DISPUTE RESOLUTION – INDIAN EXPERIENCE

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The practice of resolving disputes through arbitrations is not a new development in India. It has existed since times immemorial. Earlier it was in the form of *Panchayats* presided over by a *Sarpanch*. The term '*Panchayat*' does not necessarily imply that it should be adjudication by five wise men. There have been instances where *Panchayats* have been composed of 1 to 11 judges. The *Panches* were ordinarily elected according to their wealth, social standing and influence in the community. They could decide matters which were referred and also matters which were not referred. The binding authority behind their decisions was the fear of excommunication from the community and also from the religious services, as *Panchayats* were incomplete without religious preachers. In fact, so prevalent was the system of arbitration in India that Marten, CJ. in a Full Bench decision of the Bombay High Court in *Chanbasappa Gurushantappa v. Baslinagayya Gokurnaya Hiremath*, AIR 1927 Bom 565 (FB), stated that:

> "It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a *Panch* is one of the natural ways of deciding many a dispute in

India."

Codification of the law of arbitration started in India under the British rule. However, while the United Kingdom continued to modulate and reform its Arbitration Acts in 1934, 1950, 1975 and 1989 to keep pace with developments in the field of arbitration, the Indian law as contained in the Indian Arbitration Act, 1940 remained static till the coming into force of the Arbitration and Conciliation Act, 1996 Act.

Experience under the 1940 Act: There were inherent flaws in the 1940 Act, inasmuch as a recalcitrant party could drag on with the litigation right from the time of invocation of arbitration to the stage of award being made rule of the court. During arbitration proceedings, a party could delay the proceedings either in the form of applications under Sections 5 and 11 of the Act seeking removal of an arbitrator on grounds of bias or it could move the court under Section 33 for adjudication on the jurisdiction of the arbitral tribunal. After declaration of the award, the numerous grounds for challenge enumerated under Section 30, provided a rich and fertile ground for prolonging the proceedings. The seriousness of the situation was succinctly summarized by the Supreme Court in *Guru Nanak Foundation v. Rattan Singh & Sons*, (1981)4 SCC 634 wherein it is stated:

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less

> formal more effective and speedy for resolution of disputes avoiding procedural clap trap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted and without an excepting challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with 'legalese' of unforeseeable complexity."

Again, in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import,* (1981)1 SCC 80, the Supreme Court held:

> "Protracted, time consuming, exasperating and atrociously expensive court trials impelled an alternative mode of resolution of disputes between the parties: arbitrate – don't litigate. Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a Judge of the choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words of EDMUND DAVIES, J. in Price Vs Milner, these may be disastrous proceedings."

Enactment of the 1996 Act: With the enactment of the Arbitration and Conciliation Act, 1996, which is, by and large, based on the UNCITRAL Model Law as approved by the United Nations General Assembly, it was hoped that the lacunas in the 1940 Act had been addressed. In fact, whereas the UNCITRAL Model allowed litigants to approach the court at the interim stage of arbitral proceedings, i.e. to challenge the arbitrator on the ground of bias (Article 12 and 13) and on the issue of jurisdiction (Article 16), Indian Parliament made a distinct

departure from the said position and expressly provided that none of the parties, had the right to approach the court against the decisions of the arbitral tribunal either on the ground of bias or jurisdiction till the publication of the award.

Compared to the grounds on which award under the 1940 Act could be challenged, the grounds available under the 1996 Act were very few. The Supreme in *Olympus Superstructures (Pvt.) Ltd. Vs Meena Vijay Khaitan,* (1999)5 SCC 651, held that section 34 of the Act is based on Article 34 of the UNCITRAL Model Law and it would be noticed that under the 1996 Act the scope of provisions for setting aside the award is far less the same under section 30 or section 33 of the 1940 Act.

Judicial trends: Unfortunately, while the intention behind the framing of the 1996 Act was commendable, some serious issues have developed in its implementation. A series of judicial decisions have had the effect of whittling down the laudable objectives behind the framing of the Act.

In *Oil & Natural Gas Corp. Ltd.* v. *SAW Pipes*, 2003(5) SCC 705, the Supreme Court vastly enlarged the scope of challenge to awards - much more than what was available under Act of 1940. After this judgment, courts have now started scanning through awards as if they are sitting in appeal over the verdict of the arbitrator. In fact, under the garb of the award being against the Public Policy of India, all and sundry objections are raised and sought to be covered under the

category of “Public Policy”. However, a ray of hope has emanated from the Supreme Court in its recent pronouncement in *McDermott International Inc.* v. *Burn Standard Co. Ltd.*, (2006)11 SCC 181. In para 65 (on page 520), it has been observed as under:

> “We are not unmindful that the decision of this Court in ONGC had invited considerable adverse comments but the correctness or otherwise of the said decision is not in question before us. **It is only for a larger Bench to consider the correctness or otherwise of the said decision**. The said decision is binding on us. The said decision has been followed in a large number of cases”. (Emphasis supplied)

The aforesaid extract clearly reflects the deep concern of the legal fraternity and also, obliquely, that of the Supreme Court. The matter has still not been decided by the larger Bench. However, it is sincerely hoped that a larger Bench would consider the matter from all perspectives and the anomaly created by the judgment in *Saw Pipe's case* would be removed and the position of law *qua* challenge to awards would be restored to the pre-*Saw Pipe* days.

Another major judicial development that has taken place is in respect to the law relating to appointment of arbitral tribunal under Section 11 of the Act. The legal position as enunciated by a 7-Judge Bench of the Supreme Court in *SBP and Co.* v. *Patel Engg, Ltd.*, (2005)8 SCC 618, is that the order under Section 11 of the Act is not administrative but judicial in character. Thus, for all intents and purposes, proceedings under Section 11, which were earlier more or less summary in nature, are now being dealt with in the manner of any other case.

Chief Justices of various High Courts, burdened as they already are with various judicial and administrative duties, are now taking longer time to dispose of the Section 11 applications. Since the appointment is judicial in nature and once the arbitrator is appointed there can be no challenge under Section 16 of the Act, the matter has to be dealt with in detail at the High Court level itself, which obviously entails a lot of time.

If the cumulative effect of *Patel Engg.* case and *Saw Pipes* case is seen, then the only logical conclusion would be that delay in arbitral proceedings is bound to occur right from the inception stage and it would take years for the beneficiary of the award to reap the fruits of decree. May be, with the passage of time and the delays in Court proceedings, the Supreme Court would be constrained to reconsider its recent verdict. Till then let the legal fraternity deliberate upon the verdict and draw its own considered conclusions.

Another important development that has taken place is that now the Courts have started entertaining applications under Section 14 of the Act challenging the arbitral tribunal on the ground that it is *de jure* or *de facto* unable to perform its functions. The grounds for challenge under the said section are diverse, i.e. from challenging the bias of the arbitral tribunal to challenging any interim order passed by it with which a party does not agree. Strangely, courts have allowed parties to take recourse to Section 14 even without their having taken recourse to Sections 12 and 13 of the Act [*State of Arunachal Pradesh v. Subhash Projects &*

Marketing Ltd., 2007(1) Arb LR (Gau, DB) and *Alcove Industries Ltd.* v. *Oriental Structural Engineers Ltd.,* 2008(1) Arb LR 393 (Del)]. Thus, effectively, Sections 12 and 13 are being rendered redundant. The avowed objective, as enshrined in para 4(v) of the Statement Objects and Reasons, i.e. "to minimize the supervisory role of courts in the arbitral proceedings", has also been defeated to a large extent. Recently though in *Progressive Carrier Academy Pvt. Ltd. v. Fit Jee Ltd*., OMP No. 297 of 2006 and *Oriental Structural Engineers v. Alcove Industries Ltd*., FAO (OS) 128 of 2008 the Delhi High Court has corrected this anomaly and has observed that a petition under Section 14 of the Act seeking termination of mandate of an arbitral tribunal on the ground of bias is not maintainable.

Need for amending the Law: Considering the above worrying trends, the Ministry of Law, Union of India, recently proposed certain amendments to the Act of 1996. Through a Consultation Paper, they invited comments from the General Public on the amendments proposed in relation to Sections 2(2), 11, 12, 28, 31(7)(b), 34 and 36 of the Act. The major changes proposed by the said amendment are as follows:

- Insertion of an implied arbitration clause in every commercial contract with a consideration of specified value (Rs. 5 crore or more);

- Promotion of Institutional arbitrations, inasmuch as it is proposed that the High Courts/Supreme Court has to refer the matters to arbitration institutions rather than appointing arbitrators themselves;
- Existing arbitration clauses too would be deemed to be amended so as to provide for Institutional arbitrations.
- Increasing the scope of declaration to be made by an arbitrator under Section 12 to ensure greater transparency in arbitration proceedings;
- Reduction of rate of interest from 18% to the “current rate of interest”;
- Amending Sections 28 and 34 of the Act by providing for setting aside of awards if (a) the arbitrators do not take into account contractual provisions or trade usage or (b) if the award contains “patent and serious” illegalities or (c) it contains an erroneous decision on an application under Section 13(2) or Sections 16(2) or 16(3);
- Nullifying the effect of the judgment of the Supreme Court in *Saw Pipes* case by limiting the explanation of “public policy of India”;
- Amendment to Section 36 of the Act providing that an arbitration award shall not be automatically stayed merely on filing of an application for setting aside the award. The court can put the objecting party to terms before granting stay; and
- Establishment of Commercial Divisions in the High Courts (vide a separate Act) where the awards, appeals etc. would be filed. Thus jurisdiction of

lower judiciary is sought to be specifically excluded in respect to arbitration matters.

- Amendment of Section 2(2) limits applicability of Part-I of the Act only where the place of arbitration is in India.

While the above Consultation Paper of the Government has drawn various comments and requires detailed analysis, it is proposed that in addition, the following changes ought to be made to the Act:

(a) A reasonable time limit should be fixed for making an award. In the earlier amendment bill of 2003, a time limit of 1 year (with a possible extension of another 6 months by the parties) had been provided. For further extension beyond the said period, provision had been made for approaching the Court. It is imperative that a similar provision should be made in any new legislation otherwise the very purpose of arbitrations, i.e. cheap and expeditious remedy would be lost.

(b) A cap should be fixed on the number of cases that an arbitrator can take up at any given time. In any case, it should not exceed 8 cases at a time.

(c) To ensure that the arbitrators finish the matter within a fixed time limit, it should be provided that fees would be payable only upon conclusion of the case. This, incidentally, would also save the parties incurring unnecessary expenditure upon an arbitrator who resigns/ otherwise vacates his office, without making the award.

(d) Periodical reports should be ensured from the arbitrators, either to the High Court or the Institution which appoints them, detailing the progress of cases entrusted to them.