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## India

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### A. Legislation and rules

#### A.1 Legislation

International arbitration in India continues to be governed by the Arbitration and Conciliation Act 1996 (the “Arbitration Act”). In 2015, the Indian parliament amended the 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 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 arbitration seated abroad, respectively. Part I of the Arbitration Act contains provisions for judicial intervention at, broadly, four stages: (i) reference of a dispute

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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 an arbitral award under Section 34. Part II of the Arbitration 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 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 relief), 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.<sup>5</sup>

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 have interpreted this widely and set aside awards, but lately in the pro-arbitration landscape, 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

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<sup>5</sup> Proviso to Section 2(2) of the Arbitration Act.



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 basic notions of morality or justice.<sup>6</sup> 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.<sup>7</sup>

Incorporating judge-made law into the statute for clarity, the Amendment Act also contains some significant amendments that are aimed at reducing timelines (as provided in sections allowing fast-track procedures,<sup>8</sup> sections mandating the rendering of an arbitral award within 12 months of a reference to arbitration<sup>9</sup> and the commencement of arbitral proceedings within 90 days of grant of interim relief by domestic courts<sup>10</sup>), 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 to Section 36 that the filing of an application for setting aside an arbitral award will not prevent proceedings for enforcement, even when is pending a challenge, in the absence of a specific stay granted by the court.<sup>11</sup>

In a significant step, the Amendment Act 2015 introduced Section 31A, which delineates the award of costs by the arbitral

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<sup>6</sup> Section 34(2)(b) Explanation 1 of the Arbitration Act.

<sup>7</sup> Section 34(2)(b) Explanation 2 of the Arbitration Act.

<sup>8</sup> Section 29B of the Arbitration Act

<sup>9</sup> Section 29A(1) of the Arbitration Act.

<sup>10</sup> Section 9(2) of the Arbitration Act.

<sup>11</sup> Section 36(2) of the Arbitration Act.

tribunal following the “costs-follow-the-events” principle, where the successful party’s costs are borne by the unsuccessful party.<sup>12</sup> 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.<sup>13</sup> Section 17 of the Amendment Act 2015 now also allows for parties to seek security for costs from the arbitral tribunal as an interim measure, as provided for in the Civil Procedure Code, 1908.<sup>14</sup>

#### A.1.2 Commercial Courts Act 2015

The Commercial Courts Act 2015 provides for the constitution of “commercial courts” at a district level (except in areas where the High Court exercises ordinary civil jurisdiction, where “commercial divisions” will be constituted) and “commercial appellate divisions” in each High Court to adjudicate appeals filed against decisions of the commercial courts and the commercial divisions.<sup>15</sup> These commercial courts or divisions will adjudicate commercial disputes<sup>16</sup> of INR 10

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<sup>12</sup> Section 31(A)(2)(a) of the Arbitration Act.

<sup>13</sup> Section 31(A)(3) of the Arbitration Act.

<sup>14</sup> Section 17(1)(ii)(b) of the Arbitration Act.

<sup>15</sup> Sections 3, 4 and 5 of the Commercial Courts Act 2015.

<sup>16</sup> The term “commercial dispute” is defined under Section 2(1)(c) of the Commercial Courts Act 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-*



million (approximately USD 150,000) and above, which is the current “specified value” under the Commercial Courts Act 2015.<sup>17</sup>

All suits and applications that involve a commercial dispute of the specified value and above, including disputes which relate to domestic or international arbitrations and the enforcement of foreign and domestic arbitral awards, are now subject to procedure specified under the Commercial Courts Act 2015.

### A.1.3 Investor-state arbitration and the Model BIT

India is currently a signatory to over 80 BITs. Typically, India is bound by ad hoc arbitration provisions contained within these BITs, as it is not a signatory to the ICSID Convention.

In a recent drive to renegotiate those BITs whose initial term is about to expire, the Indian government has stated that it intends to terminate at least 58 of the existing BITs and renegotiate the same on the basis of the Model BIT, which was issued in December 2015.

#### A.1.3.1 Definitions of “investment” and “investor” under the Model BIT

The Model BIT follows a hybrid asset/enterprise-based definition of investment,<sup>18</sup> having removed the requirement of substantiality of business operations from an earlier draft. This definition 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*

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*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 Amendment Act further clarifies that a commercial dispute shall not cease to be a commercial dispute merely because: (i) 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; and (ii) one of the contracting parties is the state or any of its agencies or instrumentalities, or a private body carrying out public functions.

<sup>17</sup> Section 2(1)(c)(i) of the Commercial Courts Act.

<sup>18</sup> Article 1.4 of the Model BIT.

gain;” (iv) “*the assumption of risk;*” and (v) “*significance for the development of the Party.*”

The definition of “investor”<sup>19</sup> includes natural and juridical persons, both of which have been carefully defined. Under the Model BIT, the definition of an investor includes, “*a legal entity that is constituted, organized and operated under the law of that Party and that has substantial business activities in the territory of that Party.*”

Interestingly, this is in deviation to some of the BITs India has entered into, particularly the India-Mauritius BIT. Under this BIT, an investor can refer to a “*corporation incorporated in accordance with the laws of a Contracting Party*”.

The Model BIT also defines an investment as an “enterprise” that is constituted in good faith and has the “*characteristics of an investment*” such as “*the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made.*” In addition, the Model BIT contains a negative list<sup>20</sup> of those items which do not constitute investment, and this list includes portfolio-based investments and effects of judicial decisions as well as interests in debt securities issued by the government.

#### A.1.3.2 Investment protections under the Model BIT

Noticeably, the Model BIT does not include a Most Favored Nation obligation, or a broad Fair and Equitable Treatment obligation. Instead, there is a more narrow “treatment of investment” clause in Article 3 that incorporates the customary international law standard for rights against the denial of justice, as well as protections against targeted discrimination, manifestly abusive treatment and the right to

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<sup>19</sup> Articles 1.5 and 1.9 of the Model BIT.

<sup>20</sup> Clarification to Article 1.4 of the Model BIT.



due process.<sup>21</sup> However, it does accord full protection and security to the investor and its investment,<sup>22</sup> and national treatment<sup>23</sup> to investors.

## A.2 Institutions, rules and infrastructure

India has arbitration centers 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 Chambers of Commerce in different states such as the Bombay Chambers of Commerce and Madras Chambers of Commerce.

The Mumbai Centre for International Arbitration (the “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 facilities that follow international best practices. In May 2017, the Supreme Court of India directed the MCIA to appoint an arbitral tribunal in an international commercial dispute, by exercising its discretionary power under Section 11 of the Arbitration Act.<sup>24</sup>

## B. Cases

### B.1 The pro-arbitration approach continues

Since the landmark decision of the Supreme Court in *BALCO*, Indian courts have preferred a pro-arbitration and non-interventionist stance.<sup>25</sup>

In *Sasan Power*,<sup>26</sup> the Supreme Court continued this trend, by determining that two Indian parties may conduct an arbitration which

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<sup>21</sup> Article 3.1 of the Model BIT.

<sup>22</sup> Article 3.2 of the Model BIT.

<sup>23</sup> Article 4 of the Model BIT.

<sup>24</sup> Order dated 9 May 2017 in Arbitration Case No. 33/2014 - Sun Pharmaceutical Industries Ltd., Mumbai and M/s Falma Organics Limited Nigeria.

<sup>25</sup> *Bharat Aluminium Company Ltd. v. Kaiser Aluminium Technical Service, Inc.*, (2012) 9 SCC 552.

is seated outside India. However, the Supreme Court refused to comment on whether Indian parties could opt out of an Indian-seated arbitration. Recently, the Delhi High Court in *GMR Energy*<sup>27</sup> relied on *Sasan Power* and held that there is no prohibition on two Indian parties choosing a foreign-seated arbitration, as it would not be against Indian public policy.

In *Voestalpine*<sup>28</sup>, the Supreme Court interpreted the newly amended Arbitration Act and determined that former employees of one party may be appointed as arbitrators if the arbitration agreement provided for the same, so long as they have no connection to the dispute referred to arbitration.

As regards the enforcement of arbitral awards in India, courts have continued to adopt a non-interventionist stance. In *NTT Docomo*<sup>29</sup>, the Delhi High Court refused to allow the Reserve Bank of India (RBI) to intervene in proceedings for the enforcement of a USD 1.6 billion LCIA award. Enforceability of the award was challenged on the ground that it violated Indian public policy, as it allegedly violated extant foreign exchange regulations. While holding that the RBI had no locus to intervene in enforcement proceedings, and that the award in question never violated extant foreign exchange regulations, the Delhi High Court allowed the enforcement of the award. Interestingly, the Delhi High Court observed that the impact on the influx of foreign direct investment, as well as on strategic international relations, would be important factors to consider while examining the enforceability of an arbitral award. In the same vein, the Delhi High Court allowed the enforcement of the award in *Cruz City*,<sup>30</sup> and determined that even if a foreign award violated extant foreign exchange regulations, it would

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<sup>26</sup> *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*, AIR 2016 SC 3974.

<sup>27</sup> *GMR Energy Ltd v. Doosan Power Systems India Pvt. Ltd.*, (2017) SCC OnLine Del 11625.

<sup>28</sup> *Voestalpine Schinen GmBH v. Delhi Metro Rail Corporation*, (2017) 4 SCC 665.

<sup>29</sup> *NTT Docomo Inc. v. Tata Sons Ltd.*, 2017 SCC OnLine Del 8078.

<sup>30</sup> *Cruz City I Mauritius Holdings v. Unitech Ltd.*, (2017) 4 SCC 665.



not attract the public policy bar on enforcement in Part II of the Arbitration Act.

## B.2 Investment treaty arbitrations

India has received over 22 notices of dispute under various BITs in the last six years. Notably, Vodafone BV (Netherlands) initiated treaty arbitration against India under the India-Netherlands BIT, for the allegedly unfair retrospective amendment of a tax legislation. This amendment effectively reversed a favorable Supreme Court decision that determined that Vodafone BV's USD 11 billion acquisition of an Indian company did not attract any tax liability. Interestingly, Vodafone (UK), the parent company, attempted to initiate another arbitration against India under the India-UK BIT on the same circumstances. However, the Delhi High Court restrained it from doing so in *Union of India v. Vodafone Group PLC*.<sup>31</sup> It applied the “group of companies” doctrine and determined that since there was duplicity in parties and reliefs requested, there was a risk of conflicting decisions. It remains to be seen what effect this decision might have on the international tribunal.

In a similar vein, Cairn Energy initiated treaty arbitration administered by the Permanent Court of Arbitration (the “PCA”) against India, under the India-UK BIT, over a USD 1.6 billion capital gains tax demand issued by the Indian tax authorities in relation to the acquisition of its Indian entity by Vedanta Resources. Recently, the arbitral tribunal refused to grant interim measures requested by Cairn Energy to restrain the Indian tax authorities from enforcing the tax demand against the investor. Further, Vedanta Resources is also pursuing a treaty claim against India, on similar facts and circumstances.

Devas Multimedia (Mauritius) pursued a treaty arbitration against India, which was administered by the PCA, for the termination of its contract with government-owned Antrix Corp. Ltd., the commercial

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<sup>31</sup> I.A.9460/2017 in CS (OS) No. 383/2017; order dated 22 August 2017.

wing of the Indian Space Research Organisation. In this case, the investor also pursued a parallel commercial arbitration under the investment contract, in which it received a favorable award for an amount of USD 672 million. Under the treaty arbitration, the investor received a favorable determination of liability, the valuation of which is currently pending.

The Yukos shareholders approached the Delhi High Court for enforcement of the USD 50 billion award under the Energy Charter Treaty against the Russian Federation.<sup>32</sup> However, this petition was subsequently withdrawn (with liberty to file afresh), since the award is currently undergoing setting-aside proceedings in The Hague.

Currently, Nissan Motors (Japan) is pursuing a treaty claim against India under the 2011 India-Japan Economic Partnership Agreement, seeking over USD 770 million for unpaid tax incentives allegedly assured by the Tamil Nadu state government.

Interestingly, for the first time, a favorable treaty award for EUR 33 million was obtained by an Indian investor under the India-Poland BIT in *Flemingo Duty Free*.<sup>33</sup> This claim involved the unfair termination of licenses by the Polish airport authorities, which entitled the investor to operate duty-free shops at Chopin Airport in Warsaw.

### C. Funding in international arbitration

Traditionally, third-party funding has never been prevalent in India and has been viewed with suspicion. There is no legislative framework that governs or regulates funding in litigation or international arbitration. In the past, some courts have determined that third-party funding is permissible,<sup>34</sup> while some courts have declined

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<sup>32</sup> *Yukos Universal Ltd. v. The Russian Federation* in O.M.P. (EFA) (COMM.) 2/2016, O.M.P. (EFA) (COMM.) 3/2016, and O.M.P. (EFA) (COMM.) 4/2016.

<sup>33</sup> *Flemingo Duty Free Shop Pvt. Ltd. v. Republic of Poland*, UNCITRAL Award dated 12 August 2016.

<sup>34</sup> *Intertoll Ics Cecons O & M Co Private Limited v. National Highways Authority of India* 129 (2006) DLT 146.



to uphold such agreements on the grounds of public policy or professional ethics.<sup>35</sup> The Bar Council of India Rules, 1975, which regulate professional conduct and ethics in the legal profession, state that an advocate shall not make his or her fee contingent on the result of litigation, or agree to share the proceeds thereof.<sup>36</sup> Notwithstanding, there is no law that explicitly prohibits third-party funding agreements, particularly with respect to arbitration. In practice, we have observed that third-party funding institutions have claimed to pursue opportunities in India.

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<sup>35</sup> Re KL Gauba AIR 1954 Bom 478; Re: Mr 'G', A Senior Advocate of the Supreme Court AIR 1954 SC 557.

<sup>36</sup> Rule 20, Chapter II, Part VI of the Bar Council of India Rules, 1975, under the Advocates Act, 1961.