Kluwer Arbitration Blog

2024 Year in Review: Arbitration in India – Reset or Rewind?

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In recent years, arbitration in India has continued to take significant strides – as covered in our previous posts here, here and here. In this post, we look back on the important developments in the Indian arbitration legislation and landscape over the last two years, and discuss the key takeaways looking ahead.

Proposed Statutory Amendments to the Indian Arbitration & Conciliation Act

Since mid-2023, the Indian government has been mulling amendments to the [Indian] Arbitration & Conciliation Act, 1996 ("**Act**"). In June 2023, the Indian Ministry of Law & Justice constituted an Expert Committee ("**Committee**") to "*examine the working of arbitration law in India and recommend reforms to the Act*". In February 2024, the Committee issued its Report, which recommended several changes to the Act, which included: (a) reducing court intervention, such as through amendments to Sections 9 and 17 (interim relief) and Section 37 (appeals); (b) improving efficiency of the arbitration proceedings; and (c) incorporating specific provisions on emergency arbitration.

More recently, in October 2024, the Indian government introduced the Draft Arbitration and Conciliation Bill 2024 (**Draft Bill**)[1] and invited public comments on the same.

There is a lot to unpack in the Draft Bill. For starters, the Draft Bill proposes removing the conciliation related provisions into a separate legislation and accordingly changing the name of the Act to "*Arbitration Act*". It also proposes to replace the term "place" of arbitration with "seat" – to align with international practices and ensure clarity between the concepts of seat and venue. These concepts were often used interchangeably in practice, and led to significant litigation in Indian courts on questions of what constitutes the correct seat of the arbitration and which court had curial jurisdiction.

Another key change proposed is to the court's power to grant interim relief under Section 9 of the Act. The proposed amendment to Section 9 limits the power of courts to grant interim relief only to two situations: (i) before the commencement of arbitration; and (ii) after the making of the award. Under the current Section 9, a court can grant interim relief even during the pendency of the arbitration, if it found that circumstances exist which may not render the remedy provided under Section 17 (i.e. applying to the tribunal) efficacious. This power has been categorically removed in

the Draft Bill.

On the heels of the *Amazon* ruling in 2021 (covered here), the Draft Bill also gives statutory recognition to and aims to facilitate emergency arbitrations (seated in India). However, no such recognition is given to emergency orders issued in foreign seated arbitrations.

The Draft Bill also introduces a controversial proposal on "appellate arbitral tribunals", a separate body empowered to determine challenges to awards issued in India-seated arbitrations. The proposed Section 34-A in the Draft Bill provides that arbitral institutions can provide for an "appellate arbitral tribunal" in their institutional rules, which would have the power to determine challenges to arbitral awards, to the exclusion of the seat courts. Consequently, the parties would have the ability to choose the forum for filing set aside applications – either the seat court or the appellate arbitral tribunal. This proposal has raised concerns about undermining the legitimacy of the arbitration process and whether it strikes the right balance between party autonomy and the supervisory role of courts.

Finally, the Draft Bill introduces various time limits aimed at expediting decisions by courts and tribunals, such as timelines for deciding applications under: (i) Section 8 (reference to arbitration) by the court; and (ii) Section 16 (jurisdictional objections) by the tribunal. In line with the technological advances in arbitration hearings, the Draft Bill also proposes to amend the definition of 'arbitration', currently defined as "*any arbitration whether or not administered by permanent arbitral institution*"), to include "*a proceeding conducted wholly or partially by use of electronic means*".

Ministry of Finance discourages government entities from using arbitration

The backlash of the Supreme Court's decision in *DMRC v. DAMEPL* setting aside an INR 3000 crore award (roughly USD 341 million) prompted the Ministry of Finance (**Ministry**) to issue an Office Memorandum setting out 'Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement' ("***Guidelines***").

While there is much to be said about the Ministry's misplaced rationale for issuing the Guidelines, this post focuses on two salient recommendations. First, the Guidelines note that arbitration should not be automatically included in procurement contracts, particularly large contracts. They must be restricted to disputes that are valued at less than INR 10 crore (roughly USD 1.1 million) and arbitration for disputes valued higher should be subject to approval from the relevant authorities. Second, the Guidelines encourage government entities to adopt mediation under the Mediation Act, 2023 for resolution of disputes.

In seeking to address the peculiarities involved when government entities are disputants, the Guidelines throw the baby out with the bathwater. In seeking to replace arbitration with mediation, the Guidelines fail to consider that arbitration and mediation don't always serve the same ends. The former is not-binding, and requires the willingness of disputing parties to arrive at a settlement. A representation to the Ministry correctly observed that in the absence of an arbitration agreement, a failure to arrive at a mediated settlement would relegate the parties to the courts, which will not only delay the outcome, but also further burden the judiciary. This would have a chilling effect on investment, particularly in the infrastructure sector which invariably involves the government as a party. If the actual intent of these Guidelines is to increase reliance on mediation, the focus should be on strengthening the mediation infrastructure and empowering government officials to authorise

mediated settlements.

India's Higher Judiciary continues to shape the law

Indian High Courts and the Supreme Court have continued to lead the way in shaping the contours of India's arbitration landscape by issuing regular rulings on contentious aspects of the Act.

Non-signatories can be bound to arbitration agreements under the Group of Companies doctrine

In *Cox & Kings Limited v SAP India Pvt. Limited*, a 5-judge bench set at naught doubts raised by a 3-judge bench of the Supreme Court in 2022 regarding the applicability of the Group of Companies doctrine. The Supreme Court confirmed that non-signatories can be bound where there is a clear intention to do so. An intention to bind the non-signatory may be discerned from factors such as the non-signatory's relationship to a party to the arbitration agreement, commonality of subject matter, composite nature of the transaction and the role that the non-signatory plays in performance of the contract. The bench also directed referral courts to refer the issue of joinder of a non-signatory to the tribunal recognising that even a prima facie examination of the issue would step on the tribunal's competence. A previous post commenting on this judgment noted that in doing so, the Supreme Court has "*placed an effective guardrail to minimise court intervention and delays prior to the constitution of an arbitral tribunal*".

The decision is also significant for clarifying the extent to which non-signatories can seek Court-ordered interim relief under Section 9 of the Act. The Court observed that non-signatories would not be entitled to interim relief until a tribunal had determined its status as a party. Our contributors are of the view that this could also extend to disentitling non-signatories from obtaining urgent relief before emergency arbitrators.

Testing validity of arbitration agreements

In December 2023, a 7-judge bench of the Supreme Court resolved the contentious line of cases regarding whether an unstamped arbitration agreement is valid under Indian law. In *In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* (covered here), the Supreme Court unanimously upheld the validity of an unstamped arbitration agreement and held that while such an agreement would be inadmissible as evidence (as per the provisions of the [Indian] Stamp Act, 1899), it would not be void in law.

In November 2024, a 5-judge bench of the Supreme Court also settled the law on the validity of unilateral appointment clauses. In *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*, the Supreme Court held that arbitration clauses which: (i) allow for one party to unilaterally appointment the sole arbitrator; or (ii) in case of a three-member panel, mandate one party to select its nominee from a panel of arbitrators proposed by the other party, violated the requirement of fairness and equality under Article 14 of the Constitution of India ("**Constitution**").

Seat – venue distinction

Reinforcing the seat-venue distinction in *Arif Azim v. Micromax Informatics FZE*, the Supreme Court applied a three-condition test to determine when a venue could be regarded as a seat: i) the arbitration agreement must designate a single place, ii) the arbitration proceedings must be fixed to that place without flexibility, and iii) there should be no contrary indicia suggesting that the designated venue is not the seat. In this cross-border dispute, the arbitration agreement designated

Dubai as the venue, UAE laws as the governing laws, and conferred non-exclusive jurisdiction on Dubai courts. The Supreme Court confirmed Dubai as the seat, and refused to appoint an arbitrator under Section 11 of the Act since Part I of the Act is inapplicable to foreign-seated arbitrations.

Applications for extension of time to complete arbitration proceedings

In *Rohan Builders v. Berger Paints*, the Supreme Court provided much needed clarity on applications for extension of time to complete arbitration proceedings, holding that an extension request can be filed even "after" the expiration of the statutory mandated time limit under Section 29(4) of the Act. A key related issue – whether an extension application can be filed after an award has already been issued – remains contentious (covered here). The Kerala High Court and the Delhi High Court have taken conflicting positions, leaving room for further clarification by the Supreme Court.

Grant of pre-reference interest

The Supreme Court in *Pam Developments v. State of West Bengal* reaffirmed the arbitrator's authority to award pre-reference interest from the date of the cause of action until the date the dispute is referred to the tribunal, even when the contract is silent on whether such interest can be awarded. The parties, however, retain the autonomy to restrict grant of pre-reference interest by expressly prohibiting it in their contract. The Court emphasised that the power of the arbitrator to grant pre-reference interest is well-settled under Section 31(7)(a) of the Act. The Court distinguished the power under the new Act from the Arbitration Act, 1940, which lacked a statutory provision for awarding interest – leaving it to courts to recognize such power.

Third-party funding

2023 saw the Delhi High Court endorsing Third Party Funding ("**TPF**") arrangements in arbitration proceedings in *Tomorrow Sales Agency v SBS Holdings* (covered here). Interestingly, the question before the High Court was whether a third-party funder could be directed to furnish security for costs on an interim basis to secure the cost award. The High Court answered in the negative, relying on two interconnected grounds: (1) the funder was not bound by the cost award since it was neither a party to the arbitration agreement nor had it been made party to the proceedings. The High Court observed that a funder could be bound by the award only if it had been compelled to arbitrate and was a party to the arbitration proceedings. (2) Consequently, an interim measure in aid of enforcement of the award cannot be enforced against a third-party.

While the decision has been lauded for incentivising TPF, the High Court missed an opportunity to clarify whether the power under section 9 can extend to measures for security for costs from a third-party funder. An appeal against the decision is now pending before a 3-judge bench of the Supreme Court.

Minimal judicial intervention: mixed signals?

Over the last two years, the Supreme Court has taken efforts to emphasise India's position as a pro-arbitration jurisdiction, by prioritising minimal judicial intervention and greater arbitral autonomy. In *NTPC v. SPML Infra Ltd.*, the Supreme Court affirmed that the tribunal is the primary authority to determine arbitrability, unless facts indicate otherwise. Thereafter, the landmark decision in *In Re – Interplay* (discussed above) saw the Supreme Court asserting the principle of limited judicial intervention at the referral stage.

Last year, in *OPG Power Generation v. Enexio Power Cooling Solutions*, the Supreme Court held that an award may not be set aside if the award contains insufficient or inadequate reasons as opposed to a perverse award lacking all reason. In another case, namely *NHAI v. Meissners Hindustan Construction Company*, the Supreme Court noted that interpretation of a contract is within the domain of an arbitrator, therefore, an award cannot be set aside if construction of contractual terms by the arbitrator was reasonable. Further, in *Avitel Post Studioz Limited v HSBC PI Holdings (Mauritius) Limited* (covered here), the Supreme Court rejected a challenge to enforcement of a Singapore-seated foreign award on the ground of arbitrator's bias, recognising the high standard of judicial intervention to a foreign award under Section 48 of the Act.

However, in an unprecedented move in April 2024, the Supreme Court in *DMRC v. DAMEPL* (referred to above, and covered here and here) exercised its extraordinary curative jurisdiction under the Constitution to set aside an award, more than seven years after it was rendered. Surprisingly, the Supreme Court undertook a detailed review of the merits and re-appreciated evidence in what was effectively the fifth round of challenge to the award (after three rounds of appeals before the High Court of Delhi and the Supreme Court, and a review petition before the Supreme Court). While the Supreme Court clarified that the exercise of curative jurisdiction should not to be adopted as a matter of ordinary course, the judgment has raised questions about India's suitability as an arbitration hub for commercial disputes.

2025 forecasts: Power to modify awards

Section 33 of the Act recognises the power of the tribunal to correct or interpret an award while Section 34 allows courts to set aside awards either wholly or in part. However, neither the Act nor the Draft Bill expressly recognise the power of courts to modify an award.

The statutory gap led to conflicting decisions from co-equal benches of the Supreme Court. In February 2024, the Supreme Court in *Gayatri Balasamy v ISG Novasoft Technologies Limited* took note of the incongruence and referred the issue to a larger bench (covered here). The case is pending before a 5-judge bench of the Court, which is presently hearing arguments on the question. The Supreme Court will be required to consider the inefficiency of requiring parties to initiate arbitration afresh against the risk that modification may open a review on merits and expand the scope of judicial intervention. If the Supreme Court acknowledges that such a power should exist and is not contained in the text of the Act, it is likely that it will defer to the Parliament to consider introducing an appropriate amendment.

India's outlook towards Investment Treaties

Finally, a few words about India's changing outlook towards investment treaties. It is largely acknowledged that India's Model BIT 2016 (covered here and here) – introduced in the aftermath of several ISDS cases against it – did not strike the right balance between the rights of investors and states. It is therefore not surprising that the Model BIT 2016 did not find many takers.

In 2024, India signed investment treaties with Uzbekistan and UAE. Interestingly, the India – UAE BIT 2024 departs from the Model BIT 2016 in a few key ways. For example, the definition of "investment" is wider and provides for contribution and risk as necessary elements for an investment, but removes the criteria of duration and economic development. It also includes "portfolio investments" within the definition of 'investment' – which was categorically removed in

the Model BIT 2016 and subsequently executed treaties, such as the India – Belarus BIT 2018 and India – Kyrgyzstan BIT 2019.

This signals a shift away from the rigours of the Model BIT 2016 – a sentiment evident from the Union Budget for 2025-26, recently announced by the Indian government. One of the critical reforms announced is the Indian government's plans to revamp the Model BIT 2016 to make it more "*investor-friendly*" – with the goal to encourage sustained foreign investment and the spirit of "*first develop India*" (*See* Union Budget Speech, paragraph 102). This is an important acknowledgement that India's Model BIT 2016 did not strike the right balance between the rights of states and investors. While there is no clarity on when the new Model BIT will be release, this shift in approach could potentially signal a reset button in the backlash against ISDS in the Indian government.

[1] The Draft Bill has been removed from the Government of India's website where it was published, and therefore has not been hyperlinked.

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