Arbitration in India – Some Myths Dispelled

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The author argues that arbitration in India has been plagued by many of the same troubles as litigation. Arbitration proceedings are often time consuming and expensive. The author believes that the Arbitration and Conciliation Act, 1996 is flawed, in that it perceives a role for the court at various stages. The similarity of arbitration with litigation is striking. In making these arguments, the author calls for a rethink of the commonly held view that arbitration, as an alternative to litigation, is free from the negatives that litigation is associated with.

I. Introduction

The Arbitration and Conciliation Act, 1996[1] was essentially conceived to provide expeditious adjudication of disputes with minimal interference by courts, and to provide for efficacious and speedy enforcement of arbitral awards, without the trappings of a cumbersome litigation process. The stated objects behind the legislation gave rise to the perception that arbitration in India is (a) speedy,

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[1] Hereinafter "the Act."

(b) inexpensive and (c) a specialised field of practice as opposed to litigation. All of these, in reality, are far from true, as the following analysis will seek to demonstrate.

II. How Speedy is Arbitration?

A. Appointment of the Arbitral Tribunal

In the absence of an agreement between the parties (lack of consensus is quite common), the party desirous of initiating the arbitration process is required to petition the Chief Justice of the jurisdictional High Court or his nominee for appointment of the arbitral tribunal under section 11 of the Act, which is to be ordered after hearing the other side. After multiple rounds of interpretation form *Konkan I*[2] to *Konkan II*,[3] a seven-Judge Bench of the Supreme Court of India in *SBP & Co.* v. *Patel Engineering Ltd.*[4] has settled the position that an order passed under section 11 is judicial (as opposed to administrative) and requires the court to be satisfied as to the existence of a valid arbitration clause, 'live' claims, duly arbitrable disputes and the like, and that if the need arises, evidence could be led in such proceedings. Orders passed by the Chief Justice or his nominee are subject to challenge by Special Leave under Article 136 of the Constitution before the Supreme Court, unless the order is that of the Chief Justice of India or his nominee, in the case of an international commercial arbitration. As such, the appointment of the arbitral tribunal itself is a court ordained process, and can take considerable time. In some cases, appointment of the tribunal itself has taken a few years!

B. Procedure Before Arbitral Tribunal

Going forward, though evidence is usually led before the arbitral tribunal (though under section 24 of the Act or if the agreement so provides, the tribunal can decide the case on the basis of documents) and most competent arbitrators ensure that the entire process of pleadings, affidavit in lieu of evidence in chief, cross-examination of witnesses and passing of the award is completed in a reasonable period of time (say, one year), it is quite common for arbitrations to linger endlessly due to indecisive tribunals, multiple interim applications, non-cooperation of parties, witnesses being located in other cities or countries and court interventions pending arbitral proceedings (notwithstanding section 5). It is said that an incompetent lawyer can drag a case for years, and a competent lawyer can drag it even longer! In the absence of a cooperative approach to arbitral

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[2] Konkan Railway Corpn. Ltd. v. Mehul Construction Co., (2000) 7 S.C.C. 201.

[3] Konkan Railway Corpn. Ltd. v. Rani Construction Pvt. Ltd., (2002) 2 S.C.C. 388.

[4] (2005) 8 S.C.C. 618.

proceedings, it is not difficult for ingenious counsel to delay the proceedings, if that is what the client desires.

C. Enforcement of Arbitral Awards

Once the award is passed, one would expect the *lis* to come to an end, and the award to be enforceable forthwith. But, under the scheme of the Act and in practice, that is when the *real* litigation commences! For reasons best known to them, the legislators chose to make arbitral awards subject to challenge before the trial court, and even awards passed by a panel of three retired Supreme Court Chief Justices are made subject to scrutiny by a single Trial Judge. Of course, section 34 has sought to confine its ambit by the use of fuzzy terminology such as 'opposed to public policy', etc. However, the decision in the case of *ONGC* v. *Saw Pipes*[5] has clarified that an arbitral award could be challenged as being 'patently illegal', in instances of the award being opposed to substantive provisions of law or being opposed to the Act or again, being opposed to the terms of the contract. By this ruling, the review under section 34 stands amplified to testing an award on the touchstone of 'compliance with substantive law, the Act and the terms of the contract' to determine whether the award violates public policy. Thereby, the role of the court under section 34 is enlarged and is now akin to that of an appellate court.

Hence, the challenge process before the trial court is a full- fledged re-hearing of the original arbitral proceedings. In some states (Karnataka for instance) the applicable Rules provide that the section 34 proceedings are to be tried, as far as possible, as an original suit. This gives rise to the possibility of evidence being led in the said proceedings as well.

After a full-blown challenge process before the trial court, appeal lies to the High Court under section 37 and another round of litigation occurs. This is followed by a Special Leave Petition to the Supreme Court against the order of the High Court by the aggrieved party. And as if the delay is not inevitable on account of these multiple tiers of challenge to an arbitral award (which, jurisprudentially, is meant to be final), per section 36 of the Act, the mere pendency of an application challenging an award before the trial court makes the award unenforceable! The Supreme Court in *NALCO* v. *Presteel Fabrications Ltd.*[6] has expressed a hope that suitable legislative action would undo this situation. The Arbitration and Conciliation (Amendment) Bill, 2001 has sought to partially remedy this flaw, but the Bill is yet to see the light of day.

[5] (2003) 5 S.C.C. 705.

[6] (2004) 1 S.C.C. 540.

One can only imagine the plight of a successful claimant in arbitration, who cannot enjoy the award until such challenge procedures are exhausted (which may well take several years) and the delight of the vanquished party who enjoys unconditional stay of execution. This flies in the face of the notion that arbitral proceedings and enforcement of awards are speedy under Indian law. Even an unsuccessful defendant in a money suit challenging a judgement and decree of the trial court under Order XLI of the Code of Civil Procedure, 1908[7] is put on terms by the appellate court and granted interim orders on condition of deposit of a substantial sum of the decretal amount. However, the Act puts a premium on defaulters who can merrily, and unconditionally, evade the enforcement of an award by merely filing an application under section 34.

Therefore the arbitration experience particularly for the successful claimant can prove rather painful, prolonged and lopsided.

III. How Inexpensive is Arbitration?

The absence of *ad valorem* court fees payable on an arbitral claim is believed to make the process affordable and convenient. The truth of the matter is that the amount saved on court fees is, more or less, expended in terms of arbitrators' fees, administrative expenses, counsels' fees and stamp duty on arbitral awards. Moreover, since no court fees is payable, frivolous and highly amplified claims and counter claims are commonplace. Multi-crore claims for damages, which often exceed the value of the principal contract, and even larger counter claims (which are now customary) have made the entire arbitration process farcical. Such large claims are treated as 'high stakes' matters and the fees payable to the arbitrators and lawyers proportionally also increase! In arbitrations involving retired Supreme Court judges, or judges from other countries in the case of international commercial arbitrations, the fee payable to the arbitrators towards 'reading charges', 'sitting fees', 'award writing fees' and 'expenses', coupled with similar fees payable to counsel, can sometimes run into crores. The costs involved in arranging sittings (often at luxury hotels) coupled with travel charges for the parties, witnesses, counsel and arbitrators where the venue is not common to both parties can be exorbitant. Such costs are peculiar to arbitral proceedings. No doubt, costs could (and should) be factored in to the award to be passed, but the fact remains that arbitral proceedings are costly, and not inexpensive by any standards.

The multiple proceedings and challenges in court, dealt with in the first segment above, compound the expenses involved in entire case.

[7] Hereinafter "CPC."

Thus, in the absence of a cooperative approach by both sides and 'affordable' arbitrators' and counsel fees, arbitral proceedings can prove extremely expensive and futile in cases where the quantum and strength of the claim do not warrant such expenditure. This largely undermines the role of arbitration in resolution of moderately-sized commercial disputes, family disputes, etc., which were meant to benefit from the ADR revolution.

IV. How 'Non-litigious' is Arbitration?

The Act provides for multiple layers and spheres of judicial intervention in the framework of arbitral proceedings. The court process for appointment of an arbitrator and challenge to the arbitral award are already discussed earlier. However, there are other key areas of court intervention, *inter alia*, in the context of grant of interim measures to a party.

The Act provides for interim measures either by the court or by the arbitral Tribunal itself. Section 9 of the Act stipulates that a party may seek interim orders during or after arbitral proceedings, but before enforcement of the award, *inter alia*, for preservation of the property or amount in dispute, injunction, and appointment of receiver or a guardian.

Under section 9, the court has the same power for interim measures as it would in respect of main proceedings before it and essentially exercises powers to grant injunction under Order XXXIX of the CPC in case of suits in addition to having the jurisdiction to make equitable orders for preservation and facilitation of arbitral proceedings.

Appeals lie against orders passed under Section 9 to the High Court empowered to hear appeals from decrees, and though no second appeal lies, the right of an aggrieved party to move the Supreme Court is preserved.

Besides the Court, the Act *vide* section 17 also vests the arbitral tribunal with the power to take appropriate interim measures for the protection of property that is subject matter of arbitration and providing security in connection therewith. Such orders made by the arbitral tribunal are appealable to the Civil Court, which orders in turn are revisable under section 115 of the CPC.[8] Even where such orders cease to be revisable owing to the amended CPC, the right to challenge the said orders by way of a writ petition before the High Court under Article 227 of the

[8] I.T.I. Ltd. v. Siemens Public Communications Networks Ltd., (2002) 5 S.C.C. 510.

Constitution is always available. Such orders could also be carried to the Supreme Court by way of Special Leave Petitions.

Even where a domestic arbitral award is final, its enforcement is again through the court by resorting to execution proceedings under the CPC, as section 36 of the Act treats such awards as decrees of the court for the purpose of their enforcement. In case of awards passed in foreign awards sought to be enforced in India, such awards are not executable by the court until the court is satisfied as to the fact that the award is not violative of the conditions laid down under the Act.[9]

It is also not uncommon for a party to file a suit in court, notwithstanding an arbitration agreement between the parties. In such cases, the defendant is required to file an application under section 8 of the Act, for the court to refer the parties to arbitration. Similar provisions exist in respect of foreign awards.[10]

The natural deduction from this review of the scheme of the Act is that the role of the courts in arbitration is unmistakable - ranging from the appointment of the arbitral tribunal to the enforcement of an arbitral award. While one cannot deny reasonable avenues for challenge against unjust and perverse arbitral awards, delay and expenditure are inevitable.

But the *key* point to be emphasised here is that since intervention of the courts is in-built in arbitration law in India, in order for one to be a successful arbitration practitioner, litigation skills are imperative. Even the very conduct of arbitral proceedings entails litigation strategies, skills and methods, particularly in pleadings, cross-examination and oral arguments. These skills are certainly required when the arbitral tribunal comprises retired Judges, who are (rightly) accustomed to court practices and a 'judicial approach' to the matter. In fact, where the arbitral tribunal is 'non-legal' (such as tribunals comprised of technical arbitrators such as engineers, technologists, etc.) litigation skills are even more necessary to keep the entire process broadly within the parameters of substantive and procedural law!

This lesson is intended essentially for law students aspiring to be 'arbitration specialists', who see arbitration as an alternative career option to litigation. Unless the basic litigation skills and experience are in place, one may struggle to cope with arbitration, much less be a successful arbitration practitioner.

[9] As contained in § 48 of the Act in the case of New York Convention Awards, and § 57 in the case of Geneva Convention Awards.

[10] § 45 and § 54 of the Act.

V. ENDNOTE

The next time someone announces arbitration in India as being speedy, inexpensive and 'out of court', think again. While arbitration continues to be a popular option as a means of dispute resolution, there are evident lacunae in the law that need to be plainly dealt with in order to make the process expeditious and affordable in practice. As for arbitration as a career option, the likeness with litigation is striking. In this backdrop, there is plenty of food for thought for legislators, judges, arbitrators, lawyers, law students, academia and clients alike.