

MAKE IN INDIA

INTERACTIVE SESSION ON

EMERGING TRENDS IN INTERNATIONAL ARBITRATION

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WHAT NEXT FOR INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA?

INTRODUCTION

- Law Commission of India – Report No.246 – Amendments to the Arbitration and Conciliation Act, 1996 – August 2014
- Supplementary to Report No.246 on the Amendments to the Arbitration and Conciliation Act, 1996
- The Arbitration and Conciliation (Amendment) Ordinance, 2015 (Promulgated on October 23, 2015)
- The Arbitration and Conciliation (Amendment) Act, 2015 (with effect from October 23, 2015)

THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

KEY AMENDMENTS - WITH EMPHASIS ON INTERNATIONAL COMMERCIAL ARBITRATION

NEW DEFINITION OF “COURT”

Amendment in Section 2(1)(e):

- Domestic arbitration - principal Civil Court of original jurisdiction in a District and High Court in exercise of its ordinary original civil jurisdiction
- International commercial arbitration - all applications including Sections 9, 27, 34 and 37 (of Part - I) will be entertained by a High Court
- Enforcement of Foreign Awards will be entertained by a High Court - Explanations added to Sections 47 and 56

DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION

Amendment to Section 2(f):

- Definition of '*International Commercial Arbitration*' narrowed - companies with central management and control outside India no longer covered
- This is also in consonance with the Law Commission Report

AMENDMENT TO SECTION 2(2)

- Subject to an agreement to the contrary, provisions of the following sections will apply to international commercial arbitrations where the place of arbitration is outside India:
 - **Section 9** – Interim measures etc. by Court;
 - **Section 27** – Court assistance in taking evidence; and
 - **Section 37(1)(a) & (3)** – Appeal against orders passed u/s. 8 and provision for appeal to the Supreme Court
- Significant development – now possible to obtain interim orders in India even if the place of arbitration is outside India
- However, if two Indian parties agree to a foreign seated arbitration, the parties will not be able to obtain interim orders in India
- Conflicting judgments
 - Bombay High Court in *Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports* (decided on June 12, 2015) – held two Indian parties cannot derogate from Indian Law
 - Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation India Pvt Ltd* (decided on September 11, 2015) – took a contrary view

AMENDMENTS TO SECTION 8

Judicial authority's power to refer parties to arbitration where there is an arbitration agreement:

- Unless it finds that prima facie no valid arbitration agreement exists
- The power is notwithstanding any judgment, decree or order of the Supreme Court or any Court
- 'Persons claiming through or under' can also apply
- Onus of producing original arbitration agreement or certified copy thereof is on the party in possession of the same
- Proviso added – If original or certified copy of the arbitration agreement is not available, application can be filed calling upon the other party to produce the same
- Section 37(1)(a) amended to make even a refusal to refer parties to arbitration an appealable order

AMENDMENTS TO SECTION 9

- **Section 9(2):** Arbitral proceedings must commence within 90 days from the date a Court passes an order for interim measures etc. or within such time as the Court may determine
- **Section 9(3):** Once arbitral tribunal is constituted, Court shall not entertain an application under this section unless circumstances exist making the remedy under section 17 not efficacious

AMENDMENTS TO SECTION 11

- **Section 11(6A):** Notwithstanding any judgment, decree or order of any court, the Supreme Court or High Court while considering application for appointment of arbitrator(s) will confine to the examination of the existence of an arbitration agreement
- The standard of examination of existence of an arbitration agreement is different from amended Section 8
- **Section 11(7):** Addition of “no appeal including Letters Patent Appeal”
- Disclosure in writing to be obtained from the prospective arbitrator

AMENDMENTS TO SECTION 17

- **Section 17(1):** During the arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with section 36, Arbitral Tribunal will have the same powers as the Court has under section 9
- **Section 17(2):** Interim orders of the arbitral tribunal will be enforceable like a Court order
- However, Kerala High Court in a decision reported on March 16, 2016 [W.P (c) No.38725/2015 and connected cases] held that orders of Arbitral Tribunal cannot pass an order to enforce its own orders

EXPEDITIOUS PROCEEDINGS

- **Section 9(2):** Arbitral proceedings must commence within 90 days from the date a Court passes an order for interim measures etc. or within such time as the Court may determine
- **Section 11(13)** - An application for appointment of arbitrator(s) to be disposed of within 60 days from the date of service of notice on the opposite party
- **Section 12(1)(b)** - Arbitrator to disclose whether he is in a position to complete the entire arbitration within 12 months (Law Commission Report recommended 24 months)
- **Section 24** - Arbitral tribunal should hold oral hearings for evidence and oral arguments on day-to-day basis and *“not grant adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause”*

EXPEDITIOUS PROCEEDINGS

- **Section 29A(1)** – Award to be made within 12 from the date the arbitral tribunal enters upon the reference i.e. the date on which the arbitral tribunal had received notice in writing of its appointment;
- **Section 29A(2)** – If the award is made within 6 months, the arbitral tribunal will be entitled to such amount of additional fees as the parties may agree;
- **Section 29A(3)** – Parties by consent can extend the period of 12 months by maximum of 6 months;
- **Section 29A(4)** – If award is not made even within the extended period (18 months), mandate of the arbitral tribunal will terminate unless the Court has, prior to or after the expiry of the said period, extended the period;
- If found that the proceedings was delayed for the reasons attributable to the arbitral tribunal, the Court may reduce fees by up to 5% for each month of delay

EXPEDITIOUS PROCEEDINGS

- **Section 29A(5)** – The Court may extend time only for sufficient cause and may impose terms and conditions while extending the period
- **Section 29A(6)** – While extending the time period, the Court can substitute one or all of the arbitrators but the proceedings will continue from the stage already reached
- **Section 29A(8)** – The Court can impose actual or exemplary costs upon any of the parties
- **Section 29A(9)** – An application for extension of period to be disposed of within 60 days from the date of service of notice on the opposite party
- However, no time frame fixed for approaching the Court seeking extension of time

EXPEDITIOUS PROCEEDINGS

- **Section 34(5)** – Application can be filed only after issuing prior notice to the opposite party and the application shall accompany affidavit of service.
- **Section 34(6)** – challenge to arbitral award to be decided expeditiously and in any event within a period of 1 year from the date of notice to the respondent.

OPTION OF FAST TRACK PROCEDURE: NEW SECTION 29B

- Parties can agree in writing for fast track procedure at any stage before or at the time of appointment of arbitral tribunal
- While agreeing for fast track procedure parties may also agree for a sole arbitrator
- Dispute shall be decided by the arbitral tribunal without any oral hearing on the basis of written pleadings, documents and submissions
- Oral hearing may be held only on request of all parties or if arbitral tribunal considers it necessary for clarifying certain issues
- Award to be made within 6 months from the date of entering reference
- If delayed beyond 6 months, provisions of section 29A (3) to (9) will apply to the proceedings
- Arbitrator fees and manner of payment shall be as agreed between arbitrator and parties

REGIME FOR COSTS

- **Section 31(8)** – Costs of arbitration to be fixed by the arbitral tribunal in accordance with section 31A
- **Section 31A(1)** – Notwithstanding the provisions of CPC, the Court or arbitral tribunal can determine which party to pay costs and what amount
- **Explanation to section 31A(1)** – “costs” means reasonable costs relating to inter-alia fees and expenses of arbitrators, courts & witnesses, legal fees and expenses, administration fees of institution
- **Section 31A(2)** – Loser Pays principle adopted
- **Section 31 A(3)** – Circumstances to consider while granting costs
- **Section 31A(5)** – Agreement for payment of whole or part of costs by a party in any event shall be only valid if made after dispute has arisen

NEUTRALITY OF ARBITRATOR

- **Section 11(8)** – Disclosure in writing from the prospective arbitrator in terms of section 12(1) in the form specified in the Sixth Schedule is mandatory before appointment
- **Section 12(1):** Broad disclosures to be made before acting as arbitrator
- **Fifth Schedule:** States the grounds which will guide in determining whether existing circumstances will give rise to justifiable doubts about independence or impartiality of arbitrators
- The amendment is in consonance with the principles of natural justice that an interested person cannot be an adjudicator
- **Section 12(5)** – If arbitrator relationship with parties or counsel falls within the **Seventh Schedule**, the arbitrator will be ineligible for arbitrator appointment but this can be waived by an express agreement in writing after dispute having arisen

ARBITRATOR FEES CAPPED

- **Addition of Fourth Schedule:** Model Fee of arbitrator(s) based on the sum in dispute/claim amount
- **Section 11(14):** High Court can frame rules after taking into consideration the rates specified in the Fourth Schedule for determining the fees of the arbitral tribunal and the manner of its payment
- **Explanation to Section 11(14)** - Not applicable to international commercial arbitrations or in case parties have agreed for determination of fees as per the rules of an arbitral institution;
- **Section 11A:** Central Government, by notification in the Official Gazette, amend the Fourth Schedule if it is expedient or necessary

ARBITRAL AWARD ENFORCEABLE DESPITE CHALLENGE PROCEEDINGS

- **Section 36(2)** - Application is required to be filed seeking stay of operation of the award
- **Section 36(3)** - The Court is required to record reasons in writing for grant of stay
- **Proviso to section 36(3)** - While granting stay, the provisions for stay of money decree under CPC would apply
- Amendment to ensure that mere filing of an application u/s 34 does not operate as a automatic stay on the enforcement of the arbitral award

SCOPE OF PUBLIC POLICY CLARIFIED IN SECTIONS 34, 48 AND 57

- *Renusagar Power Company Limited v. General Electric Company* (1994)
 - Award could be set aside if contrary to (i) fundamental policy of India or (ii) interests of India or (iii) justice or morality
 - Award cannot be set aside on the ground of error of law or fact

- *ONGC Limited v. Saw Pipes Limited* (2003) – Wide interpretation of “public policy” to include Patent Illegality

- *ONGC Limited v. Western Geco International Limited* (2014) – Very wide interpretation to term ‘*fundamental policy of Indian law*’ to include even ‘judicial approach’ and ‘wednesbury principle of reasonableness’

- *Associate Builders. v. Delhi Development Authority* (2015)
 - Followed Western Geco
 - Explained the concept of award being against ‘justice & morality’
 - Against justice – award should not shock the conscience of the court
 - Against morality – refers to sexual immorality only

SCOPE OF PUBLIC POLICY CLARIFIED IN SECTION 34, 48 & 57

- Explanation to **Sections 34(2)(b), 48(2) & 57(1)** substituted with Explanation 1 to clarify that an award is in conflict with the public policy of India only if, -
 - Making of award was induced or affected by fraud or corruption or was in violation of section 75 or 81 (earlier explanation contained only this);
 - Is in contravention with the fundamental policy of Indian law; or
 - Is in conflict with the most basic notions of morality or justice
- **Explanation 2** - Test regarding contravention with the fundamental policy of Indian law will not entail a review on the merits of the dispute (**Supplementary Report of Law Commission - February 2015**)
- **Section 34(2A)** - The challenge to arbitral award on ground of patent illegality appearing on the face of the award restricted to only domestic arbitrations and not international commercial arbitrations

MISCELLANEOUS AMENDMENTS

- Arbitration Agreement [**Section 7**] – also includes “communication through electronic means”
- Default of a party [**Section 25**] – Discretion to allow the Respondent to file its statement of defense if such right had been forfeited
- Form and content of award [**Section 31**] – If the award is silent regarding the interest on the sum directed to be paid, it shall carry interest at the rate of 2% higher than the current rate prevalent on the date of award; current rate to be as per section 2(b) of the Interest Act, 1978

PROSPECTIVE OR RETROSPECTIVE?

Clause 26 of the Seventh Schedule –

- Provisions of this will not apply to the arbitral proceedings commenced in accordance with Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree
- But will apply to arbitral proceedings commenced on or after the commencement of this Act
- Confusion in law – conflicting judgments
 - Madras High Court in *New Tirupur Area Development Corporation Ltd. v Hindustan Construction Co. Ltd* (decided on January 27, 2016) – held amended provisions would apply retrospectively to court proceedings, since the word “in relation to arbitral proceedings...” has been deliberately omitted by the Legislature
 - Madras High Court in *Jumbo Bags Ltd v. The New India Assurance Co. Ltd* (decided on March 10, 2016) observed that since arbitration proceedings were commenced prior to October 23, 2015 in terms of Section 21, amended provisions would not apply

PROSPECTIVE OR RETROSPECTIVE?

- Calcutta High Court in *Electrosteel Castings Limited v Reacon Engineers (India) Private Limited* (decided on January 14, 2016) – held amendments are prospective – Old Act will apply in respect of Section 34 proceedings filed after October 23, 2015, in respect of award passed prior to this date
- Division Bench of Calcutta High Court in *Tufan Chatterjee v. Rangan Dhar* (decided on March 2, 2016) – held the amended provisions would also apply to court proceedings initiated prior to October 23, 2015

SHORTCOMINGS

- No mention of “emergency arbitrator” in Section 1(d)
- “Seat” and “Venue” distinction not made
- Two Indian parties agreeing for foreign seated arbitration cannot seek reliefs in India under Section 2(2)
- The standard of examining existence of arbitration agreement different for Section 8 and 11
- Powers of arbitral tribunal curtailed to pass order after the award is rendered - inconsistency between Sections 17 and 32
- Arbitrability of fraud – No mention in Section 16

SHORTCOMINGS

- Ambitious time lines – may deter parties to chose Indian seated arbitration
- Time period for approaching Court to seek extension of time for completing arbitration proceedings not specified
- Even Institutional Arbitrations may be required to approach Court to seek extensions (view shared by few other arbitration practitioners)
- No time limit for deciding challenge to enforcement of foreign arbitral award (Part-II) despite recommendations in the Law Commission Report
- Confidentiality issues not addressed

ARBITRATION v. COMMERCIAL COURTS

ARBITRATION:

- Choice of expert arbitrator(s)
- Discovery of documents less onerous and only if the Tribunal orders
- The Arbitration and Conciliation (Amendment) Act, 2015 brought in changes such as a 12 month deadline for completion of arbitration
- Interim orders passed by arbitral tribunals deemed to be orders of civil court
- Procedures are less formal
- Limited scope for challenging the arbitral award

COMMERCIAL COURTS:

- Number of Commercial Courts/Divisions expected to be limited
- Broad definition and valuation may lead to more disputes being pushed to Commercial Courts/Divisions adding to their burden

ARBITRATION v. COMMERCIAL COURTS

- Though there is provision for experienced and trained judges, non-availability of talent pool is a concern
- Discovery onerous –deterrent
- Advantageous provisions of summary judgment, costs, stricter time lines, etc. but issues under definition of commercial dispute, valuation, detailed procedures, etc. to give rise to more interlocutory applications and prolonging trial
- Limited availability of courts and judges may make the time lines impractical
- Arbitration retains the edge

WAY FORWARD

- More certainty in law through legislative amendments
- Judicial intervention should be limited and only if necessary
- More emphasis on institutional arbitrations and making them in sync with global standards
 - Hot Tubbing of experts
 - Use of technology in arbitration
 - Third party funding
 - Role of experts
 - Clarity on costs
 - Time

THANK YOU

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