2020 in Review: Another Eventful Year for the Indian Arbitration Landscape

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The "2019 in Review: India" started with a quote from Jeff Bezos that the 21st century belongs to India. Little did we know then that, one year later, Jeff Bezos' Amazon would be fighting tooth and nail in a SIAC arbitration and related litigation in the Indian courts to claim a share of the burgeoning Indian market.

Despite the Covid-19 pandemic, 2020 (like 2019) has been an eventful year for the Indian arbitration landscape. This post considers some major recent developments on key topics. The three branches: the judiciary, executive, and legislature continued taking significant measures to reform the domestic and international arbitration landscape in India. While important judgments were delivered by courts across India, institutional arbitration continued making inroads in India. Similarly, the government continued its spree to amend the arbitration law. Overall, the developments paint a positive picture of India's consistent efforts to ground itself as a pro-arbitration jurisdiction. Of course, there is a scope for improvement and the journey continues.

New India-Brazil BIT

As covered in a prior post, India and Brazil signed a BIT at the dawn of the new decade to usher in a new era of BITs. The BIT is noteworthy for its departure from the widely used investor-state arbitration mechanism in favor of state-state arbitration with a focus on dispute prevention. A noticeable feature of this BIT is the restriction on an arbitration tribunal in awarding compensation, which resembles shades of the WTO dispute settlement mechanism.

The Invalidity of Unilateral Appointment of a Sole Arbitrator

Historically, the unilateral appointment of a sole arbitrator was rife in the Indian arbitration ecosystem, especially in domestic arbitrations. This gave unreasonable power to one party and created a power imbalance between the parties in an arbitration. However, as discussed, in this post, the Indian Supreme Court ("**Supreme Court**"), in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. made unilateral sole arbitrator appointments invalid under the 2015 amendments to the Indian Arbitration and Conciliation Act, 1996 ("**Act**"). The judgment was delivered towards the end of 2019 and continued to influence several arbitration proceedings in 2020 (and in 2021) such as the Delhi High Court's judgment in Proddatur Cable TV Digi Services v. Siti Cable Network Limited (2020) and City Lifeline Travels Private Ltd v. Delhi Jal Board (2021). There is still a need for further clarity on other aspects of the appointment of an arbitrator. The exercise is underway as the Supreme Court in Union of India v Tantia Construction (2021) has referred the issue to a larger bench while opining that once the appointing authority itself is incapacitated from referring the matter to arbitration, it may not appoint an arbitrator.

Choice of Seat or Venue

The choice of a seat or place of arbitration is critical. Arbitration-related disputes often land in courts when the choice of seat or venue is debatable. As discussed in this post, the Supreme Court's decision in Union of India v. Hardy Exploration and Production (India) Inc., (2019) ("**Hardy Exploration**") was criticized for failing to delineate the concepts of place, seat, and venue. The Supreme Court in BGS SGS

Soma JV v. NHPC Ltd., (2019) ("**BGS SGS**") provided the much-needed clarity. It laid down a test for determining the venue and seat of arbitrations. It went on hold Hardy Exploration as *per-incurium* for failing to follow the Supreme Court's seminal decision in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services. The BGS SGS decision was expected to put a lid on this issue. However, subsequently, in Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.(2020), when the rival contentions were based on the findings of Hardy Exploration on one hand and BGS SGS on the other, the Supreme Court chose to rely on neither of these decisions to come to its conclusion. This lack of clarity is likely to lead to further litigations in India.

Anti-Arbitration Injunctions

The Delhi High Court has taken divergent views on the issue of a civil court's jurisdiction to grant anti-arbitration injunctions. In Mcdonald's India Private Limited v. Vikram Bakshi and Ors. (2016) ("**Mcdonald's**"), a division bench of the Delhi High Court held that civil courts had jurisdiction to grant anti-arbitration injunctions where it was proved that the arbitration agreement was null, void, inoperative, or incapable of being performed. However, in Bina Modi and Ors. v. Lalit Modi and Ors (2020), a single judge of the Delhi High Court concluded that a civil court did not have the jurisdiction to entertain suits to declare the invalidity of an arbitration agreement or injunct arbitral proceedings. In an appeal against the single judge's decision, the division bench, relying on Mcdonald's, set aside the single judge's judgment. As discussed in this post, this judgment conforms to the previous Supreme Court judgements which have held that a civil court in India has inherent jurisdiction to grant injunctions in restraint of arbitration.

The Negative Effect of Kompetenz-Kompetenz

The arbitration between Devas v Antrix has been in the news for various reasons, the latest being the stay granted by the Supreme Court on the execution of the award in November 2020. The doctrine of Kompetenz-Kompetenz grants power to arbitrators to decide upon their own jurisdiction. However, the negative effect of Kompetenz-Kompetenz allows the courts to consider a jurisdictional challenge only on a prima facie basis while allowing for a complete review only by an arbitral tribunal. In the context of this arbitration, this post argues for a positive

Kompetenz-Kompetenz with concurrent jurisdiction between national courts and the arbitral tribunal (with a condition of issuing a partial award on jurisdiction before considering issues of merits).

NAFED v. Alimenta S.A.: Opening a Pandora's Box on Enforcement of Foreign Awards?

In 2020, the Supreme Court issued two significant judgments relating to the enforcement of foreign awards in India. While these judgments analysed the same legal provision regarding enforcement, they adopted contrary approaches and not surprisingly, reached diametrically opposite conclusions. As this post discusses, the earlier judgment in Vijay Karia v. Prysmian Cavi E Sistemi Srl (delivered in February 2020) eschewed reviewing the merits of the award in enforcement proceedings. However, just two months later in National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A., the Supreme Court extensively reviewed the merits of the award and held it to be unenforceable. The fate of future enforcement proceedings could hinge on which precedent is relied upon by the enforcing court.

Clearing the Mist on Arbitrability of Fraud

Raising allegations of fraud had become a frequently used shield for respondents in Indian arbitrations. Unfortunately, various cases over the years did not provide much succor for the claimants, for whom the battleground would shift from tribunals to courts, where the recalcitrant respondent would argue on the basis of the (alleged) fraud that the dispute is no longer arbitrable. Ultimately, the Supreme Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings ("**Avitel**") laid down what would exactly constitute the "serious allegations of fraud" exemption to the arbitrability of disputes. This post discusses the pros and cons of Avitel.

Clarity on the Limitation Period for Enforcement of Foreign Awards

As discussed in this post, the Supreme Court, in the case of Government of India v Vedanta settled the debate on the applicable limitation period for enforcement of a

foreign award in India. The Supreme Court held that the enforcement of a foreign award under Part II of the Act would be covered by Article 137 of the Limitation Act, which provides a period of three years, starting from when the right to apply accrues. The Supreme Court also made a passing remark and reaffirmed in this case that the courts should stay away from reviewing the merits of a case in enforcement proceedings. It echoed that the courts should only look at such cases from the narrow prism of Section 48 of the Act, which enumerates the limited grounds of refusal for enforcement of a foreign award.

Indian Parties Choosing a Foreign Seat of Arbitration

In the absence of any authoritative ruling by the Supreme Court on the issue of Indian parties choosing a foreign seat of arbitration, various High Courts have taken inconsistent positions over the years. In the latest decision dealing with this issue, the Gujarat High Court in GE Power Conversion India Private Limited v. PASL Wind Solutions Private Limited held that two Indian parties can choose a foreign seat of arbitration. As discussed in this post, the award in such arbitrations would be a foreign award under the Act. Significantly, the remedy of seeking interim measures from Indian courts in such a scenario would not be available.

Transitioning into 2021

2020 kept the domestic and the international arbitration community involved in India engaged. As 2020 came to an end, a few developments that started taking shape last year will define how 2021 proves for India to position itself as an arbitration hub.

Following are a few arbitration developments in India that are already attracting eyeballs of the international and domestic arbitration community alike.

The 2021 Amendments

The 2021 amendments to the Act (passed by the Lower House of the Indian Parliament on 12 February 2021) came on the heels of the 2019 amendments. The

amendments were earlier promulgated by way of an ordinance in November 2020. As discussed in this post, the highlights include:

- amendment to Section 36(3) of the Act that allows a court to unconditionally stay a domestic award where it is prima-facie satisfied that the underlying arbitration agreement or contract which is the basis of the award or the making of the award was induced by fraud or corruption.
- the deletion of the controversial eighth schedule (that had onerous qualification requirements to be appointed as an arbitrator) to the Act that was introduced in 2019 but was never entered into force. In this regard, the amendment provides that norms for accreditation of arbitrators will be specified by the Arbitration Council of India.

150% Growth in MCIA's Caseload

India's home-grown institution, the Mumbai Centre for International Arbitration (MCIA) has released its Annual Report for 2020 where it reports having registered more than 150% growth in the total number of cases being administered by it. The sentiments are further boosted by recent referrals that the Supreme Court and the Bombay High Court have made to MCIA. Please read more about MCIA from its CEO and secretary-general/registrar here in our recent "Interviews with Our Editors" series. The post lays down MCIA's journey in the last five years of its existence and how MCIA is registering more cases under its rules with every passing year.

Recognition and Enforcement of SIAC Emergency Arbitrator's Award

As noted above, Amazon is currently involved in legal proceedings with Indian entities including Future Retail and Reliance Retail. Amazon commenced an emergency arbitration under the SIAC Rules, which culminated in the Emergency Arbitrator *inter alia* enjoining Future Retail from proceeding with its agreement with Reliance Retail. This arbitration is seated in Delhi, India. The related court proceedings before the Delhi High Court raise important questions as to the validity and enforcement of emergency arbitrations in India-seated arbitrations. As discussed in this post, none of the previous cases relating to the enforcement of emergency arbitration awards in India had the seat in India. In another positive

development, a single judge of the Delhi High Court held that the provision for emergency arbitration under the SIAC Rules is not contrary to any mandatory provisions of the Act. However, an appeal against this decision is pending.