Update

Dispute Resolution - Legal Milestones in 2018 and a Look Ahead

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Last year saw some significant legislative amendments and landmark judicial decisions heralding a more positive outlook for the resolution of corporate and commercial disputes in India. This update summarises some of the key developments in the past year and gives a brief overview of what can be expected in 2019.

THE YEAR THAT WAS

In 2018, besides introducing significant amendments to the Insolvency and Bankruptcy Code, 2016 (IBC), the Parliament has attempted to modernise extant Indian legislation, with the passage of the Arbitration and Conciliation (Amendment) Bill, 2018 in the Lok Sabha, which aims to promote India as a seat of arbitration; and the notification of the Specific Relief (Amendment) Act, 2018, which marks a paradigm shift towards prioritising specific performance of contractual obligations instead of awarding damages in lieu of performance. Further, sweeping amendments to the Prevention of Corruption Act, 1988 have updated the Indian law on bribery by expanding the coverage of offences to specifically cover bribery by commercial organisations and their officers. In addition, the Supreme Court for the first time delineated the nature and scope of the jurisdiction of the Competition Commission of India vis-à-vis sector-specific regulators.

MAJOR DEVELOPMENTS IN 2018

1. Insolvency and Bankruptcy Code, 2016

The IBC was amended twice in the year 2018 with significant legislative amendments made to address certain teething issues. The judiciary also played an active role in delivering several important decisions that provided clarity on various contentious issues under the IBC.

(a) Impact of Supreme Court’s Decision in the Binani Cement case

In this case, the National Company Law Appellate Tribunal (NCLAT), Delhi ruled that a resolution plan must treat dissenting and assenting financial creditors equally and cannot distinguish or discriminate between two sets of creditors who are similarly positioned. The judgment also clarified that a resolution plan must provide for similar treatment to the dues of financial and operational creditors.

The principles emerging from the NCLAT judgment, particularly with respect to non-discrimination and balanced treatment
of all stakeholders, are likely to have far-reaching implications on both pending and future corporate insolvency resolution processes. The Supreme Court has subsequently upheld the decision of the NCLAT, as warranting no interference. (Rajputana Properties Pvt. Ltd. v UltraTech Cement Ltd. & Ors.)

(b) Commitments under Put Option, Non-Disposal and Shortfall Undertaking a Financial Debt under the IBC

The National Company Law Tribunal (NCLT), Delhi considered a put option, a non-disposal arrangement and a shortfall undertaking to be a contract of guarantee and consequently held that a default thereunder was a financial debt under the IBC. This was the first instance where any NCLT bench ruled on the issue of default under such arrangements. (Union Bank of India v. Era Infra Engineering Limited)

(c) Withdrawal of an insolvency application admitted by the adjudicating authority

Section 12A of the IBC permits withdrawal of an insolvency application (filed by a financial creditor/ operational creditor/ corporate debtor) admitted by the adjudicating authority subject to obtaining necessary approval of the committee of creditors. Interestingly, Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that an application for withdrawal under Section 12A of the IBC shall be submitted before the issuance of invitation for expression of interest from resolution applicants to submit resolution plans.

Notably, the Supreme Court has held that Regulation 30A has to be read subject to Section 12A of the IBC, which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest. Therefore, it is now settled that it is permissible to withdraw an admitted insolvency application even after issuance of invitation for expression of interest (Brilliant Alloys Private Limited vs Mr. S. Rajagopal & Ors.)

(d) Applicability of the Limitation Act, 1963 on IBC proceedings

The Supreme Court resolved the ambiguity with respect to the applicability of the Limitation Act, 1963 (Limitation Act) to an application filed under the IBC and concluded that the Limitation Act would apply to proceedings under the IBC.

Additionally, the Supreme Court clarified that ‘the right to sue’ accrues when a default occurs. If the default has occurred over three years prior to the date of filing of the insolvency application, the application would be barred under Article 137 of the Limitation Act, the exception to this being those cases where, depending on the facts of the case exclusion of time provisions under the Limitation Act may be applied to condone the delay in filing such application. (B.K. Educational Services Private Limited vs Parag Gupta and Associates)

(e) Implications of ArcelorMittal Judgment

In this landmark judgment, the Supreme Court has provided a comprehensive analysis of issues concerning eligibility for bidding for distressed assets under Section 29A of the IBC.

The Supreme Court interpreted Section 29A of the IBC stating that it is a ‘see through provision’ and the ‘de facto’ position of a person has to be checked as opposed to ‘de jure’ position. It is therefore important to discover who the real individuals or entities are who are acting jointly or in concert, and who have set up a corporate vehicle for the purpose of submission of a resolution plan. Further, ‘acting jointly’ does not mean a joint venture necessarily but must be looked at in the sense of acting together.

The Supreme Court ruled that the stage of ineligibility attaches when the resolution plan is submitted by a resolution applicant. It further clarified that ‘management’ under Section 29A(c) ordinarily vests in the board of directors and includes managing director, manager and officer as per the Companies Act, 2013. It was also observed that, the expression ‘control’, in Section 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control. ‘Control’ here, as contrasted with ‘management’, means de facto control of actual management or policy decisions that can be or are in fact taken. Further, the Supreme Court held that the observations of
the Securities Appellate Tribunal in relation to 'control' in the case of Subhkam Ventures (I) Private Limited v. SEBI shall also apply to the expression 'control' under Section 29A.

Additionally, the Supreme Court settled that the timelines specified in the IBC are mandatory and cannot be extended and that the model timelines as provided in Regulation 40A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 are to be followed as closely as possible by all authorities. (ArcelorMittal India Private Limited vs Satish Kumar Gupta & Ors.)

(f) IBC Process Cannot be Initiated where Challenge to Arbitral Award is Pending

The Supreme Court held that proceedings under the IBC cannot be initiated by an operational creditor when there is a pending proceeding challenging an arbitral award. (K. Kishan vs Vijay Nirman Company)

2. Proposed Amendments to the Arbitration Act, 1996

The Arbitration and Conciliation Act, 1996 (Arbitration Act) was amended substantially in 2015 (2015 amendments). However, some uncertainty remained. To bring clarity to the Arbitration Act, the Arbitration and Conciliation (Amendment) Bill, 2018 (Proposed Amendments) was passed by the Lok Sabha on 10 August 2018. The Proposed Amendments are currently pending before the Rajya Sabha.

Some of the salient features of the Proposed Amendments are discussed below.

- **Establishment of Arbitration Council of India**: An independent body called the Arbitration Council of India (ACI) is to be established to promote arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. The ACI will have the power to frame policies governing grading of arbitral institutions and recommend various measures to be adopted for easy resolution of commercial disputes.

- **Appointment of arbitrators**: The Proposed Amendments seek to minimise court intervention for the appointment of arbitrators and provide for the designation of arbitral institutions by the Supreme Court and High Courts for the appointment of arbitrators.

- **Time limits**: A period of six months, starting from the date of appointment of arbitrators, is being proposed for the completion of the statements of claim and defence. It has also been clarified that in case an application for extension of time has been made by the parties before the appropriate court, the mandate of the arbitrator will continue until the application has been disposed of.

- **Retrospective application of the 2015 Amendments**: The Proposed Amendments clarify that the 2015 amendments shall not apply to arbitral proceedings commenced before 23 October 2015 or to court proceedings arising out of or in relation to such arbitral proceedings, irrespective of whether such court proceedings were commenced prior to or after 23 October 2015.

3. Amendments to the Specific Relief Act, 1963

The Specific Relief (Amendment Act), 2018 radically amends the Specific Relief Act, 1963 to make specific performance the default remedy for most contractual disputes. This aims to limit the traditional common law rule of monetary damages being the primary recourse. Further, the amendment seeks to reduce the discretion involved in grant of relief of specific performance. This should have a positive impact on enforceability of contracts in India, which has remained a long-standing complaint against the Indian business environment in general.


Effective July 2018, India overhauled its primary anti-corruption legislation the Prevention of Corruption Act, 1988 (POCA
The amendments to POCA have overhauled a three-decade old statute and brought the Indian law at par with a select set of countries that have moved to a compliance-based approach to addressing bribery and corruption. The key amendments are:

- **Bribe giving is a stand-alone crime**: POCA now punishes the act of giving or attempting to give a bribe as a distinct/stand-alone crime. Earlier, a bribe-giver was punished for abetting the crime while the law focused on the actions of the corrupt public official.

- **Bribery by a corporation**: The amendment brings in specific provisions for liability of a commercial organization/corporation and the liability of its individual actors.

- **Liability of director, manager, secretary or person-in-charge**: When it is proved in court that the offence of bribery committed by a commercial organization has been committed with the consent or connivance of any of its directors or any other officers, such directors/officers shall be guilty of the offence and be liable under the POCA.

- **Good defence to argue payment of bribe under duress**: The amended law permits a bribe-giver to set up the defense of having given the bribe under duress. However, this requires the bribe-giver to report to the government within seven days of the action.

5. **Supreme Court on Overlapping Regulatory Jurisdiction**

Recently, the Supreme Court, in *CCI v. Bharti Airtel Limited & Ors.*, determined the nature and scope of the jurisdiction of the Competition Commission of India (CCI) in regulated sectors vis-vis the sectoral regulator. Reliance Jio Infocomm Limited filed a complaint under Section 19(1) of the Competition Act, 2002 (*Competition Act*) before the CCI and alleged cartelisation by the three incumbent telecom operators, namely, Bharti Airtel Limited, Vodafone India Limited and Idea Cellular Limited (by using the platform of the Cellular Operators Association of India (COAI)). The incumbent operators and COAI contended that the Telecom Regulatory Authority of India (TRAI) had exclusive jurisdiction to deal with telecom issues, and the CCI did not have jurisdiction to entertain complaints of alleged cartelisation.

The Supreme Court partly agreed with the incumbent operators and COAI and held that since TRAI was already seized of the same subject matter with the principal issue being non-compliance of TRAI Regulations and license conditions i.e. jurisdictional aspects, it would be appropriate for the TRAI to decide on these issues first. It is only thereafter, that the CCI can examine whether the conduct of the incumbent telecom operators (& COAI) was a collusive act of cartelisation. As such, the law laid down by the Supreme Court is that if there are jurisdictional aspects involved which are squarely within the domain of the sectoral regulator, the CCI cannot exercise jurisdiction until those jurisdictional aspects have been decided by the sectoral regulator.

**LOOKING AHEAD**

As with any significant legislative overhauling, the utility of the statutory amendments mentioned above are largely predicated on their successful implementation. The government appears keen on demonstrating the attractiveness of India as an investment destination. The emphasis on institutional arbitration is likely to improve investors' confidence and make India an attractive seat of arbitration. Moreover, we can expect many of the gaps experienced in the implementation of the IBC to be plugged with more resolution exercises reaching a conclusion, and the legislature incorporating lessons learned from such processes into law. The IBC is expected to take bigger strides in 2019 with the proposed introduction of cross-border insolvency and personal insolvency regimes.

*For a round-up of some of the key legal developments across sectors in 2018 and a brief insight on what to expect in 2019, please read our sector-wise updates, which can be accessed at [https://www.trilegal.com/index.php/publications/updates](https://www.trilegal.com/index.php/publications/updates)*

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