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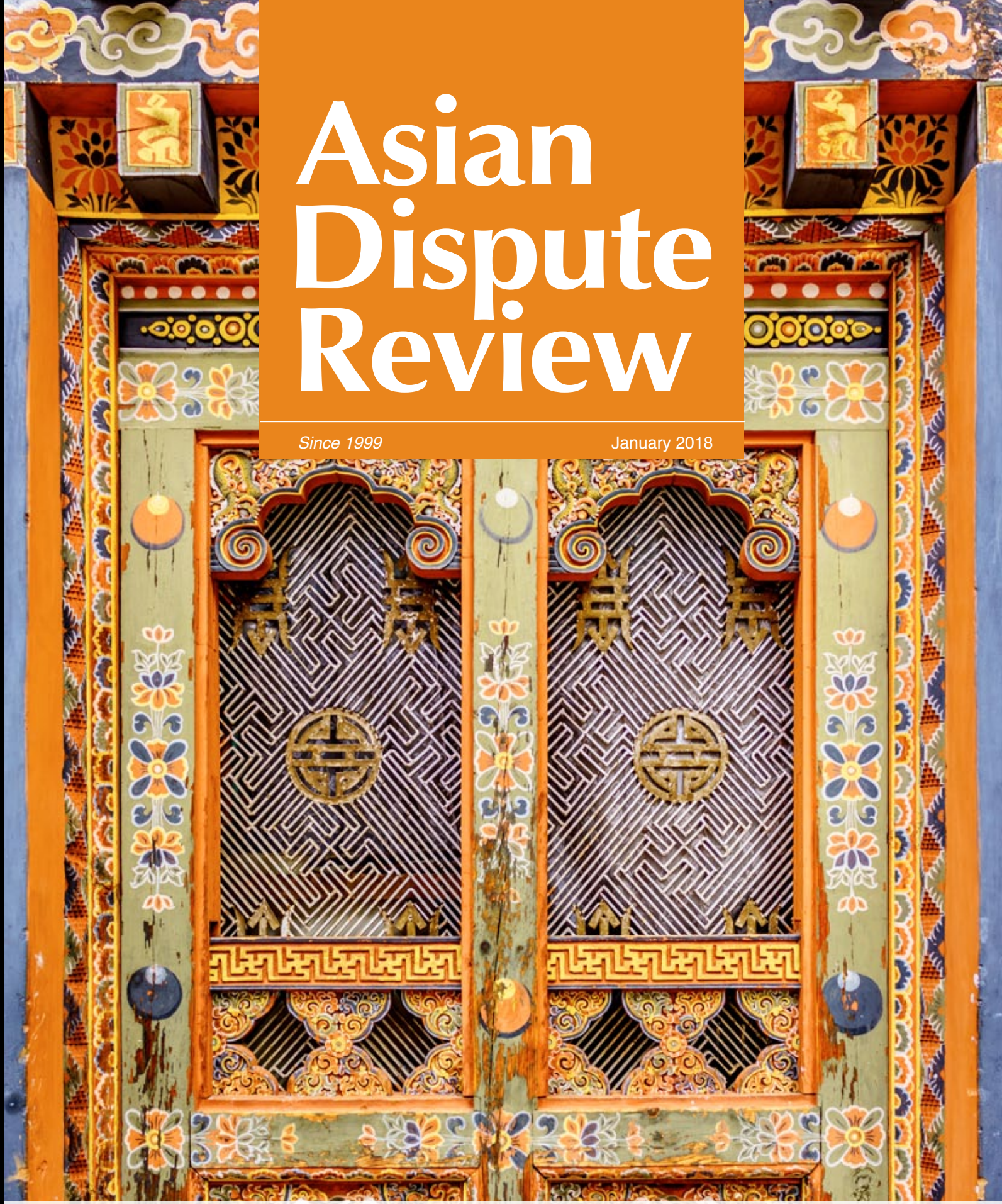

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EDITORIAL

This issue of *Asian Dispute Review* begins with a critique, prepared by Kshama Loya, Ashish Kabra & Vyapak Desai, of a report by the Indian High Level Committee to Review the Institutionalisation of Arbitration Mechanism (the Srikrishna Report). This is followed by an article by Christine Sim that considers the possibility of using costs orders to regulate third party funding in arbitration.

Louise Barrington then discusses the success of the Vis East Moot on its fifteenth anniversary, looking at the past and future of this well-known international arbitration competition. This is followed by an 'In-House Counsel Focus' article by Winnie Ma, who provides a practical analysis of the Arbitration Rules 2017 International of the Chinese Arbitration Association, Taiwan's leading international arbitral institution.

The 'Jurisdiction Focus' article by Bryan Dayton & Seri Takahashi then discusses developments in the United Arab Emirates, both positive and negative, that impact upon the UAE's goal of becoming a world-class international arbitration forum.

Nakul Dewan's new textbook, *Enforcing Arbitral Awards in India*, is then reviewed by Sheila Ahuja. This issue concludes with a report on Hong Kong Arbitration Week 2017 by Navin Ahuja.

We regret that this will be the last issue in which Navin G Ahuja serves as an Editorial Assistant. We thank him for the excellent support he has provided and wish him well in his future career.

The editorial team would like to take the opportunity to wish our readers all the very best for 2018.

General Editors

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Arbitration in India: The Srikrishna Report – A Critique

Kshama Loya, Ashish Kabra & Vyapak Desai

In this article, the authors critically discuss recommendations of the 2017 report of the Indian High Level Committee to Review the Institutionalisation of Arbitration Mechanism. The focus is on recommendations regarding the grading of arbitral institutions by a proposed autonomous body, the accreditation of arbitrators and reform of the Arbitration and Conciliation Act 1996.

Introduction

As part of an initiative to improve the ease of doing business in India, a number of seminal reforms have recently been introduced by the government. The enactment of the Insolvency and Bankruptcy Code, amendments to the Arbitration & Conciliation Act 1996[1] (the 1996 Act) and the establishment of commercial courts are all steps aimed at improving speed and efficiency in commercial dispute resolution in India.

As a step in the same direction, in January 2017 the Ministry of Law & Justice (MLJ) constituted a High Level Committee to Review the Institutionalisation of Arbitration Mechanism under the chairmanship of retired Supreme Court justice BN Srikrishna (the Committee). The purpose of this initiative was to suggest reforms aimed at improving institutional arbitration in India, strengthening the 1996 Act and improving dispute management systems under Bilateral Investment Treaties (BITs) involving India. The Committee submitted its report (the Report) in July 2017. It makes a number of recommendations for further reform of the arbitration landscape in India.[2]

Arbitration Promotion Council of India and the grading of arbitral institutions

The Committee recommends the establishment of an

Arbitration Promotion Council of India (APCI), the functions of which would include (i) grading arbitral institutions in India and (ii) recognising institutions that provide accreditation to arbitrators.[3]

> "The purpose of ... [the Srikrishna Committee] initiative was to suggest reforms aimed at improving institutional arbitration in India, strengthening the 1996 Act and improving dispute management systems under Bilateral Investment Treaties (BITs) involving India."

The Committee found that arbitral institutions in India lacked requisite infrastructure, did not have up to date rules, were poorly managed and lacked arbitrators with sector-specific expertise. In order to improve standards, therefore, the Committee recommends that institutions be graded by an independent body. This is intended to result in the development of certain minimum standards and objective criteria that the institutions should seek to achieve.

The idea of grading arbitral institutions is a novel one. This proposal would certainly provide guidance to arbitral institutions and set standards. The APCI would be responsible for laying down and implementing the grading policy. It is critical that the proposed process of formulating policies and grading of arbitral institutions is transparent. To that extent, the Committee has recommended that the grading system be published and that results be made available on a public portal. It is equally important that the APCI should aim to formulate objective standards for grading, as this would provide clear goals to the arbitral institutions and allow them to evaluate their status effectively. Anything contrary to this or in the nature of regulation would defeat the purpose of establishing the APCI and may not generate the requisite trust in the institutions.

The Committee also makes clear, however, that the APCI is not intended to be a regulator and that any act of regulating arbitral institutions would contravene party autonomy. It is contemplated that the APCI would be a professionally-run institution. However, the proposal as it currently stands would allow the government to nominate a majority of the members to the APCI governing board. This creates doubts with regard to the functioning and independence of the APCI and whether it may qualify as a *de facto* regulator of arbitration. Further, given that the government itself is a party to many arbitrations, the grading of arbitral institutions by a government-controlled institution would give rise to a potential conflict of interest. As a result, there are reservations against the establishment of the APCI and the grading of arbitral institutions.

Market competition may arguably be considered as a sufficient driver for the improvement of arbitral institutions. However, the position in India is not quite like that in other countries, such as China and Singapore. Market competition and government support in India have not, of themselves, led to the development of premier arbitral institutions thus far. There is, therefore, a need for a different solution.

Accordingly, it is suggested that the governing board of the APCI be expanded to seven members, with the addition of another overseas arbitration practitioner and a senior partner of a reputable law firm with demonstrable expertise in international and domestic arbitration being nominated by the Chief Justice of India. Upon the establishment of a specialised arbitration Bar and bench in India (see below), the governing board should also include individuals nominated by these bodies. This is expected to enhance the independence, reputation and professionalism of the APCI, such that it will remain a body promoting arbitration and not a regulator of it.

> "The Committee found that arbitral institutions in India lacked requisite infrastructure, did not have up to date rules, were poorly managed and lacked arbitrators with sector-specific expertise."

Accreditation of arbitrators

The Committee also suggests that the APCI should formally recognise institutions such as the Chartered Institute of Arbitrators that provide accreditation to arbitrators.[4] The Committee suggests that arbitrators accredited by an APCI-recognised institution would be preferred for high value arbitrations or international commercial arbitrations seated in India. It is also suggested that government contracts may stipulate the appointment of arbitrators accredited by an APCI-recognised institution.

Internationally, a number of institutions have evolved a practice of recognising professional arbitrators. This practice has gained favour and informs parties of available choices of well qualified, trained and expert arbitrators. However, the imposition of a mandatory requirement to select an accredited arbitrator from a list maintained by a recognised institution in the case of government contracts would be perceived as a limitation on party autonomy. Given the breadth of industries and disputes that arise from government contracts, limiting parties to a select pool of arbitrators may create situations in which the parties' choices would be extremely limited or would exclude experts in the field. Ideally, the creation of a pool of accredited arbitrators and making a list of such arbitrators publicly available would inform parties about potential candidates, leaving them to make informed choices with regard to appointments.

The creation of a specialist arbitration Bar & bench

The Committee makes several recommendations as to the creation of a specialised arbitration Bar and bench.[5] The authors would suggest further that senior practitioners be appointed to the bench as temporary judges for one to two years, purely for arbitration matters. Such a practice is prevalent in a number of jurisdictions. The expertise and experience of senior practitioners would immensely benefit the legal community and users in India by expanding the pool of judges and creating robust precedents.

Proposed amendments to the 1996 Act

The Report attempts to address an array of issues in this regard.[6] This article addresses only a number of proposals that are novel or which necessitate further deliberation.

(1) Appointment of arbitrators (section 11)

The Committee recommends that the Supreme Court or High Court shall in all cases only nominate an appointing authority, ie an arbitral institution graded by the APCI. Such arbitral institution would then appoint an arbitrator. The Committee has suggested the adoption of a default arbitrator appointment procedure along the lines of that which applies in Singapore and Hong Kong. This would be a laudable step.

> "The idea of grading arbitral institutions is a novel one. … The Committee … makes clear, however, that the APCI is not intended to be a regulator and that any act of regulating arbitral institutions would contravene party autonomy."

(2) Time limit for arbitration (section 29A)

The prescription of a time limit for the completion of arbitration under s 29A of the 1996 Act has generated great

debate. The Committee recommends that (i) international commercial arbitrations be excluded from this requirement, (ii) six months be prescribed for the submission of pleadings, and (iii) the 12-month time limit for completion of arbitration should commence thereafter. This proposal raises several questions.

(1) The Report is silent on the start date for computing the six-month period for submission of pleadings. This could relate either to the first preliminary meeting of the parties with the tribunal, or when the tribunal enters upon the reference.
(2) A party may seek an extension of time beyond the six-month period to submit its pleadings or even seek amendment of pleadings. Would such an extension be permitted? If so, would time for completion of the arbitration start to run only after this extended period?
(3) Would amendment of pleadings be permitted post the six-month period?
(4) In an institutional arbitration, should not the power to extend time vest with the institution?

> “Market competition and government support in India have not, of themselves, led to the development of premier arbitral institutions thus far. There is, therefore, a need for a different solution.”

The authors suggest that no specific time limit should be laid down for submission of pleadings and that a fixed period of 12 months, extendable by consent to 18 months, be retained. If, however, no period for submission of pleadings is prescribed, the time limit for completion should simply be fixed at 24 months. This would eliminate issues arising out of extensions for submission of pleadings and consequential computations of time. Furthermore, in the case of institutional arbitration, power should be vested with the institution to permit or refuse extensions of time. This would serve a dual purpose: firstly, the burden would be taken away from the courts to decide upon extensions in institutional arbitration cases (leaving them to deal with extension applications solely for *ad hoc* arbitrations) and, secondly, to promote institutional arbitration. It should be noted that, under several sets of arbitration rules, institutions perform the role of extending applicable time limits with regard to a number of aspects of an arbitration. Under the SIAC Rules, for example, the Registrar can extend the time limit for completion of an expedited arbitration, while under the ICC Rules of Arbitration, the ICC International Court of Arbitration is empowered to extend various time limits specified in those rules.

The authors recommend further that time could also be saved with regard to extension applications made to the court under s 29A(5) of the 1996 Act. If the tribunal has a reasonable apprehension that it would be unable to issue its award within the 12/18 month period (as the case may be), it must declare this to the parties – preferably 30 days before expiry of the stipulated completion period. This would enable parties to consider whether they should consent to an extension of time (in the case of a 12-month period) or apply to the court for one as soon as possible (in the case of an 18-month period). Further, it should be mandatory for Commercial Division courts to dispose of extension applications within 60 days.

The Report suggests the continuation of the tribunal's mandate pending the disposal of an extension application. This is a meritorious and pro-arbitration move. To do otherwise would be difficult and time-consuming where the tribunal includes three arbitrators. The authors believe that the courts are sufficiently able to determine such issues on the basis of the record of proceedings. If the tribunal wishes to have a say in an extension appication, it must make a record of a party's conduct or other circumstances that have delayed proceedings in its procedural orders, which can then be scrutinised by the court.

(3) Setting aside arbitral awards (section 34(3))

Section 34(2)(a) of the 1996 Act requires parties to furnish proof of grounds for setting aside an award. The Committee has duly recognised that this language has been incorrectly understood by courts to treat applications for the setting aside of awards in a manner akin to a lawsuit. Thus, to rectify this defect, the Committee has proposed that the phrase "furnishes proof" be replaced by "establishes on the basis of the arbitral tribunal's record".

The existing language is borrowed from the UNCITRAL Model Law and is akin to wording found in the New York Convention of 1958. Departure from such language should therefore be more measured. In certain situations, a party may be required to rely on facts and circumstances falling beyond the tribunal's record. These include, for example. cases involving allegations of fraud or corruption, failure to give a party proper notice, and situations giving rise to doubts regarding the impartiality or independence of an arbitrator that are discovered subsequently. It is therefore suggested that a separate explanation may be added without changing the existing language of s 34.

(4) Confidentiality of arbitration proceedings

The Committee's recommendation would put India on a par with jurisdictions such as Hong Kong, France and New Zealand, which have express legislative provisions mandating that arbitration proceedings and awards are confidential. This does not, however, extend to proceedings before courts in matters concerning challenges to or enforcement of awards.

(5) The immunity of arbitrators

The concept of arbitrator immunity has been gaining traction in a number of jurisdictions for some time. The Committee recommends the incorporation of an express provision in the 1996 Act to deal with arbitral immunity. The suggested provision is similar to section 29 of the English Arbitration Act 1996, which protects arbitrators except in cases involving bad faith. The inclusion of an express provision would certainly clear doubts regarding the scope of an arbitrator's immunity, as the absence of an express provision may arguably correlate with the current lack of cases against arbitrators in India. While such a provision may give respite to arbitrators against proceedings assailing their conduct, however, it may also serve as a breeding ground for recalcitrant and disgruntled parties to wage proceedings against arbitrators under the pretext of 'bad faith', thereby derailing arbitrations. The authors recommend that while India could adopt this concept in the 1996 Act, it ought to be accompanied by strict safeguards to prevent its abuse, such as maintaining a high threshold for proof of 'bad faith' and the mandatory imposition of costs in cases of unsuccessful challenges to arbitrators brought on the ground of bad faith.

(6) Model rules for ad hoc arbitration

The Committee suggests the adoption of a set of model rules for the conduct of *ad hoc* arbitration on an 'opt out' basis. This would provide welcome guidance for parties who choose the *ad hoc* route. However, the adoption of model rules alone may not achieve the intended aims of efficiency and speedy adjudication of disputes. Such an outcome is promised by institutional arbitration not merely on the strength of its rules but also through the application of practices such as the efficient administration of disputes and the appointment of experienced and trained arbitrators.

"… [A provision conferring arbitral immunity] ought to be accompanied by strict safeguards to prevent its abuse, such as maintaining a high threshold for proof of 'bad faith' and the mandatory imposition of costs in cases of unsuccessful challenges to arbitrators brought on the ground of bad faith."

The application of default arbitration rules rules may create confusion in the scheme of the 1996 Act. For example, s 23 of the 1996 Act prescribes that the statement of claim shall be filed in such time as may be agreed by the parties or determined by the arbitral tribunal. Under the default rules, a fixed period of 30 days or one prescribed under the arbitration timetable is provided for. In such a scenario, it is unclear which scheme would be applicable. Whilst such a conflict could be resolved by the application of relevant principles (in most cases by treating the default rules as part of the arbitration agreement between the parties), it risks creating a situation for satellite litigation.

It is suggested that instead of providing for default rules as an annexure, default rules considered as important for bringing greater procedural clarity to *ad hoc* arbitrations should be introduced in the main body of Part I of the 1996.

Other positive recommendations

The Committee has also recommended a number of further additional provisions of and amendments to the 1996 Act that are mostly progressive. The authors welcome the much-awaited recommendation that the proposed Act to amend the 1996 Act should apply to court proceedings arising only out of arbitrations commenced on or after 23 October 2015. The Government and its agencies have rightly been urged to incorporate a mandatory institutional arbitration clause in agreements involving five crores (50 million rupees). The Report also provides for the express recognition of emergency arbitration and emergency awards, which would place Indian legislation on a par with Hong Kong and Singapore. Lastly, permitting foreign lawyers to appear in India-seated arbitrations involving foreign law would also be a strong move forward. These are all welcome changes that seek to streamline and strengthen arbitration in India.

Dispute resolution under BITs

The Report also deals with dispute resolution mechanisms proposed in India's 2016 Model BIT and dispute prevention strategies.[7]

Article 15 of the 2016 Model BIT provides for a multi-step procedure – lasting up to 5 years and 9 months (if the maximum period is considered), including exhaustion of local remedies – before the investor can initiate arbitration. The Committee believes this to be "effective for investment disputes". Further, it advises mandatory mediation either before issuance of request for arbitration or immediately thereafter, to prevent the hardening of positions.

Mandating a period of five years for the resolution of an investor-State dispute through local remedies strikes at the very heart of effective alternative dispute resolution, however. While attempts are being made to complete domestic and international commercial arbitration within two years (with challenges to an award being brought within one year), a prolonged and arduous route of nearly six years before investor-State arbitration can be initiated is counter-productive.

The constructive solution would be to provide for negotiation and mediation at the preliminary stage. Upon becoming aware of the alleged measure giving rise to the dispute, the aggrieved party should be required to issue a notice of dispute. This should be followed by a 30-day cooling off period involving good faith negotiation, followed by mandatory mediation which should be concluded within 6 months. If no settlement results, the party issuing the notice of dispute may bring a claim before the Commercial Division of the appropriate High Court having jurisdiction to decide questions arising from the subject matter of the dispute. Upon failure to obtain a remedy within 12 months of initiation of the claim before the High Court, the aggrieved party issuing the notice of dispute may commence investor-State arbitration by issuing a notice of arbitration.

> “Mandating a period of five years for the resolution of an investor-State dispute through local remedies strikes at the very heart of effective alternative dispute resolution …”

The Committee has rightly recommended bolstering the Indian adjudication system as a dispute prevention strategy, bringing uniformity in operating procedures. Recommendations include appointing an International Law Adviser (ILA), along with a team of experts in international investment law to provide strategic advice to the Indian Government, and the establishment of an Inter-ministerial Committee (IMC).

However, the Report offers a quaint recommendation on empanelment of arbitrators to counter-balance ‘pro-investor’ arbitrators. While identifying certain experts in international investment arbitration as the available choices upon initiation of arbitration, it is not desirable to empanel arbitrators in the same vein as empanelling counsel for the State. To do this may give rise to challenges as to the impartiality and independence of State-appointed arbitrators and give rise to suspicion and accusations of apparent bias.

The Report recommends the incorporation of an appellate mechanism in BITs to review decisions of arbitral tribunals. Whilst this may be beneficial under free trade agreements involving several countries, an appellate mechanism in a BIT would be tantamount to implementing a further level of adjudication between two States by another arbitral tribunal, unless the parties nominate an established judicial organisation such as the Permanent Court of Arbitration to appoint the appellate body.

Conclusion

The recommendations made by the Committee are largely necessary and should bring about a positive change in the arbitration landscape of India. It is therefore hoped that the majority of the Committee’s recommendations will be accepted and incorporated in the 1996 Act at the earliest opportunity. However, as discussed previously, certain recommendations do require further consideration.

> “It is … incumbent upon both the judiciary and the legislature to take note of the varied interpretations and loopholes under the 1996 Act (and any that may arise in the legislation amending it), and to plug the gaps through both informed and uniform decisions and constructive further legislation.”

As the passage of time exposes fissures in a reformed statutory regime, time is of the essence to reconstruct and re-legislate, if need be. The arbitration regime in India continues to call for both clarification and a robust framework for its effective implementation. It is therefore incumbent upon both the judiciary and the legislature to take note of the varied interpretations and loopholes under the 1996 Act (and any that may arise in the legislation amending it), and to plug the gaps through both informed and uniform decisions and constructive further legislation.

1 *Editorial note:* See *India: amendments to the Arbitration and Conciliation Act 1996* [2016] Asian DR 55.

2 *Editorial note: Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017), available at http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf. See also MLJ press release of 4 August 2017, *High Level Committee on making India hub of Arbitration Submits Report*, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=169621.

3 *Editorial note*: Report, Part I, section VI, sub-section A.

4 *Editorial note*: *Ibid*, Part I, section VI, sub-section B.

5 *Editorial note*: *Ibid*, Part I, section VI, sub-sections C and D respectively.

6 *Editorial note*: *Ibid*, Part I, section VI, sub-section E.

7 *Editorial note*: *Ibid*, Part III.