Kluwer Arbitration Blog

2019 in Review: India

Ashutosh Ray (Assistant Editor for South Asia) · Wednesday, February 12th, 2020

Amazon founder Jeff Bezos on his recent visit to India in January 2020 remarked that the 21st century belongs to India. If that is true, it would also mean a flurry of disputes involving some Indian angle are inevitable and will keep the arbitration industry busy. Thus, even though 2019 may have drawn curtains over the decade, the evolution of arbitration in India will continue to garner immense interest from the rest of the world.

At the start of the new year (and a new decade), it is opportune to reflect the developments and discussions that kept the Indian arbitration community engaged.

The 2019 Amendments

The 2019 amendments to the Indian arbitration law came in quick succession since the last amendments in 2015. The amendments garnered global interest and remained a topic of hot discussion. Following are some of the key amendments:

- The amendments envisage the establishment of an arbitration council (43B) that will grade arbitral institutions in India (S.43I).
- The appointment of arbitrators may be delegated by the courts to these arbitral institutions to streamline the appointment of arbitrators, especially in ad-hoc arbitrations where the parties are unable to appoint an arbitration tribunal mutually (S.11).
- The amendments mandate certain qualifications for the arbitrators for their appointment by an accredited institution (by the authority given to them by the court) in an ad-hoc arbitration (where the parties are unable to appoint an arbitrator). Some of the qualifications include that the arbitrator must be one of the following: an advocate in India, a chartered accountant, a costs accountant or a company secretary with certain years of experience (the eighth schedule).
- There are provisions to ensure that arbitrations are completed in a time-bound manner. They require the pleadings to complete under six months from the appointment of the tribunal (S.23). Similarly, in domestic arbitration, a tribunal shall pass the award within twelve months of the date of completion of the pleadings (S 29A). It is worth noting that these time limits to complete the arbitration do not apply to international commercial arbitrations and are only suggestive in nature (S 29A).

A State-supported International Arbitration Institution

The New Delhi International Arbitration Centre Act 2019 ("NDIAC Act") was passed last year. The passing of the NDIAC Act is to create a state-backed independent and autonomous regime for the promotion of institutional arbitration. The NDIAC Act seeks to declare the New Delhi International Arbitration Centre an institution of national importance and facilitate the promotion of institutional arbitration at both domestic and international levels.

A Hands-off Approach Towards BIT Arbitration?

The Delhi High Court's refusal to grant an injunction against a BIT arbitration in *Union of India v. Khaitan Holdings (Mauritius*) was seen progressive in international quarters. The judgement was on an interim application and there is a lack of clarity on this point from the Supreme Court and other high courts. However, the decision is the latest on the issue and reflects the judiciary's forward-looking mindset in terms of its non-interventionist approach to a BIT arbitration. The court, however, mentioned that Indian courts have the jurisdiction to grant anti-BIT arbitration injunctions in rare and compelling circumstances. It noted that the Arbitration and Conciliation Act, 1996 applies only to commercial arbitration and that a court may exercise jurisdiction relating to a BIT arbitration through the Code of Civil Procedure, 1908. It may be viewed in skepticism as well, since, without the application of the Arbitration and Conciliation Act, 1996, parties will find it very difficult to enforce a BIT arbitration award in India.

Pre-deposit Requirement Unconstitutional

The Supreme Court in *M/s. Icomm Tele Ltd. v. Punjab State Water Supply & Sewerage Board & ANR.* struck down part of an arbitration clause that required one of the parties to deposit ten percent of the amount claimed prior to commencing arbitration proceedings. The contract was between a state entity and a private party and the Supreme Court held that such a clause was arbitrary and unconstitutional. It stressed the need for arbitration to be speedy and inexpensive, to help alleviate the burdens of Indian courts. As discussed in this post, the judgement is likely limited to contracts with the state or a state entity. This is because a constitutional challenge such as this may not be available against private parties. Another argument is that where commercially minded private parties have entered into a contract under free volition and considering their business needs, they may not retract from the negotiated terms. Despite this doubt on the scope of the judgement, it has been hailed as another step towards the judiciary's pro-arbitration stance.

Limited Scope of "Public Policy"

Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India ("*Ssangyong*") was a Supreme Court judgement that clarified the limited scope of the "public policy" ground for setting aside an award as amended by the Arbitration and Conciliation (Amendment) Act 2015. In *Ssangyong*, the Supreme Court held that the earlier broad interpretation for "fundamental policy" was changed post the 2015 amendments. It relied on the 246th Report of the Law Commission of India which stated that the scope of the public policy ground was different

(wider) for the challenge of a domestic award vis-à-vis enforcement of a foreign award. The Supreme Court further relied on the Supplementary to the 246th Report, which stated that the amendments on the issue of setting aside an award 'were suggested on the assumption that other terms such as "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.'

"Group of Companies" Revisited and Reinforced

As covered here, the Supreme Court in *Reckitt Benckiser v. Reynders Label Printing* and *MTNL v. Canara Bank* has reinforced the basic principles to be considered while applying the "group of companies" doctrine, such as mutual intention, a direct commonality of subject matter and composite transaction. Both cases provide a fresh and modern outlook through the principles of the settled law in circumstances that are driven by their respective unique facts. They also showcase the Indian judiciary's maturity, which is mindful of commercial needs and interests, which may require binding non-signatories to an arbitration.

***Perkins'* Perks**

The last quarter of 2019 saw significant developments with the Supreme Court rendering judgments including *Perkins Eastman Architects DPC v. HSCC (India) Ltd* and *Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors.* (discussed below) that are forward-looking and will have a lasting effect on how arbitrations are conducted in India. In *Perkins Eastman Architects DPC v. HSCC (India) Ltd.* the Supreme Court held that a person who has an interest in the outcome of the dispute shall not appoint a sole arbitrator. This judgment will have a deep reforming effect on several government contracts where the government entity is solely entitled to appoint an arbitrator once an arbitration commences.

No Automatic Stay on Arbitral Awards

In *Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors.* the Supreme Court settled that there will be no automatic stay on an arbitral award if it were to be challenged in a court. This is welcome judgment as it has struck down Section 87 (which had resulted in an automatic stay of an award pending the challenge) of the Arbitration & Conciliation (Amendment) Act, 2019 for being manifestly arbitrary under the Constitution of India. The removal of automatic stay was first recommended by the 246th Report of the Law Commission of India consequently adopted by the 2015 amendment to the arbitration law. However, the 2019 amendment had the effect of undoing the changes that were brought in by the 2015 amendment. This judgment should have a decluttering effect on several matters where the parties are unable to recover the arbitration award for several years due to an automatic stay. This may not only encourage the sentiments of the parties to arbitrate, but also provide liquidity to several businesses to expand, as they will be able to secure the award amount pending the outcome of any petition of setting aside of the award.

Transitioning into 2020

- *India's Win in a BIT Arbitration*

The beginning of 2020 has been eventful for India. The government recently announced that all claims brought against it in a BIT arbitration by Tenoch Holdings Limited (Cyprus), Mr Maxim Naumchenko (Russian Federation) and Mr Andrey Poluektov (Russian Federation) were dismissed in entirety. The award is not public yet. According to the government's announcement, the arbitration was the result of the cancellation of Letters of Intent for the issuance of telecommunications licenses to provide 2G services in five telecommunications circles in India. The reason for cancellation cited by the government, among others, was India's essential security interests. The proceedings were rather swift as the tribunal was constituted only in July 2019.

- *New India-Brazil BIT*

According to this report, India has also signed a new BIT with Brazil in January since it revised the model BIT in 2015. The signing comes around two years after the Union Cabinet approved signing and ratification of the Investment Cooperation and Facilitation Treaty (ICFT) between the two countries. Reports suggest that the new treaty incorporates elements from both India's and Brazil's model BIT. The text of the ICFT is available here.

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As India looks forward to 2020, and if Jeff Bezos' predictions about the 21st century belonging to India are true, the Indian arbitration canvas will continue to be vivid.

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