

India Continues Sweeping Commercial Law Reform

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With the 2015 amendment (**2015 Amendment**) to the (Indian) Arbitration and Conciliation Act, 1996 (**Arbitration Act**), the Indian parliament set in motion a systematic overhaul of the commercial laws in India. The aim was to streamline performance of contracts and improve the efficiency of the dispute resolution process in order to create a pro-business environment that would also encourage foreign direct investment into India.

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Recently, that overhaul has seen two significant developments. First, on 23 July 2018, the Indian parliament passed the Specific Relief (Amendment Bill), 2018 (**Amendment Act**). The Amendment Act radically amends the Specific Relief Act, 1963 (**Specific Relief Act**) so that specific performance is now the default remedy for contractual and other disputes. This displaces the traditional common law rule of first having to prove that monetary damages would be inadequate - a process that was often prohibitively time-consuming given the pace of litigation in India.

Second, the Indian parliament is on the verge of approving further amendments to the Arbitration Act that would significantly strengthen the country's arbitral mechanisms and be a continuation of the pro-arbitration attitude of the Indian courts. We discuss both developments below.

AMENDMENTS TO THE SPECIFIC RELIEF ACT

The following are the highlights of the Amendment Act:

Reversal of the traditional rule

Consistent with other common law jurisdictions, the Specific Relief Act had established a general rule that the remedy of specific performance would only be available if a monetary award would be inadequate.¹ The Amendment Act now displaces this rule and makes specific performance the default remedy if a contract is breached. The change

¹ Sections 14 and 38, Specific Relief Act (Unamended).

reflects the government's recognition that, at least within the Indian court system, the availability of damages arising out of prospective legal proceedings is not an effective alternative to performance. The new rule is pursuant to the findings of the Expert Committee established in 2015 to review the law regarding specific relief. The Committee identified delays inherent in the Indian court system, inconsistency of shifting costs, ineffective enforcement of decrees and the indiscriminate grant of injunctive relief (often granted without regard to the proportionality of capital investment or opportunity cost).²

No Discretion

Specific performance has traditionally been understood as a discretionary remedy. However, the Amendment Act now provides that the court *shall* grant interim relief, i.e. the court no longer has discretion in this matter. However, whether it is effective in practice and how the courts interpret it remains to be seen.

Substituted Performance

Inspired by the statutes governing contracts in Spain, Ethiopia and Québec, the Expert Committee recommended the addition of the availability of compensation pursuant to substituted performance.³ In effect, the innocent party, when faced with non-performance can arrange for performance using third parties and still proceed against the party in breach of the contract for compensation associated with arranging for substitute performance.

While a similar remedy can arguably be sought under the general principles of damages arising out of contractual breach, the express recoverability of actual costs and expenses spent on obtaining substitute performance (without reference to traditional limits in foreseeability, etc.) should assist the injured party. The Expert Committee considered that the existence of such a remedy would create appropriate incentives both for the injured and the breaching party not to abide by the terms of the contract. The inclusion of this remedy is likely to have a significant impact on commercial disputes in India.

Exceptions

The exceptions to the mandatory specific relief regime include (i) certain matters related to trusts, (ii) where the contract by its very nature cannot be made subject to specific performance (such as cases that would require the court to continually

² Expert Committee, ¶7.1.8.

³ Expert Report, ¶11.2.1 at 57.

supervise compliance), (iii) where the contract is dependent on personal qualifications of a person or (iv) where the contract is of a determinable nature.⁴

Further, no specific performance can be granted to a party that has obtained substitute performance; or has either become incapable of performing or failed to perform its contractual obligations; breached an essential term of the contract or has acted fraudulently to subvert the contract. These provisions preserve the traditional requirement that specific relief can only be granted in favour of a party who has been ready and willing to perform its own obligations.

No Infrastructure Injunctions

Infrastructure development in India is frequently marred by delays due to court injunctions emanating from proceedings between various stakeholders in the infrastructure project. Delays of any kind come at huge economic cost to the Exchequer. It is perhaps this context that led to the most important change to the Specific Relief Act, i.e. the Amendment Act prohibits courts from granting injunctions with respect to infrastructure projects where such injunction would create an impediment or delay the process of completion of the project or interfere with the provision of the facility/service forming the subject-matter of the process.⁵ Until now, injunctions were granted only if the traditional criteria of prima facie case, risk of irreparable harm, and balance of convenience were fulfilled.

As the Expert Committee noted in its report, infrastructure projects inherently involve public interest and it is difficult to arrive at a monetary value for damage to the public caused by a delay in completing an infrastructure project. The Amendment Act's conditional prohibition on infrastructure injunctions is likely to make it extremely difficult for parties to obtain such injunctions going forwards, helping to ensure that infrastructure projects are delayed less often.

The list of infrastructure projects covered under these provisions includes roads, bridges, shipyards, airports, public transport, water and sanitation, and other social and commercial infrastructure. Affordable housing projects and certain hotel constructions are also covered by the provision.

Timeline

The Amendment Act requires that a suit for specific performance must be decided within 12 months from the date of service of summons. This time limit may be extended by a further six months by a reasoned order of the court. Similar timelines for

⁴ Section 14, Specific Relief Act (Amended).

⁵ Sections 20A and 41(ha), Specific Relief Act.

the disposal of commercial cases and appeals were established by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. Whether India's judicial infrastructure will be up to the task of complying with these new time limits remains to be seen.

FURTHER AMENDMENTS TO THE ARBITRATION ACT

Soon after the passage of the 2015 Amendment, the Government formed a high-level committee to consider further amendments with the goal of strengthening institutional arbitration. The Indian Parliament now is close to implementing changes that would accomplish that goal. Pending only the approval of the Upper House, the Arbitration and Conciliation Amendment (Bill) includes the following key changes:

Institutional Arbitration and Appointment

The Bill sets up the Arbitration Council of India (**Council**), to be based in New Delhi, as an independent body to develop guidelines for arbitrations, establish a repository of arbitral awards, and generally promote the use of arbitration in India. Perhaps most importantly, the Council will grade arbitral institutions in India. Arbitral institutions graded by the Council, rather than the courts, will then appoint arbitrators.⁶

In addition, the Bill introduces the accreditation of arbitrators with detailed eligibility and qualification criteria set out in a schedule to the Arbitration Act.

Duty of Confidentiality

Neither the earlier regime nor the 2015 Amendment clearly identified the legislative position on confidentiality of arbitration proceedings. The Bill now provides for the obligation of parties, arbitrators and arbitral institutions to maintain confidentiality of all arbitral proceedings, except where disclosure is necessary for the implementation and enforcement of the award.⁷

Arbitrator Immunity

The Bill provides for the protection of arbitrators from liability for acts done in good faith under the Arbitration Act. Unlike the English Arbitration Act 1996, there is no carve-out for gross negligence or wilful misconduct.

⁶ Proposed Section 11(3A), 11(8) and 11(9), Arbitration Act.

⁷ Proposed Section 42A, Arbitration Act.

Clarifications from the 2015 Amendment

A number of provisions in the Bill are intended as course corrections for some of the issues arising out of the 2015 Amendment. To settle the controversy surrounding the applicability of the 2015 Amendments, the Bill clarifies that the 2015 Amendment applies only to those court proceedings relating to arbitrations commenced on or after the date of the commencement of the 2015 Amendment.

Further, the Bill addresses the practical difficulties arising from the introduction of the 12-month time limit (extendable to 18 months) for the issuances of an award, commencing from the date of constitution of the tribunal. The 2015 Amendment made this requirement applicable to *all* arbitrations seated in India. The Bill introduces two critical changes. First, it amends the time limit to 12 months from the date of completion of pleadings (instead of 12 months from the date of constitution of the tribunal) and it introduces a separate 6-month time limit for completion of pleadings running from the date of constitution of the tribunal.⁸ Second, the Bill exempts international commercial arbitrations (meaning arbitrations involving at least one non-Indian party) from this requirement.

CONCLUSION

The Amendment Act is another step by the Indian Government to make the country an attractive jurisdiction in which to do business. Prioritising specific performance over monetary compensation reflects a shift relatively unknown to common law jurisdictions, which traditionally view specific performance as an exceptional remedy. However, the government has made this change in response to the massive backlog of cases that plague the Indian courts in the hopes of discouraging contractual breaches and, where breaches occur, to improve timely access to an effective remedy.

The severe curtailment of the courts' ability to grant injunctions halting infrastructure projects will come as welcome tonic to investors in the infrastructure sector. Projects in sectors such as power, construction, transport, real estate, communications and education (which last year combined to account for about 40 percent of all foreign direct investment inflows into India⁹) are all covered and will benefit directly from this legislative change.

⁸ Proposed Section 23(4), Arbitration Act.

⁹ According to the Reserve Bank of India, these sectors accounted for USD 13,979 million of the USD 37,366 million in total foreign direct investment made in India in 2017-18. Available at https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/APPEN201718_98A4E51BDEFA46449A8C9041A3471DA29A.PDF

The second round of changes proposed to the arbitration regime address some of the negative feedback following the implementation of the 2015 Amendment. These changes ought to generate momentum for further use of institutional arbitration in a jurisdiction where ad-hoc arbitrations have long been the most popular choice for parties. Yet, critical issues important to foreign investors such as the uncertainty surrounding the ability of two Indian parties to choose a seat outside India remain unresolved.

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Please note that Debevoise & Plimpton does not practice Indian law, and that this update is based on publicly available information.

Please do not hesitate to contact us with any questions.

LONDON

Lord (Peter) Goldsmith QC
phgoldsm@debevoise.com

Wendy Miles QC
wjmiles@debevoise.com

Patrick Taylor
ptaylor@debevoise.com

Shashwat Patel
spatel@debevoise.com

Geoffrey P. Burgess
gpburgess@debevoise.com