

6th Annual Joint Seminar  
"ARBITRATION IN INDIA"  
Wednesday 8th September 2010 – 6.00pm for 6.30pm

Proposed amendments to the (Indian) Arbitration and Conciliation Act, 1996.

by

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Ladies and Gentlemen:

Thank you for inviting me. Your interest in the ability of the Indian legal structure to meet the needs of business community is understandable in view of remarkable economic progress made by India.

However, we in India need to remind ourselves that we need to be aware of more of our shortcomings and less of our achievements.

First, let me tell you some of the perceived shortcomings in our legal system.

- (a) Our courts are not widely experienced in commercial matters. Before independence, we hardly had any industry worth the name (the then government did not allow us to manufacture even paper pins or biscuits) and after independence we began with socialistic ideals that discouraged us from becoming competitive. It is only in the last about 18 years that India has changed course.
- (b) Our courts are an important part of our political landscape. They not only decide ordinary cases, they protect human rights, guard against executive excesses, and goad government officials to do their statutory duty when they neglect it, which is more often than we like.
- (c) Our judges come from diverse backgrounds. At this moment, the 29 judges of the Supreme Court come from 15 different States having 15 different mother tongues, having been brought up in different cultural and educational backdrops. This, having regard to its size, and its multi-ethnic, multi-linguistic, and multi-layered society makes these judges often having different priorities. However, it is not diversity that alone is responsible for absence of consistency of outlook. Diversity added to lack of experience and inadequate training exacerbates the problem.
- (d) In contrast, by one report, in the UK, a large percentage of all the judges in the courts from the High Court upwards are white males from privileged and elite public school and Oxbridge background. The language too is not an issue as for 95% of people living in the UK, the language is English.
- (e) The Report of the Advisory Panel on Judicial Diversity 2010 by a committee chaired by Baroness Neuberger contains in Annexure (v) the statistics of

existing minority ethnic judges as on April 1, 2009. It shows that in the entire spectrum of judges, most judges are white male and the representation of the ethnic minority from High Court judges upwards is 0.00%. It further states that the overall percentage of ethnic minorities in the lower judiciary is 4.51%%.

- (f) It is not surprising that in the UK the consistency of outlook appears to be greater than in India. Of course currently the scene is changing in the UK so as to make judiciary more representative of the larger sections of British society. This is in keeping with Britain's ever increasing diversity. Such efforts are already being made in the Bar, for instance, when the previous Attorney General, the Rt Hon Baroness Scotland QC (appointed on 28<sup>th</sup> June 2007) was the first female and ethnic minority person to hold the post.
- (g) In the long run perhaps it would be advantageous to have a diversity on the Bench. Diversity and consistency of outlook in commercial matters are not incompatible.

My object in stating these facts is not to find excuses for inaction but to explain why Indian legal establishment does not pursue arbitration with the single mindedness with which, for example, the UK's does. In addition to what I have said above, the UK has had a long history, starting from guilds in the medieval times. India, as I said above, has experience of only 18 years of global level of competition.

The lack of experience was demonstrated when we enacted the Indian 1996 Act. The liberalization of the economy had taken place three years previously and in our enthusiasm to enact the latest and the most modern law, we enacted a law that, more or less, copied the UNCITRAL Model Law for not only international but also for domestic arbitration. We, unfortunately, jettisoned the entire case law built up over the previous 56 years in respect of domestic arbitration.

We also did not pay attention to the Mustill and the Saville committee reports that we should have, not because they were British reports, but because we too follow common law culture and also because we could learn from the British who have made a success of arbitration in their own country.

We have paid dearly for this folly. Not only our good record of enforcing foreign awards under the law that implemented the New York Convention has been tarnished, but our reputation as a nation with progressive judiciary has suffered.

So, now we are resolved to change our Act in different ways. There are many changes, but I will mention 4 of them.

First, we have separated the regime of domestic and international arbitrations. We have given more power to the courts to interfere with domestic awards that would not apply to international awards. This is achieved by amending s. 34 and adding s. 34-A.

The effect of the amendment would be that the domestic awards alone would be challengeable on the ground of 'patent illegality' in addition to the general grounds of

form on which all awards could be challenged. Thus, the judgment in *ONGC v Saw Pipes Ltd*<sup>ii</sup> would be applicable only when the award is a domestic award.

Second, the amendments seek to neutralize the effect of *Bhatia International* judgment which had held that Part I of the Act could apply regardless of whether the arbitration was in India or not.<sup>iii</sup> The court had at the time pointed out that in absence of the word 'only' in s. 2(2) the Part was applicable regardless of place of arbitration. This judgment has been followed up with another judgement that has held that the court may set aside an award even if place for arbitration is located outside India, provided that the governing law of the main contract was the Indian law. The proposed amendment rectifies this situation by introducing the word 'only' in s. 2(2). The proposed amendment authorises the courts to grant interim measures and to render assistance even when the arbitration is outside India.

Third, the proposed amendment in sections 8 and 11 (a) restricts the court's power to decide only the claims of non-existence of the arbitration agreement contained in the contract or entered into separately and (b) provides that all other issues be sent to the arbitral tribunal to resolve it. The proposed amendment also provides that the High Court shall consult an arbitral institution of its choice before appointing an arbitrator and out of the list given by the institution; thereafter, the High Court will appoint an arbitrator after determining the independence and impartiality of the arbitrator. This would be a significant change which would negative the principle in *SBP Co. vs. Patel Engineering Ltd.*, a 7-judge bench judgment that had expanded the scope of judicial intervention.<sup>iv</sup>

Fourth, the proposed amendment in s. 12 would require the would-be arbitrator to furnish a Declaration of his independence and impartiality. The proposed amendment will also furnish a list of illustrative circumstances that would require him to mention in the list of circumstances in the Declaration.

#### CONCLUSION.

We expect that these and other changes would make the arbitration in India, particularly international commercial arbitration, more attractive. It is a long and difficult haul; but the responses at the seminars and otherwise are encouraging. What is needed is the 'mindset' required for arbitration or the 'culture of arbitration' that is already present in the UK. The mindset would be in the form of bias towards arbitration showing initiative and judicial innovation in actively promoting institutional arbitration.

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<sup>ii</sup> *Oil and Natural Gas Corporation v Saw Pipes Ltd* (2003) 5 SCC 705.

<sup>iii</sup> *Bhatia International v Bulk Traders SA* (2002) 4 SCC 105.

<sup>iv</sup> *SBP Co. v Patel Engineering Ltd* (2005) 8 SCC 618.