Indian arbitration law: A roundup of the year 2015

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This article discusses key developments in Indian arbitration in 2015, including the amendments to the Indian Arbitration and Conciliation Act and landmark judgments.

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Amendments to the Indian Arbitration and Conciliation Act

The Indian Arbitration and Conciliation (Amendments) Act 2015 (2015 Act) came into force with effect from 23 October 2015 amending the Indian Arbitration and Conciliation Act 1996 (1996 Act) (see *Legal updates, Indian Arbitration and Conciliation (Amendments) Ordinance in force (www.practicallaw.com/9-619-7736)* and *India welcomes new arbitration law and model BIT (www.practicallaw.com/7-621-5864)*).

Background

High costs and long durations have frustrated the development of arbitration in India, making the system little better than litigation proceedings on India's older arbitration regime, to which the 1996 Act was intended to provide an effective alternative. In August 2014, the Law Commission of India published a report proposing amendments to the Arbitration and Conciliation Act 1996 (Report) (see *Legal update, Law Commission of India publishes report proposing amendments to the Arbitration and Conciliation Act 1996 (www.practicallaw.com/5-578-5045)*). The 2015 Act incorporates recommendations made in the Report. The 2015 Act contains several significant amendments, some of which aim to expedite arbitration. The key amendments are set out below.

Prospective application

Section 26 of the 2015 Act confirms that unless parties agree otherwise, the new amendments will not apply to arbitrations that were initiated prior to the commencement of the 2015 Act (that is, before 23 October 2015).

Comment: Whilst clarity on the prospective application of the 2015 Act is to be welcomed, it does not, however, indicate whether appeals from arbitral awards pronounced before 23 October 2015 are subject to the provisions of the 2015 Act. Allowing appeals filed before 23 October 2015 to fall within the purview of the new Act might be sensible as amendments in relation to appeals are procedural changes and not substantive. It is likely that this will be tested in court.

International commercial arbitration

Section 2(1)(f) of the 2015 Act defines international commercial arbitration as one where at least one party is not Indian. Therefore, an arbitration between two Indian parties does not fall within the definition of international commercial arbitration.

The 2015 Act confers jurisdiction in relation to international commercial arbitrations on courts that are not inferior to a high court (*section 2(1)(e)(ii)*). While taking away jurisdiction from lower courts will positively impact the quality of judges who hear high value applications and appeals arising out of international commercial arbitrations; this will, however, add to the workload of the already over-burdened high courts.

The following provisions now apply to international commercial arbitrations, even if the place of arbitration is outside India, unless the parties opt-out of their applicability (*proviso to section 2(2)*):

- Section 9 (interim measures by court).
- Section 27 (court assistance in taking evidence).
- Section 37(1)(a) (appeals from orders granting or refusing interim measures by courts).
- Section 37(3) (second appeals disallowed other than to the Supreme Court).

However, the proviso to section 2(2) of the 2015 Act (above) are only of use where India recognises the seat of arbitration, and not in all foreign seated arbitrations. This means that the proviso will only apply:

- Where the award is a New York Convention or Geneva Convention award.
- Where India has a reciprocal arrangement with that territory under sections 44(b) and 53(c) of the 2015 Act.
- The award fulfils the conditions for enforcement of foreign awards laid down in sections 48 and 57 of the 2015 Act.

This amendment therefore enables parties to an international commercial arbitration seated outside India to approach Indian courts for interim relief, unless parties have agreed to the contrary. To recall, *Bhatia International v Bulk Trading S.A. (2002) 4 SCC 105* (Bhatia International) had allowed this and *Bharat Aluminium Company Limited vs. Kaiser Aluminium (2012) 9 SCC 552* (BALCO) then reversed the Bhatia decision, thereby preventing Indian courts from granting interim relief in foreign seated arbitrations (see *Legal update, Uprooting Bhatia International: Part I of Indian Arbitration and Conciliation Act does not apply to arbitration outside India (www.practicallaw.com/7-521-6850)*). Although BALCO was regarded as a welcome move at the time, it adversely impacted matters where a party's assets were situated in India, because affected parties could not approach Indian courts for relief in relation to those assets. The relief had to be sought from the foreign seated arbitral tribunals and this often rendered enforcement proceedings toothless.

Comment: The amendment corrects the unintended consequences of *BALCO* and is a happy compromise between *BALCO* and the controversial Bhatia International. Moreover, allowing the parties to opt out of the provision is a step in favour of party autonomy. It removes the dilemma in relation to seating an international commercial arbitration inside or outside India.

M&A and transactional lawyers should carefully consider whether their clients would benefit from approaching India courts or if they should advise their clients to "opt out" of the proviso to section 2(2), in which case wording to this effect should be drafted into dispute resolution clauses.

Note: The amendments contain a small error. It appears that the intention is to refer to the original section 37(1)(a) - that is, appeals from orders granting or refusing interim measures by courts - and not the amended section 37(1)(a), which relates to appeals from an order of refusal pursuant to an application to refer parties to arbitration (*section 8, 2015 Act*).

Expediting arbitration

The 2015 Act contains a number of amendments aimed at expediting arbitrations in India, which has been plagued with adjournments, short hearings and delays that extended well beyond a couple of years. Significant amendments aimed at expediting arbitration are set out below.

12 month time limit to dispose of an arbitration

A tribunal is required to render an award within 12 months from its appointment. Parties may, by consent, extend this period by six months. If an award is not made within the total 18 month period, then the tribunal's mandate shall terminate unless extended by a court (*section 29A, 2015 Act*).

Comment: The government has been bold in imposing a 12 to 18 month time limit within which an arbitration must be completed. The Law Commission of India had recommended 24 months in its Report, which was shortened in the amendment (see *Legal update, Law Commission of India publishes report proposing amendments to the Arbitration and Conciliation Act 1996 (www.practicallaw.com/5-578-5045)*).

There are unintended consequences of such a strict timeline. For example, a respondent has little incentive to consent to the six month extension at the end of 12 months. At the end of 18 months, the compulsion to have the time extended by a court will lead to queues before already over burdened courts. It is expected, however, that courts will readily grant this extension.

Moreover, the time-limit might be genuinely difficult to meet in the case of high-stake complex commercial arbitrations and international parties might therefore be reluctant to have their arbitration governed by the Indian Arbitration and Conciliation Act.

Arbitrations to be heard for continuous periods of time

A tribunal is required to hold hearings for obtaining evidence and hearing oral arguments on a continuous daily basis. A tribunal is encouraged not to grant adjournments without sufficient cause and significant penalties can be imposed on parties seeking an adjournment without sufficient cause (*section 24, 2015 Act*).

Comment: The effort to have arbitrations heard over block dates, thereby reducing part-heard cross examinations, is a constructive step in the administration of justice. Arbitrations in India tend to beheld from 5-7pm, after court hours, as counsel are unable to commit time during a court-working day. Perhaps the amendment will encourage the creation of a new arbitration bar that is distinct from advocates who have a court practice. It might even prompt the engagement of foreign counsel, such as English barristers, who are able to commit block dates on a continuous basis.

Arguably, the 2015 Act could have also incentivised the use of technology for inspection/disclosure, in the preparation of briefs and bundles, in conducting administrative hearings and/or cross examinations over video link.

Fast track procedure

There is an opt-in fact track procedure for document-only arbitrations before a sole arbitrator where an award is to be made within six months (*section 29B, 2015 Act*). To opt-in, parties need to agree in writing at any stage before or at the time of appointment of the tribunal. An oral hearing can be held at the request of all parties, or, if the arbitral tribunal considers it necessary to clarify issues.

Arbitrator's fees are linked to quick disposal

If an award is made within six months, the tribunal is entitled to receive additional fees, to be determined by agreement between the parties. However, while hearing an application to extend time for issuing the award, if a court finds that the delay was attributable to the tribunal, it may penalise the tribunal by reducing its fees by an amount not exceeding 5% for each month of delay (*section 29A, 2015 Act*).

Comment: It is prudent that the amendment imposes a reduction in fees only when the delay is attributable to the tribunal. This is because an award is often delayed by circumstances outside an arbitrator's control such as a request from the parties to delay work on the award because they are attempting settlement.

It will be interesting to see whether parties begin arguing against the tribunal with respect to delays in order to reduce arbitrators' fees. There is also the possibility of complaints beting made by one member of the tribunal against another when a three member tribunal has delayed the arbitration or circulation of an award (see *Arbitrator(s) - their appointment and fees*).

Interestingly, the International Chamber of Commerce (ICC) has also recently announced that it will reduce the fees payable to arbitral tribunals that fail to submit a draft award within three months (two months in the case of a sole arbitrator). Arbitrators could see their fees reduced by 5% to 20% or higher, depending on the length of the delay (see *Legal update, ICC implements further policies to bolster transparency and increase efficiency (www.practicallaw.com/9-621-6075)*).

Arbitrator(s) - their appointment and fees

An application to the court for the appointment of a tribunal is to be dealt with as expeditiously as possible and every endeavour is to be made to dispose of it within 60 days (*Section 11 (13)*). This function is no longer just a judicial function, there by bringing institutions that administer arbitrations within the 60-day limit.

Section 12(1) of 2015 Act requires candidates who are potential arbitrators to disclose:

- The circumstances that are likely to raise justifiable doubts regarding their independence or impartiality.
- Grounds that may affect their ability to devote time to the arbitration and complete it within 12 months.

The aforesaid circumstances are not left to the imagination. The Fifth Schedule to the 2015 Act stipulates guiding principles and circumstances that might constitute conflicts of interest for a potential arbitrator. These include having previously rendered services to one of the parties, relationships with other arbitrators, a significant financial interest held by a close family member and so on. Moreover, any arbitrator whose relationship with the parties, counsel of the subject matter of the dispute falls within a category stipulated in the Seventh Schedule, is ineligible for appointment unless that ineligibility is waived by the parties in writing.

Section 12(b) also has a guiding schedule, the Sixth Schedule, which requires arbitrators to declare, amongst other things, the number of arbitrations they are working on.

In *Union of India v UP State Bridge Corp Ltd (2015) 2 SCC 52*, a judgment pronounced before the amendment, it was held that the Indian Arbitration and Conciliation Act does not exhaustively list circumstances that give rise to justifiable doubts over an arbitrator's impartiality or independence. In government contracts, arbitration clauses can provide for the appointment of departmental authorities as arbitrators. Principles of natural justice must, however, be given due regard and no authority can adjudicate on any decision or subject that has been within the domain of that authority or its direct superior.

Arbitrator's fees have increased exponentially in India, frequently being termed extortionate. This has been corrected by section 11(14), which refers to a table of fees in the Fourth Schedule, that links an arbitrator's fees to the sum in dispute. The fees in the Fourth Schedule are extremely reasonable. However, the 2015 Act has not made them mandatory, leaving it to individual high courts to frame rules in relation to benchmark fees after considering the rates specified in the Fourth Schedule.

Lastly, the court has also been empowered to terminate the mandate of the tribunal, substitute it with another tribunal and enable proceedings to continue from the point at which the mandate is terminated (see *Arbitrator's fees are linked to quick disposal*).

Comment: Disclosures to be made by arbitrators are reformist and address core concerns such as the availability of arbitrators and their experience. This is in accordance with international trends. For example, the ICC has declared that it will "publish on its website the names of the arbitrators sitting in ICC cases, their nationality, as well as whether the appointment was made by the Court or by the parties and which arbitrator is the tribunal chairperson". This will give parties an accurate picture of who has genuine experience of being an arbitrator because many persons are on panels of institutions such as the ICC, the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC) - but not all have been appointed as arbitrators.

A cap on arbitrators' fees in domestic Indian arbitrations maybe prompted by good intentions but it does takes away from party autonomy. Moreover, the fee structure proposed in the Fourth Schedule does not reflect current market rates and one wonders whether the quality of arbitrators would be affected by the proposed low fees.

Interim measures

The 2015 Act has given arbitral tribunals wide powers to grant interim relief for the preservation, custody and inspection of property, as well as for securing the amount in dispute. These orders are now enforceable under the (Indian) Civil Procedure Code as if they were orders of an Indian court (*section 17*).

Section 2(2) of the 2015 Act has been amended to allow Indian courts to grant interim measures in foreign seated arbitrations unless parties agree to the contrary (see *International commercial arbitration*).

Once an arbitral tribunal has been constituted, parties must seek interim relief from the tribunal and not from the courts unless there are circumstances where the interim award does not render the remedy required.

Where a court passes an order for an interim measure of protection, the arbitration must commence within 90 days of the order or such further time as the court may determine (*section 9(2)*).

Comment: Section 9(2) curbs the tactical practice by unscrupulous parties of obtaining interim orders from courts without them initiating arbitration. The Law Commission of India's Report had gone further by suggesting that interim relief granted by the courts be vacated if the arbitration is not initiated within 90 days of filing the interim application, but this has not been adopted in the 2015 Act.

Appeals and the public policy of India

Challenges to Indian arbitration have been plagued with conflicting judgments that have interpreted differently what is contrary to the "public policy of India". Some recent judgments have, in fact, expanded the scope of this term, enabling courts to re-evaluate the evidence and set aside arbitral awards.

The 2015 Act attempts to narrow the scope of challenges to arbitral awards on public policy grounds to those that are:

- Induced or affected by fraud.
- In contravention with the fundamental policy of India.
- In conflict with the most basic notions of morality or justice.

Sections 48 and 57 stipulate that a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

However, the scope of "fundamental policy" will continue to be subject to judicial interpretation.

In *Associate Builders v Delhi Development Authority 2014(4) ARBLR 307* (Associate Builders), the Supreme Court defined a breach of fundamental policy of Indian law as having disregard for orders of superior courts and violatino of the principles of natural justice. The amendment echoes the rationale of *Associate Builders*.

However, in *Oil and Natural Gas Corporation Ltd v Western Geco International Ltd (2014) 9 SCC 263* (Western Geco), the Supreme Court, through an elaborate consideration of the scope of the term "fundamental policy of India" reverted to and enhanced the ruling in *Oil Natural Gas Corporation Lrd v Saw Pipes Ltd (2003) 5 SCC 705* (Saw Pipes) by granting courts greater latitude to interfere with arbitral awards. The Supreme Court, under the head "fundamental policy of India" identified three no-exhaustive, distinct and fundamental juristic principles that must be understood as a part and parcel of the fundamental policy of Indian law:

- Adopting a judicial approach while adjudicating on a dispute.
- Adhering to principles of natural justice.
- Shunning perversity and irrationality by abiding by *Wednesbury* principles of reasonableness.

There is a risk that the inclusion of the words "in contravention with the fundamental policy of India" in the 2015 Act, may regress the law to the *Saw Pipes* standard of judicial interference.

Section 36 has removed an automatic stay on the enforcement of awards when a challenge to the award has been filed. A party seeking a stay is now required to file a separate application for a stay. A court will have to record its reasons in writing for granting a stay and while doing so, may order the deposit of monies or the provision of reasonable security as a pre-condition for the grant of a stay. Courts can order the security be paid before an appeal is entertained. This is a welcome change compared to previous judgments that said courts did not have this authority.

Lastly, an appeal challenging an award is to be disposed of by the court within one year (*section 34(6), 2015 Act*).

Comment: Unnecessary appeals based on adjectives such as "most basic" and "patent illegality" are avoided, but the words "in conflict with the most basic notions of morality" may continue to lead to confusion as morality differs from person to person. The scope of "fundamental policy" will also continue to be subject to judicial interpretation.

Disallowing a merits review or the re-examination of evidence, combined with the imposition of a costs regime should go a long way in preventing frivolous challenges to arbitral awards.

That said, there are a number of perverse judgments that are rendered in domestic Indian arbitrations and parties who find themselves on the receiving end of these have been left without remedy by the recent amendment which disallows a merits review other than in cases where there is a patent illegality on the face of a domestic award (*section 23(20-A), 2015 Act*).

Imposition of costs

Section 31A introduces the internationally well known costs regime where costs follow the event. Costs are not limited to legal fees, but also include travel expenses, witness expenses and so on. The imposition of costs also extends to every litigation arising out of an arbitration.

Certain factors may be considered whilst imposing costs such as the conduct of parties, whether frivolous counter claims have been made, whether reasonable offers to settle the dispute have been refused and so on.

Comment: The introduction of a costs regime that extends to litigation arising out of arbitration discourage vexatious claims and frivolous appeals. This should ensure that the arbitration process is taken seriously by the parties.

The introduction of the costs regime also places India in the list of nations where costs follow the event. If one were to compare this with international institutions; it is similar to the LCIA and INCITRAL. The ICC, however, requires the tribunal to fix costs and decide which of the parties shall bear them or in what proportion they should be borne by the parties. The ICC model is similar to HKIAC and SIAC.

The invitation to a tribunal to take into account the conduct of parties incorporates a world-wide rule. The ICC Rules 2012, and the LCIA Rules 2014 both confer discretion on a tribunal to take into account parties' conduct, including whether they conducted the arbitration in an expeditious and cost-effective manner.

Enforcement

Under the old regime, the mere filing of an appeal resulted in an automatic stay of the arbitral award. This prevented a successful party from enforcing an award, resulting in delayed execution. Under the old regime, orders issued by a tribunal could not be directly enforced either.

The 2015 Act separates a mere filing of an appeal from an automatic stay of the award. The amendment also clarifies that orders issued by a tribunal have the same effect as an order of a court, and are therefore enforceable as court orders (*section 36*).

Tribunal awards now carry a default rate of interest from the date of the award to the date of payment at commercial rates plus 2%, unless otherwise specified by the tribunal. The rate of interest applicable in such cases, prior to the amendment was 18% per annum.

Comment: Given that arbitral awards are now to be treated as court orders, a party guilty of disobeying the award would be liable for contempt. This amendment vastly improves the existing regime in relation to enforceability, especially the enforceability of interim awards.

Conclusion

The 2015 Act is likely to have a positive impact on the arbitration landscape. India's over-burdened courts have frustrated many a commercial party. The amendments address this by expediting arbitration, restricting court interference and preventing the mis-use and delay tactics that had become prevalent under the old regime. This change will hopefully encourage investments and perhaps improve India's image as an arbitration destination.

A common criticism of arbitration in India is the heavy reliance on ad hoc arbitrations, which allows disputes concerning the governance of the arbitration to get out of hand. Institutional arbitration has not picked up in India and LCIA India has recently announced that it is going to shut its India operations (see *Legal update, LCIA India to close (www.practicallaw.com/9-621-9903)*). It remains to be seen whether parties will co-operate with the intention behind the amendments by agreeing to rigid timetables.

Landmark judgments of 2015

Procedural law follows the law of the seat

In *Harkirat Singh v Rabobank International Holding BV (2015) 5 Bom CR 9* (Rabobank), the court held that in the events that the arbitration agreement is silent on the applicable procedural law, it should follow the seat of arbitration and not the substantial law governing the arbitration agreement. This follows *Yograj v Ssang Yong (2012) 12 SCC 359* but departs from *Sakuma Exports Ltd v Louis Dreyfus Commodities (2015) 5 SCC 656*, which held that the proper law of the contract should govern the arbitration agreement.

Comment: *Rabobank* quotes an interesting passage from Redfern and Hunter on International Arbitration which says that an English woman who takes her car to France has not chosen French traffic law that will oblige her to drive on the right-hand side but she has, instead, chosen to go to France. The applicability of French law follows automatically.

Arbitrability of fraud

In 2014, *Swiss Timing Limited v Commonwealth Games 2010, Organising Committee (2014) 6 SCC 677* (Swiss Timing) held that fraud can be adjudicated by arnitral tribunals, overruling *N Radhakrishnan v Maestro Engineering (2010) 1 SCC72* (N Radhakrishnan) (see *Article, Indian arbitration law: landmark judgments from 2014: Void and voidable contracts are arbitrable (www.practicallaw.com/0-605-0828)*). In 2015, the clarity afforded by *Swiss Timing* has been blurred.

The Delhi High Court in *RRB Energy Limited v Vestas Wind Systems 2015 SCC OnLine Del 8734* and the Madras High Court in *Abubackkar Siddiq v Ganesan (2 June 2015 in C.R.P. (PD)(MD) Nos.1242 of 2010 and 1243 of 2010 M.P.(MD) No.1 of 2010)* , have applied *N Radhakrishnan*. Whereas *VGN Developers Pvt Ltd v Vanjulavalli (18 June 2015 in Original Petition No.49 of 2014)* applied *Swiss Timing* and referred claims involving fraud to arbitration.

Other cases have differentiated serious allegations of fraud from a mere allegation of fraud (see *Vandana Gupta v Kuwait Airways Ltd 2015 SCC OnLine Del 11038*).

Comment: The arbitrability of fraud therefore remains an area of confusion in relation to domestic Indian arbitrations. The positions in relation to foreign seated arbitrations remains clear because *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd (2014) 11 SCC 639* settled the position that *N Radhakrishnan* is only applicable in the context of domestic India arbitrations. World Sport Group held that allegations of fraud did not bar parties from being referred to foreign seated arbitrations unless the arbitration agreement was null and void, inoperative or incapable of being performed (see *Article, Indian arbitration law: landmark judgments from 2014: Void and variable contracts are arbitrable (www.practicallaw.com/0-605-0828)* .

Although the Report had suggested that this issue be clarified, the 2015 Act did not expressly clarify whether disputes involving fraud and criminality are arbitrable. A Supreme Court decision of a three judge bench would therefore be welcome to settle the issue in the context of domestic India arbitrations. This is because *N Radhakrishnan* is a decision of a division bench of the Supreme Court whereas the decision over-ruling it, *Swiss Timing*, is a decision of a single judge of the Supreme Court of India.

Enforcement of a foreign arbitration award when BIFR proceedings are on foot in India

In *Armada (Singapore) Pte. Ltd v Ashapura Minechem Ltd 2015 SCC OnLine Bom 4783*, the Bombay High Court declared that the foreign arbitration award was enforceable as a decree despite ongoing proceedings before the board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act 1985. However, the court added that in view of pending proceedings, the foreign award could not be executed without permission from the Board.

Comment: The court seamlessly interpreted the Indian Arbitration and Concilliation Act 1996 and the Sick Industrial Companies (Special Provisinos) Act 1985. Section 22 of the latter stalls legal proceedings against a company that has been admitted for restructuring under the BIFR.

Two Indian companies can arbitrate at a foreign seat

Sasan Power Limited v north American Coal Corporation India Pvt Ltd (11 September 2015, Madhya Pradesh High Court, Rajendra menon and Sushil Kumar Gupta JJ) upheld *Atlas Exports Industries v Kotah & Company (1999) 7 SCC 61* and held that the two Indian companies can have an arbitration agreement which provides for the seat to be in a foreign country. In such cases, Part I of the 1996 Act will not apply, and if Part II applies then a court must refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed (*section 45*). The Madhya Pradesh High Court also upheld *Enercon (India) Private Limited and others v Enercon GMBH and Another 2014 (5) SCC 1*, which included the principle that the arbitration clause is independent of the underlying contract. Therefore, arbitration could not be avoided even in the absence of a substantive contract.

See also *Union of India v Reliance Industries Ltd Special Leave Petition (CIVIL) No. 11396 OF 2015* in which an arbitration seated in London where English law applied was not interfered with.

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