Indian arbitration: anticlimax, or adequate resource?

Sahil Kanuga and Vyapak Desai of Nishith Desai Associates *point out the positives, and the potential pitfalls, of arbitration in India.*

Ironically, arbitration in India is not new, existing even before India gained her independence from British rule. Since time immemorial, arbitration existed in the form of informal agreements where disputing parties would agree to listen to the decision of a respected elder, whom they trusted implicitly. Formally, arbitration in India could be found in three separate enactments: the *Arbitration Act*, 1940; the *Arbitration (Protocol and Convention) Act*, 1937; and the *Foreign Awards (Recognition and Enforcement) Act*, 1961. So why is arbitration only now considered the latest hotspot for legal eagles showing off their tongue-twister clauses and interpretational genius? To understand why, we must understand how arbitration has come to be what it is today.

Pre-1996

Prior to 1996, laws governing arbitration were encompassed in three enactments. Whilst the *Arbitration Act*, 1940 contained general provisions pertaining to arbitration, the *Arbitration (Protocol and Convention) Act*, 1937 and the *Foreign Awards (Recognition and Enforcement) Act*, 1961 dealt with the enforcement of foreign arbitration awards. At that time, notwithstanding the intention of easing the load on the courts, arbitration had become the bane of commercial transactions and had, in fact, increased the burden on the courts.

Simply put, the *Arbitration Act*, 1940 was not successful is reducing the interference of courts in the process of arbitration. As the legislation did not prevent disputing parties from approaching the courts, they would frequently do so at each stage of arbitration. As if that weren't enough, interpretational interplay between three different enactments – which supposedly provided quick and efficient remedies – ensured that simplicity, speed and efficiency, the supposed *grundnorms* of arbitration, were never going to be there. Consequently, the existence and use of arbitration resulted in the clogging-up of an already overburdened court infrastructure in India.

Post-1996

Fortunately for all, following much persuasion from the various bodies of trade, the *Arbitration & Conciliation Act*, 1996 (the Act) was promulgated. Commendably,

the Act was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which was recommended by the General Assembly of the United Nations to all countries. The influence of the UNCITRAL Model Law ensured some uniformity of the Act with arbitration worldwide, which was not entirely unwelcome as the Indian economy was undergoing a sea-change following the crisis of 1991. Breakthrough reforms, initiated by the then finance minister Dr. Manmohan Singh, had resulted in new policies including the opening of international trade and investment, deregulation, initiation of privatisation, tax reforms, and inflation-controlling measures, and growth in India thereafter was explosive to say the least.

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The Act was born from an understanding of the need to have a single law encompassing arbitration and conciliation which also incorporated provisions for the enforcement of arbitral awards, including those passed in foreign countries. It was, at that time, clearly a step in the right direction: the Act limited the manner in which a party could approach the courts, and significant power was given to the arbitral tribunal, including the power to rule on its own competence. Naturally, certain safeguards were also incorporated to ensure that justice and fair play, integral components of the principles of natural justice, were never denied to the parties.

This resulted in rejection at the threshold of all sorts of miscellaneous applications that would normally clog the courts. Putting an onus upon the arbitral tribunal to give a reasoned award, the Act went on to provide an arbitral procedure which is fair, efficient and capable of meeting the needs of today. Thus, the responsibility of proving that arbitration was an efficient dispute resolution mechanism was once again in the hands of the arbitrator.

Arbitration in India

Ad-hoc arbitration

Unlike abroad, the evolution of arbitration in India was initially limited to ad-hoc arbitration. Parties would prefer to appoint retired judges of the High Court or the Supreme Court, depending on, amongst other things, the quantum of the claim. The arbitral tribunal would usually constitute one or three such judges.

A peculiarity that came about was that in an arbitration consisting of three arbitrators, each party would appoint one arbitrator and the two arbitrators would jointly appoint the presiding arbitrator. By custom, the two arbitrators would only appoint a presiding arbitrator who was senior to both. Parties would prefer to appoint retired Chief Justices of India in view of their knowledge and experience and given the seniority of the post, the resultant choice for the third and presiding arbitrator was usually limited. Nowadays, given the huge demand for such limited senior judges, parties are often faced with a scenario where the dates between hearings could even be as long as one year, thus negating the entire concept of arbitration as a quick and efficient mechanism for dispute resolution.

The lawyers did not help the situation either, initially relegating arbitration only to weekends rather than wholeheartedly accepting it as an efficient alternative to the courts.

Another practical difficulty faced was that parties would time and again seek adjournments. Coming from a culture where the grant of such requests was the norm, the arbitral tribunal would be inclined to grant adjournments, leading to a situation where the entire process of arbitration as an efficient dispute resolution mechanism was being derailed.

In all fairness, however, one must admit that of late the problems that initially plagued ad-hoc arbitration have been (for the most part) adequately resolved.

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There are now enough retired senior judges, and the environment has now matured enough for ad-hoc arbitration to be considered effective.

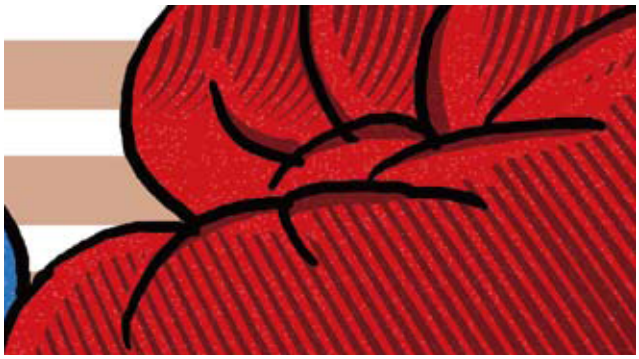
Institutional arbitration

As the Indian economy was on the verge of massive expansion, and foreign investment into India was beginning to swell, a demand for institutional arbitration – where none of the above practical difficulties were seen – suddenly arose. Yet despite the surge in foreign investment, the growth of institutional arbitration in India was relatively slow off the block.

Of late, however, a large number of well-known and internationally recognised institutional arbitration centres – such as the International Chamber of Commerce, the London Court of International Arbitration and the Permanent Court of Arbitration – have opened centres in India. For parties preferring off-shore options, the Singapore International Arbitration Centre provides a convenient alternative.

The proceedings

A typical arbitration, whether ad-hoc or administered by an arbitral institution, starts with a preliminary hearing held in the presence of the arbitral tribunal, the parties and their lawyers. In this preliminary hearing, the arbitral tribunal is given a brief overview of the dispute. The arbitral tribunal then proceeds to fix a detailed timeline within which parties are expected to exchange pleadings. Opportunities are given to file counter claims and replies thereto as well. Upon completion of this stage, the matter moves to the evidence stage and subsequently, a final hearing of the arguments takes place. Whilst pleadings are normally exchanged within six months (on average), the timelines within which the arbitration is concluded and an award is passed by the arbitral tribunal depends on a number of variable factors.



Arbitration agreement – intent is usually enough

They say that as long as the parties are in each others' good books, anything goes. But when a dispute rears its ugly head, no point is small enough to exploit. Thus, something as simple and logical as an arbitration agreement finds itself at the receiving end of interpretational mystique in a court of law.

Keeping in mind that one of the intents of arbitration is to minimise the intervention of the courts, the courts have, in a number of decisions, given the widest possible interpretation to the terms of the arbitration agreement between the parties, in order to give meaning thereto, rather than invalidate it by giving it a narrow interpretation. The courts have also time and again insisted, as was in the case of *Northern Railway Administration, Ministry of Railway, New Delhi V Patel Engineering Company Ltd*, that the parties must follow the procedure agreed in the arbitration agreement and exhaust the remedies provided therein before approaching the courts for the appointment of the arbitral tribunal. This approach also helps to minimise the supervisory role of the courts in the arbitration process.

However, while the Act envisages minimising the role of the judiciary, a challenging situation has arisen for the courts: litigants are increasingly involving the courts in issues that require them to delve deeper into the crux of the arbitration agreement, resulting in the courts setting precedents in the process. In *SBP & Co V Patel Engineering Ltd*, questions were raised regarding the powers of the courts in relation to the appointment of the arbitral tribunal, and if the courts could even consider any other issues such as the validity of the arbitration agreement. In that matter, a seven-judge bench of the Court overruled the decision of a five-judge bench of the Court in *Konkan Railway Corporation's case*, holding, *inter alia*, that the power exercised by the Chief Justice (of either the High Court or the Supreme Court, as the case may be) is not merely an administrative power but is, in fact, a judicial power. Such judicial power therefore requires the Chief Justice to see whether there is an arbitration agreement between the parties and an arbitrable dispute thereunder.

Furthering the complications, and in addition to the various contentions put forth before the courts regarding appointments of the arbitral tribunal, in *TDM Infrastructure Pvt Ltd V UE Development India Pvt Ltd* it was argued that even though both the appellant and the respondent were companies incorporated in India, the fact the directors

and shareholders were based in Malaysia would bring the proposed arbitration within the definition of '*international commercial arbitration*', as defined under Section 2(f) of the Act, and an application under Section 11 of the Act would lie before the Supreme Court. The Supreme Court rejected this contention.

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As a rule of thumb, where the agreed intent to resolve disputes by arbitration has been shown, one could expect the courts to direct the parties to such arbitration, and comply with the requisites of the agreed procedure set forth in such arbitration agreement, before intervening in any manner. Needless to say, where the existence of the agreement itself has been challenged, which agreement contains a provision to refer disputes to arbitration, then the courts may hear such matter on the ground that there was, in fact, no arbitration agreement between the parties.

The courts, judgments and public policy

Arbitration in India has seen dark days where the jurisdiction of the courts was sought to be invoked at each stage, thus delaying proceedings endlessly and frustrating the purpose for which arbitration was chosen. It was for this reason that legislature minimised the intervention of the courts and promulgated the Act, a hugely successful move that enabled the wings of arbitration to find wind to carry it to new heights. As the courts refused to intervene on the jurisdiction of the arbitral tribunal, disputes that would normally take no less than ten to fifteen years to be resolved were now being resolved in a matter of two to three years.

Yet there is now a fear that this may no longer be the case going forward. With the advent of international trade and the large number of cross-border transactions that India now sees, disputes have arisen which have culminated in proceedings before Indian courts at the interim stage as well as in appeal against arbitral awards. In the past, one would imagine that the courts would have been wary of entertaining such matters given the narrow scope of judicial intervention permissible under the Act. Not so anymore.

In *Bhatia International V Bulk Trading SA*, a three-judge bench of the Supreme Court held, *inter alia*, that the provisions of Part 1 of the Act – which contains general provisions including the powers to grant interim relief and to challenge an arbitral award – would compulsorily apply and that parties were free to deviate only to the extent permitted by the derogable provisions of Part I; and that in cases of international commercial arbitrations held outside of India, provisions of Part I would apply unless the parties had expressly or impliedly agreed to exclude all or any of its provisions. In those circumstances, the laws or rules chosen by the parties would prevail.

Relying on this judgment, another bench of the Supreme Court in *Venture Global Engg V Satyam Computer Services Ltd* proceeded to hold that an Indian court would, unless otherwise agreed by the parties, also have the jurisdiction to entertain and try a challenge to an arbitral award passed in a jurisdiction other than India.

In *Oil & Natural Gas Corpn Ltd V Saw Pipes Ltd*, the Supreme Court held, *inter alia*, that where the validity of an award is challenged, the phrase "public policy of India" used in Section 34 (which deals with challenge to an arbitral award) is required to be given a wider meaning. The concept of public policy connotes matters which concern public good and the public interest. What is for public good or in public interest, or what would be injurious or harmful to public good or the public interest, has varied from time to time. However, an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award, judgment or decision would be likely to adversely affect the administration of justice.

Even more surprisingly, in *N. Radhkrishnan V M/s*

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Maestro Engineers & Ors, the Supreme Court upheld the decision of lower courts and reiterated that notwithstanding the existence of an arbitration agreement, where a case relates to allegations of fraud and serious malpractice on the part of the respondents, it "must be tried in court and the Arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation". The judgment provides an escape from Section 8 of the Act, which requires a court to refer parties to arbitration if an action is brought in respect of a matter that forms the subject matter of an arbitration agreement. It is also not entirely inconceivable that some parties may make such allegations with an oblique motive being to prolong litigation and frustrate the legitimate claims of the other parties. In such a case an arbitration agreement is of no assistance.

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Looking forward

The courts have chosen to entertain such matters and have passed judgments which can be considered as being of a forward nature. Whilst there is no doubt that such judgments are based on sound reason, and are arguably required in the realm of the grey area that exists in the laws that govern us, the larger question that these judgments throw up remains open – whether parties would, using these judgments as precedents, be encouraged to try their luck before the Indian courts where systemic delays abound. In one sense, these could mean a return to the dark ages where matters would linger on endlessly before a court. Of course, the courts are not what they used to be and disposals today are far better than they used to be in the past, but that remains one area where parties are wary of treading and remains best unexplored. One could even argue that the Act needs to be revamped to avoid the numerous grey areas and resulting interpretations.

It is possibly also for these reasons that parties now prefer to resolve disputes in established arbitration centres set up abroad, such as the Singapore International Arbitration Centre. In such circumstances, one must take care to ensure that the seat is situated in a country from where awards are enforceable, in light of the restrictions placed by India on the enforcement of arbitral awards passed in other countries. Needless to say, to get a quick arbitral award passed by an efficient arbitral institution in a country which is not easily enforceable in India may defeat the entire purpose of such an arbitration!

Thankfully, it is possible to avoid such unexplored and unchartered situations by ensuring that the arbitration agreements between the parties are of a comprehensive nature and contain the necessary safeguards. With the benefit of hindsight, one can surely say that even though there have been judgments which enable the Indian courts to intervene, such situations are, as of now, few and far between. Notwithstanding this, parties today can never be too careful about how this facet of the law will develop going forward. For now it appears that tongue-twister clauses are here to stay and interpretational gurus have their work cut out for them!

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