Cooke Young & Keidan
Prepared by Kysen PR

Date	22 March 2019
Publication	New Law Journal
Type of publication	Legal Press

New Law Journal
Leading on debate, litigation and dispute resolution

ADR in India: modernisation & harmonisation

Shamilee Arora & Arish Bharucha review recent developments in Indian arbitration & insolvency law

IN BRIEF

- In a rapidly developing economic climate, the Indian legislative framework is evolving to accommodate the needs of commercial parties as they have recourse to the Indian legal system.

In the first section of this article, we consider the changes in the legal framework in relation to arbitration—a fast growing means of dispute resolution for commercial parties both from within India and foreign entities investing in India. In Section II, we consider the recent modernisation and harmonisation of the statute in relation to the insolvency of commercial entities (with the exception of financial services providers and institutions) by means of the Insolvency and Bankruptcy Code 2016 (the 2016 Code).

Commercial arbitration

In 2015, the Arbitration and Conciliation Act 1996 (the 1996 Act) which governs arbitrations seated in India, was amended by means of the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment). The main aim of the Amendment was to modernise and update the arbitration regime in India. In particular, the Amendment sought to address the question of delays arising from the tribunal appointment process and the conduct of arbitration proceedings under the 1996 Act. The Amendment has been subject to much controversy in respect of its applicability in situations where the arbitration was commenced before the date when the Amendment came into force, but the enforcement proceedings in relation to such arbitrations was commenced after the Amendment came into force. The 12 and 18-month time limits imposed by the Amendment have also been the target of various criticisms from practitioners. Below, we discuss these two aspects of the Amendment. We also consider the relevant proposals in relation to these two issues in the Arbitration and Conciliation (Amendment) Bill, 2018 (the 2018 Bill) which, if enacted, will have the effect of reversing the provisions of the Amendment in the two respects mentioned above, ie applicability and time limits.

Applicability

The Amendment came into force on 23 October 2015 (the effective date). Section 26 of the Amendment states that it is applicable in respect of arbitrations commenced after the effective date. The question of whether it applies to enforcement proceedings commenced after the effective date in respect of arbitrations commenced prior to this date has been put before the Indian courts.

In the case of *Board of Control for Cricket in India v Kochi Cricket Private Limited* (*BCCI*) [Civil Appeal Nos. 2879–2880 of 2018] (alongside other cases on appeal in relation to the same issue from various High Courts across India), the Supreme Court of India dealt with this issue and clarified the application of Section 26. The Supreme Court adopted a purposive interpretation of Section 26 and held that the intention of the Amendment was to provide an efficient and expeditious arbitration procedural framework in India. In light of their views on the manner in which Section 26 is drafted, the bench held that Section 26 applied to enforcement proceedings commenced in the Indian courts after the effective date, even in circumstances where the underlying arbitration itself was commenced prior to this date. Therefore, the Supreme Court held that insofar as enforcement actions in Indian courts were commenced after the effective date, the Amendment had retroactive effect on arbitrations that pre-date this legislation.

Section 29 A

Aimed at tackling slow progress, inefficiencies and rising costs, Section 29A of the Amendment imposes a 12-month time limit from the constitution of the tribunal to the conclusion of arbitration proceedings. Parties may extend the 12-month period to 18 months by consent. However, following the lapse of 18 months, the tribunal's mandate is considered terminated until and unless the parties are able to demonstrate to the courts that there are legitimate reasons causing the delay.

While this provision places emphasis on expediency and efficiency, the rather restrictive time limit necessitates an application to the supervising Indian courts in circumstances where the arbitration proceedings cannot be concluded within the 18-month period. Given that a significant number of arbitrations seated in India are conducted on an *ad hoc* basis as opposed to under institutional rules, this tends to extend the life span of the average arbitration. Most, if not all, procedural matters must be either dealt with by consent (ie, the parties must enter into long and protracted correspondence about their positions as regards procedure) or put the matter before the tribunal for consideration, in absence of default rules. Naturally, such procedural ambiguity can cause delay.

Conversely, some commentators have noted that the time restriction imposed by Section 29A (along with the fast-track arbitration procedure introduced by Section 29B of the Amendment) has been a welcome respite in an arbitration market generally riddled with delay and slow reacting supervisory courts.

The Arbitration Bill 2018

The controversy as to the applicability of the Amendment to enforcement proceedings commenced in Indian courts after the effective date, as well as the criticism attracted by the time-limits imposed by the Amendment (amongst others) have resulted in a swift re-thinking of the regime. The Srikrishna Committee, headed by Justice Srikrishna, with a mandate to increase the efficacy of arbitration in India and provide an impetus to institutional arbitrations proposed various amendments to the arbitration regime in India, which have formed the basis of the 2018 Bill.

The 2018 Bill was passed in the lower house of the Indian parliament (the *Lok Sabha*) in August 2018. The 2018 Bill, if passed in the upper house (the *Rajya Sabha*), and following Presidential assent, will be enacted as a law.

In relation to the issue of the applicability of the Amendment, the 2018 Bill reverses the position adopted by the Supreme Court in *BCCI*. Some commentators have argued that this will cause further confusion as regards applicability of the Amendment, particularly for enforcement proceedings (in respect of arbitrations commenced before 23 October 2015) commenced after 23 October 2015 but before the 2018 Bill comes into force. However, critics of the *BCCI* decision note that the 2018 Bill is positive (in this respect) as it does away with the confusing retroactive effect (which itself was the cause of much uncertainty) given to the Amendment by that decision.

Furthermore, the time limit for the completion of proceedings has been extended from 12 months to 18 months (with six months allocated solely for the exchange of pleadings). This period can then be extended to 24 months by consent of the parties.

For international commercial arbitrations (defined as legal and commercial relationships wherein one of the entities is a foreign national or resident or a foreign body corporate under the 1996 Act) this time limit will no longer be applicable. This appears to be a good compromise between the position in the 1996 Act and the Amendment. By imposing a time limit on domestic arbitrations and doing away with time limits for international commercial arbitrations in India, the 2018 Bill encourages commercial parties to adopt the rules of budding Indian arbitration institutions.

SECTION II

Insolvency and Bankruptcy Code 2016

Prior to the enactment of the 2016 Code, the insolvency rules in India were contained in the Companies Act 2013 and the Sick Industrial Companies (Special Provisions) Act 1985 among various other acts and statutes. The introduction of the 2016 Code is a step in the direction of modernisation and harmonisation of the options available to both commercial entities and creditors in order to protect their respective interests in the event of an insolvency.

Creating a creditor friendly environment

As noted above, the 2016 Code applies to legal entities that are not considered financial entities, ie banks, financial services products providers. A key feature of the 2016 Code is the creation of a lender driven insolvency and liquidation process that allows lenders to appoint insolvency professionals who are empowered to realise a company's assets and manage its affairs for the benefit of its creditors. While such a process has existed in England and Wales for some time now, this procedure is novel for the Indian landscape, thereby giving lenders providing credit to Indian legal entities a robust means of enforcing debts. Furthermore, the 2016 Code in making no distinction between foreign and domestic lenders affords international investors and credit institutions the same rights as those afforded to local Indian institutions. Commentators have viewed these reforms as steps towards the creation of a creditor friendly environment.

Professional and regulatory bodies

The concept of dedicated insolvency professionals (called Resolution Professionals by the Code), as the designation is understood in England & Wales and other common law jurisdictions, has been introduced by the 2016 Code. The Code envisages professional regulatory bodies to be set up in order to provide support and regulate the activities of the Resolution Professionals who are appointed with the task of managing companies as going concerns and/or liquidating companies.

The Code has also created the Insolvency and Bankruptcy Board of India, which is responsible for supervising and regulating the implementation of the Code.

How it is meant to work

The key provisions of the Code are the creation of a creditor led insolvency and liquidation processes. A 'committee of creditors' is able to appoint a Resolution Professional to manage and oversee the resolution of financial defaults of the company, potentially allowing for greater recoveries and giving businesses the chance to reboot. In the absence of a resolution, a liquidation process for the creditors' benefit can be instituted with minimal judicial supervision, in contrast to the previous regime.

The appointed Resolution Professional (which can be either an individual or a firm) must obtain the consent or approvals in certain circumstances from creditors to take steps to realise and maximise value. Both operational and financial creditors of a company may initiate the insolvency process. However, the committee of creditors is restricted to financial creditors (a provision that has withstood a constitutional challenge to the Supreme Court). The minimum amount of default necessary for a creditor to be able to initiate the process is INR 100,000 (equivalent to approximately £1,099 around the date of publication).

Companies may themselves initiate liquidation or insolvency proceedings by approaching the National Companies Law Tribunal, a judicial body that oversees and decides matters pertaining to company law in India in the event of default.

CONCLUSION

Despite the initial hiccups and surrounding implementation uncertainties, the arbitration and insolvency reforms are a step in the right direction as at the very least, they indicate an acknowledgment of and attempt to resolve the inefficiencies in the historical legal framework. Investors have been flocking to India over the past two and a half decades notwithstanding these inefficiencies. It is to be hoped that the modernised legal landscape encourages this trend and provides the stability and certainty that the Indian economy requires to meet its full potential. **NLJ**

Shamilee Arora, associate & **Arish Bharucha**, senior associate at Cooke, Young & Keidan (*www.cyklaw.com*). Arish will be speaking at the Knect365 India Disputes conference in London on 26 & 27 June 2019.

*appeared on the cover