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INTERNATIONAL ARBITRATION IN INDIA

*A.K. Bansal**

The new law relating to arbitration and conciliation in India will enhance the credibility of India in the eyes of the international business community as a forum for the settlement of business disputes. The Government of India introduced "The Arbitration and Conciliation Bill, 1995" (Bill No. XXX of 1995) in the Upper House of the Parliament (*Rajya Sabha*) on May 16, 1995 to improve the law relating to arbitration and to ameliorate difficulties faced in domestic as well as in international arbitrations. A joint committee of both Houses of Parliament has unanimously approved the bill with minor amendments. It is expected that it will be passed by the Parliament in its next session. The President of India issued "The Arbitration & Conciliation Ordinance, 1996" on January 16, 1996 to implement the provisions of the bill by ordinance.

The object of the bill is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards, as well as to define the law relating to conciliation and matters connected therewith or incidental thereto. The bill seeks to repeal three laws, namely the Arbitration (Protocol and Convention) Act of 1937, the Arbitration Act of 1940, and the Foreign Awards Act of 1961.

The bill seeks to make international commercial dispute resolution acceptable to parties from different states. The bill eliminates numerous difficulties faced by parties in international commercial arbitration, particularly those caused by Section 9(b) of the Foreign Awards Act of 1961. This Section, which had caused much concern on the part of parties interested in doing business in India, has been repealed by the bill.

The United Nations Commission on International Trade Law adopted the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in 1985, after deliberations by representatives of many states. The

* The author is an international commercial arbitration expert in India. He participated, as a special invitee of the Government of India, in the deliberations of the Law Ministers Working Group to draft new arbitration law in its meetings at Bombay and Calcutta. He is a Governing Body Member of the International Centre For Alternative Dispute Resolution, the Indian Society of Arbitrators, and the Indian Council of Arbitration. Mr Bansal is also head of M/s A. K. Bansal & Associates, Solicitors and Advocates, New Delhi, India.

General Assembly of the United Nations had recommended that all states give due consideration to the Model Law for the sake of uniformity of the law of arbitral procedure and the needs of international commercial arbitration practice. A few countries, such as some states within the United States, Canada, Australia, Sweden, the Netherlands and Hong Kong, have already enacted laws for international commercial arbitration largely based on the UNCITRAL Model Law. The drafters of the bill perceived definite advantages in giving effect to these international arbitration provisions in India, where they would form the basis for domestic arbitration and conciliation as well.

The Supreme Court of India commented on the mechanisms prescribed by the Arbitration Act of 1940 in the *Guru Nanak Foundation*¹ case:

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 claptrap and this led them to Arbitration Act, 1940 ('Act' for short). However, 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 ample 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. 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.

In addition to the Supreme Court, the law commission of India, representatives of trade associations, arbitration bodies and arbitration experts also favored amendment to the arbitration laws to satisfy the constitutional requirement of speedy resolution of disputes. Amendment of the law for the settlement of disputes also became necessary in light of economic reforms in India. The finality attaching to an arbitral award is critical to the acceptance of arbitration as a means of resolving commercial disputes, and it seemed that, under the Arbitration Act of 1940, finality was merely a statutory expectation and not a reality.

The government of India received recommendations from the working group of Law Ministers to draft a new arbitration statute largely based on the Model Law. Accordingly, the Ministry of Law, Justice and Company Affairs of the government of India drafted the bill in accordance with the Model Law. The bill contains some additional and modified rules to satisfy the requirements of domestic arbitration and also reflects decisions of the Indian courts and certain useful provisions of the Arbitration Act of 1940. The bill is divided into four Parts.

Part I of the bill deals with domestic as well as international commercial arbitration. Section 1 contains the short title and commencement clauses; Sections 2 to 34 of the bill are largely based on the Model Law. The bill does, however, diverge from the Model Law in Section 10(1), regarding the number of arbitrators; Section 13(5), regarding decisions on challenge to arbitrators;

¹ 1981 A.I.R. (S.C.) 2075, 2076.

and Section 28(1), regarding the choice of the parties regarding the rules applicable to the substance of the dispute. Other provisions of Part I regarding status of the award, appeals, advance on costs, territorial jurisdiction of courts, limitation, *etc.*, are largely based on the provisions of the Arbitration Act of 1940.

Under the bill, the parties are free to determine the number of arbitrators, provided that such number shall not be an even number (Section 10(1)). If a challenge to an arbitrator fails, the arbitral tribunal shall continue the arbitral proceedings and render an award, and the court cannot interfere at this stage (Section 13(4)). However, the award can be set aside on the same ground as the original challenge, by the court (Section 13(5)), and where an arbitral award is set aside on such ground, the court may also decide whether the arbitrator who is challenged is entitled to any fee (Section 13(6)).

In an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the law of India (Section 28(1)(a)), but in an international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute (Section 28(1)(b)).

The provisions of the Arbitration Act of 1940 requiring the filing of the award and making it a rule of the court have been eliminated. When the time (three months) for making an application to set aside the arbitral award has expired, or when such application has been made, but refused, the award becomes enforceable (Section 36). The award can be enforced in the same manner as if it were a decree of the court (Section 36).

Courts are barred from exercising jurisdiction until the rendering of the award, and courts cannot intervene in the arbitral proceedings. Failing an agreement, the Chief Justice or any person or institution designated by him has been entrusted with the appointment of an arbitrator. In international commercial arbitration, the reference to the Chief Justice means the Chief Justice of India, and in domestic arbitration it means Chief Justice of a High Court.

An arbitral award can be set aside by a competent court by an order under Section 34, on grounds similar to the grounds for refusing enforcement of a foreign award under the New York Convention of 1958. An appeal shall lie from such order of such court to a higher court authorized by law to hear appeals. The decision of the appellate court can be challenged in the Supreme Court of India (highest court of the country).

Part II of the bill deals with the enforcement of foreign awards. Its Chapter I is based on the New York Convention of 1958 and seeks to replace the Foreign Awards Act of 1961. Chapter II is based on the Protocol on Arbitration Clause of 1923 and the Convention on the Execution of Foreign Arbitral Awards of 1927, and seeks to replace the Arbitration (Protocol and Convention) Act of 1937.

Section 9(b) of the Foreign Awards Act of 1961 has been repealed and is not included in the bill, as it contravenes Article 1 of the New York

Convention. Section 9(b) provided that nothing in the Act (Foreign Awards Act of 1961) shall apply to any award based on an arbitration agreement governed by the law of India. This provision was overlooked and remained dormant until the Supreme Court of India, in *National Thermal Power Corporation v. Singer Company*,³ held that Indian courts could set aside a partial award rendered in London since it could not be regarded as a foreign award by reason of Section 9(b) of the Foreign Awards Act of 1961. Section 9(b) was thus contrary to the New York Convention of 1958, and it created concerns for foreign parties having business interests in India. The bill eliminates the source of that concern.

The provisions relating to enforcement have been made simpler and easier. The provisions regarding the requirement of a court order for filing of foreign awards with the court have been deleted, which should save much time and effort. Now a party can apply for enforcement of a foreign award simply by filing a copy of the award and arbitration agreement, without the formality of obtaining a prior court order.

Part III of the Bill deals with the law relating to domestic conciliation and international commercial conciliation. This Part is largely based on the UNCITRAL Conciliation Rules. The parties have been given the freedom to terminate the conciliation proceedings at any time before the settlement agreement. A settlement agreement signed by the parties has been given the same status and effect as an arbitral award. The conciliator and the parties are obligated to keep the matter confidential. Confidentiality has been extended to the settlement agreement except where its disclosure is necessary for purposes of implementation and enforcement.

Part IV of the bill contains supplementary provisions regarding the power to make rules, provision for removal of difficulties, repeal and savings clause, etc.

The courts of India are not equipped to bear the entire burden of rendering justice. Hence, alternative dispute resolution methods such as arbitration, conciliation and negotiation are being promoted by the Government of India, particularly for the settlement of commercial disputes. The introduction of the bill in the Parliament results from the Government's determination to repeal obsolete legislation regulating international commercial arbitration and to tailor a single law suiting the needs of incoming foreign investors. The new legislation eliminates unwieldy provisions of the existing arbitration law with the object of the quick disposition of disputes between foreign parties and their counterparts in India. Under the old laws, foreign investors generally would not agree to invest in India unless disputes arising out of their investments were settled through arbitration abroad. When the bill comes into force, foreigners may no longer wish to demand settlement abroad of their disputes with Indian parties on the grounds that Indian arbitration law is inadequate for resolving international commercial disputes.

Arbitration institutions, experts and parties to arbitrations in India and abroad have welcomed the bill. Eminent arbitration experts in India have

³ 1993 A.I.R. (S.C.) 999.

formed the International Centre for Alternative Dispute Resolution (ICADR) and registered it as a Society, with one of its main objectives being to provide infrastructure and other facilities for conducting and facilitating commercial arbitration and conciliation in India. It makes provision for promoting teaching and research in the field of Alternative Dispute Resolution (ADR) as well as for offering ADR services to clients in India and abroad. The ICADR was formally inaugurated in New Delhi by the Prime Minister of India on October 6, 1995. The Chief Justice of India is the Patron of the ICADR. ADR is gaining momentum in India and is supported by all sectors.

The Indian Society of Arbitrators and the Indian Council of Arbitration have also been motivated by the introduction of the bill in the Parliament. The provision of adequate infrastructural facilities for conducting international arbitrations in India is at the top of the agenda for arbitral bodies in India. It is generally believed that if the new law is well-supported by infrastructural facilities, India can emerge as a center for the settlement of commercial disputes.