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EDITOR'S NOTE

An increasing body of evidence gained over the last few decades has made it increasingly clear that emotions and state of mind have a powerful effect on physical as well as mental health. Many of the emotional and social factors that can affect health play themselves out in our relationships with other people. Mediation can help to resolve interpersonal problems that cause us to experience relationships as a source of stress rather than as a source of support. IIAM Community Mediation takes this concept to an institutional level by taking the entire dispute resolution process and maintaining control and responsibility for it in the community at large. We hope to bring about a transformation of the value systems of disputants, so as to achieve a change in the hearts and minds of people that encourages community to manage difference peacefully. Looking forward to your support.

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Legitimacy and Authority of Private Arbitrators to review State decisions in Investment Treaty Arbitrations

: UMANG SINGH

The concept of investor state arbitration hasn't gone too well in public domain as both its legitimacy as well as conduct is being criticized. It has been regularly argued that investment arbitration involves potential public interest, which distinguishes it from commercial arbitrations between private parties. The author analyses the realm of investment treaty arbitration and proposes that there should be a separate uniform global mechanism for review of the awards instead of following a treaty by treaty approach.

Introduction

The world has changed significantly in the past few decades and so has the investment regimes. Foreign capital to countries has enormously increased benefitting both the investor and nations States.[1] However, the biggest fear for foreign investors remains the security of their investments and enforcement of their legal rights against nation States. This has led to the establishment of rather unique method of dispute settlement, which we often refer as Investor-State arbitration. The States have concluded various BITs[2] and MITs which establishes a safe environment for investors allowing them to assert their legal rights and assures them that any disputes of investor against the nation State will be settled by arbitration proceedings unlike local courts of the State or by conventional diplomatic protection.[3] This is in contrast with the well-settled principle of sovereign immunity under international law in which the disputes between the States and private parties are resolved through diplomatic protection and the State of the aggrieved private party brings the claim on behalf of the investor.[4] The concept of Investor State arbitration hasn't gone too well in public domain as both its legitimacy as well as conduct is being

(Footnotes)

[1]UNCTAD in its World investment report 2010 expects the FDI inflows to reach 1.2 trillion US$ by 2010. See,http://www.unctad.org/Templates/WebFlyer.asp?intItemID=5539&lang=1 last viewed 15.09.11.

[2] BITs often referred as Bilateral Investment treaties between two countries are a document underlying the conditions for investment by private companies into foreign jurisdictions. There are more than 2000 bilateral treaties have been concluded. For list of these treaties kindly visit, http://icsid.worldbank.org/ICSID/FrontServlet last viewed 17.09.11.

[3] Chapter 11 on NAFTA has encouraged investment treaty arbitration as a method of dispute resolution. Kindly see, http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=142 for the full legal text. Last viewed 17.09.11.

[4]Hazel Fox, *The Law of State Immunity*, 2nd edition, Oxford International Law library, Oxford, 2008 at 26.

criticized. It has been regularly argued that investment arbitration involves potential public interest, which distinguishes it from commercial arbitrations between private parties.[5] There is a belief that this process of arbitration favours the developed countries and consequently developing countries pay a heavy price and are either withdrawing from such arbitrations or considering ways to eliminate them.[6] There are two major criticism of Investor State arbitrations, firstly, those set of people who acknowledge investment arbitrations as a method of dispute settlement but questions its transparency in lieu of hefty public interest involved as well as the consistency of decisions given by arbitrators. Secondly, those people who question the very legitimacy of investment-treaty arbitration and arbitrators as to what authority do they have in binding a State to their awards[7]. This essay analyses the realm of investment treaty arbitration, the question of its legitimacy and stresses on the difference between investment treaty arbitration from commercial arbitration to argue that there is substantial amount public interest involved in such arbitration thus, it needs to be conducted differently and there should be a separate uniform global mechanism for review of the awards instead of following a treaty by treaty approach.

Development of Investment Treaty Arbitration:

In event of globalisation, the foreign investments have increased enormously and the countries have negotiated multiple investment treaties to create a uniform and safe environment for foreign investors[8]. Both developed and developing nations adopts various strategies to attract foreign investments such as fiscal incentives, tax rebate etc. Investment treaty is one of the methods to lure capital from private investors. These treaties have a rather unique form of dispute settlement i.e. arbitration. It provides the investors with the direct cause of action against the State in case of breach of any obligation of the State against investors e.g. expropriation. Thus, it safeguards the substantive rights of the investors against the actions of State parties. Unlike in conventional International law the investor does not have to depend upon their parent State to pursue claims in the International Court of Justice. This also further creates problems for the investors because the remedy available in such claim is financial compensation and in many cases the investors might have to pursue litigation in the capital importing State.[9] Investment treaty arbitration claims have significantly increased in the past few decades in which investors have filed more than 319 claims majority of which is against third world countries.[10] The dispute in investment treaty arbitration is settled either by ad-hoc arbitration for e.g.

(Footnotes)

[5] Ruth Teitelbaum, A Look At Public Interest In Investment Arbitration: Is It Unique? What Should We do About It? (2010), via Hein Online.

[6] Susan D. Franck, *Development and Outcome of Investment Treaty Arbitration,* Harvard international law review, vol.50, no. 2, 2009 via Hein online.

[7] Rudolf Dolzer, *Comments on Treaty Arbitration and International Law*, pg 894-904.Online at http://www.arbitration-icca.org/media/0/12112122718320/congress_2006_toc.pdf Last viewed 16.09.11.

[8] *Supra note 2.*

[9] *Supra note 4.*

[10] See, ICSID Annual Report 2010, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2010_Eng last viewed 17.09.11.

adopting UNCITRAL rules or by submitting the dispute to World Bank Tribunal ICSID. In some cases options are also available to settle the dispute through ICC or Stockholm Chamber of Commerce.[11] In ad-hoc arbitration the parties select their arbitrators and the arbitrators chose the presiding arbitrator whereas in arbitration through ICSID the arbitration request is submitted to ICSID and the tribunal oversees all the procedural aspects of arbitration.

Legitimacy of Investment Treaty Arbitration:

The methodology of resolving investment dispute of States by arbitration has not gone too well with national legalists and NGOs. The accountability of arbitrators, transparency of proceedings and established judicial principals questions the democratic character of these arbitrations.[12] In order to understand the genesis of these criticisms we need to distinguish the investment treaty arbitration from commercial arbitration. In commercial arbitrations "the source of consent of arbitration generally is the arbitration clause".[13] But in investment treaty arbitration the consent of the State is derived from the respective investment treaty with other contracting State such as USA-Singapore BIT. The investors are not parties to the treaty but in fact beneficiaries. Thus, investment treaty arbitration is often termed as "arbitration without privity" because there is no direct contract between investors and State.[14] One of the significant differences of investment treaty arbitration from commercial arbitration is the nature of disputes, which it addresses. Unlike commercial arbitrations where the dispute generally is with regard to breach of international commercial contract, the investment treaty arbitration has larger implications. Majority of the investment treaty arbitrations are concerned with actions of State, which seriously undermines the interests of the investor. The amount of dispute is enormously high and generates a lot of public interests because State as a party to these arbitrations represents their people unlike in commercial arbitration where the interest of a corporate body is paramount.[15] In *CME Czech Republic BV v. Czech Republic*[16] an arbitration constituted in Sweden, ordered Czech Republic to pay US $ 353 million to Ronal Lauder a foreign investor. This amount is nearly equal to annual health budget of Czech Republic. This questions the authority to of arbitrators to scrutinize the State by means of public law remedies such as damages without considering the well-settled notions of international law such as State immunity and of equity.[17] Similarly, in the case of Argentina where the State was compelled to regulate the economy and market due to financial break down in 2001 which resulted in setbacks and losses to many private investors. The investors alleged that Argentina has illegally expropriated their properties and it is now facing more than 30 claims that are estimated to be 17 billion US dollars.[18] The important question is how far a State can go in protecting the interests of its own citizens in case of national disasters? Does the interests of private investors' overrides the interests of poor people? Argentina lost an arbitration claim to CMS (USA)[19] and consequently had to pay damages for 133 million US dollars. Imagine what would be the condition of the country if it loses all the claims. Despite the heavy compensation, which the nation States are compelled to pay due to such arbitrations, there has been no uniformity in rendering awards by the arbitrators. This instability in awards makes the system of investment treaty arbitration dangerous for both the parties. Ronald Lauder brought a claim on the same grounds as CME v. Czech Republic against Czech Republic six months before the BIT between USA and Czech Republic was executed and this claim failed. The tribunal quoted that "Czech Republic's breach of treaty was too remote to qualify as cause for the

(Footnotes)

[11] ICSID is an autonomous international institution established in 1965 under ICSID convention, which conducts arbitration for settlement of disputes between states and nationals of states. Online at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home last viewed 17.09.11.

[12] Gus Van Harten,*Investment Treaty Arbitration and Public Law*, 1st edition, Oxford University Press, 2000, pg 5.

[13] Nigel Blackaby, "*Investment arbitration and Commercial arbitration"* in Loukas A. and Law D .M (eds) "*Pervasive Problems in International Arbitration",* Kluwer Law International, 2006.

[14] Jan Paulsson, "*Arbitration without Privity*", 10 ICSID review- FILJ 232 (1995).

[15] *Supra note 5.*

[16] CME (Merits) (13 September 2001), 14(3) World Trade and Arb Mat.

[17] *Supra note* 11.

[18] Foreign investors who were affected due to government actions in Argentina are Enron and Azurix of USA, Vivendi and Suez of France; Siemens of Germany;Gas Natural of Spain and National Grid of United Kingdom. See, Gus Van Harten, *Treaty Arbitration and Public Law*, 1st edition, Oxford University Press, 200, pg 2 for more details.

[19] CMS Gas Transmission Company v Argentine Republic (Merits) (12 May 2005), 44 ILM 1205, 17(5) World Trade and Arb Mat 63.

harm".[20] The legitimacy of investment treaty arbitration is questioned on the authority of arbitrators i.e. what right do they have in binding a State. Some critics suggest that the arbitrators do have their personal interests in arbitrations and due to lack of transparency there is a widespread corruption in this system of dispute resolution.[21] However, there are enough benefits of investment treaty arbitration, which are often used to counter the legitimacy argument. Jan Paulsson famously argues that how can a system be illegitimate when both the parties themselves have appointed the arbitrators.[22] For example, if there is an international judicial framework set up to decide investment treaty cases, the judges on the court might not adequately represent the interests of all the nation States. Thus, the question of legitimacy is portrayed as to be subjective in nature that varies according to the needs of the nation States. However, in my view legitimacy of a system is derived from the constitutional foundations of the system. It would not be correct to label the whole regime of investment treaty arbitrations illegitimate because there are no constitutional foundations of such regime. The States negotiate BITs, they ratified ICSID convention and if the ICSID Tribunal binds them to its awards it cannot be termed illegitimate. However, the problem of legitimacy for private arbitrators arises because of the nature of disputes that are settled by such tribunals. Does a nation keen on protecting environment be bound by the arbitrators to honor its commitment to foreign investors first?[23] The conflict of private and public interest in such arbitration proceedings brings the question of legitimacy into light. The question of arbitrability is of grave importance. In commercial arbitrations the boundaries are well defined such as public and private adjudication of disputes. "The Courts act as gatekeepers for public policy issues in commercial arbitrations".[24] This distinction is absent when it comes to investment treaty disputes because Courts have absolutely no power.

(Footnotes)

[20] Lauder (Ronald S) v Czech Republic (Final Award) (3 September 2001), (2002) 4 World Trade and Arb Materials 35.

[21] David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy,* Suffolk Transnational Law Review ,vol 32, no.2, pg 513-524.

[22] Jan Paulsson, *What Authorities Do International Arbitrators Have over States?*inAlberJan Vander Burg,ed, *New Horizans in International Commercial Arbitration And Beyond*, Kluwer Law International 2005.

[23] *Supra note 4.*

[24] *Ibid.*

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Suggested Reforms in Current Investment Treaty Arbitration:

One of the advantages of arbitration generally is that the forum provides parties to appoint their arbitrators. This is significant because not only the parties decide who will judge them but they also make sure that person with requisite specialization is appointed.[25] An arbitrator need not be a law practitioner but he/she can be from any field e.g. well-qualified engineer or technologist etc. Thus, the idea to abandon the process of dispute resolution by arbitration and recourse to the conventional way of diplomatic protection seems less attractive in international scenario.[26] There have been suggestions to set up a permanent tribunal like WTO Dispute Settlement Tribunal[27] to review investment treaty arbitration awards.[28] The problem with current situation is that it indeed gives arbitrators too much power. The arbitrators know that their awards are going to be binding and there will be no appeal to it. This character of arbitration disturbs legal nationalists the most. The stakes involved in investment treaty disputes are very high. It can drain substantial amount of wealth from a nation. The public interest involved in such arbitrations is so big that the current system completely fails in accommodating such interests in awards. In fact, in some situations the dispute becomes a major political issue such as in "Cochamba Water Wars" in Bolivia where privatization of water resources led to heavy violence and bloodshed.[29] The inability of the current system lies in the fact that it views the disputes with grave public consequence as a private breach of investor's rights by states. The worldwide expansion of ICSID and recognition of investment treaty awards through New York Convention[30] has created a big enforcement regime for investment treaty arbitration. Although, major reforms in the process of dispute settlement is not easy and will not come overnight but the treaty negotiation should be taken more seriously and diligently so as to allow nation States to protect public interest involved in factors such as environment, natural resources, financial crisis etc. It would be wrong to say that there is no scope for review of investment treaty awards because ICSID allows enforcement of awards made by its tribunal only if they confirm to the convention.[31] However, there are tough questions, which need to be answered if we need to control the powers of private arbitrators. There is a need to develop substantial jurisprudence for investment treaty arbitrations and a permanent review body would help in bringing uniformity to the system. This uniformity although comes with a price tag because any kind of review escalates costs and consume time. The challenge above us is how to gain consensus on forming a review body. Who should appoint the members of such review body and what should be their composition? Arbitration is not meant only for law practitioners but all the experts in their field are eligible to arbitrate. If such review body has to exist how it can manage issues of expertise. There are more than just procedural problems for setting up a review body. Nations all over the world must possess the will to change the regime of investment treaty arbitration for its own good. The key to all these questions lies in drawing a line between public interest and private interest. Investment treaty arbitrations do not favor nations but investors and it is not necessary that the capital importing nations were always paying the price but soon capital-exporting nations might feel the heat. The negotiations of treaty are prime importance because once ratified, nations have to oblige by it. Thus, it is extremely important that the nation States safeguard their public interests while negotiating any kind bilateral investment treaty.

(Footnotes)

[25] *Supra note 21.*

[26] *Supra note 6.*

[27] WTO Dispute Settlement Body or DSB is made up of all member governments, usually represented by ambassadors or equivalent. They appoint a seven member appellate tribunal who are person of recognized authority having expertise in international trade law and are unaffiliated to any government.
See. http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm last visited 19/9/11.

[28] *Supra note 21.*

[29] Oscar Olivera& Tom lewis, *COCHABAMBA Water war in Bolivia*, 33-47, 2004.

[30] "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the*recognition and enforcement of foreign arbitral awards and* the *referral by a court to arbitration"*. See, http://www.newyorkconvention.org/ last viewed on 21.09.11.

[31] *Supra note 6.*

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Article

Renovating the Bridge

: MRINALINI SINGH

The arbitration bridge for smooth drive i.e. to maintain healthy relationship between parties has gone rough with time. A strong need is being felt to modernize the bridge. The Ministry of Law has circulated a consultation paper for proposed amendment in the Indian Arbitration Act. The author deals with development of arbitration law in India, the existing problems and the problems which may be faced due to the proposed amendments and proposes some additional changes.

INTRODUCTION:

The significant increase in the role of international trade in the economic development of nations over the last few decades has been accompanied by a considerable increase in the number of commercial disputes as well. In India too, rapid globalization of the economy and the resulting increase in competition has led to an increase in commercial disputes. At the same time, however, the rate of industrial growth, modernization, and improvement of socio-economic circumstances has, in many instances, outpaced the rate of growth of dispute resolution mechanisms. In many parts of India, rapid development has meant increased caseloads for already overburdened courts, further leading to notoriously slow adjudication of commercial disputes.[1] As a result, Alternative Dispute Resolution mechanisms including arbitration have become more crucial for businesses operating in India as well as those doing businesses with Indian firms.

As per Asian International Arbitral Journal 2008, percentage of domestic arbitral awards challenged before the SC and HC in India on various grounds between 1996 to 2007 are:[2]

Grounds	*SC*	*HC*	*SC&HC (Foreign award)*
Jurisdiction	*68.75*	*43.53*	*29.41*
Public Policy	*12.5*	*26.72*	*17.64*
Limitation	*6.25*	*13.62*	-
Non Appreciation of facts and evidence	*12.5*	*2.47*	-

The former minister of law Veerappa Moily has in his speech said that there are 52,592 cases pending in Supreme Court and 71,680 cases and 49,417 cases in Allahabad and Kolkata High

(Footnotes)

[1] Nearly 30 million cases pending in courts (www.rtiindia.org).

[2] Asian International Arbitration Journal, 2008, vol.4, number 1, page 73-74,81.

Court respectively emphasizing on the need of ADR mechanism.[3]

The bridge of arbitration though was constructed way back by the legislature for parties at dispute to cross it amicably by spending less fuel (money) and avoid longer route (of court). But it has failed to achieve its purpose. Even today a large number of parties take a longer route of court. A need for bridge's (Arbitration and Conciliation Act, 1996) renovation has arisen. An attempt was made to amend the Arbitration and Conciliation Act, 1996 in 2003 but it failed as the Standing Committee of Law Ministry felt that the Bill "gave room for excessive intervention by the courts in arbitration proceedings."[4] A Consultation Paper was published by the Ministry of Law & Justice, Government of India on 8th April 2010 carrying the proposed amendment in ADR Act and comments were invited on the proposed amendments. The purpose behind the proposed amendments to the said Act is to minimize court intervention in arbitral proceedings and to institutionalize the arbitration process in India.

ADDITIONAL (SUGGESTED) CHANGES:

Law Commission in its consultation paper has proposed many changes to make the Arbitration and Conciliation Act, 1996 more effective. In addition to the proposed changes following changes can also be brought.

1. The terms seat and place have been in controversy since long. In the case of Videocon Industries Ltd. v. UOI and Anr.[5], the Supreme Court has discussed the meaning of seat and place. The Act can contain India to be the seat of arbitration when the contract of arbitration involving Indian party does not specify the seat of arbitration or stipulates a floating arbitration.[6]

2. Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 uses term place. This term (place) shall be replaced by seat as the term 'place' means a locale where proceedings may be carried on account of convenience, whereas substantive legislative significance is attached with the term 'seat' and is decisive as to the law governing arbitration.[7]

3. As the Act is applicable on both domestic and international commercial arbitration it goes ambiguous at places. Further clarity with respect to its application in domestic and international commercial arbitration is required.

4. An unresolved issue that has arisen with regard to interim measures is whether Indian courts have jurisdiction to grant interim measures of protection where the seat of arbitration is 'foreign'. This might occur where two parties (Indian national v. non-Indian) hold arbitration outside India and the Indian party needs an interim measure of protection of an Indian court to secure their rights (i.e. to secure assets, to appoint receiver, etc). Since interim measures are of great practical importance to the parties involved, the determination of which decision-making body to approach is of critical importance. Unfortunately, the Supreme Court has not yet settled the issue, and the answer has, like a burning ember, been tossed from court to court. The Act can specifically lay down under Section 9 of the Act as to jurisdiction of the court to grant or not to grant interim measure in cases where parties or one of the party is Indian and seat of arbitration is foreign.[8]

5. Under Section 9 of the Arbitration and Conciliation Act, 1996 after an interim order is granted by the court if the party fails to initiate the arbitral proceedings, the interim order of protection passed by the court becomes almost a final order. Since the Original Petition is already disposed, the only remedy available for the party who has suffered the interim order of protection is to file a writ petition under Article 227 of the Constitution of India before the High Court. Further once the interim order of

(Footnotes)

[3] Indian Express 'The Government Contemplating Amendment to Arbitration', Bangalore 26 August 2009
[4] Indian Express 'The Government Contemplating Amendment to Arbitration', Bangalore 26 August 2009
[5] Decided on 11th May 2011
[6] CONSULTATION ON AMENDING THE INDIAN ARBITRATION ACT by Ashok Sancheti in Indian Council of Arbitration, Vol. XLVII
[7] Indian Legal Space "Amendments required in Indian Arbitration and Conciliation Act" by Lavanya Chandan
[8] Finding Harmony with UNCITRAL Model: Contemporary issues in International Commercial Arbitration in India after the arbitration and Conciliation Act 1996 by Sandeep S. Sood

protection is passed by the Court under S.9, even if the arbitral tribunal finds subsequently, that such order may have to be varied or modified, the arbitral tribunal finds that its power under Section 17 may not be effective to override or alter the orders given by the court under Section 9 of the Act. This leads to failure of justice. So Section 9 and 17 (with respect to changes in Section 9) of Act can also be amended.[9]

6. At present after making an award the arbitral tribunal gives the original stamped award to the claimant and in some cases the arbitral tribunal gives signed copies to the parties and retains the stamped award. A proper procedure can be to file the original stamped award in the Arbitration Division of the High Court or the Principal Civil Court of Original jurisdiction, as the case may be, which would deal with

(Footnotes)

[9] Comments and suggestions on the consultation paper by Indian Institute on Arbitration& Mediation. "Sec. 9(iii) Where a party makes an application under sub-section (i) or (ii) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction. (iv) The Court may direct that if the steps referred to in sub-section (iii) are not taken within the specified period, the interim measure granted under section 9, shall stand vacated on the expiry of the said period: Provided that the Court may, on sufficient cause being shown for the delay in taking such steps, extend the said period. (v) Where an interim measure granted stands vacated under sub-section (iv),the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section. (vi) While passing orders of interim protection under sub-sections (i) or (ii), the court may specify that the interim measure of protection granted, may be modified, altered or vacated, if the Arbitral Tribunal, after going through the evidence of the case, finds that such modification, alteration or cancellation is required for the ends of justice." Section 17 (3) Where a party makes an application under sub-section (1), for which there is already an order under Sec. 9 by the court, then if the arbitral tribunal feels, after going through the evidence that such order should be modified, varied or vacated for the interest of justice and for the balance of convenience, shall pass appropriate orders under sub-section (1), modifying, varying or canceling such orders, with such conditions as it may deem fit in the circumstances of the case. Provided that such modification, variation or cancellation shall not result in nullifying the execution of the award that may be passed against a party."

The Lighter Side

During the wedding rehearsal, the groom approached the minister with an unusual offer. "Look, I'll give you $100 if you'll change the wedding vows. When you get to me and the part where I'm to promise to 'love, honor and obey' and 'forsaking all others, be faithful to her forever,' I'd appreciate it if you'd just leave that part out."

He passed the minister the cash and walked away satisfied.

The wedding day arrives, and the bride and groom have moved to that part of the ceremony where the vows are exchanged. When it comes time for the groom's vows, the minister looks the young man in the eye and says, "Will you promise to prostrate yourself before her, obey her every command and wish, serve her breakfast in bed every morning of your life and swear eternally before God and your lovely wife that you will not ever even look at another woman, as long as you both shall live?"

The groom gulped and looked around, and said in a tiny voice, "Yes."

The groom leaned toward the minister and hissed, "I thought we had a deal."

The minister put the $100 into his hand and whispered back, "She made me a much better offer."

challenge under Section 34 or execution under Section 36 and to give signed copies to the parties. So, Section 32 also can be amended.[10]

7. To ensure implied arbitration in high consideration value contracts it would be preferable to incorporate a clause in Arbitration and Conciliation Act, 1996 requiring compulsory arbitration agreement clause in contract of or above a certain amount.

8. The Commercial Division of High Courts Act, 2009 has undergone change. This change would require some more amendments in Arbitration & Conciliation Act, 1996.[11]

9. A new chapter can be included after Part I of the schedule under the title, "Single Member Fast Track Tribunal or Fast Track Arbitration". After the Third Schedule there should be an insertion of Fourth Schedule which will contain the constitution of Fast Track Tribunal, procedure to be applied and representation of Counsel, etc.[12]

10. One of the issues which can arise with respect to institutional arbitration is "competency of the arbitrator". A rule with respect to qualification of arbitrators should be developed. The legislature can further add a provision directing government to lay down the necessary qualifications for arbitrators.

IMPACT OF CHANGES IN THE ACT:

It is only when disputes come before the court, no matter how well the drafting is, we realize legislative short comings. However on close analysis, following impact can be seen after the application of changes proposed by the law ministry in the Arbitration and Conciliation Act, 1996.

i) Decision of institution will not act as precedent. Law develops with the help of judicial interpretation. The sapling of arbitration though has been planted in India it still has to spread its roots. The scope of development of arbitration law will decrease substantially due to reduction in number of arbitration cases in the court.

ii) Over the time more rules and laws will be framed with respect to institutional arbitration. Each of such rules and laws being compulsory it will be incorporated into traditional court process.

(Footnotes)

[10] Comments and suggestions on the consultation paper by Indian Institute on Arbitration& Mediation "Sec. 32(4) - On passing of the final award, the original stamped award and a photocopy of the arbitral award duly signed on each page by the members of the arbitral tribunal, together with the original arbitral records shall be filed in the Principal Civil Court of Original jurisdiction in the District or if the arbitration is relating to commercial disputes of specified value, in the Arbitration Division of the High Court, by the arbitral tribunal or the institution under Sec.6, if so designated, within thirty days of the making of the award along with the list of papers comprising the arbitral records. (5). Where the arbitral tribunal or institution, as the case may be, fails to file the original stamped award, photocopy of the arbitral award and the arbitral records under sub-section (4), any of the parties may give notice to the arbitral tribunal or institution to do so within a period of thirty days from the date of receipt of such notice, failing which the party may request the Principal Civil Court of Original jurisdiction in the District or if the arbitration is relating to commercial disputes of specified value, in the Arbitration Division of the High Court to direct the arbitral tribunal or the institution to file the award and records."

[11] Comments and suggestions on the consultation paper by Indian Institute on Arbitration& Mediation "Section 2(1)(e):"Court", in relation to, (i) sections other than sections specified in sub-clause (ii) means: (a) the principal Civil Court of original jurisdiction in a district, or (b) any Court of coordinate jurisdiction to which the Court referred to in sub clause (a) transfers a matter brought before it, and includes the High Court in exercise of its original jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; and (ii) sections 34, 36 and 37 where the arbitration is relating to commercial disputes of specified value, means the Commercial Division of the High Court constituted under sub-section (1) of section 3 of the Commercial Division of High Court Act, 13(2) Amendment in Section 37: In section 37, in sub-section (1), in clause (b), the following proviso shall be inserted, namely:- "Provided that where the arbitration relates to a commercial dispute of specified value, the appeal shall lie to the Supreme Court in accordance with the provisions contained in section 13 of the Commercial Division of High Courts Act, 2009."

[12] 176th Report of Law Commission of India on Arbitration and Conciliation (Amendment)Bill

iii) The awards of institutions cannot be appealed and might not be published. It cannot fully contain the urge of the *homo ratio juris* to rely on previous decisions and to seek coherence.

iv) Issues with respect to degree of confidentiality will arise.

v) In the institutional arbitration there can be dictatorship of experts.

vi) As the Act does not talk about the qualification of arbitrators, there can be cases challenging the competency of arbitrator to arbitrate, thus rendering the entire purpose behind institutionalizing arbitration futile.

vii) Soon with respect to systematically review the governing policies, rules and procedures with an eye towards continual revision will be made by the courts when any dispute challenging the process of arbitration arises before it or by the Central Government. But it will result into ossification of flexible arbitration process.

viii) Most arbitrations are ad hoc arbitrations. There are few institutions which can provide arbitration facilities under their Rules. Often, retired judges are appointed as arbitrators who, by virtue of long tenures behind the Bench, have got accustomed to tedious rules pertaining to procedure and evidence. As a result, arbitrations become a battle of pleadings and procedures, with each party trying to stall if it works to their favor.[13] And, there may be a temptation for arbitrators to prolong the arbitration to earn higher "sitting fees".[14]

(Footnotes)

[13] Promod Nair, "Quo vadis Arbitration in India?" http://www.thehindubusinessline.com/2006/10/19/stories/2006101900101100.htm

[14] "Is Judicial Intervention in arbitration justified?" http://indiacorplaw.blogspot.com/2009/04/nlsir-symposium-is-Judicial.html

Think ... Attitude

The longer I live, the more I realize the impact of attitude on life.

Attitude to me is more important than facts.

It is more important than the past, than education, than money, than circumstances, than what other people think, or say or do.

It is more important than appearance, giftedness or skill. It will make or break a company, a church or a home.

The remarkable thing is we have a choice every day regarding the attitude we will embrace for that day. We cannot change our past. We cannot change the fact that people will act in a certain way. We cannot change the inevitable.

The only thing that we can do is to play on the one string we have and that is our attitude.

I'm convinced that life is 10% what happens to me and 90% how I react to it.

And so it is with you.

~Charles Swindall~

ix) Whispers also abound of arbitrators being vulnerable to 'being procured' and those with deep pockets being able to purchase justice.[15]

x) Many arbitrators are not familiar with the practice of arbitration or how to effectively conduct the arbitral process.[16]

xi) Without institutionalization, parties to a foreign arbitration simply will not have the option to seek interim measures which may result in a denial of justice.

xii) Court assistance may be essential to justice because in many cases jurisdiction of the foreign arbitral tribunal is limited and it inherently lacks enforcement capabilities.[17]

CONCLUSION

The Act was laid down way back in 1996. An amendment is a constructive attempt to update it with the changing times. The consultation paper calling for views of people will help people in participating actively and expressing their views. No matter how equipped a person is, it is not possible to foresee every situation. All what is needed now is that the law ministry looks into the view of people and makes further changes in the proposed amendment before coming up with an amended Arbitration and Conciliation Act, 1996.

(Footnotes)

[15] "Is Judicial Intervention in arbitration justified?" http://indiacorplaw.blogspot.com/2009/04/nlsir-symposium-is-Judicial.html

[16] "Is Judicial Intervention in arbitration justified?" http://indiacorplaw.blogspot.com/2009/04/nlsir-symposium-is-Judicial.html

[17] http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1000&context=stu_llm

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My grandfather once told me that there are two kinds of people:
Those who do the work and those that take the credit.
He told me to try to be in the first group; there was less competition there.

~Indira Gandhi~

"An Asian Perspective on Mediation - Face, Guanxi & Hierarchy" Workshop: Singapore - 19 - 20 July, 2012

An Asian Perspective on Mediation is an intensive 2-day workshop that offers you an opportunity to equip participants with enhanced skills and knowledge to manage disputes involving Asians. Participants will gain insights into the constructs of culture and appreciate the impact of some of the unique features of an Asian Culture on the resolution of disputes. This will be held on 19 & 20 July 2012 (Thursday & Friday) at Mediation Chambers 1 & 2 Supreme Court 1 Supreme Court Lane Singapore 178879. For more details, contact Singapore Mediation Centre - enquiries@mediation.com.sg or visit the website www.mediation.com.sg/training.htm

WIPO Arbitration Workshop: Maxwell Chambers, Singapore - 18 - 19 October, 2012

This Workshop is hosted by the Arbitration and Mediation Center of the World Intellectual Property Organization. The purpose this Workshop is to provide intensive basic training of a practical nature for party representatives in arbitration and for arbitrators. The training, which will be conducted by eminent international arbitrators, will focus on the main principles of international commercial arbitration law and practice, with particular reference to the practical application of the WIPO Arbitration and Expedited Arbitration Rules in intellectual property and technology disputes. The arbitration rules of other arbitration institutions will also be referred to for purposes of comparison. For more information, please see: http://www.wipo.int/amc/en/events/

Sri Lanka to set up International Arbitration Centre

Sri Lanka will be setting up an International Arbitration Centre in Colombo. This was revealed by the Minister of Justice, Mr. Rauff Hakeem during his recent visit to the Middle East. During a meeting with President of Kuwait Chamber of Commerce and Industry, the Minister explained that the Kuwaiti business and Industry would benefit from this centre.

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