

Dispute Resolution – Legal Milestones in 2019 and a Look Ahead at 2020

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1 The Year that Was

2019 stood out as a year of landmark judgements, with the Supreme Court of India emphatically ruling in favour of greater certainty in enforcement of contractual rights through arbitration and progressive restructuring legislation recognising the primacy of the commercial wisdom of creditors.

2019 also witnessed several legislative changes brought about to facilitate effective resolution of corporate, commercial and consumer disputes in India. While a majority of the legislative amendments are curative in nature, a few amendments are changing the Indian legal landscape.

The Insolvency and Bankruptcy Code, 2016 (Code) was amended twice to enable a faster resolution of insolvency disputes by protecting the interests of creditors. The Arbitration and Conciliation Act, 1996, was also amended to introduce, among other things, a nodal arbitration agency to make arbitration procedures more robust and friendly. Sweeping amendments to the Consumer Protection Act, 1986 were also introduced to provide for timely and effective administration and settlement of consumer disputes.

The year 2019 witnessed several landmark judicial precedents and notable legislative amendments promising resolution of corporate, commercial, and consumer disputes in a timely manner. Here we discuss some of the major developments in the past year and give a brief overview of the plausible changes in 2020.

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2 Major Developments in 2019

2.1 Insolvency and Bankruptcy Code, 2016

- Insolvency of Personal Guarantors

Chapter III of the Code (relating to the insolvency and bankruptcy of individuals and partnership firms), to the extent that it relates to personal guarantors of a Corporate Debtor, was made effective from 1 December 2019. The government also notified the attendant rules and regulations governing the insolvency and bankruptcy of personal guarantors.

The relevant rules define 'Guarantor' as a debtor who is a personal guarantor to a corporate debtor. The prerequisites for initiation of insolvency against a Guarantor are (i) invocation of the guarantee by a creditor; and (ii) default in payment under such guarantee, either in part or full. The minimum default threshold for initiating insolvency is Rs. 1000.

Insolvency of Guarantors has several distinctive features that set it apart from the insolvency of Corporate Debtors, some of which are listed below:

- *Expansive role of Resolution Professional:* The role of the Resolution Professional (RP) in a corporate insolvency process commences only after the admission of the insolvency application. On the other hand, in the case of insolvency of Guarantors, the Adjudicating Authority appoints the RP after the insolvency application is filed by the Guarantor or the Creditor. Post such an appointment, the RP makes a preliminary assessment on the validity of the insolvency application and submits a report to the Adjudicating Authority for approval or rejection of the insolvency application.
- *Interim Moratorium:* The concept of 'Interim Moratorium' has been introduced. The moratorium kicks in as soon as the insolvency application is *filed*, preventing the enforcement of any debts of the Guarantor and staying related legal proceedings. The moratorium in a corporate insolvency process commences only post '*admission*' of the insolvency application.
- *Repayment plan and veto powers of the Guarantor:* Under the Code, a repayment plan is prepared by the Guarantor in consultation with the RP. Further, the Code does not permit any modification of the repayment plan, without the sole approval of the Guarantor, thereby providing the Guarantor veto rights for any modification.
- *Other Significant Amendments to the Code*
 - *Corporate Debtor can now initiate insolvency against another corporate person:* The Code now permits a Corporate Debtor to initiate insolvency against another corporate person for defaulting on its dues.
 - *Expanded tenure of Resolution Professional:* The RP's tenure while managing the affairs of a Corporate Debtor has been expanded to cover the period between the conclusion of the insolvency process and implementation of the resolution plan/ commencement of liquidation.
 - *Essential goods and services:* A Corporate Debtor is protected from disruption of the supply of goods and services, which the RP considers critical to maintaining the Corporate Debtor as a going concern, subject to payment of dues by the Corporate Debtor.

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- Supreme Court's decision in *Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta and Ors.*

On 15 November 2019, the Supreme Court of India pronounced its much-awaited decision concerning the hotly contested insolvency of Essar Steel Limited. The decision clarified several aspects of the Code and also addressed the constitutional challenge to the Insolvency and Bankruptcy (Amendment) Act 2019 (2019 IBC Amendment).

- CoC's commercial wisdom is paramount: The Supreme Court has reaffirmed the primacy of the commercial wisdom of the Committee of Creditors (CoC) while determining the most suitable resolution plan. It held that the CoC's assessment of the '*feasibility and viability*' of a resolution plan must consider "*all the aspects of the resolution plan, including the manner of distribution of funds among various classes of creditors.*" In this regard, the CoC can suggest an amendment to the commercial proposal of a prospective resolution applicant if so required.
- Limited Judicial Review: Limited judicial review of the decisions of CoC by National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) has been recognised. The Supreme Court held that the NCLT and the NCLAT do not possess any residual equity jurisdiction to interfere with a business decision taken by the CoC, provided that such decision is otherwise in conformity with the provisions of the Code, any other law and the regulations.
- Creditors to be treated 'equitably,' not 'equally': Recognising that '*equitable treatment*' is accorded to '*similarly situated creditors*' depending upon the class to which they belong, (i.e., secured or unsecured, financial or operational), the Court held that the CoC in its commercial wisdom may approve a plan which provides for "*differential payment to different class of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors.*"
- Constitutionality of the 2019 IBC Amendment: The Court upheld the provisions of the 2019 IBC Amendment which provide, *inter alia*, for a minimum amount of notional liquidation value to be payable to operational creditors and dissenting financial creditors. It also held that the 330-day time limit prescribed for the completion of the insolvency process was not sacrosanct and may be extended in exceptional cases.
- Other Judicial Decisions

In addition to the decision in *Essar Steel*, the Supreme Court pronounced other notable judgments. It held, (i) that the Adjudicating Authority can only decide contractual matters between parties and not those falling in the realm of public law; (ii) that inherent powers under Article 142 of the Constitution can be resorted to in exceptional cases to extend the timeline for corporate insolvency process.

2.2 Arbitration and Conciliation Act, 1996

- Arbitration and Conciliation (Amendment) Act, 2019

The Arbitration and Conciliation (Amendment) Act, 2019 (2019 Arbitration Amendment Act) was one of the most anticipated and analysed amendments this year, as it introduces a government regulator of arbitration with rulemaking powers and prescribes minimum qualifications for a person to act as an arbitrator.

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The notable features of the 2019 Arbitration Amendment Act are as follows:

- *Arbitration Council of India (ACI)*: The ACI is established as an independent nodal agency to promote alternative dispute redressal mechanisms, drive policy/regulatory reforms in arbitration, strengthen institutional arbitration and promote uniform standards. However, there are concerns that the creation of a government regulator of arbitration with rulemaking powers, which has no precedent in any arbitration-friendly jurisdiction, is incongruous to the very notion of arbitration as a party autonomy governed alternate form of dispute resolution.
- *Accreditation of arbitrators*: The 2019 Arbitration Amendment Act provides for qualification, experience criteria and norms for accreditation of arbitrators. A foreign scholar, foreign-registered lawyer or a retired foreign officer is disqualified from acting as an arbitrator, which is needlessly restrictive.
- *Setting aside a domestic award on the ground of incapacity or fraud*: The 2019 Arbitration Amendment Act now requires a party seeking to set aside a domestic award on the ground of incapacity or fraud, to furnish proof that forms part of the arbitral tribunal's record.
- New Delhi International Arbitration Centre (NDIAC)

The NDIAC is established under the New Delhi International Arbitration Centre Act, 2019, to promote institutional arbitration and make India an international arbitration hub. While the rationale of promoting institutional arbitration through the NDIAC is admirable, concerns have been raised that the NDIAC's neutrality may be questioned considering the active role that the Central Government will play in its establishment and operations.

- Supreme Court's decision in *Hindustan Construction Company v. Union of India*

Reaffirming the finality of arbitral awards, the Supreme Court struck down section 87 of the Arbitration and Conciliation Act, 1996 (Act) which was amended by the 2019 Arbitration Amendment Act to provide for an automatic stay on the enforceability of domestic awards where an application challenging the award under section 34 is filed.

Assuaging concerns over the enforceability of arbitral awards in India, the Court held that Section 87 of the Act was manifestly arbitrary for some of the following reasons:

- *Automatic stay retrospectively reintroduced*: By retrospectively re-introducing an automatic stay on the enforcement of a domestic award (which was effectively done away with under Section 36 of the Act prior to the 2019 Arbitration Amendment Act), Section 87 of the Act militated against the very object of the Act and was unreasonable and contrary to the public interest.
- *Parity with the procedure for stay of civil appeals*: Even in the case of civil appeals under the Civil Procedure Code (where the scope of reviewing an appealed judgment is broader as compared to the limited grounds available under Section 34 of the Act) there is no automatic stay.
- *Decision in BCCI v. Kochi Cricket not considered*: The amendment to Section 87 of the Act disregarded the observations of the Supreme Court in *BCCI v. Kochi Cricket*, where the Court held that the amended provisions of Section 36 of the Act would apply to all pending proceedings initiated under Section 34 of the Act, irrespective of the date of commencement of the arbitral proceedings.

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- Other Judicial Decisions

In addition to reaffirming the applicability of the '*Group of Companies Doctrine*' (where an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns); arbitrability of fraud; and the restricted scope of challenge to domestic and foreign awards, the Supreme Court also pronounced several judgments analysing the applicability of the Limitation Act, 1963. It reaffirmed that the period spent in *bona fide* negotiations by parties towards settlement may be excluded for computing limitation and in the case of fraud, limitation would begin to run on the discovery of the fraud.

2.3 Consumer Protection Act, 2019

- Consumer Protection Act, 2019

To address challenges faced by consumers in the digital age, the legislature has repealed the Consumer Protection Act, 1986, and enacted the Consumer Protection Act, 2019 (CPA). This Act aims at modernising the consumer protection regime in India and enhancing timely and effective administration and settlement of consumer disputes.

Some notable features of the CPA are:

- E-Commerce transactions covered: The definition of '*consumer*' has been expanded to include any person buying goods or hiring/availing services, including online or offline transactions through electronic means or teleshopping.
- Product liability & unfair contracts: The CPA has introduced the concept of '*product liability*,' whereby product manufacturers, sellers and service providers are now liable to compensate a consumer for any harm caused by defective products or deficiency of services. The concept of '*unfair contracts*' is aimed at protecting consumers from unilaterally skewed or onerous contractual terms imposed by manufacturers, service providers etc.
- Unfair Trade Practices: The definition of '*unfair trade practices*' has expanded to include, (i) the sharing of personal information given by a consumer in confidence, (ii) misleading electronic advertising, (iii) refusing to take back or withdraw defective goods, or withdraw or discontinue deficient services, and (iv) refusing to refund the consideration within the period stipulated or in the absence of such stipulation, within a period of thirty days.
- Other Judicial Decisions

Noting the inclusive nature of the terms '*services*' and '*deficiency*' under the CPA, the Supreme Court recently held that statutory fees levied for any service provided, maybe the subject matter of consumer court's jurisdiction provided that there is a '*deficiency in service*.' Also, providing relief to stranded homebuyers, the Delhi High Court recently held that the CPA and the Real Estate (Development and Regulation) Act, 2017 operate concurrently and both recourses are available for home buyers.

3 Looking Ahead

There can be no doubt that the amendments in 2019, spanning across different sectors, have a clear emphasis on addressing lacunae in existing legislation. The amendments to the arbitration regime and particularly, the Supreme Court's swift action in striking down legislative obstacles to enforcement of awards, are positive steps

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towards aligning India with international best practices and inspiring investor confidence. However, it remains to be seen whether India develops into a preferred destination for international arbitration given the exclusion of foreign-registered lawyers and academics from acting as arbitrators.

Similarly, amendments to the Code are a boost to the resolution of distressed companies and will add to the ease of doing business and enforcement of contractual rights against corporate guarantors. While the decision in Essar Steel restores faith in the primacy of a creditor driven resolution process, recognition of a corporate debtor's independent rights as a creditor is also an important step towards realising the true object and intent of the Code.

That said, the real test of these legislative amendments will be predicated on their successful implementation.

For a round-up of some of the key legal developments across sectors in 2019 and a brief insight on what to expect in 2020, please read our sector-wise updates, which can be accessed at: <https://trilegal.com/knowledge-repository/page/2/?title=milestone>

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