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India

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A. Legislation and rules

A.1 Legislation

Arbitration in India continues to be governed by the Arbitration & Conciliation Act 1996 (“Act”). 2018 saw the introduction of the Arbitration & Conciliation Amendment Bill 2018 (“Amendment Bill 2018”) aimed at introducing greater ease of doing arbitration in India. The purpose of this amendment is to bring the current Indian law into line with the rapid economic growth in the country and to aid foreign direct investment and public-private partnership.

The Amendment Bill 2018 expects to achieve this by creating a robust institutional arbitration program in India with a clear focus on developing quality arbitrators in India and speedy disposal of proceedings. These proposed amendments follow the amendments to the Act that were carried out in 2015. The Amendment Bill 2018 was passed by the lower house of the Indian Parliament in August 2018 and is expected to be introduced in the Upper House of the Indian Parliament shortly.

Highlights of the Amendment Bill 2018 are:

- (a) **Expeditious disposal for the appointment of an arbitrator:**
Arbitral proceedings have historically been delayed due to the inability of the parties to agree on a tribunal and the time taken by courts to appoint the arbitrators. Under the Amendment Bill 2018, any request for the appointment of an arbitrator is

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required to be disposed of within thirty days from the date of service of notice on the opposite party. Parties can approach designated arbitration institutions for the appointment of arbitrators. For international commercial arbitrations, the appointments will be made by institutions designated by the Supreme Court of India (“the Supreme Court”). For domestic arbitrations, appointments will be made by the institution designated by a High Court. In the event that there are no designated arbitral institutions available, the Chief Justice of the concerned High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions. This pro-delegation approach was adopted previously by the Supreme Court, where it asked the Mumbai Center of International Arbitration (MCIA) to appoint an arbitrator in an international dispute between Sun Pharmaceutical Industries Limited and Falma Organics Limited.⁴ This was the first time an Indian court had instructed an independent body to appoint an arbitrator.

- (b) Promoting Institutional Arbitration and training: The Amendment Bill proposes the establishment of a statutory authority called the “Arbitration Council of India” (“the ACI”). The ACI will, *inter alia*, identify and grade qualifying arbitration institutions to be considered for designation, by the High Courts or the Supreme Court, for the appointment of arbitrators. More particularly, the ACI will discharge the function of: (1) framing policies that govern the grading of arbitral institutions; (2) recognizing professional institutions providing accreditation of arbitrations; (3) reviewing the grading of arbitral institutions and arbitrators; (4) holding training and workshops in the area of arbitration; (5) setting up, reviewing and updating norms and ensuring satisfactory levels of arbitration and conciliation; (6) acting as a forum for the exchange of reviews and techniques to be adopted for India

⁴ Arbitration Case no. 33 of 2014, order dated 3 May 2017 of the Supreme Court.



as a robust centre for domestic and international arbitration and conciliation; (7) making recommendations to the central government of India on various measures to be adopted for easy resolution of commercial disputes; (8) promoting institutional arbitration by strengthening arbitral institutions; (9) conducting examination and training on various subjects relating to arbitration and conciliation; (10) establishing and maintaining a depository of arbitral awards made both in India and overseas; and (11) making recommendations regarding personnel, training and infrastructure of arbitral institutions.

- (c) **Timeline:** The Amendment Bill 2018 now requires that the statement of claim and statement of defense be filed within six months of the arbitral tribunal's appointment.⁵ The arbitration award must be passed by the arbitral tribunal within twelve months from the date of completion of pleadings. The timeline for passing an award, prescribed by the Act, cannot be extended in the case of international commercial arbitrations.⁶
- (d) **Prospective applicability of 2015 amendments to the Arbitration Act:** The 2018 Amendment clarifies that the amendments to the Act that were introduced with effect from 23 October 2015 are not retrospective and so the amended Act will only apply to arbitrations and court proceedings relating to arbitrations, if the arbitration itself was commenced after 23 October 2015. If enacted, this position will be a legislative overruling of the law as recently interpreted by the Supreme Court.
- (e) **Qualification of arbitrators:** The Amendment Bill 2018 provides for the training of arbitrators in India to equip them with skills to handle complex commercial arbitration.⁷

⁵ Section 5 of the Amendment Bill 2018.

⁶ Section 6 of the Amendment Bill 2018.

⁷ Eighth schedule of the Amendment Bill 2018.

- (f) Confidentiality in Arbitral proceedings and Immunity of arbitrators: An express confidentiality provision to govern arbitration proceedings is proposed. Presently the Act provides for confidentiality only in cases of conciliation. An express provision on the immunity of arbitrators is also proposed.
- (g) Applications challenging an award would be required to be decided solely on the basis of the record of the arbitral tribunal, and not on extraneous evidence.

A.2 Institutions, rules and infrastructure

The New Delhi International Arbitration Centre Bill 2018 (“Bill”) was introduced in the Lower House of the Indian Parliament for establishing the New Delhi International Arbitration Centre (“NDIAC”) in place of the existing International Centre for Alternative Dispute Resolution which was set up in 1995. The Bill was introduced on the basis of the recommendations made by a High-Level Committee, chaired by Justice B.N. Srikrishna, a former judge of the Supreme Court of India. The Bill also aims to declare the NDIAC as an institution of national importance and promote the development of alternative dispute resolution in India. NDIAC proposes to (i) provide facilities and administrative assistance for the conduct of arbitration, mediation and conciliation proceedings; and (ii) maintain a panel of accredited professionals to conduct arbitration, mediation and conciliation proceedings. Key functions of the proposed NDIAC include: (i) facilitate the conducting of arbitration and conciliation in a professional, timely and cost-effective manner; and (ii) promoting studies in the field of alternative dispute resolution.

The Mumbai Centre for International Arbitration (the “MCIA”), which was established in October 2016 as a joint initiative between the government of the state of Maharashtra, the government of India, and international legal and business communities, is reported to have already handled over two hundred and fifty hearings. Similarly, one of the first institutional arbitration centers to open in India – the Nani



Palkhivala Arbitration Centre, which opened doors in 2005 in Chennai, now also operates out of New Delhi.

B. Cases

B.1 Investment treaty arbitrations

The past year has seen a significant rise in investment treaty arbitrations involving India in the energy and telecommunications sectors. Based on the information available in the public domain, India has been involved in over 24 investment treaty arbitrations as a respondent. 2017 reportedly saw three new arbitrations, namely: (i) *Carissa v India*⁸; (ii) *Nissan v India*⁹; and (iii) *Vodafone v India*.¹⁰ All three of these arbitrations are pending a resolution and the combined claim amounts in these matters are estimated to exceed USD 1 billion. With a significant amount of money at stake, the government of India has moved away from the ad-hoc appointment of lawyers and law firms to represent and defend India in these investment treaty arbitrations and periodically issues circulars identifying Indian and international law firms to represent India in these matters.¹¹

B.2 Vodafone's second investment treaty arbitration

On 17 April 2014, Vodafone International Holdings BV (“Vodafone BV”) – a Dutch subsidiary of Vodafone Group Plc., initiated an arbitration against India under the India-Netherlands BIT (“BIT”). Vodafone BV had challenged a retrospective amendment of the Indian Income Tax Act in 2012 by the Indian government. The effect of the amendment was to tax the acquisition of the indirect control in an Indian company. This retrospective amendment was enacted by the Indian Parliament after the Supreme Court of India quashed the tax-demand made by the Government of India against Vodafone BV. In

⁸ <https://investmentpolicyhub.unctad.org/ISDS/Details/862>

⁹ <https://investmentpolicyhub.unctad.org/ISDS/Details/828>

¹⁰ <https://investmentpolicyhub.unctad.org/ISDS/Details/819>

¹¹ Notice dated 30 September 2016 and 31 October 2016 issued by the Ministry of Finance, Department of Economic Affairs, Investment Division, Government of India.

2017, Vodafone Group Plc. (“Vodafone UK”) initiated a second investment arbitration against the Union of India under the India-United Kingdom BIT. Vodafone UK challenged the same amendment under the India-UK BIT.

India filed a suit before the Delhi High Court seeking an anti-arbitration injunction against Vodafone UK and sought an interim order restraining them from continuing arbitration proceedings under the India-UK BIT. On 22 August 2017, the Delhi High Court passed an ex-parte ad interim order restraining Vodafone UK from initiating or continuing arbitration proceedings under the India-UK BIT. However, in its final judgment on 7 May 2018, the Delhi High Court vacated the stay and dismissed the suit filed by India. The Court held that, while an Indian Court has jurisdiction to pass anti-suit injunctions against a party over whom it has personal jurisdiction, the provisions of the Act are not applicable to investment treaty arbitrations. The Delhi High Court held that: (1) national courts are not always divested of their jurisdiction in an investment treaty arbitration; (2) investment treaty arbitration is fundamentally different from commercial disputes as the cause of action is premised on state guarantees and assurances; (3) it is unknown for courts to issue anti-arbitration injunction under their inherent power in a situation where neither the seat of arbitration or the curial law has been agreed upon; and (4) national courts will exercise great self-restraint and grant an injunction only if there are very compelling circumstances, the court has been approached in good faith, and there is no alternative efficacious remedy available.

The Delhi High Court refused to hold that Vodafone’s UK actions amounted to an abuse of process.

B.3 Impact of arbitral awards on third parties

While the general approach has been to ensure privity of arbitral proceedings and awards, the Bombay High Court recently broke new ground by holding that if a third party’s interests are prejudiced by the interim order of an arbitral tribunal under section 17 of the Act, then



the third party (who is not a party to the arbitration proceedings) is entitled to appeal against the interim order under section 37 of the Act.¹²

In a separate matter, The Supreme Court, relying on the single economic entity doctrine, held that, where the facts of a case indicate a mutual agreement by parties (including non-signatories) to be bound by the arbitral award, an arbitral award can be enforced against a third party.¹³

The Division Bench of the Madras High Court in *SEI Adhavan Power Private Limited and Others. v. Jinneng Clean Energy Technology Limited and Others.*¹⁴ set aside an anti-arbitration injunction and stated that it is the duty of the court to impart a sense of business efficacy to the commercial understanding reflected in the terms of the agreement between the parties. The court held that a non-signatory or third party could be subjected to arbitration only in exceptional cases. In addition to factors such as a direct relationship to the party that is a signatory to the arbitration agreement, direct commonality of the subject matter and agreement between the parties to it being a composite transaction, the court would have to examine whether a composite reference of such parties would serve the ends of justice.

B.4 Clarity on the Amendment Act 2015

Prior to the amendments introduced in the Amendment Act 2015, section 36 of the Act provided that an award would become enforceable only once the time to challenge the award had expired or if such challenge had been refused. The Amendment Act 2015 changed this so that the filing of an application for the setting aside of an arbitral award will not prevent proceedings for enforcement,

¹² *Prabhat Steel Traders Pvt Ltd. v. Excel Metal Processors Pvt. Ltd. and Others.*, 2018 SCC OnLine Bom 2347.

¹³ *Cheran Properties Ltd v. Kasturi Sons Ltd* decided on 24 April 2018.

¹⁴ Original Side Appeal Nos.170 to 175 and 206 to 210 of 2018.

pending a challenge, in the absence of a specific stay granted by the court.¹⁵

This position came into effect from 23 October 2015 and created ambiguity around whether the amended section 36 of the Arbitration Act would apply to challenges to awards filed before the amendment. *In Board of Control for Cricket in India v. Kochi Cricket Private Limited*,¹⁶ the Supreme Court settled this ambiguity and held that the amended provisions would apply to pending applications for setting aside all arbitral award filed before 23 October 2015. The judgment debtor would now need to specifically seek a stay of the arbitration award or prepare to pay the award notwithstanding the pending challenge. The decision is another step towards ensuring speedy disposal of matters since stays on arbitral awards, as noted by the Supreme Court itself, would sometimes be in effect for a few years before being adjudicated.

B.5 Recent decisions by the Supreme Court

In Union of India v. Hardy Exploration and Production (India) INC,¹⁷ the Supreme Court held that in the absence of additional conditions in the contract the term “place” or “venue” of arbitration used in an arbitration agreement can be read as “seat.”

In M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi,¹⁸ the Supreme Court held that an application to set aside an arbitration award are summary proceedings and the courts should ordinarily not allow the parties to lead evidence.

In S.P Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh and Others,¹⁹ the Supreme Court held that any challenge to the arbitrator appointed should be raised before the arbitrator in the

¹⁵ Section 36(2) of the Arbitration Act.

¹⁶ (2018) 6 SCC 287.

¹⁷ (2018) 7 SCC 374.

¹⁸ (2018) 9 SCC 49.

¹⁹ Civil Appeal Nos. 11824-11825 of 2018.



Arbitration Act in the first instance and only thereafter can be raised at the time of setting aside of the arbitral award under section 34 of the Arbitration Act.

In *Simplex Infrastructure Ltd. v. Union of India*,²⁰ the Supreme Court held that the three-month timeline for the filing of an application to set aside an arbitration award cannot be extended except for a further period of thirty days on showing sufficient cause.

In *P.E.C. Limited v. Austbulk Shipping SDN BHD*,²¹ the Supreme Court held that, at the initial stage of filing of an application for enforcement of a foreign award, non-compliance with the production of the documents mentioned in section 47 of the Act shall not lead to dismissal of the application for enforcement of an award. The bench observed: “We are of the opinion that the word “shall” appearing in section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as “may.””

B.6 Investment treaty arbitrations and the right to information

There is very little publicly available data on India’s arbitration cases under bilateral investment treaties. Authorities in India under the Right to Information Act 2005 (“RTI Act”) have now had the opportunity to deal with the question of whether bilateral investment treaty cases are required to be subject to requests from the general public under the RTI Act.

One of the first matters to discuss this involved a request under the RTI Act to the Ministry of Mines, Government of India seeking a copy of the notice of arbitration that had been sent by the Ras Al Khaimah Investment Authority (“RAKIA”) to the government of India under the India-UAE bilateral investment treaty. In the memorandum, the state government of Andhra Pradesh had agreed to direct a state-owned mining company to supply bauxite to ANRAK, a

²⁰ Civil Appeal No. 11866 of 2018.

²¹ 2018 SCC OnLine SC 2549.

company in which RAKIA held shares, in order for ANRAK to operate an alumina and aluminum refinery and smelter.

After the request for information was rejected by the authorities, an appeal was filed before the Appellate Authority under the RTI Act seeking disclosure of the information and by way of an order dated 14 September 2017, the Ministry of Mines, Government of India rejected the request, stating that the information was confidential in nature. The second appeal before the Central Information Commission is still pending. A similar request by a third party was also rejected in the arbitration with Vodafone. In this regard, it is pertinent to mention that the Supreme Court has maintained that disclosures having an economic impact on society cannot be withheld under the RTI Act, provided that the release of this information does not impact the national economy.²² Since investment treaty arbitrations involve implications for both public interest and the public money, it is only in the larger interest of the public to disclose such information. Time will tell if governmental authorities or the judiciary will permit this disclosure.

²² *Reserve Bank of India v. Jayantilal N. Mistry*, (2016) 3 SCC 525.