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Recent Developments in India's Arbitration Law

In 2015 the Indian Government made far-reaching changes to the Arbitration and Conciliation Act, 1996 (the "**1996 Act**"). After a number of years of discussions about appropriate changes, and following a report by the Law Commission of India in 2014 (the "**Law Commission Report**"), the arbitration law in India was initially changed by an ordinance issued in October 2015. The ordinance was only temporary: it had effect only until the next session of the Indian Parliament. At the end of 2015, the Indian Parliament approved a bill which made the changes permanent, and on 31 December 2015 the Arbitration and Conciliation (Amendment) Act, 2015 (the "**Amendment Act**") became law.

The Amendment Act demonstrates India's commitment to drastically reduce timelines for resolving commercial disputes in India and make India a more attractive place to do business. The amendments deal with restrictions on Indian court's jurisdiction over foreign-seated arbitrations(1) and various other recommendations made in the Law Commission Report. The changes have also brought the Indian arbitration regime closer to the international standards and to the UNCITRAL Model Law on International Commercial Arbitration.

Key Changes

Interim Measures

Significant changes have been made to sections 9 and 17 of the 1996 Act, which deal with interim measures. Arbitral tribunals now have the same powers as courts with regard to interim measures, both in relation to their scope and their effect; courts cannot entertain applications for interim measures once the arbitral tribunal has been constituted; and, if a court orders interim relief before the commencement of arbitral proceedings, the arbitral proceedings must be commenced within 90 days.

The Amendment Act clarifies that the powers to grant interim relief under Part I of the 1996 Act (dealing with domestic arbitration) also apply to international arbitration. After the landmark decision of the Supreme Court of India in BALCO, which held that Part I of the 1996 Act would not apply to international arbitration, a major lacuna in the context of international arbitrations was the bar on Indian courts to grant interim measure and assist in the collection of evidence. Though this decision was welcome insofar as it reduced the scope for judicial interference in international arbitrations connected to India, it also ruled out any possibility for judicial relief in such cases. This clarification closes that loophole.

Appointment of Arbitrators

The Amendment Act makes it incumbent upon the Supreme Court or the High Court or any 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. It also deals with the grounds for challenging the appointment of an arbitrator and introduces significantly greater clarity and detail on the circumstances affecting the neutrality of arbitrators. It sets out a list of circumstances (set out in the newly inserted fifth schedule of the Amendment Act) which "give rise to justifiable doubts as to the independence or impartiality of arbitrators" and require written disclosure from a prospective arbitrator, along with a list of circumstances which render a person ineligible to be appointed as an arbitrator (set out in the newly inserted seventh schedule). These circumstances closely mirror the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

Reducing Delays

To address the criticism that the arbitration regime in India is a long drawn process, the Amendment Act has introduced provisions for time bound arbitrations. The Amendment Act inserts a new provision into the 1996 Act (section 29A) requiring arbitral tribunals to render awards within 12 months, subject to a six month extension with the agreement of the parties, and upon showing sufficient cause, a further extension by the court. While extending this time period, courts may reduce the arbitrator's fees by five per cent for each month of delay, and the parties may opt to pay the arbitrators additional fees for concluding the arbitration within the original six month period. Given that arbitration in India is currently extremely protracted, this is a welcome and significant development. However, the extent to which the amendments will be successful in minimizing court interference remains to be seen. By requiring court-sanctioned extensions for continuing arbitration, there is likely to be a frequent need to involve the courts in ongoing arbitrations (at least in the onshore context), leaving the parties exposed to the vagaries of (at least) the court scheduling process.

The Amendment Act also introduces a fast-track arbitration procedure (section 29B) under which, at the discretion of the parties, there will be a single arbitrator, proceedings will be conducted through written submissions and awards will be announced in six months. The Amendment Act also deals with challenges to arbitral awards, so that challenges to awards must be disposed of by courts within a year.

(1) On 6 September 2012, a 5-judge Constitution Bench of the Indian Supreme Court handed down its decision in Bharat Aluminium Co v. Kaiser Aluminum Technical Services (BALCO). In BALCO, the Supreme Court took the view that it disagreed with the decisions in Bhatia International v. Bulk Trading SA ((2002) 4 SCC 105) and Venture Global Engineering v. Satyam Computer Services Limited ((2008) 4 SCC 190), and that the power to grant interim measures in respect of foreign seated arbitrations or to deal with challenges to foreign awards did not flow from the provisions of the 1996 Act. In doing so, the Supreme Court took the view that the 'broad' interpretation of the court in the Bhatia judgment that all of Part I applied to arbitrations seated outside India did not find proper basis in the provisions of the 1996 Act.

Enforcement of Arbitral Awards

The Amendment Act limits the scope of challenge for foreign awards on "public policy" grounds by giving greater definition to the "public policy" ground for setting aside an award under section 34 and for refusing to enforce a foreign award under section 48. The public policy ground was given an expansive interpretation by the Supreme Court in *ONGC v Saw Pipes*(2), which had been judicially interpreted to include patent illegality. This resulted in establishing a low threshold for successful challenges and was a major cause for concern, particularly in international arbitration. The Amendment Act improves this scheme in two ways: firstly, it clarifies that patent illegality as an element of public policy applies only to domestic, and not international arbitration; and secondly, it specifies that reviews under section 34 should not be reviews on merits.

The Amendment Act also amends section 36 of the 1996 Act, which permitted the stay of execution of arbitral awards upon any application to set aside the award. This had the effect of severely delaying enforcement efforts. The amended provision only allows for the execution to be stayed if the court has passed a specific order. This ensures that a stay of the arbitral award is not an automatic consequence of an application to set it aside.

Costs

The Amendment Act provides for levy of interest, in the absence of any decision of the arbitrator, on the awarded amount at two per cent higher than current rate of interest prevalent on the date of award. In addition, the Amendment Act lays down detailed parameters for deciding cost. It provides that an agreement between the parties that the whole or part of the cost of arbitration is to be paid by a certain 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 awarding costs to the losing parties – thereby recognizing the "costs follow the event" or "loser pays" principle in order to disincentivise frivolous actions.

Definition of "Court"

The Amendment Act makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of "court". For the purposes of international arbitrations, the definition of "court" has been restricted to High Courts. In so far as domestic arbitration is concerned, the definition of "court" remains unchanged.

Thus, parties to an international commercial arbitration will no longer have to approach lower courts (often in remote parts of the country) to seek relief. Additionally, in an international commercial arbitration, parties can expect efficacious determination of any issue directly by the high courts which are better equipped in commercial disputes and generally more arbitration friendly.

Prospective Law

The Amendment Act provision clarifies that the amendments only apply to Indian arbitrations commenced on or after 23 October 2015 (unless specifically agreed by parties), which was one of the questions that remained unanswered by the amendments by an ordinance issued in October 2015.

Conclusion

The 1996 Act – designed to cover both international and domestic arbitration – had long been considered ineffective because judicial interpretation led to various ambiguities which had implications on the timing and cost of arbitrations and the enforcement of arbitral awards(3). The Amendment Act not only brings in clarity to the original law but is also a positive step towards making arbitration a fair, efficient and cost-effective remedy and fits within the government's aim – repeatedly highlighted by Prime Minister Narendra Modi – to attract maximum foreign investment by improving the "ease of doing business" in India.

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(2) (2003) 5 SCC 705

(3) The Law Commission Report spells out the issues in the following terms:

"The Act has now been in force for almost two decades, and in this period of time, 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 replace; or to litigation, to which it intends to provide an alternative.

Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated."