India as a Global Destination for International Arbitration: What Will It Take to Reach There?

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India's Past Life Story

India's prime role as a frontline jurisdiction in laying the foundation of modern-day arbitration is long forgotten and, therefore, this brief prelude: A little known fact is that India was amongst the only six Asian nations to have signed the Geneva Convention of 1927.[1] Later, it was amongst the 10 original signatories to the New York Convention and the fourth country to ratify the same. That was in July 1960. The USA ratified it a full 10 years later in 1970 and the UK in 1975. China, Singapore and Malaysia (illustratively) have ratified it only in the mid-1990s. Therefore, it is no exaggeration to say that India was amongst the handful of countries that helped lay the foundation of modern-day international commercial arbitration.

Why India Lost the Plot

Equally, it cannot be denied that India is not considered to be at the forefront and is (perhaps unfairly) considered to be a laggard.

There are a variety of reasons for this. Chiefly, we had an unsupportive Arbitration Act[2] that made interim or final challenges to an arbitrator or an award fair game. Coupled with judicial delays, it often made arbitration a retrograde dispute resolution mechanism. Moreover, (till recent years) there was hardly a body of high value arbitrations to catch the eye of leading practitioners or lead to the growth of an arbitration bar.

Things began to change post the economic reforms from the early 1990s and the opening up of the economy. India soon positioned itself amongst the fastest growing economies and a sought-after FDI destination. High-value commercial disputes could not be far away.

Rude Awakening

The reality has now begun to overtake Indian parties. All of a sudden, Indian corporations and indeed the Indian State find themselves neck deep in high-level arbitrations (generally seated outside India). Most

[1] The other five nations are Japan, New Zealand, Pakistan, Thailand and Hong Kong. None from the Americas subscribed to it. F.S. Nariman: "East Meets West: Tradition, Globalisation and the Future of Arbitration", *LCIA Arbitration International*, Vol. 20, Issue 2, page 123.

[2] The Indian Arbitration Act, 1940 (10 of 1940).

struggle with a new environment and an unfamiliar dispute resolution mechanism. In November 2011, the Indian government suffered acute embarrassment in a unanimous BIT award, rendering India liable for damages – not for any act or omission qua an investor – but for judicial delays of over nine years in not enforcing an ICC Award (*White Industries Australia Limited v. India*).[3] The Tribunal, *inter alia*, held that the delays deprived the Australian investor of "effective means of asserting claims and enforcing rights". More recent matters include *NTT v. Tata Sons* (LCIA, London), *Daiichi v. Ranbaxy* (SIAC, Singapore), and *Devas v. Antrix Corp* (ICC, Paris), cumulatively resulting in awards of over US$ 2.5 billion against the Indian defendants.

The BIT arbitrations on the anvil also present alarming figures. The Indian State is involved or threatened with arbitration claims in the telecom, energy and infrastructure sectors, which (at rough estimates) amount to over US$25 billion. These challenge India's measures varying from tax demands to rescission of contracts. Amongst the companies involved are Vodafone, Russia's Sistema JSFC, Norway's Telenor ASA, Loop Telecom UK, Axiata Group Malaysia and Capital Global and Kaif Investment (Mauritius). Telenor's claim alone is reported to be in the range of US$14 billion.[4] It is not a matter of figures alone. BIT arbitrations often raise issues of sovereignty and public policy. Take, for instance, the challenge by a UK-based hedge fund suing India for directing Coal India to sell subsidised coal to power plants (thereby bringing down its bottom line) or threats by foreign telecom companies to sue India over cancellation of their telecom licenses pursuant to the Supreme Court of India striking down the first-come-first-served policy as unconstitutional.[5]

In this scenario and with such significant rights and issues at stake, India is virtually an outsider in the system.

A Non-Player on the World Stage?

As per the LCIA's report for the year 2015, it made a total of 449 appointments of arbitrators this past year – not one of them happened to be an Indian. The nationalities of arbitrators (appointed by the LCIA) in 2015 other than from the UK included Australian, Austrian, Brazilian, Belgian, Canadian, Chinese, Cypriot, Danish, Dutch, French, German, Greek, Hungarian, Iranian, Irish, Italian, Latvian, Lebanese, New Zealand, Nigerian, Russian, Singaporean, South African, Spanish, Swedish, Swiss, Tunisian, Ukrainian, and the USA.[6]

Most Indian international arbitrations are now seated in Singapore. SIAC's report for 2015 shows India as the largest non-Singaporean contributor to its case load (and this has indeed been the case for the past several years). In 2015, Indian disputes contributed 91 cases to SIAC's workload (with China, at 46 cases, coming a distant second). The SIAC made a total of 126 appointments of arbitrators in 2015. Indians comprised a mere 3% of these appointments.[7] In comparison, the UK did not contribute to SIAC's workload at all but its nationals comprised 27% of the total appointments. Malaysia contributed with 15 cases and had 9% share in the total appointments.

Thus, it has so come to pass that Indians seem to be excluded from the system – hardly ever figuring as sole or presiding arbitrators or indeed for that matter as lead counsel.

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[3] Final Award dated 30 November 2011 in the matter of UNCITRAL arbitration under the agreement between government of Australia and the Government of Republic of India.

[4] Sumeet Kachwaha. "The New Challenges and Opportunities for India in Bilateral Investment Treaties". LexisNexis, Emerging Issues Analysis, 12 January 2013.

[5] *Centre for Public litigation v. UOI & Others,* (2012) 3 SCC 1.

[6] LCIA Registrar's Report 2015. Available at: www.lcia.org/LCIA/reports.aspx (accessed on 27 September 2016).

[7] LCIA Registrar's Report 2015. Available at: www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_ 2015.pdf (accessed on 27 September 2016).

Should a country with a glorious legal heritage not wish otherwise? And what will it take to move on from here?

One needs to realise that there is competition to be met and there are no easy trophies to be won. I give below three suggestions for consideration by the stakeholders.

Moving Forward

First: An Effective and Credible Arbitral Institution

The importance of a strong and credible arbitration institute cannot be overstated. It is no coincidence that the leading arbitration centres in the world are also home to leading arbitration institutes.

Arbitral institutes are not mere buildings letting out hearing rooms or setting fees. They serve as centres of learning – schools and colleges where young enthusiasts intermingle with senior colleagues and under the aegis of which they gather to brainstorm and exchange ideas through seminars, journals and so on. This spurs the growth of an arbitration bar which in turn provides the pool for world-class arbitrators. Arbitral institutions also (through trial, error and usage) help in the evolution of best practices and sanctify them through their rules, practice notes etc., and all this contributes to the growth of soft law of arbitration jurisprudence.

Strengthening arbitration institutes: SIAC and its vital role in promoting Singapore as a centre of international arbitration can be seen as a case study. Initially, the SIAC was funded by the Singapore government (though now it is entirely self-funded). The legislature put it on a special pedestal. Under the (Singapore) International Arbitration Act, the Chairman of the SIAC is the "appointing authority" (if the default mechanism for appointment is triggered).[8] Further, the government has carved out a tax break for local law firms. Singapore law firms can avail of a 50% tax rebate on fees earned through international arbitrations seated in Singapore. This gives Singaporean lawyers a vested interest in having arbitrations seated locally and being competitive vis-à-vis foreign lawyers.

However, what matters most is the leadership and the people at the helm of affairs. Institution building can happen only by attracting brilliant minds and empowering them to lead. The institute head is indeed the brand ambassador for his or her institute and lends it credibility. Credibility is paramount for any institute whose purpose is to administer dispute resolution. Once again, witness the Singapore example where it has not hesitated in reaching out to the best available talent beyond its shores.

Second: Engaging with the Judiciary

The local judiciary being in tune with the ethos of arbitration and support from the domestic courts is essential for the popularity and growth of any centre for arbitration.

At the outset, I may state my view that India, as a jurisdiction, should not be viewed as one lacking in legislative or court support for arbitrations. India's image has no doubt suffered due to a few retrograde court decisions (which now stand overruled and addressed under the October 2015 Amendment Act[9]). The Indian Arbitration Act[10] (though based on the Model Law) goes an extra mile in trying to keep

[8] Section 9A read with Sections 2(1), 8 (2) and 8(3) of the International Arbitration Act.

[9] The Arbitration and Conciliation (Amendment Act 2015 – Act 3 of 2016 – with retrospective effect from 23 October 2015).

[10] The Arbitration and Conciliation Act, 1996 (26 of 1996), as amended by Act 3 of 2016 (hereafter the Arbitration Act).

court intervention out and lend its fullest support to the arbitration process. Three illustrations should suffice to make this point:

Article 5 of the Model Law simply states that in matters provided for therein, no court shall intervene (except where so provided for under the said law). The Indian Act makes its intent far more emphatic rendering it a non-obstante clause: ("Notwithstanding anything contained in any other law for the time being in force ... no judicial authority shall intervene ....").[11]

Next, Section 8 (court's power to refer parties to arbitration where there is an arbitration agreement) requires the judicial authority, seized of any matter which is subject to an arbitration agreement, to refer the parties to arbitration. The only ground on which this can be resisted under Indian law is if the court finds that *prima facie* no valid arbitration agreement exists. The language of the Model Law leaves far more room for judicial intervention. It permits a non-reference to arbitration if the court finds that the said agreement "is null and void, inoperative or incapable of being performed". These potential loopholes stand removed under Indian law from court scrutiny (and entrusted to the arbitral tribunal).

Lastly (to illustrate the Indian Arbitration Act's pro-arbitration stance), Sections 13, 14 and 16 can be referred to. The Model Law provides an interim appeal to a court, if a challenge to an arbitrator *inter alia* on the grounds of bias, jurisdiction, validity of the agreement etc. fails. This is not the case under the Indian Act, which requires the arbitration to continue and an award rendered – which award can then be challenged by the aggrieved party.

Coming to court support, this can be seen best from the actual statistics of enforcement of awards. According to a 2008 study, out of a total of 17 challenges to foreign awards, only one was upheld by the Indian courts, while one was modified.[12] Subsequent statistics are about consistent with this ratio. This is far more favourable than the global average rate.[13] The domestic awards challenge figures may be misleading, because under the old Arbitration Act (of 1940) a challenge to an award was permissible on wider grounds than currently permissible (under the 1996 Act).

Commenting on the Indian judiciary and Indian courts, noted Indian Jurist Mr. F.S. Nariman stated:

> *"I must stress that there is no foreigner bias in India's legal system, nor amongst its judges. The foreign party loses or wins as often as the local. In fact, statistics show that in the last fifty-five years, amongst the important arbitration cases that ultimately reached the Supreme Court of India, foreign parties have succeeded over Indian parties in a preponderating majority of cases."*[14]

It must also be emphasised that many of the controversial judgments (which sometimes lead to stalling of arbitrations and encouraging reluctant parties to adopt guerrilla tactics) now stand largely neutralised by the 2015 Amendment to Arbitration Act[15] and it would be fair to expect that arbitrations in

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[11] Section 5 of the Arbitration and Conciliation Act, 1996.

[12] Sumeet Kachwaha. "Enforcement of Arbitral Awards in India". *Asian International Arbitration Journal* (Kluwer), Vol. 4, No. 1, p. 64 at 81.

[13] **See** Prof. Albert Jan Van Den Berg's study which concluded that globally only about 10% of the New York Convention Awards were not enforced: "Why are some awards not enforceable?" ICCA Congress Series no. 12 (Beijing 2004) at 19, 291.

[14] Fali S. Nariman. "India and International Arbitration". 41 Geo. Washington International Law Rev. 367–379 (2009).

[15] Act 3 of 2015, w.e.f. 23 October 2015.

India would normally be in as friendly and supportive an environment as anywhere else in the world.

While all of the above is true, it has to be equally recognised that India is a very large jurisdiction. With 24 High Courts (not counting the circuit benches) and over 600 High Court judges and over 28 Supreme Court judges (and indeed the spectrum of judicial delays), it is unrealistic to expect a uniform or consistent judicial approach or outcome. Not all judges have the necessary commercial or international arbitration exposure. Coupled with judicial delays, there can be missteps and expectation gaps. To some extent the issue is being addressed by designating special commercial and arbitration courts in the High Courts. But that is a work in progress and will not (by itself) suffice. Accordingly, (in my respectful suggestion) the judiciary must be open to the idea of engaging and interacting with the international arbitration community and indeed contribute to the development of the international jurisprudence on the subject.

Third: Evolving an Arbitration Bar

India cannot hope to become a centre for arbitration without a body of well-reputed specialist arbitration lawyers. Being a good (or outstanding) lawyer in the court system is not good enough. One has to be "within" the arbitration system. The legal bar in India has trained and grown in its own manner with emphasis on oral advocacy and court procedures (which is far removed from a typical well-run international arbitration). Moreover, the eminent sections of the bar operate within a comfort zone where their name and reputation speaks for itself. Recognition as part of an international arbitration bar, however, is another ball game. All over the world, serious arbitration practitioners regularly intermingle with their peers, write and speak on the subject in international/national forums, get noticed and stand out. The serious Indian contenders will have to do likewise. Recognition, credibility and acceptability will not come without a special effort. Well-entrenched lawyers may perhaps not have the appetite to get into this long haul. It is up to the younger sections of the bar to take this initiative.

Conclusion

India as a centre for arbitration should not be viewed in any narrow prism as serving the economic agenda of a few. It should be viewed as a matter of national interest and the mindset of the State agencies (and the judiciary) should contribute towards this effort. Surely, the desirability for a country to come into its own on the international dispute resolution stage has advantages beyond the obvious and I trust that the Indian participants will take it forward in right earnest.

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