Ringfencing Arbitration from Judicial Interference: Proposed Changes to the Arbitration and Conciliation Act

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by Promod Nair*

Cite as: (2010) PL October S-2 Introduction India is waking up to the realisation that its dispute resolution system needs to keep pace with its rapid economic growth. Whilst its economy grows at an impressive rate, the Indian justice delivery system has struggled to keep pace. Although the Indian judiciary has won plaudits for being professional and independent, the staggering backlog of cases remains a stubborn blot on its record.1 Delays are endemic in the system with timelines of ten years or more in obtaining a final judgment not uncommon.

It is, therefore, but inevitable that there is a huge market demand for a speedy and effective method of dispute resolution as an alternative to litigating before the courts. In recent times, arbitration has presented itself as an efficient, private sector alternative to the public justice delivery system. The Arbitration and Conciliation Act, 1996 (the 1996 Act) was designed to cater to the market demand for speedy justice and was intended to create a pro-arbitration legal regime in India. It was modelled on the lines of the widely-adopted UNCITRAL Model Law on International Commercial Arbitration and was designed on 4 core principles which were to: (i) minimise the supervisory role of the courts, (ii) narrow the basis on which awards could be challenged, (iii) ensure the finality of arbitral awards, and (iv) expedite the arbitration process.

However, although it is little more than a decade since the 1996 Act was written into the statute books, a number of â€œarbitration-unfriendlyâ€• judicial decisions have virtually rewritten it to such an extent that the plain text of the Act no longer means what it states. Inconsistent jurisprudence has resulted in uncertainty and confusion about the state of the law and has gravely undermined each of the four core principles on which the 1996 Act is based. It has also given rise to concerns about Indiaâ€™s commitment to arbitration and severely dented its claim to be an attractive seat for international arbitration.

In order to repair the damage done, and resurrect arbitration as an efficient method of dispute resolution, the Central Government has embarked on a programme to introduce significant changes to the arbitration landscape in the country. The law reform process has gained considerable traction with the release of a Union Law Ministry consultation paper (the Consultation Paper) which proposes significant amendments to the 1996 Act.

The Consultation Paper is candid in admitting that the Indian courts have â€œinterpreted the provisions of the Act in such a way which defeats the main object of [the] legislationâ€•.2 Therefore, the primary objectives of the proposed amendments are to rectify the problems created by unnecessary and excessive judicial intervention and ringfence the arbitral process from unhelpful judicial interference. The Consultation Paper proposes significant amendments to the Act with the professed objectives of ushering in a â€œnew eraâ€• of dispute settlement in India and establishing the country as an attractive seat for international arbitrations.

This article discusses the background to, and the likely effect of, the key amendments proposed in the Consultation Paper. It also considers other measures that are necessary for India to become an attractive jurisdiction for arbitration.

Restricting the application of Part I of the Act to â€œdomesticâ€• arbitrations The 1996 Act provides two distinct regimes for dispute resolution depending on the seat of the arbitration. Part I provides a framework of rules for disputesâ€”both domestic and those with an international elementâ€”where the seat of arbitration is in India. It confers significant powers on the Indian courts, which are empowered to order interim measures, appoint and replace arbitrators and hear challenges to arbitral awards. Part II, which significantly restricts the scope of judicial intervention, contains provisions for the recognition and enforcement of arbitral awards rendered in a foreign seat.

Given this scheme of the 1996 Act, it was generally understood that by choosing a foreign seat, parties could preclude intervention of the Indian courts and obtain an award that could be enforced under the New York Convention. However, this understanding (and the underlying scheme of the 1996 Act) was upset by the decision of the Indian Supreme Court in Bhatia International v. Bulk Trading S.A.3 This judgment now represents authority for the proposition that Indian courts are entitled to exercise their powers under Part I of the 1996 Act even in respect of arbitrations having a foreign seat.

Extensions of the Bhatia ruling4 have had other far-reaching, and much-criticised, consequences.5 It considerably extended the scope for the Indian courts to interfere in offshore arbitrations viz. arbitrations with a seat outside India. Under this line of authority, the Indian courts have reopened and set aside arbitral awards rendered in offshore arbitrations and suggested that they have the power to appoint arbitrators even in arbitrations seated outside India. For instance, and as foreshadowed in an article in Arbitration International,6 in Venture Global Engg. v. Satyam Computer Services Ltd.7 the Indian Supreme Court interpreted the Bhatia decision8 as giving it the right to set aside an LCIA award despite the fact that the arbitral award was rendered in London. In yet another controversial extension of the

Bhatia ruling9, in Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd., 10 the Supreme Court ruled that it was empowered to appoint arbitrators in the event of a deadlock between the parties even in cases where the seat of the arbitration was outside India.

In addition to the fact that such decisions had little textual support from the 1996 Act, attempts to exercise such self-conferred, â€œlong-arm jurisdictionâ€• also meant that the Indian judiciary was seen as keen to encroach upon powers reserved for the courts of the seat.

In order to mitigate the risk of excessive judicial intervention, it has now become standard market practice in India-related international commercial transactions to exclude the application of Part I in arbitrations seated outside India.

Against this background, the most fundamental (and very welcome) change proposed by the Consultation Paper is to nullify the Bhatia line of decisions11. Towards this end, it proposes the introduction of language that would clarify that Part I of the Act would apply â€œonlyâ€• where the place of arbitration is in India. Two exceptionsâ€”in respect of Sections 9 and 27â€”are then proposed to be carved out from this general rule. Section 9 empowers the Indian courts to grant interim measures in support of an arbitration. This could be useful, for instance, in cases where the parties might want to seek urgent relief against an Indian counter-party or restrain the sale of assets located in India. Section 27 enables an Arbitral Tribunal or a party to seek assistance from the Indian courts in obtaining evidence. This could be useful, for example, where parties may want to gain access to a document located in India or examine a witness in Indian territory, especially in circumstances where the counter-party is reluctant to cooperate.

Role of the courts in appointing arbitrators The 1996 Act envisages that where there is a delay or deadlock in the appointment of arbitrators, a Chief Justice of a High Court (in case of domestic arbitrations) or the Chief Justice of the Supreme Court (in the case of international commercial arbitrations) would be entitled to make the necessary appointments. The underlying rationale of conferring this power on the CJI and the Chief Justices of the State High Courts was explained by the Supreme Court in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.:12

19. â€¦ the function has been left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated.

This provision has proved to be a much-litigated provision of the Act, and has led to long delays in the commencement of arbitration proceedings in India. Even at this stage, the courts have displayed a needless willingness to delve into substantive, contentious issues. This is despite Section 16 of the Act specifically recognising that these issues, at least in the first instance, properly fall within the remit of the Arbitral Tribunal.13 The debate has been couched in terms of whether the function of the appointing authority is an administrative or a judicial one. This was based on the premise that if the power was judicial in nature, the appointing authority's powers would be broader in scope. It could consider issues such as the arbitrability of the dispute, the existence or validity of the arbitration agreement and such other contentious matters before deciding whether or not to appoint an arbitrator.

It was thought that the matter had been put to rest by a five-Judge Constitution Bench of the Supreme Court in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.14 In that case, a five-Judge Bench of the Supreme Court held that the appointment of an arbitrator was in the nature of an administrative act and not a judicial one. The Court held that the appointing authority was not required to go into the issue of arbitrability of the dispute especially since one of the primary objects of the law was to have the tribunal constituted as expeditiously as possible. Therefore, in a given case if there existed a controversy as to the existence or validity of the arbitration agreement, it should properly be decided by the Arbitral Tribunal, and the appointing authority would not attempt to decide the issue. The welcome effect of this judgment was that it respected the principle of competence-competence, minimised judicial intervention and ensured that the arbitral process did not get sidetracked or unnecessarily delayed in the process of seeking assistance from judges in constituting a tribunal.15

However, the welcome position established by the judgment proved to be short-lived. The Rani Construction16 decision was, rather needlessly,17 revisited and overruled by a seven-Judge Bench in SBP and Co. v. Patel Engg. Ltd.18 In that decision, the Supreme Court ruled that the power of appointment was a judicial function and consequently, if a party raised an objection as to the existence and validity of the arbitration agreement, the appointing authority would be required to make a substantive finding on these issues. In a body blow to the principle of competence-competence, the Supreme Court also held that any such findings of the appointing authority regarding the existence or the validity of the arbitration agreement would be binding on the Arbitral Tribunal. Furthermore, the order of the appointing authority could be appealed to the Supreme Court and all this meant that it could take between two to three years merely for an Arbitral Tribunal to be constituted. Despite the plain wording of the 1996 Act, the court also held that the power of appointing arbitrators could not be delegated to an arbitral institution.

It is therefore no surprise that this judgment has come to be seen as a significant obstacle to an efficient arbitration process. The Consultation Paper acknowledges that the Supreme Court judgment rendered the 1996 Actâ€™s scheme for the appointment of arbitrators â€œtotally ineffectiveâ€• and underlines the need to nullify the effects of the decision.

However, the logic of the solution it proposes is less than clear. The Consultation Paper proposes that the power to make arbitrator appointments be vested in the High Court and the Supreme Court (instead of in their Chief Justices) which only seems to reaffirm that the act of appointing arbitrators is a judicial and not an administrative function. It would have been much simpler to insert an explanation to the effect that the appointment function is in the nature of an administrative and not judicial function, and that the appointing authority ought not, at this stage, to delve into contentious issues and instead leave such matters to be decided by the Arbitral Tribunal.

Interestingly, the proposed amendment also provides that in relation to disputes of â€œspecified valueâ€•, the power to make arbitrator appointments should be delegated by the courts to an arbitral institution. The proposed â€œspecified valueâ€• threshold is `5 crores (just over US $1 million). In order to address the concern that arbitral appointments by the courts are generally prolonged affairs, the Consultation Paper proposes that the courts shall make the appointments â€œexpeditiouslyâ€• and prescribes a â€œrecommendedâ€• timeline of sixty days for this purpose. The proposed amendments seek to shut off avenues for appealing decisions made by the appointing authority.

The logic of splitting the power to appoint arbitrators between the courts and arbitral institutions is rather unclear. One wonders whether it would have been more efficient to delegate the function in its entirety to a chosen arbitral institution. In this regard, useful guidance may be had from Mauritiusâ€™ new arbitration regime. The Mauritian Arbitration Act adopts a unique solution, in that all appointing functions (and a number of further administrative functions) under the Act are vested in the Permanent Court of Arbitration (PCA). To ensure that PCA has the capacity to act expeditiously, the Mauritian Government and PCA have negotiated a host country agreement. Pursuant to this agreement, it has been envisaged that PCA will station a permanent representative in Mauritius who would assist, among other things, in making arbitral appointments. Such a scheme could be easily replicated in India, especially since India too has entered into a host country agreement with PCA. Other institutions, such as LCIA India or the Delhi Arbitration Centre, could also be entrusted with the responsibility of making arbitrator appointments.

Greater clarity to arbitrator disclosure The 1996 Act currently requires an arbitrator to disclose â€œany circumstances likely to give rise to justifiable doubts as to his independence or impartialityâ€•. Using the IBA Guidelines on Conflicts of Interest as a framework, the Consultation Paper seeks to inject greater specificity to arbitrator disclosure. It proposes that when a person is approached in connection with his possible appointment as arbitrator, he shall disclose any circumstances â€œsuch as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject-matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartialityâ€•.

Reducing the default rate of interest Where an arbitral award is for the payment of money, the 1996 Act currently provides a default rate of 18% per annum as rate of interest payable from the date of the award to the date of payment. The Consultation Paper considers that this default rate of interest is too high and proposes that it be reduced to 1% above the rates of interest fixed by Reserve Bank of India on a periodic basis.

Grounds of challenge to arbitral awards The Indian courts have often been criticised for undertaking extensive judicial review of awards. In a controversial ruling, in ONGC Ltd. v. Saw Pipes Ltd.19 the Supreme Court held that the â€œpublic policyâ€• ground for setting aside awards should be given a broad meaning and ruled that an award could be set aside if it was "patently illegal". It further held that an arbitral award would be â€œpatently illegalâ€• if it was contrary to substantive law, the provisions of the 1996 Act or the terms of the contract. Saw Pipes decision20 has been viewed as authorising greater judicial interference in arbitral awards and effectively converted what was designed to be a jurisdictional review into full-fledged appeal proceedings. Most importantly, it disregarded the will of the parties to resolve their disputes by arbitration rather than by recourse to a national court.

In order to "nullify" the effect of Saw Pipes decision21, the paper proposes to limit the scope of public policy as a ground for setting aside awards. According to the proposed amendment, an award would be considered to be contrary to public policy only if it is contrary to the fundamental policy of India, the interests of India or justice and morality. Although each of these facets of public policy are relatively nebulous concepts (and therefore subject to judicial interpretation), the proposed amendment is intended to clarify that the meaning of public policy would not include "patent illegality" under Saw Pipes approach22. In order to put the matter beyond doubt, it would be helpful if an explanation were to be added to the effect that a mere error of law would not, by itself, be contrary to the public policy of India.

Whilst seeking to clarify the meaning of public policy, the Consultation Paper proposes the introduction of a new ground for the challenge of arbitral awards viz. the existence of a â€œpatent and serious illegalityâ€•. However, this ground for challenge is designed to be available only in relation to domestic awards, and would not affect international commercial arbitrations seated in India. The language of the proposed amendment also makes it clear that in reviewing an award on this ground, a court should be satisfied that the illegality in question is â€œpatent and seriousâ€• and has caused or is likely to cause â€œsubstantial injustice to the applicantâ€•.

The Consultation Paper also seeks to fill a gap in the grounds for challenging arbitral awards. Under the 1996 Act, a challenge to an arbitrator is to be decided by the Arbitral Tribunal. However, an order rejecting a challenge cannot immediately be appealed before the courts. Instead, the 1996 Act enjoins the Arbitral Tribunal to continue the

proceedings and make an award. Similarly, a ruling by the tribunal on the scope of its own jurisdiction cannot be challenged until an award is made. The remedy for an aggrieved party in both cases is to make an application for setting aside the award under Section 34 of the 1996 Act. However, both situations are not currently expressly recognised as grounds for challenging an award. In order to clarify the position, the Consultation Paper proposes an amendment which seeks to clarify that a ruling on an unsuccessful challenge to an arbitrator or a decision by the tribunal upholding its own jurisdiction can be the subject-matter of judicial review at the time an award is challenged before the courts.

Enforcement not automatically suspended upon challenge Section 36 of the Act provides that an award will be executed as a decree of the court only if a timely application to object to the award has not been filed, or if filed, has been dismissed. Therefore, under the current scheme of the 1996 Act, once an arbitral award is challenged it effectively freezes the enforcement of the award until a final decision is made on the challenge.

This anomalous position encouraged parties to challenge arbitral awards despite little chance of eventual success, merely in order to delay the enforcement of an award. In order to address this situation, an amendment has been proposed to Section 36 to clarify that a stay of enforcement of an award would not be automatic upon a challenge being filed. Instead, an order staying enforcement would be a discretionary order to be made by the court. In seeking to amend this provision, the Government seems to have taken note of the decision of the Supreme Court in National Aluminium Co. Ltd. v. Pressteel Ltd. & Fabrications (P) Ltd.23 in which the Supreme Court expressed hope that the legislature would consider a suitable amendment to rectify this anomalous situation.

The proposed amendments also envisage that while granting a stay of the operation of an award, a court may also grant interim measures to protect the interests of the party in whose favour the award is made.

Implied arbitration agreement for high-value disputes A controversial suggestion made in the Consultation Paper is to make institutional arbitration mandatory for disputes above a specified value threshold (which is currently proposed to be set at just over US $1 million). This proposal appears fraught with difficulty. If enacted, it would be a case of â€œlegislative overkillâ€• which strikes at the core principle of arbitration viz. party autonomy. There are also likely to be serious concerns about the enforceability of an arbitral award made pursuant to such an implied arbitration clause. For instance, a fundamental requirement to obtain enforcement of an award under the New York Convention is for the underlying arbitration agreement to be in writing. A deemed or implied arbitration clause would not likely satisfy this condition, and this would substantially impact the enforceability of any such award. This proposal has been subject to extensive criticism, and thankfully, current indications are that it is unlikely to be proceeded with.

Gaps in the Consultation Paper An important issue that has not been addressed in detail in the Consultation Paper is how the proposed amendments to the 1996 Act will be integrated with the proposed wider changes in the court system and especially with the plan to establish a special division in each High Court to hear high-value commercial disputes.24 As recommended in the 176th Report of the Law Commission, the creation of a specialist, dedicated Arbitration Division to hear arbitration-related cases would go a long way in expediting disposal of challenges to, and enforcement of, arbitral awards. Although the Consultation Paper seems to envisage that the Arbitration Division would be established within the proposed commercial courts, greater clarity as to its proposed jurisdiction and powers would have been welcome.

A few other changes, not considered in the Consultation Paper but which could help improve the 1996 Act, are discussed below.

Preserving confidentiality Confidentiality is often cited as one of the important perceived advantages of arbitration over litigation, and commercial parties will often opt for arbitration in order to keep the details of their dispute private. However, the confidentiality of proceedings is not expressly recognised or provided for in the 1996 Act and this is an important omission in the statute.25 In this regard, it would be useful to derive guidance from the LCIA Arbitration Rules26 and insert a provision along the following lines into the 1996 Act:

â€œUnless the parties expressly agree in writing to the contrary, the parties, the Arbitral Tribunal and the arbitral institution concerned shall be obliged to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain provided however that this provision shall not affect any law under which disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.â€•

It is also possible, in circumstances where an award is challenged before the courts, that non-parties may access the award and relevant documents produced in the arbitration. A potential breach of confidentiality in these circumstances can be prevented by inserting a provision to the following effect:

â€œAn arbitral award or awards, or any materials created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, that are filed in court may only be inspected with the permission of the court.â€•

The reciprocity reservation India is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention permits parties to make two reservations to limit the scope of the Convention:

- (a) The â€œreciprocity reservationâ€• which permits a State to only enforce arbitral awards made in the territory of a State which is itself a party to the Convention; and
- (b) The â€œcommercial reservationâ€• which permits States to limit the application of the Convention to differences arising out of legal relationships that are considered to be â€œcommercialâ€• under the national law of that State. India, in implementing its obligations under the New York Convention in Part II of the 1996 Act, has made both permissible reservations. However, the manner in which India has implemented the reciprocity reservation is not in line with the provisions of the New York Convention. Section 44 imposes a twofold requirement for the enforcement of foreign arbitral awards viz. that: (i) the award be made in a reciprocating country; and (ii) the reciprocating country be declared as such by the Central Government by notification in the Official Gazette.

Therefore, even if a country is a signatory to the New York Convention, this does not necessarily mean that an award made in that country would be automatically enforceable in India. The language of Section 44 seems to indicate that the award would only be enforceable if the country has been notified by the Central Government as a country to which the New York Convention applies. Out of the 145 parties to the New York Convention, only 46 territories have been notified by the Central Government under Section 44 thus far.27

The second condition is not one that is permitted under the New York Convention. Therefore, in order to prevent a situation where India is held to be in breach of its international law obligations, it is necessary that Section 44 be amended so as to remove the requirement that an award be made in a country that is expressly notified to be a reciprocating country by the Central Government.

Interrelationship with the Code of Civil Procedure Section 5 of the 1996 Act seeks to define and limit the scope for judicial intervention. It provides:

5. Extent of judicial intervention.â€” Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

The legislative intention underlying this section seems to be to ensure that the 1996 Act is a complete code for all matters related to arbitration. Therefore, logically and on a plain reading of this provision, it is evident that courts ought not to intervene unless its intervention was expressly authorised by the 1996 Act.

Despite this, in ITI Ltd. v. Siemens Public Communications Network Ltd.28 a two-Judge Bench of the Supreme Court held that even though a second appeal cannot lie from an order of the appellate court made under Section 37 of the Act, a revision under Section 115 of the general law (the Code of Civil Procedure) would still lie against those orders. The Court justified its conclusion by holding that:

10. â€¦ when there is no express exclusion [of the Code of Civil Procedure, 1908], we cannot by inference hold that the Code is not applicable.28-a

This decision creates another avenue for litigation, is contrary to the legislative intention underlying Section 37, and completely nullifies the effect of Section 5 of the 1996 Act. In order to shut off avenues for unnecessary judicial interference on this ground and remove the costs and delays involved in cascading layers of litigation, it would be helpful to include a provision expressly excluding the application of the Code of Civil Procedure to matters covered by Part I of the Act.

Mere allegations of fraud should not render a dispute non-arbitrable Yet another much-criticised decision of the Supreme Court is its recent ruling in N. Radhakrishnan v. Maestro Engineers.29 It evidences the courtsâ€™ propensity to confer jurisdiction on itself at the expense of Arbitral Tribunals. In the context of a partnership dispute, the Supreme Court held that even though the dispute â€œsquarely fell within the purview of the arbitration clause in the partnership deedâ€• it would be inappropriate to compel arbitration since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by [the] parties and such a situation cannot be properly gone into by the arbitrator. 29-a

With this decision, the Indian Supreme Court effectively undermined the partiesâ€™ right to choose arbitration as a means of dispute resolution. Its approach is also inconsistent with the principle of competence-competence, which previous decisions have identified as a cornerstone of Indian arbitration law. Furthermore, the decision effectively rewrites a provision of the 1996 Act whichâ€”in Section 8â€”makes it mandatory for a court to refer to arbitration any dispute covered by an arbitration agreement.30

The Supreme Courtâ€™s analysis also appears to fly in the face of previous judgments, most notably the decisions of coordinate Benches of the same court in P. Anand Gajapathi Raju v. P.V.G. Raju31 and Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums.32 In those cases, the Court found the language of Section 8 to be peremptoryâ€"making it obligatory for the court to enforce the partiesâ€™ agreement by referring them to arbitration.

In order to pre-empt any possibility of future Benches of the Supreme Court following Radhakrishnan33 approach, it would be helpful for a clarification to be inserted to the effect that a dispute shall not be considered to be non-arbitrable merely because it involves allegations of fraud.

Conclusion The Indian Governmentâ€™s keenness to amend the 1996 Act is a welcome development, and reflects a growing momentum for change in support of arbitration in India. Although the proposed amendments to the 1996 Act could have been bolder and more comprehensive, they are nevertheless largely a step in the right direction.

Particularly in the light of the time involved in getting a review of the arbitration regime underway, and the slim chance of another round of legislative reforms over the next few years if the 1996 Act is amended soon, it is important that the Act (and the proposed amendments) be reviewed thoroughly. The fact that the Law Ministry has chosen to go through a consultation process and engage with the various stakeholders (the â€œusersâ€• of arbitration, lawyers, arbitrators, judges and academics) before introducing amendments to the 1996 Act is itself a very significant, and welcome, development. One hopes that the consultation process will be rigorous and will assist in ironing out the creases that exist in some of the proposals contained in the Consultation Paper.

However, it is necessary to realise that law reform alone will not help arbitration succeed in India. As the noted Canadian arbitration academic, Fabien Gelinas has observed:

â€œthe adoption of an adequate legal framework is not sufficient to make a country really favourable to arbitration. It is much like having a brand new stadium, a certified football and a first-rate football field. One also needs well-trained players and referees who know the rules of the game. The Bar, the judiciary and the business community are needed to bring life to legal textsâ€•.34

One of the crucial factors that will determine the success of arbitration in India is the attitude of the courts. The most striking aspect of the history of the 1996 Act has been the propensity for judicial intervention. Although the Act â€œbolted the front door and limited judicial intervention to a few [narrowly] defined instances, the Indian courts have found means to break down the back doorâ€•.35 Therefore, no matter how tightly the legislature tries to ringfence the powers of the courts, the courts have proved themselves to be adept of breaching these barriers. What, therefore, is necessary is a sea change in the courtsâ€™ attitude towards arbitration. Overzealous exercise of the courtâ€™s supervisory powers over arbitration strikes at the root of party autonomy and the partiesâ€™ conscious decision to have their disputes resolved by an Arbitral Tribunal than by the courts. It is hoped that the courts will henceforth respect the will of Parliament and of parties who have decided to arbitrate, and hold off from excessively interfering with the arbitral process. Only then will it be possible for India to erase its image of being an â€œarbitration-unfriendlyâ€• jurisdiction.

Just as important as a robust statutory framework and supportive judiciary is the development of a professional â€œculture of arbitrationâ€• if India is to establish itself as an attractive arbitration jurisdiction.

For far too long, arbitration in India has been carried out by practitioners who regard it is a useful adjunct to their â€œday jobâ€• of litigating in courts. Arbitrations are therefore typically sandwiched between court appearances, or are scheduled for evenings or weekends with long intervals between hearings. The net result is that more hearings are needed over the course of a matter leading to delays and a substantial increase in the partiesâ€™ costs. In recent times, there have been encouraging signs of the gradual development of an arbitration Bar which will go a long way in raising the standards of arbitration in India and in ensuring that arbitration will no longer be an â€œevening pastime or a weekend hobbyâ€•.

The establishment of LCIA India, which has recently launched a set of arbitration rules specially adapted to the subcontinent, may well prove to be a catalyst for greater institutionalisation of arbitration in a country where the overwhelming majority of arbitrations are conducted on an ad hoc basis. The availability of well-regarded and experienced institutions greatly assists in efficient case administration and their rules provide a strong procedural framework for the conduct of arbitrations. Arbitral institutions also serve as an important catalyst for education, training and publicity regarding arbitration which expands the understanding and acceptance of arbitration as a means of dispute resolution.

The Government too seems keen to chip in with extra-legislative measures to help foster the growth of a culture of arbitration in India. In a recent speech, the Union Law Minister has emphasised the need to build domestic arbitration capacity and train Indian lawyers, judges and arbitrators about existing and emergent global best practices in arbitration.36 Special university faculties and departments for the study of arbitration law are under consideration, and it is hoped that first-rate hearing facilities (modelled along the lines of Singaporeâ€™s â€œfantasticâ€• Maxwell Chambers) will be established in each of Indiaâ€™s major cities. If all this can be achieved within a reasonable time-frame, a new dawn for

arbitration in India is not far off.

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- According to official figures, the subordinate judiciary across the country has a backlog of 26.4 million cases, while the High Courts have arrears of 3.8 million. The Supreme Court's docket of pending cases too has crossed the 50,000 mark. See P. Suresh, â€œBacklog of cases in Indian courts: Statistics, facts, solutionâ€•, http://www.mynews.in/News/Backlog_of_cases_in_Indian_Courts_Statistics,_Facts_and_Solution_N59822.html (accessed, 14-10-2010). See also Hiram Chodosh, Stephen Mayo, A.M. Ahmadi and A.M. Singhvi, â€œIndian Civil Justice Reform: Limitation and Preservation of the dversarial Processâ€• in (1997) 30 New York University Journal of International Law and Politics 1.
- The Consultation Paper, p. 2.
- (2002) 4 SCC 105.
- Ibid.
- The Bhatia decision has also given rise to disquiet within the Supreme Court itself. For instance, in Shreejee Traco (I) (P) Ltd. v. Paperline International, (2003) 9 SCC 79, the assistance of the Chief Justice of India was sought under Section 11(4) of the 1996 Act for the appointment of an arbitrator in an international arbitration with a foreign seat. The Judge declined to exercise jurisdiction and held the petition to be not maintainable in view of the fact that the arbitration clause in the agreement contemplated arbitration proceedings to be held at New York. He reasoned that Section 11 fell within Part I of the Act and would only apply to those arbitrations which have India as its seat. This decision is clearly indicative of judicial discomfort with the overbroad ratio of Bhatia International.
- A year before the decision in Venture Global Engg. v. Satyam Computer Services Ltd., (2008) 4 SCC 190, I had commented:
- â€œ[The Bhatia ruling] may also render a foreign award liable to challenge under Section 34 of the [1996] Act before Indian courts. Thereby, a party can have two remedies against such an arbitral award: to challenge the arbitral award in terms of Section 34 of the Act; and subsequently, resist the recognition and enforcement of the award in terms of Section 48 of the Act. Such a consequence would be absurd and there can be no denying that this decision requires to be urgently reconsidered by the Supreme Court.â€•

See Promod Nair, â€œSurveying a Decade of the â€˜Newâ€™ Law of Arbitration in Indiaâ€•, 23(4) Arbitration International 6 719 (2007). Tragically, there was no reconsideration or overruling of the Bhatia decision. Instead, it came to be entrenched by means of a long line of subsequent decisions.

- (2008) 4 SCC 190.
- Supra n. 3.
- Ibid.
- (2008) 10 SCC 308.
- Supra n. 3.
- (2002) 2 SCC 388 at SCC p. 405, para 19.
- Section 16 provides that an Arbitral Tribunal â€œmay rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement...â€•.
- Supra n. 12.
- See Promod Nair, â€œSurveying a Decade of the â€˜Newâ€™ Law of Arbitration in Indiaâ€•, 23(4) Arbitration International 69 721-22 (2007).
- Supra n. 12.
- The Court failed to heed the note of caution that another seven-Judge Bench of the Apex Court had sounded in Keshav Mills Co. Ltd. v. CIT, AIR 1965 SC 1636: (AIR p. 1644, para 23)

When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided.

The SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618, court ought to have appreciated that there was little practical or legal infirmity in its earlier judgment in Rani Construction that required it to be overruled, especially since the system for appointment of arbitrators established by that decision was working well.

- (2005) 8 SCC 618.
- (2003) 5 SCC 705.
- Ibid.
- Ibid.
- Ibid.
- (2004) 1 SCC 540.
- The Commercial Division of the High Courts Bill, 2009 is currently pending before Parliament and if enacted, would mean that all commercial disputes worth over `5 crores (roughly US $1 million) would be removed from the jurisdiction of the District Court and sent to the High Court to be heard by a special commercial division. It also envisages a fast-track procedure for the disposal of cases by the Commercial Division which would see judgments rendered within 30 days of the conclusion of arguments.

- The English Arbitration Act, 1996 also does not contain express provisions in relation to the preservation of confidentiality. However, under English law, parties to an arbitration, and the tribunal, are under implied duties to maintain the confidentiality of the hearing, documents generated and disclosed during the arbitral proceedings, and the award. See Dolling-Baker v. Merrett, (1990) 1 WLR 1205 : (1991) 2 All ER 890 (CA); Hassneh Insurance Co. of Israel v. Mew, (1993) 2 Lloydâ€™s Rep 243; Ali Shipping Corpn. v. Shipyard Trogir, (1999) 1 WLR 314 : (1998) 2 All ER 136 : (1997) EWCA Civ 3054 (CA).
- See Article 30 of the LCIA Arbitration Rules.
- See Sumeet Kachwaha, â€œThe Arbitration Law of India: A Critical Analysisâ€• 1(2) Asian International Arbitration Journal 105 at p. 123 (2005).
- (2002) 5 SCC 510.
- Ibid., at p. 516, para 10.
- (2010) 1 SCC 72.
- Ibid., at p. 77, para 21.
- See David Brynmor Thomas and Promod Nair, â€œIndia: Parties will be able to evade arbitration thanks to new Supreme Court rulingâ€•, 5(1) Global Arbitration Review 2010.
- (2000) 4 SCC 539.
- (2003) 6 SCC 503.
- Supra n. 29.
- Fabien Gelinas, â€œArbitration and the Challenge of Globalizationâ€• in 17(4) J Intâ€™l Arb. 117 at p. 120 (2000).
- See Promod Nair, â€œSurveying a Decade of the â€˜Newâ€™ Law of Arbitration in Indiaâ€•, 23(4) Arbitration International 69 738 (2007).
- Global Arbitration Review, 10-9-2010.