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Arbitration Reform In India: A Look At The Hong Kong Model

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The Indian Government ('Government') plans to revamp the country's arbitration landscape and is considering amendments to its arbitration legislation. If the Government is keen on transforming India into a global arbitration hub, it could draw from the experience of Hong Kong, which is a successful model for arbitration in the Asia-Pacific region. Since the gazettal of China (including Hong Kong) by the Government, an increasing number of Indian parties are turning to Hong Kong for arbitration.

Adoption of the latest version of the UNCITRAL Model Law

The Indian Arbitration and Conciliation Act 1996 ('Indian Arbitration Act' or 'Act') is based on the 1985 version of the UNCITRAL Model Law and is currently out of sync with modern international arbitration practices. The Law Commission of India in its Report No 246 ('Law Commission Report') has recommended some amendments to the Indian Arbitration Act based on certain provisions of the latest version of the UNCITRAL Model Law (i.e., the 2006 version).

Hong Kong is the first Asian jurisdiction to adopt the latest version of the UNCITRAL Model Law. Its arbitration legislation, the Arbitration Ordinance (Cap. 609) ('Ordinance'), creates a user-friendly and unitary system that applies to both international and domestic arbitrations. The Government should consider modernising the Indian Arbitration Act by adopting the 2006 version or incorporating similar provisions to provide further guidance as to how a party may seek interim relief from the arbitral tribunal or the Indian courts, and how such relief can be enforced in India.

Confidentiality

Confidentiality is one of the key expectations of users of arbitration. The Indian Arbitration Act does not contain any provision on confidentiality regarding arbitral proceedings and awards. Given the high frequency of arbitration-related court proceedings in India, disclosure of confidential information in these public court proceedings might be a source of concern.

By contrast, Hong Kong has incorporated express provisions on confidentiality in its arbitration legislation. Section 18 of the Ordinance defines the scope of a party's duty of confidentiality and codifies a number of exceptions to such duty. Sections 16 and 17 of the Ordinance extend the scope of confidentiality to cover arbitration-related court proceedings and judgments. If the Government intends to provide for comprehensive protection of confidentiality to the arbitral process, sections 16-18 are a viable model to consider.

Interim measures

Under section 17 of the Indian Arbitration Act, the arbitral tribunal has the power to order interim measures of protection. Notwithstanding this power, the Act lacks any provision for enforcement of tribunal-ordered interim relief. As a result, Indian parties often seek interim orders from the Indian courts under section 9 of the Act. The Law Commission Report has recommended that tribunal-ordered interim relief be made enforceable as court orders. However, it is unclear whether the recommendation applies to interim measures issued by arbitral tribunals seated outside India.

In Hong Kong, section 61(1) of the Ordinance expressly provides that orders or directions made by arbitral tribunals in or outside Hong Kong are enforceable in the same manner as orders or directions of the Hong Kong court. These orders and directions include interim measures. To give more teeth to tribunal-ordered interim relief, the Government should consider expressly providing for the enforceability of interim measures made by arbitral tribunals seated in or outside India.

As a result of the *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* (2012) 9 SCC 552 decision ('BALCO') (see summary here), Part I of the Indian Arbitration Act does not apply to foreign-seated arbitrations where the arbitration agreements were concluded on or after 6 September 2012. Parties to foreign-seated arbitrations cannot approach Indian courts for interim relief in support of such arbitrations. In this regard, the Law Commission Report recommended that section 9 be made applicable to foreign-seated international commercial arbitrations, unless the parties agree to the contrary.

In Hong Kong, section 45 of the Ordinance empowers the Hong Kong courts to grant certain interim measures in support of arbitral proceedings whether commenced in or outside Hong Kong. Section 45 provides guidance on when the courts may grant such interim relief. The Government could consider a similar approach.

Emergency arbitration

The use of emergency arbitration has become popular with Indian parties. For foreign-seated arbitrations, the need for emergency arbitration has found greater resonance in the post-*BALCO* scenario. As to arbitrations seated in India, the Indian courts often deal with applications for urgent interim relief, since the Indian Arbitration Act does not expressly recognise emergency arbitration. Notwithstanding the Bombay High Court's recent decision in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd.* Arbitration Petition No 1062/2012, Judgement of 22 January 2014 where the Court issued an interim order in terms similar to an emergency arbitrator's award, there is scope for legislative amendments to recognise expressly emergency arbitration decisions in India. The Law Commission Report has made recommendations to expand the definition of 'arbitral tribunal' to include emergency arbitrators and to add provisions to recognise tribunal-ordered interim relief as an Indian court order. However, it is unclear whether the recommendation applies to emergency arbitrators' decisions issued outside India.

As an alternative to the above, sections 22A and 22B of the Ordinance provide that any emergency relief granted by an emergency arbitrator in or outside Hong Kong is enforceable in the same manner as an order or direction of the Hong Kong Court of First Instance. This is a separate set of provisions that states clearly the definition of an emergency arbitrator and leaves no question as to the enforceability of any emergency relief granted by an emergency arbitrator in or outside Hong Kong. Extending the definition of "arbitral tribunal" to include an emergency arbitrator without

qualifications would subject emergency arbitrators to provisions that should apply only to arbitrators, such as provisions regarding the procedure for constituting a three-member tribunal and the power of the tribunal to determine the existence or validity of the arbitration agreement.

Default appointing authority

In *ad hoc* arbitrations seated in India, if a party fails to appoint an arbitrator, an application is made to the Chief Justice of the High Court or the Supreme Court of India, as appropriate, to appoint the arbitrator. The time taken by the Court in making the appointment can vary and, in many cases, exceeds 6-7 months. In the dispute between Reliance Industries Ltd. and the Government over cost recovery at the KG-D6 block, the Supreme Court of India took more than a year to appoint the presiding arbitrator.

Further, if the parties have not agreed on the number of arbitrators, the Indian Arbitration Act provides for the appointment of a sole arbitrator. This may not, however, be suitable for certain complex and high-value cases that warrant the appointment of three arbitrators.

The Law Commission Report has recommended that the power to appoint arbitrators be transferred to the 'High Court' and the 'Supreme Court'. However, there is no recommendation in relation to the default number of arbitrators prescribed in the Indian Arbitration Act.

For *ad hoc* arbitrations seated in Hong Kong, the Hong Kong International Arbitration Centre ('HKIAC'), is designated as the default appointing authority by the Ordinance. If a party fails to appoint an arbitrator, HKIAC will normally appoint the arbitrator within two weeks. In the absence of party agreement, HKIAC will decide the number of arbitrators (i.e., one or three).

The Government may consider adopting the Hong Kong model by amending the Indian Arbitration Act to (i) designate a reputable arbitral institution as the default appointing authority; and (ii) remove the default number of arbitrators in the Act and empower the appointing authority to make the determination. With a backlog of more than 31 million cases, it would be difficult for the Indian courts to perform these functions in a timely manner.

Judicial support for Arbitration

Through a series of decisions such as *Bharat Aluminium v Kaiser Aluminium*, *Shri Lal Mahal Ltd v Progetto Grano Spa* (2012) 9 SCC 552 and *Reliance Industries Ltd v Union of India* (2014) 7 SCC 603, the Indian courts appear to be shedding their interventionist tag. However, recent decisions such as *Associate Builders* and *Western Geco* 2014 (4) ARBLR 307 have muddied the waters, making it hard to predict the direction the judiciary will adopt towards arbitration in any particular case.

The Hong Kong courts are internationally renowned for their pro-arbitration approach and have produced a body of case law that demonstrates Hong Kong's judicial support for the arbitral process. This is illustrated by (*inter alia*) the Hong Kong Court of First Instance decision in *T v TS* 2014 WL 7311 that if a party unsuccessfully resists enforcement of or challenges an award, or seeks unsuccessfully to reopen through court proceedings an issue dealt with in an arbitration, it will pay costs on an indemnity basis unless special circumstances exist. Further, in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111, 139F, the Court of Final Appeal held that the public policy exception to the enforcement of an award must be construed narrowly and only awards that are "*contrary to the fundamental conceptions of morality and*

justice" of the forum should be denied enforcement.

Recent statistics amply demonstrate the pro-arbitration bias applied by the Hong Kong judiciary. Between 2011 and 2014, the Hong Kong courts did not refuse to enforce any awards.

Following Hong Kong's consistent pro-arbitration approach is crucial to establishing India as an attractive place in which to arbitrate.

By looking at the Hong Kong arbitration model, the Government could strengthen India's current arbitration regime to ensure that it is in line with international standards.

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