# Arbitration: An Emerging Litigation!

## Introduction

In today's business contracts, arbitral provisions are preferred due to various factors. These include desire for secrecy, inclination to shift to a system where industry experts can take decisions rather than traditional judicial officers and judges, possibility of flexible procedures, the leeway given to parties to settle a dispute without shaking the business relations. Equally, there has been an increasing perception too that arbitration may have become parallel to litigation since it has started becoming "informally formal," expensive and potentially leads to prolonged advocacy. The Arbitration and Conciliation Act, 1996 ("**Act**") tried to address these challenges to a certain extent. However, the Act could not achieve its objective in the demanding business environment and fill in the impediments caused by judicial pronouncements towards finality of an award.[1] Consequently, it was amended by the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act**"), notified on January 1, 2016 and effective October 23, 2015.

The Amendment Act modified about 20 sections and introduced few new provisions. This newsletter discusses selective amendments which, hopefully, ought to cure or, at the least, improve the existing defects.

## 1. Application of Part I of the Act

The Supreme Court in *Bharat Aluminum & Co Vs Kaiser Aluminum & Co*[2] imposed an embargo on the courts from intervening in arbitrations whose seat was outside India by holding that Part I of the Act, applicable to domestic arbitrations, would not apply to foreign seated arbitrations. Section 2(2) was amended and a proviso has been inserted which provides that, subject to contrary agreement, provisions of sections 9, 27, 37(1)(a) and 37(3) from Part I shall apply even if the seat is outside India and the foreign award is enforceable under Part II of the Act. This amendment of Section 2(2) now enables a party to approach the Indian courts for interim relief even in foreign seated arbitrations and the necessary implication is that the choice of a foreign law or a foreign seat or foreign institutional rules may not amount to implied exclusion of section 9. This may provide big relief to those looking for swift, interim relief under section 9. In this regard, the provisions of section 27 (which deal with court assistance in taking evidence), section 37(1)(a) (which deal with appeal from order granting or refusing interim measures by courts), and section 37(3) (which provides that no second appeal shall lie from an order passed in appeal under this section, but which does not affect the right to appeal to the Supreme Court), have also been made applicable to foreign seated arbitrations.

In other words, the legal position which has emerged from the amendments to Section 2 is that only selective provisions (sections 9, 27, 37(1)(a) and 37(1)(3)) apply to arbitrations whose seat is outside India, unless the parties agree to the contrary. As such, the emerging position will be that these provisions will apply, unless excluded, to only those arbitrations

[1] In ONGC v Western Geco International Ltd, the SC extended scope of "public policy" and modified the award. The court held that if the arbitrators failed to make an inference which should have been made, or made a *prima facie* wrong inference, then the adjudication will be open to challenge and may be cast away or modified.
[2] 2012 9 SCC 552

which take place in a country, the arbitral awards of which are enforceable and recognized under the provisions of Part II of the Act. It is also noteworthy to examine the rationale behind inserting the words *"subject to an agreement to the contrary."* An agreement may be express or implied. When implied, it can be only inferred from the facts and circumstances of the case. As such, careful and meticulous drafting of arbitral clauses assumes huge significance, since ambiguous or complex clauses may lead to unwarranted litigation, on preliminary issues.

It is worthwhile to highlight the corresponding changes to section 9.. The changes ensure that where a party secures an interim order from a court *before commencing arbitration*, it is obligatory to commence arbitration within 90 days of the interim order or within such further time as prescribed by the court. While the existing jurisprudence also required parties to commence arbitration and not merely use an interim relief to stall arbitration, insertion in the statue will ensure that nobody can cause inordinate delay by securing interim orders and abstain from commencing arbitration. By doing this, contracting parties will be compelled to pursue arbitration.

## 2. Challenges to an award

Section 34 of the Act has come under considerable flak in the last two decades on account of the absence of finality of an award and the ability of a losing party to go seek alternative relief, thereby removing the efficaciousness of arbitration as a means of dispute resolution. In other words, an inevitable corollary has to be minimization of judicial interference and courts should exercise their powers with caution so that the arbitral process does not lose its intended flavor. One of the key grounds of challenge (and the bane of many companies) to an award was the nebulous and ever evolving concept of "public policy." In the absence of a definition of public policy, losing parties have taken benefit and escaped from or delayed enforcement. The amendments to section 34 are largely progressive and should minimize judicial interference as the scope of "public policy" has been narrowed and an award can be set aside only if it **(i)** was induced or affected by fraud or corruption; or **(ii)** is in contravention with the fundamental policy of India; or **(iii)** is in conflict with the most basic notions of morality or justice. The amendments further provide:

- An arbitral award arising out of domestic arbitrations may be set aside by the court, if it finds that the award is vitiated by patent illegality appearing on the face of the award. It is interesting to note that this insertion in section 2(A) does not apply to international commercial arbitrations, suggesting possibly that different standards have been set for them. The hope of India Inc. is that a progressive arbitration regime in India will soon see the solution for resolving this anomaly.
- A new sub-section has been introduced compelling the party challenging the award to notify the other party, in writing, that it intends to challenge the award and when an application is moved under section 34, it has to be accompanied by an affidavit reiterating compliance with the notice requirement.
- Applications moved under section 34 will have to be decided within one year after the service of notice to commence challenge (referred in the preceding bullet) is served. This is, by far, a critical change and, ought to, at the bare minimum, reduce the time taken to decide the challenges.

These amendments to section 34 reflect the intent of the legislature that an award cannot be set aside merely on grounds of erroneous application of law or re-appreciation of evidence.

## 3. Strict timelines and fast track procedure

There is a general notion prevailing that Indian arbitrations are long-drawn which may fundamentally oppose the basic premise of arbitration. The insertion of section 29A[3] mandates, amongst others, completion of arbitration in 12 months from the date when the tribunal commences, possibility of additional fees for the tribunal if they closed the arbitration sooner, an extension of additional 6 months provided the parties agree i.e. total 18 months, are all targeted to reduce delays by ensuring speedy completion of the proceedings. If there is a need to extend beyond 18 months, there is an obligation to seek consent of the court before the expiry of 18 months, failing which the mandate of the arbitrators stands terminated.

Different views have been expressed on these changes. In the writer's opinion, arbitration cases are varied and differ from each other on various counts such as business involved, claims, and nature of disputes. Setting common timelines for all arbitrations disregards such inherent variance in issues that may arise in arbitration. Further, while interference by the court is sought to be minimized, by requiring court approval to extend the period beyond 18 months will, presumably, delay and hamper speedy disposal of cases, more so as the court process will be driven by the Civil Procedure Code. Then, the court has wide discretion in granting extension beyond 18 months which can be evident from use of the words *may* and *sufficient cause* in section 29A. It is possible parties may try to convince the court about *sufficient cause* by their lengthy arguments and evidence. Further, the aggrieved party may even go to the higher court challenging the court's decision which, in turn, may lead to inordinate delay in the proceedings. Nevertheless, the efforts made by the Amendment Act in alleviating the general discomfort amongst stakeholders in respect of inordinate delay in attaining finality of the arbitration proceedings are praiseworthy and in the right direction.

## 4. Appointment of Arbitrators

The Amendment Act has also introduced changes to the appointment of a tribunal. Section 12 has been amended with the objective of ensuring appointment of impartial and neutral arbitrators. The changes impose an obligation on a potential arbitrator to disclose conflict of interest and any circumstance (including business, financial or other) which could jeopardize his ability to be impartial or expressly state if they do not have the time to be committed and complete the arbitration within 12 months. Further, a new exhaustive schedule (Fifth Schedule) has been inserted which details the grounds that would give rise to a justifiable doubt as to the independence and neutrality of arbitrators. Further, another schedule (Seventh Schedule) has been added and a new sub-section (5) has been inserted which provides that a person having relationships as specified in the Seventh Schedule shall be ineligible to be

[3] Section 29 A requires that all arbitrations must be completed within one year of arbitral tribunal being constituted. This period can be extended to a further period of maximum 6 months by the consent of all 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.

appointed as an arbitrator.[4] Amongst others, this list includes a person who may be an employee, consultant, advisor or who has any other past or present business relationship with a party to the dispute. The list also refers to a manager, director or part of the management, or a person who has a similar controlling influence over the parties. As such, it may not be possible any more for a public-sector or a government entity to appoint its employees as arbitrator(s) in their proceedings. These changes should, hopefully, help to bring in a community of arbitrators who are unfettered by any vested interest and will induce the trust of the parties by their impartiality and neutrality, thereby leading to minimal challenge to the award on this ground. The intended results may be achieved by strategic selection of appropriate arbitrators with nuanced approach of the matter, so as to provide for speedy and less procedural resolution of conflict, consistent with the underlying object of arbitration.

The Delhi High Court judgment delivered in Assignia VIL JV and the Rail Vikas Nigam Ltd[5] is noteworthy. In this case, the court refused to uphold an arbitral clause whereby one of the party's employee was made an arbitrator. The arbitration clause provided that the respondent, Rail Vikas Nijam Ltd., would nominate five candidates, from which the petitioner would select its nominee arbitrator. It further stipulated that the candidates should meet certain criteria, as specified in the clause and stated that they should be serving or retired officers of the respondent or its related body viz., Indian Railways Accounts Service, with the presiding officer necessarily to be a serving railway officer. Thereafter, three claims were referred to arbitration and a tribunal was constituted accordingly. However, with the escalation of the dispute, the respondent sought to terminate the contract. The petitioner wanted to refer the termination dispute for arbitration and had requested for an independent tribunal to be appointed. The respondent refused to provide a list of candidates for the termination dispute on the ground that the existing tribunal could hear the three pre-existing claims. The petitioner approached the High Court seeking its interference in appointing a tribunal to adjudicate over the termination dispute. The court reiterated the importance of complying with the guidelines under section 12(5), read with Seventh Schedule, for appointment of arbitrators to ensure independence and impartiality and held as follows: "*the arbitrator being an employee of one of the parties would definitely give rise to justifiable doubt as to his independence and impartiality and would defeat the very purpose of amending the Act.*" The court noted that under the new regime, it shall secure the appointment of an independent and impartial arbitrator and any clause that may require an arbitrator to be employee of a party would not be upheld, though the arbitration agreement more generally would still be effective Finally, the court further proceeded to appoint a three-member tribunal consisting of retired judges to adjudicate the disputes between the parties therein. The appointment of in-house counsels as arbitrators has also been unequivocally ruled out.

This judgment assumes significance in the sense that it indicates the judicial activism in implementing the new amendments to the Act even in respect of older contracts, where the dispute arose after the Amendment Act came into force.

[4] Section 12(5) states that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: However, subsequent to disputes having arisen, parties may waive the applicability of this sub-section by an express agreement in writing.

[5] Arbitration Petition No. 677 of 2015 – Judgment delivered on April 29, 2016

## Conclusion

While the Amendment Act has taken some corrective steps in curing certain defects viz., systemic inordinate delays, expensive and ineffective resolution of disputes, still the arbitration regime in India needs a makeover. It is not as if all the changes are on the right track. The existing issues which persist even after the changes shall be addressed and cleared off so as to bring the system at par with international standards. For instance, given the objective of minimal judicial interference, provisions requiring court approval for further extension of time beyond 18 months in terms of section 29(A) in effect may further prolong the arbitration timelines. Further, there is ambiguity created by the prospective application of the Amendment Act in respect of cases where proceedings may have commenced before October 23, 2015.

Nevertheless, it is the first step in a right direction to ensure that the arbitration regime in India is business friendly, time-sensitive and enforcement is easier than in the past and there is great optimism amongst the stake holders that the corrective measures taken by the Amendment Act will boost India as a preferred business destination.

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