Indian arbitration law: landmark judgments from 2014

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An article summarising India's landmark judgments on arbitration law from 2014.

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This article summarises India's landmark judgments on arbitration law from 2014. It also highlights leading Indian judgments that impacted international commercial arbitration involving Indian parties prior to 2014.

In addition, this article discusses the Indian Law Commission's latest Report on proposed amendments to the Indian Arbitration and Conciliation Act 1996 (IACA 1996). The reader must, however, bear in mind that the amendments have not received Parliamentary assent.

Joinder of non-signatories to an arbitration agreement and the "group of companies" doctrine

In *Rakesh S Kathotia v Milton Global Ltd (MS Sonak J of the Bombay High Court on 22nd September 2014, to be reported)* (Rakesh Kathotia), the Bombay High Court upheld *Chloro Controls (I) Pvt Ltd v Severn Trent Water Purification (2013) 1 SCC 641* (Chloro Controls), finding that non-signatories can be bound by an arbitration agreement in the following circumstances:

> "... an arbitration agreement entered into by a company, being one within a group of companies, can bind its non signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the nonsignatory affiliates..." (*paragraph 18 of the judgment*).

In *Rakesh Kathotia*, the court held that an arbitration agreement contained in a joint venture agreement between two groups, namely the Vaghani group and the Subhkam group bound entities controlled by each group.

Comment: Whilst the judgment has been welcomed for bringing group companies within the purview of an arbitration agreement to give effect to the intention of the parties to a joint venture agreement, the inclusion of parties in an arbitral process without a careful study of whether they had agreed to be bound by it, is a matter of concern. The court, however, did clarify that the Group of Companies doctrine adopted in *Chloro Controls* must only be adopted in exceptional cases.

Indian court's ability to interfere with foreign awards at an interim stage

In *Reliance Industries Limited & Another v Union of India in Civil Appeal No. 5765 of 2014* (Reliance Industries), the Supreme Court of India considered whether Part 1 of the IACA 1996 applied to a foreign seated arbitration.

Part I of the IACA 1996 allows Indian courts to grant interim relief and set aside awards in relation to domestic arbitrations.

In *Bhatia International v Bulk Trading S.A. (2002) 4 SCC 105* (Bhatia International), the court extrapolated Part I of the IACA 1996 by extending its application to arbitrations seated outside India, unless the parties opted out of this arrangement. This was a controversial decision that led to Indian courts granting interim relief in foreign seated arbitrations.

On 6 September 2012, in a landmark ruling, the Supreme Court in *Bharat Aluminium Company v Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552* (BALCO) reversed the controversial decision of *Bhatia International* by restricting the ability of local Indian courts to interfere with foreign seated arbitrations (see *Legal update, Supreme Court of India overrules Bhatia International (www.practicallaw.com/8-521-2738)*).

BALCO is, however, applicable prospectively and therefore, the decision in *Bhatia International* continues to apply to arbitration agreements concluded on or before 6 September 2012.

Despite the prospective applicability of *BALCO*, the Indian courts are keen to adopt the *BALCO* approach in as many cases as possible. In *Reliance Industries*, although the arbitration agreement was concluded before 6 September 2012, the court held that Part I of IACA 1996 did not apply as English law governed the arbitration agreement and the seat of arbitration was London. Accordingly, the Supreme Court found that the intention of the parties was to exclude the applicability of Part I.

The Supreme Court also held that English courts had exclusive jurisdiction to hear a challenge from the arbitration award and in the circumstances, the courts in New Delhi could not entertain a challenge brought by the Union of India.

Comment: The Indian courts' pro international arbitration approach is a welcome change from the previous protectionist mindset and should put international parties at ease when drafting arbitration clauses in their contracts with Indian parties.

For a full analysis of this decision, see *Legal update, Indian Supreme Court considers jurisdiction of Indian courts in foreign seated arbitration where Indian public policy involved (www.practicallaw.com/6-570-9065)* .

An arbitrator's right to grant security as an interim award

In *Baker Hughes Singapore Pte v Shiv-Vani Oil and Gas Exploration Services Ltd (2014 SCC Online Bom 1663)*, the Bombay High Court held that an arbitral tribunal has the power to grant monetary interim measures to secure a claim. The court relied on Section 17 of IACA 1996, which empowers an arbitral tribunal to award interim measures of protection, including the provision of appropriate monetary security. The court also drew an analogy from the powers of arbitral tribunals to grant money claims.

Comment: Following the pro arbitration approach being adopted by Indian courts, this judgment upholds the rights of parties to make interim applications concerning monetary security to an arbitral tribunal. This avoids the need to approach an Indian Court for such relief.

Arbitrability of matters relating to oppression and mismanagement

In *Rakesh Malhotra v Rajinder Kumar Malhotra and others MANU/MH/1309/2014* (Rakesh Malhotra), the Bombay High Court upheld a decision of the Indian Company Law Board (CLB) and pronounced that issues relating to oppression and mismanagement were not arbitrable because they were internal issues within a company which had been "dressed up" as matters arising out of a joint venture agreement that had an arbitration clause (see *Legal update, Bombay High Court holds that oppression and mismanagement claims cannot be referred to arbitration (www.practicallaw.com/1-585-4106)*).

Patel J held that the CLB has special powers under sections 397-402 of the Indian Companies Act 1956 (these sections continue under the Indian Companies Act 2013) to deal with oppression and mismanagement petitions. In ordinary circumstances, such oppression and mismanagement disputes are not arbitrable; unless they are found to have been "dressed up" to evade an arbitration clause. Examples of the "dressing up" argument include when an oppression and mismanagement petition is found to be *male fide* or vexatious.

Patel J also stated that:

> "In assessing an allegation of 'dressing up', the Section 397/398 petition must be read as a whole, including its grounds and the relief sought. It cannot be carved up and deconstructed so as to bring some matters within the arbitration clause and leave other matters out."

Therefore, a court should be reluctant to split causes of action to accommodate an arbitration clause. Unless litigation is in relation to the same matter as an arbitration agreement, it will not be referred to arbitration.

However, in *Vikram Bakshi and another v McDonalds India Pvt. Ltd and others (Unreported) (VK Shali J of the Delhi High Court on 22 December 2014)*(Vikram Bakshi), the Delhi High Court adopted a stance contrary to the pro-arbitration approach that Indian courts have recently taken. VK Shali J held that the arbitration agreement was inoperative or incapable of being performed as oppression and mismanagement proceedings were ongoing before a CLB. Given that there would be overlapping disputes between the arbitration and CLB proceedings, and an LCIA arbitration would suffer from *forum non conveniens* as most parties were Indian, an anti-arbitration injunction was granted, akin to an anti-suit injunction.

Comment: The lengthy judgment in *Rakesh Malhotra* has been praised by many Indian practitioners for its lucidity. It may be referred to where a dispute arises covered by an arbitration agreement which also concerns oppression, mismanagement and/or other matters that fall within the purview of a CLB. If the latter holds true, the dispute will not be referred to arbitration.

Distinguishing the seat of arbitration from the venue

The Indian courts issued several decisions in 2014 in which they distinguished the seat of arbitration from the venue for holding hearings.

In *Enercon (India) Limited and Others v Enercon GmbH and Anr (2014) 5 SCC 1* (Enercon), the Indian Supreme Court held that London had simply been designated as a venue for holding the arbitration but was not the seat of arbitration. In this matter, the law governing the substantive contract, the agreement to arbitrate and the conduct of arbitration, was Indian law. Nijjar J held that it was important to differentiate the legal seat of arbitration from the geographically convenient venue for holding hearings. An agreement in relation to the seat is analogous to conferring an exclusive jurisdiction clause on the country where the arbitration is seated. However, designating a convenient venue for arbitration, in this instance London, did not confer supervisory jurisdiction on the English courts over the arbitration proceedings. Therefore, the respondent was prevented from approaching the English courts for interim relief (see *Legal update, Indian Supreme Court on choice of seat and whether courts outside seat can grant relief in support of arbitration (www.practicallaw.com/8-561-2185)* .

Paragraphs 98 to 117 of the *BALCO* decision also held that the venue where arbitrations are conducted would not have the effect of changing the seat of arbitration.

In *Reliance Industries* (which follows *Enercon*), the law governing the substantive contract was Indian law, the law governing the arbitration agreement was English law and the law governing the conduct of arbitration (the curial law) was the UNCITRAL Arbitration Rules 1976.

The court rejected a submission from the appellants that English law governed only the conduct of the arbitration because English law governed the arbitration agreement itself. Challenges from such an award, if any, would be subject to English law.

Reliance Industries applied the English case of *Naviera Amazonica Peruana S.A. v Compania Internacional De Serguros Del Peru (1998) 1 Lloyd's Rep 116 (CA)*, which held:

> "All contracts which provide for arbitration and contain a foreign element may involve three potentially relevant systems of law: (1) the law governing the substantive contract; (2) the law governing the agreement to arbitrate and the performance of that agreement; (3) the law governing the conduct of arbitration. In the majority of cases all three will be the same. But (1) will often be different from (2) and (3). And occasionally, but rarely (2) may also differ from (3)."

The court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the substantive law in order to give effect to the resulting award.

Comment: Distinguishing the seat of arbitration from the venue will provide a great boost to institutional arbitration in India where, for example, an arbitration under the rules of LCIA India can be seated in London but conducted in India. It is hoped that this will help reduce ad hoc arbitrations, which have become a cause of concern in India and where it would be difficult to distinguish the seat from the venue. It will also enable parties to hold arbitrations in India without being subject to a full blown appeal or challenge from the arbitration award to Indian courts. This should comfort parties who are wary of getting involved in lengthy Indian legal battles.

The IACA 1996 does not define the seat of arbitration. The Law Commission of India's *Report No. 246: Amendments to the Arbitration and Conciliation Act 1996* (the Report), chaired by Justice AP Shah, has suggested that this definition be included when the IACA 1996 is amended (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 Ordinance that incorporated recommendations made by the Report was not presented to the President of India and is in the process of being tabled before the Indian Parliament instead.

Void and voidable contracts are arbitrable

The principle of *separability (www.practicallaw.com/4-205-5215)* of the arbitration agreement from the substantive contract has been used by Indian courts to validate an arbitration clause even if the underlying contract is declared null and void. In 2014, the Indian courts referred disputes involving allegations of fraud and/or corruption to arbitration, displaying a glimpse of their pro-arbitration stance.

In *Swiss Timing Limited v Commonwealth Games 2010, Organising Committee (2014) 6 SCC 677* (Swiss Timing), the respondent objected to the matter being referred to arbitration on grounds that the agreement was void due to criminal proceedings concerning corruption. The respondent argued that since allegations of corruption could not be ruled upon by an arbitrator, the criminal proceedings should be completed before the arbitration could proceed.

The court held that arbitration and criminal proceedings could proceed simultaneously as an arbitral tribunal's findings are not binding on criminal proceedings. If the criminal trial resulted in a conviction rendering the underlying contract void, an appropriate plea could be taken to resist the execution or enforcement of the award.

While it is mandatory for the courts to refer a dispute to arbitration when there is an arbitration agreement, a court can refuse to do so if the contract is void on a meaningful reading of the contract, or void on the face of the contract without recourse to further evidence. A mere claim that a contract is void will not suffice.

A court cannot refuse to refer a dispute to arbitration on allegations of fraud, coercion, undue influence and misrepresentation, since they would result in a contract being voidable, but not void.

In *World Sport Group(Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd (2014) 11 SCC 639* (World Sport Group), a judgment pronounced a few months before Swiss Timing, the Supreme Court clarified that an arbitration agreement is a separate agreement that is not vitiated if the main contract is terminated, frustrated or voidable. A court would have to analyse each case to understand whether the arbitration agreement is also void together with the main agreement or whether the arbitration agreement survives, despite the underlying contract being vitiated.

In *World Sport Group* the Supreme Court held that allegations of fraud did not bar parties from being referred to foreign seated arbitrations. Under the IACA 1996, the only bar to referring parties to foreign seated arbitrations were those specified in section 45, where an arbitration agreement was either:

- Null and void.
- Inoperative.
- Incapable of being performed.

The decision, however, left arbitrations seated in India, open to continue to be governed by *N Radhakrishnan v Maestro Engineering (2010) 1 SCC 72* (N Radhakrishnan), which held that allegations of fraud and consequential rescission of the agreement would bar arbitrability. *N Radhakrishnan* has been overturned in paragraph 21 of *Swiss Timing*.

(See *Legal update, Indian Supreme Court considers whether issues of fraud can be dealt with in arbitration (www.practicallaw.com/1-558-1917)*).

In *New India Assurance Company Ltd v Genus Power Infra Ltd, (2015) 2 SCC 424*, the respondent argued that a letter of subrogation settling the claim had been signed under duress, coercion and undue influence. The respondent therefore requested, and the Delhi High Court agreed, to appoint an arbitrator. The Supreme Court set aside the High Court order, making a finding that it would be improper to burden a party, who contends that the dispute is not arbitrable on account of the discharge of a contract, with the huge cost of arbitration merely because a plea of fraud, coercion, duress or undue influence has been made. Such pleas must be backed up by evidence. If there is merit in the allegation, the court may decide the issue or leave it to be decided by the arbitral tribunal. If, on the other hand, such plea is found to be lacking credibility, the matter must be dealt with straight away.

The obiter comments in *Enercon* also state that it can be left to the arbitral tribunal to decide whether the underlying contract is a concluded contract between the parties or whether it is void, inoperative or incapable of being performed.

Comment: This line of judgments is another display of the pro-arbitration approach taken by Indian courts to allow a larger variety of disputes to fall within the arbitration umbrella. This is reflected in the Law Commission's Report in which it suggests limiting the role of the judiciary:

> "... judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration... there **shall** be a conclusive determination as to whether the arbitration agreement is null and void" (Emphasis added.)

The Report also suggests making issues of fraud expressly arbitrable.

Challenging an arbitration award versus enforcement of an arbitration award

Challenges from an arbitration award are governed by the law governing the arbitration agreement, whereas enforcement is governed by the substantive law of the contract. This distinction was dealt with in *Reliance Industries*, which followed *Videocon Industries Ltd v Union of India (2011) 6 SCC 161* and *Sumitomo Heavy Industries Ltd. v ONGC (1998) 1 SCC 305*. In *Reliance Industries*, as mentioned above, the law governing the contract was Indian law, but the law governing the arbitration agreement was English law. The court held that enforcement is governed by the substantive law of the contract and therefore the arbitral award could be challenged before the courts in India, or, before the courts in England, applying Indian law.

In *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd, Arbitration Petition No. 1062/2012 (High Court of Bombay, India, 22.01.14)*, the underlying agreement was governed by Indian law and disputes were to be settled pursuant to the Singapore International Arbitration Centre (SIAC) Rules, in Singapore. Avitel argued before the Bombay High Court that the tribunal did not have jurisdiction to hear issues of fraud because the agreement was governed by Indian law, which prevented fraud from being arbitrated.

The Bombay High Court held that, unless something pointed to the contrary, the agreement to arbitrate in Singapore meant that the arbitration agreement was governed by Singaporean law. Since Singaporean law permits fraud to be determined in arbitration, the tribunal would not be barred from dealing with allegations of fraud. (See *Legal update, Bombay High Court considers whether fraud can be determined in arbitration (www.practicallaw.com/2-559-5787)*).

Comment: It is important for parties to consider carefully the implications of the governing law of the contract just as much as the law governing the arbitration agreement. This is because the former will impact the practical aspects of enforcing an arbitral award, while the latter will affect the range of issues within the purview of the arbitration.

The Report has suggested that the following problem be addressed, namely, where a party's assets are located in India and there is a chance that they will dissipate those assets, the other party might lack an efficient remedy if the seat of arbitration is abroad. This is because an interim "order" would not be directly enforceable by filing an execution petition, as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the (Indian) Civil Procedure Code 1908 (ICPC 1908). The ICPC 1908 provides the mechanism for enforcing foreign judgments.

This problem can be overcome if the party in control of the assets is in breach and the other party initiates contempt proceedings in the foreign court, where "judgment" could be enforced under sections 13 and 44A of the ICPC 1908.

The Report has also suggested that section 36 of the IACA 1996 should be rectified to prevent misuse. The section presently states that an arbitral award can only become enforceable after the time for filing a petition under section 34 has expired or after the section 34 challenge has been dismissed.

Challenging an award or its enforcement on grounds that it is contrary to Indian public policy

There is a long line of contradictory judgments on this topic both pre and post 2014.

In *Shri Lal Mahal Ltd v Progetto Grano Spa (2014) 2 SCC 433* (Shri Lal Mahal), the court upheld the interpretation of public policy in the narrower sense as established in *Renusagar Power Company Ltd v General Electric Company 1994 Supp (1) SCC 644* (Renusagar), and not in the broader sense set out in *ONGC Ltd v Saw Pipes (2003) 5 SCC 705* (Saw Pipes).

In *Saw Pipes*, the court had held that an arbitral award should be set aside if it is:

- Contrary to the fundamental policy of Indian law.
- Contrary to the interests of India.
- Contrary to justice or morality.
- Patently illegal.

Saw Pipes had an unintended consequence; although it was pronounced only in the context of purely domestic awards, it was applied to international commercial arbitration awards. (Note, however, that RF Nariman J held in *Associate Builders v Delhi Development Authority 2014 SCC Online SC 937* that *Saw Pipes* has been consistently applied).

In *Renusagar*, the court narrowed the definition of "public policy of India" as interpreted by the courts in *Saw Pipes* to mean only the first three of the bullets listed above, that is "patent illegality " was excluded.

In *Shri Lal Mahal*, before the matter was before the Supreme Court of India, the High Court in London had taken a view in relation to the legality of an arbitration award. In enforcement proceedings before the Indian Supreme Court, it refused to reconsider the merits of the foreign arbitral award. It held that an Indian court does not exercise appellate jurisdiction over a foreign award and that section 48 of the IACA 1996 does not give an opportunity to have a second look at the foreign award during enforcement proceedings.

The court held that the expansive construction accorded to the term "public policy" in *Saw Pipes* cannot apply to the use of the term "public policy of India" in section 48(2)(b) of the IACA 1996 (the section states that "Enforcement of an arbitral award may also be refused if the Court finds that the enforcement of the award would be contrary to the public policy of India".)

Despite *Shri Lal Mahal* being welcomed for upholding foreign awards with minimal interference by Indian courts at the stage of enforcement, the case of *ONGC v Western Geco International Limited (2014) 9 SCC 263* (Western Geco) only refers to the *Saw Pipes* judgment. In *Western Geco*, the Supreme Court widened the scope of "fundamental policy of Indian law", which is a part of "public policy" under sections 34 and 48 of the IACA 1996, to include the following:

- **Judicial approach.** No tribunal or court may act in an arbitrary, capricious or whimsical manner.
- **Principles of natural justice.** These must be followed and reasoned decisions must be made.

- **Wednesbury principle of unreasonableness.** A decision should not be so unreasonable that no reasonable person acting reasonably could have made it.

The court did not apply the patent illegality test, but chose instead to apply the contravention of "public policy" test.

The court held in *Western Geco*, that if the aforesaid principles on the "fundamental policy of Indian law" were not followed by an arbitral tribunal, then the award could be open to challenge under section 34(2)(b)(ii) of the IACA 1996 (which states that "An arbitral award may be set aside by the Court... if the Court finds that the arbitral award is in conflict with the public policy of India"). The court also confirmed that if the arbitrators failed to draw an inference which ought to have been drawn, or if they drew an inference that was prima facie untenable and resulted in a miscarriage of justice, then such an award would be liable to be challenged, discarded or modified.

By making this decision, the court has opened the way for arbitration awards to be subject to the scrutiny of the courts, which could be seen as a regressive step.

In *Associate Builders v Delhi Development Authority (2014) SCC Online SC 937*, the court summarised the line of judgments on public policy. RF Nariman J held that:

> "It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts."

In *Reliance Industries*, the court dealt with an arbitration award contrary to Indian statutes or made against the Government of India. In this case, the appellants argued that disputes in relation to royalties, cess, service tax and the CAG audit were not arbitrable because they were not purely contractual disputes. It was held that the disputes were contractual and there was no violation of statutory provisions.

Although the Government of India was a party to the agreement in the *Reliance Industries* case, it was held that the "arbitration agreement cannot be jettisoned on the plea that award, if made against the Government of India, would violate public policy of India." The court added that if the final award was made against the Union of India, enforceability could be resisted on the grounds of public policy.

Comment: The cases demonstrate conflicting views that have emerged from the Indian Supreme Court in relation to public policy considerations when seeking to enforce an award. The Report recommends that the restriction of the scope of "public policy" in sections 34 and 48 of the IACA 1996 should be brought in line with *Renusagar*. A specific amendment has been proposed in order to remove the basis for the decision of the Supreme Court in *Saw Pipes*. Such an amendment will bring much needed clarity and hopefully alleviate confusion to those seeking to enforce a foreign award in India.

An arbitrator's right to award interest on interest on the final award

In *M/s Hyder Consulting (UK) Ltd v Governer State Of Orissa, (2015) 2 SCC 189* (Hyder Consulting), HL Dattu CJ clarified the meaning of the word 'sum' used in section 31(7)(b) of the IACA 1996, which states that "A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

The court held that if the arbitral award is silent about interest, the party in whose favour the award is made will be entitled to interest at 18% per annum on the principal amount awarded, from the date of award till the date of payment. In doing so, the court upheld *State of Haryana and others v S.L. Arora and Company (2010) 3 SCC 690*, where the court had ruled that an award of interest on interest from the date of award is not permissible.

Comment: *Hyder Consulting* is a welcome relief because it is consistent with previous judgments and takes a practical view for parties facing an award of payment against them.

The Report also notes that section 31(7) of the IACA 1996 has been misinterpreted. It recommends that an express clarification be made to allow compound interest at market rate, rather than the current 18% mentioned in the IACA 1996.

The 246th Report on amendments to the IACA 1996

On 5 August 2014, the Law Commission of India, a committee chaired by Justice AP Shah, presented to the Minister for Law and Justice *Report No. 246: Amendments to the Arbitration and Conciliation Act 1996* (see *Legal update, Law Commission of India publishes report proposing amendments to the Arbitration and Conciliation Act 1996 (www.practicallaw.com/5-578-5045)*). Contributories to the Report included Justice Rohinton Nariman, Mr Darius Khambatta, Mr Ciccu Mukhopadhyay and Ms Zia Mody, amongst others.

A number of recommended changes in the Report have already been mentioned in this article, namely:

- Void and voidable contracts.
- Enforcement.
- The interpretation of public policy.
- Awarding interest on interest.

These, together with several other important suggestions and consequences are highlighted below:

- **Institutional arbitration is likely to get a boost in India.** The Commission is promoting institutional arbitration in India.
- **The appointment of an emergency arbitrator.** The Commission have sought to grant legislative sanction to institutional rules in relation to the appointment of an emergency arbitrator.
- **Arbitrator's fees.** Recognising the huge cost of ad hoc arbitration in India, the Commission has recommended a model schedule of fees and has empowered the high courts to frame rules in relation to fees. The Commission recognises that foreign parties involved in international commercial arbitrations with Indian parties might have a different approach to fees. Similarly, institutional rules might have their own schedule of fees. Therefore, the Commission has restricted the model schedule of fees only to domestic ad hoc arbitrations.
- **Implementing a costs regime.** The Commission also believes that one of the methods to provide relief against frivolous and misconceived actions is to implement a regime for actual costs as implemented in the UK.
- **The intervention of the judiciary.** The Commission has suggested that the high courts should have dedicated judicial benches looking at arbitration cases to alleviate the problem that arbitration challenges, appeals and matters are pending for years before the courts. Suggested amendments also include a maximum period of one year within which challenges to arbitration awards and enforcement should be dealt with by the courts.
- **Counterclaims and set offs.** Counterclaims and set offs can be adjudicated on by an arbitrator without seeking a new reference provided that such claims fall within the scope of the arbitration agreement.

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