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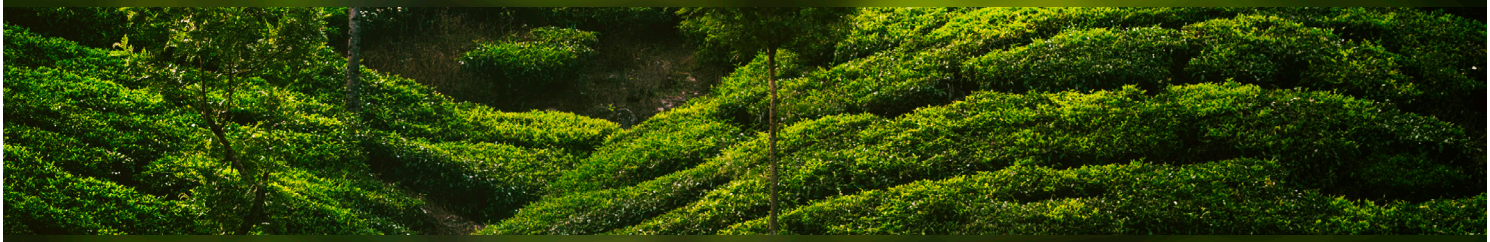

INDIA ARBITRATION ROUND-UP:
2018 SO FAR

INDIA ARBITRATION ROUND-UP: 2018 SO FAR

Recent months have seen continued positive steps in the field of arbitration in India. In this update, we look back at the key developments so far in 2018. These include a number of pro-arbitration decisions from the Supreme Court of India, a refusal to grant an injunction against an investment treaty arbitration brought against the Indian government and proposed amendments to India's arbitration legislation.

Both legislative and, to some extent, judicial decisions are being driven by India's policy objective of improving its position in the World Bank's annual Doing Business rankings (where difficulties in enforcing contracts still drag down India's overall ranking). Efforts to increase the viability of India as a reliable seat of arbitration and enhance the integrity of institutional arbitration in India are both encouraging initiatives which, in the long run, should facilitate the process of resolving disputes with Indian counterparties.

Key developments

- Recent decisions suggest an increasingly non-interventionist approach to enforcement of foreign awards.
- Delhi High Court refuses to grant injunction against Vodafone investment treaty arbitration.
- Proposed legislative reforms seek to strengthen institutional arbitration in India.
- Supreme Court issues pro-enforcement decisions in relation to India-seated arbitrations.
- Supreme Court provides clarifications on the extent to which foreign lawyers and law firms can operate within India.

Enforcement of foreign arbitral awards continues upwards trend

As the ultimate recourse for recovering any damages in India-related business ventures, the enforcement and execution of awards is always an issue of special concern to foreign investors, particularly where the arbitrations involve parties whose assets are located in India. With that in mind, recent cases on enforcement of foreign awards make encouraging reading.

Delhi High Court enforces Chinese award despite CIETAC split

The Delhi High Court recently enforced a 2015 arbitral award in an arbitration administered by the China International Economic and Trade Arbitration Commission (CIETAC), despite an application resisting enforcement based (among other things) on the CIETAC split with its sub-commissions in 2012.

The underlying arbitration agreement in *LDK Solar High Tech (Suzhou) Co Ltd v*

Hindustan Clean Energy Ltd, provided for the arbitration at the CIETAC in Shanghai. In 2012, the Shanghai sub-commission of CIETAC had spun off to establish an independent institution called the Shanghai International Arbitration Centre (SHIAC). Hindustan Clean Energy resisted enforcement of the award on the ground that following the 2012 spin-off, the arbitration should have been administered by the SHIAC. The Court rejected this contention and held that the arbitration agreement clearly provided that disputes would be arbitrated through "CIETAC." While Shanghai was the place of arbitration, the agreement did not state that the Shanghai sub-commission of CIETAC would administer the arbitration.

The Court also referred to the CIETAC Rules 2005 which made it clear that the agreement as to the place of arbitration was different from the agreement as to which branch of CIETAC should administer the case.

No statutory appeal against enforcement of foreign award

In *Kandla Export Corporation & Anr v OCI Corporation & Anr* the Supreme Court confirmed that statutory rights of appeal under the Commercial Courts Act, 2015 (the Commercial Courts Act) would not apply in respect of an order to enforce a foreign award.

This case concerned a 2014 arbitral award in favour of OCI Corporation made in London under the Rules of the Grain and Free Trade Association. Kandla Export had unsuccessfully appealed against the award before both the English High Court and the Court of Appeal. In India, the Gujarat High Court then rejected Kandla Export's objections to enforcement.

Before the Court, Kandla Export sought to argue that, under Section 13(1) of the Commercial Courts Act, it was entitled to

appeal the enforcement decision to the Commercial Appellate Division of the Gujarat High Court. But the Court found that in all cases of enforcement of foreign awards, rights of appeal are provided for under the Arbitration and Conciliation Act 1996 (the Arbitration Act), which specifically provides that an appeal may only lie from an order *refusing* to enforce an award. Kandla Export's only right of appeal in this case would be by way of a special leave petition to the Court (which had already been dismissed in this case).

Encouragingly, the Court took note of the broader purpose of both the Commercial Courts Act and the Arbitration Act – namely the speedy resolution of commercial disputes. In its conclusion, the Court noted that "*enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community.*"

US$550 million ICC award enforced by Delhi High Court

In *Daiichi Sankyo Company Limited v Malvinder Mohan Singh And Ors*, the Delhi High Court granted enforcement of a US$550 million ICC award made by a Singapore-seated tribunal in 2016. In the arbitration, Daiichi Sankyo alleged that the Singh brothers had concealed and misrepresented critical information when selling their interest in Indian pharmaceutical company Ranbaxy in 2008.

The Singh brothers challenged enforcement of the award under Section 48 of the Arbitration Act on the basis that the enforcement would be contrary to the public policy of India. Essentially, they argued:

- the tribunal's award of damages was contrary to Indian law;
- the award of consequential damages was beyond the tribunal's jurisdiction;
- the claim was barred by limitation;
- an award of interest amounts to "an award of multiple damages"; and
- an award of damages against minor respondents is illegal and unenforceable.

The Court rejected all objections except the last. In doing so the Court took a notably light touch approach to intervening on the basis of public policy, noting that "fundamental policy of Indian

law" does not mean provisions of the statute but substratal principles on which Indian law is founded. The Court also found that quantification of damages was a fact-based enquiry which was necessarily within the domain of the arbitral tribunal.

As for amounts awarded against minors, the Court held that protection of a minor is a fundamental policy and a substratal principle on which Indian law is founded. With that in mind, the Court found the nature of the awards against the minors to be "shockingly disproportionate" (noting that any gains made by the estate of the minors on account of the fraud paled in comparison with the potential liabilities under the ICC award).

Interestingly, the ICC award remains subject to a set-aside challenge in Singapore (in which two eminent Indian senior advocates, Harish Salve and Gopal Subramanium, were admitted to argue the application). The judgment is expected shortly.

Interim injunction against treaty arbitration vacated

Vodafone given green light to proceed

In the judgment of *Union of India v Vodafone Group Plc* delivered on 7 May 2018, the Delhi High Court refused to restrain Vodafone from proceeding with an arbitration against the Indian government under the India-UK bilateral investment treaty (BIT) – in effect reversing an interim injunction which it had previously granted.

By way of background, in April 2017 Vodafone invoked the India-Netherlands BIT and filed a claim against the government of India in connection with the retrospective tax liability imposed on it for its US$11 billion acquisition of shares in an Indian mobile phone operator. While that arbitration was pending, Vodafone brought another arbitration under the India-UK BIT. In a decision which had raised eyebrows amongst the international arbitration community, the Indian government had previously obtained an interim injunction against the second arbitration on grounds that the claim was too similar to the arbitration under the India-Netherlands BIT.

But in a decision more in line with conventional arbitration theory, the Court gave Vodafone the green light to continue with both arbitrations, on the basis that whether or not the second arbitration amounted to an abuse of process was a matter for the tribunal in those proceedings to decide. The Court also took account of Vodafone's offer to consolidate the two arbitrations, with India's consent.

While this is undoubtedly a pro-arbitration decision, certain observations made by the Court may still have important implications for investment treaty arbitrations against the Indian government. Notably, the Court considered that investment treaty arbitrations are fundamentally different from commercial arbitrations, on the basis that the cause of action in such claims is grounded on state guarantees and assurances (which are not commercial in nature). Consequently, in the Court's view, the Arbitration Act would not apply to investment treaty arbitrations and the inherent powers of the Court would not be circumscribed by the Arbitration Act.

Nonetheless, the Court found that Indian domestic courts are not completely divested of their inherent jurisdiction to restrain investment treaty arbitrations which are "*oppressive, vexatious, inequitable or constitute an abuse of the legal process,*" especially in circumstances where neither the seat of arbitration nor the curial law has been agreed upon. But the Court also added that as a matter of self-restraint, the Indian domestic courts should not generally exercise their jurisdiction in respect of an investment treaty arbitration unless (i) there are compelling circumstances; (ii) the court has been approached in good faith; and (iii) no alternative efficacious remedy is available.

Further amendments to India's arbitration legislation in the pipeline?

With the ink on the most recent 2015 amendments to the Arbitration Act (the 2015 Amendment Act) barely dry, a further round of amendments to India's arbitration legislation has already been proposed. In March 2018, the cabinet approved the Arbitration and Conciliation (Amendment) Bill 2018 (the 2018 Amendment Bill), in which the main features of which include:

- Establishment of a new body called the Arbitration Council of India, responsible for grading and accreditation of arbitral institutions in India;
- Arbitral appointments in ad hoc arbitrations would be made by arbitral institutions specifically designated by the Supreme Court or the High Court (rather than the courts themselves);
- The controversial 12-month time limit for issuing an arbitral award in India-seated arbitrations would no longer apply to international arbitrations. For domestic arbitrations where the 12-month time limit applies, the timeline would begin from the completion of pleadings, rather than from the date of constitution of the tribunal; and
- An express duty of confidentiality would be imposed in relation to all arbitral proceedings in India, except for the award itself.

The proposed amendments reflect the policy initiative, flowing from a 2017 report of the High Level Committee chaired by retired Justice Srikrishna of the Supreme Court, to strengthen institutional arbitration in India and encourage a move away from *ad hoc* arbitration which has traditionally dominated the Indian landscape.

The efforts to promote institutional arbitration coincide with plans to launch a New Delhi International Arbitration Centre (NDIAC) (unveiled in January 2018). Meanwhile, the Mumbai Centre for International Arbitration (MCIA) is already administering cases under its own arbitration rules and proving to be a realistic option for high-quality institutionally administered proceedings in India.

The 12-month time limit in respect of Indian arbitration proceedings introduced under the 2015 Amendment Act does not appear (thus far) to have caused as much disruption as might have been anticipated, with most parties by all accounts agreeing to six-month extensions where appropriate and arbitrators endeavouring to render awards within the statutory deadline. However, the proposed removal of the 12-month time limit from international arbitrations (seated in India) reflects a perception that a strict timeline may not be appropriate for complex disputes involving an international element and may, ultimately, discourage parties from using India as a seat in international arbitrations.

It is as yet unclear when or in what form the proposed amendments will take effect.

India-seated arbitration: procedural complexities

Courts of the seat barred from deciding application for attachment of assets

The recent decision in *Antrix Corporation Ltd v Devas Multimedia* is the latest instalment of a long-running saga, which has now highlighted the procedural difficulties still associated with India-seated arbitrations.

An ICC tribunal seated in New Delhi awarded Devas US$562 million (plus interest) in September 2015 on the basis that Antrix had unlawfully terminated a 2005 agreement. Upon obtaining the award, Antrix proceeded to file a "Section 9" application to attach Antrix's bank accounts in the Delhi courts.

However, even though the arbitration agreement in the original agreement identified New Delhi as the seat of arbitration, the Delhi High Court took the

view that it was barred from hearing and deciding Antrix's application on the basis that Devas had filed a previous "Section 9" application in the Bangalore courts in 2011, seeking an order restraining Devas and the tribunal from continuing with the arbitration. The Court found that if Antrix's Section 9 petition is maintainable, then that would be the "end of the matter" as far as the Delhi courts were concerned.

In the decision, the Court highlighted the distinction, as provided for under the Arbitration Act, between the courts having "subject-matter jurisdiction" i.e. the courts within whose jurisdiction, the cause of action is located and the courts of the seat, finding that both courts have jurisdiction over the arbitral process.

The Court found that *only* if the parties had designated the seat as New Delhi and also provided an exclusive forum selection clause in favour of the courts of New Delhi, could it be said that the Delhi courts would have exclusive jurisdiction over all applications under the Arbitration Act. This appeared to depart from the Supreme Court's 2017 decision in *Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.*, where the court held that "*the moment the seat is designated, it is akin to an exclusive jurisdiction clause*" – although in that case, the parties both designated Mumbai as the seat, and provided an exclusive forum selection clause in favour of the Mumbai Courts.

Most international parties will be familiar with the need to specify the seat of arbitration in their arbitration agreements. But in the Indian context, the *Antrix* decision is a reminder that parties negotiating India-seated arbitration agreements may also need to consider expressly providing which courts have "exclusive jurisdiction" over arbitration-related court proceedings. Otherwise, there is a risk that court proceedings in relation to the arbitration may be dragged before a different forum or multiple forums.

Enforcement of domestic Indian awards

Two Supreme Court decisions in relation to the enforcement of India-seated arbitral awards have removed some of the confusion around the enforcement procedure, and are welcome steps in showing the Court's pro-arbitration leanings and pro-enforcement policy.

It is important to note that these decisions dealt with provisions under Part I of the Arbitration Act – which apply only where the place of arbitration is India. While a foreign seat of arbitration is still the preferred option for arbitration agreements involving foreign investors, the increasingly arbitration-friendly jurisprudence together with gradual legislative overhaul means that arbitration in India – preferably under the rules of a reputable arbitral institution – is becoming a more viable option in appropriate circumstances.

Supreme Court finds modernised enforcement regime should apply retrospectively

Changes to the Indian arbitration regime introduced by the 2015 Amendment Act were designed to streamline the arbitral process and in particular to facilitate the enforcement of awards. Yet, there was considerable uncertainty as to whether these changes applied to arbitrations and related court-proceedings commenced prior to 23 October 2015, i.e. the date from when the amendments took effect (the Commencement Date).

In *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.*, the bone of contention was the applicability of Section 36 of the Arbitration Act (as amended by the 2015 Amendment Act). Prior to the 2015 Amendment Act, Section 36 had been interpreted to provide for an automatic stay of enforcement whenever an application for setting aside was filed under Section 34 – an unappealing prospect for award creditors looking to enforce an award in India. Under the 2015 Amendment Act, however, it was clarified that there would be no automatic stay simply upon the filing of a setting

aside application. Rather, to obtain a stay on enforcement, a party was required to furnish sufficient security and make a separate application for a stay.

The issue before the Court was therefore whether, for arbitration-related court proceedings initiated prior to the Commencement Date, Section 36 would apply as amended by the 2015 Amendment Act or in its original, pre-amendment form.

Based on Section 26 of the 2015 Amendment Act, which provides that "*this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act,*" the Court concluded that the 2015 Amendment Act applied separately and prospectively, to:

- arbitral proceedings that commenced on or after the Commencement Date; and
- court proceedings that commenced on or after the Commencement Date, irrespective of whether these proceedings related to arbitrations that were commenced prior to the 2015 Amendment Act.

But the Court also found that for arbitration-related enforcement proceedings commenced prior to the 2015 Amendment Act, Section 36 of the Arbitration Act (as amended by the 2015 Amendment Act) applied retrospectively and would have effect even on court proceedings initiated before the Commencement Date.

The Court's decision was based on the plain language of Section 36, which states that "*[w]here an application to set aside the arbitral award* ***has been*** *filed in the Court under Section 34 the filing of such an application shall not by itself render that award unenforceable…*".

But in arriving at its decision, the Court was also influenced by:

- the 246th Law Commission Report which found that an automatic stay under Section 36 interfered with the cost-effective and expeditious disposal of cases;
- India's poor ranking by the World Bank as a jurisdiction for the enforcement of contracts; and
- the statement of Objects and Reasons for the 2015 Amendment Act which identified the need for speedy disposal of arbitrations with minimal court intervention.

To this end the Court also commented on the drafting of Clause 13 of the 2018 Amendment Bill, which proposes to insert a new Section 87 to the Arbitration Act, that runs contrary to the Court's decision and states that the 2015 Amendment Act will not apply to arbitration-related court proceedings initiated prior to the Commencement Date. The Court encouraged the Parliament to reconsider this.

Award holder can make an enforcement application directly before the court in whose jurisdiction the judgment debtor's assets are located

In *Sundaram Finance v Abdul Samad*, the Supreme Court considered the issue of the precise court in which a party can file an application for the execution of an award in India.

This decision clarified divergent views from different high courts, on whether an award creditor is required first to file for execution of an award at the court of the seat and then transfer the executed decree to the court where the judgment debtor's assets were located, or whether an application for execution of the award could be filed directly in the court where the assets were located.

The Court noted that the divergent views arose as a result of misinterpretations of Sections 42 and 36 of the Arbitration Act.

Section 42 of the Arbitration Act relates to the jurisdiction of the Court over arbitration proceedings and provides that "*where*

with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court".

The Court clarified that Section 42 refers to the jurisdiction of the court of the seat in relation to arbitral proceedings and applications relating to arbitration proceedings only. As a result, Section 42 is no longer relevant after arbitration proceedings have been terminated upon issuance of a final award.

Section 36 of the Arbitration Act, meanwhile, provides that an award is to be enforced "*in accordance with the provisions of the Code of Civil Procedure 1908, in the same manner as if it were a decree of the court*". On this basis, some high courts took the view that, analogous to the system employed in the execution of Indian court judgments, execution of an award under Section 36 must take place at the court of the seat and the executed decree must then be transferred to the court where the judgment debtor's assets are located.

However, the Court clarified that while the enforcement mechanism is akin to the enforcement of a court decree, an award itself is not a decree of a civil court. Since an award is passed by an arbitral tribunal, there is no reason that the court within whose jurisdiction the arbitral award was passed should be taken to be the court that has passed the decree.

The Court therefore concluded that an award holder can make an application for enforcement of an award directly before the court in whose jurisdiction the judgment debtor's assets are located.

In a similar decision in *Cheran Properties Limited v Kasturi & Sons Limited* in April 2018, the Supreme Court found that a party can approach the National Company Law Tribunal directly for execution of an award relating to the transmission of shares (without needing to approach the civil courts).

These decisions remove the need for proceedings before multiple courts in the enforcement of an award, rendering the enforcement process less cumbersome.

Supreme Court ruling on operations of foreign counsel

Foreign lawyers not prevented from conducting international arbitrations in India

In *Bar Council of India v AK Balaji & Ors* the Supreme Court provided clarification on the extent to which foreign lawyers and law firms can operate within India.

In this decision the Court clarified that foreign lawyers are in fact permitted to visit India for a temporary period on a casual, "fly in and fly out basis", to give legal advice to their clients in India regarding foreign law. However, the Court acknowledged that such a "fly in and fly out" arrangement could amount to the "practice of law" (which is prohibited) if done on a regular basis and cautioned against this.

Nevertheless, the Court acknowledged that the facts and circumstances of each case would vary and require differing levels of advice and involvement from foreign lawyers. Rather than setting out a specific threshold for the number of visits that would result in the involvement of a foreign law firm being categorised as casual or frequent (amounting to the practice of law), the Court held this would have to be determined on a case-by-case basis. It also encouraged the Bar Council of India and/or the Indian legislature to make appropriate rules in this regard.

The Court also held that foreign lawyers could not be prevented from coming to India to conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration, though they

would be governed by the code of conduct applicable to the legal profession in India. This encouraging move upholds the principle of party autonomy and allows international parties arbitrating in India to avail themselves of their choice of legal representation.

Concluding comments

While complexities still abound in India-related arbitration, developments in 2018 tend to support a positive outlook for foreign investors.

From the enforcement perspective, recent cases demonstrate a real desire by the Indian courts to encourage prompt and effective enforcement of foreign arbitral awards. This was echoed by the Supreme Court's remarks in *Kandla Export*, where it recognised that a mechanism for the speedy enforcement of foreign awards is central to India's position as an equal commercial partner in the international community. Difficulties which – in former years – might well have presented a real obstacle to enforcement (such as the CIETAC split in *LDK Solar High Tech*) are being dealt with efficiently in well-reasoned decisions.

As for India-seated arbitrations, the courts are gradually ironing out some of the technical difficulties which lingered following the 2015 amendments to the Arbitration Act, thus smoothing the path to enforcement for domestic awards. Meanwhile, the drive for continued legislative reform and the strengthening of domestic Indian arbitral institutions form the backbone of a concerted effort to grow India into a reliable seat of arbitration.

That said, the risk of procedural complications associated with an Indian seat of arbitration (such as those seen in *Antrix*) mean that, generally speaking, foreign-seated arbitration still remains the preferred choice for foreign investors.

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