JOURNEY TO THE 'ONLY GAME IN TOWN'

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I consider it to be a great honour to have been invited to join the Editorial Advisory Board of this Journal, and to be associated with CARTAL.

It is clear that arbitration and, in particular, *international* arbitration,[1] will play an important part in the development of India's forthcoming role as a top-rank player in international commerce. International arbitration, which has been my own field of interest for almost fifty years, is indeed a separate and distinguishable 'animal' (to adopt Jan Paulsson's analogy) from other forms of arbitration.

National (often referred to as 'domestic') arbitration is a relatively simple process, in which all the elements are rooted in the same substantive and procedural *national* law and culture. The parties are (by definition) of the same nationality, or resident in the same country; the arbitrators and the parties' counsel are qualified as such in the relevant country; the applicable substantive and procedural laws (*lex causae* and *lex arbitri*, respectively) are common to all the players; and the local courts, which may have to rule on challenges to, or enforcement of, the eventual award are similarly equipped.

In short, while the subject-matter of a *domestic* arbitration may be complicated, there is nothing particularly complex about the *process* itself. The local national law applies to interpretation of the contract, the substantive issues in dispute, the jurisdiction of the tribunal, its powers and duties, and the procedure to be followed - as well as to any interlocutory issues and challenges to, and enforcement of, the award.

The motivation of parties in agreeing to resolve their existing or future disputes by *domestic* arbitration is usually either to avoid (a) the expense and delay that are thought (rightly or wrongly) to be associated with litigation in national courts, and/or (b) exposing the details of their dispute (and the evidence) publicly in

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[1] See Professor Jan Paulsson's apt reflections on 'elephants' and 'sea-elephants', in his lecture delivered at McGill University in 2008(published in Stockholm International Arbitration Review 2008:2, 1-20)

'open court'.[2] The choice between resorting to national courts or domestic arbitration for resolution of disputes which, for any reason, cannot be settled by direct or third-party assisted negotiation is usually dictated by the parties' desire to avoid expense and delay and/or to maintain confidentiality.

By contrast, *international* arbitration is by definition concerned with the resolution of disputes between parties of *different* nationalities, citizenship or places of business. This is a situation which must be analysed from a completely different perspective. If the parties to an international business transaction are to consider referring any disputes for resolution by a *national court*, how do they choose the court? Should it be the court of the country in which one of the parties resides, or operates? Should it be the court of a third, 'neutral', country? Or is there an appropriate *international* court?

It takes only a few seconds of reflection to conclude that none of these options are feasible. However well-regarded, in the 21st century, the national courts of either of the parties are clearly not to be considered as sufficiently 'neutral'. In the relevant context there is no available *international* court; and the choice of a 'third country' national court would be absurd, given that both parties would have to hire 'foreign' lawyers, with a 'right of audience' in the relevant court; translate all the documents into the language used in the chosen court; and that such court would probably have to decide the case applying a law that would be 'foreign' to its judges.

Then there is the question of *enforcement* of the result. While there are a number of bilateral treaties covering the recognition and enforcement of national court judgments in other countries, there are few (if any) *multilateral* international treaties. Therefore, unless the parties could find an acceptable 'third-country' court which has bilateral enforcement treaties with the countries of both parties, the 'third-country-court' notion is not a practicable solution.

It follows that *international arbitration* is the 'only game in town' for the resolution of business disputes in a manner that will lead to a binding result that will be enforceable[3] across national boundaries. Many countries, as well as their judiciary and legal professions, have embraced this concept. They have introduced legislation, and promoted the training of specialist lawyers to handle *international*

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[2] In most developed modern systems, justice must not only be done, it must be 'seen to be done'; only in exceptional situations will hearings (and the ensuing judgments) be held, and kept, *in camera*.

[3] By definition, *arbitration* is a process that is intended to lead to a binding, and enforceable, result.

disputes, which are resolved under various sets of rules, principles and guidelines developed by consensus within the international arbitration community.[4]

In summary, India must decide whether to pursue its own path, based on long-standing national procedural traditions, or to open its arms and join the majority of the international trading community, at grass-roots level, by embracing new legislation based as closely as practicable on the UNCITRAL Model Law;[5] and by creating a procedural culture for *international* arbitrations that is aligned with current practices recognised within the international arbitration community.[6]

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[4] One of the most successful agencies of the United Nations is UNCITRAL, which has created and promoted a number of international instruments designed to increase the effectiveness and efficiency of the international arbitration process.

[5] The Indian Arbitration Act, 1996 is based on the UNCITRAL Model Law, but (a) it deviates from it in a number of material respects, and (b) has been interpreted by some Indian courts in a manner that does not accord fully with the way it has been interpreted in other leading Model Law jurisdictions.

[6] For example: by recognising the value as a precedent of the 2010 edition of the UNCITRAL Arbitration Rules; by introducing a system of evidence-gathering on the lines of the International Bar Association's Rules on the Taking of Evidence in International Arbitrations; and by encouraging the Indian judiciary, at all levels, to pay more than lip-service to the letter and spirit of modern international practice to the level of court intervention in the *international* arbitral process.