Dependability, diversity and delay

Sumeet Kachwaha and Dharmendra Rautray of Kachwaha & Partners highlight some important points in the Indian litigation and arbitration landscape

Perhaps the most striking feature about India is its diversity. It is diverse in terms of race, customs, language, geography, religion and wealth. There are 18 official languages (recognised by the Constitution of India). However English is the language of business and commerce. The Constitution recognises English as the official language for Central legislation as well as for the higher judiciary.

Politically, India has a quasi-federal structure with 28 States and seven centrally-administered regions (called Union Territories). The demarcation of legislative competence between the Centre and States is governed by the Constitution which lists out the subjects on which the Centre or States may legislate. For instance, law and order is a State subject while import and export is a Central subject. The Constitution has a pro-Centre leaning.

Courts, judiciary and bar

Though India has a quasi-federal structure, the judiciary is unified. Broadly, there is a three tier structure. First, each administrative district (there are over 600 districts) is headed by a District Court. Then each State has a High Court. Since some States share the same High Court, there are 21 High Courts in India. At the apex is the Supreme Court of India, situated in New Delhi.

The various High Courts can have very diverse characteristics. For instance, the High Court for the small State of Sikkim has a strength of only two judges, whereas the High Court for the State of Uttar Pradesh has about 65. The Supreme Court of India has about 29 judges who sit in several divisions of varying strength. Matters of fundamental significance are decided by a bench comprising of five judges.

Besides the broad three-tier structure there are a host of specialised tribunals, the more prominent ones being the Company Law Board, Competition Commission, Consumer Protection Forum, Debt Recovery Tribunal and Tax Tribunal. These tribunals function under the supervisory jurisdiction of the High Court where they may be situated.

The Indian judiciary is known for its independence and extensive powers. The High Court or the Supreme Court in exercise of their constitutionally conferred writ jurisdiction are empowered to strike down legislation on the ground of unconstitutionality. They can and (fairly routinely) do intervene in executive actions as well, on the ground of unreasonableness or unfairness or arbitrariness of State action.

Indeed courts can even strike down an amendment to the Constitution on the ground that it violates the basic structure of the Constitution. Besides, the High Courts and the Supreme Court have donned an activist mantle, which goes under the name of public interest litigation, whereunder they can intervene with a governmental policy if it adversely impacts the public at large or the public interest is such that it requires court intervention.

India has a unified all India Bar which means that an advocate enrolled with any State Bar can practice and appear in any court across the length and breadth of the country, including the Supreme Court of India. Foreign lawyers are not permitted to appear in courts (although they can appear in arbitrations) and the entry of foreign law firms into India (for non-court matters) has not yet been permitted, though it is being debated and considered.

The influence of the British judicial system, which India imbibed, continues in significant aspects. The official language for court proceedings in the High Court and the Supreme Court is English. The procedural law of the land as well as most commercial and corporate laws are modelled on English laws. English case law is regularly referred to and relied upon in the courts.

There is great emphasis on oral arguments. India has adopted the adversarial system. Almost all

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matters are heard extensively in open court. Advocates are seldom restrained in oral arguments and complex hearings may well take days of arguments to conclude. Specialisation is a relatively new phenomenon and most lawyers have a wide-ranging practice.

Litigation

Foreign judgments

There can be two situations in which foreign judgments may be recognised and enforced, depending on whether the judgment is rendered in a reciprocating or non-reciprocating territory. In the latter case, a fresh suit has to be brought in India to enforce the foreign judgment. This fresh suit cannot, however, be defended on merits by the defendant. It can be defended only on six grounds set out in Section 13 of the Code of Civil Procedure 1908 (CCP):

(i) the (foreign) judgment has not been pronounced by a court of competent jurisdiction;

(ii) it has not been given on the merits of the case;

(iii) it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India (where applicable);

(iv) the proceedings in which the foreign judgment was obtained are opposed to natural justice;

(v) it has been obtained by fraud; or

(vi) it sustains a claim founded on a breach of any law in force in India.

The requirement that the foreign judgment must be on "merits" needs some elaboration. It may well happen that if the defendant does not turn up to court in a foreign jurisdiction, the court passes a default judgment (simply accepting the claimant's case).

This is not considered to be on merits in India and is therefore not enforceable. Indian courts would require that even where the defendant is *ex parte*, the court considers the matter on merits (including where necessary examining the claimant's witnesses) and then renders a reasoned order.

In so far as reciprocating territories are concerned, the foreign judgment can be straightaway treated as a decree and executed as such, but even here, at the execution stage, the defendant can take the same six defences as are available for a non-reciprocating territory. Therefore the difference between a reciprocating and a non-reciprocating territory is not fundamental in nature.

> **"An ordinary civil suit takes an inordinate period of time to be disposed of in India"**

Class action

There are two different paths which may be available in a given situation to bring a class action. First (and the one increasingly gaining in popularity) is the public interest litigation (PIL) route. In the early 80s, the courts through a series of judgments evolved their PIL jurisdiction. This was through expansion of the writ jurisdiction vested in the High Court and the Supreme Court under the Constitution of India.

In short, the courts held that in order to safeguard citizens rights it would entertain petitions from any individual or organisation acting bona fide and espousing a public cause. In such cases the court would not only waive the requirement of *locus standi,* it would also waive procedural requirements. The Court would (in public interest) abandon its typical hands-off role in an adversarial proceeding and take on an activist mantle. Thus, PIL jurisdiction is quicker, cheaper and more effective.

It has become the preferred route to move non-compliant or apathetic State agencies or where there is breach or non-adherence of laws, or indeed any public interest issue is involved. The PIL jurisdiction is not available where substantive damages are sought, however.

The second mechanism available for class action is under Order 1 Rule 8 of the CCP. This, among other things, states that where there are numerous persons having the same interest in a suit, one or more such person may, with the permission of the court, sue or defend such suit on behalf of and for the benefit of all persons so interested.

The Court shall in such cases (at the Plaintiff's expense) give notice to persons who are purported to be represented. A person suing on behalf of the class cannot abandon or withdraw or enter into any compromise or satisfaction unless the court has once again given notice to all persons interested in the matter and a so-called fairness hearing is held. If the court determines that the person suing or defending any such action is not proceeding with due diligence, it may substitute in his place any other person having the same interest in the suit.

Any decree passed in a suit under Order 1 Rule 8 CCP shall be binding on all persons on whose behalf or for whose benefit the suit was instituted or defended.

As an ordinary civil suit takes an inordinate period of time to be disposed of in India, this provision is not

About the author

Sumeet Kachwaha has over 30 years' experience in the legal profession, working mainly on the corporate and commercial side. He is highly ranked in the litigation and arbitration sections of leading legal directories and has handled some leading and landmark commercial cases in the Indian courts. He has also been involved on non-contentious work in high-stakes projects, particularly in infrastructure, power, construction and telecoms.

Kachwaha's publications include 'Enforcement of Arbitration Awards in India' and 'The Arbitration Law of India – A Critical Analysis' in the Asian International Arbitration Journal (2005 and 2008). He has served as chair of the dispute resolution and arbitration committee of the Inter-Pacific Bar Association and speaks regularly at international forums.

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usually resorted to. However where there is no statutory remedy, substantial damages are sought or a PIL would not lie, this route may be adopted.

Cross-border fraud/crime

The government recently enacted the Prevention of Money Laundering Act 2002 (PML Act) as amended in 2009. This Act defines "criminal activity" in a Schedule which basically enumerates the full range of white collar crimes including forgery, cheating and counterfeiting. If a cross-border offence is involved, it must be an offence not only in the foreign jurisdiction but also as per Indian law.

The Act also provides for attachment, confiscation, compensation and repatriation from India of proceeds of any criminal activity. Broadly the procedure is as follows:

A Director or a Deputy Director appointed under the Act may provisionally seize or attach any proceeds of crime arising out of or relating to a criminal activity. Generally the Director will act on the basis of a Charge Sheet or a State Complaint filed in court. (A Charge Sheet is a police report filed after investigation). In emergency cases the Director can act without waiting for a formal complaint to be filed.

However in every case, the seizure or attachment is subject to ratification by an Adjudicating Authority and this process must be initiated within 30 days of the seizure and concluded within 150 days, failing which the order of attachment will lapse. The criminal proceedings under this Act are instituted in a Special Court as designated (with about 55 Special Courts designated under the PML Act). In the event the trial results in a conviction, an order of confiscation and repatriation is passed in relation to the property (or the value thereof).

Indian courts and authorities would render assistance as required under the PML Act including gathering of evidence. Such assistance would be rendered to the authorities/courts of contracting states as requested. It may be mentioned that India has a Mutual Legal Assistance Treaty with 27 countries, including Switzerland, the United Kingdom, Canada, the United Arab Emirates, Russia, France, South Korea, Singapore and the USA. Agreements or treaties have been signed with four other territories (Hong Kong, China, Bosnia & Herzogovina and Bangladesh) but these have not yet become effective. On December 15 2010, India became a member of the Eurasian Group on anti-money laundering and combating financing of terrorism.

It may be clarified that even if a Mutual Legal Assistance Treaty is not in place, the Indian courts and authorities would render assistance to any foreign country on the basis of reciprocity.

Problems associated with litigation

India has a sophisticated legal system (inherited from its British days). Its judges are fiercely independent and generally respected for their integrity. The chief obstacle in litigation in India is the phenomenon of court delays. Court proceedings can get bogged down for far too long. Writ petitions (where High Courts and Supreme Court can take direct cognisance against state authorities) usually get disposed of quickly (within a year or two), but this recourse is only available where the primary relief is against state authorities.

Regular civil suits for damages need to go through the full gamut of evidence and the niceties of the CCP. This can take years (if not decades) due to the pendency and backlog. At the same time courts are liberal in matters of interlocutory relief and sometimes interlocutory orders (decided in a preliminary hearing on considerations of *prima facie* case and balance of convenience) may well decide the fate of the matter. As ordinary civil disputes can take far too long, parties would be well advised to incorporate an arbitration clause in their agreements.

Arbitration

Historically, India has been at the forefront in signing and implementing international treaties and conventions on arbitrations. It was amongst the six Asian nations to have signed the Geneva Convention. (India became a signatory here on October 23 1937). India was the fourth country in the world to have ratified the New York Convention (on July 13 1960). By way of an aside, the USA ratified the New York Convention in September 1970, the UK did so in 1975 and Singapore and Canada as recently as 1986.

In 1996 India opened a new chapter in its laws of arbitration by enacting an Act faithfully based on the Model law of 1985 and the Uncitral Rules of 1976. The Indian Arbitration & Conciliation Act, 1996 is a composite piece of legislation which provides for domestic arbitration; international arbitration (taking place in India) and enforcement of foreign awards. It also provides for conciliation (the latter being based on the Uncitral Conciliation Rules 1980).

The Act has two main Parts. Part I deals with any arbitration taking place in India (whether it is between domestic parties or international parties). This Part contains extensive provisions based on the Model Law and the Uncitral Rules. Part II essentially provides for enforcement of foreign awards on the New York Convention grounds. (Part III provides for conciliation.)

Despite the best of legislative intent, the working, implementation, and interpretation of the Act have become controversial in its short existence. Over the years the courts have taken on a far more interventionist role than envisaged under the Act. The problem becomes aggravated because of the inevitable delays which accompany every court intervention.

ONGC v Saw Pipes (2003)

Here the Supreme Court held that a domestic award can be challenged on merits also if the court finds it to be contrary to the substantive law governing the parties or to be against the terms of the contract. This judgment applies only to domestic awards (as foreign awards continue to be governed by an earlier decision of the Supreme Court which narrowly construed the public policy ground under the New York Convention to exclude any challenge on merits).

SBP & Co. v Patel Engineering (2005)

In this case, the Supreme Court held that when it is called upon to assist in the constitution of the arbitral tribunal, it must necessarily decide upon some preliminary issues such as the validity of the arbitration agreement. The court may further (at its discretion) decide whether the claim is a live one or there has been accord or satisfaction or it is

About the author

Dharmendra Rautray's main areas of practice are arbitration, litigation, contracts, business transactions and international trade. He authored the Book on Arbitration published by Wolters Kluwer in 2008 and has been published in many international law journals. He is among the four members comprising the Core Committee of the Delhi High Court Arbitration Centre and speaks regularly on dispute resolution in international forums.

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time barred, and so on.

Any decision by the court on such matters would be conclusive and binding on the parties and on the tribunal. This decision thus impacts the competence-competence jurisdiction of the arbitral tribunal and entangles a simple process (of constitution of the arbitral tribunal) into a prolonged legal battle on matters which are primarily meant to be decided by the arbitrators (and not by the courts).

Venture Global v Satyam Computers (2008)

This was another controversial judgment of the Supreme Court which held that the court has power to set aside a foreign award even if it is not sought to be enforced in India. The court traced its powers to do so by borrowing the domestic law provisions (which provide for setting aside of an award) in relation to foreign arbitrations also.

The court held, however, that the domestic law provisions of the Act (Part I) could be contractually opted out of if the parties have expressly or impliedly excluded the application of these provisions from their arbitration. A subsequent decision of the Supreme Court has held that if the parties have selected a foreign law as the law of the arbitration, it would be an implied exclusion of the domestic law provisions of the Indian Act. The position is however not free from doubt.

On the positive side it can be stated that there is no anti-foreigner bias or anti-arbitration attitude within the judiciary. Almost all foreign awards brought for enforcement in India have been enforced (out of a total 21 foreign awards sought to be enforced, only two have been refused by Indian courts). Amongst domestic awards, 80% have been enforced, 5% varied and 15% set aside.

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Proposed amendments

With a view to tackle the backlog of delays, the government has tabled a Bill with two main features: seeking to establish commercial divisions in the High Courts, and introducing fast track procedures applicable to the commercial divisions. In short, the proposal is that commercial disputes having a value of Rs5 crores or more (about $1.1 million) shall be brought directly before the commercial division of the High Court (that is, the litigation does not have to start from the District Court).

Court recourse in relation to arbitration or arbitral awards shall be before the commercial division of the High Courts (subject to the same valuation). Fast track procedures have also been envisaged for such matters. A direct appeal to the Supreme Court is one important proposal here. The Bill is pending before the Select Committee of the Upper House.

Regarding arbitrations, a consultation paper was circulated by the Ministry of Law on April 82010 seeking views on some crucial amendments to the Arbitration & Conciliation Act 1996. The basic purport of the proposed amendments is to prevent courts from interfering with offshore arbitrations (either by way of granting interim relief, making appointments in the arbitral tribunal or entertaining petitions to set aside foreign awards).

The proposed amendments also seek to limit the scope of interference on merits in a domestic award (for foreign arbitrations in any case the courts would not go into the merits as per the narrow interpretation of the “public policy” ground laid down by the Supreme Court). The consultation paper also contains some other proposals for the expediting of arbitrations and disposal of any challenge to an award. Unfortunately, there does not seem to be much progress on the proposed amendments and it continues to remain at the bureaucratic level.