granted in reciprocating countries that are also parties to the New York Convention or the Geneva Convention. Part 1 contains provisions for the appointment of an arbitrator, interim measures and grounds available to challenge an award that is granted in India.

The Supreme Court observed that since Part II of the Act is only applicable to awards granted in reciprocating territories, if Part 1 of the Act was held to be not applicable to arbitrations held outside India, then the parties to such an arbitration would be left without a remedy ,as any such arbitration award granted by the non-reciprocating country was not recognised or enforced in India. The Court felt that this could not be the intention of the legislature and held that Part 1 is applicable to arbitrations that are held outside India, unless the parties expressly or impliedly agree to exclude its applicability. Accordingly, the Court granted interim measures with respect of disputes that the parties had agreed to submit for arbitration to the International Chamber of Commerce (ICC) in Paris. The Court noted that Article 23 of the ICC rules does not prohibit a judicial authority from granting interim measures.

An interesting consideration would be the outcome if such facts and circumstances, as mentioned above, were applied to another arbitral institution with a different set of rules. For example, the rules of the Singapore International Arbitration Centre provide that if the seat of arbitration is Singapore, the applicable law of arbitration would be the International Arbitration Act of Singapore. This could be argued to be an implied exclusion of Part 1 of the Act. Also, unlike Article 23 of the ICC rules, the Singapore International Arbitration Centre (SIAC) rules do not contain a provision that gives parties to an arbitration agreement the right to approach a judicial authority for seeking interim measures of protection.

“The consultation paper provides fresh hope that India would find its rightful place in the roster of arbitration friendly states”

The Bhatia International decision, though widely criticised for making the Act applicable to arbitrations held outside India, provides recourse for parties to approach Indian Courts for interim relief in arbitrations conducted in countries that have not been declared by India to be notified countries for the recognition of foreign awards. As of today, India has notified only 45 countries as reciprocating territories. According to the principles stated in *Bhatia International*, parties arbitrating in countries that have not been notified may approach the courts in India for remedies including that of having the award enforced in India, which would otherwise have been denied under the Act.

Venture Global – challenging a foreign award

As noted earlier, Part II of the Act contains provisions for the enforcement of arbitral awards in India that are passed in notified reciprocating territories that are either a party to the New York Convention or the Geneva Convention. Sections 48 and 57 of Part II of the Act contain limited grounds on which enforcement can be refused.

In *Venture Global*, the Supreme Court considered whether Part I of the Act applies to a foreign award. Following the decision in *Bhatia International*, the Supreme Court held that Part 1 of the Act does apply to foreign awards and parties may make an application under Section 34 of the Act to set aside such awards.

The *Venture Global* and *Saw Pipes* decisions, therefore, provide additional grounds to challenge a foreign award in comparison to the limited grounds contained in Sections 48 and 57 of Part II of the Act.

Patel Engineering -validity of an agreement

Under the various provisions of Section 11 of the Act, if parties to an arbitration agreement fail to appoint an

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Shafaq's practice includes a variety of transactions with both domestic and international clients. She has advised and assisted clients on issues concerning the legal aspects of structuring and restructuring investments in India and globally across a multitude of sectors. Shafaq has led several legal due diligence teams and often renders opinions on issues concerning litigation, arbitration, doing business in India and on contract laws.

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arbitrator according to the terms contained in the arbitration agreement, then either party may approach the Chief Justice of the Supreme Court, in the case of international commercial arbitrations or the Chief Justice of the relevant High Court, in the case of domestic arbitrations, which will then appoint or designate an institution to appoint, an arbitrator as per the provisions of the Act. There has been considerable debate on whether an order appointing an arbitrator passed by a Chief Justice is an administrative order or a judicial order. Previous cases held that it is an administrative order and accordingly the Chief Justice does not have the power to decide on the existence or validity of the arbitration agreement while considering an application made by a party under the provisions of the Act, for appointment of an arbitrator.

However, in *Patel Engineering*, the Supreme Court overruled the earlier decisions and held that an order appointing an arbitrator by a Chief Justice is a judicial order and consequently, if a party raises an objection regarding the validity of the arbitration agreement, the Chief Justice is also required to determine the existence and validity of the arbitration agreement. The Supreme Court further held that the finding of the Chief Justice regarding the existence and validity of the arbitration agreement will be binding on the arbitral tribunal, negating the power conferred on the arbitral tribunal to determine the validity of the arbitration agreement under Section 16 of the Act. The judgment in *Patel Engineering* has been viewed as a roadblock to an efficient and effective arbitration process in India due to the possibility of excessive intervention by the judiciary.

The above decisions leaned against an arbitration-friendly environment in India. However, the recent trend of judgments may provide comfort to foreign parties and help them overcome inhibitions of arbitrating in India. In *Great Offshore vs Iranian Offshore Engineering & Construction Company, 2008,* the Supreme Court observed that one of the main objectives of the Act, is to minimise the supervisory role of the courts in the arbitral process and technicalities (such as stamps, seals and signatures) should not interfere in the enforcement of an arbitration agreement if the intention of the parties to arbitrate in clear. In *M/s Nandan Biomatrix v D1 Oils 2009,* the Supreme Court exercised its powers under Section 11 (6) of the Act and held that the parties intended to arbitrate and thus referred their disputes to the SIAC. In *Glencore Grain Rotterdam v Shivnath Rai Harnarain, 2008*, while considering the grounds on which enforcement of an award passed in London was being resisted by the defendants, the Delhi High Court held that the scope of inquiry did not enable a party to impeach an award on merits and the defendants had failed to clarify how the enforcement of the award would be contrary to the Public Policy of India. Consequently, the award was deemed to be a decree of the Court under Section 49 of the Act and thus enforceable in India. In *Max India Limited* v *General Binding Corporation,* the Delhi High Court refused to entertain an application for interim measures because the arbitration clause provided that courts in Singapore would have the jurisdiction to settle any disputes arising out of the agreement. Relying on the decision in *Bhatia International* the court considered the clause to be an implied exclusion of Part 1 of the Act. More importantly, in *RS Jiwani v Ircon International* the Bombay High Court held that an arbitration award is severable and if a part of it is illegal and incapable of enforcement, the other part that is legal and valid can still be enforced. This judgment ensures that parties successful in arbitration are not caused unnecessary hardship when losing parties attempt to second-guess arbitral awards in courts on spurious grounds. However, under the Indian law on precedent, this decision of the Bombay High Court is only binding on courts in Maharashtra and Goa but will have persuasive value in all other courts.

The trend of recent judgments thus indicates an adoption of a less interventionist approach by the Indian Courts. This indeed could be the dawn of a change in the perception towards India as an arbitration-friendly jurisdiction. Meanwhile, the Permanent Court of Arbitration (PCA) signed a host country agreement with the Government of India to establish a regional facility in India. The presence of PCA in India will provide a good forum for the resolution of investor-state disputes. The London Court of International Arbitration has also opened a centre in India and is being promoted by leading lawyers and arbitrators in India. The presence of these and other arbitral institutions will provide a strong framework for parties seeking to conduct arbitrations.

With the volume of inbound investment increasing in recent years, the Government of India also felt the need to introduce amendments in the Act to curtail the excessive judicial intervention and provide comfort to foreign investors. Based on the recommendations of the 176th Report of the Law Commission of India, the Arbitration & Conciliation (Amendment) Bill 2003 was introduced in the Parliament in December 2003. In July 2004 the Bill was referred for in-depth study to a committee chaired by Justice Dr BP Saraf and later referred for examination to the Departmental Relating Standing Committee on Personnel, Public Grievances, Law and Justice. The Standing Committee was of the view that the provisions of the Bill still contained room for excessive intervention by Courts in arbitration proceedings. It further expressed the view that since many provisions of the Bill were contentious, the Bill may be withdrawn and a fresh legislation brought into effect after considering the recommendations of the Standing Committee. Accordingly, the bill was withdrawn from the Parliament.

The Union Ministry of Law and Justice has now released a consultation paper proposing key amendments in the Act, including excluding the applicability of Part I of the Act to arbitrations held outside India and narrowing the scope and meaning of public policy as a ground for setting aside arbitral awards. Though a much belated move to resolve the anomalies in the Act, the consultation paper is nevertheless a step in the right direction and provides hope that India would soon become an arbitration friendly jurisdiction.

About the author

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