INDIA'S ARBITRATION LEGISLATION: DOES THE SINGLE ACT SERVE THE PURPOSE

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Internationally, India is generally considered to be 'on the brink' of enacting new legislation to govern arbitrations that take place within the territorial jurisdiction of the nation's courts. One question that must be addressed by the legislators is whether there should be one Act or two. The international arbitration community is watching with interest.

Approximately sixty countries have enacted new arbitration legislation since the UNCITRAL Model Law was published in 1985. They are divided between those that adopted the 'one Act' and 'two Act' solutions. A third approach, which may be described as a 'hybrid', is where particular jurisdictions have elected to adopt separate regimes to cover domestic and international arbitrations, but to incorporate both (sometimes in separate chapters) in a single Act, or Code. This 'hybrid' solution is effectively a sub-division of the 'two Act' approach.

Various considerations must be taken into account by legislators in states contemplating the enactment of statutory regimes designed to govern *international* arbitrations that will take place within their territories. At a 'drafting level' the national legislator is confronted by two potentially conflicting objectives.

The first is to retain the 'cultural' aspects of arbitration that have been applied over many centuries, if not millennia, within the jurisdiction in question. These are often regarded as essential. The second is to 'harmonise' the juridical regime to be applied in the country in question in order to treat domestic and international arbitrations in a reasonably consistent manner, and (in the interests of the state in question) to create a regime that is in accordance with modern international norms. For states that are close to becoming really major players in international commerce, such as India and Brazil, it must surely be

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important to accept international dispute resolution processes that accord with international norms.

For New York Convention[1] countries (which, by the early 21st century, had become the significant majority), this meant ensuring that the national law should require that their courts should comply with their international treaty obligations, in particular those that are to be applied to the enforcement and recognition of 'foreign' arbitral awards.

Before embarking on an analysis of the *One Act or Two* dilemma, it is desirable to set out a brief historical account of the modern international commercial arbitration since the middle of the 20th century. The context is that the design objective of arbitration is to create a private quasi-judicial process that will achieve a *final, binding and enforceable* resolution of a dispute. This is not too difficult in a national/domestic context. However, it is not easy in a 'cross-border' context, where the executory powers of a state other than that at the seat of arbitration must be available and effective.

The first real attempt to create an enforcement regime for arbitral awards across national boundaries was made through the Geneva treaties[2] in the mid-1920s. However, this system did not work effectively, because of the so-called *double-exequatur*[3] problem. The solution was not found until 1958, when the legendary Professor Pieter Sanders produced the drafted document 'on the back of the proverbial envelope during a weekend break of the then relevant UN Committee (ECOSOC). This led to the creation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter "NYC").

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 330 UNTS 38.

[2] Geneva Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, 92 LNTS 301.

[3] An 'Exequatur' is a legal document issued by a sovereign authority allowing a right to be enforced in the courts of that state without any further judicial process. 'Double Exequatur' means that the relevant sovereign authority in the country where enforcement was sought permitted the merits of an arbitral award made in another country to be reviewed in the courts of the 'enforcement state'. This was the feature that led to the failure of the 1927 Geneva Convention to gain wide acceptance.

This Convention has been a remarkably successful international instrument – possibly the most successful ever in the field of private international law - ratified by around 150 countries by the second decade of the 21st century. One of the key provisions (which logically might have been in the title, although it could have made it too long!) was that signatory states accepted an obligation to enforce *arbitration agreements* between parties to cross-border commercial contracts.

However, this was just the beginning, not the end, of the story, because it is necessary to have national legislation in place, and to create a body of practice rules for the courts, in countries where recognition and enforcement arbitral awards may be needed. The next step was for the United Nations(which had by then created a body called UNCITRAL[4]) to tackle the question of national legislation on international commercial arbitration in NYC[5] contracting states, in order to ensure that the courts in these countries would have the powers needed for the purpose of complying with their NYC treaty obligations. This project was moved forward in the 1980s. After much external consultation and internal discussion, the relevant UNCITRAL Working Group concluded that it would not be practical to achieve this aim through an international treaty, or convention, and it was decided to implement it by means of a *model law* – thereby focusing on *'harmonisation'*, rather than *'unification'*. The result, achieved in 1985, was the UNCITRAL Model Law on International Commercial Arbitration.[6]

The discussion published by the UNCITRAL Secretariat's Explanation of the Model Law indicates that national laws on arbitration revealed considerable disparities.[7] These not only concerned individual provisions and solutions at the level of detail, but also the development of the arbitral process itself. Some national laws may be regarded as outdated, often going back to the nineteenth century and frequently equating the arbitral

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[4] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, http://www.uncitral.org/uncitral/ (last visited Oct. 28, 2013).

[5] New York Convention Countries, describes the states that have signed and ratified the New York Convention of 1958.

[6] United Nations Commission on International Trade Law, UNCITRAL Model Law, 1985 (as amended in 2006), U.N. SALES NO.E.08.V.4.

[7] *Available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf,

process with litigation in national courts. Others may be considered as fragmentary in that they do not address some of the most important issues that exist in the context of modern international arbitration.

Research indicates that more than sixty jurisdictions have enacted new legislation on arbitration since the UNCITRAL Model law was launched in 1985.[8] Of this total, approximately 35% can be classified as *"two Act"* jurisdictions and the remainder as *"one Act"* jurisdictions. Some of the *"one Act"* jurisdictions have, like France, incorporated separate regimes for domestic as well as international arbitration. However, the statistics demonstrate that both the "*one Act*" solution and the "*two Act*" solution are both viable options.

States contemplating new arbitration legislation have to take a number of important decisions. The present short study explores only one particular element. This is whether states should introduce two Acts or one, and/or whether there is a viable alternative solution. The problem arises in particular for countries that wish to retain some kind of *'appeal'* or *'challenge'* on the merits of an arbitral award. For those that do, there is no real option. They need to have two separate regimes - one for domestic (or national) arbitrations, and another for international arbitrations.

This is because New York Convention countries are bound by their treaty obligations not to permit any challenge to '*foreign'* awards on their merits (including questions of law). In such jurisdictions challenges to arbitral awards are permitted only on the grounds set out in Article 5 of the NYC. These countries, therefore, need two arbitration regimes – one for domestic arbitrations permitting some level of challenge, or appeal, to the national courts on the merits of the award, and another for the recognition and enforcement of *foreign* awards. Fortunately, this was not a problem for England in the discussions that led to 1996 Arbitration Act. This was because in 1979, it had already been resolved to abandon the concept of *case-stated-type* appeals on points of law, except

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[8] *Available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

in relation to arbitrations in the so-called 'special categories' (which included maritime, commodities and insurance arbitrations).

However, in England, there were other angles to consider when looking at the topic. The right to appeal on points of law had already been abolished – except in the '*special category'* arbitrations – by the 1979 Arbitration Act. Nevertheless, in the 1990s there was still an intense debate about the level of judicial review that should be applied to '*foreign*' arbitral awards in respect of which enforcement was sought in England.

Further, there were some who felt that international and domestic arbitrations deserved two different regimes, in order that England`s own distinctive court procedures could be retained in the context of domestic arbitration. One of the arguments against this proposition was that there could be difficulties in establishing, at the outset of an arbitration, whether it was *'international'* or *'domestic'*, and another was if a decision on this was taken at the beginning of the process, whether it could be changed during the course of the arbitration, for example, if the nationality of a party changed while the arbitration was in progress.

Nevertheless, at that time, there was a clear majority in favour of implementing a single arbitration Act. The English Arbitration Act, 1996 was therefore prepared on the basis that it would (a) apply to both domestic and international arbitrations, and (b) be fully consistent with the UNCITRAL Model Law.

The result was that many detailed provisions were incorporated in order to ensure that the procedure in domestic arbitrations would be consistent with existing common law procedural rules, at the same time enshrining in it, all of the points of principle contained in the Model Law. The consequence was that, when passed through the parliamentary process, the English Arbitration Act, 1996 contained110 sections (articles), compared to the 36 articles of the Model Law. This may be the main reason why UNCITRAL has not recognised England as a *Model Law* jurisdiction, notwithstanding that (unlike some other countries) there is nothing in its1996 Arbitration Act that is inconsistent with the Model Law.

With the benefit of 20:20 hindsight, it would have been interesting if England had taken the opposite view on the *'one Act or two'* question. On the basis of UNCITRAL's own classification of national arbitration laws around the World, it seems likely that if it had taken the *'two Act'* path, England would have been categorised as a 'Model Law' jurisdiction for international arbitrations.

However, whatever the merits, there remains a genuine debate on the *'one Act or two?'* question in states that have prospective new arbitration legislation on their agendas. Is there any other credible path? The 'French Solution' of 2011, contained in the amendment to its Civil Code, is certainly worth serious consideration. France has adopted the *hybrid* approach. The new law replaces the previous text of Book IV of the *French Code of Civil Procedure*.[9] Embodied in Articles 1442 to 1527 of the *French Code of Civil Procedure,* the new legislation encompasses both domestic and international arbitrations in a single piece of legislation. It incorporates two separate regimes – one for international arbitrations, and the other for domestic arbitrations, in separate 'chapters'. It is possible that this may be no more than a cosmetic difference. 'Time alone will tell', but it is an ingenious solution and it would certainly be worthwhile for the legislators in India to review it carefully and take it into consideration when formulating their own new arbitration legislation.

In summary, states that wish to retain a distinctive system for the regulation of national/domestic arbitrations, particularly those that intend to offer opportunities for challenges to arbitral awards on the merits in their own courts, have no realistic option. They should adopt a 'two Act' system or, at least, a *hybrid* system incorporating provisions for two separate regimes in a single Act/Code along the lines implemented by France. However, states that are ready to abandon any opportunities for appeals to their own courts on the merits of a dispute (including challenges to arbitral awards on issues of law) that may have existed in their previous arbitration legislation, may find themselves content to adopt a *'one Act'* solution by implementing the UNCITRAL Model

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[9] *Décret no°2011-48 portantréforme de l'arbitrage'* was published on 14 January 2011 in the Official Journal of France. The new provisions comprise Articles 1442 to 1527 of the French Code of Civil Procedure (CCP).

Law, or something very close to it, to govern both domestic and international arbitrations.