India

Chapter 13: Dispute resolution

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13.1 Structure of the courts

The ease of doing business is largely dependent on the legal and regulatory framework of a country. An effective judiciary enabling timely adjudication of disputes, coupled with recognition of the importance of enforcement of contractual obligations is a key factor contributing towards building investor confidence in a country.

A key factor that contributes to boosting investor confidence, as recognised by the World Bank is the enforcement of contracts supported by timely adjudication of commercial disputes. The judiciary in India, like most countries, has a hierarchical structure, comprising the Supreme Court as the apex court of the country, High Courts as the highest courts in states and subordinate courts in various districts supervised by the High Courts.

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19 '6. In section 5 of the principal Act,
(a) after clause (c), the following provisos shall be inserted, namely: —
"Provided that the Central Government may in public interest and in consultation with the Commission prescribe any criteria other than those prescribed in clauses (a), (b) and (c), the fulfilment of which shall cause any acquisition of control, shares, voting rights or assets, merger or amalgamation to be deemed to be a combination under this section and a notice for any acquisition of control, shares, voting rights or assets, merger or amalgamation fulfilling such criteria shall be given to the Commission under section 6."'
http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

20 (1) C-2015/02/246, which involved the transfer of business, assets and operations of two cement plants owned by Jaiprakash Associates Limited to UltraTech Cement Limited; and (2) C-2016/10/443, which involved the amalgamation of Agrium Inc and Potash Corporation of Saskatchewan, Inc.

21 '6. In section 5 of the principal Act, —
…
(b) for clause (a) of the Explanation, the following clause shall be substituted, namely: —
"(a) "control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—
(i) one or more enterprises, either jointly or singly, over another enterprise or group; or
(ii) one or more groups, either jointly or singly, over another group or enterprise;"'
http://feedapp.mca.gov.in//pdf/Draft-Competition-Amendment-Bill-2020.pdf accessed 13 May 2020.

Further, to ensure the timely, efficient and effective resolution of commercial disputes, the Commercial Courts Act, 2015, as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (the '2018 Amendment'), was enacted. The Commercial Courts Act is primarily aimed at expediting commercial disputes at the original and appellate levels, by way of, inter alia, specialised fora, Commercial Courts at the district level and Commercial Divisions in all High Courts, ordinary original civil jurisdiction, and Commercial Appellate Divisions in the High Court so as to bring about a time-bound adjudication of commercial disputes. The specialised Commercial Courts have jurisdiction to try all suits and applications relating to a commercial dispute of a specified value.[22] The pecuniary jurisdiction of Commercial Courts has been brought down to INR 300,000 from the earlier specified value of INR 10m by way of the 2018 Amendment.

The Commercial Courts Act provides that any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of 60 days from the date of judgment or order. Further, any person aggrieved by the judgment or order of a Commercial Court at the level of a District Judge exercising original civil jurisdiction or, as the case may be, the Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of 60 days from the date of the judgment or order. [23]

13.2 Use of arbitration

Arbitration has emerged as a popular and effective means of dispute resolution in India, governed by the Arbitration and Conciliation Act, 1996 (the '1996 Act'). The government has made concerted efforts to introduce global best practice into the arbitration regime with the intention to make India a global arbitration hub. For instance, key amendments have been brought about by the Arbitration and Conciliation (Amendment) Act, 2015 (the '2015 Amendment') and the Arbitration and Conciliation (Amendment) Act, 2019 (the '2019 Amendment'). These amendments are designed to improve the perception of India as an international arbitration jurisdiction by attempting to strengthen institutional arbitration, reduce judicial interference and empower arbitral tribunals, so as to build confidence in arbitration as an effective mechanism of adjudication of commercial disputes. As far as adjudication of challenges to arbitral awards are concerned, the Indian judiciary is increasingly taking a non-interventionist approach. Arbitrations are now characterised by limited interference of courts from the stage of referral of disputes to arbitration until proceedings to set aside/challenge an arbitral award. Some of the key changes to the 1996 Act in this regard are:

13.2.1 Interim relief

Prior to the 2015 Amendment parties could seek interim relief from courts prior to the commencement of arbitration, but were under no compulsion to commence arbitral proceedings in a timely manner. Therefore, parties enjoyed the benefit of interim orders from courts for extended periods of time. To address this anomaly, the 2015 Amendment mandated that arbitration must commence within 90 days from the date of the interim order. Moreover, the courts are not

22 The Commercial Courts Act 2015, s 6.

23 *Ibid*, s 13.

to entertain any application under section 9 of the 1996 Act, unless they find that circumstances exist that may not render the remedy under section 17 (ie, seeking interim relief from the arbitral tribunal) efficacious.

Under section 17 of the 1996 Act, which is applicable to India-seated arbitrations, interim measures of protection may be passed by the arbitral tribunal during the arbitral proceedings. Now, by virtue of the 2015 Amendment, the arbitral tribunal has same power for making orders under section 17 of the 1996 Act as the court has for the purpose of, and in relation to, any proceedings before it under section 9, and any such order passed by the arbitral tribunal is enforceable under the Code of Civil Procedure 1908 (CPC) in the same manner as if it were an order of the court.

13.2.2 Proceedings to set aside or challenge the enforcement of an award

The 2015 Amendment brought much needed clarity to the ambit of the term 'public policy' in section 34(2)(b) of the 1996 Act, which is applicable for proceedings to set aside an arbitral award rendered in an India-seated arbitration. By way of this amendment, two explanations were added to section 34(2)(b) specifying that an award may be set aside on this ground only if the award: (1) is vitiated by fraud or corruption; (2) is in contravention with the fundamental policy of Indian law; or (3) is in conflict with the most basic notions of morality or justice. The additional ground of 'patent illegality appearing on the face of the award' remains available as an independent ground for setting aside an arbitral award only for India-seated arbitrations other than international commercial arbitrations. The 2015 Amendment has, however, clarified that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

Further, the 2019 Amendment clarified that the scope of challenge to an arbitral award under section 34 is limited to a challenge based upon the record of the arbitral tribunal. Therefore, wide-ranging challenges based on evidence not led before the arbitral tribunal – which create uncertainty and increase time and cost related to the ultimate enforcement of the arbitral award – has been restricted, providing an impetus for the swift enforcement of awards. As regards the enforcement of foreign awards under section 48, all grounds for challenge except 'patent illegality' are available.

Indian courts have increasingly adopted a pro-arbitration approach and even staved off challenges to awards on the ground of breach of public policy for alleged violation of foreign exchange regulations. One of the key decisions in this regard was that of the Delhi High Court in *NTT Docomo Inc v Tata Sons Ltd, 2017 SCC OnLine Del 8078,* wherein the Delhi High Court noted that:

> 'The issue of an Indian entity honouring its commitment under a contract with a foreign entity which was not entered into under any duress or coercion will have a bearing on its goodwill and reputation in the international arena. It will indubitably have an impact on the foreign direct investment inflows and the strategic relationship between the countries where the parties to a contract are located. These too are factors that have to be kept in view when examining whether the enforcement of the Award would be consistent with the public policy of India.'

Prior to the 2015 Amendment a mere admission of a challenge to an India-seated award meant that the award could not be enforced. Such a grant of an automatic stay on the mere admission of a challenge to an award led to a lot of frivolous challenges to arbitral awards. Thus, to encourage a

pro-enforcement environment, the 2015 Amendment introduced changes to section 36 of the 1996 Act mandating that:

- a separate application be made by an award debtor seeking stay over enforcement of the award; and
- while considering the application for grant of stay in the case of an arbitral award for payment of money, the court should have due regard to the provisions for grant of stay of a financial decree under the provisions of the CPC, that is, typically for the deposit of security for costs. Practically, commercial courts in India have directed the party challenging the award to deposit security in the range of 50–100 per cent of the award amount.

13.2.3 Thrust towards institutional arbitration

The government is proactively investing in building infrastructure for arbitral institutions, such as the setting up of the New Delhi International Arbitration Centre and Mumbai Centre for International Arbitration, to bring India on a par with jurisdictions such as Singapore and London, which boast of pre-eminent arbitral institutions such as the Singapore International Arbitration Centre (SIAC) and London Court of International Arbitration, respectively.

There is a thrust towards the development of an arbitration bar and expertise. The 2019 Amendment is clear in its intention to encourage institutional arbitration in India and regulate the development of an arbitration bar, including by way of proposing setting up the Arbitration Council of India (ACI), specifying qualifications for arbitrators and tasking the arbitral institutions rather than courts with the functions of the appointment of arbitrators under the amended section 11. However, these provisions are yet to be notified for enforcement.

13.2.4 Other important reforms to the 1996 Act

Apart from the above amendments, there are other noteworthy amendments brought about by the 2015 and 2019 Amendments.

Mandatory disclosure of impartiality

Under section 12, the 2015 Amendment has made it mandatory for an arbitrator to make a declaration of independence and impartiality. The Fifth Schedule lists the grounds that would give rise to justifiable doubts as to the independence or impartiality of the arbitrator. The Seventh Schedule sets out the conditionalities under which an arbitrator is ineligible to act as such unless, subsequent to disputes having arisen, parties have waived this disqualification by way of an express agreement in writing. Further, section 14 provides for the substitution of an arbitrator in the event of the termination of his/her mandate. This is intended to encourage greater transparency and accountability in the process.

Extension of the time by consent of parties

The 2015 Amendment introduced section 29A into the 1996 Act with the aim of effective and time-bound disposal of India-seated arbitrations. This section provided that an arbitral award must be rendered within 12 months from the date on which the arbitral tribunal enters reference, and such a time period may be extended by a period of six months by the mutual consent of parties. A further extension of this period could only be made by judicial order and would invite scrutiny into the conduct of the arbitral proceeding and potential cost consequences to the parties or tribunal. However, this provision has been further amended by the 2019 Amendment to provide that in the case of non-international commercial arbitrations, the award must be passed within 12 months from the date of completion of pleadings. Further, pleadings are to be completed within six months from the date upon which the arbitrator receives notice of his/her appointment in writing, whereas there is no mandated timeline for India-seated international commercial arbitrations, which are expected to meet these timelines on a best endeavours basis.

Fast-track procedure

Section 29B was introduced in the 2015 Amendment for the purpose of the completion of arbitrations involving small claims through a fast-track procedure. Such arbitrations are to be conducted through documentary evidence and must be completed within six months.

Costs

Section 31A was introduced in the 2015 Amendment to bring the concept of the 'costs follow events' regime to India and discourage frivolous claims.

Confidentiality

The 2019 Amendment introduced section 42A, which obligates the arbitrator, arbitral institution and parties to the arbitration to maintain confidentiality of arbitral proceedings, except where the disclosure of an award is necessary for its implementation and enforcement.

All the above amendments to the 1996 Act have opened up a gamut of options for parties seeking to resolve disputes through arbitration to find timely, efficient and cost-effective dispute resolution through arbitration.

13.3 Other forms of dispute resolution

Apart from litigation and arbitration, other ADR mechanisms in India include mediation and conciliation. While they are effective mechanisms to resolve the pendency of litigation in India, they are less popular in India as a matter of practice. In fact, the CPC encourages ADR. Section 89 of the CPC stipulates that where it appears to the court that there exist elements of settlement that may be acceptable to the parties, the court may formulate the terms of the settlement, subject to input from the parties, and refer them for resolution by means of arbitration, conciliation, mediation or judicial settlement through the Lok Adalat. However, this provision is severely underutilised in India.

Further, the 2018 Amendment has added section 12A to the Commercial Courts Act 2015, which introduced the concept of pre-institution mediation. Essentially, this contemplates mediation of commercial disputes prior to the institution of a suit in the case of suits that do not contain a plea for urgent interim relief. It also provides for the enforcement of settlement terms arrived at between parties. In this regard, the amendment provides that the written settlement between the parties would have the same status as that of an arbitral award under section 30 of the 1996 Act. However, pre-institution mediation is still at a nascent stage in India and has not yet emerged as an effective means of resolution of disputes between parties.

Further, under the Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018, it is only where both parties to the commercial dispute appear before the concerned authority and give consent to participate in the mediation process that the authority may refer the matter to a mediator. However, the reality is that the average commercial litigant in India, does not, to date, view mediation as an effective means for binding dispute resolution. This is further augmented by the lack of adequate infrastructure for training mediators and the consequent non-availability of a skilled pool of mediators who can effectively resolve disputes through a non-adversarial process, such as mediation.

Interestingly, the 2019 Amendment mandates the ACI to take all such measures as may be necessary to promote and encourage arbitration, mediation, conciliation or other ADR mechanisms and, for that purpose, to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration. However, the relevant provision has not yet been notified for enforcement, and given the existing lack of infrastructure, the functions of the ACI pertaining to the promotion of mediation remain unclear. Therefore, cultivating a skilled pool of mediators through concerted efforts at training and developing adequate infrastructure to support and promote mediation and conciliation as an effective dispute resolution mechanism is critical for the growth of these ADR mechanisms as effective tools for commercial dispute resolution in India.