Kluwer Arbitration Blog

2021 in Review: India Continues to Make Significant Strides

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While the second wave of Covid-19 hit India harder in 2021 than in 2020, this did not hamper progression in the legal sphere. 2021 saw several notable arbitration-related developments including another amendment to the Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**"). Following on the tradition of the "2020 in Review: India" and "2019 in Review: India" posts that reflected eventful times in the Indian arbitration landscape, this post revisits India-focused discussions of topical issues that were published in the *Kluwer Arbitration Blog* over the last year.

Joining Non-Signatories to Arbitrations

Joining non-signatories to arbitrations is antithetical to consent, which is a fundamental basis of arbitration. In 2012, the Indian Supreme Court first adopted the group of companies doctrine in ***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors***. as a basis to join non-signatories to an arbitration. Over the last decade, *Chloro Controls* has been applied in various factual scenarios, including in Canada, as discussed in this post. As this post discusses, the developing case law highlights the challenges in the application of the group of companies doctrine and discusses instances where this doctrine has been applied in conjunction with principles of alter ego and lifting of the corporate veil to join non-signatories to an arbitration. The emerging jurisprudence in India suggests that the original ratio of *Chloro Controls* appears to have been diluted. As this could lead to the unintended addition of third parties to arbitrations, parties should be aware of the potential risks where Indian law is applied.

Another Amendment to the Indian Arbitration Act

Since the 2015 amendments to the Indian Arbitration Act, the Indian parliament has proactively ironed out the creases in the workings of the Indian Arbitration Act. While the previous amendments were welcomed by all, this post described the 2021 amendments as a "*retrogression in the pro-arbitration regime sought to be fostered in India.*" Significantly, the 2015 amendments removed the automatic stay jurisprudence in the enforcement of awards in India. However, the 2021 amendment empowered the courts to "*stay the [enforcement of the] award unconditionally*" in cases where the court is *prima facie* satisfied that the arbitration agreement or underlying

contract or the making of the award was induced or effected by fraud or corruption. Case law suggests that recalcitrant parties have previously misused the position under Indian law on arbitrability of fraud claims to wriggle out of arbitration proceedings and drag the proceedings into courts. There is an apprehension that this amendment similarly could deprive the award holders from realizing the fruits of awards.

Two Indian Parties Choosing a Foreign Seat of Arbitration

Complementing the Indian parliament's proactive approach, the Indian Supreme Court has also continued to pronounce pro-arbitration judgments. In a watershed judgment, in ***PASL Wind Solutions Private Limited v. GE Power Conversion***, the Indian Supreme Court laid to rest the argument that the designation of a foreign seat between two Indian parties was contrary to public policy. As noted in this post, the Indian Supreme Court recognized party autonomy as "*the brooding and guiding spirit of arbitration"* and held that Indian parties are free to choose a seat anywhere in the world. This reflects a major step forward in favor of international arbitration as a venue for dispute resolution, even where domestic business transactions may be at stake.

Post-award Interim Reliefs to the Losing Party

Grant of interim reliefs by courts in support of arbitration highlights the symbiotic relationship shared between the court system and arbitral procedure. The power of courts to grant such reliefs is recognized in the UNCITRAL Model Law, which is replicated in section 9 of the Indian Arbitration Act. **Section 9** itself does not bar *any party* from approaching the court to seek interim measures under any given situation. However, recent Indian court judgments have held that after the arbitral award is made, only the winning party in the arbitration proceedings is entitled to obtain interim reliefs from the courts, whereas, the losing party in the arbitration proceedings is not entitled to seek any remedy under **Section 9**. This post discusses this interesting facet of section 9 and argues that this provision should also extend to the losing party. Such a construction will provide parties with an avenue of relief under all circumstances.

Arbitration Agreement in an Unstamped Document

Under the Indian Stamp Act, any unstamped or inadequately stamped document loses its evidentiary value. The question before the Indian Supreme Court in *M/s. N. N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. & Ors.* ("NN Global") concerned the enforceability of an arbitration clause contained in an unstamped work order. As discussed in this post, the Indian Supreme Court overruled its previous decisions in *SMS Tea Estates v. M/s Chanmari Tea Co.* and *Garware Wall Ropes v. Coastal Marine Constructions and Engineering Ltd* and held that the arbitration agreement is a separate agreement and therefore, would survive independent of the substantive contract. The previous judgments had prompted parties to raise the issue of stamp duty as another ground to resist arbitration. Thankfully, the authoritative pronouncement in NN Global on the basis of the doctrine of separability will nip this issue in the bud.

Discussion on Unequal Power in the Appointment of an Arbitration Tribunal

Taking the lead from an earlier discussion on the issue of unilateral appointment of sole arbitrators, this post looks at one of the ways in which the appointment of an arbitration tribunal can be lopsided. The post critically analyzes a judgment of the Indian Supreme Court where it held that one of the parties could effectively appoint two arbitrators (including the presiding arbitrator) and even the third arbitrator could only be appointed (by the opposite party) from a panel set by the first party. The post discusses how this judgment's rationale found support in one of the decisions of the Delhi High Court where it deemed legal an appointment of an arbitrator selected through an exhaustive roster forwarded by one of the parties. It is hoped that the cloud surrounding the issue of unilateral appointments is authoritatively decided by the Indian Supreme Court soon.

No Sovereign Immunity to Resist Enforcement of an Arbitration Award

This post discusses two petitions that were taken up together by the Delhi High Court where the Court ruled that foreign states cannot claim sovereign immunity or related procedural safeguards under the Indian Code of Civil Procedure, 1908 to resist enforcement of awards before Indian courts. Citing examples from the UK and the US, the post highlights international consensus that state actors are to be treated at par with private parties when involved in commercial disputes. The countries that had filed petitions resisting enforcement of arbitration awards were Afghanistan and Ethiopia. The Delhi High Court held that an arbitration agreement in a commercial contract where a foreign state is participating is an implied waiver of any defense against enforcement based on the principle of sovereign immunity. This is a positive development for private counterparties who frequently enter into contracts with state actors.

Might Devas' Liquidation Order Lead to Another BIT arbitration?

The National Company Law Tribunal ("NCLT") ordered the liquidation of the Devas Multimedia ("Devas") in May last year on the basis that it was incorporated for fraudulent purposes. The NCLT order was upheld by the National Company Law Appellate Tribunal and the Indian Supreme Court has also recently upheld the liquidation order. This post discusses how the NCLT order could lead to yet another BIT claim in the already heavily contentious matter being fought in various fora. The post argues that an arbitral tribunal would have jurisdiction over a claim of indirect expropriation as the liquidation of Devas was done with an alleged view to preventing enforcement of an ICC award in favor of Devas. The post contends that since arbitral awards can be subject to expropriation, a BIT claim could be sustained on the basis that the commercial award was expropriated by way of liquidation of Devas.

Court's Discretion to Modify an Arbitration Award

This post discusses an Indian Supreme Court judgment that lays down the scope of an Indian court's power to modify an award under the Indian Arbitration Act when it is presented with setting-aside applications. In brief, the post highlights the ratio of the judgment that as a general rule Indian Arbitration Act does not provide any power to courts to modify an arbitral award.

However, it does allow limited scope in rare circumstances where an award may be modified by a court. The post concludes that while the judgment has advanced the debate on the topic, it does not settle it. The courts are sure to develop this area in the future as further disputes arise among litigants.

Enforcement of Foreign Seated Emergency Awards in India

Beginning in late 2020, the Amazon v Future Retail judgment captured global attention. This post discusses the judgment and breaks it down to clarify that, as made to be, the case is not an authority for the proposition that foreign-seated emergency arbitrations awards are enforceable in India. This is because the arbitration, in this case, was seated in India (in Delhi) though the administrative institution was SIAC. The post discusses the provisions in the Indian Arbitration Act that enable the enforcement of emergency awards. It also discusses potential arguments in favor of and previous decisions on enforcement of foreign seated emergency awards in India.

This post on the same case examines it through a different prism and evalutes whether the decision has presented the parties with a difficult either-or dilemma between seeking an emergency award and approaching the court for interim relief. The post discusses the regime of seeking interim relief post the amendment of the Indian Arbitration Act in 2015 and the consequence of the Amazon decision in seeking interim reliefs before courts.

Status of Arbitrability of Derivative Action Claims in India

Arbitrability of derivative claims has been a grey area in India. While there are judgments that have held that certain derivative claims, especially those relating to oppression and mismanagement are non-arbitrable, they are different from typical derivative action suits that may be arbitrable. This post reviews Indian judgments on the issue and advocates in favor of arbitrability of derivative actions while being careful of the pitfalls. In doing so, the post also discusses the decisions of American courts and how they have looked at the issue.

The Indian Supreme Court’s Approach Towards Scrutiny of Arbitral Awards

This analysis of the Indian Supreme Court’s judgments between January 2020 and September 2021 is an interesting read as it provides empirical evidence of the well-known trend of Indian courts in terms of abstaining from interfering in the enforcement of arbitration awards. The post discusses the current scope of scrutiny of a domestic arbitration award under Section 34 of the Indian Arbitration Act while also noting certain departures where the Indian Supreme Court has engaged in excessive interventions.

Looking Forward into 2022

The Indian Supreme Court’s decision in Amazon v Future was significant for emergency

arbitration proceedings. However, recently the Delhi High Court stayed the arbitration proceedings and the issue is currently before the Indian Supreme Court. We will have to wait and see what the final outcome is. In another signigicant academic development, the book Arbitration in India (ed. Dushyant Dave, Martin Hunter, Fali Nariman, Marike Paulsson) was published in 2021. This book offers a detailed analysis and description of the evolution and current position of the arbitration law and practices in India. With India proving itself as a mature arbitration jurisdiction (with a few steps back once in a while) in the past few years, 2022 should be another year to keep an eye on India.

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