Lexis®PSL ARBITRATION

India—proposed amendments to arbitration law: a solution with many problems

First published on Lexis®PSL Arbitration on 15/08/2018

Arbitration analysis: On 10 August 2018, the Indian Parliament's Lok Sabha (the House of the People) passed the Arbitration and Conciliation (Amendment) Bill 2018 (Bill) with the aim of further improving the arbitration regime, particularly institutional arbitration, in India. The Bill is premised on the Report of the High Level Committee to Review the Institutional Arbitration Mechanism in India chaired by Justice B.N. Sri Krishna (Committee).

Vyapak Desai, Ashish Kabra and Shweta Sahu of the International Litigation and Dispute Resolution team at Nishith Desai Associates discuss this development.

Original news

Arbitration and Conciliation (Amendment) Bill 2018

Report of the High Level Committee to Review the Institutional Arbitration Mechanism in India

What amendments are proposed by the Bill?

In brief, the Bill, *inter alia*, proposes the following amendments:

- creation of Arbitration Council of India (ACI) for grading and accreditation of arbitral institutions to promote and encourage arbitration and other alternate dispute resolution mechanisms
- arbitrators to be appointed by arbitral institutions (as recognised by the ACI) designated by the Supreme Court (for international commercial arbitrations) or the High Court (in other cases)
- international commercial arbitrations to be excluded from the 12-months' timeline under section 29A of the Arbitration and Conciliation Act 1996 (the Act). The time-period is to be calculated from the date of completion of pleadings
- introduction of an express provision to maintain confidentiality of arbitral proceedings
- introduction of an express provision on arbitral immunity
- schedule containing qualifications and experiences of arbitrators to be appointed
- applications challenging an award should be decided only on the basis of the record of the arbitral tribunal

While the Bill awaits clearance from the Rajya Sabha (Council of States), the amendments require further consideration. Some of the amendments, may, in fact create more confusion or be detrimental to the growing acceptance among foreign parties particularly investors of India as a safe seat of arbitration. In this article, we provide an overview of such aspects which may need to be reconsidered. After the Bill is passed by the Rajya Sabha (ie the Upper House of the Indian Parliament), the Bill will be sent for Presidential assent. Thereafter, the Bill will become an Act and be notified to that effect.

The ACI

Even though the ACI is proposed to be an independent body corporate, some cynicism is associated with the constitution of the ACI and powers vested in it. The Committee had recommended for a body which consisted of individuals nominated by the Chief Justice of India and Central Government and included a reputed overseas practitioner. However, the Government has adopted a different approach in making the ACI a body consisting only of individuals nominated by the Central Government besides having the Secretaries to the Government of India (in Department of Legal Affairs and Department of Expenditure) as ex officio members. Given the role and powers of the ACI, it may only be hoped that the involvement of the government is limited, considering this may create a situation of conflict given that the government is one of the biggest litigators. Further, ACI was envisaged as a body which would frame guidelines. However, the Bill vests wider powers on ACI for framing regulations and rules, which in turn, gives it a flavour of a regulator of arbitration.

Determination of the 12-months' timeline from 'completion of pleadings'

The Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act of 2015) introduced section 29A into the Act which prescribes a 12-month timeline from the date on which the tribunal received notice of appointment, for making of the award. Parties could extend this period further by six months by agreement or otherwise by approaching the court. There were debates over whether imposition of such a timeline was unreasonable, impinged upon party autonomy and introduced further court interference into the arbitral process. Further, there was lack of clarity on the status of arbitration during pendency of such extension application before court. However, in view of the authors and in their experience, the prescription of timeline indeed brought about a practical difference in the conduct of arbitrations in the country which were otherwise marred by significant delays.

The Bill seeks to alleviate the concerns around the prescribed timeline by providing:

- a six-month period from the date on which the arbitrator(s) receive notice of their appointment for filing of the statement of claim and defence. There is no provision for extension of this six-month period
- thereafter, a period of 12 months from the date of completion of pleadings (ie filing of statement of claim and defence) is provided for making of the award. This period of 12 months can be extended in the same manner, as prescribed earlier
- the mandate of the arbitrator would continue during the pendency of the application made to court for extension

However, this solution provided in the Bill also does not appear to be ideal. Provision of such a timeline for completion of pleadings without any scope for extension thereof, once again creates unnecessary limitations against ability of the parties and the arbitrator to structure the arbitration as per the requirements of the dispute. Further, in a situation where the respondent chooses to file a counter-claim, it remains unclear if the same is also required to be filed within this six-month period. There may be responses to such counter-claims and further pleadings in form of rejoinders, reply to counter claim, amendment of the earlier pleadings which, as the Bill stands, may be made post the six-month period for filing of statement of claim and defence. Thus, the exact intent behind providing a period of six months for filing of statement of claim and defence, remains unclear. Further, in the event the claimant delays in filing the statement of claim, some prejudice may be caused to the defendant in filing of the defence within the six-month period.

Thus, the solution may not lie in dividing the time frame further into various parts for different portions of the arbitration proceeding. It is suggested that simply an 18-month time-frame for completion of arbitration may be better suited.

Further, instead of approaching the over-burdened courts for extension, it is suggested that such power be vested in institutions in cases of institutional arbitration. Institutional rules usually prescribe timelines such as time period for filing response to notice of arbitration, for appointment of arbitrator, for making of the award etc. (see, SIAC Rules, r 4.1; MCIA Rules, r 4.1; LCIA Rules, r 2.1; SIAC Rules, r 9; MCIA Rules, r 8, r 9; LCIA Rules, r 5.6; SIAC Rules, r 32; MCIA Rules, r 30). Further, the arbitral institutions have the power to extend such timelines. For example, the SIAC and MCIA Rules provide that '…the Registrar may at any time extend or abbreviate any time limits prescribed under these Rules' (see, SIAC Rules, r 2.6; MCIA Rules, r 2.5). Thus, the arbitral institutions may also be given the ability to extend the 18 or 12-month time-frame. Such a provision may allow for quicker decision-making on extension of timeline and reduce the burden on courts and concerns around judicial interference. Also, institutions usually have an overview of the dispute. Therefore, they may be better placed than courts in granting extensions.

Lastly, the exclusion of the international commercial arbitrations from the 12-month timeline may not be suitable. It was noted by the Committee that arbitral institutions are adept at monitoring conduct of the arbitrations and ensuring timely delivery of the award. Thus, setting of time frames in the context of international commercial arbitrations may not be suitable. However, in the Indian context, provision of a time line provided the necessary fillip to all stakeholders for working towards quicker resolution of disputes. More than institutional arbitration, the timeline provided assurance to foreign investors that their arbitrations, if seated in India, would not be marred by delays. Further, excluding international commercial arbitrations from the time frame would also impact ad-hoc arbitrations, which though not preferable are still common. Thus, instead of excluding international commercial arbitrations from the timeline, it is suggested that institutions be granted the power to extend this timeline. This would promote institutional arbitrations, keep the conduct of the arbitration within the institutions' control and monitoring, reduce court interference and meet the objective of ensuring speedy resolution.

Confidentiality of arbitral proceedings

The Bill also proposes introduction of a non-derogable provision (ie section 42A) for maintaining confidentiality of arbitral proceedings. This provision mandates that the arbitrator, arbitral institution and the parties shall maintain the confidentiality of the proceedings. However, instead of bringing clarity on the issue of confidentiality, it creates room for confusion.

The Committee suggested inclusion of the following exceptions to obligations to ensure confidentiality:

- disclosure required by a legal duty
- disclosure to protect or enforce a legal right
- to enforce or challenge an award before court or judicial authority

However, the Bill only expressly includes the third aspect (arguably only partially) as an exception to confidentiality, ie where the disclosure is required for enforcement and implementation of the award. There are multiple other situations where a party may be required to disclose the award or the details of the arbitral proceedings eg while challenging an award, seeking interim reliefs from court, appealing against an interim order of the arbitrator, appointment of arbitrators by court, termination of mandate of arbitrator or while seeking court's assistance for taking evidence. Further, there may be statutory mandates requiring a party to disclose details pertaining to the arbitration such as under the regulations framed by SEBI. These are more straightforward circumstances where it may be argued that the disclosure is permitted, given that there are provisions in law entitling a party to exercise such rights and the confidentiality provision did not intend to take away such rights expressly granted under law.

However, the answer may not be so easily forthcoming in other circumstances such as:

- where the information is provided to a third-party expert for the arbitration
- where the information such as the award is required to be disclosed for protection against an action by a third person
- where the information is provided as part of a due diligence exercise
- where the information is provided to a third-party funder
- where the information is required to be disclosed pursuant to a discovery/production of document request in a subsequent arbitration or legal proceeding

Other countries which have express provisions on confidentiality in their legislation usually provide for broader exceptions such as, where a party is obliged to make a disclosure under law or where the disclosure is made to a professional or other advisors to the party (see, section 2D of the Hong Kong Arbitration Ordinance; section 14C of the New Zealand Arbitration Act 1996). Thus, this amendment ought to be re-considered and not bind the parties to an arbitration agreement to such broad-termed confidentiality obligations. Reference may be made to the exceptions to the principle of confidentiality enunciated by English courts, ie '(i) Consent ie where disclosure is made with the express or implied consent of the party who originally produced the material; (ii) order of the Court, an obvious example of which is an order for disclosure of documents generated by an arbitration for the purposes of a later court action; (iii) leave of the court…(iv) disclosure when, and to the extent to which, it is reasonably necessary for the protection of the legitimate interests of an arbitrating party' (*Ali Shipping Corporation v. Shipyard Trogir* [1997] EWCA Civ 3054; *Emmott v. Michael Wilson & Partners* [2008] EWCA (Civ) 184). Questions of public interest, eg, where one of the parties is the government, or interests of fair disposal of disputes may also justify waiver of confidentiality obligations (*Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* [1995] 128 A.L.R. 391 (H.C.A.); *London & Leeds Estates Ltd v Paribas Ltd. (No. 2)* [195] 1 E.G.L.R. 102 (Q.B.) (not reported by LexisNexis UK)).

Thus, it is suggested that the said provision be amended to include exceptions to confidentiality obligations to ensure that the provision is not too widely-termed. Such exceptions should not be exhaustive but only be illustrative of the commonly accepted exceptions to the rule of confidentiality (Michael Hwang and Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26 Journal of International Arbitration 5). The possibility of inclusion of consequences of the breach of such confidentiality may also be considered. Further, it is suggested that such provision of confidentiality should be derogable ie parties should have the ability to define their own limits of confidentiality.

Applicability of the amendments

There were divergent views on the issue of applicability of the Amendment Act of 2015. The Supreme Court of India in, *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd and others* Civil Appeal Nos. 2879-2880 of 2018 held that the Amendment Act of 2015 is prospective in nature. Thus, the amendments were applicable to arbitral and court proceedings commenced subsequent to the enforcement of the Amendment Act of 2015 (ie 23 October 2015). The judgment particularly provided that the section 36 as amended would apply to even pending applications under section 34 of the Act for setting aside the awards. This removed the issue of automatic stay on enforcement of arbitral award upon filing of a setting aside application. This automatic stay had previously plagued the arbitration regime and prevented successful parties from enjoying the fruits of their litigation.

However, the Bill provides that the Amendment Act of 2015 would apply only to 'arbitral proceedings commenced on or after the commencement of the [Amendment Act of 2015] and to court proceedings arising out of or in relation to such arbitral proceedings.' It excludes '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 [Amendment Act of 2015]' from applicability of the Amendment Act of 2015.

More importantly, the Supreme Court had also directed its judgment be placed before the Ministry of Law and Justice. The specific rationale being that the Bill should be amended such that the judgment is not effectively overruled and the considered position in the judgment is retained. Notwithstanding the observations of the Supreme Court, the Lok Sabha passed the Bill with its original terms. This is likely to create issues particularly where the execution proceedings have commenced or otherwise where parties have been ordered to furnish security pending the set aside proceedings in light of the judgment. This is a regressive step which implies that award holders who come under the previous regime would continue to be plagued by the issues in the Act prior to the Amendment Act of 2015.

Concluding remarks

Undoubtedly, the Amendment Act of 2015 followed by the Bill aim at a more progressive dispute resolution mechanism, more so, plugging the possible lacunae in the existing arbitration regime, in its strive towards achieving international standards of dispute resolution. Nevertheless, for a more holistic and favourable arbitration ecology, and avoidance of future litigations, the above may be closely looked into prior to the Bill being enacted into law. Additionally, there appears to be some oversight resulting in certain grammatical/typographical errors in the Bill, which should be rectified.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.