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THE BEGINNING OF A NEW ERA IN INDIAN ARBITRATION

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With the grand 'Make in India' vision, which is, in part based on building investor confidence, there is a need to bring some of our laws in line with international practice. Important among these is the Arbitration and Conciliation Act, 1996, especially when India is pitching itself to be an international hub for commercial arbitration. The objectives are to minimize delays, brining international commercial arbitrations within our fold, minimize supervisory role of courts and ensuring effective enforcement of arbitral awards. The Arbitration and Conciliation (Amendment) Bill received the Presidential assent on 31st December 2015, is an attempt to realize these objectives. This issue of the Law & Policy Brief analyses the salient features of these amendments, through which the Indian government hopes to attract foreign investment by projecting India as an investor friendly country with a sound legal framework.

Introduction

The Arbitration and Conciliation Act, 1996 was enacted to consolidate the law relating to arbitration in India. It consolidated and repealed the Arbitration Act, 1940 which dealt with only domestic arbitration, the Arbitration (Protocol and Convention) Act, 1937 which dealt with the Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 which dealt with the New York Convention Awards. The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The 1996 Act provided for both domestic and international commercial arbitrations. The major objectives of the 1996 Act were to curtail delays, to comprehensively bring international commercial arbitrations within its fold, to minimize the supervisory role of the courts and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court. In 2001, the Law Commission came up with the 176th report recommending various amendments to the Act. Accordingly, an Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. However, it was observed that the Bill gave room for substantial intervention by the courts in the arbitration process and that many of the provisions were not only insufficient but also contentious and was, therefore, subsequently withdrawn. Thereafter, the Ministry of Law and Justice issued a consultation paper on 8th April, 2010 inviting suggestions and comments from various stakeholders and upon extensive deliberations, discussions and in-depth study, the 20th Law Commission gave its recommendations in its 246th Report on 'Amendments to the Arbitration and Conciliation Act, 1996'.

The Law Commission observed that, "although Arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems, including those of high costs and delays, making it no better than either the earlier regime which it was intended to

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replace; or to litigation, to which it intends to provide an alternative."[1] The Commission importantly pointed that, "even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during arbitration, there exists a serious threat of arbitration-related litigation getting caught up in the huge list of pending cases before the courts."[2] An award which is challenged under section 34 renders the award inexecutable and remain pending for years. Thus, the very object of alternative dispute resolution frequently stands frustrated. Few more challenges that the Indian Arbitration faced were high fees charged by the Arbitrators especially in ad-hoc arbitration[3]; dates that are spread over long period of time; frequent adjournments; frivolous hearings; irrelevant evidence; judicial intervention; automatic stay of arbitral award upon a section 34 application[4]; setting aside of arbitral awards by taking an expansive view of the term public policy[5] and on the contravention of a term of the contract by the Arbitral Tribunal.[6] Additionally, judicial intervention in foreign seated arbitrations as seen in the Bhatia International[7] and other cases which gave powers to Indian courts to provide interim relief pending arbitration, appoint arbitrators, and set aside arbitral awards even in foreign seated arbitration has only led to further confusion. Although, BALCO[8] clarified the position of law and stated that PART I and PART II of the Act are mutually exclusive and that the Act is territorial in nature and that section 9 and 34 would only apply when the seat of arbitration is in India, there were few areas, such as getting interim measures and enforcing the same, which were problematic. Further, there are problems such as powers of the tribunals to order interim measures; neutrality of arbitrators; conflicting judgments regarding arbitrability of fraud[9], and costs incurred.

Therefore, it is the need of the hour that India amended its law relating to Arbitration, especially, when it is pitching itself to be an international hub for commercial arbitration. With the grand 'Make in India' dream, which is, in part, based on building investor confidence, there is a need to bring our laws in line with international practice. To this end, the Arbitration Law in India has gone through a complete transformation recently. The government at first introduced the amendments to the Arbitration and Conciliation Act, 1996 through the Arbitration and Conciliation (Amendment) Ordinance, 2015 on 23rd October, 2015. Later, the Arbitration and Conciliation (Amendment) Bill was introduced in the Lok Sabha by the Hon'ble Minister for Law and Justice Mr. D.V. Sadananda Gowda on 3rd December, 2015. The Amendments to the bill were considered by the Lok Sabha on 17th December, 2015 and by the Rajya Sabha on 23rd December, 2015[10] and, on the New Year's eve, the Amendment Bill received the Presidential assent signaling to the world that India is geared up to a new arbitration regime and that it is ready to be the arbitration hub in the future. Through the Amendment Bill the Indian government has sought to make necessary amendments to attract foreign investment by projecting India as an investor friendly country with a sound legal framework. A few salient features of the amendments are mentioned below.

Salient Features of the Amendments

Jurisdiction of Courts

The definition of 'Court' under section 2(e) has been amended to provide that in case of international commercial arbitration, the court shall be the relevant High Court. This amendment is a welcome move as it minimizes the number of courts/appeals that the parties could approach/make in an international commercial arbitration. The amendment clarified doubts regarding the applicability of certain provisions to international commercial arbitration. Earlier, Part I of the Act included provisions related to interim orders by a court, order of the arbitral tribunal, appealable orders etc. only applied to matters where the place of arbitration was India. Under the new amendment, these provisions would also apply to international commercial arbitrations even if the place of arbitration were outside India. However, this would apply subject to the agreement between the parties. Section 2 (2) stands amended to the extent that the provisions of section 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act. This ensures that an Indian court can exercise jurisdiction to grant interim measures even where the seat of the arbitration is outside India.

The amendment to Section 8 mandates the court to refer the parties to arbitration when an arbitration agreement exists between the parties. Earlier, if any matter that is brought before a court is the subject of an arbitration agreement, parties will be referred to arbitration. The new amendment states that this power of referral is to be exercised by a court even if there is a previous court judgment to the contrary. The court must refer the parties to arbitration unless it thinks that a valid

arbitration agreement does not exist. It also provides that an application for reference to arbitration may be made by a party to the arbitration agreement or any person claiming through or under him. Additionally, the amendment does not provide for an appeal under the section however, it states that an appeal under section 37 is permissible only when the court refuses to refer the parties to arbitration.

Interim measures, Emergency Arbitrator and Appointment of Arbitrator

The amendment to Section 9 provides that a party may make an application before a court for interim measures and that the arbitral proceedings must commence within 90 days from the making of the order or within a time specified by the court. It further provides that the court shall not entertain an application for interim measures unless it finds that circumstances exist which may not render the remedy provided under section 17 efficacious. This section therefore, limits interference by the courts and empowers the arbitral tribunal. However, it does not provide whether there would be a possibility to appoint an *emergency arbitrator* to provide for interim measures before an actual arbitration procedure is set to begin. A provision towards emergency arbitrator was recommended by the Law Commission.

Section 11 of the Act has been rightly amended. A new sub-section 6(A) which is added to Section 11 mandates that the court shall confine itself to the examination of the existence of an arbitration agreement and no other issues while determining an application to appoint an arbitrator thereby clarifying that the court shall not look into the validity of the agreement or issue relating to the arbitrability of the dispute. It leaves this work to the arbitrator. This is very much a pro-arbitration move. Also, sub-section (13) mandates that an application for appointment of an arbitrator shall be disposed of by the High Court or the Supreme Court, as the case may be, as expeditiously as possible and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice to the other party. Also, the amendment added Section 11(6)(B) which provides that the designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this Section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court which clarifies the questions relating to whether the judiciary in appointing an arbitration is performing an administrative or judicial function. The amendment interestingly adds Section 11(14) wherein it provides a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act.

Neutrality of Arbitrators

As mentioned earlier, neutrality of arbitrators has been heavily contested and is an important issue and the government has tried to deal with this subject in the new amendment. In order to ensure neutrality of arbitrators, Section 12 has been amended to the effect that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances as to the existence of any relationship or interest of any kind, which is likely to give rise to justifiable doubts as to his independence or impartiality. To this effect a Model form has been provided under the Sixth Schedule to make such disclosure. Further, if a person is having a specified relationship as provided under the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. The amendment also added a Fifth Schedule which shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Arbitration Hearings and Awards

Section 17 has been amended to empower the arbitral tribunal to grant all kinds of interim measures which the court is empowered to grant under section 9 and such an order is enforceable in the same manner as if it is an order of the court. This is a welcome move as earlier an interim order under Section 17 could not be enforced since it was not considered a decree of the court. Section 24 has been amended to provide further that the arbitral tribunal shall as far as possible, hold oral hearings for the presentation of evidence or for oral arguments on a day to day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournments without sufficient cause. This section empowers the arbitrator to impose costs on the parties for delays and should act a deterrent.

Section 29 A has been added to provide for a time limit for arbitral award. This is probably one of the most important and much needed amendment provided in our Arbitration Act, 1996. It provides that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period upto six months, beyond which period any extension can only be granted by the court, on sufficient cause. The section also incentivizes the arbitrators for speedily giving the award by providing that they shall be entitled to additional fees as the parties may agree. If the award is not made in time the mandate of the arbitrator shall be

terminated unless the court has extended the period. It also provides that while extending the period, if the court finds that the proceedings have been delayed for reasons attributable to the arbitral tribunal, then it may order reduction of fees of arbitrators by not exceeding five per cent for each month of such delay. This Section should also act as a deterrent on the arbitrator.

Some New Features

Section 29 B has been added to provide for an innovative feature such as the fast track procedure. It provides that the parties to the dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months. Under the fast track procedure, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents, and submissions filed by the parties without any oral hearing. A new section 31 A has been added to provide comprehensive provisions for costs. It is applicable to both arbitrators and litigation in court. This will help in avoiding frivolous and meritless litigation/arbitration.

Another most important inclusion is Section 34 (6) which provides that an application to challenge the award is to be disposed of by the court within one year. This is a welcome move as most of the arbitral awards usually are challenged in a court of law and are pending before the courts for a long period of time. Section 34 is also amended to restrict the term public policy of India by explaining that only where making of an award was induced or affected by fraud[11] or corruption or it is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice would be included within the meaning of public policy. The amendment further provides that an arbitral award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. This will refrain parties from misusing the Arbitration Act.

Section 36 of the amended Act clarifies doubts with regard to automatic stay of arbitral awards when challenged under Section 34. It states that where an application to set aside the arbitral award has been filed in the court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the court grants an order of stay of the operation of the said arbitral award subject to the conditions as it may deem fit and by giving reasons. Therefore, it is necessary for the court to give reasons for the stay and at the same time could ask the party to deposit the sum accordingly to protect the interest of the parties involved.

Conclusion

The Amendment Act should have laid more emphasis on Institutional arbitration and should also have made provisions for emergency arbitrator, which is a standard practice in institutional arbitration abroad. Nevertheless, the government has taken the first step by amending the Act. It has cleared many loopholes that existed in the previous Act and has put to rest many issues over which conflicting judgments have been rendered. We will now have to see how the judiciary will interpret the above changes brought in the law and how the newer decisions will impact the future of arbitration in this country.

References

[1] See 246th Report, Law Commission of India, August 2014 available at http://lawcommissionofindia.nic.in/reports/Report246.pdf

[2] Ibid

[3] See *Union of India v. Singh Builders Syndicate (2009) 4 SCC 523*

[4] See *National Aluminium Co. Ltd. V. Pressteel Fabrications (2004) 1 SCC 540*

[5] See *ONGC v. SAW Pipes (2003) 5 SCC 705*

[6] ibid

[7] See *Bhatia International v. Interbulk Trading SA (2002) 2 SCC 105*

[8] See *Bharat Aluminium Co. v. Kaiser Aluminium and Co. (2012) 9 SCC 552*

[9] See *Radhkrishnan v. Maestro Engineers (2010) 1 SCC 72 and Swiss Timing Ltd v. Organizning Committee (2014) 6 SCC 677*

[10] See http://www.prsindia.org/billtrack/the-arbitration-and-conciliation-amendment-bill-2015-4078/

[11] Supra 9, *Swiss Timing Ltd v. Organizning Committee*

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