Dispute Resolution Hotline

January 14, 2019

WINDS OF CHANGE IN THE INDIAN DISPUTE RESOLUTION LANDSCAPE: A 2018 WRAP

Last year saw India jump 23 notches, ranking 77th worldwide in world bank's ease of doing business index. Several reform initiatives undertaken by the Indian Government in the last few years are credited for this. The year also had its share of capital markets volatility, banking scandals, ballooning of bad debts, companies going under the bankruptcy hammer and such.

With the new year 2019 waiting to unfold before us, we wrap up crucial developments from the year gone by.

CONTRACT ENFORCEMENT FINALLY SEES RELIEF

India currently ranks 163rd in the ease of doing business index in enforcement of contracts. Keeping in mind India's abysmal performance in this index, the legislature proposed amendments to the Specific Relief Act, 1963 to bring it up to speed with today's requirements by introducing the Specific Relief (Amendment) Act, 2018.

Specific Relief now the rule and not the exception

In line with the UNDROIT Principles of International Commercial Contracts, the amendments turn the erstwhile regime upside down by requiring courts to now order specific performance as a rule rather than as an exception. The courts no longer have discretion in deciding the remedy and must grant specific relief unless specifically barred under the said act. It also dispenses with the Plaintiff's requirement to make a specific averment on its readiness and willingness to perform the contract. Just the mere indication of a willingness to perform in spirit suffices. The amendments change the nature of specific relief from an equitable and discretionary remedy to a statutory remedy.

Substituted Performance

The amendments introduce the concept of substituted performance, which provides the party not in breach the opportunity to recover the expenses for substituted performance by a third party or agency from the party committing the breach. The introduction of substituted performance will enable parties to satisfy performance of the contract work even if there is a breach as the party not in breach can ensure the performance of the contractual objective through a third party or through its own agency without suffering inordinate delays of litigation.

No injunction delaying infrastructure projects

Another interesting feature introduced by the amendments is with respect to infrastructure projects in terms of granting of injunctions. If the said injunction granted by the court in relation to an infrastructure project would delay the progress or completion of that infrastructure project, such injunction shall not be granted by the court. This amendment includes an element of public interest as such public works and infrastructure projects, vital to the economy, ought not to be stayed at the instance of one party. In fact, the amendments also envisage designation of special courts for suits pertaining to infrastructure projects.

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COMPETITION COMMISSION INTERVENES TO ACHIEVE A LEVEL PLAYING FIELD IN THE DIGITAL SPACE

In a first of its kind ruling in the Indian context in relation to the digital space, the Competition Commission of India ("CCI") imposed a penalty of USD 21 million on Google for abusing its dominant position by favoring Google's own verticals in its search engine results. Google was alleged to promote its own vertical search services viz. YouTube (videos), Google News (news) and Google Maps (maps) and manipulating its search and quality score algorithm leading to only their own sites appearing prominently on the search results, irrespective of whether they were the most relevant and popular sites in the search.

In its ruling, the CCI observed that Google was leveraging its dominance in the market for online general web search, to strengthen its position in the market for online syndicate search services and accordingly directed Google to not enforce any restrictive clauses on third party websites for hosting Google search bars and ads. At the same time, the CCI recognized the need for '*targeted and proportionate*' public intervention without restraining innovation. It also gave due appreciation to the crucial role that market drivers like Google play in driving India into the future, iterating that, *"public intervention in such markets should be targeted and proportionate. Such a calibrated approach in technological markets ensures that intervention remains effective; it does not restrain innovation and helps the market to regulate itself."*

For a detailed analysis , you may access our hotline **here** .

INSOLVENCY AND BANKRUPTCY UPDATES

Adoption of a framework for Cross Border Insolvency

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Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016 ("IBC") inter alia requires the central government to enter into ad-hoc arrangements with other jurisdictions to address cross-border insolvency related issues with respect to each other. However, as no steps were taken towards making such arrangements, the Insolvency Law Committee recommended the incorporation of the UNCITRAL Model Law on Cross Border Insolvency into the domestic regime, subject to domestic specifications.

The recommendations provide for a comprehensive insolvency framework for corporate debtors having assets in various jurisdictions and facilitating resolution of such debtors for the benefit of all creditors irrespective of their geographical location. It provides for courts and resolution professionals to coordinate and cooperate with their counter parts across borders to achieve the common goal of arriving at the best possible outcome for the creditors. The recommendations also retain the requirement of reciprocity, primacy of local laws, and public policy safeguards for the protection of domestic interests.

Home Buyers given the status of financial creditors

Amendments were made to the IBC in June 2018 recognizing the status of home buyers as financial creditors and giving them due representation on the Committee of Creditors. This will also enable home buyers to invoke Section 7 of the IBC against errant developers. These amendments came in the wake of the controversy surrounding the status of home buyers in the insolvency proceedings initiated against Jaypee Infratech Limited wherein the Supreme Court passed an order[1] directing Jaiprakash Associates Limited (the parent company) to deposit INR 2,000 Crores with the Court in relation to the insolvency proceedings pending against its subsidiary, Jaypee Infra-tech Limited and also directing certain lawyers of the home buyers to participate in the meetings of committee of creditors.

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Ending unintelligible discrimination between similarly placed creditors

After a long and winding legal battle between two bidders (Dalmia and UltraTech Cements), the National Company Law Appellate Tribunal ("NCLAT"), in the latter half of 2018, finally settled the Binani case. The NCLAT deemed the resolution plan submitted by Dalmia to be discriminatory in nature as it treated similarly placed financial and operational creditors differently. In the early days of the IBC, operational creditors were being accorded inferior treatment by bidders as compared to financial creditors. Statutory provisions were being interpreted in a manner, to provide operational creditors with a minimum payout of the liquidation value due to them as against their admitted claims, which on many occasions was close to nothing. The NCLAT ruling in the Binani case is a welcome move towards ending unintelligible discrimination between similarly placed creditors.

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The 29-A Conundrum

Section 29-A was introduced into the IBC in 2017 listing out several criteria which had to be complied with to qualify as a bidder in the Corporate Insolvency Resolution Process ("**CIRP**"). The intent around restricting promoters from bidding for the assets of the Corporate Debtors was centered around the moral hazard of promoters bidding for their own assets at steep discounts, thereby benefiting at the cost of the lenders.

However, what resulted was a case of throwing out the baby with the bath water. The inclusion of Section 29-A increased the scope for litigious parties to obstruct the timely resolution of accounts. It also reduced the pool of potential bidders thereby restricting price discovery and maximization of returns for creditors. A case in point being the insolvency proceedings of Ruchi Soya Industries Ltd, wherein the committee of creditors declared Adani Wilmar as the highest bidder. A resolution plan was close to being finalized. At the last juncture, a claim of ineligibility under Section 29-A came to be raised by Patanjali Ayurved, the second highest bidder, against Adani Wilmar on the grounds that the spouse of the managing director of Adani Wilmar is the daughter of a defaulting promoter. This resulted in further delay of the resolution process at the very last stage. In fact, the delay was such that Adani Wilmar in December 2018 wrote to the resolution professional raising concerns over deterioration in asset quality due to delay in the completion of CIRP and questioned as to why it should buy the deteriorated assets at the same price.

By way of the June 2018 amendments, pure-play financial entities (such as ARCs, AIF, FII, FVCI etc.) have been exempted from being disqualified on account of holding an NPA. This is because, given the nature of business of such entities, they are likely to be related to companies that are classified as NPAs. Further, a resolution application holding an NPA by virtue of acquiring it in the past under IBC gets a three-year cooling off period from the date of such acquisition. Notwithstanding the eligibility criteria for resolution applications, Courts have been laying emphasis on the importance of finding the best offer which allows for maximization of returns for the creditors and the corporate debtor. A case in point would be the Essar Case, where all fora unanimously held that the first bids of Numetal and Arcelor Mittal were disqualified under Section 29-A. However, both the bidders were allowed to submit revised bids in order to ensure maximization of returns.

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COMMERCIAL COURTS AND PRE-INSTITUTION MEDIATION

Taking inspiration from global best practices in jurisdictions such as the United States, United Kingdom, Australia and Singapore, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted to establish special commercial courts for speedy disposal of 'commercial disputes' and to reduce the existing workload on Indian courts.

In August of 2018, the legislature introduced the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 further broadening the scope of commercial courts in India by reducing the specified value for 'commercial disputes' from INR 10,000,000 to INR 3,00,000. It introduces mandatory pre-institution mediation, to be completed within three months and where a settlement arrived at pursuant to such mediation is to have the status of an arbitral award, for suits which do not contemplate urgent relief.

The amendment further gives state governments the flexibility to designate as many commercial courts in territories where the High Courts do not have ordinary original jurisdiction as may be necessary. It also gives them the power to appoint judges even without the concurrence of the chief justices of High Courts. While this is an attempt to fill

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vacancies which the judiciary itself has been unable to do so for years, it raises questions regarding the independence of the judiciary, and is a provision which might prove to be controversial in times to come.

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ENFORCEMENT OF FOREIGN ARBITRAL AWARDS SIMPLIFIED

Delhi High Court narrows scope of fundamental policy of India

The Delhi High Court allowed the enforcement of an award seated in Singapore, worth Rs 3,500 crores, against former promoters of India's Ranbaxy Laboratories Ltd. The Court upheld the enforcement of the award and observed that section 48 of the Arbitration & Conciliation Act, 1996 ("Arbitration Act") does not allow the Court to reassess the correctness of an award on merits or re-appreciation of the evidence. In this case, the Court has given due recognition to the principle of minimum interference in a foreign award. The Delhi High Court maintained the trend of recent years where the scope of 'fundamental policy of India' has been narrowed down significantly to allow easier enforcement of foreign awards. Time and again, we have witnessed various debates and discussion over the enforceability of foreign awards in India. The Delhi High Court in this judgment has put to rest all the discussions by reaffirming that mere contravention of an Indian statute would not result in breach of the fundamental policy of Indian law and that it would take a breach of a substantial principle on which the Indian law is founded to have the award set aside.

Execution can be initiated where assets are located

In the case of *Sundaram Finance Ltd v Abdul Samad and Anor*[2] the Supreme Court considered whether an award can be directly filed and executed before the court where assets of a judgment debtor are located or if it needs to be first filed before the competent court having jurisdiction over the arbitration proceedings and then seeking transfer of the decree for execution. The Supreme Court held that an award holder can now initiate execution proceedings before any court in India where assets are located, thereby simplifying the process of execution of international awards.

For a detailed analysis , you may access our hotline **here** .

SUPREME COURT ENCOURAGES VOLUNTARY COMPLIANCE WITH ARBITRAL AWARDS

With a view to upgrade India's arbitration regime, the legislature introduced the Arbitration and Conciliation (Amendment) Act in 2015 ("**Amendment Act**"). Introduced with much fan fair, the amendments had its share of ambiguities and problems. Prior to the Amendment Act, mere filing of a challenge to an arbitral award operated as an automatic stay on enforcement. The amendments sought to do away with such an automatic stay, now requiring a separate application for stay conditional upon furnishing of adequate security. Consequently, several execution petitions came to be filed while a challenge to the award remained pending. Whether such execution petitions are maintainable, and whether lifting of the automatic stay affects the vested rights of a challenging party was a question put before the apex court.

In the case of *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd*[3] .It was observed therein automatic stay on enforcement on mere filing of a challenge to an award was a weapon used by recalcitrant respondents to continue to evade their contractual obligations and the honoring of the award. Taking a positive view on legislative intent, it held that the amendments to Section 36 of the Arbitration Act, now requiring a separate action for stay to be filed, was a mere procedural change and did not take away any vested right of the Judgment Debtor. This should boost voluntary compliance with arbitral awards considering that a party would have to in any event deposit monies to secure the award.

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THE ARBITRATION BILL 2018 – LAUDABLE INTENTIONS AND DANGEROUS IMPLICATIONS

The Lok Sabha passed the Arbitration and Conciliation (Amendment) Bill, 2018 in the later part of last year, currently pending approval by the Rajya Sabha.

Amongst other things, the bill provides for the Establishment of the Arbitration Council of India ("**ACI**") entrusted with the responsibility of grading arbitral institutions and accrediting arbitrators. It provides extensive powers to the central government in appointing and supervising members of the ACI. Considering that the government is one of the biggest litigants and a party in many arbitration disputes, such a government body regulating arbitrators and arbitrations is incompatible with the very concept of arbitration. The bill introduces certain minimum qualifications for arbitrators such as requiring an arbitrator to be conversant with the constitution of India. Such a provision is certainly regressive, and is only likely to cause more challenges against arbitrators, and severely restrict foreign legal professionals from acting as arbitrators in India seated arbitrations.

While the intention behind the bill is to facilitate India's development as an international arbitration hub and provide an impetus for businesses choosing India as a seat, it includes various provisions, which if implemented, have the potential to set back many years of progress witnessed in the Indian Arbitration landscape.

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THE ROAD AHEAD

As the reform measures of the past few years begin to settle in, jurisprudence around the newly enacted laws and amendments continue to mature. The momentum was certainly kept up last year, with several amendments to laws being introduced, as well as recommendations for new ones. At the same time, the Judiciary has played its role and extended an arm of support to the legislature in its endeavor to bring India up to speed with international best practices. No doubt loopholes and lacunae remain which will require ironing out in due course. However, what cannot be denied is that winds of change in the Indian dispute resolution landscape are gathering momentum. With the pending Arbitration Bill of 2018, effective implementation of the 2015 arbitration amendments, the Commercial Courts Act, the IBC entering its third year, and proactive jurisprudence, 2019 promises to be an interesting one for Indian Dispute Resolution.

– Siddharth Ratho & Vyapak Desai
You can direct your queries or comments to the authors

[1] Order dated September 11, 2017 in *Chitra Sharma v. Union of India,* Writ Petition (Civil) No(s). 744/207 (Supreme Court)
[2] Civil Appeal No 1650 of 201
[3] (2018) 6 SCC 287.