



### INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA—has it come of age?

BY SAHIL KANUGA & VYAPAK DESAI

Vyapak Desai heads the International Litigation and Dispute Resolution Practice Group and Sahil Kanuga is a senior associate at Nishith Desai Associates

#### Recent Judicial Developments on Arbitration in India

Arbitration in India slowly appears to have turned a full circle. Recent judgments from the courts have provided some clarity, certainty and possibly, even the much-needed impetus to ensure that arbitration remains the preferred dispute resolution mechanism.

Significantly, arbitration in India is not new. It existed in its various avatars since time immemorial, including in the form of informal agreements where the disputing parties would agree to listen to the decision of a respected elder. The law on arbitration in India can be found in the Arbitration & Conciliation Act, 1996 (“the Act”). The Act was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law (“**UNCITRAL Model Law**”), which was recommended by the General Assembly of the United Nations to all countries. The Act was, at that time, clearly a step in the right direction. Under the Act, the manner in which a party could approach court was limited and significant power was given to the arbitral tribunal including the power to rule on its own competence (*Doctrine of Kompetenz-Kompetenz*). It could be said that the Act provides an arbitral procedure which is fair, efficient and capable of meeting the needs of today.

For its own peculiar set of reasons, ad-hoc arbitration, which was the preferred option in India, came to be regarded as not the most efficient option available for disputing parties. To have an ad-hoc arbitration go on for more than five years was not unusual, thus negating the basic concept of arbitration. However, one must in all fairness admit that of late, the problems that initially plagued ad-hoc arbitration have been (for the most part) adequately resolved and the

environment has now matured enough for ad-hoc arbitration to be considered effective. In fact, even institutional arbitration has now entered India with reputed international arbitration bodies like the London Court of International Arbitration and Singapore International Arbitration Centre focusing on India.

#### Arbitration in India: a litigant’s nightmare

A key issue faced was that while the Act envisages seeks to minimize the role of the courts in the process of arbitration, litigants are increasingly involving the courts in issues that require the courts to delve deeper into the crux of the arbitration agreement. This does take time and results in arbitration no longer being as efficacious a remedy as envisaged. Significantly:

- In *Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd.*, the Supreme Court of India, *inter alia*, held that where the validity of award is challenged, the phrase “*public policy of India*” used in Section 34 (which deals with challenge to an arbitral award) was required to be given a wider meaning and *inter alia* including patent illegality as one of the grounds for challenge.
- In *SBP & Co. Vs. Patel Engineering Ltd.*, the Supreme Court of India held, *inter alia*, that the power exercised by the Chief Justice (of either the High Court or the Supreme Court, as the case may be) in appointing an arbitrator<sup>1</sup>, is not merely an administrative power but was, in fact, a judicial power. Holding such power to be a judicial power, therefore, requires the Chief Justice to analyze the issue and pass a decision on whether there is an arbitration agreement between

the parties and an arbitrable dispute thereunder. This, clearly, is a departure from the *Doctrine of Kompetenz-Kompetenz* enshrined in the Act.

- In *Bhatia International V. Bulk Trading S.A.*, the Supreme Court of India, *inter alia*, held that the provisions of Part 1 of the Act, which contains general provisions including the powers to (i) grant interim relief and (ii) challenge an arbitral award, would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I and that in cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Relying on this judgment, another bench of the Supreme Court in the case of *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 *N. Radhkrishnan v. M/s. Maestro Engineers & Ors.*, the Supreme Court of India has upheld the decision of lower courts and reiterated that notwithstanding the existence of an arbitration agreement, where a case *inter alia* relates to allegations of fraud and serious malpractices on the part of the respondents, such a case “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 said 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

*continued on page 4*



## International Arbitration

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of \_\_\_\_\_\* arbitrator(s).

The language of the arbitration shall be \_\_\_\_\_.

\*State an odd number. Either state 1, or state 3.

Parties should also include an applicable law clause. The following is recommended:

This contract is governed by the laws of \_\_\_\_\_\*.

\*State the country or jurisdiction.

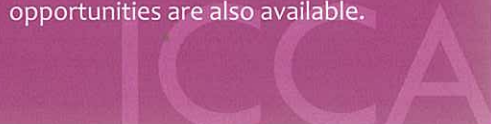


10-13 June 2012

The 21st International Council for Commercial Arbitration (ICCA) Conference will be hosted in Singapore for the first time in 2012.

A must-attend Conference for all connected to arbitration, we will spare no efforts to deliver an exciting and productive programme. It will include key note addresses from leaders of the arbitration world, who will present the latest knowledge and innovative thinking, on a wide range of important issues and topics.

For more information on this conference, please visit [www.iccasingapore2012.org](http://www.iccasingapore2012.org) or call the SIAC at (65) 6221 8833. Sponsorship opportunities are also available.



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.

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 existed in the laws that govern us, the larger question that these judgments throw up remains open. That being whether parties would, using these judgments as precedents, be encouraged to try their luck before the Indian courts, where systemic delays abound. 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 such arbitral awards.

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 but in light of the above judgments, a greater amount of judicial intervention is feared. One could even argue that the Act needs to be revamped to avoid the numerous grey areas and resulting interpretations.

### Recent developments: a step in the right direction


It was widely perceived that certain decisions of courts in India interpreted provisions of the Act in a manner that led to an increase in judicial intervention and curtailment of party autonomy, acknowledging the need of the hour, a Consultation Paper was introduced by the Ministry of Law & Justice, proposing certain amendments to the Act and thereby seeking to reduce judicial intervention and encourage institutional arbitration.

*"The law is an ass"* is an adage that has withstood the test of time. But in the below cases, the courts in question have sent out certain signals which should assuage the business community and reinforce their faith in arbitration, atleast to some extent.

- The Delhi High Court, in *Max India Limited v. General Binding Corporation*<sup>2</sup> held that where the parties had agreed that disputes were to be referred for arbitration to the Singapore International Arbitration Centre ("SIAC") as per SIAC Rules and to be resolved under the law of Singapore where jurisdiction was

provided as Singapore, the contract between the parties clearly implied the exclusion of the jurisdiction of Indian Courts and excluded the applicability of Part I of the Act and therefore dismissed the petition as not-maintainable.

- Similarly, the Supreme Court of India, in the case of *Dozco India Pvt. Ltd. Vs Doosan Infracore Co. Ltd.*<sup>3</sup>, has take a step forward in cases of international commercial arbitration and held that where parties have chosen a foreign law and seat of arbitration outside India, the same was actually inferred to be an agreement to exclude the application of Part I of the Act. This judgment comes as a welcome change step curtailing the scope of judicial interference and is actually in line with the envisaged objectives of the Act.
- Separately and of equal significance, the Delhi High Court has, in the case of *Penn Racquet Sports Vs. Mayor International Ltd.*<sup>4</sup>, dismissed a challenge to and upheld the enforcement of a foreign award passed in an International Chamber of Commerce, Paris, arbitration. By this judgment, it appears that the Court has adopted a *hands-off* policy from the challenge to an enforcement of a foreign award, unless it is shown that an adequate reason to interfere is brought to the attention of the court. The Court has reiterated that the obligation of the party seeking to challenge a foreign award is far more onerous than even challenging a domestic award. Further, the Court has reiterated that a foreign award will be recognized and enforced as a decree of a court, unless it falls within the exceptions provided.

The proposed amendments in the Consultation Paper and these judgments will provide significant comfort, assurance and certainty to the international community as well as foreign award holders, who are seeking to have their award recognized and enforced in India. The judgments are clearly a step in the right direction for the judiciary and should ensure that arbitration remains the preferred dispute resolution mechanism. 

#### REFERENCES:

- 1 Under Section 11 of the Act.
- 2 OMP 136/2009;
- 3 Arbitration Petition No. 5 of 2008 decided on October 08, 2010;
- 4 E.A. No. 705 of 2009;