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Shaping Indian arbitration jurisprudence

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A careful balance needs to be maintained between progressing arbitration laws and deviating from its historic global roots.

The Indian Arbitration Act, 1996, is international in its outlook. It is founded on two United Nations documents: the UNCITRAL Rules of 1976 and the UNCITRAL Model Law of 1985. India adopted these blueprints for its international and also its domestic arbitrations.

Departures from the Model Law

Though based on the Model Law and the UNCITRAL Rules, the Indian act makes some departures. Essentially, the departures are meant to keep courts out of the arbitral process and insulate arbitrations from court delays. The act envisages recourse to a court in limited situations, including:

1. Appointment of an arbitrator, where the parties' envisaged method for the same fails (section 11);
2. Ruling on whether the mandate of an arbitrator stands terminated due to an inability to perform his functions or failure to proceed without undue delay (section 14(2)); and
3. Providing assistance in taking evidence (section 27).

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Two key areas where the court intervention is back-ended to the post-award stage.

Article 13 of the Model Law. This article provides for a challenge to an arbitrator on grounds of lack of independence or impartiality. In the absence of an agreement to the contrary, the challenge will lie before the arbitral tribunal. If the tribunal rejects the challenge, an aggrieved party can approach the court within 30 days. The Indian legislation has made a departure. It did not wish the arbitral proceedings to get entangled with court delays. Section 13 of the Indian Act thus provides that if the arbitral tribunal rejects the challenge, it shall nevertheless continue with the arbitration and render the award. The aggrieved party can then revive its challenge before the court (at the award set-aside stage).

Article 16 of the Model Law. This empowers the tribunal to rule on its own competence, including as to the existence or validity of the arbitration agreement. If the arbitral tribunal rejects the objection to its jurisdiction, the aggrieved party may approach the court within 30 days. Departing from this, the Indian

Act does not permit any interim recourse to the court. It provides that if the arbitral tribunal rejects a challenge to its jurisdiction, it shall continue with the arbitration and render the award. An aggrieved party may then revive its jurisdiction challenge at the award set aside stage. (If of course, the tribunal accepts that it does not have jurisdiction, the tribunal's order is straightway appealable to the court).

Such departures aside, the original intent was to closely shadow the Model Law and the UNCITRAL Rules. Subsequent legislative interventions have, however, introduced altogether new provisions. Two noteworthy ones being:

1. A new section 29A introduced in 2015 is intended to time manage arbitrations. It requires the award to be rendered within one year of completion of the pleadings, extendable by six months by mutual consent but thereafter only with permission of the court. A later 2019 amendment exempted international arbitrations from the purview of the section.

2. The Model Law simply required an arbitrator to make a declaration of his independence and impartiality and disclose any circumstance likely to give rise to justifiable doubts. The Indian law mirrored this. The 2015 amendment, however, expanded the law with a heavy hand. It imported (with variations) the IBA "Red" (Waivable and Non-Waivable), "Orange" and "Green" lists (IBA Guidelines on Conflicts of Interest in International Arbitration). The Indian approach was to compress the four IBA lists into two and incorporate them as the fifth and the seventh schedules to the act. The fifth schedule sets out matters which are deemed to give rise to justifiable doubts as to the arbitrator's independence or impartiality and therefore required to be disclosed, and if not objected to would constitute a no objection to the appointment. It is not a per se bar to the appointment. The seventh schedule enumerates matters which render an arbitrator "ineligible" to be appointed unless, subsequent to the dispute having arisen, the parties expressly waive the conflict.

The Indian approach has ended up creating some anomalies. For instance, several situations enumerated in the fifth schedule verbatim overlap with the seventh schedule (thereby creating an internal contradiction). The exact same language could not have been deployed in both schedules. This calls for a legislative review.

Reforms and proposed reforms

India has shown its keenness to keep its arbitration laws effective and efficient and remove glitches that may arise with the passage of time. The Arbitration Act has been amended thrice – in 2015, 2019 and 2021 – and a fourth amendment is now expected. The 2015 amendment brought about a constructive change, curtailing the scope of judicial review of an arbitral award. Firstly, it provided that the "public policy" grounds cannot be used to launch a merit-based challenge to an award. Public policy is now to be narrowly construed as essentially involving a contravention of "the fundamental policy of Indian law". Secondly, it narrowed the "patent illegality" ground by qualifying that it cannot involve a mere error of law or reappreciation of evidence. Thirdly, it excluded the applicability of the "patent illegality" ground to challenge an international award, thereby affording greater protection to arbitrations between Indian and foreign entities (and encouraging seating of international arbitrations in India).

Upcoming reforms

The government has declared its intent to enact a fresh round of amendments. Expected amendments include:

1. Section 9-A: The act currently does not recognise the concept of an "emergency arbitrator" (though it is now a part of all major arbitral institution rules). The proposed amendment would create a legislative framework for parties to apply for one (prior to the tribunal's constitution) for granting of interim relief.

2. The act currently provides greater protection for international arbitration awards vis-à-vis domestic awards by insulating them from the "patent illegality" challenge ground. The proposed amendment will do away with this distinction. This is not a step in the right direction. A merit-based challenge is not part of the Model Law. The "patent illegality" ground was introduced by the courts in 2003 as "judge–made" law and later its scope restricted by the 2015 amendment. The proposed amendment will reverse this and bring back the "patent illegality" ground for international arbitrations as well. This can only discourage foreign entities from seating their arbitrations in India.

3. A new proposal envisages setting up Appellate Arbitral Tribunals by arbitral institutions, which would entertain award challenge applications. These tribunals would substitute the courts of first instance and set up under their rules. The risk is obvious. A judicial role would be outsourced to a private forum with little transparency. This would inspire little confidence.

Changes needed

A worthwhile suggestion from eminent jurist, FS Nariman is to cut short the multi-layer challenges to an award. Currently, a challenge to an award lies before a single judge, with an appeal to the division bench and a further recourse to the Supreme Court – thereby, rendering it a four-step judicial process. Nariman rightly pointed out that this is far too much and the challenge can lie straight away before the division bench, with a discretionary appeal to the Supreme Court.

Moreover, there should be a provision for arbitrators to review their awards and correct obvious errors – akin to the power of any court to review its judgment. The current regime allows for correction of typographical or clerical errors only, thereby necessitating a lengthy and costly recourse to a court to challenge the entire award, when matters could have been efficiently resolved by the arbitral tribunal.

Concluding thoughts

India did well to closely follow the Model Law and UNCITRAL Rules. Subsequent legislative interventions, however (in several instances) have been perceived to be hasty and not well considered. Going forward, India needs to be more surefooted – especially where it seeks to depart from international jurisprudence.

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