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# Towards a New Law on International Arbitration in India

A.K. BANSAL\* ←

The Government of India has decided to repeal its old "slow-track" arbitration law by introducing a Bill in the Parliament, and to adopt a new law for international commercial arbitration, largely based on the UNCITRAL Model Law. This law shall apply to domestic as well as international arbitration in India.

## I. SLOW-TRACK ARBITRATION

At present under Indian law, arbitration is an extremely slow process and sometimes, it takes more than a decade to get an award and to enforce it. Arbitration law is contained in three Acts, namely: the Arbitration Act, 1940; the Arbitration (Protocol and Convention) Act, 1937; and the Foreign Awards (Recognition and Enforcement) Act, 1961—hereinafter referred to as the 1940 Act, the 1937 Act, and the 1961 Act, respectively. The 1940 Act deals with domestic awards while the other two deal with foreign awards. There is no provision relating to conciliation in these Acts. The law is old and its slow-track arbitration could not meet the requirements of the day.

Even the courts in India are slow. The Chief Ministers and Chief Justices, in a meeting held in New Delhi in December 1993, passed a resolution and highlighted the problems of arrears of cases in the courts. Institutions such as the Indian Council of Arbitration, the Indian Society of Arbitrators, the Federation of Indian Chambers of Commerce and Industry, etc. have been pressing hard for the improvement of arbitration law in India.

## II. FOREIGN AWARDS

India is a party to the 1923 Protocol on Arbitration Clauses and the 1927 Convention on the Execution of Foreign Arbitral Awards. The 1937 Act was passed to give effect to the said Protocol and Convention. India is also a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

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Mr Bansal is an international commercial arbitration expert in India and, as a special invitee of the government of India, participated in the deliberations of the Law Ministers Working Group to draft a 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.

the 1961 Act was enacted to give effect to this Convention. The performance of domestic arbitration law was very unsatisfactory. Section 9(b) of the 1961 Act had created many problems as some awards made abroad were declared to be governed by the 1940 Act. Recently, the Supreme Court of India interpreted Section 9(b) of the 1961 Act in the *NTPC v. Singer Company* case and now it is recognized that the said Section 9(b) is contrary to Article 1(1) of the New York Convention. The 1961 Act also contained provisions for the filing of the awards and registration of applications for filing of the awards which further delayed enforcement of the awards. The grounds for refusing enforcement of a foreign award are very limited, being based on the Convention.

### III. INTERNATIONAL COMMERCIAL ARBITRATION: DOMESTIC AWARDS

The 1940 Act is applicable to awards made in India. Domestic arbitration law in India, Pakistan and Bangladesh is based on the English Arbitration Act of 1934. The English Act has been amended from time to time, but the 1940 Indian Act has remained unchanged for the last fifty-five years. Similarly, arbitration law has not been amended in Pakistan or Bangladesh, except for minor changes. In India, the 1940 Act contains provisions for arbitration without intervention of the courts; arbitration with intervention of the courts; and arbitration in suits. The award is not enforceable until the court passes a decree confirming the award and this process takes a considerable time. The judgment or decree of the court is also subject to revision and appeal in the higher courts. The grounds for setting aside an award are very wide. Hence, under the 1940 Act, the arbitration law and procedures are time-consuming, costly and unsatisfactory for the settlement of commercial disputes.

### IV. THE PROPOSED NEW LAW

The Government of India has decided to liberalize and globalize its economy, and is reviewing the laws for better efficiency and harmony in world trade.

The United Nations Commission on International Trade Law (UNCITRAL) adopted, in 1985, the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the Model Law). The General Assembly of the United Nations recommended that all States should give due consideration to this Model Law to bring uniformity to the law on arbitral procedures and to meet the specific needs of international commercial arbitration. It seems that there is now a competition in the world to have the best arbitration law. Many countries have adopted the principles of Model Law, with or without amendments.

The Government of India constituted a Working Group comprising Law Ministers, Law Secretaries of the different states of India, and also eminent arbitration experts and representatives of arbitral institutions, with the mandate of reviewing the

law relating to arbitration. The recommendations of the Working Group were used in preparing the Arbitration and Conciliation Bill,<sup>1</sup> and comments of various arbitration bodies. Chambers of Commerce and other relevant users of arbitration were taken into account in finalizing the text. The new Bill seeks to unify the three existing Acts—the 1940 Act, the 1961 Act and the 1937 Act—and also introduces modes of conciliation for the settlement of disputes. Many States have different law for domestic and international commercial arbitration. It is proposed in this Bill to apply the same rules to domestic and well as international commercial arbitration—which will have definite advantages of simplification.

## V. MAIN FEATURES OF THE BILL

### A. *Domestic and International Commercial Arbitration*

The provisions relating to domestic and international commercial arbitration in India are contained in the first part of the Bill. The same set of rules shall apply to all arbitrations held in India, irrespective of the type of arbitration. This part of the Bill is largely based on provisions of the Model Law. The language, style and serial number of the rules are the same as those of the Model Law for better understanding and identification. Some useful provisions of the 1940 Act, such as the limitation and territorial jurisdiction of the courts, have been retained. Some new provisions, such as interest and costs, have been introduced for clarity.

### B. *Foreign Awards*

Part II of the Bill deals with the enforcement of foreign awards and is based on the 1958 New York Convention and the earlier Conventions of 1923 and 1927. The provisions of the 1961 and 1937 Acts have been incorporated in two different chapters with some amendments to make the law simpler, uniform and conforming to the relevant international conventions. Section 9(b) of the 1961 Act has been dropped.

### C. *Conciliation of Domestic and International Commercial Disputes*

Part III deals with the conciliation of domestic as well as international commercial disputes. Conciliation has been introduced to encourage alternative dispute resolution. In 1980, UNCITRAL adopted the UNCITRAL Conciliation Rules and the United Nations General Assembly recommended the use of these Rules for amicable settlement of disputes of the parties. Part III is largely based on the UNCITRAL Conciliation Rules. The settlement agreement is to be treated as an arbitral award and is final and binding on the parties.

<sup>1</sup> The text of this Bill was published in *World Trade and Arbitration Materials*, Vol. 7, No. 4, July 1995.

#### D. *Independence and Impartiality of Arbitrators*

The independence and impartiality of the arbitrator have been recognized as the basic rule of arbitration. The arbitral award has been given greater sanctity. The provisions for filing the original award in the court and for applying to make it a ruling by the court, and the requirement of a formal decree in terms of the award, have been considered as unnecessary and time-consuming and, hence, the arbitral award shall be deemed as a decree of the court and there will be no necessity to go to court for filing an arbitral award and getting a decree.

#### E. *Compatibility with ICC Rules*

The new law is compatible with the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce which have been well-tested over many decades. Hundreds of arbitrations have been conducted successfully under these Rules, which were found to be very good for the speedy and fair settlement of international commercial arbitrations.

#### F. *Powers of the Arbitrator*

The arbitrators have been given the clear power to:

- proceed *ex parte* if a party does not appear in spite of notice;
- grant interest; and
- grant interim measures of protection in respect of the subject-matter of the dispute.

Under the 1940 Arbitration Act, only the court could grant such measures of protection. The arbitrators have also been authorized to take procedural decisions. The arbitrators will have to disclose their interest, if any, in any party or in the subject-matter of the dispute, treat the parties equally and grant them full opportunity to present their case, and make a reasoned award. The arbitral awards shall be reasoned.

#### G. *Intervention by the Courts*

Intervention by the courts has been reduced: the new approach is to support arbitration and to minimize the role of the court. The jurisdiction of the court is effectively curtailed and is barred until the making of the arbitral award. The court cannot interfere with the arbitration proceedings. The arbitral award can be challenged on grounds similar to those of the New York Convention as adopted by the Model Law. An appeal has also been provided against the decision of the court. Now, the courts' time will be saved to a considerable extent as they have been given very limited functions under the new law.

The Bill is a consensus document, as its draft was circulated and has been debated

and commented on by representatives of the most important Chambers of Commerce, arbitration bodies, arbitration experts, government departments, etc., on the invitation of the Government of India, and their comments were considered in finalizing the text of the Bill. It was introduced in the *Rajya Sabha* (the Upper House of Parliament) on 16 May 1995: it is expected that it will be referred to a committee for report and, thereafter, be considered and passed by the Upper House. Then the Bill will be submitted to the *Lok Sabha* (the Lower House of Parliament) for its consideration. The process of enactment may take about six months.

Once the new law is enacted, India is likely to become a popular centre for alternative dispute resolution in the Asian region. Being based on the popular UNCITRAL Model Law and Conciliation Rules, Indian law shall be instantly recognized and understood the world over.