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India*

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A. Legislation, trends and tendencies

A.1 Legislation

International arbitration in India continues to be governed by the Arbitration and Conciliation Act 1996 ("Arbitration Act"). In 2015, the Indian Parliament amended Arbitration Act significantly, with the passage of the Arbitration and Conciliation (Amendment) Act 2015 (the "Amendment Act 2015"). This amendment was made contemporaneous with the passage of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the "Commercial Courts Act 2015"). The simultaneous passage of these pieces of legislation has significantly altered the arbitration landscape in India.

A.1.1 Background to the Arbitration Act

Prior to the current legislation, arbitration in India was governed by the Arbitration Act 1940 (the "1940 Act"), the Foreign Awards (Recognition and Enforcement) Act 1961 and the Arbitration (Protocol and Convention) Act 1937. The Arbitration Act was drafted in light of the publication of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the "Model Law"), the UNCITRAL Arbitration Rules 1976 and the UNCITRAL Conciliation

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Rules 1980 (together, the "UNCITRAL Rules") by the United Nations Commission on International Trade Law ("UNCITRAL"), which was to serve as a framework for nations to harmonize domestic arbitration legislation. These were published at a time when the Indian economy was opening up to international trade and investments, so the enactment of the Arbitration Act was a step toward encouraging and facilitating such foreign trade and investment.

A.1.2 The Arbitration Act, as amended by the Amendment Act 2015

The Arbitration Act is divided into four parts, of which Parts I and II relate to arbitrations seated in India and arbitrations seated abroad, respectively. Part I of the Arbitration Act contains provisions for judicial intervention at, broadly, four stages: (i) reference of a dispute to arbitration under Section 8; (ii) application to the court for interim relief under Section 9; (iii) application to court for the appointment of arbitrators; and (iv) challenge to the arbitral award under Section 34. Part II of the Act, which applies to international commercial arbitrations, has a provision to make an application to the courts for reference to arbitration under Section 45. At this stage, the courts are required to refer the dispute to arbitration unless they find that the agreement is null, void, inoperative and incapable of being performed. Section 48 provides the grounds for the challenge of an arbitral award in an international commercial arbitration.

There have been various decisions of the Supreme Court and High Courts of India on whether certain provisions of Part I are applicable to arbitrations governed by Part II. These have mostly been on whether the provision for interim relief under Section 9 will be applicable to international commercial arbitration. This position has been clarified by way of the Amendment Act 2015, which makes certain provisions of Part I of the Arbitration Act, such as Section 9 (interim reliefs), Section 27 (court assistance in taking evidence in an arbitration), Section 37(1)(a) (appeals against the orders granted under Section 9) and Section 37(3) (restrictions on a second appeal from an

order passed under Section 37), applicable to foreign-seated arbitrations, subject to any agreement to the contrary.[4]

Another area that has had a lot of varying judicial pronouncements over the years has been the grounds available for the challenge of an award. One of the grounds is "contrary to the public policy of India," which is a ground under Section 34 for domestic arbitration and Section 48 for international arbitration. Courts in the past interpreted this widely and set aside awards, but lately in the pro-arbitration scenario, courts have also preferred to read down the scope of this ground. The Amendment Act 2015 has restricted the scope of the definition for this purpose to certain specified criteria: (i) the making of an award was induced by fraud or corruption or it violates the confidentiality of any conciliation proceedings or the provisions dealing with the admissibility of evidence submitted in the course of conciliation proceedings; (ii) it is in contravention of the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.[5] Additionally, the Amendment Act 2015 now provides that an examination of whether an award contravenes the fundamental policy of Indian law will not entail a review of the merits of the dispute.[6]

Incorporating judge-made law into the statute for clarity, the Amendment Act also contains some significant amendments that are aimed at reducing the timelines (as provided in sections allowing fast-track procedures,[7] sections mandating rendering an arbitral award within 12 months of a reference to arbitration[8] and the commencement of arbitral proceedings within 90 days of grant of an interim relief by

[4] Proviso to Section 2(2) of the Arbitration Act.
[5] Section 34(2)(b) Explanation 1 of the Arbitration Act.
[6] Section 34(2)(b) Explanation 2 of the Arbitration Act.
[7] Section 29B of the Arbitration Act.
[8] Section 29A(1) of the Arbitration Act. (Explanation to the section reads as follows: an arbitral tribunal is deemed to have entered upon reference on the date on which the arbitrator or all the arbitrators receive notice of their appointment in writing.)

domestic courts[9]), reducing court intervention and promoting the finality of arbitral awards.

Prior to the amendments introduced in the Amendment Act 2015, Section 36 of the Arbitration Act provided that an award would become enforceable as a decree of the court only once the time to challenge the award had expired or if such challenge had been refused. However, as challenges to awards invariably involved a significant delay, the Amendment Act 2015 has now introduced a clarification in Section 36 that the filing of an application for setting aside an arbitral award will not prevent proceedings for enforcement, even during the pendency of a challenge, in the absence of a specific stay granted by the court.[10]

In a significant step, the Amendment Act 2015 has introduced Section 31A, which delineates the award of costs by the arbitral tribunal, following the "costs-follow-the-events" principle, where the successful party's costs are borne by the unsuccessful party.[11] It also allows the tribunal to decide on costs awarded to parties based on their conduct, the type of claims, etc., at the time of granting the award.[12] Section 17 of the Amendment Act 2015 also allows for parties to seek security for costs from the arbitral tribunal as an interim measure, as provided in the provisions of the Civil Procedure Code 1908.[13]

A.1.3 Commercial Courts Act 2015

The Commercial Courts Act 2015 mandates the constitution of "commercial courts" at a district level,[14] in areas where no high court exercises ordinary original civil jurisdiction; it provides for the constitution of "commercial divisions" where high courts exercise

[9] Section 9(2) of the Arbitration Act.
[10] Section 36(2) of the Arbitration Act.
[11] Section 31(A)(2)(a) of the Arbitration Act.
[12] Section 31(A)(3) of the Arbitration Act.
[13] Section 17(1)(ii)(b) of the Arbitration Act.
[14] Section 3(1) of the Commercial Courts Act 2015.

ordinary original jurisdiction;[15] and "commercial appellate divisions" in each high court to adjudicate appeals filed against decisions of the commercial courts and the commercial divisions.[16] These commercial courts or commercial divisions will adjudicate commercial disputes[17] of INR one crore (approximately USD 150,000) and above, which is the current "specified value" under the Commercial Courts Act 2015.[18] All suits and applications that involve a commercial dispute of the specified value and above, including applications for domestic as well as international arbitrations under the Arbitration Act, that were, and still are currently pending before the relevant courts will be transferred to the respective commercial courts or commercial

[15] Section 4(1) of Commercial Courts Act 2015.
[16] Section 5(1) of the Commercial Courts Act 2015.
[17] The term "commercial dispute" is defined under Section 2(1)(c) the Commercial Courts Act 2015 as "a dispute arising out of—(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; (ii) export or import of merchandise or services; (iii) issues relating to admiralty and maritime law; (iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing- and financing of the same; (v) carriage of goods; (vi) construction and infrastructure contracts, including tenders; (vii) agreements relating to immovable property used exclusively in trade or commerce; (viii) franchising agreements; (ix) distribution and licensing agreements; (x) management and consultancy agreements; (xi) joint venture agreements; (xii) shareholders' agreements; (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; (xiv) mercantile agency and mercantile usage; (xv) partnership agreements; (xvi) technology development agreements; (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; (xviii) agreements for sale of goods or provision of services; (xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; (xx) insurance and re-insurance; (xxi) contracts of agency relating to any of the above; and (xxii) such other commercial disputes as may be notified by the Central Government." The Arbitration Act 2015 further clarifies that a commercial dispute shall not cease to be a commercial dispute merely because: (a) it also involves action for recovery of immovable property or for realization of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions.
[18] Section 2(1)(i) of the Commercial Courts Act 2015.

divisions created by the legislation. All appeals filed before the commercial appellate division must be disposed off within a period of six months.[19]

The Commercial Courts Act 2015 also introduces a regime on costs (by way of amendments to the Civil Procedure Code 1908), very similar to the provisions made in the Amendment Act 2015 explained above, incorporating the "costs follow the events" principle, which must be followed as a general rule.[20]

A.1.4 Investor – State Arbitration and 2015 Model BIT

In December 2015, the government of India approved and issued the final model Bilateral Investment Treaty ("Final Model BIT")[21] following a public consultation on the draft model BIT.[22] The Final Model BIT varies in considerable regard from the draft model BIT. Further, India has sought to terminate 57 BITs with countries with a view to signing new treaties based on the Final Model BIT.[23]

The Final Model BIT contains a hybrid definition of investment that includes "enterprise constituted, organized and operated in good faith by an investor" and specifies that investors must possess certain characteristics, such as: (i) "commitment of capital or other resources"; (ii) "certain duration"; (iii) "the expectation of profit or gain"; (iv) "the assumption of risk"; and (v) "significance for the development of the Party."[24] The definition of "investor" includes

[19] Section 14 of the Commercial Courts Act 2015.
[20] Section 2 of Schedule of the Commercial Courts Act 2015. (Substitution to Section 35(2) of the Code of Civil Procedure).
[21] Model Text for the Indian Bilateral Investment Treaty, Ministry of Finance website. See also Grant Hanessian and Kabir Duggal, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?*, ICSID Review (Forthcoming).
[22] Draft Indian Model Bilateral Investment Treaty Text, Government of India website, available at https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/. See also India Chapter, *The Baker McKenzie International Arbitration Yearbook* 2015-2016, pp. 156-157 (discussing the Draft Indian Model BIT).
[23] See, eg, *India Takes Steps To Reform Its Investment Policy Framework After Approving New Model BIT*, Investment Treaty News (10 August 2016).
[24] Final Model BIT, Art. 1.4.

natural and juridical persons, both of which have been carefully defined.[25]

The Final Model BIT offers core investment protections. For example, Article 5 states that a party cannot expropriate/nationalize an investment except: (i) for public purpose; (ii) in accordance with due process of law; and (iii) on payment of "adequate compensation."[26] The Final Model BIT offers a carefully crafted "treatment of investments" clause that is narrower than the common "fair and equitable treatment" clause or even the minimum standard of treatment clause.[27] It also contains a full protection and security clause that has been restricted only to the physical security of the investment,[28] in addition to a "national treatment" clause.[29] Importantly, however, the Final Model BIT does not provide a most-favored-nation (MFN) clause or umbrella clause.

In keeping with recent business developments, Article 12 of the Final Model BIT, entitled "corporate social responsibility," requires investors to "endeavor to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies" and further states that these principles may address "labor, the environment, human rights, community relations and anti-corruption."[30]

On the dispute resolution front, the Final Model BIT envisions a complex, sequential process, allowing for disputes to be resolved by an international arbitral tribunal. A key point worth emphasizing here is that an investor is required to exhaust local remedies for a period of

[25] *Id*., Arts. 1.5, 1.9.
[26] *Id*., Art. 5.1.
[27] *Id*., Art. 3.1.
[28] *Id*., Art. 3.2.
[29] *Id*., Art. 4.1.
[30] *Id*., Art. 12.

five years before it can submit a "notice of dispute."[31] This is an important development because most existing treaties do not provide for such a long exhaustion period. It remains to be seen how successful India will be in negotiating and renegotiating treaties based on the Final Model BIT.

A.2 Institutions, rules and infrastructure

The LCIA India was established in 2009. However, in June 2016, LCIA India closed its office in the country due to a lack of takers in the Indian market.[32]

India has arbitration institutions attached to various high courts such as Karnataka, Delhi, Punjab and Haryana, to name a few, which are active and significant institutions. Apart from these, there are arbitration institutions run by the Chambers of Commerce in different states, such as the Bombay Chambers of Commerce and Madras Chambers of Commerce.

The Mumbai Centre for International Arbitration (MCIA) is a joint initiative between the government of the State of Maharashtra, the government of India, and international legal and business communities. It was established in October 2016 and aims to provide international arbitration best practices, top-of-the-line facilities and administrative services to cater to the commercial needs of legal and business practitioners in India and abroad. [33]

[31] *Id*., Art. 15.2. It is worth noting that the Draft Model BIT did not include a temporal requirement, but instead merely stated that an investor had to exhaust "all judicial and administrative remedies." Draft Model BIT, Art. 14.3(ii)(a).
[32] http://www.lcia-india.org/
[33] http://mcia.org.in/about/

B. Cases

B.1 Development of Interventionist Jurisprudence

The 2002 decision of the Supreme Court in the *Bhatia International* case[34] was a landmark one, in which a three-judge bench of the Supreme Court (while considering a Section 9 petition for interim measures) under the Arbitration Act, in an ICC arbitration), unanimously decided that all provisions of Part I of the Arbitration Act, regulating domestic arbitrations, including Section 9, would apply to foreign-seated arbitrations. The Supreme Court further held that Part I would compulsorily apply to domestic arbitrations and would also apply to foreign arbitrations, unless the parties specifically exclude it. The *Venture Global Engineering* case[35] took the interpretation of the *Bhatia International* case to the next level by stating that Part II of the Arbitration Act, which provides for the enforcement of foreign awards, was incomplete without the support of Part I, as it did not possess important provisions such as those for challenging a foreign award. These gaps were meant to be addressed by making provisions of Part I applicable to Part II of the Arbitration Act. The *Venture Global Engineering* case effectively made the Arbitration Act extraterritorial in its operation, unless the parties explicitly or implicitly excluded the jurisdiction of Indian courts. Such an interpretation of the applicability of Part I of the Arbitration Act was upheld by a string of subsequent cases.

B.2 The new pro-arbitration approach

This position was completely reversed by a 2012 decision of the Supreme Court in the *BALCO* case,[36] which held that for arbitration agreements executed after 6 September 2012, parties to foreign-seated arbitrations would not be entitled to any reliefs under Part I of the Arbitration Act. The Supreme Court determined that there would

[34] *Bhatia International v. Bulk Trading S.A. & Anr*, (2002) 4 SCC 105.
[35] *Venture Global Engineering v. Satyam Computer Services Ltd.*,(2008) 4 SCC 190.
[36] *Bharat Aluminium Company Ltd v.Kaiser Aluminium Technical Service, Inc.,* (2012) 9 SCC 552.

strictly be no intermingling of the provisions of Part I with Part II. Therefore, no interim relief could be claimed under Section 9 of the Arbitration Act if the arbitral proceeding was seated outside India. This trend was further reinforced in the seminal judgment of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[37] where the Supreme Court held that the doctrine of "patent illegality" for setting aside a domestic arbitral award under Section 34 of the Arbitration Act would not apply to the enforcement of foreign arbitral awards under Section 48, as the scope of objections to enforceability of a foreign award were inherently different from the challenges that can be raised against a domestic award. The Amendment Act 2015 has clarified this position and made certain sections of Part I applicable to foreign-seated arbitrations, subject to any agreement to the contrary by the parties. The question of whether choice of foreign seat excludes the applicability of Part I by necessary implication is discussed further in this chapter.

The decision of the Supreme Court in cases such as *Enercon (India) Ltd. v. Enercon GMBH*, [38] show the pro-arbitration stance of the Courts in India. In this case, on a complicated factual matrix, the Supreme Court examined several issues including the existence and severability of the arbitration clause, governing law and seat of arbitration and concurrent jurisdiction of Indian and foreign courts. The Supreme Court held that when faced with an "unworkable" arbitration clause belonging to a contract that was not concluded, it was the duty of the court to respect the intention of the parties to arbitrate and make the clause workable within the contours of the law. It was held that: (i) the intention of the parties was to treat India as the seat of arbitration since Indian law was made applicable to the curial aspects of the agreement, while London was merely the venue; and (ii) consequently, Indian courts would have exclusive jurisdiction over matters incidental to the arbitration and English courts would not have concurrent jurisdiction. The Court referred the parties to arbitration

[37] 2013 (3) ARBLR 1 (SC).
[38] (2014) 5 SCC 1.

and constituted the arbitral tribunal, while further granting an injunction restraining the proceedings in the English court.

Another indication of the pro-arbitration trend was the contradictory decision to the Bombay High Court judgment in *Addhar Mercantile Private Limited (Applicant) v. Shree Jagdamba Agrico Exports Pvt. Ltd.*[39] Here, the Bombay High Court interpreted an agreement between two Indian parties to have the "arbitration in India or Singapore and governed by English law," to mean that the arbitration must be held in India and governed by Indian law, as Indian policy did not permit Indian nationals to derogate from Indian law. A contradictory decision was rendered by the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation,*[40] which ruled that two Indian parties may conduct arbitration in a foreign seat under English law. The Court relied on an earlier decision of the Supreme Court in *Atlas Exports Industries v. Kotak & Company*[41] (a case decided under the 1940 Act), which held that an agreement between Indian parties that have contractually agreed to have a foreign-seated arbitration would not be considered to be against the public policy of India. The *Sasan* case went up to the Supreme Court on appeal, which upheld the decision of the Madhya Pradesh High Court, but did not comment on whether Indian parties could opt out of an Indian-seated arbitration.

In *Union of India v. Reliance Industries and Others*,[42] the Supreme Court clarified the concept of necessary implication of exclusion formulated in the *Bhatia International* case[43] read in the context of the *BALCO* case,[44] where the Supreme Court held that if the juridical seat of arbitration is outside India and the law governing the arbitration

[39] Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013, Bombay High Court.
[40] FA-310-2015, Madhya Pradesh High Court decision dated 11 September 2015.
[41] (1999) 7 SCC 61.
[42] (2015) 10 SCC 213.
[43] *Bhatia International v. Bulk Trading S.A. & Anr*, (2002) 4 SCC 105.
[44] *Bharat Aluminium Company Ltd v.Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

agreement is one besides the Arbitration Act, then Part I of the Arbitration Act, which provides jurisdiction to the local courts for various reliefs that parties may seek, is excluded. This means that local Indian courts would not have jurisdiction to entertain matters connected to an international arbitration case, where the juridical seat of arbitration and the substantive laws governing the dispute or the arbitration agreement are ones other than the Indian laws.

Connected to the above, and in a case after the amendment of the Arbitration Act, the Delhi High Court in *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd*[45] held that Indian courts would have jurisdiction on international commercial arbitration matters, where the substantive laws are foreign laws and the seat of arbitration is also located abroad, thus contravening the principle of necessary implication of exclusion of jurisdiction of Indian courts, as decided in the case of *Union of India v. Reliance Industries and Others*,[46] by the Supreme Court of India. This case also held that even if the arbitration was commenced prior to the Amendment Act, the provisions of the Amendment Act will be applicable to all court proceedings instituted after the Amendment Act was in force.

C. Trends and observations

In the past 10 years, the arbitration regime in India has slowly but surely moved from "high judicial intervention" to "minimal judicial intervention," which is evident in both judgments of the courts as well as legislative amendments.

The legislative intention for the process of arbitration seated in India seems to be to make the process of arbitration a more viable and attractive option, in light of the overburdened court systems, and to make India an attractive destination for international arbitration. In

[45] O.M.P. (I) (COMM.) 23/2015 & CCP (O) 59/2016, IA Nos. 25949/2015 & 2179/2016.
[46] (2015) 10 SCC 213.

pursuit of that intention, the Amendment Act 2015 has introduced several pertinent provisions, such as determining a time limit within which the arbitral award must be rendered, the mandatory requirement for arbitrators to declare any conflicts of interest, reducing the intervention of domestic courts in international arbitrations, the time period within which arbitral proceedings must commence after interim relief has been granted, the introduction of a fast-track procedure, and the automatic enforcement of the arbitral award unless a stay has been granted by the court with relevant jurisdiction.

While some of these provisions, such as the rigid time limit of 12 months for rendering an arbitral award, may be optimistic, considering the nature of an arbitration process, it is part of a positive trend. Additionally, with the establishment of institutions such as the MCIA, the attempt is to make India a neutral and attractive venue for conducting international arbitrations by reducing judicial intervention, and increasing recognition and enforcement of foreign arbitral awards.