India adopts arbitration law reforms

Global

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In a significant development for Indian arbitration law, the President of India has formally adopted the Arbitration and Conciliation (Amendment) Ordinance 2015 (the "**Ordinance**"), which will bring about major and long-awaited reforms to arbitration in India. The Ordinance amends India's Arbitration and Conciliation Act 1996 (the "**Act**") and seeks in particular to eliminate the procedural delays that have previously frustrated arbitration proceedings and shaken investor confidence in selecting India as a seat of arbitration. The reforms do not reflect the UNCITRAL Model Law and are innovative in many respects, so whilst they are a positive development for Indian arbitration law, they also carry certain risks and uncertainties.

We have previously reported on the Government of India's intention to adopt a model bilateral investment treaty as part of its plan to establish India as an arbitration-friendly jurisdiction worthy of foreign investment. The modernisation of Indian arbitration law in the Ordinance is the latest significant step towards making this plan a reality.

We set out below a summary of the key changes introduced by the Ordinance.

- In ad hoc domestic arbitrations, a tribunal is now required to render its **award within 12 months** of the date of appointment of the arbitrators, failing which a court may order a reduction in the arbitrators' fees or substitute one or more arbitrators. As a further incentive to efficiency, the arbitrators will be entitled to additional fees (in an amount to be agreed upon by the parties) if the award is rendered within six months. The parties can also choose to extend the 12-month period for a further six months at which point, if the tribunal has not yet rendered the award, the tribunal's mandate will automatically terminate unless the court grants a further extension. Where no court extension is granted, the arbitrators will therefore be *functus officio* after 18 months, meaning the dispute will have to be heard again by a new tribunal.
- A **fast track procedure** has been introduced for the resolution of disputes by ad hoc domestic arbitration within six months. Where the parties agree to this procedure, the tribunal will decide the dispute without an oral hearing unless one is requested by all the parties or the tribunal considers it necessary to clarify certain issues.
- Where an application is made to the court for **appointment of an arbitrator** in an ad hoc domestic arbitration, the Ordinance states that the courts should endeavour to dispose of such applications within **60 days**.
- The Ordinance adds detail to the Act's provision on the **suitability of arbitrators in ad hoc domestic arbitrations**. Prior to their appointment, potential arbitrators are required to disclose circumstances which are likely to give rise to justifiable doubts as to their independence and impartiality, such as the existence of any past or present relationship with, or interest in, any of the parties to the arbitration, or in relation to the subject matter in dispute. As guidance, the Ordinance sets out a list of circumstances which are likely to give rise to such doubts, e.g. a close family member of an arbitrator has a significant financial interest in one or the parties. The arbitrators must also disclose any circumstances which are likely to affect their ability to devote sufficient time to the arbitration, bearing in mind their obligation to render an award within 12 months. These changes are in line with international practice including the IBA's rules on conflicts of interest.

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The Ordinance has clarified the circumstances in which a court has the **power to set aside or refuse to enforce an award for being in conflict with public policy**, namely where the award i) has been obtained by fraud or corruption; ii) is in contravention with the fundamental policy of Indian law; or iii) is in conflict with the most basic notions of morality and justice. The Ordinance also emphasises that the test for contravention with a fundamental policy must not involve a review of the merits of a dispute. In relation to domestic arbitrations only, 'patent illegality' has been added as a ground for setting aside an award; it is not sufficient that there has been mere erroneous application of the law. This clarification sets some boundaries for the Indian courts, which have previously given the 'public policy' ground a wide meaning.

- Indian courts will have the power to grant **interim measures** in relation to international commercial arbitrations (those seated outside of India where at least one party is not Indian). This addresses the anomaly created by the case of *Bharat Aluminium* (Civil Appeal No. 7019 of 2005) where the court held that because the power to grant interim measures is found only in Part 1 of the Act (which applies only to arbitrations seated in India), the Indian courts do not have the power to grant interim measures where the seat of arbitration is outside India. The new power should strike the balance between limiting unwanted judicial interference in arbitration and allowing the courts to grant protection to parties who have chosen to arbitrate abroad. Tribunals will also have the same power as the courts to grant interim measures and collect evidence, and their orders will have the same enforceability as those made by the courts.
- In order to discourage frivolous claims, the 'loser pays' principle, common to dispute resolution procedures in other jurisdictions, will now apply to any **costs orders** made by tribunals in relation to the parties' legal fees and expenses and the costs of the arbitration.
- In deciding costs, tribunals will also now be able to take into account '*frivolous counter claims*' that lead to delay in the proceedings.

A notable absence from the Ordinance is any provision dealing with the recognition of emergency arbitrators and the validity of their awards. A trend has emerged in recent years towards arbitral institutions including emergency arbitration provisions in their rules to provide recourse to parties wanting urgent relief (e.g. ICC and LCIA (see our Law Now)). A consequential debate that has arisen is whether or not an emergency arbitrator can be recognised as an arbitrator and what the status is of his/her award. In light of this some countries (e.g. Hong Kong and Singapore) have amended their arbitration laws to recognise emergency arbitrators and allow for the enforcement of their awards. The lack of similar provisions in the Ordinance represents a missed opportunity for India to be completely up-to-date.

Comment

As the Indian dispute resolution system has been characterised by extensive delays, there will quite likely be transitional issues before the new time limits become workable and are respected by the parties and tribunals. In particular, the 60-day period for appointment of an arbitrator by the court is likely to be a significant test for the judicial system. In addition, will parties be willing to offer additional fees for an earlier award and will this even be achievable by arbitrators? Will requests to the court for extensions instead become the norm or will parties allow the time limit to expire in the hope of getting a new tribunal that will further delay the resolution of the dispute?

Perhaps bearing in mind the issues that arise as a result of the reforms and to further promote arbitration in India, applications and appeals in relation to arbitrations above a certain monetary value (currently INR 10m, £100,000) will be subject to the jurisdiction of the new (yet to be constituted) commercial divisions of the High Courts in India.

The reforms have the potential to have a significant impact but their success depends largely on the judicial approach to their enforcement.

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