DISPUTE RESOLUTION IN INDIA

Sumeet Kachwaha is the founding partner of dispute resolution and arbitration practice Kachwaha & Partners. He has handled many landmark matters, including a large number of cross-border disputes. The firm has continuously served leading multinational corporations across the globe, including well-known names such as Alcatel-Lucent, Hyundai Engineering and Construction Co Ltd (Kota Chambal bridge-collapse case), AngloAmerican, Haldor Topsøe (Competition Commission), Siemens and recently a Qatari government company. Mr Kachwaha serves as vice president of the Asia Pacific Regional Arbitration Group and also serves on the six-member advisory board of the Kuala Lumpur Regional Centre for Arbitration. He recently concluded a two-year term as programme coordinator for the Inter-Pacific Bar Association after serving as the chair of its dispute resolution and arbitration section for three years. Among its recent successes, Kachwaha & Partners represented a Middle East government company in a very high-value, international, commercial arbitration, in which sums of aound US$197 million were unanimously awarded. Sumeet Kachwaha was lead counsel in the matter. In another recent high-value International Chamber of Commerce (ICC) arbitration (in which sums of US$105.95 million were awarded in relation to an international trade dispute between an Australian coal mining company and an Indian government company), Mr Kachwaha, acting as lead counsel before both the arbitral tribunal and the High Court of Delhi, succeeded in dismissing the challenge to the award.

GTDT: What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? To what extent are treaty claims increasing?

Sumeet Kachwaha: The clear preference for parties in India is to go for arbitration. This is for the straightforward reason that the courts are clogged, delays are inordinate and realistic costs never awarded (both as a matter of law and practice).

The first BIT award against India (*White Industries Australia Limited v Union of India*) was delivered in November 2011. Thereafter, 22 treaty claims have been initiated, eight of which were filed in the past four years. Disconcerted by the ambit and reach of such claims, the Union of India has allowed 58 bilateral investment treaties (BITs) to lapse (subject to a 15-year sunset clause). The new BIT dispute resolution model agreement that India has announced envisages an investment arbitration only after domestic remedies are first attempted for a period of five years and do not result in resolution.

GTDT: Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? Has Brexit affected choice of law and jurisdiction?

SK: Over the past few years, there have been several Indian cases discussing the interpretation and operation of arbitration agreements in detail, for instance clarifying the distinction between seat and venue of arbitration. There has also been wider adoption of international best practices in drafting or formulating arbitration clauses. As a result, a generation of ambiguous arbitration clauses have given way to more conscientiously drafted ones that specify choice of law and seat and rules. Until a few years ago, parties would blindly go for ad hoc arbitration without realising the consequences. This trend has now considerably reduced.

In a recent case of *Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd and Ors* (2017), the Supreme Court of India held that the designation of seat in an arbitration agreement would be akin to conferring exclusive jurisdiction to the courts therein (to the extent permissible). This would also be the case where no part of the cause of action has arisen in the seat court.

Indian parties (in international arbitrations) prefer to go for Indian law, or alternatively English Common Law as the applicable law. Many international arbitrations end up getting seated outside India (unless the government is the dominant contracting party). Singapore is a favourite choice. This is driven by its geographical convenience and world-class arbitration facilities. A recent example reflecting this choice is the *Daiichi-Ranbaxy* arbitration, involving Japanese and Indian pharmaceutical companies. The tribunal seated in Singapore awarded US$400 million as damages for the respondent's non-disclosure of relevant facts while selling shares to the claimant. Enforcement proceedings relating to this award have since been allowed by the Indian Supreme Court even when set-aside proceedings are pending in Singapore.

It would be interesting to see the trend in drafting of arbitration clauses following these judgments (since efforts are also being made to strengthen institutional arbitrations within India). Brexit has not affected choice of law in India.

GTDT: How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction?

SK: Owing to a rapidly growing economy, there is decent high-value commercial work available in India. It is rare for top lawyers to drop their rates driven by competition. At the same time, it is a large and diverse legal market with a lack of uniformity of operating principles for stakeholders. Accordingly, this is a generalised statement as to what one may normally expect here.

GTDT: What have been the most significant recent court cases and litigation topics in your jurisdiction?

SK: One very high-value litigation that continues to have a ripple effect concerned cancellation of 122 telecosm (spectrum allocation) licences issued by the government of India to telecosm companies on 'first come first serve' basis. The Supreme Court of India struck down this basis of allocation, terming the same unconstitutional, and cancelled all the licences. In the process, millions of dollars in investments were lost, leading to a serious threat to the Indian state of BIT litigation running to over US$24 billion (at rough estimates).

Another controversial step was the government of India bringing about a retrospective tax legislation to nullify a Supreme Court decision that struck down a US$2 billion tax demand on Vodafone. Vodafone has retaliated by serving BIT arbitration claims against India.

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Recent focus has also shifted to the empowered Competition Commission of India. There have been a spate of high level disputes and high profile entities (Google, major airlines, etc) contesting penalties of up to US$540 million. A US$1 billion fine imposed by the Competition Commission for alleged cartelisation in the cement industry was set aside by the Competition Appellate Tribunal (citing violation of natural justice in the proceedings).

GTDT: What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

SK: Clients avoid court litigation to the extent they can. Alternative remedies are explored including filing writ petitions (where the government corporations are involved), relief through consumer courts or initiating criminal proceedings (simply to exert undue pressure). As stated above, the chief reasons to avoid court litigation are the inordinate court delays and denial of costs (irrespective of the results). Average time for any litigation in India is currently about 15 years. Arbitrations are thus perceived to be a realistic option.

GTDT: Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction.

SK: India is somewhat negatively perceived in terms of enforcement of contracts, which has led to damping of investor sentiment. In an attempt to overcome this in 2015, special commercial courts (Commercial Divisions and Commercial Appellate Divisions) have been set up within each High Court of India. India has a total of 24 High Courts (as some states share a High Court), each being the highest court in its state. Essentially, this new legislation enables a cause of action to be brought in the first instance before the High Court in commercial disputes above a certain value. Further, the legislation requires judges specially trained in commercial laws to take cognisance of such (commercial) matters. It is too early to pronounce upon the success or otherwise of this move but it is definitely a step in the right direction.

In addition to help improve investor sentiment, the reform should also help avoid instances such as the *White Industries* case where an Australian investor was awarded damages against India for inordinate delays (of nine years) faced in court in trying to enforce an ICC award in its favour.

GTDT: What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

SK: The much awaited 2015 Amendment to the Indian Arbitration and Conciliation Act has been the most significant and radical change in the Indian arbitration landscape. Incorporating many positive recommendations made by the Law Commission of India as well as in judgments of courts, the amendment remedies many problems that kept India from ranking among the preferred seats of arbitrations. The new Act now allows parties to approach Indian courts for interim reliefs in foreign-seated arbitrations; indicates timelines for filing and disposal of arbitration applications before courts; clearly outlines the provisions in relation to award and determination of costs by tribunals; limits grounds on which awards arising out of international commercial

THE INSIDE TRACK

What is the most interesting dispute you have worked on recently and why?

I will mention a very neat and simple point of interpretation involved in an international sales transaction. On the face of it, it was very tricky against our clients (interplay between various emails and letters) but once the approach to interpretation was accepted, it resulted in a US$105 million award in the clients' favour. What was interesting was how a simple argument, neatly presented, can result in a large award.

If you could reform one element of the dispute resolution process in your jurisdiction, what would it be?

The single most fundamental reform required in the dispute resolution process in India is proper understanding and implementation of case management. It is because of poor case management and an overindulgence of Machiavellian strategies that precious court time and resources are eaten up and cases get frustratingly delayed.

What piece of practical advice would you give to a potential claimant or defendant when a dispute is pending?

I would give the same advice that we give to ourselves in our firm: whether we are for the claimant or the respondent, we put in substantive upfront preparation so that we are always on the front foot. We have seen miraculous results through this simple strategy. Very often, so-called weak cases turn out to be winners and the opposition taken by surprise. Once we are in the arena of dispute, we like to keep an active pace and keep the pressure on until conclusion.

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arbitrations seated in India may be challenged; defines the public policy ground clearly (and narrowly); and perhaps most importantly, eliminates the automatic stay of awards on filing of a challenge under section 34. The only downside of the recent amendments may be the overzealous 12-month timeline for completion of arbitrations, failing which, a recourse must be made to courts for extension of time.

GTDT: What are the most significant recent developments in arbitration in your jurisdiction?

SK: In recent years, Indian arbitration has seen a leap in progressive (pro-arbitration) judgments. In *Chloro Controls*, the Supreme Court expansively interpreted the Arbitration Act to hold that an arbitration agreement may bind non-signatory parties also under certain circumstances. This decision is a significant step in establishing an arbitration regime that best reflects the realities of complex international or interdependent commercial transactions.

A further key question that has come into focus through recent cases is that of arbitrability of disputes. The issue of arbitrability has seen a mixed line of jurisprudence, with courts taking progressive as well as conservative views, leaving the contour less than predictable. The Supreme Court in *A Ayyasamy v A Paramasivam* (2016) observed that only cases of 'serious fraud' shall be non-arbitrable, whereas allegations of fraud simplicitor remain arbitrable. However, a clear judicial distinction between the two categories is yet to evolve. At the same time, the Supreme Court has (somewhat unfortunately) also held that disputes under the Trust Act (ie, pertaining to private or family trusts) would not be arbitrable under any circumstance. This is as (according to the Court) there is a specified mechanism under the Trusts Act for resolution of disputes.

High Court decisions pending confirmation by the Supreme Court on this issue include judgments from the High Court of Bombay holding copyright disputes as arbitrable while shareholders' 'oppression and mismanagement' disputes are not (again, on the ground of specific statutory remedy being provided for). The Delhi High Court has taken a liberal view, holding that debt restructuring disputes may be referred to arbitration despite the existence of a tribunal set up specifically to decide such matters. Hence, there is a lack of consistency in the way courts have approached the issue of arbitrability.

GTDT: How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

SK: ADR (mediation, expert negotiation, etc) has not really taken off in India, at least not in major commercial disputes. The real reason for this is that the weaker party in a commercial dispute sees no reason to amicably settle given the court delays in normal litigation. Settlements do take place in commercial matters but these are often not out of any structured third-party intervention and usually through mutual personal efforts of parties, mutual or family connections.