Adr in an era of globalisation: an indian perspective

History

In a country with a population in excess of a billion, and plagued by an underfunded court structure full of corrupt and ineffecient officers, we are looking at decades of stagnation, a backlog of cases in excess of 29 million, across the state-level courts, the twenty-one high courts and the supreme court. According to Global Corruption Report 2007: Corruption in Judicial Systems, Indians shelled out an estimated $600 billion as bribes to the judiciary, which is higher than the bribes paid out in any other sector in the court.

This long gestation period of litigation has resulted in a large scale loss of confidence in the judiciary, with a growing number of people opting to stay away from court. Enter alternate dispute resolution. It is this plethora of people who are prime targets of an alternate dispute mechanism. The prime time solution to the snail's pace discharge of cases. The main selling point of arbitration is the speedy and cheap resolution of disputes outside of a courtroom.

While arbitration is a product of a private agreement, once an arbitration award is rendered, the prevailing party can seek to have that award confirmed by the courts, and, having done so, can invoke the coercive power of the state to enforce it in the same manner as it could a court judgment. Initially received with skepticism by the courts in various countries, arbitration is now being embraced as an effective form of alternate dispute resolution.

As a result of the burgeoning international trade and an explosion in the foreign direct investment numbers in the country, arbitration and other

forms of alternate dispute resolution are becoming more and more indispensable. One of the major problems with foreign litigation is that foreign judgments are subject to several layers of appellate review, whereas, foreign awards are much easier to enforce in different sovereign states. Arbitration is particularly successful in fields like construction, where a certain amount of expertise is required while resolving disputes, of which there is paucity in the courts.

Arbitrators are chosen from the same industry, and are generally required to resolve disputes based on fact rather than legal issues. Most companies prefer such a business approach to resolution of disputes, rather than a legal approach. Arbitration in India was first governed by the Arbitration and Conciliation Act, 1940, which was later replace by the 1996 Act. The 1996 Act was designed primarily to implement the UNCITRAL Model Law on International Commercial Arbitration and create a pro-arbitration legal regime in India.

This Act was largely aimed at subduing the loopholes which allowed for excessive judicial intervention in the 1940 Act. Some of the features of judicial review The words in Section 30 of the 1940 Act read “ shall not be set aside” took away the jurisdiction of the courts to set aside an award except on one or more of the grounds specified in the section. Amended in 1996, however, the section re-numbered section 34 reads “ An award may be set aside only if...” Hence, the court has no jurisdiction to set aside an award on any other grounds.

This amendment was brought with an intention to reduce the scope of judicial review to allow for a minimum level of court intervention. In R. S. Avtar Singh & Co. v. N. P. C. C. Ltd. , the court commented on the nature and extent of the court’s jurisdiction: It is a well settled principle of law that the award of the arbitrator who is a chosen judge of facts and of law between the parties cannot be set aside unless an error is apparent on the face of the award or it can be inferred from the award that the arbitrator has misconducted himself or the proceedings or that he has not applied his mind to the material facts.

Hence, the court is not sitting in appeal on the award, nor can it re-examine the material which was adduced before the arbitrator. The court cannot examine the correctness of the award on merits nor it is obligatory for the arbitrator to give detailed reasons. Unless the court comes to the conclusion that the award is preposterous, it cannot set aside nor substitute its own decision in place of the arbitrator. In short, the arbitrator is the final judge of facts and law, and the arbitral award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or failed to appreciate the facts.

Section 31 (3) of the new Act of 1996 states that an arbitral award shall state the reasons upon which it is based, unless the parties have agreed otherwise, or the award is agreed on the terms enumerated under Section 30. This was reiterated by the court in the case of Tamil Nadu Electricity Board v. Bridge Tunnel Construction Co.. The rationale behind this order of the court is to ensure that the arbitrator acts capriciously, and to give the

parties assurance that the grounds for the course of action chosen by him and reasonable and just.

At the same time, however, to ensure the finality of the award, reasonable of reasons given by an arbitrator cannot be challenged on merits. Why judicial review? The main purpose of arbitrator’s is to try to decide disputes correctly on the basis of the applicable law, and subsequently, explain the rationale for their decision. The need for a provision for judicial review in the field of arbitration is born out of the state’s concern to maintain the integrity of the arbitral process, and maintain a balance between party autonomy and the laws of the land.

Judicial review is primarily intended to guard against arbitrariness of awards, and to ensure that the law of the land is followed within the state’s jurisdiction. No doubt judicial intervention is a requisite in the field of arbitration which lacks a certain decisional law in the matter. However, the issue to be addressed is to what extent, and an attempt is to be made to define the scope of this judicial intervention. To what extent can court’s come forward and substitute their judgment for the arbitral award?

Parties who are dissatisfied with arbitration awards often call upon the courts for review. Procedurally, review is sought in an action to modify the award or set it aside; by way of defense, in a proceeding brought to enforce the arbitrator's decision; or, by way of replication, in an action where the dissatisfied party has sued on his original claim and the satisfied party has pleaded the award. One of the major problems with the 1996 Act, is that a person aggrieved by an arbitral award has to start right from the District

court in order to hallenge an award. Additionally, in two recent Supreme Court decisions, Oil & Natural Gas Corporation v. SAW Pipes and SBP v. Patel Engineering, the scope of judicial review has been widened by interpreting anything contrary to " public policy" as being " patently illegal", and since any award which contravenes Indian statutory provisions is patently illegal, it is also contrary to public policy, and hence, subject to the judicial review of courts. Generally speaking, arbitral awards are not subject to appeal.

However, in most countries, including India, there are provisions to set aside an award in extreme cases. Judicial review of foreign arbitral awards generally falls into two categories. First, the reviewing court inquires whether requirements of natural justice were observed in the arbitration proceeding and whether the arbitration agreement is valid under the applicable law. Failing so, the arbitral award will be denied recognition or enforcement on the grounds that the fundamental requirements of natural justice or legality have not been met.

Subsequently, the court inquires into the merits of the award, that is, whether the arbitral body has committed an error in rendering the award. The question of judicial review, however, is a two-headed coin. On the one hand, limiting the scope of judicial review reaffirms the roots of arbitration, that is efficient and speedy resolution of disputes. Conversely, however, widening the scope of judicial review defeats the very concept of finality of an arbitral award, and hence, moving back to square one of the legal court system.

Why not? The way in which the proceedings under the Act are conducted and without an exception challenged in courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. An informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with “ Legalese” of unforeseen omplexity. To the critics of judicial review of arbitral proceedings, the likelihood and to an extent, inevitability of judicial review serves as a serious deterrent to individuals and companies seeking arbitration as a solution to commercial disputes. A certain school of thought views arbitration as a mere dress rehearsal for subsequent litigation, and disregards judicial review as a mere interference to the finality of the arbitral award. India is a country growing in leaps and bounds, with the coming ofglobalization.

Being a country looking to attract more foreign investment, developing a fool-proof, cost-efficient and speedy legal system is vital. When a foreign company explores the prospects of investing in India, they factor in the possible legal costs, and the opportunity to settle disputes through arbitration quickly and cheaply is an attractive selling point. However, with increasing judicial intervention, and the inevitability of ending up in court, hassle-free dispute resolution is no longer a pro on their list of pro’s and con’s.

Hence, the 1996 Act was passed with the objective to minimize the supervisory role of the courts in the arbitral process. The very epitome of minimal judicial intervention is contained in Section 5 of the Arbitration and Conciliation Act, 1996, which reads: “ Notwithstanding anything contained in any other law for the time being in force, no judicial authority is to intervene except as provided in the Act” Section 34 of the Act imposes certain restrictions on the right of the court to set aside an arbitral award, and the limited grounds on which the award can be challenged have been enumerated.

The five grounds upon which an award can be set aside as per Section 34 (2) (a) are: -Incapacity of parties -Non-existence or invalidity of arbitration agreement -Exceeding jurisdiction -Non-compliance of due process -Composition of arbitral tribunal As per Section 34 (2) (b), an arbitral award may also be set aside by the court on it’s own initiative if the subject matter of the dispute is not arbitrable or the impugned award is in conflict with the public policy of India. Public policy, however, has not been defined anywhere in the Act.

Borrowing the definition of public policy from Section 23 of the Indian Contract Act, 1872: “ The consideration or object of an agreement is lawful, unless – it is forbidden by law; or is of such nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy. ” The court, over the years, has subscribed to

varying conceptions of public policy, swinging between the narrow view and the broader view. In Gherulal Parakh v.

Mahadeodas Maiya, the court favoured the narrower view, and commented that: “...though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days. ” Withrespectto public policy in the field of arbitration, the court held in Renusagar Power Co. Ltd. v. General Electric Co. , that in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India.

It was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to: -Fundamental policy of Indian law -The interest of India -Justice or morality The court in recent times, however, has subscribed to the broader view of public policy, choosing to widen the scope of judicial review. A landmark judgment in this respect is Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.. The crux of the case was that the arbitral tribunal had failed to take into account Section 73 and 74 of the Indian Contract Act, 1872.

The major issue, however, that it dealt with was whether the Court would have jurisdiction under Section 34 of the 1996 Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act, or any substantive law governing the parties, or is against the terms of the contract. The judgment of the court in this case, not

only negated the purpose of the 1996 Act, but also widened the scope of judicial review beyond the realms provided for in the 1940 Act as well.

It was held that an award is opposed to “ public policy” under the same heads laid down in Renusagar Power, but also if it is: -Patently illegal -So unfair and unreasonable that it shocks the conscience of the court Another important judgment of the Supreme Court in 2005 was SBP & Co. v. Patel Engineering, which sanctioned further intervention in the judicial process. The case dealt with the appointment of an arbitrator by the Chief Justice, and the contention was that the Chief Justice could adjudicate on contentious preliminary issues such as the existence of a valid arbitration agreement.

The court agreed, while holding that the Chief Justice’s findings would be final and binding on the arbitration tribunal. This judgment makes a mockery of the principle of Kompetenz Kompetenz, which is the power of an arbitral tribunal to determine its own jurisdiction, enshrined in Section 16 of the 1996 Act. This opens up a Pandora’s box of opportunity for parties to sabotage the appointment process of arbitrators and make spurious arguments simply to delay the arbitration proceedings. Looking Ahead

It is easy to forget the purpose of arbitration and get carried away with the nuances of the law. Therefore, in an attempt to move forward, it is important to incorporate the very aspect of finality and amicable resolution in the contract itself. Of course the most apparent solution at the face of it is to close all doors to review of the award by incorporating a clause for the same in the contract. However, this can only be done at the risk of receiving an award not in line with the principles of natural justice.

On the legislature’s part, the Arbitration and Conciliation (Amendment) Bill, 2003, currently pending before the Parliament, proposes to introduce a new section 34A, which would allow an award to be set aside “ where there is an error apparent on the face of the arbitration award giving rise to a substantial question of law”. This narrows the scope for review laid down by the SAW Pipes ruling, but it still affords losing parties an opportunity to approach courts in an attempt to second – guess arbitral tribunals, very similar to the position during the applicability of the 1940 Act.

An interesting avenue to be explored in the future, particularly in the case of contracts involving large sums ofmoney, is a system of contemporary and concurrent dispute resolution, involving the establishment of Dispute Review Boards (DRBs). This system has been adopted by the National Highway Authority of India (NHAI), Maharashtra Sewerage Board and Delhi Metro in recent times. A Dispute Review Board basically consists of three experienced, respected and impartial reviewers.

It is constituted before the commencement of the contract, and regular inspections are carried out to ensure smooth functioning of the contract and ensure good working conditions. This serves to familiarize the reviewers with the job process and the basicenvironmentas well, so that in case a dispute arises, a well-informed decision can be made. In such a case, a hearing is convened where the reviewer’s hear arguments of both sides and after deliberation submit a non-binding recommendation to the contractors.