LEGAL ALERT

Highlights of Amendment to the Arbitration and Conciliation Act 1996 via Arbitration Ordinance 2015

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The Government of India decided to amend the Arbitration and Conciliation Act, 1996 by introducing the Arbitration and Conciliation (Amendment) Bill, 2015 in the Parliament. The Union Cabinet chaired by the Prime Minister, had given its approval for amendments to the Arbitration and Conciliation Bill, 2015 taking into consideration the Law Commission's recommendations, and suggestions received from stake holders.

In an attempt to make arbitration a preferred mode of settlement of commercial disputes and making India a hub of international commercial arbitration, the President of India on 23rd October 2015 promulgated an Ordinance ("Arbitration and Conciliation (Amendment) Ordinance, 2015) amending the Arbitration and Conciliation Act, 1996.

Amendments

The following are the salient features of the new ordinance:

1) The first and foremost welcome amendment introduced by the ordinance is with respect to definition of expression 'Court'. The amended law makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'. In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. Accordingly, in an international commercial arbitration, as per the new law, district court will have no jurisdiction and the parties can expect speedier and efficacious determination of any issue directly by the High court which is better equipped in terms of handling commercial disputes.
2) **Amendment of Section 2(2):** A proviso to Section 2(2) has been added which envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27(taking of evidence), and Section 37(1)(a), 37(3) shall also apply to international commercial arbitrations, even if the seat of arbitration is outside India, meaning thereby that the new law has tried to strike a kind of balance between the situations created by the judgments of Bhatia International and Balco v. Kaiser. Now Section 2(2) envisages that Part-I shall apply where the place of arbitration is in India and that provisions of Sections 9, 27, 37(1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India unless parties to the arbitration agreement have agreed to the contrary.
3) **Amendment to Section 8: (Reference of parties to the dispute to arbitration):** In Section 8, which mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is subject matter of arbitration agreement . The sub-section(1) has been amended envisaging that notwithstanding any judgment, decree or

order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists. A provision has also been made enabling the party, who applies for reference of the matter to arbitration, to apply to the Court for a direction of production of the arbitration agreement or certified copy thereof in the event the parties applying for reference of the disputes to arbitration is not in the possession of the arbitration agreement and the opposite party has the same.

4) **Amendment to Section 9 (Interim Measures):** The amended section envisages that if the Court passes an interim measure of protection under the section before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine. Also, that the Court shall not entertain any application under section 9 unless it finds that circumstances exist which may not render the remedy under Section 17 efficacious.

   The above amendments to Section 9 are certainly aimed at ensuring that parties ultimately resort to arbitration process and get their disputes settled on merit through arbitration. The exercise of power under Section 9 after constitution of the tribunal has been made more onerous and the same can be exercised only in circumstances where remedy under Section 17, appears to be non-efficacious to the Court concerned.

5) **Amendment to Section 11 (Appointment of Arbitrators)**: In so far as section 11, "appointment of arbitrators" is concerned, the new law makes it incumbent upon the Supreme Court or the High Court or person designated by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party.

   As per the new Act, the expression 'Chief Justice of India' and 'Chief Justice of High Court' used in earlier provision have been replaced with Supreme Court or as the case may be, High Court, respectively. The decision made by the Supreme Court or the High Court or person designated by them have been made final and only an appeal to Supreme Court by way of Special Leave Petition can lie from such an order for appointment of arbitrator. The new law also attempts to fix limits on the fee payable to the arbitrator and empowers the high court to frame such rule as may be necessary considering the rates specified in Fourth Schedule.

6) **Amendment to Section 12:** Amendment to Section 12, as per the new law makes the declaration on the part of the arbitration about his independence and impartiality more onerous. A Schedule has been inserted (Fifth Schedule) which lists the grounds that would give rise to justifiable doubt to independence and impartiality of arbitrator and the circumstances given in Fifth Schedule are very exhaustive. Any person not falling under any of the grounds mentioned in the Fifth Schedule is likely to be independent and impartial in all respects. Also, another schedule (seventh schedule) is added and a provision has been inserted that notwithstanding any prior agreement of the parties, if the arbitrator's relationship with the parties or the counsel or the subject matter of dispute falls in any of the categories mentioned in the seventh schedule, it would act as an ineligibility to act as an arbitrator. However, subsequent to disputes having arisen, parties may by expressly entering into a written agreement waive the applicability of this provision. In view of this, it

would not be possible for Government bodies to appoint their employees or consultants as arbitrators in arbitrations concerning the said Government bodies.

7) **Amendment to Section 14**: Amendment of Section 14 aimed at filling a gap in the earlier provision, which only provided for termination of mandate of the arbitrator. If any of the eventualities mentioned in sub-section (1) arises. The new law also provides for termination of mandate of arbitration and substitution and his/her substitution by another one.

8) **Amendment to Section 17 (Interim Measures by Arbitral tribunal):** The old Act had lacunae where the interim orders of the tribunal were not enforceable. The Amendment removes that lacunae and stipulates that an arbitral tribunal under Section 17 of the Act shall have the same powers that are available to a court under Section 9 and that the interim order passed by an arbitral tribunal would be enforceable as if it is an order of a court. The new amendment also clarifies that if an arbitral tribunal is constituted, the Courts should not entertain applications under Section 9 barring exceptional circumstances.

9) **Amendment to Section 23**: The new law empowers the Respondent in the proceedings to submit counter claim or plead a set-off and hence falling within the scope of arbitration agreement.

10) **Amendment to Section 24**: It requires the arbitral tribunal to hold the hearing for presentation of evidence or oral arguments on day to day basis, and mandates the tribunal not to grant any adjournments unless sufficient causes shown. It further empowers the tribunal the tribunal to impose exemplary cost where adjournment is sought without any sufficient cost.

11) **Insertions of new Section 29A and 29B(Time limit for arbitral award and Fast Track Procedure)** : To address the criticism that the arbitration regime in India is a long drawn process defying the very existence of the arbitration act, the Amended Act envisages to provide for time bound arbitrations. Under the amended act, an award shall be made by the arbitral tribunal within 12 months from the date it enters upon reference. This period can be extended to a further period of maximum 6 months by the consent of the parties, after which the mandate of the arbitrator shall terminate, unless the Court extends it for sufficient cause or on such other terms it may deem fit. Also, while extending the said period, the Court may order reduction of fees of arbitrator by upto 5% for each month such delay for reasons attributable to the arbitrator. Also, the application for extension of time shall be disposed of by Court within 60 days from the date of notice to the opposite party.

    The Ordinance also provides that the parties at any stage of arbitral proceeding may opt for a fast track procedure for settlement of dispute, where the tribunal shall have to make an award within a period of 6 months. The tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without oral hearing, unless the parties request for or if the tribunal considers it necessary for clarifying certain issues. Where the tribunal decides the dispute within 6 months, provided additional fees can be paid to the arbitrator with the consent of the parties.

12) **Amendment to Section 25**: The new Act empowers the tribunal to treat Respondent's failure to communicate his statement of defence as forfeiture of his right to file such statement of defence. However, the tribunal

will continue the proceedings without treating such failure as admission of the allegations made by the Claimant.

13) **Amendment to section 28**: The new law requires the tribunal to take into account the terms of contract and trade usages applicable to the transaction. In the earlier law, the arbitral tribunal was mandated to decide disputes in accordance with the terms of the contract and to take into account the trade usages applicable to the transaction. To that extent, the new law seeks to relieve the arbitrators from strictly adhering to the terms of the contract while deciding the case. However, the arbitrator can still not ignore the terms of the contract. Therefore, the new amendment seems to bring in an element of discretion in favour of the arbitrators while making of an award.

14) **Amendment to Section 31**: This provides for levy of future interest in the absence of any decision of the arbitrator, on the awarded amount @2% higher than current rate of interest prevalent on the date of award. The current rate of interest has been assigned the same meaning as assigned to the expression under Clause (b) of Section 2[1] of the Interest Act, 1978.

In addition, the new Act lays down detailed parameters for deciding cost, besides providing that an agreement between the parties, that the whole or part of the cost of arbitration is to be paid by the party shall be effective only if such an agreement is made after the dispute in question had arisen. Therefore, a generic clause in the agreement stating that cost shall be shared by the parties equally, will not inhibit the tribunal from passing the decision as to costs and making one of the parties to the proceedings to bear whole or as a part of such cost, as may be decided by the tribunal.

15) **Amendment of Section 34 (Limiting the gamut of Public Policy of India):** As per the new amendment, an award passed in an international arbitration, can only be set aside on the ground that it is against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention with the fundamental policy of Indian law; (iii) it is in conflict with basic notions of morality and justice. The present amendment has clarified that the additional ground of "patently illegality" to challenge an award can only be taken for domestic arbitrations and not international arbitrations. Further, the amendment provides that the domestic awards can be challenged on the ground of patent illegality on the face of the award but the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. The new Act also provides that an application for setting aside of an award can be filed only after issuing prior notice to the other party. The party filing the application has to file an affidavit along with the application endorsing compliance with the requirement of service of prior notice on the other party. A time limit of one year from the date of service of the advance notice on the other parties has been fixed for disposal of the application under Section 34. Significantly, there is no provision in the new Act which empowers the court or the parties to extend the aforesaid limit of one year for disposal of the application under Section 34.

[1] Section (2) (b) : "Current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

16) **Amendment to Section 36 (Stay on enforcement of award):** The Ordinance provides that an award would not be stayed automatically by merely filing an application for setting aside the award under Section 34. There has to be a specific order from the Court staying the execution of award on an application made for the said purpose by one of the parties. The Ordinance aims to remove the lacunae that existed in the previous Act where pending an application under Section 34 for setting aside of arbitral award, there was an automatic stay on the operation of the award. The new law also empowers the Court to grant stay on operation of arbitral award for payment of money subject to condition of deposit of whole or a part of the awarded amount.
17) **Amendment to Section 37:** Under Section 37(1), the new law makes provision for filing of an appeal against an order of judicial authority refusing to refer the parties to arbitration under Section 8.
18) As regards enforcement of certain foreign awards, the new law seeks to add explanation of Sections 48 and 57 thereby clarifying as to when an award shall be considered to be in conflict within public policy of India. The parameters are the same as are provided under Section 34. Similarly, the expression "Court" used in Sections 47 and 56 have been defined to mean only the High Court of competent jurisdiction.

Conclusion

The amendment brought to the 1996 Act is certainly a positive step towards making arbitration expeditious, efficacious and a cost effective remedy. The new amendments seek to curb the practices leading to wastage of time and making the arbitration process prohibitively a costly affair. The new law also makes the declaration by the arbitrator about his independence and impartiality more realistic as compared to a bare formality under the previous regime. Making the arbitrator responsible for delay in the arbitration proceedings, for the reasons attributable to him, would ensure that the arbitrators do not take up arbitrations, which are beyond their capacities. Such a deterrent would imbibe self-discipline and control amongst the arbitrators. It can be said that the present amendments certainly travel an extra mile towards reducing the interference of the Court in arbitration proceedings that has been a consistent effort of the legislature since passing of the 1996 Act.

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