



The Asia-Pacific Arbitration Review 2020

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The Asia-Pacific Arbitration Review 2020

A Global Arbitration Review Special Report

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Dzungsr & Associates LLC

Welcome to *The Asia-Pacific Arbitration Review 2020*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than our journalistic output is able to. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought-leadership inspired by recent events, written by pre-eminent practitioners from around Asia.

Across 16 chapters spanning 128 pages, this edition provides an invaluable retrospective, executed by 34 leading figures. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, the Philippines, Singapore and Vietnam, has overviews of developments in energy arbitration, investment treaty arbitration, and enforcement, and includes a discussion of the pros and cons of discounted cash-flow as a method of valuing a growth business.

Among the nuggets it contains:

- a description of how China has extended its reporting system – whereby lower courts must notify the Supreme People's Court before taking decisions that may affect awards or arbitrations – to include domestic cases;
- statistics showing a boom in arbitration in Vietnam, plus a review of the most recent cases on annulment and enforcement;
- a full review of all the significant court decisions from India in the past year;
- how Malaysia has made it easier for foreign counsel to appear in international arbitrations there; and
- remarkable statistics from Korea showing the growth of international cases at the Korean Commercial Arbitration Board and the extent of the government's development plans.

The review also looks to answer speculative questions facing arbitration in the Asia-Pacific. The retrospective on the Hong Kong International Arbitration Centre on the occasion of the HKIAC's 35th birthday answers 'will Hong Kong will be seen as neutral territory vis-à-vis the mainland in the future?', while 'DCF – gold standard or fool's gold?' questions how arbitrators might attempt to value Spotify Technology were it expropriated by Sweden.

If you have any suggestions for future editions, or want to take part in this annual project, my colleague and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels

Publisher
May 2019

India

Naresh Thacker and Mihika Jalan

Economic Laws Practice

Introduction

India has witnessed a significant jump to the 77th rank in the World Bank's latest Ease of Doing Business rankings (2019), up 23 notches from 2018. Hence, the government of India's intent of promoting ease of doing business and creating parity with international regulatory standards has clearly delivered results.

In this, there is little doubt that the judiciary has a tremendous impact on the economy. Litigation disputes – more specifically, finality, to disputes with enforcement of judgments, decrees or awards – is the ultimate loop that needs to be closed in order for the business engine to run smoothly. The present government as well as the courts have understood this urgent need and this is visible both in the legislative intent as well as judiciary's treatment of disputes. In our article in *The Asia-Pacific Arbitration Review 2019*, we had dealt with the amendments to the Arbitration and Conciliation Act, 1996 (Arbitration Act) through the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act) and its effect on the conduct of arbitration within the country. We also dealt with various challenges addressed by courts across the country in the implementation of the Amendment Act. Further, we had touched upon the Arbitration and Conciliation (Amendment) Bill 2018 (Amendment Bill), which as of now has been approved by the Union Cabinet and the lower house of the Indian parliament. However, its fate now hangs in balance as the lower house of the Indian parliament was dissolved in view of the general elections in India and the Amendment Bill will now have to be reintroduced at an opportune time. In this edition of *The Asia-Pacific Arbitration Review* we have updated the position of Indian law on arbitration since our last article. We analyse the effect and consequences of a few key decisions passed in the last year.

Upholding independence and impartiality of arbitrators

For an unbiased decision, it is obvious that no man or woman should be a judge in his or her own cause. While the foregoing is a recognised principle of natural justice and followed in India, the practice of appointing ex-employees as arbitrators has nevertheless for long been prevalent in India. When this practice was brought to the attention of courts, they frowned upon it as such practice cast justifiable doubts about a tribunal's ability to adjudicate impartially. To ensure that awards rendered an unbiased view of the dispute, the Amendment Act inserted schedule 5 and schedule 7 in the Arbitration Act. These schedules incorporate International Bar Association Guidelines relating to independence and impartiality of arbitrators in the Arbitration Act.

These newly inserted standards for independence and impartiality of arbitrators have been zealously upheld by the Indian judiciary. To eliminate bias, the Supreme Court expanded the scope of schedule 5 to the amended Arbitration Act (which disallows a party's employee to act as an arbitrator) by holding that if the person named as an arbitrator was ineligible to act as an arbitrator (in this case by reason of his being a managing director of the

party), then such a person would also be ineligible for nominating another arbitrator.¹ On another occasion, to ensure constitution of a fair and unbiased tribunal, the court went to great lengths to note that '... [a] panel should be broad based ... engineers of prominence and high repute from private sector should also be included. Likewise [a] panel should comprise of persons with legal background ... as it is not necessary that all disputes that arise, would be of technical nature ...'.² On yet another occasion the court noted that an arbitrator, who was in contravention of clauses 22 and 24 of schedule 5 to the amended Arbitration Act, would be de jure disqualified under section 14(1)(a) from continuing with his mandate and therefore, the court terminated his mandate. All these instances clearly reflect the judiciary's painstaking efforts to ensure appointment of impartial arbitrators.

In 2018, the issue of employee arbitrator once again reared its head and the Supreme Court, while deciding the issue of appointment of ex-employees, held that such mandate is not against the provisions of the Arbitration Act, both pre- and post-Amendment Act. The Supreme Court noted certain decisions of English courts and concluded that the Arbitration Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his or her independence and impartiality. In this instance, the nominee arbitrator had retired almost 10 years ago from the services of the nominating party, which formed the factual basis of the Supreme Court's decision.³ The conclusion could have been markedly different if the arbitrator appointed was a former employee of the nominating party anytime in the past three years.

Interim relief

Prior to the Amendment Act, litigants were unsure about efficacy of interim relief obtained from a tribunal because the tribunals' powers to grant interim reliefs were restricted in scope and its enforcement shrouded in ambiguity. To ensure that interim relief granted by a tribunal was an efficacious remedy, the Amendment Act aligned the tribunals' powers to that of the courts' and made interim relief granted by tribunal enforceable as an order of the court under the provisions of the Code of Civil Procedure, 1908 (the Code).

Further, while courts have repeatedly upheld the additional powers of interim relief conferred by the Amendment Act on the tribunals,⁴ the Bombay High Court, on one occasion, noted a practical limitation to such powers – that the power of a tribunal to appoint a receiver was limited to appointment of a private receiver as opposed to the court receiver.⁵

Following the Amendment Act coming into effect, the Supreme Court extended its pro-arbitration approach to issues that had arisen in relation to arbitrations prior to the Amendment Act. This is exemplified by the Supreme Court's decision in *Alka Chandewar*,⁶ wherein the court enforced the interim directions passed by the tribunal, noting that the party's failure to comply

with tribunal's interim order amounted to a contempt of tribunal's order. This view encourages parties to arbitrations initiated prior to the Amendment Act (before 23 October 2015) to approach tribunals for interim relief, being rest assured that such interim orders are enforceable.

In order to balance the requirement of minimal intervention of court in arbitration with easy accessibility to courts for efficacious remedies, section 9(3) of the amended Arbitration Act dissuades courts from entertaining application for interim relief after tribunals have been constituted, unless courts find that circumstances exist in which interim relief granted by tribunal may be inefficacious. Explaining the fine balance, the Calcutta High Court⁷ clarified that under section 9(3), the court's power is not automatically barred by constitution of an arbitral tribunal and that the court may grant relief if it finds that the relief given by the tribunal will be inefficacious. However, the Calcutta High Court noted that, in the event the tribunal assumes powers in circumstances under sections 33⁸ and 34,⁹ an application for interim relief will have to be made to the tribunal (provided such relief will be efficacious). To put to rest the controversy created by the decisions of the Supreme Court in *Bhatia International*¹⁰ and *BALCO*,¹¹ the Amendment Act introduced provisions under which parties to an international commercial arbitration seated outside India are allowed to approach courts in India for interim reliefs. This amendment has far-reaching consequence as it allows foreign parties or foreign award holders to secure their interests pending grant or enforcement of an award. The usefulness of the amendment is illustrated by a recent decision of the Bombay High Court wherein the high court secured sums due under a foreign award that was pending enforcement. In relation to the proviso to section 2(2) of the amended Arbitration Act, the Bombay High Court noted that recourse to Indian courts for interim measures in relation to a foreign-seated arbitration is a transitory provision, pending enforcement of the foreign award.¹² The Bombay High Court's recent ruling, that an application for interim relief in relation to a foreign award can be made to a court which enjoys jurisdiction over the assets of the judgment debtor,¹³ spares users the unnecessary dilemma of deciding which court to approach, that is, a court that enjoys jurisdiction over the subject matter of arbitration or a court which enjoys jurisdiction over that subject matter of the award.

For 2019, a necessary corollary of replicating the tribunal's powers with that of the court's powers, with respect to grant of interim relief, is its effect on the rights of a third party. This situation arose recently and was addressed by the Bombay High Court. The high court held that a third party has a remedy under section 37 of the amended Arbitration Act to file an appeal before a court against an interim order passed by a tribunal. Observing the absence of the word 'party' in section 37, which is otherwise used in section 34 of the amended Arbitration Act, the Bombay High Court concluded that such absence makes the legislative intent clear that the term was deliberately not inserted so as to provide a recourse to appeal to third parties affected by interim relief granted by tribunals and courts.¹⁴

Restricting grounds for challenge to an award

To reduce judicial intervention with an award, whether granted in a domestic or a foreign seated arbitration, extensive amendments pertaining to a challenge against an award were introduced in the Arbitration Act. The amendments in this context are welcomed.

The Indian judiciary has strictly implemented the amended provisions, refusing applications seeking to stall enforcement of

awards for the mere asking. Repeatedly, the courts have clarified that in proceedings wherein an award is challenged, the courts do not sit in appeal over it, thereby limiting courts' interference with an award.¹⁵

The above was also illustrated recently by the Supreme Court's decision wherein the issue of arbitrability of dispute, which had been decided in the award, was yet again argued before it in an appeal from a high court's order rejecting a challenge to an award. Re-examining the law in India about the scope of interference by a court with an award under sections 34 and 37 of the Arbitration Act, the Supreme Court concluded that the scope of its powers under the said section does not warrant an independent assessment of the merits of the award and declined to interfere with the award.¹⁶

Separately, when called upon to decide the validity of two-tiered arbitration in context of the Arbitration Act, the Supreme Court upheld parties' autonomy to provide for a two-tiered arbitration.¹⁷ In the case, the validity of appellate arbitration was challenged on the grounds that, inter alia, two-tiered arbitration was not in accordance with the Arbitration Act and was against public policy. Rejecting the foregoing grounds, the Supreme Court noted that in providing for two-tiered arbitration, the parties had not bypassed any provision of the Arbitration Act. The court further noted that the argument that an appeal is a creature of statute would not apply in the present case as there was a distinction between a statutory appeal to a court and an appeal to a non-statutory body agreed between the parties.

After considering the intent of the Arbitration Act, the Supreme Court has recently clarified that for, establishing the grounds on the basis of which an award was challenged under section 34, the parties will not 'ordinarily' be required to lead evidence and that the records of the arbitrator qualified as 'proof' under section 34.¹⁸ However, in this decision, the Supreme Court noted that where there may be some matters that may not be contained in such record, which are relevant to determination of issues, in that case such matters may be brought to the court's notice by affidavits filed by both parties. The Supreme Court further clarified that persons swearing to the affidavits should not be cross-examined 'unless absolutely necessary'.

The above decision seems to be at odds with the Amendment Bill, to the extent that the latter seeks to amend the Arbitration Act to provide that proof under section 34 is limited to records of the tribunal and does not leave any leeway of additional evidence being led under circumstances as were present in the above decision. In this regard at least the Amendment Bill seems to be heading in the correct direction.

Enforcement of awards

Prior to the Amendment Act, initiation of challenge proceedings automatically led to stay on execution of a domestic award. Such a practice was, hitherto, used to disrupt the execution of an award for an award holder. By expressly prohibiting such automatic stay on execution proceeding, the amendments provided the much-needed relief to an award holder who can now proceed to execute an award, unless the execution proceeding is expressly stayed.

Clarifying and expediting the process for execution of an award, the Supreme Court ruled that an award may be executed directly by the court having territorial jurisdiction over the award-debtor's assets.¹⁹ Thus, the court did away with ubiquitous practice of requesting transfer of execution proceedings initiated before a court enjoying supervisory jurisdiction over the arbitration to another court. This decision not only clarifies the procedure for

execution but puts to rest the continuous debate about whether execution proceedings had to be first initiated before a court having jurisdiction over the arbitration proceedings and then transferred to the court where the assets of the judgment debtor were located, or whether the execution proceedings could be directly initiated before the court which enjoys jurisdiction over the assets of the judgment-debtor.

In 2018, this position was reiterated by the Supreme Court when it held that because the award required a transmission of shares that could only be effected by a rectification of the register of the company, the party requiring such rectification may approach the national company law tribunal for effective enforcement of the award.²⁰

Further, be it a domestic award or a foreign award, the Supreme Court has refused to expand the scope of its review in the context of enforcement proceedings. The Supreme Court in relation to domestic awards has reiterated that an arbitral award is given the status of a decree of a civil court and should be enforced in accordance with the Code; that an executing court can only execute the decree and cannot hold any factual inquiry that can have the effect of nullifying the decree itself.²¹ In relation to enforcement of foreign awards, it has been reiterated that grounds for resisting enforcement of foreign award in India are narrow. When called upon to determine the question of enforceability of an award in light of the provisions of Foreign Exchange Management Act 1999 (FEMA), the Delhi High Court noted that ‘the width of the public policy defence to resist enforcement of a foreign award, is extremely narrow. And the same cannot be equated to offending any particular provision or a statute.’²² On another occasion, similar contentions in relation to FEMA – that the foreign award contravened the provisions of FEMA – were raised before the Delhi High Court, which refused to intervene with the ruling of the arbitral tribunal. The court held that the tribunal’s interpretation of the agreement was consistent with the parties’ intentions and was not opposed to Indian law.²³

Recently, when called upon to decide objections raised against the enforcement of a foreign award on the grounds that the applicant had failed to produce the arbitration agreement at the time of filing for enforcement and that the charter party agreement containing the arbitration clause was unsigned, the Supreme Court rejected the objections.²⁴ While deciding the first issue, the Supreme Court noted that the agreement was produced later in the proceedings and that the non-production of arbitration agreement at the time of filing the enforcement application was not a ground mentioned in the exhaustive list of grounds for refusing enforcement under section 48 of the amended Arbitration Act. Further, noting that the objective of the New York Convention was to facilitate enforcement of foreign awards, the Supreme Court denounced adherence to excessive formality for enforcement. It also upheld the arbitration agreement in an unsigned charter party holding that the term ‘agreement in writing’ in the New York Convention is wide and includes even correspondence exchanged between the parties, and that the arbitrator and court had examined abundant material on the issue.

Place of arbitration

International arbitration practice has primarily been seat-centric. Having adopted the Model Law, India, too, follows the seat centric principles in arbitration. The Supreme Court in *BALCO*²⁵ recognised that the seat was the centre for international arbitration and held that Indian courts would have no jurisdiction over any arbitration seated outside India. This has been reiterated by the

courts time and again, with the Bombay High Court even imposing costs of 500,000 rupees on a party that sought to challenge an award (granted in an arbitration seated in New York) before the court.²⁶ The Bombay High Court reiterated that Part 1 of the Arbitration Act did not apply to arbitrations seated outside India.

The Supreme Court has clarified the importance of the seat in the context of domestic arbitrations, holding that the seat of arbitration was akin to an exclusive jurisdiction clause²⁷ and as a consequence, a choice of an Indian city as the seat or place of arbitration would confer exclusive jurisdiction on the courts of such city. Thus, an application challenging the award will lie to courts of the city named as the seat of arbitration.

Recently, however, while distinguishing the *Indus Mobile* decision on the grounds that the arbitration agreement in the said case provided for an exclusive arbitration clause, a division bench of the Delhi High Court, when called upon to decide whether choice of seat automatically vests courts of the seat with exclusive jurisdiction for arbitration related proceedings, held that it did not. The high court reasoned that if choice of seat meant that the courts of the seat enjoyed exclusive jurisdiction, such choice would deprive courts where the cause of action arose of jurisdiction and would militate against Supreme Court’s decision in *BALCO*.²⁸ However, in arriving at its conclusion, the Delhi High Court failed to notice a decision of a coordinate bench, wherein the fact that Delhi was chosen as seat of arbitration by the parties was held to be good enough to claim exclusive jurisdiction. This was in spite the fact that the agreement conferred Mumbai courts with exclusive jurisdiction as well as the fact that the cause of action had arisen in Mumbai. This case took note of the decision of Supreme Court in *Indus Mobile* to arrive at its conclusion.

Another issue recently addressed by Supreme Court recently was how to determine the seat of arbitration when the arbitration agreement expressly provided only for the venue.²⁹ In this case, the law governing procedure of arbitration was UNCITRAL Model Law on International Commercial Arbitration of 1985 (Model Law), with the arbitration taking place and the award being passed in Kuala Lumpur. Reiterating the difference between a seat and a venue of arbitration, the Supreme Court held that, while place of arbitration and seat of arbitration can be used interchangeably and on a plain reading ‘place’ of arbitration (in the absence of any conditions in relation to the ‘place’) can be equated to a ‘seat’ of arbitration, the same is not true for a venue. Whether ‘venue’ can be considered as a ‘seat’ would necessarily have to be examined on a case-to-case basis, depending on the conditions appended to the chosen ‘venue’. The Supreme Court held that a seat was not elected because the parties failed to choose and the arbitrator failed to determine the place for arbitration. The fact that the arbitration took place in Kuala Lumpur and the award was passed in Kuala Lumpur was not sufficient to treat Kuala Lumpur as the seat. Hence, the Supreme Court upheld the jurisdiction of Indian courts to hear a challenge to the award.

What constitutes an arbitration agreement?

Of late, there have been various decisions clarifying the law on arbitration agreement. The Supreme Court has clarified and reiterated that for reading an arbitration clause in another document as a part of the contract between parties, there must exist in the contract a conscious acceptance of the arbitration clause in the other document. Finding such an intention to exist and paying heed to the developing nature of commercial law, the Supreme Court on one occasion held that a general reference in a contract to a standard form of contract of one party was sufficient to

incorporate the arbitration clause contained in such standard form of contract.³⁰

However, the foregoing decisions are not mere examples of liberal interpretations but also examples on the necessity of ascertaining a mutual intention of the parties to agree to refer their disputes to arbitration. Hence, when a party recently sought to obtain interim relief in a matter on the basis of a purported oral agreement to arbitrate de hors a written agreement between the parties (which expressly barred arbitration), the Supreme Court held that the arbitration agreement was not valid and, thus, refused interim relief.³¹ This reiterates the courts' attempt to uphold the sanctity of party autonomy in arbitrations.

The decisions of the Supreme Court and the Bombay High Court, respectively,³² upholding the validity of open-ended arbitration clauses, which allow parties to determine the mode of dispute resolution once the dispute arises, demonstrates that decisions of Indian courts are in sync with international jurisprudence. In *Jay Bhagwati*, the party opposing such a clause contended that the clause, at best, allowed parties to mutually agree on a future date as to whether the disputes should be referred to arbitration (which as per the settled position of law does not constitute a valid arbitration agreement). However, the Bombay High Court distinguished open-ended clauses from clauses that are an agreement to enter into an arbitration agreement sometime in future on the basis that the former kind of clause 'does not contemplate any such mutual consent subsequently after arising of dispute between the parties'.

In the Supreme Court, however, the foregoing argument was not made. Nonetheless, the Supreme Court upheld the validity of open-ended clause before it and this is reason enough for the lower courts to adhere to this as a precedent.

Minimal intervention of courts

Having adopted the Model Law, the Arbitration Act provided for minimal intervention by courts in arbitral proceedings. To bolster the existing provisions, the Amendment Act, in addition to limiting courts' role in granting interim reliefs and interfering with awards, also restricts courts' role in an application for appointment of arbitrators. The Supreme Court, while deciding an application for appointment of an arbitrator under the amended Arbitration Act, recognised such restrictions introduced as section 11(6A)³³ in the amended Arbitration Act.³⁴

However, in certain exceptional cases, the Supreme Court has upheld intervention of courts on grounds other than those under the Arbitration Act. In one ruling, in view of a full and final settlement existing between the parties, the Supreme Court, while deciding an application for appointment of an arbitrator, refused to refer the matter to arbitration on the grounds that for a reference to arbitration a dispute needed to exist.

More recently, in another case, the Supreme Court upheld an order of a high court (division bench), which in turn upheld the order of high court (single judge) recalling its previous order for appointment of arbitrator.³⁵ The Supreme Court held that the high court as a constitutional court and a court of record enjoyed inherent powers to recall its orders. In response to an argument that the minimal intervention policy of courts, as envisaged in the Arbitration Act, interdicts a high court's power to review or recall its decision, the Supreme Court held that, since it had concluded that there was no arbitration agreement between the parties, the Arbitration Act did not apply to the present case. However, this decision leaves open the question as to whether in the presence of a valid arbitration agreement, will the high courts and Supreme Court continue to enjoy inherent powers.

Other than the immediate foregoing instances, the Indian judiciary has taken great care in restraining itself from intervening in the arbitral process. This is illustrated in a recent decision of the Delhi High Court where the court recognised an arbitral tribunal's power to pierce the corporate veil.³⁶

Likewise, after noting the decision of the Supreme Court in *SBP & Co*,³⁷ the Bombay High Court recently reiterated a settled position of law that in exercise of writ jurisdiction under section 226 and 227 of the Constitution of India, high courts cannot entertain a petition from interlocutory orders passed during arbitral proceedings.³⁸

Emerging issues

Although, the Amendment Act, with the support of the Indian judiciary, has made great strides in clarifying and aligning the law of arbitration in India with international arbitral standards and practices, there remain grey areas of law which have escaped the attention of or remain unaddressed by both, the legislature and the judiciary.

Indian parties' foreign seat

A question that has repeatedly reared its head, is whether two Indian parties can choose a foreign seat for an arbitration. Deciding this question in the context of the erstwhile Arbitration Act 1940,³⁹ the Supreme Court held that two Indian parties were free to opt for a foreign-seated arbitration. However, the position of law under the Arbitration Act, with the amended provisions, remains unclear.

While deciding an application for appointment of an arbitrator, the Supreme Court on one occasion held that under the Arbitration Act, it was not open for two parties to derogate from Indian law by opting for a foreign-seated arbitration.⁴⁰ Yet again, this case is not definitive, as the court via official corrigendum clarified that '... any findings or observations made hereinbefore were only for the purpose of determining the jurisdiction of this court as envisaged under section 11 of the 1996 Act and not for any other purpose'.

Though the Bombay High Court⁴¹ expressed its view that such a proposition could be considered as opposed to public policy of India, the Madhya Pradesh High Court, following the Supreme Court's decision under the erstwhile Arbitration Act 1940, took a view contrary to the view taken by the Bombay High Court.⁴² While the decision of the Madhya Pradesh High Court was appealed to the Supreme Court, this particular question remained unaddressed.

Unilateral appointments of arbitrators

The Amendment Act provides grounds that raise justifiable doubts about the independence and impartiality of an arbitrator and grounds, which render a party's nominee ineligible to act as an arbitrator. A recent decision,⁴³ wherein the Delhi High Court allowed a contractually agreed appointing authority, who was one of the party's representatives, to unilaterally appoint an arbitrator, brings to light that the practice of unilateral appointment is prevalent in India. This practice raises concerns about the independence and impartiality of arbitrators who are unilaterally appointed. By providing grounds that raise justifiable doubts and grounds that render a party's nominee ineligible to act as an arbitrator, the Amendment Act has put to rest certain concerns associated with the independence and impartiality of arbitrators. Thus, even while unilaterally appointing an arbitrator, a party cannot nominate a person who, in terms of schedule 7 of the Arbitration Act, is ineligible to act as an arbitrator. Nonetheless, the Amendment Act fails

to put an absolute end to the practice of unilateral appointment of arbitrators. Concerns about impartiality linger in the minds of parties in India, which is a maturing jurisdiction and where in certain cases, for example in contracts where parties have unequal bargaining power, the provisions of the Amendment Act may not totally negate the possibility of appointment of an arbitrator whose independence may be justifiably doubted.

Failure to recognise emergency arbitrators

Emergency arbitrators are commonly provided in the rules of almost all international arbitral institutes, for example, the Singapore International Arbitration Centre, the International Chamber of Commerce, and domestic arbitral institutes, such as the Mumbai Centre for International Arbitration (MCIA). Given the lengths that the legislature and the judiciary have gone to ensure that interim measures in arbitrations are meaningful, it is difficult to understand why the opportunity to recognise emergency arbitrators has been missed. This failure is especially baffling given that the legislature has adopted a proactive approach towards institutional arbitration.

While courts have, in relation to foreign-seated arbitrations, granted interim reliefs under the Arbitration Act in *Raffles Design*⁴⁴ and *Avitel*,⁴⁵ the courts to date have ruled that a suit has to be filed for seeking enforcement of such awards rendered by emergency arbitrator.⁴⁶ Given the ambiguity in law about the status of relief granted by an emergency arbitrator and the procedure to enforce the same, parties ought to be careful in agreeing to arbitral rules which do not provide an opt-out mechanism from the provisions relating to emergency arbitrators.

Further amendments to the Arbitration Act: Arbitration and Conciliation (Amendment) Bill 2018

A high-level committee under the chairmanship of Honourable Justice B N Srikrishna, Supreme Court of India, was constituted by the government to review the state of Indian arbitration pursuant to the Amendment Act. The committee submitted its report on 30 July 2017. On the basis of few suggestions in the report, the Amendment Bill was issued. Among the various changes suggested, the Amendment Bill lays emphasis on institutional arbitration, as opposed to ad hoc arbitration, and seeks to address practical difficulties faced in the applicability and implementation of the Amendment Act. We analyse a few important amendments suggested to the Arbitration Act and consequences ensuing therefrom.

Impetus to institutional arbitrations

Great efforts have been made by both the judiciary and the legislature to encourage institutional arbitration for settlement of disputes. The Maharashtra state government implemented the 'Institutional Arbitration Policy' for the state of Maharashtra where it suggested that dispute resolution mechanisms in all existing government or public sector undertakings contracts and agreements (where value exceeds 50 million rupees) be amended to provide for reference of disputes to 'Indian Arbitration Institutes'.⁴⁷ The government of Maharashtra recognised and approved the MCIA, a domestic arbitration institute of repute, as an arbitration institute.⁴⁸ Now, the Union Cabinet through the Amendment Bill seeks to provide impetus to institutional arbitrations by, inter alia:

- requiring that the Supreme Court or a high court (as the case may be) in an application for appointment of arbitrators to designate arbitral institutions that have been graded by the Arbitration Council of India (Council) to appoint arbitrators. In the absence of a graded arbitral institute the chief justice

- of a high court is required to maintain a panel of arbitrators from which arbitrators are to be appointed by the court; and
- establishing an independent body to grade arbitral institutions and accredit arbitrators.

The foregoing efforts have been bolstered by the judiciary, with the Supreme Court on a previous occasion (for the very first time) directing the MCIA to appoint an arbitrator in an international commercial dispute. In this, the court delegated its power of appointment of arbitrator to an 'institution designated by such court'. Further, various high courts have keenly promoted institutional arbitrations. This is exemplified by the establishment of the Delhi International Arbitration Centre, under the aegis of the Delhi High Court, and the initiative of the High Court of Punjab and Haryana to establish the Chandigarh Arbitration Centre.

Confidentiality

The Amendment Bill proposes to include that, notwithstanding anything contained in any other law for the time being in force the arbitrator, the arbitral institution and the parties to the arbitration agreement shall keep confidential all the arbitral proceedings. The only document exempted from confidentiality is an award that can be disclosed for the purpose of implementation and enforcement. While the suggestion is a positive step towards ensuring that secrecy of arbitral proceedings, the watertight wordings of the proposed amendment leaves doubt as to if and in what other circumstances can the confidentiality be exempted, for example, in relation to comply with a legal duty.

Arbitration Council of India

To encourage India as a hub of international commercial arbitrations, the Amendment Bill seeks to establish a body – the Arbitration Council (the Council). It further proposes that the Council shall establish uniform professional standards on matters concerning arbitration for the purpose of promoting arbitration, conciliation, mediation and other alternative dispute resolution mechanisms in India. It also outlines that, among other things, the Council remains responsible for grading of arbitral institutions and arbitrators and for reviewing such grading. The Amendment Bill also vests some regulatory powers in the Council, such as the framing of regulations for the discharge of its functions in consultation with the central government and in consonance with the Arbitration Act (as amended), and to this end it proposes to define 'regulations' as 'regulations made by the Council under this act'. The Amendment Bill also envisages the Council maintaining an electronic depository of all arbitral awards and such other records related thereto, in such manner as may be specified by the regulations. However, details about what documents are within the ambit of the phrase 'other records related thereto', the accessibility to the depository, the measures to be taken to prevent theft and data privacy breach remain unclear.

Retrospective or prospective applicability of the Amendment Act

A question that has arisen since the enforcement of the Amendment Act is whether arbitration-related proceedings that were initiated prior to the Amendment Act but were pending at the time of its coming into effect (23 October 2015) are regulated by the provisions of the Amendment Act. The ambiguity about applicability of the Amendment Act to proceedings pending when the Amendment Act was brought in force arose primarily due to the terminology of section 26 of the Amendment Act, which

reads ‘but this act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this act’.

The rulings of various high courts on this issue were in conflict. Consequently, appeals were filed before the Supreme Court to decide the issue. Recently, the Supreme Court has finally decided the issue.⁴⁹ The court noted that it was clear from the language of section 26 that the amended provisions were prospectively applicable to arbitral proceedings and court proceedings in relation thereto. Further, determining the applicability of the amended section 36 to existing proceedings, the court held that ‘section 36, as substituted, would apply even to pending section 34 applications on the date of commencement of the Amendment Act’.

Interestingly, the Amendment Bill, which was approved prior to the Supreme Court’s decision, takes a contrary view. The Amendment Bill proposes to introduce section 87 to the Arbitration Act stating that the Amendment Act will not apply to court proceedings arising out of or in relation to arbitral proceedings that commenced prior to Amendment Act and the same is irrespective of when such court proceedings commenced, that is, whether prior to or after the Amendment Act.

In said circumstances, the Supreme Court in its ruling has drawn the legislature’s attention to section 87 of the Amendment Bill. It remains to be seen whether the Amendment Bill will be aligned with the Supreme Court’s ruling. Further, since the Amendment Bill remains silent on its applicability, it remains to be seen whether learnings from past mistakes will be imbibed by introducing a provision expressly dealing with the applicability of the Amendment Bill.

While the reason for further amendments to the Arbitration Act is discernible, doubts persist as to the nature of the amendments proposed. A few impediments yet remain in the Arbitration Act, despite the Amendment Act, and these certainly need to be ironed out. Further, the need to institutionalise arbitration in the country is a well-intentioned notion, but the proposed amendments throw up interesting mix of questions, foremost among them whether by seeking to bring in a regulator, the Amendment Bill impinges upon party autonomy.

Notes

- 1 *TRF Ltd v Energo Engineering Projects Ltd*, 2017 (8) SCC 377.
- 2 *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation*, 2017 (4) SCC 665.
- 3 *The Government of Haryana PWD Haryana (B and R) Branch v GF Toll Road Pvt Ltd & Ors*, 2019 SCC Online SC 2.
- 4 *NTPC Ltd v Jindal IIF Ltd & Ors*, 2017 SCC Online Del 11219; *Delhi State Industrial & Infrastructure v PNC Delhi Industrial Infra Pvt Ltd*, 2019 SCC Online Del 7413; *Lanco Infrastructure Ltd v Hindustan Construction Co Ltd*, 2016 SCC Online Del 5365; *Enercon GmbH & Ors v Yogesh Mehra & Ors*, 2017 SCC Online Bom 1744.
- 5 *Shakti International Pvt Ltd v Excel Metal Processors Pvt Ltd*, 2017 SCC Online Bom 321.
- 6 *Alka Chandewar v Shamshul Ishrar Khan*, 2017 SCC Online SC 758.
- 7 *Bishnu Kumar Yadav v ML Soni & Sons & Ors*, AIR 2016 Cal 47.
- 8 (33) Correction and interpretation of award; additional award:
 ‘(1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties:
 (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
 (b) if so agreed by the parties, a party, with notice to the

other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

[. . .]

- (3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.

[. . .]

Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.’

- 9 (34) Application for setting aside arbitral award:
 ‘Recourse to a Court against an arbitral award may be made only by an application for setting aside such award . . .
 (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.’
- 10 *Bhatia International v Bulk Trading SA*, (2002) 4 SCC 105.
- 11 *Bharat Aluminum Co v Kaiser Aluminum Technical Services Inc*, (2012) 9 SCC 552.
- 12 *Aircon Beibars FZE v Heligo Charters Pvt Ltd*, 2017 SCC Online Bom 631.
- 13 *Trammo DMCC (formerly Known as Transammonia DMCC) v Nagarjuna Fertilizers & Chemicals Ltd*, 2017 SCC Online Bom 8676.
- 14 *Prabhat Steel Traders Pvt. Ltd v Excel Metal Processors Pvt Ltd*, 2018 SCC Online Bom 2347.
- 15 *MP Power Generation Co Ltd & Anr v Ansaldo Energia Spa & Anr*, 2018 SCC Online SC 385.
- 16 *MMTC Ltd v Vedanta Ltd*, 2019 SCC Online SC 220.
- 17 *Centrotrade Minerals and Metals Inc v Hindustan Copper Ltd*, (2017) 2 SCC 228.
- 18 *M/s Emkay Global Financial Services Ltd v Girdhar Sondhi*, (2018) 9 SCC 49.
- 19 *Sundaram Finance Ltd v Abdul Samad*, 2018 SCC Online SC 121.
- 20 *Cheran Properties Ltd v Kasturi and Sons Ltd*, 2018 SCC Online SC 431.
- 21 *Punjab State Civil Supplies Corporation Ltd v Atwal Rice and General Mills*, (2017) 8 SCC 116.
- 22 *Cruz City 1 Mauritius Holdings v Unitech Ltd*, 2017 SCC Online Del 7810.
- 23 *NTT Docomo Inc v Tata Sons Ltd*, 2017 SCC Online Del 8078.
- 24 *PEC Limited v Austbulk Shipping Sdn Bhd*, 2018 SCC Online SC 2549.
- 25 *Supra* at note 11.
- 26 *Katra Holdings Ltd v Corsair Investments LLC & Ors*, 2017 SCC Online Bom 8480.
- 27 *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd & Ors*, AIR 2017 SC 2105.
- 28 *Antrix Corporation Ltd v Devas Multimedia Pvt Ltd*, 2018 SCC Online Del 9338.
- 29 *Union of India v Hardy Exploration and Production (India) Inc*, 2018 SCC Online SC 1640.
- 30 *Inox Wind Ltd v Thermocables Ltd*, (2018) 2 SCC 519.
- 31 *Municipal Corporation of Greater Mumbai & Anr v Pratibha Industries Ltd & Ors*, 2018 SCC Online SC 2737.
- 32 *Zhejiang Bonly Elevator Guide Rail Manufacture Co Ltd v Jada Elevator Components*, 2018 SCC Online SC 1503; *Jay Bhagwati Construction Co v Haware Engineers & Builders Pvt Ltd*, 2018 SCC

Online Bom 3873.

- 33 Section 11 (6A): 'The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.' Arbitration and Conciliation Act, 1996 : Section 11 – Appointment of arbitrators.
- 34 *M/s Duro Felguera SA v M/s Gangavaram Port Ltd*, (2017) 9 SCC 729.
- 35 *Supra* at note 31.
- 36 *GMR Energy Ltd v Doosan Power Systems India Pvt Ltd*, 2017 SCC Online Del 11625.
- 37 *SBP & Co v Patel Engineering Ltd*, (2005) 8 SCC 618.
- 38 *Suchitra Chavan v Axis Bank Asset Sales Centre*, 2018 SCC Online Bom 2854.
- 39 *Atlas Export Industries v Kotak & Co*, (1999) 7 SCC 61.
- 40 *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd*, (2008) 14 SCC 271.
- 41 *Addhar Mercantile Pvt Ltd v Shree Jagdamba Agrico Exports Pvt Ltd*, 2015 SCC Online Bom 7752.
- 42 *Sasan Power Ltd v North America Coal Corporation India Pvt Ltd*, 2015 SCC Online MP 7417.
- 43 *DK Gupta & Anr v Renu Munjal*, 2017 SCC Online Del 12385.
- 44 *Raffles Design International India Pvt Ltd v Educomp Professional Education Ltd*, 2016 SCC Online Del 5521.
- 45 *Avitel Post Studios Ltd v HSBC PI Holdings (Mauritius) Ltd*, 2014 SCC Online Bom 929.
- 46 *Supra* at note 44.
- 47 Government Resolution No. Misc. 2016/C. No.20/D-19, 13 October 2016.
- 48 Government Resolution No. ARB/C.No.01/2017/D-19, 28 February 2017 read with Government Resolution No. Misc-2016/C.No.20/D-19, 01 December 2016 and Government Resolution, 4 March 2017.
- 49 *Board of Control for Cricket in India v Kochi Cricket Pvt Ltd and Ors*, 15 March 2018, Civil Appeal Nos. 2789-2880 of 2018 (arising out of SLP (C) Nos. 19545-19546 of 2016).



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Economic Laws Practice (ELP) is a leading full-service Indian law firm established in 2001 by eminent lawyers from diverse fields. The firm brings to the table a unique combination of professionals comprising lawyers, chartered accountants, financial planners, economists and company secretaries; enabling us to offer services with a seamless cross-practice experience and top-of-the-line expertise to our clients.

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