

Dispute Resolution – Legal Milestones Financial Year 2020-21 and a Look Ahead

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1 The Year that Was

For the dispute resolution practice, the past financial year has been shaped primarily by the COVID-19 pandemic. Despite the initial disruption due to the national lockdown imposed by the Indian government, the legislature and judiciary moved swiftly to take measures to ensure fairness to pandemic-affected parties and seamless dispensation of justice.

The Insolvency and Bankruptcy Code, 2016 (IBC) remained suspended to prevent further strain on cash strapped businesses affected by the pandemic. An extension to the limitation period declared by the Supreme Court ensured that a party's right to seek relief against a counterparty was unaffected by delays caused due to the pandemic. Further, a significant transition, albeit temporary, of the judicial system to virtual meeting platforms offered a glimpse into the possible future of the Indian justice system.

The year also witnessed key developments in the insolvency and arbitration space. Pursuant to amendments to the IBC and related regulations in March 2020, initiation of corporate insolvency resolution process (CIRP) for defaults occurring since the pandemic-induced national lockdown remained suspended. Further, extensions for actions under CIRP and liquidation timelines were provided due to the nationwide lockdown. Separately, the Supreme Court provided much-needed clarity on

The financial year 2020-21 was significant in terms of legislative amendments and landmark judgements to assist businesses through the economic slowdown caused by the COVID-19 pandemic and resolve commercial disputes efficiently. Here we discuss some of the major developments in the past year and provide a brief overview on what to expect in the coming financial year.

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the ability of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) to adjudicate contractual disputes concerning a corporate debtor undergoing insolvency resolution.

Under the Arbitration and Conciliation Act, 1996 (Arbitration Act) unconditional stay will now be granted for enforcement of domestic arbitral awards if there is a *prima facie* case of fraud or corruption. Further, courts have rendered certain key decisions including those favoring enforcement of foreign awards; clarifying the validity of reliefs granted in emergency arbitrations; and holding that landlord-tenant disputes (not covered by Rent Control laws) are arbitrable.

1 Major Developments in the Financial Year 2020-21

1.1 COVID-19 Related Updates

- Amendments to Insolvency and Bankruptcy Code (IBC) and related regulations

Several corporates and businesses were hit hard by the pandemic and consequent lockdowns, leading to severe losses. This caused a domino effect where many corporates found themselves reeling under mounting debts with the threat of insolvency looming large over them.

In this backdrop, the IBC and its relevant regulations were amended in March 2020 and in subsequent months, to provide relief to corporates, particularly medium and small enterprises and protect them from insolvency proceedings and potential closure. These amendments include:

- Moratorium on CIRP initiation:* A moratorium was imposed on operational creditors, financial creditors and corporate applicants from initiating CIRP for any default arising on or after 25 March 2020. At first, the moratorium was only till 24 September 2020. However, given the continuing domino effect of the pandemic on businesses, the moratorium period was extended twice and made operational till 24 March 2021. No further extensions have been notified and hence creditors would now be able to initiate CIRP. For any defaults during the moratorium period, a CIRP can never be initiated. *Please [click here](#) for a more detailed analysis.*
- Extension of timelines for actions during CIRP and liquidation:* The IBC regulations were amended to provide extensions for various actions under the CIRP and liquidation process during the lockdown imposed by the Central government from 25 March 2020 to 29 May 2020. While the regulations provided extension of timelines for only the nationwide lockdown period imposed by the Central government, certain NCLTs provided extension of these timelines in cases where State governments imposed further lockdowns.

- Supreme Court extends the period of limitation

Given the difficulties faced by litigants in undertaking filings for various proceedings within the statutory limitation periods during the pandemic, the Supreme Court, *suo moto*, extended the period of limitation for all proceedings from 15 March 2020. In *Sagufa Ahmed's* case, the Supreme Court clarified that it had extended only the period of limitation and not any additional period beyond the limitation period during which the courts/tribunals have the discretion to condone delays. *Please [click here](#) for a more detailed analysis.*

Recently, the Supreme Court considered the relative normalcy of the situation and ended the extension of limitation with effect from 14 March 2021. Discontinuing the extension, the Supreme Court clarified that while computing limitation period, the period from 15 March 2020 to 14 March 2021 will stand excluded.

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Further, parties have been given a period of 90 days from 15 March 2021 to file any legal actions where the limitation period ended during the exclusion period or within 90 days thereafter.

The Supreme Court's extension of the limitation period provided much-needed relief to lawyers and litigants who were struggling to adhere to timelines and limitation periods during the lockdown and due to limited functioning of courts. With the lifting of limitation extension, lawyers are expected to initiate all pending legal actions, in a timely manner.

- Supreme Court directs waiver of interest-on-interest during the loan moratorium period declared by the RBI on term loans

With the onset of the pandemic, the Reserve Bank of India (RBI) issued circulars permitting banks, NBFCs and other lending institutions to grant a moratorium for payments from term loan borrowers due to COVID-19 (Loan Moratorium Circulars). The period of moratorium was initially three months and, thereafter, extended by a period of another three months, i.e., from 1 March 2020 to 31 August 2020. However, during the moratorium period, interest-on-interest would accrue.

Aggrieved by the Loan Moratorium Circulars, several stakeholders filed writ petitions seeking directions from the Supreme Court on whether the loan moratorium period could be extended further and if a complete waiver of interest and interest-on-interest during the loan moratorium period could be granted. The Supreme Court also considered whether the government can be directed to grant additional sector-wise relief packages. Interestingly, the government had announced an *ex-gratia* scheme waiving interest-on-interest on loan moratorium for borrowers who have borrowed up to INR two crores (INR twenty million).

The Supreme Court reasoned that interest-on-interest in term loans can be charged only in cases of wilful default and not in cases of non-payment during moratorium. Based on this, the Supreme Court directed that interest-on-interest on all loans covered by the Loan Moratorium Circulars should be waived. It further directed all lending institutions to refund or adjust in subsequent instalments, any interest-on-interest collected for the moratorium period. Separately, the Central government's waiver of interest-on-interest on loans up to INR two crores (INR twenty million) was held to be arbitrary. Lastly, the Supreme Court rejected pleas for extension of the moratorium period, total waiver of interest for the moratorium period and sector-wise relief, observing that these are matters of government policy.

The judgement provided clarity on and substantial relief to term loan borrowers. More importantly, it also balanced the interests of the banking industry that feared a collapse if complete interest amounts were directed to be waived.

- Other Judicial Decisions

In the case of *Zee Learn*, the Bombay High Court considered if the Loan Moratorium Circulars would also allow moratorium on redemption of debentures. The court held that the moratorium offered by the Loan Moratorium Circulars does not apply to redemption of debentures and mutual funds. The Delhi High Court also issued a similar order. Please [click here](#) for a more detailed analysis.

In another interesting development, the Delhi High Court, in *Ramanand v. Girish Soni*, held that a tenant cannot claim suspension of payment of lease or rental amount merely on account of non-use of the premises pursuant to the lockdowns imposed to curb the spread of COVID-19, unless the lease agreement provides for a waiver or suspension of rent. Please [click here](#) for a more detailed analysis.

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1.2 Supreme Court's decision on jurisdiction to adjudicate contractual disputes affecting the ability of a corporate debtor under CIRP to continue as a 'going concern'

In the case of *Astonfield Solar*, the Supreme Court held that a valid termination of a contract with a corporate debtor under CIRP can be stayed if such termination would disable the corporate debtor from continuing as a 'going concern' and result in the certain death of the corporate debtor.

Further, the Supreme Court held that the NCLT and NCLAT have jurisdiction to decide such contractual disputes that arise solely from or relate to a corporate debtor's insolvency. In this regard, the reason provided was that the NCLT is the forum vested with the responsibility of ensuring continuation of CIRP, which requires preservation of the corporate debtor as a going concern. However, the Supreme Court also cautioned that, the NCLT and NCLAT while exercising such jurisdiction should not usurp the legitimate jurisdiction of other courts, tribunals and forums when a dispute is unrelated to the insolvency of a corporate debtor.

1.3 Arbitration

- Amendment to the Arbitration Act

The Arbitration and Conciliation (Amendment) Act, 2021 (Arbitration Amendment Act) received Presidential assent on 11 March 2021. Some of the key changes introduced by the Arbitration Amendment Act are:

- Unconditional stay on arbitral award* – Prior to the Arbitration Amendment Act, the Arbitration Act did not provide for automatic conditional stays on domestic awards, if the award was challenged before the courts. This entailed courts typically requiring the defeated party to deposit the claim amount with the court pending the challenge. The amendment now provides an exception to this rule. Now, courts must grant unconditional stay on domestic awards if it is *prima facie* satisfied that the contract, arbitration agreement or arbitral award are induced/effected by fraud or corruption. The amendment is applicable to all arbitrations and related court proceedings, irrespective of when the arbitral or court proceedings were commenced.
- Norms for accreditation of arbitrators* – In 2019, the Arbitration Act was amended to introduce a Schedule containing norms for accreditation of arbitrators such as neutrality, equity, best international practices etc. The Schedule attracted criticism as it restricted the ability of parties to nominate arbitrators, especially foreign arbitrators. By way of an amendment, the Arbitration Act, now omits the Schedule and the amended Arbitration Act states that qualifications, experience and norms for accreditation of arbitrators will be specified by the regulations. These regulations are yet to be notified.

The amendment omitting the controversial Schedule aids party autonomy in arbitrations seated in India and is a welcome step. However, providing for an unconditional stay upon *prima facie* existence of fraud and corruption will likely open a window for disruption, since this could encourage insincere parties to raise claims of fraud and corruption in challenge proceedings to scuttle the enforcement of arbitral awards.

- Supreme Court's decision on the validity of an arbitration clause in the event of non-payment of stamp duty on the underlying contract

In the *N.N. Global Mercantile* case, the Supreme Court considered the issue of whether an arbitration agreement would be non-existent in law, invalid or unenforceable, if the underlying contract was not stamped as per the applicable stamping laws. The Supreme Court held that non-payment or underpayment

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of stamp duty on an underlying contract, does not invalidate an arbitration agreement contained in a contract. Further, due to contrary judgements by coordinate benches on this point, the Supreme Court referred the matter to a Constitution Bench for conclusively deciding the issue.

- Supreme Court's decision in *Vidya Drolia v. Durga Trading Corporation* on arbitrability of tenancy disputes
The Supreme Court settled the long standing issue of arbitrability of tenancy disputes by holding that landlord-tenant disputes (outside of Rent Control laws) are arbitrable as they are not actions *in rem* (against the world) but pertain to subordinate personal rights of the parties in dispute. The court noted that the Transfer of Property Act does not contain a bar against arbitration and carved out an exception for landlord-tenant disputes governed by rent control legislation where specific courts have been designated to exclusively hear disputes. *Please [click here](#) for a more detailed analysis.*
- Supreme Court's pro-enforcement decision in *Government of India v. Vedanta Limited and Ors*

This case concerned challenges to enforcement of an arbitral award passed in an arbitration seated in Malaysia, between two Indian parties, namely *Government of India and Vedanta*. Pursuant to arbitration proceedings between the parties seated in Malaysia, the Government of India challenged the award in a Malaysian court on the grounds that the award was in conflict with public policy. The challenge was rejected by the Malaysian court. Vedanta filed an enforcement petition in India, which was challenged before the Delhi High Court by the Government of India on grounds of limitation and it being contrary to the public policy of India.

On the issue of limitation, the Supreme Court ruled that the general limitation of 12 years is not applicable to foreign decrees and therefore, the limitation period for execution of a foreign decree is three years from when the right to apply accrues. Further, on the issue of whether the enforcement of an arbitral award can be refused in this case, the Court observed that the enforcement may be refused only if it violates the most basic notions of morality, justice or public policy of India. The enforcement court would, however, not second-guess or review the correctness of the judgement of the seat courts while deciding the challenge to the award. This judgement again reflects the increasing pro-arbitration stance taken by Indian courts and their positive efforts towards enforcement of foreign awards in India.

- Delhi High Court's recognition of 'Emergency Awards'

In February 2021, an interim order was passed by a single judge bench of the Delhi High Court in the *Future Retail v. Amazon.com* dispute, *prima facie* upholding the validity of emergency relief by an emergency arbitrator in an India seated arbitration between the two Indian parties. In this interim order the single judge held that emergency arbitration provisions under the Singapore International Arbitration Centre Rules are not contrary to the mandatory provisions of the Arbitration Act. A stay on this order was however granted by a division bench of the Delhi High Court, an appeal to which is presently pending before the Supreme Court.

Recently, the single bench of the Delhi High Court also issued its final judgement in the dispute holding that an emergency arbitrator is an arbitrator for all intents and purposes and an order passed by an emergency arbitrator is an order enforceable under the Arbitration Act. The single judge's decision upholding the emergency reliefs reflects the Indian judiciary's effort to uphold party autonomy. Notably, the single judge's judgement has been appealed before and stayed by the division bench of the Delhi High Court. It is also likely that the decision from the division bench would be further appealed before the Supreme Court, who will hopefully settle the issue of validity of emergency arbitrations and enforceability of emergency reliefs.

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- Gujarat High Court's decision on two Indian parties arbitrating outside India and seeking interim reliefs

The Gujarat High Court in the case of *GE Power Conversion v. PASL Wind Solutions* held that the Arbitration Act does not per se prohibit two Indian parties from choosing a foreign seat of arbitration and an award passed in such an arbitration is not contrary to the public policy of India.

The High Court further considered whether any interim reliefs under Section 9 of the Arbitration Act can be passed by Indian courts pursuant to a foreign seated arbitration by two Indian parties. The High Court observed that apart from domestic arbitrations, Section 9 applies only in cases of foreign seated 'international commercial arbitration', where one party must necessarily be non-Indian. It was therefore, held that Indian courts cannot issue interim reliefs in foreign seated arbitrations between two Indian parties.

This decision of the Gujarat High Court creates an anomaly in so far as it allows two Indian parties to arbitrate abroad but deprives them of the right to avail interim reliefs from Indian courts. This could create practical issues for Indian parties who want to choose a foreign seat of arbitration. An appeal is presently pending before the Supreme Court against the aforesaid decision and we expect that the Supreme Court will conclusively decide the issue of legality of two Indian parties arbitrating outside India and their ability to seek interim reliefs in India.

2 Looking Ahead

Despite the onslaught of the COVID-19 pandemic and subsequent nationwide lockdowns, the Indian judicial and arbitration system has in the financial year 2020-2021 seen several changes. The year saw significant developments in arbitration law- evincing the consistent, pro-arbitration approach of the Indian courts. It will be interesting to see how the law evolves from here, on various seemingly open issues such as arbitration by two Indian parties at a foreign seat, interim reliefs to such parties and validity of emergency reliefs under Indian law.

Further, March 2020 onwards, insolvency laws were suspended to protect corporate debtors and requisite changes were made to the justice dispensation system to accommodate urgent cases. As the economy now revives itself, what remains to be seen is how the insolvency framework will be amended to balance the interests of corporate debtors with those of creditors who have suffered equally due to mounting defaults of debtors. Additionally, the provisions under the IBC in relation to insolvency of individuals have currently been brought into effect only for personal guarantors of corporate debtors. The year ahead could also witness insolvency provisions in respect of all defaulting individuals being brought into effect.

Lastly, since the judiciary in the past financial year has primarily been hearing only urgent matters, this financial year could see a greater burden on the courts to deal with all matters, urgent or otherwise. It would also be especially interesting to see how much of the accommodations made in the last financial year in terms of provisions for virtual hearings would be permanently adopted and carried forward by the judiciary in future.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed [here](#).

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