SIAC
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Where The World Arbitrates

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Foreword

Arbitration in the context of international commercial disputes is today, the primary mode of dispute resolution. Of course, while a great distance remains to be traversed, the Indian experience has already seen us travel a considerable expanse and scale new heights. Rest assured, this is a ship we have boarded for the long-haul!

The past few years, I have witnessed a number of positive changes in India. To my mind, most significant is a noticeable change in sentiment and outlook. A rigid lack of judicial deference to the arbitral tribunal, has given way to strong conventions of non-interference in the sacrosanct arbitral exercise. Also, the exceptional support of our government in seeking to align Indian norms with the best practices the world over, must be commended.

Being an integral part of the SIAC, I can attest to the continuous and well-directed efforts that are underway, to assist and ensure that we collectively, bear witness to a paradigm shift to the institutionalised form of arbitration, and the obvious benefits that are a necessary by-product of its seamless processes and methods.

Also, with the few exceptions, which we must learn to respect, we must remain committed to champion the cause of uniformity in the arbitral exercise across and beyond territorial borders. Irrespective, I find comfort in the honest truth, that circumstance will furnish ample cause for a sustained tightening of bonds between and across the international arbitration community.

And, I am obviously thrilled that SIAC has proved to be the much-desired cementing force in the subcontinent when it comes to debating and resolving issues as also addressing common concerns. Therefore, conceiving of the India edition of SIAC's Newsletter must be acknowledged as another significant and worthy step in this direction.

Personally, and to speak of happy excuses to celebrate SIAC's success, I can think of no better way than to pen this foreword to the 2nd edition. Quite simply, because it was essential and desirable that as we embarked upon the task of navigating the path ahead, that we have this much needed platform, where we share our progress, raise our concerns frankly, and debate the pressing issues that we face, passionately.

I welcome the wealth of ideas, the rich experiences and the engaging dialogue, which take form in the contributions made by my esteemed colleagues and friends in this edition. My words may fail me, but I am deeply grateful.

For the reader, I trust that you will enjoy reading the current edition, as much as I have. ◆

Mr Rajiv K Luthra
Member, SIAC Board of Directors;
Founder & Managing Partner
at L&L Partners Law Offices

“The past few years, I have witnessed a number of positive changes in India. To my mind, most signifcant is a noticeable change in sentiment and outlook.”

Highlights from the SIAC Podcast Featuring Interview of Mr Darius Khambata, SC[1]

Bharat Chugh: ...When you look back at India's journey in arbitration - the law and the judicial approach, what would your assessment be? ...

Darius Khambata:. ... India and arbitration have had a love and hate relationship. So, there was a general distrust in arbitration initially, and I think we started getting over that with our Arbitration & Conciliation Act , 1996. And thereafter, with the jurisprudence that our courts developed, particularly the Supreme Court, the Delhi High Court, and the Bombay High Court, we've turned the corner. I think everyone has now realised that arbitration is a fundamental segment of our dispute resolution mechanism, and especially for commercial disputes it's indispensable. I do think that India is now much more positive about arbitration. There are, of course, a lot of things to do. A lot of changes that are required. But the general trend is positive and good. I mean, I could get very granular on this, but I am giving you a broad overview. I think it's a positive trend.

Chahat Chawla: **...What are the ways and means in which in-house counsel and companies can use arbitration more effectively to save time and costs?**

Podcast Interview with Mr Darius Khambata
Member, SIAC Court of Arbitration

> “One of the most crucial things [for in-house counsel] is appointment of arbitrators... The second thing, of course, is to form your team... And then lastly, you have to know when not to fight ... You need to think ahead, and have the ability to support your legal team when it says let's not get into this area, or let's give up this point, or let's settle. You need to have the authority and the courage to do that.”

Darius Khambata: ...One of the most crucial things [for in-house counsel] is the appointment of arbitrators. And, again, the tendency to say that ‘I must appoint an arbitrator who will advance my cause’ is completely wrong. Most good arbitrators won't do that. And in any case, it's not worth it, because you need to appoint an arbitrator who is respected by the Tribunal and by his potential co-arbitrators. So you need to appoint someone whose word will count, and who can persuade the Tribunal to do the right thing. And that's not necessarily someone who is partisan to the cause of the party appointing him or her. So, it's probably more important, especially in international arbitrations, to appoint a person who you think will carry weight with the rest of the tribunal - that's very critical. The second thing, of course, is to form your team. And again, in international arbitration, sometimes legal teams go out of control. You have far too many people interacting. You have accountants, sets of lawyers, counsel, and firms, etc. So, you need to have a leaner team. But, you need to have more than just one person in conduct because as you would know, the stress, and the pace of an international arbitration often makes it very difficult for just one person to do the entire argument and evidence at a stretch ... So, you need people who work well together, and who are happy to share the burden. Picking your team is equally important. And then lastly, you have to know when not to fight. You have to know when to give up a case or when to give up a point. In international arbitration costs will follow, so if you are advancing issues or points that have no real merit, and if you lose, you're going to get dunked with a huge order of costs, which is the other side's costs.

1. *This podcast was transcribed by the Centre for Online Dispute Resolution (CODR)*

You need to think ahead, and have the ability to support your legal team when it says let's not get into this area, or let's give up this point, or let's settle. You need to have the authority and the courage to do that. So these are what I would say things that in-house counsel should be looking out for.

> But a good lawyer will always ... separate the wheat from the chaff and come out with a clear and simple argument. Now, that's common to both fields, whether it's arbitration or litigation.

Bharat Chugh: When it comes to the art of advocacy, do you see a big difference in terms of advocacy as far as court is concerned, and advocacy as far as arbitration is concerned? A lot of young practitioners would be listening in. What would be your advice to them on how they should perceive these two things and be more effective at it?

Darius Khambata: It's tempting to say there are differences, but when you sit back and think about it, fundamentally, they are the same. And fundamentally, what you have to do is to make a clear case, and have clarity of thought and expression. This for me is the most important thing. You have cases with most complex facts, 30-50 volumes, stacks of law and references in the pleadings and the submissions. But a good lawyer will always ... separate the wheat from the chaff and come out with a clear, simple argument. Now, that's common to both fields, whether it's arbitration or litigation. And that's the most difficult thing for a lawyer to actually do. ...The more junior you are, the less courage you have to give up a point or to give up a case as you want to cite more cases, or argue more points. But in the long run, that doesn't actually work well. You have to be able to give up cases, be able to give up points and focus on really the essential...

Chahat Chawla: Coming back to COVID-19, and international arbitration, do you think parties are now looking for even cheaper and faster ways of resolving their disputes...?

Darius Khambata:. One thing is clear that virtual hearings are here to stay whether it's arbitration or litigation in court. I think everyone has realised that if handled properly, if you have the correct hardware, if you have the correct rules and procedures and decorum, they work very well. They are also very cost-effective... Next few years internationally are going to be tough cost wise. Clients are going to be looking at matters much more closely in terms of cost. And I think as lawyers...we owe it to them to devise ways of reducing unnecessary and slothful cost. Virtual hearings are very important means of doing that. So I think, yes, things are going to change. But I think that will be a change for the better. And, the sooner, we lawyers face up to the challenge, stand up to it, and actually motivate it, the better for us and for the system of dispute resolution as a whole.

Chahat Chawla: So if we could do a thought experiment and get into a time machine, and if you could just go back in time and do one thing in your life differently than how you did it, what would that be?

Darius Khambata: : I could do many things differently. Difficult to say, because I think if I could do one thing differently, I perhaps would have had a longer higher education. I just had one year abroad doing my masters. And I did have the opportunity at that time of doing what they call an SJD which is the doctorate at law school...But, because of financial constraints, and wanting to get back and start work, it wasn't possible. In retrospect, I would have loved to have done that. I would have also loved to have cross registered taking different types of courses in the university, not just law. Then again, you are there just for one year and you want to make the most of it in terms of law. So, I certainly would have loved an academic life if I could do everything all over again...

Chahat Chawla: ...Many youngsters are tempted to take up super specialisations at the very start of their career... Since you've seen so many trajectories, would you think one is better off picking one area of law and sort of building expertise? or is it good to sort of dabble with different areas of law and get a wider perspective while starting off?

Darius Khambata:. Again, there's no real fixed answer to that. I must tell you that I have been for several years, tremendously impressed at the sheer talent that is coming through from our young lawyers. I've never seen this sort of explosion of talent and skill. Hats off to them. And I think we have a strong base for a great legal profession, even now and in the future, certainly. So that's really something. Yes, some of them are specialists and they are pretty damn good at what they do. I'm more of a generalist, but of course, when we say that, as civil lawyers, we tend not to do criminal matters. Sometimes you have to do them. So I think there's value, when you're arguing a case, to have a more generalised background because there are principles and concepts across fields of law that can intersect as vectors. And it's very valuable to have that knowledge and experience. So, on balance, I think, a generalist but I wouldn't discount a specialist either. Some of them are fantastic. And when you're up against them, you really feel at a disadvantage because of their sheer expertise in that field.

> ...if I could do one thing differently, I perhaps would have had a longer higher education...I certainly would have loved an academic life.

Bharat Chugh: ... I have one final question for you. If you were to look into a crystal ball, what is your prediction? Where do you see arbitration going in India in the next five years, or maybe 10 years?

Darius Khambata: I don't need a crystal ball. I mean, you can see it all around you actually, I think it's going well. There are obviously improvements to be made. And I think if each of us, in our own way make those improvements ....[and] inculcate better practices, I think arbitration in India is going to go places...

> “So I think there's value, when you're arguing a case, to have a more generalised background because there are principles and concepts across fields of law that can intersect as vectors. And it's very valuable to have that knowledge and experience. So on balance, I think, a generalist but I wouldn't discount a specialist either.”

You can click on the link to listen to this podcast on Spotify.

**Disclaimer – The views and opinions expressed in this article are solely those of the interviewer/interviewee and do not necessarily reflect the official views of SIAC.*

India related Investment Arbitrations: Current Status and Future Direction

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India has seen a significant shift in its investment arbitration landscape in the last decade with a flurry of cases against it, as well as a notable increase in the use of investor-State Dispute Settlement (**ISDS**) by its own investors. In this article, we explore the status of claims against India as well as claims filed by Indian investors, and consider the future direction of ISDS related to India in light of India's more State-centric approach to treaty negotiations following the introduction of the Model BIT and the termination of many of India's BITs.

1. CURRENT STATUS OF INVESTMENT ARBITRATION CASES

Claims against India – a recap and recent developments

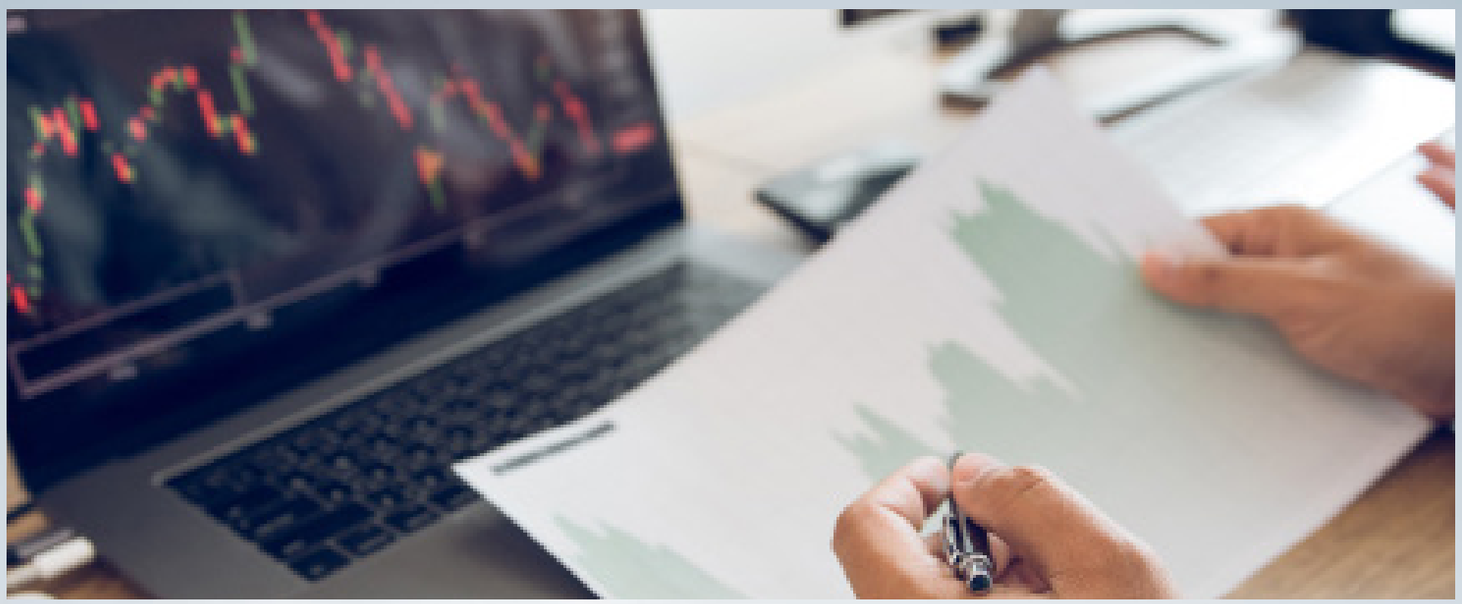
India settled many of its early investment treaty disputes, including a number of investment disputes brought against it in 2004 in relation to the Dabhol Power Plant project in Maharashtra.[2] India's first investment treaty dispute that ran its course was *White Industries v India*, for which the final award was rendered in 2011.[3] In that award, India was found to have breached the effective means standard (imported using the most-favoured nation provision) under the India-Australia BIT as a result of certain judicial delays in the Indian courts.

This initial phase was followed by a spate of cases, particularly in relation to taxation measures.[4] As at the date of this article, there have been 26 publicly known cases filed against India.[5] Out of these, India is known to have prevailed in only two.[6]The most recent tribunals to rule against India were the tribunals in the *Vodafone* and *Cairn* cases in September 2020 and December 2020, respectively. In the both these cases, the respective tribunals found that India was in breach of the fair and equitable treatment (**FET**) clause under the relevant BITs, and Cairn was awarded over USD 1.2 billion.[7]

India has launched a challenge against the *Vodafone* award in Singapore[8] and the *Cairn* award in the Netherlands.[9] Cairn has applied to have the award recognised in the US, the Netherlands, Canada, France and the United Kingdom.[10] Notably, it has been reported that India recently asked State-run banks to withdraw funds from their foreign currency accounts abroad, apparently in the fear that Cairn may attempt to seize the cash,[11]and that Cairn has now sought to enforce its award against the assets of Air India (India's State-owned airline).[12] On 6 May 2021, three investors of the Indian telecommunications company, Devas Multimedia Private, have also put India on notice of a dispute under the India-Mauritius BIT, in response to certain retaliatory measures that the Indian government allegedly took following two arbitration proceedings in *Devas v Antrix* and *CC/Devas v India* (which resulted in an award in favour of the respective investors of over USD 1 billion and around USD 111 million, respectively).[13] The alleged measures include placing Devas into liquidation and moving assets of Antrix, an Indian State-owned entity with which Devas had concluded an agreement for the lease of space segment capacity on two satellites, to a newly formed company. [14] Similar to Cairn, three Mauritian shareholders in Devas Multimedia have also approached a US court in June 2021 to enforce against Air India its USD 111 million treaty award in *CC/ Devas v India*. [15]

What is perhaps more encouraging is the fact that India recently settled its arbitration with Nissan Motor Co., Ltd. (**Nissan**) under the India-Japan Comprehensive Economic Partnership Agreement (**CEPA**), regarding the failure by the Tamil Nadu state government to pay certain contractually agreed incentives. This represents the only reported settlement of an investment treaty claim against India in the recent years. Nissan argued in the arbitration that the state government's actions amounted to a breach of the FET clause and the umbrella clause of the CEPA.

1. The views expressed in this article are personal and do not reflect the views of the firm. The authors are grateful to Aashna Agarwal and Amrutanshu Dash, trainees at Allen & Overy, for their assistance with the preparation of this article.
2. UNCTAD, Investment Dispute Settlement Navigator, India, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last accessed on 4 May 2021).
3. White Industries Australia Limited v. The Republic of India, UNCITRAL, Award dated 30 November 2011; Nishith Desai Associates, *International Investment Treaty Arbitration and India* (April 2019) at p.7, available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Investment_Treaty_Arbitration_and_India.pdf.
4. A recent example of a tax-related claim is the claim filed this year by Earlyguard Limited, a UK subsidiary of Japan's Mitsui & Co., under the India-UK BIT filed in 2021: IA Reporter, ***Another Investor Lodges a Treaty-Based Claim against India over a Tax Assessment Dispute***, 30 April 2021, available at: https://www.iareporter.com/articles/another-investor-lodges-a-treaty-based-claim-against-india-over-a-tax-assessment-dispute/ (last accessed on 8 May 2021). Other noteworthy examples include the arbitrations commenced by Vodafone International Holdings BV (**Vodafone**) under the India-Netherlands BIT in 2014 and by Cairn Energy PLC (**Cairn**), Vedanta PLC and Vodafone Group Plc in 2015, 2016 and 2017, respectively, under the India-UK BIT.The proceedings commenced by Louis Dreyfus Armateurs SAS under the India-France BIT in 2018 and the proceedings commenced by Tenoch Holdings Limited under the India-Cyprus BIT and the India-Russia BIT in 2019.
5. The most recent of these, *Earlyguard v India*, was filed in 2021. See: IA Reporter, *Another investor lodges a treaty-based claim against India over a tax assessment dispute* , https://www.iareporter.com/articles/another-investor-lodges-a-treaty-based-claim-against-india-over-a-tax-assessment-dispute/ (last accessed on 15 October 2021).
6. The proceedings commenced by Louis Dreyfus Armateurs SAS under the India-France BIT in 2018 and the proceedings commenced by Tenoch Holdings Limited under the India-Cyprus BIT and the India-Russia BIT in 2019.Global Arbitration Review, India challenges Cairn's billion-dollar tax award (24 March 2021), available at https://globalarbitrationreview.com/india-challenges-cairns-billion-dollar-tax-award (last accessed 18 May 2021).
7. The *Vodafone* award directed India to cease asking for a retroactive tax charge, and India was also charged interest, penalties and reportedly had to bear 60% of Vodafone's legal costs and 50% of the arbitration costs. The complete award is not publicly available. See: IA Reporter, *Breaking: Vodafone Prevails in Treaty-Based Arbitration against India*, available at https://www.iareporter.com/articles/breaking-vodafone-prevails-in-treaty-based-arbitration-against-india/ (last accessed 18 May 2021).
8. Live Mint, *India challenges Vodafone arbitration ruling in Singapore court* (24 December 2020), available at: https://www.livemint.com/companies/news/india-challenges-vodafone-arbitration-in-singapore-court-11608786798274.html (last accessed 18 May 2021). Global Arbitration Review, *Singapore appeal court blocks cross-disclosure in BIT cases,* available at: https://globalarbitrationreview.com/singapore-appeal-court-blocks-cross-disclosure-in-bit-cases (last accessed 15 October 2021. In May 2021, India's request for cross-disclosure between the *Vedanta and Cairn cases* were also rejected by the Singapore Court of Appeal.
9. Global Arbitration Review, India challenges Cairn's billion-dollar tax award (24 March 2021), available at https://globalarbitrationreview.com/india-challenges-cairns-billion-dollar-tax-award (last accessed 18 May 2021).
10. *Id*. In July 2021, Cairn successfully froze more than EUR 20 million worth of property belonging to India in Paris: Global Arbitration Review, *Cairn freezes Indian property in Paris* (8 July 2021), available at: https://globalarbitrationreview.com/attachments-and-freezing-orders/cairn-freezes-indian-property-in-paris (last accessed 15 October 2021)
11. NDTV Profit, I*ndia Asks State Banks To Withdraw Cash Abroad So Cairn Cannot Seize It* (6 May 2021), available at https://www.ndtv.com/business/cairn-energy-government-asks-state-run-lenders-to-withdraw-cash-from-cairns-accounts-2436593 (last accessed on 18 May 2021).
12. Global Arbitration Review, *Cairn Pursues Air India over treaty award* (17 May 2021), available at https://globalarbitrationreview.com/cairn-pursues-air-india-over-treaty-award?utm_source=Cairn%2Bpursues%2BAir%2BIndia%2Bover%2Btreaty%2Baward&utm_medium=email&utm_campaign=GAR%2BAlerts (last accessed 18 May 2021).
13. IA Reporter, *India is Put on Notice of Treaty-Based Dispute over Alleged Retaliatory Actions against Claimants in Billion-Dollar Satellite Arbitrations* (8 May 2021), available at https://www.iareporter.com/articles/india-is-put-on-notice-of-treaty-based-dispute-over-alleged-retaliatory-actions-against-claimants-in-billion-dollar-satellite-awards/ (last accessed on 18 May 2021).
14. In May 2021, India's National Company Law Tribunal (**NCLT**) granted Antrix's petition to wind up Devas, holding that Devas had been incorporated in a fraudulent manner and for unlawful purposes, and appointed a liquidator to liquidate Devas. The NCLT's decision has been appealed. IA Reporter, *India round up: Devas is wound up, Devas' shareholders seek to seize assets from Air India, and India is told to pay an earlier vaccine award*, available at: https://www.iareporter.com/articles/india-round-up-devas-is-wound-up-devas-shareholders-seek-to-seize-assets-from-air-india-and-india-is-told-to-pay-an-earlier-vaccine-award/ (last accessed 15 October 2021). in 2016, and a claim brought by Khaitan Holdings Mauritius Limited under the India-Mauritius BIT for cancellation of a telecom licence in 2013.
15. Global Arbitration Review, *More BIT award creditors target Indian airline*, available at: https://globalarbitrationreview.com/more-bit-award-creditors-target-indian-airline (last accessed 15 October 2021).



Following a jurisdictional decision in Nissan's favour (with one aspect deferred), [16] the parties settled the dispute in May 2020, resulting in a payment by India to Nissan of more than USD 200 million.[17]

It has also been reported recently that the Indian government is in talks with Vodafone and Cairn to settle the long running investment disputes discussed above.[18] Further, apparently in response to the Vodafone and Cairn arbitrations, the Indian Parliament enacted the Taxation Laws (Amendment) Act, 2021 in August 2021, providing that an offshore indirect transfer of Indian assets will be taxable from 28 May 2012 (and not retrospectively before that date), and any tax demand raised for such a transfer before 28 May 2012 (which was the basis of the tax claims made by Indian revenue authorities against Vodafone and Cairns) will be nullified on fulfilment of specified conditions such as withdrawal of pending arbitration proceedings and committing not to file any in the future.[19]

Claims by Indian investors: a notable increase

Between 2000 and 2010, Indian investors were not frequent users of ISDS, with only two claims filed by Indian investors during this period.[20] In recent years, however, consistent with the fact that India is increasingly a capital exporting, as well as capital importing, State, there has been a notable increase in the number of investment treaty claims brought by Indian investors. There are now seven publicly known investment treaty claims by Indian investors, five of which were filed in the last five years.[21] These claims are against Mozambique, Saudi Arabia, Libya, Macedonia, Bosnia, Indonesia and Poland, and involve industries such as mining, construction and insurance.[2]

2. FUTURE DIRECTION IN LIGHT OF THE MODEL BIT

The future direction of ISDS related to India, including whether the especially high level of activity in the recent decade will continue, hinges on the ultimate impact of India's more State-centric approach to treaty negotiations following the introduction of the Model BIT and the termination of India's BITs.

India's revised Model BIT: a brief recap

In December 2015, India adopted a new model bilateral investment treaty (the **Model BIT**). As compared to India's previous BITs, the Model BIT significantly limits the protections afforded to investors in a number of ways. In particular, the Model BIT:

a. narrows the scope of investors and investments afforded protection under the BIT.[23]
b. replaces the FET clause with the customary international law standard of protection, the scope of which is expressly limited to cases of denial of justice, fundamental due process violations, targeted discrimination on manifestly unjustified grounds such as gender, race or religious belief, and manifestly abusive treatment such as coercion, duress and harassment. Notably, the BIT does not specifically protect investors' legitimate expectations. [24]
c. does not contain a most-favoured nation (**MFN**) clause or an umbrella clause.

16. IA Reporter, *Nissan v India: previously-unseen jurisdictional decision reveals tribunal's rejection of objections on tribunal constitution, fork-in-the-road, contractual forum selection clause, time-bar and taxation exception* (13 September 2019), available at https://www.iareporter.com/articles/nissan-v-india-previously-unseen-jurisdictional-decision-reveals-tribunals-rejection-of-objections-on-tribunal-constitution-fork-in-the-road-contractual-forum-selection-clause-time-bar/ (last accessed 18 May 2021).
17. Global Arbitration Review, *Nissan settles treaty claim against India* (29 May 2020), available at https://globalarbitrationreview.com/nissan-settles-treaty-claim-against-india (last accessed 19 May 2021). The other pending cases against India as of the date of this article include a claim brought by GPIX LLC under the India-Mauritius BIT against India's airport authority and ministry of civil aviation, among others, relating to transport and storage operations in 2020, a claim brought by Korea Western Power Co under the India-Korea BIT as well as the India-Korea CEPA for failure to honour fuel supply commitments in 2019, a claim brought by Ras-Al-Khaimah Investment Authority under the India-UAE BIT for cancellation of a memorandum of understanding relating to the supply of bauxite in 2016, a claim brought by Strategic Infrasol and Thakur Family Trust under the India-UAE BIT for non-investigation of forgery and criminal action allegations against an Indian company in 2016, and a claim brought by Khaitan Holdings Mauritius Limited under the India-Mauritius BIT for cancellation of a telecom licence in 2013.
18. Bloomberg, *Vodafone, Cairn in Talks to Settle Tax Disputes, India says* (9 August 2021), available at https://www.bloomberg.com/news/articles/2021-08-09/vodafone-cairn-in-talks-to-settle-tax-row-india-official-says (last accessed on 14 October 2021).
19. PIB, *Framing of rules for the amendments made by the Taxation Laws (Amendment) Act, 2021* (28 August 2021), available at https://pib.gov.in/PressReleasePage.aspx?PRID=1749947 (last accessed on 14 October 2021).
20. *Ashok Sancheti v Germany* in 2000 and *Ashok Sancheti v UK* in 2006.
21. UNCTAD, Investment Dispute Settlement Navigator, India, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india (last accessed on 2 May 2021).Article 15.2, Model BIT.
22. These cases include claims by Patel Engineering Limited under the India-Mozambique BIT (in 2020 for failure by Mozambique's transport and communications ministry to award a promised concession to it. The case is currently pending), Khadamat Integrated Solutions Private Limited under the India-Saudi Arabia BIT (in 2018 for frustration of a large-scale land development project in Saudi Arabia. The tribunal declined jurisdiction), Simplex Projects Limited under the India-Libya BIT (in 2018 for suspension of a housing development project due to civil unrest in Libya and due to certain actions of Libyan public authorities. The case is currently pending), Gokul Das Binani and Madhu Binani under the India-Macedonia BIT (in 2017 for expropriation and subsequent reassignment of their concessions to mine lead and zinc. The claim was dismissed), Usha Industries under the India-Bosnia BIT (in 2017 for fraudulently inducing it to invest in a State-owned insurance company and subsequently freezing its shareholding in the company. The claim was dismissed), Indian Metals & Ferro Alloys Ltd. under the India-Indonesia BIT (in 2015 for overlaps between its coal mining concession and those of other companies, resulting in conflicting rights to mine coal in the same territory. The claim was dismissed) and Flemingo Duty Free Shop Private Limited (Flemingo) under the India-Poland BIT (in 2014 for termination of lease agreements for retail stores at Warsaw Chopin Airport).
23. Article 1.4 of the Model Text for the Indian Bilateral Investment Treat, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download(**Model BIT**), defines investment as an enterprise that has the following characteristics: "commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significance for the development of the Party in whose territory the investment is made". The definition specifically excludes assets such as portfolio investments, debt securities issued by the government and intangible rights such as brand value and goodwill, thereby limiting the definition to more traditional investments.
24. Article 3.1, Model BIT.

d. requires that an investor pursue local remedies for at least five years before commencing arbitral proceedings. [25]
e. limits the scope of the full protection and security (FPS) clause to the physical security of investors and investments only. [26]
f. explicitly excludes measures regarding taxation from the purview of the BIT. [27]

Many commentators have noted that the drafting of the BIT was heavily influenced by India's past experience with investment arbitration. Notably, India has restricted the scope of FET protection available and removed taxation from the ambit of the Model BIT, apparently in response to a large number of taxation-related cases where investors successfully invoked the FET clause against India. As a result, this is likely to foreclose future claims similar to the ones brought by Vodafone and Cairn under the new treaties adopting the Model BIT. Further, the lack of MFN protection appears to be a response to White Industries, where, as described above, the tribunal found that India breached an "effective means" clause that was imported from the India-Kuwait BIT pursuant to a MFN clause.

India's termination of its BITs

In tandem with the introduction of the Model BIT, India proceeded to terminate a majority of the BITs that it had entered into prior to the Model BIT - to date, India has terminated 74 of its 86 BITs.[28] For the treaties it could not terminate, because the minimum period that the BIT must be in force had not yet expired[29], India has sought to conclude joint interpretative statements aimed at bringing the relevant BIT in line with the Model BIT.[30]

Despite India's termination of the vast majority of its BITs, most of these BITs will continue to provide existing investors with protection for around ten to fifteen years. This is because many of these BITs contain "sunset" clauses, which protect investments made before termination for a certain period after its termination.[31] However, such sunset clauses will not protect any new investments. As things currently stand, India does not have a BIT or a free trade agreement with investment protection in place with three of the top five States that invested in India in 2020, i.e., Mauritius, Netherlands, and USA. [32]

Future negotiations

India is expected to use its Model BIT as the base in negotiating new and replacement BITs with other States, to fill the gaps in the network following the termination of a large number of BITs as discussed above. Since the introduction of the Model BIT, India has entered into four new BITs with Belarus, Brazil, Kyrgyz Republic and Taiwan.[33] The BITs with Belarus and Taiwan are largely based on the Model BIT, in that they adopt the restricted definitions of investor and investment, exclude the FET standard and require exhaustion of local remedies. In contrast, the India-Brazil BIT is largely based on Brazil's Model BIT. However, similar to India's Model BIT, the India-Brazil BIT does not adopt the FET standard, does not contain an MFN provision, and excludes taxation measures from the purview of the BIT. Further, and notably, the India-Brazil BIT excludes ISDS (only providing for State-to-State arbitration). [34]

Given the criticism that the Model BIT offers insufficient protection for foreign investors, some States may resist the inclusion of more controversial features of the Model BIT discussed above, particularly where significant investments are at stake. It is notable that the States that have currently accepted the terms of the Model BIT (i.e., Belarus, the Kyrgyz Republic and Taiwan) do not feature in the top ten States that invested in India in 2020. [35] India's increasing profile as a capital-exporting country, [36] coupled with the fact that India's own investors are becoming more significant users of ISDS, may also push the direction of treaty negotiations away from the Model BIT.

**Disclaimer – The views and opinions expressed in this article are solely those of the author(s) and do not necessarily reflect the official views of SIAC.*

25. Article 15.2, Model BIT.
26. Article 3.2, Model BIT.
27. Article 2.4(ii), Model BIT.
28. Government of India, Department of Economic Affairs, Bilateral Investment Treaties (BITs)/Agreements, available at: https://www.dea.gov.in/bipa (last accessed on 2 May 2021). The termination of the India-Sudan BIT will take effect from 19 October 2021.
29. For example, the BITs that India has not terminated include the India-Lithuania BIT, which entered into force on 1 December 2011 and has a minimum period of 15 years; the India-UAE BIT, which entered into force on 21 August 2014 and has a minimum period of ten years; and the India-Senegal BIT, which entered into force on 17 October 2009 and has a minimum period of 15 years.
30. For example, it concluded joint interpretative statements for its BITs with Bangladesh in 2017 and Colombia in 2018. In essence, these statements aim to restrict the scope of investments and investors protected under the relevant BITs as well as the ambit of the FET clause, the national treatment provision and the MFN clause: See Joint Interpretative Declaration between the Republic of India and Republic of Colombia regarding the Agreement for the Promotion and Protection of Investments between India and Colombia, dated 10 November 2009, dated 4 October 2018, available at https://mea.gov.in/Portal/LegalTreatiesDoc/CO18B3453.pdf; Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments, dated 4 October 2017, available at: https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf.
31. For example, the India-United Kingdom BIT, the India-Germany BIT, the India-Netherlands BIT, the India-Portugal BIT and the India-South Korea BIT (all of which have been terminated) contain a sunset clause which protects investments made prior to the termination of the BIT for 15 years from the date of termination of the BIT: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments dated 6 January 1995, Article 15; Agreement between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments dated 10 July 1995, Article 15; Agreement between the Republic of India and the Kingdom of the Netherlands for the promotion and protection of investments dated 1 December 1996, Article 16.1; Agreement between the Portuguese Republic and the Republic of India on the Mutual Promotion and Protection of Investments dated 19 July 2002, Article 15.3; Agreement between the Government of the Republic of India and the Government of the Republic of Korea on the promotion and protection of investments dated 7 May 1996, Article 11.2.
32. Department for Promotion of Industry and Internal Trade, FDI Statistics, available at: https://dipp.gov.in/publications/fdi-statistics (last accessed on 5 May 2021).
33. Government of India, Department of Economic Affairs, Bilateral Investment Treaties (BITs)/ Agreements/ Joint Interpretative Statements (JISs) signed subsequent to adoption of Model BIT text 2015, available at: https://www.dea.gov.in/bipa?page=7 (last accessed on 2 May 2021). The BIT with Taiwan is between the India Taipai Association in Taipei and the Taipei Economic and Cultural Center in India.
34. See Article 4 of the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, dated 25 January 2020, available at: https://www.dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20Brazil%20-%20English_0.pdf. In case of a breach of the BIT, a joint committee comprising of officials from both countries will try to prevent a dispute from arising. If the dispute cannot be prevented, it will be referred to State-to-State arbitration. Investment Cooperation and Facilitation Treaty between the Federal Republic of Brazil and the Republic of India dated 25 January 2020, Articles 18-19.
35. Department for Promotion of Industry and Internal Trade, FDI Statistics, available at: https://dipp.gov.in/publications/fdi-statistics (last accessed on 5 May 2021).Department for Promotion of Industry and Internal Trade, FDI Statistics, available at: https://dipp.gov.in/publications/fdi-statistics (last accessed on 5 May 2021).
36. For instance, India's investment in Africa and Latin America is expected to grow in the coming years. India Brand Equity Foundation, Indian Investment Abroad - Overseas Direct Investment by Indian Companies, available at: https://www.ibef.org/economy/indian-investments-abroad (last accessed on 5 May 2021).

India Continues Its Tryst With Statutory Time Limits

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India has been zealous in its efforts to keep up with global arbitration practices and towards establishing itself as a hub for institutional arbitration for some time now. Every change in law though, comes with its set of challenges, and the legislature has consistently taken steps to ameliorate the arbitration regime.

The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**")[1] introduced statutory time limits for the conduct of arbitration proceedings and resultantly created a buzz in the arbitration fraternity. Experts spoke of this as an unprecedented move against party autonomy, a hallmark of arbitration per se, and saw this as an assault on parties' rights to chart their own path for conduct of proceedings[2].

Given the nature of discourse on this subject within the international diaspora, the legislature reacted yet again. The time limits to make an award under the Arbitration and Conciliation Act, 1996 ("**the Act**") was amended by the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**")[3] . While doing so, the legislature reviewed the feedback it received from arbitral institutions.

In this article, we have reflected upon the amendments to time limits for completion of arbitration proceedings in India and its effect on stakeholders of arbitrations seated in India.

Amendments introduced by the 2015 Amendment Act

In 2015, time limits under section 29-A were introduced in the Act to address the prolonged time that ad-hoc arbitrations were taking in India. These time limits were applicable to all arbitrations seated in India, and therefore included international commercial arbitrations as defined under section 2(1)(f) of the Act ("**ICA**") and domestic arbitrations – irrespective of whether the arbitration was ad-hoc or through an institutional mechanism.

The time period for completion of arbitral proceedings was 12 months which began from the date on which the arbitral tribunal entered upon reference.[4] If the proceedings were not completed within 12 months, parties by consent could extend the time period for a further period of 6 months.[5] If the award was not made within 12 months and/or within the enlarged period of 6 months, the mandate of the arbitrator(s) was terminated[6] unless the parties made an application to the court to seek an extension of time[7] ("**Extension Application**").

The parties could file the Extension Application either prior to or after the expiry of the time limit to make the award. While determining an Extension Application, the courts were empowered to extend the time period upon parties showing sufficient cause for an extension and subject to any conditions as may be imposed by the courts in accordance with the Act.

The necessity of further amendments

To promote institutional arbitration and to fill the lacunae in the Act, a Committee was constituted under the chairmanship of Hon'ble Justice B.N. Srikrishna (Retd.) ('**Committee**'). The Committee published its findings in a Report dated 30 July 2017[8] ('**Report**').

As set out in the Report, the mandatory time limit introduced through section 29-A was a cause for debate within the international community[9]. Arbitral institutions often prescribe guidelines for the arbitral tribunal to set out the procedural timetable or the rules themselves may fix timelines for the arbitration proceedings. Thus, the non-derogable nature of section 29-A encroached upon the power of arbitral institutions to govern the conduct of arbitrations, thereby portraying India as a less attractive seat of arbitration for parties.

The international fraternity felt, and rightly so, that in complex and document heavy arbitrations, the impact of time limits was counter-productive and rendered the entire exercise as a mere lip service. An unmalleable time frame, without reference to the nature, complexity, and volume of documents etc. of a dispute was unrealistic. The time limits went against the grain of an efficient dispute settlement mechanism that necessitated providing a reasonable opportunity to the parties to place their case before a tribunal. Also, it militated against the tribunal's endeavor to do complete justice. This was particularly disconcerting for arbitral institutions that prided themselves on providing speedy, efficient, neutral, cost effective and impartial justice.

Court intervention which is preferred to be minimal was in effect being increased as parties were forced to knock on the doors of the court for extension of time, where further delays were experienced in obtaining such extension.

2019 Amendment Act

After considering the Report, the legislature introduced the Arbitration and Conciliation (Amendment) Bill, 2019 ("**Bill**"). Among other provisions, the amendments to section 23 (completion of pleadings) and section 29-A (time limits) of the Act were also notified and brought into force.

1. http://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf
2. Report of the High Level Committee to review the Institutionalisation of Arbitration Mechanism in India (Justice Srikrishna Committee), 30th July 2017, at page 63 and 64,http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
3. http://egazette.nic.in/WriteReadData/2019/210414.pdf
4. Explanation to sub-section 1 of section 29A provided – *For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.*
5. Section 29-A(3)
6. Section 29-A(4)
7. Section 29-A(5)
8. Supra at Note-2
9. Supra at Note-2

Time limits no longer applicable to ICAs seated in India

The 2019 Amendment Act has excluded ICAs from the ambit of section 29-A and the time limits under section 29-A are now applicable only to domestic arbitrations[10]. While having done so, the legislature has added a proviso to section 29-A(1) which provides that in the matter of an ICA, the award "*may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under section 23 (4)*". The proviso impresses upon stakeholders that while ICAs are relieved from time limits, efforts may still be made to dispose the arbitration in a timely manner.

Dichotomy between the inspiration for the Report and the 2019 Amendment Act

The Committee in its proposals seemed to be guided by the fact that institutional arbitrations required different treatment from ad-hoc arbitrations. The Report noticed the strong criticism by international arbitral institutions of the time limits in the Act and noted that reputed international arbitral institutions had a strong case management suite. Although inspired by the ability of international arbitral institutions to expeditiously conclude arbitrations without the necessary strictures, the Report itself did not, while proposing a withdrawal of such timelines, draw a distinction between arbitrations which were administered by institutions vis-à-vis ad-hoc arbitrations. However, the 2019 Amendment Act considered ICAs as a separate species from domestic arbitrations.

ICAs vs. Domestic Arbitrations

The 2019 Amendment Act recognized that the needs of an ICA were different from those of a domestic arbitration. The legislature placed party autonomy on a higher pedestal in context of ICAs. In an effort to project India as a favorable seat of arbitration globally, the legislature excluded all ICAs (i.e. institutional and ad-hoc) from the 12-month time limit. By doing so, the interests of both, arbitral institutions in the international diaspora and international parties in ad-hoc ICAs have been met - inasmuch as party autonomy has been preserved. Seemingly, the legislature was aware that the opportunity cost of this amendment was that it may adversely impact a few ad-hoc ICAs.

Since only ICAs are excluded from the realm of section 29-A, arbitral institutions that are administering domestic arbitrations seated in India will continue to be bound by time limits. In practical experience, in domestic arbitrations seated in India, Indian parties have either opted for ad-hoc arbitration or an arbitration under the aegis of an Indian-origin institute. One may argue that there was no need to extend time limits to arbitral institutions that are administering domestic arbitrations since such institutions may already have measures and/or rules in place to ensure timely completion of proceedings. However, from an Indian perspective, while some foreign as well as Indian arbitral institutions do have an excellent regime in place for timely settlement of disputes, there are those Indian arbitral institutions that are yet to tighten procedural timetables. In the author's view, seemingly, the latter may have weighed in on the legislature.

Timeline for completion of pleadings

Prior to the 2019 Amendment Act, section 23(1) provided that the statement of claim and defence shall be filed within the time period agreed upon by the parties or determined by the arbitral tribunal.

The un-amended section 23 was applicable to ICAs and domestic arbitrations – irrespective of whether the arbitration was an ad-hoc arbitration or institutional arbitration.

Based on feedback received from arbitrators conducting domestic arbitrations, the Committee had recommended that the timeline for completing arbitral proceedings in *domestic arbitrations* be calculated from the date of completion of pleadings.[11] The Committee was of the view that in *domestic arbitrations* the pleadings ought to be completed within 6 months.

As recommended by the Committee, ICAs were not to be timebound in any manner whatsoever and were thus to be excluded from the purview of section 29-A. A holistic reading of the Committee's recommendations leads to the conclusion that ICAs were also to be exempted from the applicability of the six months' time limit for completion of the pleadings.

The Bill which led to the 2019 Amendment Act, however, adopted, whether consciously or otherwise, a different approach. In its Statement of Objects and Reasons, the Bill set out that an amendment was being carried out to section 23 of the Act relating to "*Statement of claim and defence*" so *as to provide that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator receives the notice of appointment*. In complete contrast to the Report, which had seemingly suggested that the period for completion of pleadings should apply in cases of domestic arbitrations, the legislature decided to apply it to all arbitrations without any distinction drawn between ICAs and domestic arbitrations.

Expressly restricting the time period for completion of pleadings, the 2019 Amendment Act inserted sub-section (4) in section 23[12] of the Act. Section 23(4) provides that the pleadings under section 23 shall be completed within a period of 6 months from the date the tribunal enters upon reference. The amended section 23(4) read with the amended section 29-A provides that the 12-month period under section 29-A(1) will commence from the date of completion of pleadings.

Earlier, some arbitrations spilled over the 12-month time limit due to delayed completion of pleadings and administrative snags. The amendments to section 23(4) and section 29-A (1) will ensure timely completion of pleadings and aid parties to comply with the 12-month time limit as the time limit now commences from the date of completion of pleadings and not from the date the tribunal enters upon reference.

Does section 23(4) apply to ICAs?

The amended section 29-A purportedly makes it clear that *time limits for completion of proceedings do not apply to ICAs*. At the same time, however, proviso to section 29-A(1) when read with the amended section 23, more particularly sub-section (4) leads to an irresistible interpretation that the *time limit for completion of pleadings apply as much to ICAs* as it applies to domestic arbitration.

From a cumulative reading of section 23(4) with proviso to section 29-A(1), it appears that time limits for completion of pleadings would apply to ICAs as well. What, nevertheless, is left to the discretion of the arbitral tribunal is the time for completion of the proceedings once pleadings have been filed. In such an event, the arbitral tribunal is expected to adhere to the legislative mandate to hasten proceedings and thus endeavour to complete the proceedings within 12 months from the date of completion of pleadings.

10. Supra at Note-3
11. Supra at Note-2
12. Supra at Note-3
13. *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited,* O. O.M.P.(MISC.) (COMM.) 512/2019 decided on January 23, 2020,.

This, however, in the author's view runs contrary to and dilutes the objective of the change in law, which intended to treat ICAs from an international standpoint and bring in a parity with those that are institutionally administered. Evidently, the initial goal was to align the procedures followed in ICAs seated in India with those seated outside. Thus, if the time limit under section 23(4) are applicable to ICAs, the intent sought to be achieved by the Committee, appears to have been diluted. Peculiarly, the Statement of Objects and Reasons in the Bill that led to the 2019 Amendment Act makes no such reference to the underlying intent to exclude ICAs completely from all time limits. Instead, it makes a direct reference to the necessity for amending the time limits for completion of pleadings in arbitrations without any distinction between ICAs and domestic arbitrations.

It is difficult for parties involved in a domestic arbitration to seek the court's help to overcome the strict time limits. The question, however, to ask is whether qua ICAs it can be argued that the proper interpretation of section 23(4) is that the timeline provided therein is only suggestive and at best a guiding yardstick? Only time will tell if the timelines under section 23(4) stick in case of ICAs or not. Until such time one needs to proceed on the basis that it does.

Clearly, the Indian legislature seems to have found a hybrid answer to the need of the arbitral institutions to relieve India seated arbitrations administered by them from the constraints of strict statutory timelines. While it sought to break the shackles of the statutory time limit by keeping ICAs out of the purview it yet did not allow an unhindered and unhinged operation.

> “Overall, despite its challenges, time limits have streamlined arbitration proceedings in India...the relief to ICAs seated in India is welcoming.”

Mandate of the Arbitrator(s)

In a welcome addition, pursuant to the 2019 Amendment Act, during the pendency of an Extension Application under section 29-A(5), the arbitrator's mandate shall continue and not terminate automatically. Therefore, the arbitrator can continue with the arbitration during the pendency of the Extension Application. Not only will this aid in saving time, it may also ensure that any delays in disposal of an Extension Application before the court, does not have a knock-on effect on the procedural timetable.

The amended section 29-A(5) is applicable to all domestic arbtirations seated in India, including those that are adminstered by arbtiral institutions and those that are ad-hoc.

Retrospective applicability

In *Shapoorji Pallonji*[13], the Delhi High Court held that "*the amended Sections 23(4) and 29A(1) of the Arbitration and Conciliation Act, being procedural law, would apply to the pending arbitrations as on the date of the amendment*". Contrastingly, shortly thereafter, in *MBL Infrastructures*[14], the Delhi High Court held that the amended section 29-A would be prospective in nature.

Subsequently, in *ONGC Petro Additions*[15], upholding *Shapoorji Pallonji*, the Delhi High Court *inter alia* held that (i) section 29-A was procedural in nature and did not create any rights/liabilities in favor of any of the parties; (ii) *MBL Infrastructures was per incuriam*; (iii) the amended Section 29A(1) of the Act would be applicable to all pending arbitrations seated in India as on August 30, 2019 (i.e. date on which the 2019 Amendment Act came into effect) and commenced after October 23, 2015 (i.e. the date from which Section 29A came into effect); (iv) that the strict time-line of 12 months was not applicable to proceedings which were in the nature of ICAs and seated in India; and (v) the tribunal would not be bound by the timeline prescribed by the earlier order if the proceedings are in the nature of an ICA.

Resultantly, in ICAs (institutional and ad-hoc) pending as on the date of the amendment, time limits under section 29-A are not applicable.

In domestic arbitrations, the timelines for ongoing arbitrations will be recast and the time limit for completion will now be reckoned from the date of completion of pleadings.

Conclusion

A variety of compulsions pushed for bringing in time limits and reflecting upon the Indian experience, this does seem to be a salutary change. However, any statute that unreservedly infringes upon party autonomy, defeats the very reason for existence of arbitration as an alternate to court proceedings. The legislature could have achieved its objective of making arbitration speedy and efficient in India by providing parties the right to derogate from the mandatory time limits set out under the Act. To protect party autonomy, the statute could have provided that parties' agreements on time limits (or in the case of an institutional arbitration where institutional rules provide for time limits) would supersede the mandatory period set out under the law of the seat. The non-derogable nature of section 29-A as it stands, does little to uphold the spirit of party autonomy.

Overall, despite its challenges, time limits have streamlined arbitration proceedings in India. While the course of the amendments to section 29-A remains to be seen, the relief to ICAs seated in India is welcoming.

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14. *MBL Infrastructures Ltd. v. Rites Ltd.* O.M.P.(MISC)(COMM) 56/2020, decided on February 10, 2020.
15. *ONGC Petro Additions Limited v. Fernas Construction Co. Inc*, Order dated July 21, 2020 in OMP (MISC) (COMM) 256/2019 & I.A. 4989/2020

Arbitrability of IP

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Intellectual Property Rights are inherently state granted monopolies. As such, disputes pertaining to intellectual property rights often involve questions that concern public policy and a declaration of rights that is likely to impact third parties unrelated to the dispute. For instance, a decision on patent validity in an inter-party dispute allows the patent holder to apply for a certificate of validity, which is valid *in rem*. As such, the arbitrability of Intellectual Property Rights has been debated across India in various cases. Most recently, the Supreme Court in *Vidya Drolia v. Durga Trading Corpn.*1 has shed some guidance on this issue.

It would be remiss to discuss the *Vidya Drolia* case without discussing the march of law that it follows. A good starting point in charting this journey would be the decision of the Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*[2] The Supreme Court held that while most civil and commercial disputes that can be decided by courts can also be decided through arbitration, certain disputes, having regard to their nature, may fall exclusively within the domain of the public fora, i.e., the courts. This could be because the legislature has chosen so or because such disputes by necessary implication, must only be adjudicated by a public forum. The Supreme Court provided certain examples, such as, testamentary and eviction cases but did not allude specifically to IP disputes.

Subsequently, in the *A. Ayyasamy*[3] case the Supreme Court included IP disputes in its list of issues that cannot be subject matter of arbitration. It may be inferred from the discussion in the judgment that the Supreme Court's opinion was based on the *in rem* nature of the subject matters it chose to exclude from arbitrability.

The issue of arbitrability of IP has also been considered by various State High Courts in relation to disputes arising from IP contracts. The Bombay High Court in E*ros International Media Ltd. v. Telemax Links & Ors.*[4] held that claims of copyright infringement arising from contracts are arbitrable. The Court opined that the statutory requirement for adjudication of copyright disputes by a judicial fora ought not to be interpreted to mean that the jurisdiction of an arbitral tribunal would altogether be ousted. Further, the Court noted that to hold that all copyrights and trademark issues are in rem would be too sweeping and broad.

Importantly, the *Eros case* held that, for instance, when the claim is an opposition to a registration, such a remedy would be *in rem*. However, in an action of infringement or passing off between two parties, the action is necessarily *in personam*. Hence, the Court accorded primacy to the reliefs sought by the parties before it (the relief of injunction and damages) and distinguished it from reliefs sought in testamentary proceedings, where a will must be proved and a declaration *in rem* is sought.

However, subsequently, in *IPRS v. Entertainment India Ltd*.[5] the Bombay High Court held that existence, validity and infringement of copyright are not issues that could be determined through arbitration. It reached this conclusion by agreeing with the findings of the Delhi High Court in the *Mundipharma case*,[6] that Copyright is conferred by a specific statute that requires every suit or civil proceeding to be determined by a court. It also agreed with the judgment in the *SAIL case*[7] which held that rights to a trademark are rights in rem and "*by their very nature not amenable to the jurisdiction of a private forum chosen by the parties.*"

Notably, the facts in the *IPRS case* required a determination of the very existence of copyright but in the *Eros case* the only remedy claimed was the enforcement of a copyright license. Hence, the facts of the two cases may be distinguished from each other. One may infer that the *IPRS case* therefore does not preclude the arbitrability of IP disputes that do not involve determination of rights in rem and the findings in *Eros case* would remain undisturbed.

In practice however, one finds that there is invariably a challenge to the validity of the patent, trademark or copyright that is licensed. This has also been noted in by the Supreme Court in the *Vidya Drolia case* observing that *a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem.* Though this case pertained to a landlord-tenant dispute under the Transfer of Property Act, 1882, it extensively discussed what constitutes non-arbitrability. Pertinently, the Court notes that *there is a difference between non-arbitrable claim and non-arbitrable subject-matter*. It further discussed the aspect of non-arbitrability by necessary implication as set out in *Booze Allen*. In laying down the principles, the Supreme Court has specifically noted that "*rights under a patent license may be arbitrated but the validity of the underlying patent may not*."

The Supreme Court laid down a fourfold test to determine whether the dispute is not arbitrable including, inter alia, (i) if the subject matter relates to actions *in rem* that do not pertain to subordinate rights *in personam*, (ii) if the dispute affects third-party rights and (iii) if the subject matter is expressly or by necessary implication non-arbitrable. Arguably, merely because the Indian IP statutes designate the kind of civil court that must hear a matter does not qualify the requirement of exclusion by necessary implication. Accordingly, an IP dispute that does not require a determination of the validity of the IP but is restricted, for instance, to a claim of damages/breach of license, i.e. pertains to a subordinate right *in personam* arising from a right *in rem*, may be arbitrable.

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Disputes pertaining to intellectual property rights often involve questions that concern public policy and a declaration of rights that is likely to impact third parties.
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1. *Vidya Drolia v. Durga Trading Corpn.* (2021) 2 SCC 1
2. *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*, (2011) 5 SCC 532
3. A. Ayyasamy v. A. Paramasivam & Ors., (2016)10 SCC 386
4. Eros International Media Ltd. v. Telemax Links & Ors., (2016) 6 Bom CR 321
5. *Indian Performing Rights Society v. Entertainment India Ltd.*, Arbitration Petition No.341 of 2012, decided by the Bombay High Court on 31st August, 2016
6. M*undipharma AG v. Wockhardt Ltd.* ILR 1990 Del 606
7. 2014 SCC Online Bom 4875

With the increase in commercial disputes in India and in light of the long delays in their resolution, a new procedural law was introduced for setting up separate Commercial Benches in courts across India. These "commercial courts" have stricter timelines and provide lesser discretionary powers to courts, in the hope of faster adjudication of cases. While the commercial courts have taken actions to expedite suits and reduce pendency, without a nuanced national approach towards arbitrability of IP delays would be inevitable. It is indisputable that most modern commercial agreements contain some form of IP licensing / assignment.

The *Vidya Drolia case* has provided some much-needed clarifications with respect to determining the arbitrability of disputes. At the same time, the supplementing opinion in the judgment also makes an interesting observation –

> *It is important to note that various countries have already allowed inter partes arbitration with respect to in rem rights concerning intellectual property, etc., through a statutory framework. It is worthwhile to study the feasibility of the same, if we want to provide impetus to arbitration.*

While a straightjacket formula may never be achieved, India may take inspiration from countries like Singapore and Hong Kong and notify a law or guidelines that would identify a common approach that may be followed by all Courts. India may also consider taking a cue from the fourfold test laid down by the Supreme Court and pass guidelines that allow the arbitrability of IP disputes where the remedies sought arise and relate exclusively to the parties to the arbitration and exclude declaratory reliefs such as ownership / validity of the IP.

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Arbitration, Best Yet to Come – a General Counsel's Perspective

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Of late, there has been a lot of interest around the development of arbitration jurisprudence and improvements in the arbitration eco-system in India. These developments and improvements are reflected not only in legislative intents but also in judicial decisions. Arbitration has gathered a lot of interest from all stakeholders as is also apparent from the fact that presently it is one of the most talked about subjects in national and international conferences.

It is generally perceived and may be rightly so that litigation in India has its own disadvantages of being time consuming and costly. Due to these flaws of the litigation process, Alternative Dispute Resolution (ADR) mechanisms have found their place and provided hopes to India Inc. Out of ADRs, arbitration was the most practised and prevalent mechanism and both the Public and Private Sectors have been adopting this religiously in almost all their commercial contracts. Post Arbitration & Conciliation Act, 1996 (the 1996 Act), India Inc. had high expectations of the arbitration mechanism from the standpoint of time, cost and simplicity of procedure, besides the flexibility of getting the disputes resolved expeditiously through arbitrators who have industry specific knowledge and understanding.

With the passage of time, various limitations in the arbitration processes and procedures as provided in 1996 Act surfaced. Prevalence of ad-hoc arbitration, lack of specialised tribunals and lawyers, processes similar to civil procedure code and evidence act, uncertainty in the time and cost of the process, interference of courts etc. led to corporates getting frustrated and disappointed with arbitration; and arbitration, in fact became an abridged version of litigation. To make it worse for general counsels, these limitations of the arbitration process were preventing them from meeting the expectations of the corporates. As a result, corporates and general counsels were forced to look for some alternative mechanism for getting their disputes resolved as disputes form an inseparable part of commercial arrangements. There was a need to make ADR mechanisms impeccable and capable of meeting the needs of the corporates as the justice delivery system in India was still overburdened with over 35 million pending cases with no immediate hope of any improvement. The situation regarding pending cases is getting worse as the number of fresh cases filed outweigh the number of cases disposed thus leading to increases in pending cases every year. Resultantly, the corporates are not left with much option but to resort to arbitration.

General Counsel's predicament

Why was a general counsel forced to resort to arbitration or ADR as a substitute to litigation when he could have by choice selected arbitration as a preferred mode of dispute resolution mechanism? The experience suggests that in the entire process a general counsel has to perform the difficult task of balancing the expectations of corporate versus the arbitration ecosystem. If we talk about the pain points of a general counsel relating to arbitration procedure, then it would boil down to time and cost. Prior to 2015 Amendments, there were no provisions for arbitration process being time bound or any rules regarding fees of the tribunal or the guiding principles for fixation of fees. Also procedures followed were akin to those followed in litigation making the whole process laden with legal technicalities and cumbersome.

Thereafter the complex process of challenge and uncertainty revolving around interpretation of public policy, ambiguities in the otherwise limited grounds of challenge made arbitration a difficult choice. Additionally, while negotiating arbitration clauses in international contracts, the general counsels were met with severe resistance if they proposed India as the seat of arbitration.

Amendments to 1996 Act – Welcome steps

Fortunately, identification of gaps in the process of arbitration coupled with the intent to make India a hub for international as well as domestic arbitration led to bringing changes in the 1996 Act. The legislative desire to change the 1996 Act in order to make India a more arbitration-friendly jurisdiction is clear from the fact that in the last 6 years, the 1996 Act has been amended thrice. The effort of legislature to make arbitration more effective has been supplemented by numerous judicial decisions leading to elimination of ambiguities.

The legislature has tried to take care of the pain points by introduction of time bound arbitration process, fee schedule, limited interference by courts, clarity on grounds of challenge, misuse of automatic stay on filing of objections and many more. The recent judicial decisions confirm that after the 2015 Amendments, the interpretation of the term 'public policy' has been narrowed down. The Courts, today, are of the view that under no circumstances can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of that court. This would be an entry into the merits of the dispute, which is contrary to the ethos of section 34 of the 1996 Act.

Fast Track Procedure

As a general counsel, one has high hopes on the 2015 amendments to 1996 Act. Introduction of the fast track procedure (section 29B) is a significant step in the direction of making arbitration more effective and expeditious. Under this procedure, unless the parties request for oral hearing, or the arbitral tribunal considers it necessary to have oral hearing, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties.

Institutional Arbitration

The 2015 amendments would also be helpful in changing the focus of the general counsels from ad-hoc arbitration to institutional arbitration. Going for an institutional form not only eases out administrative issues for parties but also makes the entire process more effective. The arbitrators who are appointed by such institutions owe responsibility to these institutions and indirectly it acts as a check on the entire process.

The introduction of the Arbitration Council of India is another bold step. Amongst other functions, an important function attributed to this council is reviewing the grading of arbitral institutions and arbitrators. Once notified, it would help in changing the perception of arbitration in India and would help in establishing arbitration infrastructure of India globally.

Digital Arbitration

The digital technologies in court/arbitration proceedings have been in vogue for quite some time in one way or the other. COVID-19 has brought a sea change in the use of digital technologies in arbitration proceedings which include proceedings through video conferencing, paperless proceedings, remote participation, and increased level of security for maintaining confidentiality. The experience suggests that the commercial world and the legal fraternity have benefitted significantly from cost, time and convenience standpoint. But the other important aspect is the fact that such use of technologies is paving the way for next level of reforms in the dispute resolution mechanism. The online dispute resolution mechanism would perhaps be one of the solutions to the challenges of contemporary arbitration process. The institutions providing services of online dispute resolution may provide dispute settlement mechanism for business-to-business or business-to-consumer keeping all the inherent advantages like party autonomy, cost and time advantages and so on which we generally look for in arbitration. Pertinently 1996 Act provides us the flexibility of resorting to Digital Arbitration as section 19 clearly states that the arbitral tribunal shall not be bound by the Code of Civil Procedure or the Indian Evidence Act and that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. The time has now come for all of us to work closely with the government and all interested groups to take concrete steps to make digital arbitration an everyday reality and help in ease of doing business. General counsels can definitely play a pivotal role in achieving this objective.

Misuse of party autonomy – not allowed

This discussion would be incomplete without referring to another critical development in the arbitration jurisprudence. Prior to 2015 amendment, it was seen that some entities were trying to misuse the autonomy given by the 1996 Act in the appointment of arbitrator. This autonomy led to dominant party forcing the other party to sign contracts with arbitration clauses providing power to only one party to appoint arbitrator. We have seen these kinds of clauses being misused to appoint such arbitrators, whose conduct casted aspersions on the entire regime of arbitration. The 2015 amendment provided for certain classes of people who could not be appointed as arbitrators. Further the Supreme Court also settled the law in this regard where effectively unilateral appointment of arbitrators has been done away with. Undoubtedly this development would instil trust and faith of parties in the arbitration process and would lead to institutional arbitration getting popular and becoming the preferred mechanism of dispute resolution.

Reasons to rejoice

As we have seen, a lot has been done to establish arbitration and make it a coveted mode of dispute resolution. Needless to mention that if we are collectively able to follow the timelines and the principles as are now prescribed under the 1996 Act, arbitration would be able to yield such beneficial results which will not only espouse the object of the 1996 Act but will also benefit the parties at large. With the pro-arbitration approach of the courts coupled with recent amendments in the 1996 Act, the future of arbitration appears to be bright and the corporate India has also reasons to rejoice.

**Disclaimer – The views and opinions expressed in this article are solely those of the author(s) and do not necessarily reflect the official views of SIAC.*

Quiz on the SIAC Rules, 2016

1. The deemed commencement date of arbitration under Rule 3.3 of the SIAC Rules 2016 is:

A. the date the Claimant serves the Notice of Arbitration on the Respondent
B. the date Respondent receives the Notice of Arbitration from the Claimant
C. the date the Notice of Arbitration and the Case Filing Fee are filed with the Registrar of the Court of Arbitration of SIAC
D. the date of constitution of the arbitral Tribunal
E. none of the above

2. The term "costs of the arbitration" under Rule 35.2 of the SIAC Rules 2016 includes:

I. the Tribunal's fees and expenses
II. the Emergency Arbitrator's fees and expenses
III. the Tribunal Secretary's fees and expenses
IV. SIAC's administration fees and expenses
V. the costs of any expert appointed by the Parties

A. I and III only
B. I, II and IV only
C. I, III and IV only
D. II, III, and V only
E. IV and V only

3. Only candidates empaneled on the SIAC Panel of Arbitrators can be appointed as arbitrator in cases administered under the SIAC Rules 2016. True or false?

A. True
B. False

4. Which of the following application(s) under the SIAC Rules 2016 could be made after the constitution of the arbitral Tribunal?

I. Expedited Procedure under Rule 5 of the SIAC Rules 2016
II. Joinder of the additional parties under Rule 7 of the SIAC Rules 2016
III. Consolidation of two or more pending arbitrations under Rule 8 of the SIAC Rules 2016
IV. Early Dismissal of claims / defences under Rule 29 of the SIAC Rules 2016
V. Application for the appointment of an Emergency Arbitrator under Rule 30.2 and Schedule 1 of the SIAC Rules 2016

A. I and V only
B. I, II and IV only
C. II, III and IV only
D. II, IV, and V only
E. III and V only

5. Match the following applications that can be made under the SIAC Rules 2016 with the deciding authority

A. Application for appointment of Emergency Arbitrator
B. Application for Consolidation filed with the Notice of Arbitration
C. Application for Early Dismissal of Claims and Defences

I. Committee of the Court of Arbitration
II. Tribunal
III. President of the SIAC Court of Arbitration

6. An application for a non-party to be joined in a pending arbitration under the SIAC Rules 2016 may be made by the non-party. True or false?

A. True
B. False

7. Which statement is INCORRECT in relation to the Expedited Procedure under Rule 5 of the SIAC Rules 2016:

A. an application for Expedited Procedure is decided by the President of the Court of Arbitration of SIAC
B. the Final Award shall be made within six (6) months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such Final Award
C. it is possible to discontinue the application of the Expedited Procedure
D. an arbitration under the Expedited Procedure must in all cases be referred to a sole arbitrator
E. none of the above

8. What factors are taken into account in the appointment of an arbitrator under the SIAC Rules 2016:

A. nationalities of the parties to the arbitration
B. seat of arbitration and law governing the contract in dispute
C. qualifications of the arbitrator
D. nature and circumstances of the dispute
E. all of the above

9. Which of the following are NOT criteria for the consolidation of two or more pending arbitrations under Rule 8.1 of the SIAC Rules 2016:

I. all parties have agreed to the consolidation
II. all the claims in the arbitrations are made under the same arbitration agreement
III. the same Tribunal has been constituted in each of the arbitrations or no Tribunal has been constituted in the other arbitration(s)
IV. the arbitration agreements are compatible and the disputes arise between the same Claimant(s) and Respondent(s)
V. the arbitration agreements are compatible and the disputes arise out of the same legal relationship(s)

A. I and III only
B. I, II and V only
C. I, III and IV only
D. II, IV, and V only
E. III and IV only
F. III and V only

10. Which of the following statements are CORRECT with respect to the powers of the Registrar of the Court of Arbitration of SIAC under the SIAC Rules 2016:

I. abbreviate any time limits under the SIAC Rules 2016 in an arbitration conducted under the Expedited Procedure
II. determine on a prima facie basis whether an arbitration shall proceed in the event any party objects to the existence or validity of the arbitration agreement or to the competence of SIAC to administer an arbitration under Rule 28.1 of the SIAC Rules 2016
III. fix the Tribunal's fees and expenses
IV. determine and apportion the actual costs of the arbitration as defined under Rule 35 of the SIAC Rules 2016
V. may order a suspension of the arbitral proceedings pending the resolution of a challenge against an arbitrator under Rule 14

A. I and III only
B. I, II and IV only
C. I, III and V only
D. III, IV and V only
E. II and IV only

Answer Key
1. C
2. B
3. B
4. C
5. A - III; B - I; C - II
6. A
7. D
8. E
9. E
10. C