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EDITOR'S NOTE

Trade and investment have been supported by economists and policymakers as a primary means for lifting populations out of poverty. Recent economic turmoil has caused some observers to question the accepted view. How does law or ADR help relate to this duty? A conference on "Poverty and the International Economic Legal System: Duties to the World's Poor" is being held in Basel, Switzerland on 20 – 22 October 2011. The conference aims to address the topic of "duties to address poverty" from multiple international economic law viewpoints and will be looking for solutions. Details of the conference are available at the News & Events section. All are welcome.

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Arbitration in India: Looking Ahead

: TRISHA MITRA

India is on the threshold of phenomenal growth in industries and commerce and it is but obvious that such a growth will be accompanied by a rise in commercial disputes. A statutory frame-work that ensures arbitration in India as a smooth and free process, will go a long way in boosting this industrial and commercial growth in the country. However, it is of the opinion of critics, legal luminaries and even business houses that the Supreme Court of India and the High Courts, in a slew of judgments, have failed to recognize and uphold the essence of the Act, which has led to confusing and faulty interpretations by them. The author analyses the various judgments, its impact and the changes in store.

Nearly one and half decades after the enactment of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act"), there are whispers in the air that the Act has lost its basic structure and identity and is no longer what its legislators intended it to be.

Arbitration is an alternate dispute resolution mechanism by which two parties to a dispute choose to settle it outside the precincts of the Courts of the land. It is well settled that arbitration is, by its very nature, a cheaper and less time-consuming process than litigation, especially in India where cases are known to prolong for decades. Also, it is no doubt far more confidential, and the resulting award is generally easier to enforce than a court decision, owing largely to the New York Convention. India is now on the threshold of phenomenal growth in industries and commerce and it is but obvious that such a growth will be accompanied by a rise in commercial disputes. A statutory framework that ensures arbitration in India as a smooth and free process, will go a long way in boosting this industrial and commercial growth in the country.

However, it is of the opinion of critics, legal luminaries and even business houses that the Supreme Court of India and the High Courts, in a slew of judgments, have failed to recognize and uphold the essence of the Act, which has led to confusing and faulty interpretations by them. While arbitration is supposed to be a process free from the encumbrances of the Court, the Courts of the land have now interpreted the provisions of the Act in such a way as to open the flood-gates of judicial interference at every stage of the arbitration process.

It is to be remembered at the very outset that the Act provides for judicial intervention in the following stages:

1. Making reference in a pending suit [Section 8]
2. Passing interim orders [Section 9]
3. Appointment of arbitrators [Section 11]
4. Terminating mandate of arbitrator [Section 14(2)]
5. Court assistance in taking evidence [Section 27]
6. Setting aside an award [Section 34]

7. Enforcement of an award by way of decree [Section 36]
8. Entertaining appeals against certain orders [Section 37]
9. Directing delivery of award [Section 39(2)]
10. Reference of a dispute to arbitration in insolvency proceedings [Section 41]

THE BHATIA INTERNATIONAL JUDGMENT:

The onslaught of criticism started with the *Bhatia International v. Bulk Trading S.A. and Anr.*[1] case wherein the Hon'ble Supreme Court ruled that the Provisions of Part I of the Act (including Section 9) were also applicable to international commercial arbitrations, irrespective of the seat of the arbitration, unless parties specifically contracted out of Part I, either expressly or impliedly. Critics say that this decision broadened the applicability of this Act much beyond what was contemplated by its makers. This case has now started a dangerous trend of judgments; dangerous because the Hon'ble Apex Court did not limit its decision to merely Section 9 of the Act, which has led to other Courts applying other provisions of Part I as well, thereby interfering with foreign arbitral proceedings.

The most recent case-in-point is the judgment by the Hon'ble Supreme Court in *Citation Infowares Ltd. v. Equinox Corporation*[2] wherein a company incorporated in USA contracted with a company incorporated in India and the contract was governed by the laws of California. The seat of arbitration was not specified. The defendant terminated the contract prematurely and then resisted the plaintiff's application to invoke the arbitration clause in India. The plaintiff filed an application for appointment of an arbitrator under Section 11 of the Act. The question in dispute was whether this application is to be allowed considering the contract was subject to the Californian laws. It was argued on behalf of the defendants that there is a presumption that the law of the contract would be the law of arbitration. The Hon'ble Apex Court held that such presumption is limited to those cases wherein the arbitration clause did not mention the law of arbitration, but specified the seat of arbitration. In such a case, the Court may infer that the seat of arbitration is an indicator that its laws would be the applicable procedural and substantial laws. In the instance case, in the absence of a specified seat of arbitration, the Court held that the Indian Act applied and an arbitrator could be rightly appointed under Section 11 of the Act.

(Footnotes)
[1] AIR2002SC1432
[2] (2009) 5 UJ 2066 (SC)

COURTS AND SECTION 34:

Section 34 is very significant in respect of the delicate task of balancing the party autonomy on one hand, and judicial control of the arbitral result on the other. This balance accentuates the quest of arbitration to achieve the speed and efficiency coupled with maximum independence from court intervention.[3]

Principles laid down under Section 34 states that an award may be set aside if it is contrary to:

1. Fundamental policy of Indian law; or
2. The interest of India; or
3. Justice or morality: or
4. If it is patently illegal.

In the *Renusagar Power Plant Co. Ltd. Vs. General Electric Co.*[4] case , while giving a narrow meaning to the expression 'public policy of India' the Apex Court observed that "It is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction."

Consequently, the Supreme Court in its judgment of *ONGC v. Saw Pipes Ltd.,*[5] has ruled that an arbitral award can be challenged under Section 34 of the 1996 Act on the ground that it violates the public policy of India, interalia, because it is contrary to the fundamental policy of Indian Law, justice and morality or is 'patently illegal'. It also distinguished itself from the *Renusagar* judgment on the ground that the *Renusagar* judgment was in context of a foreign award, while the ratio of SAW Pipes would be confined to domestic awards only. Whether foreign or domestic awards, the crux of the matter is that these judgments have undermined the importance of party autonomy and given undue leeway for judicial interference.

The recent decision of the Supreme Court on the subject of setting aside an award on the ground of public policy under Section 34 is *Venture Global Engineering Vs. Satyam Computer Services Ltd.*[6] Based on the earlier judgment in Bhatia International, the Supreme Court in this case held that it is open to the parties to exclude the application of the provisions of part I by express and implied agreement, failing which the whole of part I would apply. The unfortunate consequence of such a decision is that any commercial dispute, being subject to arbitration, between two parties anywhere in the world runs the risk of attracting the Indian law on arbitration to govern it. Was this the extent of the Act contemplated by its legislators? Not answered.

SECTION 11: THE DOMAIN OF THE CHIEF JUSTICE

The kompetenz-kompetenz principle empowers arbitrators to rule on their own jurisdiction and to determine the validity and existence of the arbitration agreement. In India, the principle is set out in section 16 of the Arbitration Act. Under the various provisions of Section 11 of the Arbitration Act, if parties to an arbitration agreement fail to appoint an arbitrator according to the terms contained in the arbitration agreement, then either party may approach the Chief Justice of the Supreme Court or his designate, in the case of international commercial arbitrations or the Chief Justice of the relevant High Court or his designate, in the case of domestic arbitrations, who will then appoint or designate an institution to appoint an arbitrator as per the provisions of the Arbitration Act.

However, in *SBP & Co. v. Patel Engineering,*[7] 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

(Footnotes)

[3] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* 2nd Edition, 2005, p 269, para 7-004.

[4] AIR 1994 SC 860

[5] (2003)5 SCC 705

[6] AIR2008SC1061

[7] (2005) 8 SCC 618

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, thus negating the power conferred on the arbitral tribunal to determine the validity of the arbitration agreement under Section 16 of the Act. This judgment has been criticized that the Chief Justice has conferred upon himself powers, which were not envisaged by the legislation, at the cost of the only instrument that reflects the intentions of the parties: *the arbitration agreement*.

BREAKING THE SHACKLES OF JUDICIAL CONTROL

The Act is enacted for the purpose of limiting the intervention of the courts in an arbitral process to the minimum to achieve the object of expeditious resolution of disputes, so that trade and commerce are not affected on account of litigation before a court. The current position of the Indian law in this regard clearly illustrates that it is not conducive to speedy and inexpensive arbitration processes. Party autonomy and the independence and authority of the arbitrators are the hallmarks of this Act. Court involvement should be limited to assistance and giving effect to the arbitration process agreed by the parties. Unnecessary judicial interference falsifies both the trust which the legislature and the parties have placed in the arbitrator, and discourages arbitrators from employing them boldly in the future. The Union Ministry of Law and Justice has now released a consultation paper proposing key amendments to the Arbitration Act. Though a much belated move, it is nevertheless a step in the right direction and provides hope that India would soon become an arbitration friendly jurisdiction.

The consultation paper recommends amending Section 2(2) of the Act to make the Act applicable only to arbitrations in India and making Section 9 and 27 applicable to international commercial arbitration where the place of arbitration is not India, if the foreign award is recognized and enforceable in India. This amendment will essentially achieve what the Bhatia International judgment initially sought to achieve but couldn't. It is a step towards curbing intervention by Indian courts in arbitration where the place of arbitration is not in India, thus bringing it to be in sync with the UNCITRAL Model Law on which the Act is based in the first place.

Another amendment contemplated by the Act is to vest the power to appoint arbitrators, if the parties fail to do so, in the Supreme Court (and not the Chief Justice of India) and in the High Court (and not the Chief Justice of the High Court) under Section 11 of the Act. The amendment also seeks to give an impetus to institutional arbitration, which is widely believed to be more expeditious and cheaper, by making it obligatory upon the Supreme Court and High Court to refer a 'commercial dispute of specified value' to arbitration. The expressions "commercial dispute" and "specified value" shall have the same meaning assigned to them under the Commercial Division of High Court Act, 2009 which is also yet to come into force. Further, to ensure that the process of appointing arbitrators is not encumbered by court delays, the amendment states that the Courts are to appoint an arbitrator within 60 days of the date of service of notice to the opposite party.

Promoting Student Authors

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the "Indian Arbitrator". From amongst the submitted articles, every year one student author will receive the "Best Young Author" certificate from IIAM.

Section 28 of the Arbitration Act deals with rules applicable to substance of the dispute. Section 28 (3) provides that "In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction". In *Saw Pipes*, the Supreme Courts held that an award that is contrary to the terms of the contract would be patently illegal and could be challenged under section 34. The paper proposes to amend section 28 (3) as follows – "In all cases, the arbitral tribunal shall take into account the terms of the contract and trade usage applicable to the transaction." Thus, the proposed amendment seeks to clarify that an arbitral tribunal only needs to take into account the terms of the contract. This should lead to less interference by courts on the ground that the award is against the terms of the contract. Furthermore, to nullify the effect of Saw Pipes noted above, the paper proposes to narrow the scope and meaning of public policy as a ground for setting aside awards. According to the proposed amendment, an award will only be considered to be in conflict with public policy when it is contrary to either the fundamental policy of India or interests of India or justice and morality.

CONCLUSION:

For all those who were weary of the future of arbitration in India and worried about it not being given the impetus and importance it deserves, there is good news. The Law Minister, on June 23, 2010, released the National Litigation Policy, which aims to reduce the cases pending in various courts in India under the National Legal Mission to reduce average pendency time from 15 years to 3 years. And the very erudite policy-makers have rightly emphasized on the need to resort to arbitration to realize their objectives. The Policy states that government departments and Public Sector Units should employ ADR mechanisms, especially arbitration, where possible and be Efficient and Responsible in respect of arbitration too. The Policy contains some provisions which also give a hawk's eye view of the problems arbitration faces in India. These are:

> "…
> B) The resort to arbitration as an alternative dispute resolution mechanism must be encouraged at every level, but this entails the responsibility that such an arbitration will be cost effective, efficacious, expeditious, and conducted with high rectitude. In most cases arbitration has become a mirror of court litigation. This must be stopped.
>
> C) It is recognized that the conduct of arbitration at present leaves a lot to be desired. Arbitrations are needlessly dragged on for various reasons. One of them is by repeatedly seeking adjournments. This practice must be deplored and stopped.
> …
>
> E) Lack of precision in drafting arbitration agreements is a major cause of delay in arbitration proceedings. This leads to disputes about appointment of arbitrators and arbitrability which results in prolonged litigation even before the start of arbitration. Care must be taken whilst drafting an arbitration agreement. It must correctly and clearly reflect the intention of the parties particularly if certain items are required to be left to the decision of named persons such as engineers are not meant to be referred to arbitration.
>
> F) Arbitration agreements are loosely and carelessly drafted when it comes to appointment of arbitrators. Arbitration agreements must reflect a well defined procedure for appointment of arbitrators. Sole arbitrator may be preferred over a Panel of three Arbitrators. In technical matters, reference may be made to trained technical persons instead of retired judicial persons.
>
> G) It is also found that certain persons are "preferred" as arbitrators by certain departments or corporations. The arbitrator must be chosen solely on the basis of knowledge, skill and integrity and not for extraneous reasons. It must be ascertained whether the arbitrator will be in a position to devote time for expeditious disposal of the reference."

"Never Play With The Feelings Of Others
Because You May Win The Game
But The Risk Is That You Will Surely Lose
The Person For A Life Time".
~ Shakespeare ~

These clauses more or less sum up the obstacles faced by arbitration in India and should be kept in mind by not just the Government or its agencies, but also business houses, lawyers and judges who would only benefit from it.

The stage is all set for the growth and rise of commercial arbitration to new heights. If the current zeal and enthusiasm to reform the Act and to bring into existence other laws which will aid arbitration in India, is maintained, then nothing can come in the way of India becoming one of the world's favorite jurisdiction for commercial arbitration, much like Singapore, London or even Paris.

(Author: Trisha Mitra is a 4th year law student of Symbiosis Law School, Pune, India)

Think ... Mr. Crow and Mr. Rabbit

Mr. Rabbit was walking down the road when he spotted a crow at the tiptop of a very tall tree.

He shouted, "Good Morning, Mr. Crow."

Mr. Crow shouted back down, "Good Morning Mr. Rabbit."

Mr. Rabbit shouted up, "Whatcha doin' today?" and the answer shouted back down was, "Absolutely nothin' Mr. Rabbit, absolutely nothin' and loving it."

Well, that sounded pretty good to Mr. Rabbit, so he shouted back up, "Do you think I could do that too?"

Mr. Crow shouted back down, "I don't see why not!"

So, Mr. Rabbit lay down on the side of the road and began doing absolutely nothing.

In 30 minutes, a fox came along and ate him.

The moral of the story is: You can get away with doing absolutely nothing, but only if you are really high up.

Article

Divorce Mediation as a mentally healthier process for children

: REBECCA NELSON

No matter how it is done, divorce will likely be a traumatic event to any child as they struggle with the instability of their once secure world is turned upside down. Clearly the more co-operational process of a mediated divorce provides an advantage to the adversarial process of traditionally litigated divorce both for the parents and for the children. The divorce mediation process does not necessarily eliminate all of the problems associated with a traditionally litigated divorce; however it can reduce the tension, thereby reducing the stress level. The author gives an overview.

Children of parents who are going through the process of a separation and divorce experience a myriad of emotions that include but are not limited to anxiety, depression, anger, guilt, resentments and fear. Although it may be nearly impossible to avoid any negative emotions at all for these children, it is possible that the process of divorce mediation over a traditionally litigated divorce can minimize the intensity of these. To understand how the traditional process of divorce can more negatively affect children, we need to understand the key differences between these two paths leading to a legal divorce.

In a traditional divorce one party will retain an attorney to represent them, who will then draft up a Petition for Divorce typically demanding that their client be awarded everything: custody, child support, alimony, the house, the cars etc… Once the Petition is drafted then it is filed with the family court and served to the other spouse, thus provoking a response from the other attorney. This is a process that typically elicits anger and resentments from each spouse, likely reflecting in their daily activities, specifically their children. Parents can become so overcome with managing these emotions that they may have less patience for their children, who can be exacerbated by difficulties with getting proper sleep and increased financial concerns. It is not unusual for parents to discuss their anger towards their spouse with friends or family on the phone, unknowingly being overheard by their children. Some adults will even use their children as a pawn in the games that ensue in the process of a couple getting a divorce or even try to get their children to side with them in the dispute. In litigated divorces processes, the spouses are generally told not to have any direct communication with one another because the lawyers are paid to represent their party. Finally, the judge is the final voice deciding the outcome of each line in the case, thus parents are forced to have an outside party to make their major life decisions. Clearly co-parenting can become quite difficult or nearly impossible as tempers flare and children often suffer as a result.

The divorce mediation process does not necessarily eliminate all of the problems associated with a traditionally litigated divorce; however it can reduce the tension, thereby reducing the stress level of both parents. In the process of mediation a nonbiased third party who does not represent either party helps the husband and wife negotiate the terms of their divorce in a way that is fair and equitable to both parties. Couples that use mediation are more content with the existing child-care arrangements, and less likely to have disagreements about child contact. Agreements reached in mediation are vital to making and maintaining cooperative relationships between divorcing parents. Mediation increases aspects of positive co-parenting after the divorce, thus improving their ability to manage their emotions. Simply put, happier parents, happier children.

No matter how it is done, divorce will likely be a traumatic event to any child as they struggle with the instability of their once secure world is turned upside down. Clearly the more cooperational process of a mediated divorce provides an advantage to the adversarial process of traditionally litigated divorce both for the parents and for the children. Parents that are encouraged to negotiate the terms of their divorce on their own are overall more cooperative with the plans for co-parenting. In a mediated process the goal is not to "win" the divorce and the winners are the various family members who will benefit from a more cooperative process.

(Author: Rebecca Nelson is a licensed marriage and family therapist (LMFT) and a certified divorce mediator. She is also the co-founder of Hope Counseling and Mediation Center, LLC in Lincoln, Rhode Island, USA (http://www.hopecounselingri.com)

Interested to contribute Articles?

We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

Publication of the Article will be the discretion of IIAM and submissions made indicates that the author consents, in the event of publication, to automatically transfer this one time use to publish the copyrighted material to the publisher of the IIAM Journal.

The Lighter Side

A turkey farmer was always experimenting with breeding to perfect a better turkey. His family was fond of the leg portion for dinner and there were never enough legs for everyone.

After many frustrating attempts, the farmer was relating the results of his efforts to his friends at the general store get together.

"Well I finally did it! I bred a turkey that has 6 legs!" They all asked the farmer how it tasted.

"I don't know" said the farmer. "I never could catch the darn thing!"

Chinese Supreme Court urges Judges to use Mediation

China's Supreme People's Court (SPC) has told Judges around the country to use mediation more often in settling disputes and promoting community harmony. The Supreme Court said that in circumstances where mediation can be used in Court, they 'should take every opportunity to encourage the litigants to resolve disputes through mediation rather than through formal legal proceedings' - in a press release that appeared on the SPC website.

Writ Jurisdiction not absolute bar in case of Arbitration Clause – Supreme Court of India

The Supreme Court of India in "Union of India v Tantia Construction Pvt Ltd" considered the extent to which the High Courts in India are entitled to exercise their powers under the writ jurisdiction, notwithstanding the presence of an arbitration clause in the agreement entered into between the parties. The court held that the presence of an alternate remedy (ie, going down the arbitration route) did not constitute a bar on the High Courts from entertaining the dispute in its writ jurisdiction, especially in light of the injustice apparent from the facts of the case.

Conference

Poverty and the International Economic Legal System: Duties to the World's Poor

Event in Basel, Switzerland
Thursday, 20 October 2011 –Saturday, 22 October 2011

International trade and investment have been supported by economists and policymakers as a primary means for lifting populations out of poverty. Recent economic turmoil has caused some observers to question accepted view. Given states' acceptance of the Millennium Development Goals, they have obligations to reduce poverty, but few directions how to do so. How do the legal frameworks of trade, investment, financial regulation, and commercial arbitration relate to this duty? This conference will address the particular topic of "duties to address poverty" from multiple international economic law viewpoints. Global experts in each of these fields will discuss the impacts such rules have, or could have, on efforts to reduce poverty. The conference will be looking for solutions to questions about whether the rules regulating international economic activities are sufficient to ensure that poverty reduction is an actual result, and suggesting changes where necessary.

For more details, see: http://www.arbitrationindia.com/htm/events.html

Alternative Dispute Resolution Centre in Jammu & Kashmir

Chief Justice J&K High Court, Justice F M Ibrahim Kalifullah laid the foundation stone of Alternative Dispute Resolution Centre at Batmaloo. Built at a cost of Rs 1.69 crore, the Centre is hoped to speed up justice delivery system in the State through alternative resolution and arbitration.

New law on Arbitrators' liability in Spain

Spain has amended its Arbitration Law and has introduced, among other things, an obligation for arbitrators and arbitral institutions to take out an insurance policy in order to cover their potential liabilities. This update discusses the conflict between the Insurance Law and this new requirement for an obligatory insurance policy in connection with arbitrators' liability under Spanish law.

More than 4000 parties have voluntarily engaged in mediation in Singapore

Twenty-six organisations from industries such as transport, property and media have signed the Singapore Mediation Charter, pledging to consider mediation as a first resort in resolving disputes. The charter is an initiative by the Singapore Mediation Centre (SMC), which hopes to encourage businesses to settle disputes amicably rather than battling it out in court.

Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For more details on CDM, mail to training@arbitrationindia.com

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If you have a passion for dispute resolution and you are interested to start a Dispute Resolution Centre, please mail your details to: dir@arbitrationindia.com

For details of IIAM activities visit www.arbitrationindia.org