India

Arbitration law in India – a review of recent developments

by Deepak Malhotra

The *Arbitration and Conciliation Act* 1996 has meant that arbitration law in India has finally come of age. The 1996 Act sets the scene for wider access to arbitration and enhanced investor confidence. This article considers the scope and effects of this Act and also addresses the issue of whether the Act is a fair product of much commercial pressure and academic debate.

THE HISTORICAL PICTURE

Recent developments in Indian arbitration law, culminating in the passing of *the Arbitration and Conciliation Act* 1996, represent significant changes in Indian legislation as a whole. With the influx of foreign investment since liberalisation of the economy began in 1991, and foreign investor scrutiny becoming increasingly keen, Indian arbitration law is seen as a pivotal aspect of the growing economy. Economic considerations aside, the recent legislative developments follow in the footsteps of a fascinating historical background to arbitration in India.

Prior to British rule, laws in India were in general not codified, with 'arbitration' being governed by social sanctions. The beginnings of arbitration in India can be traced back to the *Bengal Regulation XVI* 1793 which authorised Indian courts to recommend parties to submit their disputes to a means of formal resolution before an independent body, other than the courts. It was after the coming into existence of the Legislative Council of India in 1834 that the procedure to be followed by the Courts of Civil Judicature was codified by *Act VII* of 1859. Section 312 of this Act enabled parties to an action to apply to a court to have an order passed referring the matter in dispute to arbitration. Subsequent sections of the Act laid down the procedures for arbitration and the making and filing of awards.

ARBITRATION AND CONCILIATION ACT 1996

The 1996 Act has clearly made important strides in establishing a smoother and more cohesive arbitral process, in consolidating provisions relating to the enforcement of foreign awards and, importantly, in recognising the role of conciliation in the resolution of modern day disputes.

Case law developments arising out of the 1859 Act and the increasing recognition of the role of arbitration in a forward looking society led to the *Indian Arbitration Act* 1899. However the 1899 Act was not alone in its focus on arbitration. When the *Indian Code of Civil Procedure* was being framed in the early 1900s, the Select Committee charged with the power to develop the code considered it desirable:

'to eliminate from the code all the clauses as to arbitration and insert them in a new comprehensive arbitration act.'

Delay in getting this done meant that matters relating to arbitration continued concurrently in the *Arbitration Act* 1899 and in the *Civil Procedure Code* 1908.

Finally, in 1940, a comprehensive *Arbitration Act* was enacted repealing not only the 1899 Act but also the provisions relating to arbitration contained in s. 89 and 104, and in Schedule II, of the *Civil Procedure Code*. Alongside the 1940 Act, the *Arbitration (Protocol & Convention) Act* 1937 was enacted to allow for the enforcement of foreign awards under the Geneva Convention 1927, and the *Foreign Awards (Recognition & Enforcement) Act* 1961 was enacted for the enforcement of foreign awards under the *New York Convention* 1958.

This brings us up to-date. With ever-increasing commercial pressures resulting from the growth of the global business, academic discussion dictated that new and improved arbitration legislation was needed. After much promise, and amidst wide legal and industry support, the *Arbitration and Conciliation Act* 1996 was enacted; coming into force in August 1996.

CHANGES RESULTING FROM THE 1996 ACT

The 1996 Act has made significant strides towards ensuring that the advantages of arbitration over court proceedings have become better established. In particular the Act has been introduced against the backdrop of an increased need for the enforceability of overseas and domestic awards and the realisation by parties to a dispute that arbitration is comparatively cheaper, quicker and offers greater flexibility than court proceedings.

The 1996 Act repeals the *Arbitration Act* 1940 and consolidates the provisions of the Acts of 1937 and 1961 regarding the enforcement of foreign awards. New provisions have been introduced to make the domestic arbitral process smoother by omitting or amending the various sections of the 1940 Act which permitted intervention by courts at almost every stage of the arbitration process, a hindrance noted by the Supreme Court of India in a number of cases.

The importance of consolidating and amending the *Arbitration (Protocol & Convention) Act* 1937 and the *Foreign Awards (Recognition & Enforcement) Act* 1961, relating to international commercial arbitration under the Geneva and New York Conventions respectively, arose from the need to speed up the process of liberalisation of the Indian economy. With 'non-resident Indians' and 'foreign institutional investors' expressing a strong interest in the Indian market, the laws relating to international commercial arbitration had to be made more responsive to improve investor confidence and to harmonise the domestic system with the concepts of arbitration and conciliation of other legal systems around the world. Further, the United Nations Commission on International Trade Law ('UNCITRAL') framed in 1985 a Model Law on International Commercial Arbitration. In the interests of procedural uniformity, it had become essential to adopt the Model Law as recommended by UNCITRAL. To this end, the Government of India, unlike some developed countries, adopted the Model Law for both domestic and international arbitration, a point noted in the 1996 Act whereas the Indian *Arbitration Act* 1940 provided for domestic arbitration only.

See p. 22 for recent UK developments in arbitration

KEY FEATURES OF THE 1996 ACT

The Arbitration and Conciliation Act 1996 is divided into four parts:

- Part I – Arbitration;
- Part II – Enforcement of certain foreign awards;
- Part III – Conciliation; and
- Part IV – Supplementary provisions.

Provisions of the 1996 Act apply irrespective of whether the arbitration or conciliation is domestic or international. Part II of the Act comprises two chapters; chapter one relates to awards under the *New York Convention* 1958 and chapter two relates to awards under the *Geneva Convention* 1927. Section 52 of ch. 1 excludes application of ch. 2 but ch. 2 does not exclude the application of ch. 1. Part III of the Act recognises conciliation as an alternative means of resolving disputes in addition to arbitration in international trade matters.

The most important departure made by the Act from previous law relates to judicial intervention with the arbitral process. The 1996 Act now dictates that where an arbitration agreement exists, the relevant judicial authority to whom the dispute is presented is required to direct the parties to resort to arbitration, in accordance with the terms of the agreement, provided that the application for arbitration is made before or when a written statement on the merits of the case is submitted to the judicial authority by the party seeking arbitration.

The Act has also largely eliminated the basis on which the award made by an arbitrator may be challenged before a court. Such a challenge will now only be permitted on the basis of invalidity of the agreement in question, lack of proper jurisdiction, absence of proper notice to a party of the appointment of the arbitrator or of arbitral proceedings, or a party being unable to present its case. In addition, an arbitral award can now be set aside if it is in conflict with 'the public policy of India'. This is a sensible provision as it covers, inter alia, fraud and corruption. The obvious drawback is that 'public policy' issues are open to interpretation and it is hoped that courts and judicial authorities alike will adopt a consistent approach so as not to prejudice genuine arbitration cases. As a general rule, an award will not be set aside if it is a mere contravention of public policy. As recognised in previous case law, such as *National Thermal Power Cor Fin v Singer Co [1992] 8 CIA 116 (c)*, it must be repugnant to the fundamental policy of Indian law or to concepts of justice or morality.

The 1996 Act has further increased the powers of an arbitrator by the addition of various provisions, such as:

- the law to be applied by him;
- the power to determine the venue of arbitration failing agreement;
- the power to appoint experts;
- the power to apply to the court for assistance in taking evidence; and
- the power to award interest on arbitration judgements which have been awarded.

The Act has also addressed obstructive tactics sometimes adopted by parties in arbitration proceedings and now a party who knowingly keeps silent, only later to raise a procedural objection, will not be allowed to do so. These are welcome improvements, as such frustrating tactics adopted by unscrupulous parties not only hinder individual cases, but also severely prejudice the credibility of the entire judicial process.

More generally, the Act has added various other useful provisions. For example, the power to nominate arbitrators has been vested (in the absence of agreement between the parties) in the Chief Justice or to an institution or individual appointed by him and the previously tight time-limits for the making of awards has been removed. Further, unless the agreement provides otherwise, the arbitrators in a case are now required to provide the underlying reasons for their award. The award itself has also been vested with the status of a decree. This is important in that, subject to the power of the court to set aside the award, it is no longer necessary to apply to a court for the award to be converted into a decree; a process which has merely added an unnecessary additional loop to proceedings in the past.

The importance of transnational commercial arbitration has sensibly been recognised by the 1996 Act and it has been provided that, even where the arbitration is held in India, the parties to the agreement shall be free to designate the law applicable to the substance of the dispute. This provision is of particular importance in addressing the concerns of foreign investors regarding the governing law and the effect of non-Indian governing law on arbitration cases involving a foreign investor and an Indian party.

on the internet

http: //itl.irv.uit.no/trade law/papers.UNCITRAL.html

More information is available on the United Nations Commission on International Trade Law (UNCITRAL) at this address

As already mentioned the 1996 Act has recognised the importance of conciliation as an alternative method of resolving disputes. The provisions in the Act are the first statutory provisions in Indian legislation dealing with conciliation and, as set in Part III of the Act, are very much in line with the *Conciliation Rules* framed in 1980 by UNCITRAL. Unlike an arbitrator, a conciliator is not empowered to give a decision on the dispute presented to him. However the conciliator does work towards steering the parties to reaching a settlement by agreement between themselves. The Act provides that conciliation commences when one party writes inviting the other party to a conciliation process, which will only begin provided the other party, accepts, again in writing. While conciliation is pending or has commenced a party is barred from initiating arbitral or judicial proceedings except to the extent that 'such proceedings are necessary for preserving his rights', (s. 77 of the Act). The informal conciliation process essentially involves the parties submitting a statement of the dispute and their respective grievances to the conciliator. He or she then, 'in an independent and impartial manner' (s. 67(1) of the Act) reviews the statements provided, invites the parties for discussion (either jointly or separately) and proposes a settlement. It is for the parties to consider the settlement and, if they are happy with its terms, prepare a legally binding and enforceable agreement with or without the assistance of the conciliator.

ENFORCEMENT OF AWARDS UNDER THE CONVENTIONS

Under the 1996 Act, a foreign award can be enforced in India in accordance with the provisions of the *Geneva Convention* 1927 and the *New York Convention* 1958 if the said conventions apply to the arbitration and India is a party. The foreign award must have been made in a country which has ratified the conventions. As previously mentioned, India enacted legislation to implement the two conventions in the form of the *Arbitration (Protocol & Convention) Act* 1937 and the *Foreign Awards (Recognition and Enforcement) Act* 1961, which were enacted pursuant to the provisions of the Geneva Convention 1927 and the New York Convention 1958, respectively.

As previously mentioned the 1996 Act has consolidated the provisions regarding the enforcement of awards under the conventions. It is, however, worth noting India's two reservations when initially ratifying the conventions. First, the Government of India decided that it would only apply the conventions to the recognition and enforcement of an award if it were made in the territory of another convention state. To this end, the two implementing Acts of 1937 and 1961 provided that the government would notify the names of countries to which the conventions applied and which countries had made reciprocal provisions for the enforcement of Indian awards in those countries. Second, the government considered that the conventions should only be applied to differences arising out of a legal relationship which are considered commercial under Indian law. Courts have interpreted the term 'commercial dispute' under the two implementing Acts in certain decisions where the question was at issue.

The above reservations aside, the Government of India has supported the conventions and their practical impact on arbitration in India. Further, the new 1996 Act has strongly backed the conventions and the enforcement of awards under their provisions. Indeed, an important landmark judgment has confirmed the positive impact and thinking of the new legislation. The Mumbai High Court has held that a party losing a foreign arbitration award has no right to challenge it in any Indian court. The ruling was delivered by Justice S S Nijjar who dismissed two petitions filed by the Bombay Gas Company (BGC) to setting aside an award granted in the UK to Masceranhas in June 1997. Subsequently, Masceranhas filed a petition in the Mumbai High Court for enforcement of the award, something challenged by the BGC on the grounds that it was not governed by Indian law. This is the first decision of the High Court under the 1996 Act and clearly has great significance in establishing the rule that a foreign arbitration award cannot now be disputed in India.

KEY FEATURES OF THE 1996 ACT

The Arbitration and Conciliation Act 1996 is divided into four parts:

Part I – Arbitration;

Part II – Enforcement of certain foreign awards;

Part III – Conciliation; and

Part IV – Supplementary provisions.

The procedures for enforcement of foreign awards under the *Geneva Convention* 1937 and the *New York Convention* 1958 are substantially similar. Any person interested in enforcing a foreign award may apply in writing to any court having jurisdiction over the subject matter of the award. In addition to the filing of the award and the agreement on which it is based, as required by the convention, the 1996 Act requires that the evidence as to the award being a foreign award has also to be filed.

The competent courts in which the award is to be filed are the courts which will have jurisdiction over the subject matter of the award. The application will be numbered and registered in the court as a suit between the applicant as plaintiff and the other parties as defendants. The court will direct notice to be given to the parties requiring them to show cause why the award should not be filed. The court, on being satisfied that the foreign award is enforceable under the Act, will pronounce judgment according to the award. Upon the judgment so pronounced, a decree will follow, as in the case of domestic awards. No appeal will lie from such a decree except insofar as the decree is in excess of or not in accordance with the award. The various High Courts, including the Bombay and Calcutta High Courts, have made rules regarding the procedure and forms to be used for applications for enforcement of foreign awards.

Awards made in India under Indian procedural law will now also be enforceable under the provisions of the 1996 Act. Enforcement of a domestic award will be made by a court against the defaulting party. For this purpose, formal application is required and notice is given to all parties and, and as matter of practice, objections heard. The court will then draw up an enforcement decree unless the losing party voluntarily makes payment. Where an agreement has the closest connection with India and the Indian laws and no connection with any foreign law, it will be governed by the laws in force in India. An agreement governed by the laws of India will not be a foreign award (*Gas Authority of India Ltd v Spiecapagsa (1994) Suppl. CLA 81 (Delhi)*).

CONCLUSIONS

The 1996 Act has gone a long way towards refining arbitration and developing conciliation laws in India. The Act is comprehensive and seeks to address the practical difficulties and concerns of lawyers advising their clients on Indian arbitration matters and of the wider investor community as a whole. Much research, debate and hard work has gone into the new legislation. The Indian Council of Arbitration, together with Indian commercial and quasi-government bodies, as well as the international legal communities, should be thanked for their perseverance in ensuring that the passage of the Act has been well debated and documented.

The 1996 Act has clearly made important strides in establishing a smoother and more cohesive arbitral process, in consolidating provisions relating to the enforcement of foreign awards and, importantly, in recognising the role of conciliation in the resolution of modern day disputes. As with any new legislation the major test, both in terms of legal interpretation and practical consequences, will be the cases and disputes which arise and, in particular, those which provoke legislative interpretation and judicial comment. Nevertheless, as pointed out in this article, landmark cases have already set a positive precedent for future arbitration case law in India and it is hoped that this will continue. If it does, confidence in not only the Indian arbitration and judicial system but also the Indian economic environment will grow.

Deepak Malhotra
Solicitor