



The Asia-Pacific Arbitration Review 2021

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The Asia-Pacific Arbitration Review 2021

A Global Arbitration Review Special Report

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Account manager Bevan Woodhouse

Production editor Kieran Redgewell

Chief subeditor Jonathan Allen

Subeditor Sarah Meaney

Head of production Adam Myers

Editorial coordinator Hannah Higgins

Publisher David Samuels

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Subscription details

To subscribe please contact:

Global Arbitration Review

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL

United Kingdom

Tel: +44 20 3780 4134

Fax: +44 20 7229 6910

subscriptions@globalarbitrationreview.com

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For an authorised copy, contact gemma.chalk@globalarbitrationreview.com.

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Prefacevi

Overviews

Arbitration in mainland China's free trade zones aiming to match international standards 7

Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre)

Disputes in construction and infrastructure projects 11

Craig Shepherd, Daniel Waldek and Mitchell Dearness
Herbert Smith Freehills

Innovation in progress – developments in Korea after the launch of KCAB INTERNATIONAL 18

Sue Hyun Lim
KCAB INTERNATIONAL

Investment Treaty Arbitration in the Asia-Pacific 24

Tony Dymond, Z J Jennifer Lim and Cameron Sim
Debevoise & Plimpton LLP

Serving the Maritime Ecosystem 35

Punit Oza
Singapore Chamber of Maritime Arbitration

Covid-19 – the economic fallout and the effect on damages claims 38

Oliver Watts
FTI Consulting

The rise of arbitration in the Asia-Pacific 43

Andre Yeap SC and Kelvin Poon
Rajah & Tann Singapore LLP

Third-party funding in the Asia-Pacific region ... 49

Gitanjali Bajaj, Ernest Yang and Queenie Chan
DLA Piper

Country chapters

Australia 55

Frank Bannon, Dale Brackin, Steve O'Reilly and Clive Luck
Clayton Utz

China 63

Zhang Shouzhi, Huang Tao and Xiong Yan
King & Wood Mallesons

Hong Kong 70

Peter Yuen, Olga Boltenko and Matthew Townsend
Fangda Partners

India 73

Naresh Thacker and Mihika Jalan
Economic Laws Practice

Japan 81

Yoshimi Ohara
Nagashima Ohno & Tsunematsu

Korea 84

Beomsu Kim, Young Suk Park and Jae Hyuk Chang
KL Partners

Malaysia 89

Andre Yeap SC and Avinash Pradhan
Rajah & Tann Singapore LLP

Singapore 96

Alvin Yeo SC, Chou Sean Yu and Lim Wei Lee
WongPartnership LLP

Vietnam 103

Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh
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Welcome to *The Asia-Pacific Arbitration Review 2021*, 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 the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought leadership inspired by recent events, from 37 pre-eminent regional practitioners.

Across 17 chapters and 112 pages, it offers an invaluable retrospective. 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, Singapore and Vietnam. It also has overviews of construction and infrastructure disputes in the region (and how to avoid them), investment treaty arbitration (particularly its relevance to the Belt and Road Initiative), the impact of covid-19 on the art of damages calculation, and third-party funding.

Among the nuggets it contains:

- the common mistakes that contractors make when allocating risk in contracts and how to avoid them;
- a groundbreaking year for international arbitrations in Korea;
- the vogue among Asian states for including appeal mechanisms in their ISDS;
- how China's government has managed to open up the mainland market to institutions such as the ICC, without having to amend the national arbitration law;
- the end of natural-justice based challenges to awards in Singapore; and
- a handy table showing the position of third-party funding in eight Asian states.

And much, much more.

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

David Samuels

Publisher

May 2020

In summary

With two amendments to the Arbitration and Conciliation Act, 1996 and a plethora of decisions of the Indian judiciary, the present article analyses the major developments in the Indian arbitration scenario in 2019 and early 2020. It closely examines the efforts of the Indian legislature and judiciary in making arbitration an expeditious and efficacious method for resolution of disputes.

Discussion points

- Implementation of the major amendments introduced to the Arbitration Act along with significant judicial pronouncements in relation to the same.
- Developments in relation to enforcement of arbitral awards and arbitral proceedings.
- In view of various judicial pronouncements, considerations to be borne in mind in relation to arbitration agreements.
- Arbitrability of disputes involving allegations of fraud.

Referenced in this article

- The Arbitration and Conciliation Act, 1996.
- The Arbitration and Conciliation (Amendment) Act, 2015.
- The Arbitration and Conciliation (Amendment) Act, 2019.
- A high-level committee to review the institutionalisation of arbitration mechanism in India under the chairmanship of Honourable Justice B N Srikrishna, Supreme Court of India (the Srikrishna Committee).
- The Limitation Act, 1963.
- Central Information Commission.
- Arbitration Council of India.

The growth curve for arbitrations in India has been exceptional in the past few years. The legislature and the judiciary have independently taken conscious steps to make India an arbitration friendly jurisdiction. With two amendments to the Arbitration and Conciliation Act, 1996 (the Arbitration Act) and a slew of decisions, arbitration has perhaps undergone its most drastic change since the enactment of the Arbitration Act. Shedding stereotypes, courts have recognised the need for minimal judicial interference in the arbitral process and have exercised admirable restraint in upholding this necessity, including exercising restraint in the review of arbitral awards. In this chapter we look at a few recent

significant developments that have contributed to the robust pro-arbitration trend in India that has been a work in progress for considerable time.

Recent developments in the Indian regime

Arbitration awards

Challenge to the constitutionality of section 87 introduced by the 2019 Amendment Act

The most significant and a much-welcomed development is the decision of the Supreme Court of India in *Hindustan Construction*.¹ Readers may be aware that as soon as the substantial amendments introduced through the Arbitration and Conciliation (Amendment) Act, 2015 (the 2015 Amendment Act) were brought into effect on 23 October 2015, questions arose as to whether these amendments could be applied retrospectively. Section 26 of the 2015 Amendment Act² provided that while the amendments were not to apply to arbitral proceedings commenced prior to coming into force of the 2015 Amendment Act, the amendments would apply in relation to arbitral proceedings commenced thereafter. The seemingly ambiguous language led to conflicting decisions. Courts differed on the interpretation of whether the amendments applied retrospectively to pending court proceedings in relation to pending arbitral proceedings, to court proceedings commenced after 23 October 2015 but that were in relation to pending arbitral proceedings, and other such permutations and combinations.

Among the amendments that became a subject of the retrospective or prospective applicability debate was the complete substitution of section 36 of the Arbitration Act, which pertains to the enforcement of an arbitral award. Under the erstwhile section 36,³ an award was enforceable (i) once the time period to challenge the award under section 34 of the Arbitration Act had expired and no challenge had been made, or (ii) once the challenge to the award had eventually been dismissed. Thus, award debtors chose to challenge the arbitral award and let the proceedings languish in court as it bought them an automatic stay against enforcement of the award. Through the substituted section 36,⁴ the legislature has removed the automatic stay against enforcement that was available to award debtors. Now the award debtor has to separately apply for a stay against enforcement; this stay can be made conditional by the courts and conditions can include the deposit of the award amount or part thereof in court. Therefore, award holders can be secured through such deposits while the challenge to the award will be permitted to run its due course.

As there was much confusion on whether such amendment to section 36 would be applicable to petitions challenging awards that were pending as on 23 October 2015, the Supreme Court had to step in and clarify the law in *BCCI*.⁵ The Supreme Court held that the scheme of the 2015 Amendment Act read in light of section 26 thereof was generally prospective in nature but that each amendment had to be looked at separately to understand if it could be applied retrospectively. Considering the substituted section 36, the

Supreme Court found that the same was applicable retrospectively. This meant that in all pending applications where awards had been challenged and where an automatic stay had been previously available to the award debtor, the stay no longer subsisted, and the award debtor would now have to apply for a stay.

As this decision led to an upheaval in the automatic stay against enforcement that had been previously obtained by award debtors, the courts were flooded with applications by award holders seeking to enforce the award and thereby to secure the award amount pending the challenge to the award. Also, courts, based on the ratio in *BCCI* began interpreting each amendment by analysing the decision of the Supreme Court in their own manner. As such, the legislature thought it fit to step in again and clarify the ambiguity created by section 26 of the 2015 Amendment Act.

Through the Arbitration and Conciliation (Amendment) Act, 2019 (the 2019 Amendment Act), the legislature introduced section 87⁶ to the Arbitration Act, which clarified that the 2015 Amendment Act was to apply only to arbitral proceedings commenced on or after 23 October 2015 and only to court proceedings arising out of or in relation to such arbitral proceedings. Further, section 26 of the 2015 Amendment Act was done away with⁷ and therefore the 2015 Amendment Act was made prospective in its applicability. The decision in *BCCI* that applied the amended section 36 retrospectively to pending challenge applications was thus also overruled.

This had severe implications on all of the challenges to arbitral awards that were pending as on 23 October 2015 as well as to challenges that were filed after 23 October 2015 but related to arbitral proceedings commenced prior to 23 October 2015. In such cases, the award debtor still enjoyed the automatic stay against enforcement by simply filing a challenge to the award. Only in cases of arbitral proceedings commenced on or after 23 October 2015 did the award debtor now have to apply separately for a stay. Reversal of the *BCCI* decision led to a second churning in the pending challenges. Thus, it was not long before the Supreme Court was called upon to decide the validity and constitutionality of section 87 of the Arbitration Act as inserted by the 2019 Amendment Act and to also similarly rule upon the deletion of section 26 of the 2015 Amendment Act.

In *Hindustan Construction*, the Supreme Court struck down the insertion of section 87 of the Arbitration Act and the deletion of section 26 of the 2015 Amendment Act. The apex court found that the said actions of the legislature, which effectively made the entire 2015 Amendment Act prospective in its applicability, were wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act. The Supreme Court stated that the insertion of section 87 of the Arbitration Act and the deletion of section 26 of the 2015 Amendment Act was:

manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. This is for the reason that a key finding of the BCCI judgment (supra) is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act.

Resultantly, the findings in the *BCCI* decision continue to apply. The apex court has thus provided much needed respite to award holders who were more often than not frustrated by a recalcitrant award debtor who through a simpliciter challenge application

could stay the enforcement of such award for lengthy durations without much ado. Now, award debtors, irrespective of when they suffered the award, must be able to prove why enforcement of the award must be stayed and further may be subjected to depositing the whole or part of the award amount. This will result in a withdrawal of many of the pending challenges to the awards and thwart any future frivolous challenges as well.

Furthermore, in *Pam Developments*⁸ the Supreme Court clarified that even government entities, who as award debtors have sought to set aside an award, may, like private parties, be required to deposit the award amount while seeking a stay against the enforcement of an arbitral award. This brings much relief to private parties, especially in the infrastructure industry, who as award holders may be able to secure the award amount pending the setting aside proceedings and may also be able to withdraw such deposits upon furnishing a solvent security, thereby alleviating any cash flow issues.

Challenge to a domestic award

The year 2019 saw some significant developments in relation to the law on a challenge to a domestic award.

Despite the Supreme Court's decision in *Fiza Developers*⁹ that the proceedings in court pertaining to a challenge to an award ought to be summary in nature, the scope of evidence in such proceedings was a contentious issue. This was until the position was clarified by the apex court in *Emkay Global*.¹⁰ Here, the apex court stated that an application for setting aside an award will not ordinarily require anything beyond the record of the arbitral tribunal. However, the court was quick to provide for circumstances when relevant matters were not contained in such arbitral record but were necessary to determine the challenge; it clarified that in such circumstances, affidavits of witnesses and their cross-examination would be allowed. However, it cautioned that such cross-examination will be allowed only if absolutely necessary. The 2019 Amendment Act introduced amendments to section 34(2)(a)¹¹ providing that in an application for challenge, the basis for the challenge is to be established from the record of the arbitral tribunal. However, unlike the decision in *Emkay Global* the amendment did not provide for circumstances where evidence not forming part of tribunal's record could be brought before the court through an affidavit. Post the 2019 Amendment Act, in *Canara Nidhi*¹² the apex court was called upon to decide whether the additional evidence that parties sought to introduce at the stage of setting aside proceedings should be allowed. The apex court reiterated its decision in *Emkay Global* and held that an exceptional case would have to be made out in order to permit additional evidence to be adduced. This decision will expedite the disposal period for setting aside applications and ensure that a limited review on the basis of the arbitral record is maintained as a rule.

In *Ssanyong Engineering*¹³ the Supreme Court stated that a unilateral addition or alteration of a contract can never be foisted on an unwilling party nor can a party be made liable for a bargain it had never entered into with the other party. The apex court treated this course of conduct as a breach of the fundamental principle of natural justice and one that shocked the conscience of the court. In view of the foregoing principles, the apex court set aside an award premised on a policy circular that was introduced unilaterally by the respondent to compute price adjustments under the contract. Understandably, as stated by the apex court itself, this ground is available in only exceptional circumstances and is not one which will be oft applied nor of universal application. The courts will be extremely cautious when relying upon this principle and will use it in the rarest of rare circumstances.

Also, in a welcome reiteration, the apex court restated that the high courts in exercise of their writ jurisdiction under articles 226 and 227 of the Constitution of India cannot set aside an award.¹⁴ Under article 226 of the Constitution of India, high courts have the power to issue order, directions and writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the fundamental rights conferred by Part III of the Constitution of India and for any other purpose. Further, under article 227 of the Constitution of India, every high court in India has superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The Supreme Court in *SBP & Co*¹⁵ had already disapproved the stand adopted by some of the high courts in correcting an award, passed by an arbitral tribunal, by exercising its powers under articles 226 or 227 of the Constitution of India. The Supreme Court has now reiterated that the courts cannot use their writ power to set aside an award.

Enforcement of a foreign award

In *Vijay Karia*¹⁶ the apex court, while reiterating the limited grounds on which the enforcement of a foreign award may be resisted, has most importantly allowed enforcement of an award even if such enforcement would violate the provisions of Foreign Exchange Management Act, 1999, thereby affirming the decision pronounced by the Delhi High Court in *Cruz City*.¹⁷ The apex court in *Vijay Karia* clarified that for a foreign award to be unenforceable as being in contravention of the fundamental policy of Indian law, as stated in *Renusagar Power*,¹⁸ it must involve a breach of some legal principle or legislation that is so basic to Indian law that it is not susceptible to being compromised. The court in *Vijay Karia* emphasised that ‘fundamental policy’ refers to the core values of India’s public policy as a nation, which may find expression not only in statutes but also in time-honoured principles that are followed by the courts. Further, the apex court also noted that the phrase ‘was otherwise unable to present his case’ occurring in section 48(1)(b) of the Arbitration Act cannot be given an expansive meaning. Thus, it refused to hold that failure to consider a material issue would fall within the rubric of section 48(1)(b). Having said that, the apex court explained that if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the court and may be set aside, as was done by the Delhi High Court in *Campos Brothers*.¹⁹ The apex court’s ruling in *Vijay Karia* is evidence of how far India has come from its initial stance in *Phulchand Exports*²⁰ – a decision wherein the phrase ‘public policy of India’ as used in section 48(2)(b) of the Arbitration Act was given a wider meaning and it was held that a foreign award could be set aside if it was patently illegal. Further, the imposition of heavy costs by the apex court in *Vijay Karia* on the appellant is a firm message to dissuade parties from pursuing all frivolous remedies to resist the enforcement of an award.

Another development in the law for enforcement of a foreign award is that the high courts across India appear to be at a consensus about 12 years being the period of limitation for enforcing a foreign award, under article 136 of the Limitation Act, 1963 (the Limitation Act).²¹ Having said that, it is also imperative to note that in March 2020 the Supreme Court, while deciding the limitation period for enforcing a foreign decree pronounced in a reciprocating territory, ruled that if the decree holder did not take steps for executing the decree within the limitation prescribed in the country where the decree was issued (the cause country), the limitation period for enforcing such a decree in India would be

the limitation prescribed in the cause country and it would commence to run from the day the decree was passed.²² It also noted that where a decree holder did take steps to execute the decree in the cause country, but the decree was not fully satisfied, then the limitation period for a petition for execution of the decree in India is three years, as prescribed by article 137 of the Limitation Act, computed from the finalisation of execution proceedings in the cause country. In light of the apex court’s decision with respect of a foreign decree, the authors believe that a similar approach may be adopted for a foreign award from a reciprocating territory, since under the Arbitration Act such foreign awards are enforceable as a decree in India.

Appointment of arbitrators

The aspects that a court needs to examine when asked to appoint an arbitrator under section 11 of the Arbitration Act has always been a subject of debate in India. Initially, the approach, keeping in mind the objective sought to be achieved by enacting the Arbitration Act along the lines of the Model Law, was that of minimal enquiry.²³ However, the scope of enquiry expanded beyond examining the existence of the arbitration agreement with the Supreme Court’s decision in *SBP & Co*. This was clarified by the Supreme Court in *National Insurance*,²⁴ which segregated what matters the court ought to look into, what the court may look into and what the court should not look into when it was asked to appoint an arbitrator. By the 2015 Amendment Act, section 11 (6-A) was introduced in the Arbitration Act, which provided that in an application to appoint an arbitrator, notwithstanding any judgment, decree or order of any court, courts must confine their examination to the existence of an arbitration agreement. Despite the legislature’s intent to restrict the scope of enquiry, the Supreme Court in *United India*²⁵ expanded the same to include examination of whether the dispute was arbitrable. Recognising the need to restrict such scope, the Supreme Court in *Mayavati Trading*²⁶ held that after the amendment, all the courts need to see is whether an arbitration agreement exists – nothing more, nothing less. The restricted scope of enquiry is a welcome change in stance. It is noteworthy that section 11(6-A) was deleted by the 2019 Amendment Act. While the said deletion is yet to be brought into force, the intended deletion was understood by certain commentators to mean that the law as it stood prior to the 2015 Amendment Act was going to be resuscitated insofar that the court was empowered to go into preliminary issues at the time of appointing the arbitrator. The Supreme Court in *Mayavati Trading* clarified that the deletion of section 11 (6-A) had been recommended by the Srikrishna Committee since it foresaw the appointment of arbitrators being done institutionally, in which case the courts under the old statutory regime would no longer be required to appoint arbitrators and consequently to determine whether an arbitration agreement exists or not. Therefore, the argument that the deletion has resuscitated the law prior to 2015 Amendment Act will not hold water.

Arbitration agreements

No unilateral appointments of a sole arbitrator by a party interested in the outcome of a dispute

Through the 2015 Amendment Act, section 12 of the Arbitration Act, which provided for challenges to the appointment of an arbitrator, was amended. Further, the Seventh Schedule was introduced, which made certain classes of persons ineligible to be appointed as an arbitrator. In *TRF Limited*,²⁷ the apex court held that the managing director of one party, being the named sole arbitrator in the agreement and having become ineligible to be

appointed as an arbitrator by operation of the Seventh Schedule, is by virtue of such ineligibility himself not eligible to appoint an arbitrator. In 2019, the Supreme Court was once again called on to determine the validity of a clause providing for a party's chairman and managing director to appoint a sole arbitrator for adjudicating disputes.²⁸ Placing reliance on its ruling in *TRF Limited*, the apex court ruled that such a clause was invalid. The court ruled that the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. It also noted that the foregoing has to be taken as the essence of the amendments brought in by the 2015 Amendment Act. It stated that while it was conscious that if such a view was taken as the conclusion from *TRF Limited*, it would always be available to argue that a party or an official or an authority having an interest in the dispute would be disentitled to appoint an arbitrator as a logical deduction from *TRF Limited*. The issue of unilateral appointment of sole arbitrator by a party who was not an employee or officer of the party concerned, was again raised before the Delhi High Court.²⁹ The court relying on the decision of the Supreme Court in *Perkins Eastman* held the clause therein as being invalid on the ground that the 'company' acting through its board of directors will have an interest in the outcome of the dispute. The foregoing decisions reiterate the judiciary's commitment to promoting an impartial arbitration regime in India. The decisions come as a relief to many private sector parties who have contracts with public sector undertakings (PSU) wherein the arbitration agreement endows the unilateral right of appointment on PSUs. Notably, in a case where the right to nominate an arbitrator is given to both parties, but the right is restricted to a pool of arbitrators selected by only one party, the appointment procedure does not run afoul of the law.³⁰ While in the Indian context the foregoing decisions are welcome, it does impinge on party autonomy at one level. The backbone of arbitration as an effective dispute resolution mechanism is that, arbitration in its entirety relies on a contract between parties, which is drawn up out of free will. To exert influence over this important right of parties may be frowned upon by the international arbitration community.

Stamp duty on arbitration agreements

While parties check their arbitration clauses that allow appointment of sole arbitrators by a party interested in the outcome of disputes, they must also be careful and ensure that the agreement is sufficiently stamped. Prior to the amendments to the Arbitration Act, the Supreme Court in *SMS Tea*³¹ had held that it cannot act on an arbitration clause contained in an insufficiently stamped document. The Supreme Court in *Garware Wall*³² concurred with its decision in *SMS Tea*. Recently, the Court in *Dharmaratnakara Rai*³³ held that no arbitrator could be appointed under an arbitration clause that was contained in a lease deed that was insufficiently stamped under the Karnataka Stamp Act, 1957, yet again reaffirming its earlier decision in *SMS Tea*. Courts, in such cases, impound the document until payment is made of the differential duty and penalty if any applicable. This involves a delay, which can be avoided if the document is stamped sufficiently.

Wording of the arbitration agreements

Arbitration agreements often contain certain language that can result in the applicability of amendments to the law mid-way through an arbitration or related proceedings. Recently, the Bombay High Court³⁴ was called upon to decide on the applicability of the amended section 36 provisions to court proceedings initiated in respect of an award pronounced prior to the

2015 Amendment Act. Since the arbitration clause in the present case provided that the Arbitration Act along with all the statutory modifications and re-enactment shall apply to the reference made under the said arbitration agreement, the court held that as parties had so agreed, even though the arbitration notice was invoked much prior to the 2015 Amendment Act, the amended provisions would apply. Hence, the applicant was not held entitled to any automatic stay of the impugned arbitral award.

Excepted matters in arbitration agreements

Further, parties should also be mindful of the 'excepted matter' under the contract. The apex court's ruling in *Mitra Guha*³⁵ reiterates that when parties themselves agreed that the decision of the Superintending Engineer in levying liquidated damages was final and the same was an excepted matter, then the correctness of his decision cannot be called into question in the arbitration proceedings and the remedy if any, will arise in the ordinary course of law. In our experience, we note that the excepted matters clause is a commonly agreed term in contracts with PSUs. In agreeing to such a clause, parties must (if possible) negotiate to tighten the scope of excepted matters in their contracts since arbitration, in all likelihood, will not be a way forward for such matters.

Arbitrating allegations of fraud

In 2016, in *Ayyasamy*,³⁶ the apex court had ruled that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties and that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and have no implication in the public domain, the arbitration clause cannot be avoided and the parties can be relegated to arbitration. Recently, the apex court in *Rashid Raza*,³⁷ while deciding an application for appointing an arbitrator, noted that the working tests of 'simple allegations' as laid down by it in *A. Ayyasamy* were: (i) does the plea permeate the entire contract and, above all, the agreement of arbitration, rendering it void, or (ii) whether the allegations of fraud touch upon the internal affairs of the parties inter se or have an implication in the public domain. Since the allegation of fraud pertaining to the affairs of the partnership and siphoning off money therefrom were neither allegations that would vitiate the partnership deed as a whole (or, in particular, the arbitration clause), nor have an effect on the public domain, the apex court proceeded to appoint an arbitrator. This is another instance of the court's policy of minimal interference in arbitration. While previously the issue of fraud being non-arbitrable was raised even at the stage of appointment of an arbitrator, in light of the amendments introduced by the 2019 Amendment Act to section 11 and the observations of the Supreme Court in *Mayavati Trading*, the only stage for raising the plea of arbitrability of a dispute due to allegations of fraud will now be in an application challenging the jurisdiction of arbitrators and thereafter in setting aside proceedings, if any.

Time limits for completion of proceedings

Keeping in mind the need for expediting arbitrations in India, the 2015 Amendment Act, through the insertion of section 29A, introduced time limits for making an award. Although the provision was aimed at expediting disposal of arbitrations in India, the same was criticised as it moved away from the bedrock of arbitration (ie, party autonomy).

By the 2019 Amendment Act, the legislature excluded international commercial arbitrations seated in India from the purview of the time limits under section 29A. For domestic arbitrations

other than international commercial arbitrations seated in India, the computation of the 12 months' time period was amended to begin from the date on which the pleadings are completed under section 23(4) of the amended Arbitration Act. As per section 23(4) of the amended Arbitration Act, the pleadings are to be completed within six months of the date on which the arbitrator or arbitrators received written notice of their appointment.

Recently, with respect to an arbitration that commenced on 26 May 2018 and was pending on 30 August 2019 (ie, the date the amendment to section 29A was notified), the Delhi High Court clarified that the amended section 23(4) and section 29A(1) of the amended Arbitration Act, being procedural in nature, would apply retrospectively.³⁸

While controversy on the applicability of section 23(4) and section 29A of the amended Arbitration Act was resolved, another hot topic that occupied the minds of courts was whether in an international commercial arbitration an application under section 29A can be filed before a high court if the arbitrator was appointed by the Supreme Court under section 11 of the Arbitration Act. The Bombay High Court has answered this question in the negative, especially because under section 29A(6) the court has the power to substitute an arbitrator and the exclusive jurisdiction to appoint arbitrators for an international commercial arbitration is vested with the apex court.³⁹ The question also arose before the Delhi High Court, which disposed the petition because a parallel petition for the same relief was filed before the apex court since the apex court had appointed the arbitrator in the instant case.⁴⁰ However, when the matter was called before the apex court, the petition therein was withdrawn by the petitioner, with the apex court noting that it had neither expressed any opinion on the merits or demerits of the matter nor dealt with any contentions made by the parties.⁴¹ As a result, the application before the Delhi High Court was restored and the Delhi High Court extended the time to make the award.⁴² This question has fortunately become irrelevant as international commercial arbitrations are no longer under the purview of section 29A.

Similar questions have also arisen with respect to arbitrations other than international commercial arbitrations (ie, since the exclusive jurisdiction for appointment of arbitrators vests with the high court, whether the appropriate forum for exercising the power under section 29A is the 'Court' as prescribed under section 2(1)(e) of the Arbitration Act⁴³ or the high court). While few high courts have taken a view that court for the purposes of section 29A is the court that appointed the arbitrator in a court appointed tribunal,⁴⁴ others have taken a conflicting view – that the power will rest with principal civil courts.⁴⁵

Confidentiality of arbitration proceedings

Through the 2019 Amendment Act, India enacted a specific provision, namely section 42A within its arbitration statute pertaining to confidentiality of arbitral proceedings. A carveout was made in respect of the arbitral award where such disclosure was necessary for the purpose of implementation and enforcement of the award. In an interesting development, an application was filed by one R S Sravan Kumar under the Right to Information Act, 2005 (the RTI Act) before the Central Public Information Officer (CPIO), Department of Space, Bengaluru seeking information, *inter alia*, for details of whether or not Antrix Corporation Ltd had paid the damages awarded by an arbitral tribunal to Devas Multimedia Private Limited and whether there was any limitation to the payment under the award. Since Mr Kumar was denied the information, he filed an appeal before the Central Information

Commission (the Commission). The Commission deciding the appeal held that since the arbitral award was yet to be finalised and the question of its implementation and enforcement has not arisen, the disclosure of the information sought for is exempted as per section 42A introduced by the 2019 Amendment Act.⁴⁶ While this is a minor step towards its implementation, the trend to enforce this section will considerably go a long way in appeasing concerns for confidentiality of parties to international commercial arbitrations.

Arbitration Council of India

One of the key amendments that was introduced through the 2019 Amendment Act but not notified was the introduction of a nodal agency, namely the Arbitration Council of India (ACI).

To promote institutional arbitration in India, the Srikrishna Committee had recommended the setting up of ACI, which was to have representatives from stakeholders in arbitration in India and abroad. The said body was to act more as a catalyst for the growth of arbitral institutions in India including policymaking for grading arbitral institutions, policymaking for accreditation of arbitrators and creation of a specialist arbitration bar. The body's functioning was largely recommendatory in nature and to help foster institutional arbitration in India in a democratic manner.

The legislature in its own wisdom, and straying quite far from the recommendations of the Srikrishna Committee, has envisaged the setting up of a body that is predominantly comprising of government officials or nominees thereof. This has led to serious criticism as the government and its entities being involved in a key number of arbitrations and related court litigations ought to have maintained a degree of separation from the composition of such a body. Also, the very nature and function has moved away from being recommendatory to being regulatory. ACI, as envisaged, will have wide-ranging powers from making rules, regulations⁴⁷ and grading arbitral institutes, reviewing such grading, etc.⁴⁸ Such wide-ranging powers may prove antithetical to the very conceptualisation of such a body and the purpose it sought to achieve. Perhaps, the legislature may yet heed the criticism and not notify the said amendments, or at the very least, modify them to reflect the inspiration behind them.

Parting thoughts

Unmistakably India has made and continues to make great strides in easing the conduct of business in the country, a facet of which is the improvement in the arbitration scenario in India. However, an interplay of the arbitration law with other commercial laws, especially the Insolvency and Bankruptcy Code, 2016 (the IB Code), has led to choppy waters. A question has arisen on few occasions – if either before, during or after the arbitral proceedings, a party to the arbitration is ordered to deposit money with a court as an interim measure, then whether an award holder is eventually entitled to withdraw the sums when the depositing party has become subject to a corporate insolvency resolution process (CIRP) under the IB Code. The Bombay High Court held that once an award became enforceable as a decree of the court, then no question remained of the amount being claimed by the corporate debtor; that, from the time the deposit was made until the time withdrawal is ordered, that amount was not the property of either party to the dispute.⁴⁹ The Court also rejected the argument of the corporate debtor that the application for withdrawal of the deposit was an application for the recovery of any property by an owner or lessor where such property is occupied by or is in the possession of corporate debtor under section 14(1)(d) of the IB Code. Hence,

the court permitted the award holder to withdraw the amount deposited by the corporate debtor. In appeal before the division bench of the Bombay High Court, recording that the award holder submitted that the amount it received was subject to the orders passed by the National Company Law Tribunal, Mumbai bench, the court dismissed the appeal.⁵⁰ However, the National Company Law Appellate Tribunal (NCLAT), while answering the said question, held that the amounts deposited with the court are an asset of the corporate debtor and must be added to the total assets of the corporate debtor; that the claims by the award holder can be taken care of by the successful resolution applicant, if a resolution plan is approved.⁵¹ The appeal filed from NCLAT's decision before the Supreme Court was dismissed by the apex court as it found no ground for interfere with NCLAT's decision.⁵² In light of these decisions where one's claims are against companies that have unstable financial health, one will have to decide which route to adopt.

Having said that, it is obvious that interplay of laws will be ironed out in time. Apart from these teething issues, to spur further growth in the arbitration regime, India must complement its legislative and judicial measures with administrative measures promoting institutional arbitrations. Perhaps then, India will truly become a hub for arbitration.

Notes

- 1 *Hindustan Construction Company Limited and Anr. v Union of India and Ors.*, 2019 SCC OnLine SC 1520.
- 2 26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.
- 3 36. Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (V of 1908) in the same manner as if it were a decree of the Court.
- 4 36.(1) Where the time for making an application to set aside the arbitral award under Section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.
 - (2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
 - (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).
- 5 *Board of Control for Cricket in India v Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287.

- 6 87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) shall:
 - (a) not apply to:
 - (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016);
 - (ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016);
 - (b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.
- 7 Section 15 of the 2019 Amendment Act.
- 8 *Pam Developments Pvt. Ltd. v State of West Bengal* (2019) 8 SCC 112.
- 9 *Fiza Developers and Inter-trade Pvt. Ltd. v AMCI (India) Pvt. Ltd. and Anr* (2009) 17 SCC 796.
- 10 *Emkay Global Financial Services Limited v Girdhar Sondhi* (2018) 9 SCC 49.
- 11 34(2). An arbitral award may be set aside by the Court only if—
 - (a) the party making the application establishes on the basis of the record of the arbitral tribunal that—
- 12 *Canara Nidhi Limited v M. Shashikala & Ors.* (2019) 9 SCC 462.
- 13 *Ssangyong Engineering & Construction Co. Ltd. v National Highway Authority of India*, 2019 SCC OnLine SC 677.
- 14 *M/s Sterling Industries v Jayprakash Associates Ltd. & Ors.*, 2019 SCC Online SC 1154.
- 15 *SBP & Co. v Patel Engineering Limited* (2005) 8 SCC 618.
- 16 *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors.*, 2020 SCC OnLine SC 177.
- 17 *Cruz City 1 Mauritius Holdings v Unitech Limited* (2017) 239 DLT 649.
- 18 *Renusagar Power Co. Ltd. v General Electric Co.* (1994) Supp (1) SCC 644.
- 19 *Campos Brothers Farms v Matru Bhumi Supply Chain Pvt. Ltd.*, 2019 SCC OnLine Del 8350.
- 20 *Phulchand Exports Limited v O.O.O. Patriot* (2011) 10 SCC 300.
- 21 *Cairn India Ltd & Ors v Government of India*, judgment dated 19 February 2020, Del HC, O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015; *Imax Corporation v E-City Entertainment (I) Pvt. Ltd. and Ors.*, 2019 SCC OnLine Bom 4044.
- 22 *Bank of Baroda v Kotak Mahindra Bank Limited*, 2020 SCC Online SC 324.
- 23 *Konkan Railway Corporation Ltd. v Mehul Constructions Co.* (2000) 7 SCC 201.
- 24 *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267.
- 25 *United India Insurance Co. Ltd. v Hyundai Engineering* (2018) 17 SCC 607.
- 26 *Mayavati Trading Pvt. Ltd. v Pradyua Deb Burman* (2019) 8 SCC 714.
- 27 *TRF Limited v Energo Engineering Projects Limited* (2017) 8 SCC 377.
- 28 *Perkins Eastman Architects DPC and Ors. v HSCC (India) Limited*, (2019) SCC Online SC 1517.
- 29 *Proddatur Cable TV Digi Services v Siti Cable Network Limited*, 2020 SCC OnLine Del 350.
- 30 *Central Organization for Railway Electrification v ECI-SPIC-SMO-MCML (JV)*, 2019 SCC OnLine SC 1635.
- 31 *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Company Pvt. Ltd.* (2011) 14 SCC 66.

- 32 *Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engineering Ltd.* (2019) 9 SCC 209.
- 33 *M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram & Other Charities & Ors. v M/s Bhaskar Raju & Brothers & Ors.*
- 34 *Chetan R. Shah. v Emkay Fincap Ltd.*, 2019 SCC Online Bom 3190.
- 35 *Mitra Guha Builders (India) Co. v Oil & Natural Gas Corporation Ltd.*, 2019 SCC Online SC 1442.
- 36 *A. Ayyasamy v A. Paramasivam* (2016) 10 SCC 386.
- 37 *Rashid Raza v Sadaf Akhtar* (2019) 8 SCC 710.
- 38 *Shapoorji Pallonji And Co. Pvt. Ltd. v Jindal India Thermal Power Ltd*, Order 23 January 20202, Del HC, O.M.P.(MISC.)(COMM.) 512/2019.
- 39 *Cabra Instalaciones Y Servicios, S.A. v Maharashtra State Electricity Distribution Co. Ltd.*, 2019 SCC OnLine Bom 1437.
- 40 *Tecnimont S.P.A. & Anr. v National Fertilizers Ltd.*, Order dated 23 October 2018, Del HC, O.M.P.(MISC.)(COMM.) 260/2018.
- 41 *M/s. Tecnimont S.P.A. & Anr. v National Fertilizers Ltd.*, Order dated 30 November 2018, Supreme Court, MA No.2743/2018 in Arbitration Case (C) No.24/2016.
- 42 *Tecnimont S.P.A. & Anr. v National Fertilizers Ltd.*, 2018 SCC OnLine Del 13250.
- 43 Section 2(1)(e) of the Arbitration Act reads as follows:
(1) In this Part, unless the context otherwise requires.
...
(e) "Court" means:
(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;
- (ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.
- 44 *Nilesh Ramanbhai Patel v Bhanubhai Ramanbhai Patel*, judgment dated 14 September 2018, Guj HC, M.C.A. (OJ) No. 1/2018, In R/ Petn. under Arbitration Act No. 56 of 2016.
- 45 *M/s. URC Construction (Private) Ltd. v M/s. BEML Ltd.*, 2017 SCC Online Ker 20520.
- 46 *R.S. Sravan Kumar v CPIO, Department of Space*, Order dated 22 November 2019, Central Information Commission, Second Appeal No. CIC/DSPCE/A/2018/616027.
- 47 Section 43L, as proposed to be inserted by the 2019 Amendment Act.
- 48 Section 43D, as proposed to be inserted by the 2019 Amendment Act.
- 49 *Nahar Building Ltd. v Housing Development & Infrastructure Ltd.*, Order dated 21 January 2020, Bom HC, IA/1/2019 in ARBP/74/2017.
- 50 *Housing Development & Infrastructure Ltd. v Nahar Building Ltd.*, Order dated 30 January 2020, Bom HC, IA(L)/1/2020 in COMAP(L)/32/2020 in IA/1/2019 ARBP/74/2017.
- 51 *Morgan Securities & Credits Private Limited v Resolution Profession of Videocon Industries Limited*, Order dated 22 January 2020, NCLAT, Company Appeal (AT) (Insolvency) No. 1366/2019, 1367/2019, 1368/2019, & 20/2020.
- 52 *Morgan Securities & Credits Private Limited v Videocon Industries Limited & Anr.*, Order dated 16 March 2020, SC, Civil Appeal Nos. 1729/2020, 1739-1740/2020 and 1811/2020.



Naresh Thacker
Economic Laws Practice

Naresh Thacker is a partner at ELP and heads the firm's litigation and alternate dispute resolution practice. He is a qualified lawyer with the additional attribute of being a solicitor (non-practising) in England and Wales. Mr Thacker has more than 20 years of experience in mediation, domestic and international arbitration and litigation; particularly in large infrastructure project arbitrations and post M&A arbitrations, corporate litigation, commercial disputes, regulatory and tax disputes and white-collar crime.

Over the years he has handled a number international and domestic arbitration matters for Indian and global corporates and has adeptly handled ad-hoc and institutional arbitrations alike, including those under the rules of the International Chamber of Commerce International Court of Arbitration, the London Court of International Arbitration, the Singapore International Arbitration Centre, UNCITRAL and the Swiss Chamber of Commerce.

Mr Thacker's experience in tax disputes span issues relating to indirect tax, including central excise, customs, service tax and VAT. On the regulatory front he routinely advises and represents clients on foreign exchange issues and energy-related matters. He has successfully represented clients before multiple tribunals and courts in India in matters pertaining to economic offences, a large number of which have industry-wide implications.



Mihika Jalan
Economic Laws Practice

Mihika Jalan is an associate manager in the litigation and dispute resolution practice of economic laws practice. She graduated from ILS Law College, Pune in 2014, and is enrolled with the Bar Council of Maharashtra and Goa. Ms Jalan deals with arbitrations, both domestic and international, as well as litigation before courts.



9th Floor, Mafatlal Centre
Vidhan Bhavan Marg
Nariman Point
Mumbai 400021
India
Tel: +91 22 6636 7000

Naresh Thacker
nareshthacker@elp-in.com

Mihika Jalan
mihikajalan@elp-in.com

www.elp-law.in

Established in 2001 with the aim of bringing together a diverse set of professionals to deliver effective solutions for clients, Economic Laws Practice (ELP) is today a leading full-service law firm in India with more than 200 professionals – lawyers, chartered accountants, cost accountants, company secretaries, sector experts and economists – assisting clients on transactional, advisory, litigation, regulatory and tax matters.

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