

Many have lost faith in the Indian arbitration system

Hiroo Advani, founder and senior partner of Advani & Co., and president, The Arbitration Bar, is enthusiastic about the Supreme Court's latest decision in *Bharat Aluminium*, which aligns India with the global view on offshore arbitrations. He talks to **Soneera Sanghvi** about the challenges facing arbitration in India and what can be done to remedy the situation



SUDIPTA BANERJEE

Why is this decision so important for India?

Previously, India was the complete black sheep of the arbitration community as even if seat of the arbitration was in London, Paris or Singapore, the awards were challenged in India as per the ruling of *Bhatia International*.

Bhatia was a decision of three Supreme Court (SC) judges. Precedent bound smaller benches of the SC enforced them, even though several benches expressed serious misgivings regarding the decision. A reversal of the decision means that these international awards can no longer be challenged in the Indian courts. This will give complete confidence to the arbitration process.

What are some of the key highlights of this decision?

The *Balco* decision, apart from overruling *Bhatia*, also overruled the decision of *Venture Global*, an equally unpopular decision. The decision also appears to have restricted the grounds of challenge regarding enforcement of a foreign award under Section 48 of the Arbitration and Conciliation Act of 1996. This is a critical element, as ultimately parties want to enforce and recover the award granted by the arbitrators. The court also held that the parties were no longer entitled to seek interim relief under Section 9 of the Act even if the parties have assets in India. The court held that this was a lacuna in the act, and a matter

to be dealt with by the legislature, instead of the bench. This has left the issue of interim reliefs wide open, with no solution in sight. Additionally, this decision will be applied prospectively. We are now advising all our clients to resign their agreements to ensure that their agreements are effective after the date of the decision!

Any other arbitration decisions that should be reconsidered by the SC?

The *Masetro* decision, in effect says that if there are allegations of fraud, then the arbitrators cannot consider the same, and the dispute is no longer arbitrable. This is also against other international decisions.

The other decision is *Sakunya Holdings*, which takes the view that if in a suit, parties who are not signatories to the arbitration agreement have been joined, then under Section 8 of the Arbitration Act, the suit is no longer arbitrable. Litigants seeking to avoid arbitration can easily join parties to the suit to avoid litigation. However, a larger bench of the SC is reviewing *Sakunya*.

What can we do to speed up arbitration in India and make it more efficient?

Presently, the bulk of the arbitrators are retired judges of the SC or various high courts who simply have no experience in arbitrations, resulting in several adjournments and piece meal hearings spread out over years. Several general counsels

working for large corporations have completely lost faith in the Indian arbitration system. To resolve these issues, a number of law firms and senior practitioners have formed The Arbitration Bar (TAB). TAB aims to ensure discontinuation of piece-meal hearings. It also aims to ensure that arbitrations are no longer treated as a side activity of counsels, to be heard during non-court hours and weekends. TAB has prepared a set of approved procedures, which will hopefully receive judicial recognition, forcing arbitrations to follow the procedures to guarantee speedy hearings. TAB has also suggested prescribed fees for arbitrations on the value of the claim or an hourly basis. This safeguards against arbitrators who hold exceedingly brief hearings or repetitive adjournments in order to enhance their own fees. A large number of retired judges simply see arbitration as a future pension.

What is your view on the future of arbitration in India?

Presently the arbitration has a dim future in India, unless the SC tackles some of the issues discussed earlier, and accepts TAB's suggested procedures on fees and time-bound hearings. One of the most painful issues for the arbitration community is that arbitrators often take several years after concluding hearing to declare the award. At TAB, we have recognised this failing and suggested that all awards be issued within three months of the last hearing. ♦