

# India Overhauls Its Arbitration Regime

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Sweeping changes have been made to India's arbitration legislation, the *Arbitration and Conciliation Act, 1996* (the "1996 Act"). These changes have been made through an executive ordinance and came into effect on 23 October 2015. The amendments will lapse if they are not ratified by the Indian Parliament within six months.

The amendments will have a direct and immediate effect on arbitrations involving Indian parties, whether in India or outside. There are several changes; this note identifies the impact of the most significant ones.

## Costs

The amendments propose a number of changes to make Indian arbitration, including international arbitrations seated in India, more efficient, and bring India's regulation in line with global best practices. One that could be a game changer is the introduction of s.31A to the 1996 Act. This is an overriding provision which allows Indian courts hearing arbitration-related proceedings to award costs on a more robust basis than before.

While India has in principle followed the traditional English law rule with respect to costs i.e., that the loser pays the winner the costs of litigation, the 'costs of litigation' are calculated on an antiquated basis (as prescribed in India's *Code of Civil Procedure*) and the losing party usually ends up having to pay only a fraction of the winning party's actual costs. The absence of the risk of paying large amounts towards the winning party's legal costs incentivised the strategic use of (unmeritorious) court proceedings by recalcitrant parties in international arbitrations – such as applications for arbitrator appointment and set aside.

s.31A, which allows Indian courts to award costs based on the winning party's actual costs, should hopefully deter such unmeritorious litigation. Further, s.31A also allows Indian courts to take parties' conduct into account when deciding how to award costs, and to use cost sanctions to discourage excessive, dilatory or unreasonable conduct on the part of litigants. Whether or not Indian courts choose to wield this stick remains to be seen. But, in any case, arbitral tribunals deciding India-related disputes may well take comfort that the Indian arbitration regime supports robust cost decisions.

## Interim relief

The amendments also propose some significant changes with respect to the applicable regime for arbitrations seated outside India. These changes are designed to make it easier for businesses to arbitrate their disputes offshore.

While the *BALCO* judgment in September 2012, and more recently the [Reliance Industries](#) judgment, have laid down principles that should reduce excessive intervention by Indian courts in arbitrations outside India,

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there was criticism that Indian courts had thrown the baby out with the bathwater e.g., Indian courts could not issue interim relief even in *support* of international arbitration.

This lacuna has now been resolved. The new position is back in line with the *UNCITRAL Model Law*. The amendments clarify that while Indian courts cannot generally intervene in foreign seated arbitrations, there are certain exceptions to this: ss. 9 (grant of interim measures by courts), 27 (court assistance in taking evidence) and certain appeals – all of which are designed to *support* foreign seated arbitrations.

This is a positive development for companies: by arbitrating outside India, they can minimise undesirable intervention by Indian courts while at the same time retaining recourse to valuable relief e.g., preservation of assets in India.

## Direct access to higher judiciary

The amendments (ss.2(e) and 47) confer jurisdiction to hear all questions relating to international commercial arbitrations, including applications for the enforcement of foreign awards, to the High Courts (i.e., the highest court in each state). This is another potential game-changer. Under the old regime, arbitration applications in most instances were first heard by the district courts. This led to considerable delays (it can take up to 6-10 years to complete a matter in the district courts). Also, because district court judges are less familiar with international arbitrations, there was a real risk of poor judgments that then had to go through the appeal process, leading to further delays and costs. While it remains to be seen how efficiently the High Courts deal with the glut of cases that will now be transferred from the lower courts, this change is positive and should lead to better decisions in the first instance.

## Other changes

There are a number of other amendments – such as the limitation of the infamous “public policy” ground for challenging awards – that are on the whole positive. As with most Indian legal reform, however, the devil lies in the implementation of the changes by the judiciary. For example, the specified grounds of challenge under “public policy”, such as “justice and morality” are vague enough to be subject to abuse; likewise, time-limits for awards (of 12 months, and extendable to 18 months) and related procedure (involving court application to extend the time-limits beyond 18 months) can become yet another source of delay. However, given the recent string of pro-arbitration rulings from the Indian judiciary, there is good reason to believe that these changes to the Indian arbitration regime will be implemented by the Indian judiciary in a positive manner.

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