Kluwer Arbitration Blog

2022 Year in Review: Coming of Age of Indian Arbitration

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In recent years, arbitration in India has grappled with numerous challenges. Recalcitrant parties knocking on the doors of trigger-happy courts ensured, unfortunately, that arbitration was viewed with mistrust in India. However, the changes observed in the last few years, including those discussed in our prior year in review posts focused on India (see here, here and here), bode well. In this post, we reflect on the major changes of the past years and discuss how these themes and their impacts have developed during 2022 in particular, to conclude that arbitration in India has come of age.

Firm Pro-Enforcement Shift

As many readers will know, in India, it was commonplace for the losing side to mount a challenge to arbitral awards, by way of setting aside applications or filing objections to enforcement actions. Dealing with such applications, invariably, the courts would review the awards on merits, and frequently, interfere with the awards. This phenomenon is now of the past. With the recent amendments to the (Indian) Arbitration and Conciliation Act, 1996 ("**Indian Arbitration Act**") and the judicial pronouncements, recognition of awards, especially foreign awards, has become the norm.

As far as domestic awards are concerned, by amending the Indian Arbitration Act, the Indian Parliament tamed the *unruly horse* of public policy to restrict it to mean the fundamental policy of Indian law (as discussed here). Moreover, the scope of the ground of patent illegality, which is only available as a ground to set aside India-seated awards, was limited to illegality which goes to the root of the matter. However, as discussed here, there have been odd instances where the courts have reappreciated evidence and supplanted their own conclusions. On the other hand, in *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*, the Indian Supreme Court cautioned against interfering with the tribunal's interpretation and findings of fact. An interesting example of the Indian courts' pro-enforcement shift in approach was when the Indian Supreme Court, in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*, disregarded the majority award and declared, relying on its inherent powers under the Indian Constitution, the minority opinion as the award. This decision has been discussed here. As discussed in this post, in *KLA Const Technologies v. The Embassy of the Afghanistan* and *Matrix Global v. Ministry of Education, Ethiopia*) the Delhi High Court held that foreign States cannot claim sovereign immunity in commercial matters to resist enforcement of awards before Indian

courts.

Similarly, while dealing with recognition of awards made outside of India, the Indian courts now consistently adopt a strong pro-recognition approach. As discussed here, in *Vijay Karia v. Prysmian Cavi*, the Indian Supreme Court recognised that a residual discretion remains with the court to enforce a foreign award, despite grounds for its resistance having been made out. In this case, the court also imposed substantial costs on the losing party. This is significant because it is unusual for Indian courts to impose costs in cases where they are dealing with arbitration-related matters. Similar examples where the courts have recognised awards include *Banyan Tree Growth Capital LLC v. Axiom Cordages Ltd.* and *Centrotrade Minerals & Metals Inc. v Hindustan Copper Limited*. However, commentators have labelled *NAFED v. Alimenta S.A.* as an anomaly in which case the court reviewed the merits of the award and set it aside. Correcting the course, recently in *Gemini Bay Transcription Pvt Ltd. v. Integrated Sales Service Limited*, the Indian Supreme Court rejected the challenge to the award brought by a non-signatory, refused to reappreciate evidence and upheld the award which was made against the non-signatory. Empirical evidence, as noted here, suggests that Indian courts now abstain from interfering with awards.

Shot in the Arm for Emergency Arbitrations

The Indian Arbitration Act does not recognise emergency arbitration proceedings and also does not provide for the enforcement of orders or awards made in such proceedings. There have been cases where Indian courts have passed interim measures in similar terms to the orders made by emergency arbitrators in arbitrations seated outside of India. However, in the absence of provisions relating to emergency arbitrations, such proceedings were virtually non-existent in arbitrations seated in India. In case emergency reliefs were required in India-seated arbitrations (pre-constitution of the tribunals), the parties would normally approach the courts for interim measures under the Indian Arbitration Act.

In a major development (as discussed here), in *Amazon.com NV Investment Holdings Inc. v. Future Retail Ltd.* the Indian Supreme Court recognised that orders passed by emergency arbitrators under institutional arbitration rules are recognised and can be enforced under the Indian Arbitration Act. This is the first India-seated arbitration where the Indian Supreme Court held that "*[t]here is nothing in the Arbitration Act that prohibits contracting parties from agreeing to a provision providing for an award made by an Emergency Arbitrator*." This is significant for two reasons. In addition to *PASL Wind Solutions Private Limited v. GE Power Conversion* where it was held that two Indian parties can choose a foreign seat, Amazon reinforces the fact that party autonomy now reigns supreme in India. Secondly, as discussed here, parties now have a choice between seeking interim measures before the courts or invoking emergency arbitrations. As discussed below, the Mumbai Centre for International Arbitration ("**MCIA**") received its second emergency arbitration application in 2022 while the first one was received in 2021. This appears to be a direct consequence of the *Amazon* decision.

Group of Companies Doctrine vis-à-vis Non-Signatories

While the trend has been largely positive and has given certainty to stakeholders as to what to expect in Indian seated arbitrations, there were a few substantive and legal issues that remained in

the grey in 2022. As discussed in this post, two different benches of the Indian Supreme Court gave differing opinions on the tenability of using the "group of companies" doctrine to non-signatories in an arbitration agreement.

The Indian Supreme Court delivered two diverging judgments in relation to the doctrine. First, in *ONGC v. Discovery Enterprises Pvt Ltd*., a full bench of the Court agreed with the application of the group of companies doctrine in Indian law and set aside an arbitral award that failed to consider the applicability of the doctrine. To the contrary, in another matter, in *Cox & Kings Limited v. SAP India Private Limited & Anr*. judgment dated 6 May 2022, yet another full bench of the Supreme Court seemingly restrained the use of the doctrine. The Indian Supreme Court examined the doctrine's consistency with fundamental principles such as party autonomy and distinct corporate personality. Ultimately, the Indian Supreme Court has referred the matter to an even larger bench to settle the issue of the scope, and applicability of the doctrine.

Rise in Institutional Arbitration

While the official reports of several institutions such as ICC, LCIA, and SIAC are awaited, MCIA has released its 2022 annual report (available here). The statistics are promising as the caseload has increased over 20% over the previous year, and the total value of disputes under administration has crossed a billion USD, a significant milestone for the domestic arbitral institute. Other highlights include 24 new filings, 2 emergency arbitrations that were disposed of within 14 days of filing, 92% of all arbitrations completed in 18 months, and no MCIA award set-aside. Noticeably, 1 in every 3 arbitrators that MCIA appointed were women. The trajectory is representative of the maturing of India as a pro-arbitration jurisdiction.

2023: What's in Store?

It will be an important year to assess if India's image as a pro-arbitration jurisidiction goes from strength to strength or falters after a decent spell of the last year. If 2023 were to turn out similar to 2022, one could argue that India has passed the proverbial litmus test after cumulative efforts spanning nearly a decade by the courts, the government and the arbitral institutions to transform India into a mature arbitration jurisdiction.

It is worth mentioning that the Delhi International Arbitration Centre would be hosting the first Delhi Arbitration Week between 16 February and 19 February 2023. The week which is based along the lines of the Paris Arbitration Week, is supported by the judiciary and is an effort to further the cause of arbitration (both international and domestic) in India. We look forward to the discussions taking place during that week.

This post is part of Kluwer Arbitration Blog's 2022 in Review series. Other posts in the series can be seen here.

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