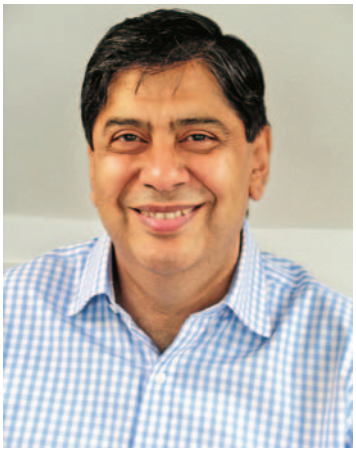
International Arbitrations:

Maturing in India

The concept of arbitration is not new to India, it goes back several thousand years. But there has been a sea change in approach in recent years, and a new international arbitration culture has emerged in India today, says Sarosh Zaiwalla



Zaiwalla is senior partner in Zaiwalla & Co Solicitors London. He was a member of the International Court of Arbitration of the ICC in Paris from January 1998 to December 2002. He is also a practicing arbitrator and has been involved in over 800 international commercial and maritime arbitrations
The views expressed here are personal

It is often said that honest men dread arbitration more than lawsuits. Indeed, *Russell on Arbitration*, the English practitioner's Bible on international arbitration, began the first chapter of its early editions with these very words. International arbitration has come a long way since then.

In this article I will discuss, using my 25 years of experience in international arbitrations in London and my experience as a former Member of the International Court of Arbitration of the International Chamber of Commerce (ICC), whether the arbitration culture has finally matured in India to an international standard and what further paths it will take. I will draw from my personal experience of being involved in the development of dispute resolution mechanisms in the People's Republic of China, and having represented Chinese state corporations in several London arbitrations.

Everyone involved knows that there has been a sharp rise in international arbitrations throughout the world. This is simply because of globalisation and increasing global trade. Many deals from India are across borders. In such deals, unless one party has a clear upper hand, neither side would like to go to the other side's courts. An arbitration agreement in international contract bridges this gap and provides a neutral forum to resolve disputes. It takes disputes outside the jurisdiction of the national courts.

This move away from national courts means that the dispute resolution takes place in a neutral venue and with arbitrators from different cultures, who are independent of the parties involved. This is an important aspect because the international parties' local culture effects the way a party interprets a term, say in English, in a contract. The nuances of words in the English language are often understood differently in different countries' cultures.

India has now emerged, along China, as one of the two choice destinations for investments. For India to have reached this long overdue position is not surprising. What is surprising is the time it has taken. China reached this position much faster after the Chinese leadership decided that it was necessary to link China's economic development with foreign investment.

One reason for China's ability to make faster progress is because it did not have the same commitment to the principles of modern western democracy that India has. When I first visited China in 1991 there were only four state-owned law firms. These firms were under direct control of the state in one way or the other.

Even though the Chinese legal profession has grown considerably, the state leadership has always managed to monitor and influence this growth. The Chinese Institutional Arbitration Body (CITEC) has been able to generate confidence in the international investor community by ensuring that its awards are fair and just and reflect commercial reality. There would have been a fiat to that effect from the Chinese political leadership, which would be followed without any argument. To strengthen this confidence, CITEC welcomed foreign arbitrators to be involved in the process. CITEC maintains a panel on which some of the most eminent international arbitrators are invited to serve.

It is a rather different picture in India. Arbitration is not new to this country. It goes back several thousand years. It did not necessarily rise from the courts. Arbitration parties in India meant a respected individual or individuals, often good friends of one or both of the sides. Disputes were sought to be decided in a friendly way. There were on many occasions no Chinese walls between the dispute decider and the parties. It was not unknown for an Indian arbitrator to talk to one of the parties without the other being present. Of course, this was done in good faith. But to a foreign disputant, not familiar with Indian culture, it could give rise to serious misgiving in terms of lack of independence.

In the past few years, I have found a sea change in approach. Gone are the days when international arbitrations were monopolised by retired Supreme Court and

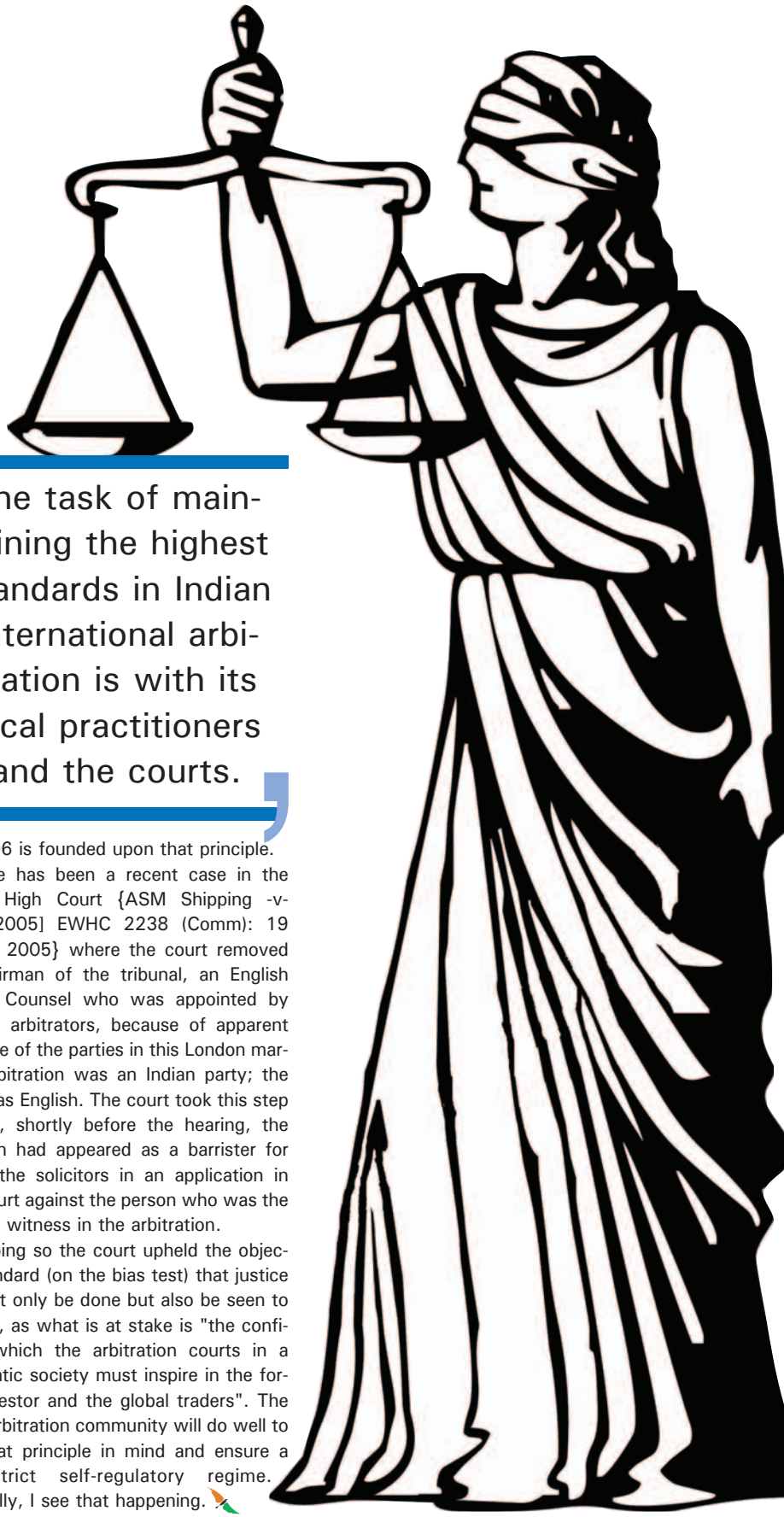
High Court judges who would conduct the arbitrations at 5 pm for two to three hours with frequent adjournments. The retired judges were not familiar with the dynamics of modern arbitration. Some of them were slow to accept changes. Others tried and failed because they did not get cooperation from their fellow old-fashioned arbitrators.

But a new international arbitration culture has emerged in India today. A young breed of Indian lawyers has adopted the style of day-to-day hearing with a fine-toothcomb approach to the investigation of the issues involved. These new Indian lawyers, many of them trained in the US and Europe, have recognised that the only way for India to instil confidence in foreign investors is to ensure that they have the security of the rule of law in the event things go wrong with their investment, as it often does.

The young breed of Indian lawyers also accepts that the old Indian arbitration culture (and on a rare occasion a corrupt arbitrator) did considerably slow down India's ability to attract foreign investment. I find that these lawyers are exercising a much more self-regulatory approach than ever before in ensuring the highest international standards. For example it is not now unknown in India for a tribunal of three to contain two foreign arbitrators in an international arbitration conducted on Indian soil, which is governed by the Indian Arbitration Act, 1996.

The 1996 Act has proved to be a landmark statute. This new act is intended to give parties considerable power to shape the arbitration process and curb the ability of the courts to intervene in the proceedings. It also showed that India was prepared to take a more international approach. The task of maintaining the highest standards in Indian international arbitration is in the hands of its local practitioners and the Indian courts.

There can be no more serious or substantial injustice to a foreign investor than having a tribunal that is not impartial. The right to a fair hearing by an impartial tribunal is fundamental. The Indian Arbitration



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Act 1996 is founded upon that principle.

There has been a recent case in the English High Court {ASM Shipping -v- TTMI [2005] EWHC 2238 (Comm): 19 October 2005} where the court removed the chairman of the tribunal, an English Queens Counsel who was appointed by the two arbitrators, because of apparent bias. One of the parties in this London maritime arbitration was an Indian party; the other was English. The court took this step because, shortly before the hearing, the chairman had appeared as a barrister for one of the solicitors in an application in High Court against the person who was the principal witness in the arbitration.

In doing so the court upheld the objective standard (on the bias test) that justice must not only be done but also be seen to be done, as what is at stake is "the confidence which the arbitration courts in a democratic society must inspire in the foreign investor and the global traders". The Indian arbitration community will do well to keep that principle in mind and ensure a very strict self-regulatory regime. Thankfully, I see that happening.