Mid-year review 2017—arbitration developments in India

24/07/2017

Arbitration analysis: Payel Chatterjee, Moazzam Khan and Vyapak Desai of Nishith Desai Associates (NDA) look back over the past six months of arbitration in India and consider what may be coming up in the remainder of 2017.

What has been the most significant arbitration-related case law or legislative developments in India during the first half of 2017?

Note: judgments referred to below are not reported by LexisNexis UK.

The latest disciplining of the arbitration laws in India came in the form of the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment Act) and sought to address various issues including:

- interim reliefs in India for foreign-seated arbitrations
- recognition of the institutional arbitrations
- accountability for the delays in the arbitration process, and
- curbing the delays in court proceedings incidental to arbitration

As is often the case, new amendments seeking to address old issues come with their own fresh ones—most hotly debated among them being whether the new amendments were to apply retrospectively or prospectively. While most High Courts took a view that the amendments would apply to arbitrations which commenced after 23 October 2015, and court proceedings (section 9 proceedings, section 34 proceedings etc) that commenced after 23 October 2015 (even if the arbitration proceeding itself would have been initiated pre- 23rd October 2015), there were dissident High Courts which went on to hold that the amendments would not apply to any proceedings (including court proceedings) where the arbitral proceedings were initiated before 23 October 2015 (see *Ardee Infrastructure Pvt Ltd v Anuradha Bhatia* 2017 SCC Online Del 6402).

Most of the first half of 2017 went by with India's arbitration community waiting with bated breath for the Supreme Court to finally settle the law on this—the wait it seems is not over yet (see *SLP(C) NO* 19545-19546/2016, *SLP(C) NO* 5021/2017, *SLP(C) NO* 9599-9600/2017). In the meantime, the courts in India—with the Supreme Court and the Delhi High Court leading the way—were seen to continue their prolific pro-arbitration stance in other matters including:

Upholding two-tier arbitration clauses

The Supreme Court held that a two-tier appellate arbitration mechanism (parties providing for an appeal from the first tier arbitration to another arbitral tribunal thereby giving two opportunities of arbitration to resolve their disputes) did not violate fundamental policy or public policy of India (see *Centrotrade Minerals and Metal Inc v Hindustan Copper Ltd* (2017) 2 SCC 228).

Third party to an arbitral award—even where it is Reserve Bank of India (RBI)—cannot oppose enforcement of a foreign arbitral award

The Delhi High Court in the recent *Tata-Docomo* ruling dismissed the objections filed by the RBI, a third party, and upheld enforcement of foreign arbitral awards (see *OMP (EFA)* (Comm) 7/2016 & IAs 14897/2016, 2585/2017.) The Delhi High Court held that RBI cannot implead itself in an enforcement application when it was not a party to the arbitration agreement. This decision stresses the importance of an Indian party having the ability to honour its commitments to a foreign party and the obligation to treat foreign investments fairly.

Securing award amounts

The Delhi High Court in its recent decision secured the amounts of US$562.5m under the arbitral award in favour of Devas and against Antrix Corporation (the commercial arm of Indian Space and Research Organisation (ISRO)—a government undertaking) prior to the recognition and enforcement stage. This was done despite Antrix Corporation having previously filed a section 9 petition to restrain Devas from proceeding with the arbitration and restraining the constitution of the tribunal as per the International Chamber of Commerce rules in another court of concurrent jurisdiction. The Delhi High Court had to rule on the issue whether it was barred from entertaining the Devas Petition in light of the principles determining jurisdiction as set out in section given that Antrix had previously filed a section 9 petition before the Bangalore City Civil Court. The Delhi High Court ruled that the section 9 petition pending before Bangalore City Civil Court was not maintainable and accordingly the Delhi High Court had jurisdiction to grant security for the amount in dispute as prayed for by Devas. The ruling adopted an approach which would uphold the spirit of the act rather than defeat its purpose.

What have been the most significant developments in arbitral institutions in India in the same period?

The Mumbai Centre for International Arbitration (MCIA) has been operational since October 2016 and has gained a fair amount of popularity in a short period among the business and legal community. It is a unique organisation set up in association with the government of Maharashtra and the domestic and international arbitration experts. Its rules became effective from 15 June 2016 and have been drafted based on international best practices and adapted to suit the Indian market with certain distinguishing features.

The Delhi International Arbitration Centre (DIAC) under the aegis of the Delhi High Court has also gained momentum and the 60-day suggestivetime limit set by the Amendment Act on courts for appointment of arbitrators was seen as a major driver for this. Additionally, a recent announcement was made by the Punjab and Haryana High Court to launch an International Arbitration Centre (IAC) in Gurugram, for resolution of domestic and international disputes. The Indian Council for Arbitration (ICA), the oldest arbitral institution in the country, also updated its rules on domestic and international arbitration and amended the ICA maritime arbitration rules.

What developments are you expecting during the rest of 2017?

Before 2017 bids us adieu, we expect the Supreme Court to lay the controversy of the applicability of the Amendment Act (as discussed in the first section) to rest.

The new amendments also stipulated, rather ambitiously, that arbitrations must be concluded within 18 months. While it may be unfair to expect resolution of a highly contested, high-value, complex commercial arbitration within 18 months, the latter half of 2017 will certainly show how the courts intend to deal with the arbitrations which overshoot this time limit.

What have been the most notable features of your practice so far this year?

We have developed a strong expertise and carved a niche for ourselves in the areas of inbound and outbound litigation with a strong focus on complex cross-border disputes. Our practice has been involved in different kinds of matters representing clients in international commercial arbitrations as well as enforcement of domestic and foreign arbitral awards.

Our team represented the Russian Federation in the enforcement proceedings of the arbitral award of US$50bn in favour of majority shareholders of Yukos shareholders in India. The award-holders proceeded to various countries including India for enforcement of the same though the award had been set aside in Hague (seat of arbitration). NDA's internal advocacy unit at New Delhi argued and handled this matter. The matter gained significance as India joined the ranks of countries like US and Germany, which did not permit Yukos to continue the enforcement proceedings when the underlying award had been set aside. The result was achieved on the first hearing after Russian Federation entered appearance before Hon'ble Delhi High Court giving boost to the reputation of courts in India which otherwise have faced criticism due to delays in the legal system.

Our team was involved in representing a Japanese multi-national corporation in multiple international commercial arbitrations involving a claim of over INR2.5bn. The arbitration dealt with a highly debated issue of two Indian parties choosing a foreign seat. The submissions on Indian Law were led by NDA's Internal Advocacy Unit which succeeded in

persuading a Singapore International Arbitration Centre tribunal that in an arbitration between two Indian parties there was no bar to choosing a foreign seat of arbitration.

We have also represented several domestic and foreign clients in enforcement of arbitral awards and have been successful in obtaining orders on disclosure and restraining from sale of its assets, comprehensive attachment and sale orders in respect of immovable and moveable properties of the debtors as well as bank accounts to recover the amounts. We also secured one of the largest cost orders for an Indian litigation.

Has anything else caught your eye?

Courts throughout India—with Delhi again in the lead—are seen as taking pro-enforcement positions. The instances of refusal to enforce are decreasing rapidly and where it's an arbitral award coming from a recognised institution, such cases are now nearly non-existent.

Additionally, the Amendment Act has also given legislative recognition to the Red and Orange Lists of the International Bar Association guidelines on conflict addressing the issues of independence and impartiality of arbitrators.

With the commercial courts being set-up, all arbitration-related proceedings are referred to judges having commercial acumen and understanding, increasing the efficiency in the system and delivering arbitration-friendly judgments, and thereby reinforcing faith in the Indian judiciary.

The direction across judiciary, legislature and executive seems clear—the goal is to make India into an arbitration hub, not just an arbitration-friendly jurisdiction.

Vyapak heads the international litigation and dispute resolution practice at NDA where he represents clients in a wide-range of services with a special focus on cutting edge cross-border and complex litigations and international commercial arbitrations. He is a leading attorney in the advisement and representation of clients involved in media, entertainment, franchising, oil and gas, and financial services sectors for pragmatic and effective pre-litigation strategies, arbitrations and litigations before various forums including the Supreme Court, High Courts and Tribunals of India.

Payel is a senior member of NDA's international litigation and dispute resolution practice and is also an integral member of the firm's competition law practice. She focuses on commercial arbitration and regulatory litigation and has worked in a range of sectors and industries including corporate, IT, intellectual property, telecom, private equity, food and beverages, pharmaceuticals and several others. Payel has been involved in representing international clients in cross-border litigations and international commercial arbitrations as well as enforcement of foreign awards and judgments in India.

Moazzam co-heads the international dispute resolution practice at NDA. He represents clients across various sectors and industries including manufacturing, IT, hospitality, funds, PE, aviation etc. His forte has been representing clients in cross-border litigations and international commercial arbitrations and he is consistently engaged in enforcement of foreign awards and judgments in India.

Interviewed by Jenny Rayner.

This article was first published on Lexis®PSL Arbitration on 24 July 2017. Click for a free trial of Lexis®PSL.
The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor