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A sixty month makeover: reinventing India as an “arbitration-friendly” jurisdiction

Promod Nair (J. Sagar Associates) · Tuesday, May 10th, 2011

Such a makeover will certainly not be achieved in sixty minutes. Sixty days will not nearly be enough. One would not, however, have to be too audacious to hope that India can reinvent itself as an arbitration-friendly part of the world in sixty months.

From its early years as a newly independent, fledgling democracy, India has relied significantly on five-year plans to design and deliver significant economic change. A succession of such plans starting from the 1950s has helped it realise increasingly impressive economic growth rates, especially over the last two decades. What it now urgently needs is a five-year plan to reform and modernise its courts and create the necessary infrastructure for arbitration to flourish in its shores.

A roadmap for arbitration reform was recently outlined by Fali Nariman in the inaugural LCIA India lecture. The title of the lecture could not have been more appropriate- “Ten Steps to Salvage Arbitration in India”.

In enhancing its arbitration credentials, India will do well to learn from Singapore’s experience in establishing itself as a leading international arbitration centre in just over two decades. During this period, SIAC has grown to be a pre-eminent arbitration institution in the region- a fact which is evidenced by its impressive caseload. The presence of a highly-regarded, home-grown institution is perfectly complemented by Maxwell Chambers, which provides state-of-the-art hearing facilities and support services. Pro-arbitration courts, specialist judges to hear arbitration-related disputes and rights of access for foreign lawyers to conduct arbitrations in the city State have all come together to aid Singapore’s rise as a hub of arbitration.

With the recent establishment of LCIA India and the possibility that other leading arbitral institutions may follow suit in establishing an on-the-ground presence in India, the absence of well-regarded arbitral institutions can no longer be a limiting factor. As in the case of Singapore, such initiatives would be ideally complemented by the setting up of well-resourced hearing facilities in each of India’s major cities. This would make the task of organising arbitrations in India much easier than is the case today.

However, excellent hearing facilities and the creation of physical infrastructure alone will not guarantee the success of arbitration in India. It will also need a pro-arbitration legal framework and a judiciary that is supportive of arbitration. Equally essential are a pool of lawyers who are skilled in arbitration work and arbitrators of unquestionable integrity and competence.

Encouragingly, there have been signs that India is gradually developing a specialist arbitration bar. This will help raise the standards of arbitration, ensure that it is no longer “an evening pastime or weekend hobby” for Indian litigators and increase the pool of domestic arbitrators. The government too seems eager to chip in with extra-legislative measures aimed at fostering a better arbitration culture. The law ministry has emphasised the need to build domestic arbitration capacity and train Indian lawyers, judges and arbitrators in global best practice in arbitration. Plans have been mooted to develop special faculties and departments for the study of arbitration at leading Indian universities. If these proposals are translated into action and yield the desired results, the practice of arbitration in India will undergo a substantial change.

What will however be crucial is for India’s courts to be more understanding and supportive of arbitration. In recent years, a number of “arbitration-unfriendly” judgments have given rise to concerns about India’s commitment to arbitration. The government recognises the problems caused by excessive judicial intervention, and a consultation paper released last year is candid in admitting that the Indian courts have interpreted the provisions of India’s arbitration law in a way that defeats the main object of the legislation. Corrective measures by way of legislative amendments are on the anvil to nullify the effect of these decisions.

Once the amendments are enacted into law, it is hoped that the courts will respect the not-so-subtle message from the Parliament 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 “arbitration-unfriendly” jurisdiction.

In the meanwhile, parties involved in India-related commercial transactions should take extra care in drafting dispute resolution clauses in their contracts. A guide highlighting specific issues to be aware of, and practical drafting solutions is available at

> www.herbertsmith.com/NR/rdonlyres/D55058D4-7CBD-4E4A-AB06-3566026A7B43/0/8619DisputeresolutionandgoverninglawclausesinIndiarelatedcommercialcontractsd7.pdf

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