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INDIA ARBITRATION ROUND-UP:
MARCH 2019

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A steady stream of arbitration cases continues to come out of the Indian courts, covering investment disputes, domestic arbitration and the enforcement of foreign arbitral awards.

With India's general election looming on the horizon, it is unclear how the arbitration landscape will develop in 2019. While India's overall ranking in the World Bank's annual 'Doing Business 2019' report jumped from 100 to 77, this was not due to any real improvement in enforcing contracts, where India still ranks in lowly 163rd position. For foreign investors in India, arbitration is the preferred method of dispute resolution and developments in arbitration can have a real impact on investment protection strategies.

In this briefing, we highlight significant developments in the past six months.

Key developments

- No stay of treaty proceedings in 2G scam dispute
- Courts examine whether non-signatories can be bound by arbitration agreement and the effect of unsigned arbitration agreements
- Supreme Court lays down factors for determining seat of arbitration
- No stamp duty payable on enforcement of foreign awards
- Supreme Court deals with principles for awarding interest on arbitral awards

The Arbitration and Conciliation (Amendment) Bill 2018

In our last India briefing, we covered the proposed amendments to India's arbitration legislation through the Arbitration and Conciliation (Amendment) Bill 2018. However, these amendments remain on hold for the time being, as the Bill, which aims to introduce a series of changes targeted chiefly at strengthening institutional arbitration, was passed by the Lower House (Lok Sabha) but has still not been passed by the Upper House (Rajya Sabha).

There has been some criticism of the Bill from the arbitration community in India and abroad. A particular area of concern is the constitution of the Arbitration Council of India, which as contemplated by the Bill, is a governmental body with wide-ranging powers that will enable it to regulate arbitration and arbitrators. The introduction of a regulatory body is perceived to be against the spirit of arbitration. Some commentators have also taken issue with the composition of the Commission, in circumstances where the Indian government is the country's biggest litigant.

In a recent speech in New Delhi, Lord Peter Goldsmith QC criticised the Bill as "[*setting] back the cause of Indian arbitration by many years, perhaps a generation*". He was concerned about the wording of the Bill that suggests "qualified" arbitrators must be Indian advocates and considered the introduction of the Commission an "*anathema to the idea of free and autonomous arbitration*".

It remains to be seen how the government will respond to these criticisms, if at all. It is true that, in a jurisdiction that has historically struggled with efficient arbitration, introducing a body that creates a hierarchical structure and adds another level of administration to the arbitration process will be less than helpful. Instead of regulating arbitration, the focus should instead be on widespread adoption of efficient practices amongst practitioners and arbitrators.

No stay of treaty proceedings

In *Union of India v Khaitan Holdings (Mauritius) Ltd & ors*, the Delhi High Court reinforced the Courts' approach to non-interference in arbitration proceedings, including investment arbitration. It refused to grant an ad interim stay of investment arbitration proceedings commenced against India under the India-Mauritius BIT.

The UNCITRAL arbitration was originally initiated in 2012 by Khaitan Holdings, a shareholder in an Indian company whose telecom spectrum licence was cancelled in the fallout from the well-known 2G spectrum scandal. After the arbitration had lain dormant for several years pending the outcome of Indian criminal proceedings, the first date of the hearing before the tribunal was scheduled for 28 January 2019.

India's key grounds for seeking the anti-arbitration injunction were that (a) the respondents could not have initiated a valid dispute under the BIT since they did not fulfil the BIT qualifications of "investor" and "investment" and (b) the arbitral proceedings were an abuse of process.

In line with conventional arbitration theory, the Court held that these issues ought to be raised before and adjudicated upon by the tribunal itself. The Court also held that the arbitral proceedings which are already underway could not be termed as oppressive, vexatious or an abuse of process at this stage. While the Court did feel the need to make certain comments on the substantive arguments on jurisdiction and merits, these were on a *prima facie*, non-binding basis.

An issue of some concern is the Court's endorsement of the earlier finding in *Union of India v Vodafone Group* (covered in our previous India Arbitration Round-up) that:

(a) BIT proceedings are not governed by the Indian Arbitration Act as they are not "*commercial arbitrations*"; and

(b) the jurisdiction of Indian courts in relation to BIT proceedings would be determined under the Civil Procedure Code.

If the Indian courts maintain this view, one consequence could be that investors seeking to enforce BIT awards in India may not be able to use the procedure for enforcement of foreign awards under the Arbitration and Conciliation Act 1996 (the Arbitration Act).

Non-party to arbitration agreement still party to arbitration proceedings?

The recent decision of the Delhi High Court in *Royale India Rail Tours Ltd. v Cox & Kings India Ltd. & Anr*, is the latest in a line of Indian Court decisions on the question of whether a non-party to an arbitration agreement can be made a party to arbitration proceedings under that agreement.

The dispute in this case arose out of a JVA between Indian Railway Catering and Tourism Corporation and Cox & Kings India Ltd. The JV Co was not itself a party to the JVA. Both the JVA and the

Articles of the JV Co contained arbitration clauses which referred to resolution of disputes between the JV partners only.

In arbitrations which arose under the Articles and the JVA, the tribunal issued orders allowing the JV Co to be deleted as a party to the proceedings. Cox & Kings and the JV Co appealed these orders. They argued that the JVA and the Articles formed part of a single transaction and, because the primary relief sought was specific performance of the JVA (which would impact the JV Co as well), the JV Co was a necessary and proper party to the proceedings.

The Court found that the arbitration agreements under the Articles and the JVA only bound the JV partners. It distinguished recent decisions of the Supreme Court which had taken a more expansive view, namely: (1) *Cheran Properties*, where the Court held that a signatory company can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to do so; and (2) *Ameet Lalchand*, where the Court held – more radically – that a non-signatory may be bound by arbitration agreements in situations where it is a party to an agreement that is "*interconnected*" with the agreement containing the arbitration agreement.

In this case, the Court considered it was clear that the arbitration agreement bound the JV partners only. The case is a reminder that where it is desired that all parties to a transaction be brought before the same arbitral forum, each of those parties should be stated to be party to the relevant arbitration agreement. This applies in the Indian context, just as elsewhere.

Amendments to Arbitration Act do not impact arbitrability of consumer disputes

In Emaar MGF Land Limited v Aftab Singh, the Supreme Court clarified the scope of arbitrable disputes and held that Section 8 of the Arbitration Act does not exclude the jurisdiction of a consumer forum to hear a consumer dispute, even where there is a valid arbitration agreement between the parties.

The National Consumer Disputes Redressal Commission (NCDRC) refused to refer a dispute before it to arbitration, on the basis that the dispute properly fell within the jurisdiction of a consumer forum and was non-arbitrable as a matter of public policy. The NCDRC was guided by "*court-evolved jurisprudence*" that the Consumer Protection Act provided a special remedy capable of being continued despite the presence of an arbitration agreement.

The issue before the Supreme Court was whether the 2015 amendments to Section 8 of the Arbitration Act (the 2015 Amendment Act) rendered such prior case law irrelevant. Section 8(1), as amended, reads: "A judicial authority, before which an action is brought in a matter which is the subject of an arbitration shall (…) *notwithstanding any judgment, decree or order of the Supreme Court or any Court*, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

The Court found that the amendment to Section 8 was not intended to do away with "special or additional remedies" contained in other legislation or override an entire body of case law classifying types of disputes as non-arbitrable. Rather, the amendment was designed to minimise the extent to which judicial authority can refuse to refer a dispute to arbitration on the sole basis that *prima facie* no valid arbitration agreement exists.

While there may be a legitimate debate on whether or not consumer disputes should be arbitrable in the context of Indian public policy, the Court's reading of Section 8 (as amended) was undoubtedly correct. This case is, perhaps, another example of how the amendments under the hastily introduced 2015 Amendment Act have resulted in some unintended consequences and unnecessary litigation.

Unsigned arbitration agreement enforced

In a decision giving primacy to the parties' intention to arbitrate, the Supreme Court confirmed in *Caravel Shipping Services Private Limited v Premier Sea Foods Exim Private Limited*, that an arbitration agreement will not be rendered unenforceable by virtue of it being unsigned. Rather, the sole requirement for a valid arbitration agreement is that it be in writing.

The arbitration agreement in question was contained in the printed conditions annexed to an unsigned Bill of Lading, which provided that the respondent agreed to be bound by all terms on both sides of the Bill. The Kerala High Court had refused to enforce the arbitration agreement, on the ground that it was in a printed form and did not evince an obvious intention to arbitrate.

The Supreme Court overturned the High Court's decision and held that the arbitration clause was binding because the respondent had expressly agreed to be bound by it. The respondent had also itself expressly relied on the Bill (though unsigned) as part of its own cause of action, and so could not be allowed to disavow the unsigned arbitration agreement. The Court considered the requirements for a valid arbitration agreement under Section 7 of the Arbitration Act and found that the "only prerequisite" is contained in Section 7(3), which states that an arbitration agreement must be in writing. The fact that Section 7(4) states that this requirement will be fulfilled by a signed arbitration agreement does not mean that all arbitration agreements must be signed.

This is a pro-arbitration decision, indicative of a growing inclination on the

part of the Indian Courts to find a valid arbitration agreement and reduce the wiggle-room for parties to avoid their contractual obligation to arbitrate.

However, the *Caravel Shipping* decision does not imply that an arbitration agreement is brought into effect the moment it is committed to writing. In the Bombay High Court decision of *M3NERGY Sdn. Bhd. v Hindustan Petroleum Corporation Ltd*, the Court found that where oral and documentary evidence clearly indicate that a draft Joint Executing Agreement was not a concluded agreement between the parties, the arbitration clause in that agreement was also not concluded. *Caravel Shipping* – which involved a concluded agreement – did not assist the party trying to rely on the arbitration clause.

Supreme Court lays down guidance on determining seat

In a decision that put to rest long-standing confusion between the terms "venue", "seat" and "place" and underscored the importance of clear drafting, in *Union of India v Hardy Exploration and Production*, the Supreme Court also set out the principles applicable to determining the seat of arbitration proceedings.

In this case, the parties had provided that the *venue* for arbitration proceedings was Kuala Lumpur. The arbitration agreement also specified the applicability of the UNCITRAL Model Laws 1985, Article 20 of which states that parties may agree the place of arbitration, failing which it shall be determined by the Tribunal.

The Court stated that, in the first instance, where a "place" is agreed upon and is not qualified by any conditions, it receives the status of a "seat", i.e., the juridical seat of arbitration (by reference to which the curial law is determined). The terms "place" and "seat" may therefore be used interchangeably. However, where a reference to "place" is accompanied by conditions precedent (for example, that it has to be either agreed by parties or determined by the Tribunal), these conditions have to be satisfied before the "place" can become the seat. Lastly, the Court noted that a venue could become a seat "*if something*

else is added to it as a concomitant", such as the governing law of the contract, the applicable rules, etc.

In this case, the Court found that the reference to "place" was subject to conditions precedent, which had not been satisfied, and that Kuala Lumpur was not the seat or the place of the arbitration. Interestingly, the Court found that while the hearings had been held in Kuala Lumpur and the award signed there, this did not amount to a "determination" by the Tribunal on the seat – rather, the Court considered that a determination required a positive decision from the Tribunal.

The Court did not determine what the seat actually was, but nevertheless found that, as Indian law was the governing law of the contract, the Indian Courts had jurisdiction to entertain an application relating to the award under section 34 of the Indian Arbitration Act.

This decision provides guidance on the factors the Indian courts will apply to determine the seat of arbitration. Needless to say, all this can be avoided if parties clearly designate the seat of arbitration in their arbitration agreement in the first place. Pursuant to this decision, parties to arbitration proceedings with ties to India may wish to ensure that, where the identity of the seat is in doubt, the Tribunal's determination on the seat of the arbitration proceedings is clearly set out in the award.

Stamp duty no bar to enforcement of foreign award

The path to enforcement of foreign arbitral awards can lead down some unexpected rabbit holes, particularly in

India. However, the decision in *M/S Shriram EPC Limited v Rioglass Solar SA* makes clear the Courts' stance on making this path easier and does away with an escape route frequently invoked by award debtors of foreign arbitration in India – namely, non-payment of stamp duty.

In the above-mentioned case, Rioglass had obtained a 2015 ICC Award in its favour to the tune of 4.3 million Euros, made by Christopher Style QC in London. Shriram argued that the award could be enforced as it had not been stamped in accordance with the provision of the Indian Stamp Act, 1899.

In order to determine the question – which had been the subject of conflicting views in various High Court decisions – the Supreme Court undertook a whistle-stop tour of the evolution of arbitration law in India, starting from the year of the Indian Stamp Act, 1899 (at which time there were still several princely states in India, governed by sovereign rulers, which had their own laws). The Court concluded that the only "award" referred to in the Indian Stamp Act was an award made in the territory of British India (by an arbitrator or umpire made in a reference not made by an order of the Court in the course of a suit).

As such, the expression "award" has never included a foreign arbitral award, although the Court recognised that India would not necessarily be precluded from levying stamp duty on foreign awards under the New York Convention. The fact that stamp duty was not paid on theaward in this case did not render it unenforceable.

The confirmation that foreign investors need not be concerned with stamping foreign awards is a welcome one. Nonetheless, those familiar with Indian arbitration will still be aware of the stock-in-trade "stamp duty" defence in a slightly different context, whereby Indian parties allege the unenforceability of a contractual document due to the counterparty's purported failure to comply with the Indian stamping regime.

Entitlement to interest on amounts awarded

In *Vedanta Limited v Shenzen Shandong Nuclear Power Construction Company Limited*, the Supreme Court confirmed the parties' entitlement to claim, and the Tribunal's discretion to award, interest. The Court clarified this as being subject

to certain principles for awarding interest applicable to international commercial arbitrations seated in India.

The dispute arose out of a series of EPC contracts and was referred to arbitration under the Indian Arbitration Act, seated in Mumbai. In its 2017 award, the Tribunal adopted a dual rate of interest on the amounts award. If award sums were paid within 120 days from passing of the award, a 9% interest rate would apply, after which a 15% rate would apply until the date of payment.

While one might understand the Tribunal's attempt to incentivise early, prompt payment of its award, the Supreme Court considered that the 15% rate amounted to a penal rate of interest contrary to principles of proportionality and reasonableness. The Court modified the interest payable on the INR component to a flat 9% and on the EUR component to LIBOR + 3%.

Noting that the method of awarding interest in international commercial arbitration is "*riddled with inconsistencies*", the Supreme Court laid out a number of factors which tribunals should take into account, including the "loss of use" of the principal, internationally prevailing rates of interest and proportionality. The rate of interest, it stated, must be compensatory rather than punitive.

While these indicators are sensible and should provide useful guidance to tribunals, the Court also opened the door to challenges on tribunal awards of interest on broad and general grounds, noting that "courts may reduce the interest rate awarded by an arbitral tribunal where such interest rate does not reflect the prevailing economic conditions or where it is not found reasonable or promotes the interests of justice".

Meanwhile, in *Jaiprakash Associates Ltd. v Tehri Hydro Development Corporation India Ltd*, the Supreme Court gave primacy to the parties' agreement and determined that an arbitrator cannot award interest if the underlying contract expressly prohibits this. In this case, the general conditions of contract contained an express clause that no interest would be payable on money due to the contractor. The Tribunal had awarded interest nonetheless, relying on a 1996 decision of the Supreme Court (in *Board of Trustees for the Port of Calcutta v Engineers-De-Space-Age*) which had held that an arbitrator's power to award interest was not "*stifled by [the] term of the contract*". Where section 31 of the Arbitration Act 1996 provides that an arbitrator's power to award interest is subject to the terms of the agreement between the parties, the Court held that no interest was payable. It distinguished *Board of Trustees* on the basis that (a) it contained different wording in the underlying contract on the prohibition of interest and (b) it was issued pursuant to the Arbitration Act 1940 and therefore inapplicable to arbitrations governed by the 1996 Act.

Concluding comments

The Indian courts continue to grapple with a wide range of arbitration-related issues. Recent arbitration decisions re-emphasise the non-interventionist approach adopted by the Indian judiciary and highlight the Courts' emphasis on giving effect to the parties' agreements and intentions to arbitrate. While a number of thorny issues persist in Indian arbitration, for the most part, the Courts have reached well-reasoned conclusions in line with best practices in international arbitration.

As usual, while some of the cases relate to legal issues which are outside an investor's control, many of them highlight the mundane but fundamental importance of drafting a clear and correctly-scoped arbitration agreement. In a complex and sometimes unreliable legal landscape, that at least is something which commercial parties should be able to achieve with relative ease.

CONTACTS

Nish Shetty
Partner
T: +65 6410 2285
E: nish.shetty@
cliffordchance.com

Kabir Singh
Partner
T: +65 6410 2273
E: kabir.singh@
cliffordchance.com

Matthew Brown
Senior Associate
T: +65 6506 2763
E: matthew.brown@
cliffordchance.com

Akanksha Bhagat
Associate
T: +65 6661 2045
E: akanksha.bhagat@
cliffordchance.com

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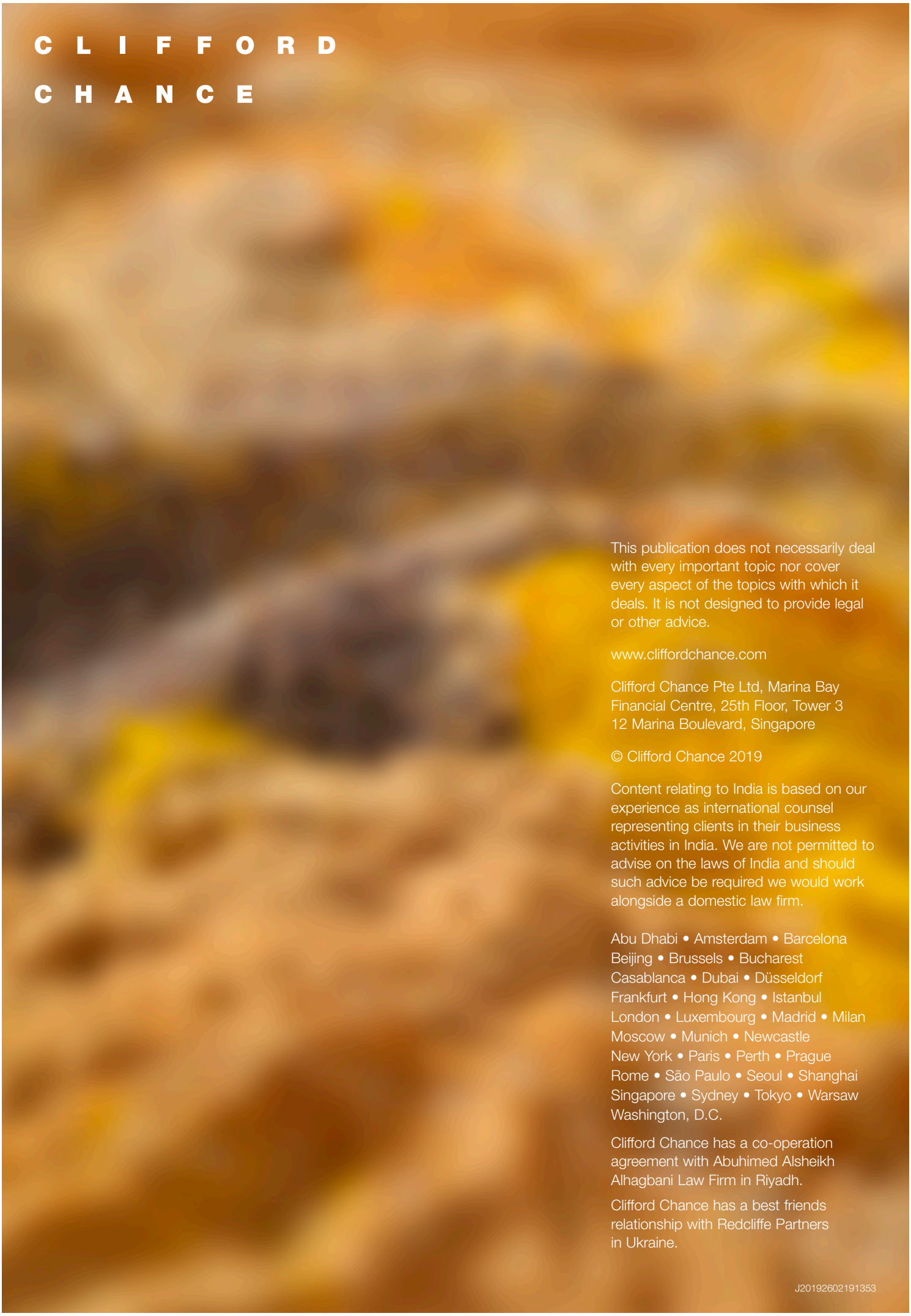

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Clifford Chance Pte Ltd, Marina Bay Financial Centre, 25th Floor, Tower 3
12 Marina Boulevard, Singapore

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