ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

Arbitration & Conciliation Act, 1996

AN ANALYSIS OF THE AMENDMENTS

CONTENTS

PREFACE

Dear Reader,

*In furtherance of the new economic policy, the Arbitration & Conciliation Act, 1996 (the "**Act**") was first promulgated about 20 years back by way of an ordinance as part of urgent economic reforms. It is no surprise then that another ordinance [the Arbitration & Conciliation (Amendment) Ordinance, 2015; hereinafter the "**Ordinance**"] late last year amended that same law to bring it in sync with the times, as part of the current government's push towards ease of doing business in India. Before the end of the year, Parliament passed the Arbitration & Conciliation (Amendment) Act, 2015 made it effective from 23 October 2015 [hereinafter the "**Amendment**"].*

Over the years, arbitration has become the default choice for adjudication of commercial disputes. In India, this is true even with respect to purely domestic disputes, as trials in courts take significantly longer due to huge pendency. However, over the last two decades, the process of arbitration – in particular in ad hoc domestic disputes – had come to look more like the traditional court proceedings in India. Combined with high costs due to a small pool of qualified and trusted arbitrators, there has been a growing sense of exasperation amongst the users of the process.

An amendment to the law to remedy some of these issues, and others such as misinterpretation of certain provisions that invariably crop up in the life of any legislation had been on the cards for quite some time. After two aborted attempts – one in 2001 and the other in 2010 – the law has finally been amended. The Amendment carries forward most proposals of the 246th Law Commission Report released in 2014, but also introduces some unique provisions not hitherto seen in any leading arbitration statute. Some of these provisions provide some extraordinary measures to remedy certain peculiar issues with ad hoc domestic arbitration including the time limit for completing arbitration and arbitrators fees.

The Amendment mandates that every arbitration seated in India must result in an award within 12 months of the arbitral tribunal being constituted, with parties having the right to extend this by another 6 months through mutual consent. If this does not happen, the mandate of the tribunal terminates – unless the Court extends it imposing such conditions as it deems fit. The Court can also penalize arbitrators by ordering reduction of their fees at the time of granting such extension. It can, if it considers fit, substitute one or all the arbitrators at the time of granting extension.

The Amendment also suggests many other changes of far reaching consequence - some affecting a significant departure from the existing law, some clarifying certain controversies, and others simply confirming the law as declared through interpretations received from courts over time.

Three changes in particular are of great consequence to international businesses – first, foreign parties are no longer required to litigate in lower courts in remote corners of this vast country with High Courts now becoming the court of first instance for all purposes relating to international arbitration; second, provisions relating to interim measures from courts and seeking court assistance in taking evidence have been extended to foreign seated arbitrations; and third, the removal of 'patent illegality' as a ground to challenge awards arising out of international arbitration seated in India.

We have done a detailed analysis of the amendments outlining the effect, comparison with the 246th Law Commission Report and our views on the impact of these changes in both legal and practical terms. One of the most important questions in any litigant's mind would be the effect these amendments would have on their existing proceedings. Though that was an aspect that the Ordinance provided no guidance on, the Amendment provides that it will not affect any proceedings in arbitration initiated prior to 23 October 2015.

We hope you find this study of the amendments helpful and, as always, we are open to comments, suggestions, and questions.

Warm Regards,

The Litigation & Dispute Resolution Team

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ANALYSIS OF THE AMENDMENTS

SECTION 2(1)(E): DEFINITION OF "COURT"

Amendment Introduced

- The Amendment amends section 2(1)(e) to provide a new definition to "Court" for international commercial arbitration, i.e. with respect to arbitration seated in India but involving at least one foreign party.

- In such cases, all references to "Court" will now mean the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration or a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court, with respect to subject matter of arbitration.

Effect of the Amendment

- In all international commercial arbitrations, High Courts have been made the exclusive forum for reliefs under the Act, which was earlier the Principal Civil Court.

ELP Comments

- The amendment to the definition is a welcome change as foreign parties which are unfamiliar to the legal system in India would be spared from having to litigate in remote areas of the country.
- The only potential downside is that shifting more responsibility on to the High Courts, which are already extremely loaded with pending cases, might cause potential delays.
- The part of Law Commission's recommendation that has not been included will impact a situation where interim reliefs under section 9 or court assistance for seeking evidence under section 27 is sought in foreign seated arbitration (in light of amendment to section 2(2)) and such arbitration has no co-relation to India, i.e. the subject matter is not situated in India. In such cases, it is difficult to determine which High Court will have the jurisdiction. It is not clear why this recommendation was excluded.

Comparison with the 246th Law Commission Report

- The provision as recommended by the Law Commission has been substantially adopted. However, under sub-clause (ii), the Law Commission also recommended adding the sentence "*or in cases involving grant of interim measures in respect of arbitrations outside India, the High Court exercising jurisdiction over the court having jurisdiction to grant such measures as per the laws of India, and includes the High Court in exercise of its ordinary original civil jurisdiction*", which was not adopted by the Amendment.

SECTION 2(1)(F)(III): DEFINITION OF "INTERNATIONAL COMMERCIAL ARBITRATION"

Amendment Introduced

- The Amendment deletes "a company" from the criteria in the definition which refers to central management and control as a factor in determining whether one of the parties is not Indian, for the purpose of qualifying the arbitration as an "international commercial arbitration"

Effect of the Amendment

- The amendment confirms the interpretation that the Supreme Court had given to the provision, holding that in case of a company, if the place of incorporation is India, central management and control would be irrelevant in determining whether it was an international commercial arbitration. That criteria has now been restricted to an association or body of individuals, and not in case of a company.

Comparison with the 246th Law Commission Report

- Amendment suggested by the Law Commission has been adopted.

ELP Comments

- This amendment codifies the position taken by the Supreme Court in *TDM Infrastructure Pvt. Ltd. vs. UE Development India Pvt. Ltd.[(2008) 14 SCC 271]*, and reaffirmed in subsequent decisions by the courts.
- An opportunity has been missed to introduce another criterion, i.e. subject matter of the contract, as relevant to determine whether an arbitration should be considered 'international'. The Act had omitted that criterion while adopting the definition from the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"). In light of the amount of international work that Indian companies have been doing in recent times – and particularly in light of the default position under private international law which considers 'subject matter' relevant – two Indian parties should be allowed to choose a foreign law and seat if the subject matter of the contract is not Indian. In absence of such provision, it is possible a much wider and unsound interpretation will find its way in on the issue of two Indian parties' freedom to choose a seat outside India – as has recently happened in the *Sassan Power Ltd. vs. North American Coal Corporation India Pvt. Ltd. [Order dated 11 September 2015, High Court of Madhya Pradesh, First Appeal No. 310 of 2015]* case.

SECTION 2(2): TERRITORIAL APPLICABILITY OF THE ACT

Amendment Introduced

- A proviso has been added to existing section 2(2) to provide that provisions relating to interim measures (section 9) and assistance of court in taking evidence (section 27), and appeals from orders under the said provisions(section 37) will apply, unless excluded by parties, even to arbitrations not seated in India.

ELP Comments

- The Amendment has brought this provision in line with Article 1(2) of the Model Law.
- What is surprising is that the word "only" has not been introduced to section 2(2). The absence of this word was the primary cause for the entire controversy which started with *Bhatia International vs. Bulk Trading SA [(2002) 4 SCC 105]*. All proposals for amendment of the Act, starting with the 2001 Law Commission Report had recommended this.
- The Supreme Court in *Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc. [(2012) 9 SCC 552]* had reasoned that the word "only" in Article 1(2) of the Model Law had been used in view of the exceptions carved out in the said Article, through the proviso. Since the proviso was missing in the Act, the word "only" was not required. Now that the proviso has been added, it is strange that the word 'only' has been omitted – which could lead to avoidable complications.

Effect of the Amendment

- As the law currently stands, there is a complete bar on any Indian court exercising any jurisdiction whatsoever with respect to an arbitration not seated in India. The amendment remedies this anomaly by providing that provisions for interim measures and taking assistance of court in seeking evidence can be invoked even if the arbitration is seated outside India.

Comparison with the 246th Law Commission Report

- The Amendment partly adopts the recommendations of the Law Commission. Although the proviso has been adopted verbatim, the word "only" has not been added after the words "shall apply" in the said section, contrary to the suggestion by the Law Commission.

SECTION 7: ARBITRATION AGREEMENT

Amendment Introduced

- The following addition has been made to section 7(4)(b):

  "7(4) An arbitration agreement is in writing if it is contained in –

  ……

  (b) an exchange of letters, telex, telegrams or other means of telecommunication, **including communication through electronic means**, which provides a record of the agreement;
  ….." [emphasis supplied]

ELP Comments

- This amendment aligns the Act with the judicial position already established in cases such as *Shakti Bhog Foods Ltd. vs. Kola Shipping Ltd. [(2009) 2 SCC 134]* and *Trimex International FZE Ltd. vs. Vedanta Aluminium Ltd. [(2010) 3 SCC 1]* that electronic communication would constitute an agreement in writing under section 7.
- The recommendation for insertion of section 3A by the Law Commission was an attempt by the Law Commission to align the Act with the position in most advanced jurisdictions that an arbitration agreement is not required to be in writing *per se* but should be capable of being evidenced in writing. This is also the position under the English Arbitration Act. It is unclear why the Amendment has rejected this recommendation.

Effect of the Amendment

- An exchange of emails, text messages or other electronic communications which provide a record of the agreement will also constitute an agreement in writing.

Comparison with the 246th Law Commission Report

- The recommendations put forward by the Law Commission have not been adopted by the Amendment. The most glaring omission is the definition of "electronic communication" that has been provided in the Law Commission Report but omitted in the Amendment.

- The Law Commission also recommended that a section 3A be inserted stating "*An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means*." However, the said recommendation was not adopted.

SECTION 8: REFERRING PARTIES TO ARBITRATION

Amendment Introduced

- The amended sub-section (1) states that a judicial authority before which an action is brought in a matter which is subject of an arbitration agreement shall refer the parties to arbitration upon an application made by a party to the arbitration agreement or any person claiming through or under him, not later than the date of submitting his first statement on the substance of the dispute, unless it finds that *prima facie* no valid arbitration agreement exists.

- This reference has to be made notwithstanding any judgment, decree or order of the Supreme Court or any Court.

- Insertion of a proviso to sub-section (2) which

ELP Comments

- Some of the recommendations of the Law Commission that have not been accepted were unnecessary and is well-advised to have been avoided. Section 8 has been a rather successful provision which has almost consistently received a pro-arbitration treatment, with courts holding that it would be mandatory to refer parties to arbitration. Therefore, too many changes to this provision ought to be avoided – which seems to have been the approach in the Amendment.

(contd.)

states that where the party seeking reference to arbitration under sub-section (1) does not have the original arbitration agreement or a duly certified copy, and the same is retained by the other party to the agreement, then the party applying for reference to arbitration shall also file along with the application a petition praying the Court to call upon the other party to produce the original arbitration agreement/certified copy thereof before that Court.

Effect of the Amendment

- By virtue of the amendment, not only the parties to an arbitration agreement but any person claiming through or under the party to arbitration can seek reference of the dispute to arbitration under section 8. This should allow possibility of non-signatories being referred to arbitration in arbitrations seated in India.
- The law as it stood made it mandatory for a judicial authority to refer the parties to arbitration and the scope of any review was extremely limited. The amendment now provides that courts should take a *prima facie* view as to existence of a valid arbitration agreement.
- The amendment also provides that such reference has to be made notwithstanding any judgment, decree or order of the Supreme Court or any Court. While it is not clear, in our view, this is intended to negate the effect of certain decisions which had questioned the arbitrability of disputes involving allegations of fraud.
- Insertion of the proviso is an enabling provision to ensure that a party seeking reference to arbitration under section 8 is not prevented from making an application merely because the original arbitration agreement or a duly certified copy thereof is not available and is retained by the other party.

Comparison with the 246th Law Commission Report

- The recommendations made in the Report have not been fully adopted in the Amendment and in fact constitutes a significant departure from these recommendations.
- The Law Commission had recommended the insertion of the words "*refer to arbitration such of the parties to the action who are parties to the arbitration agreement*" in sub-section (1).

ELP Comments

(contd.)

- In *Chloro Controls (I) P. Ltd. vs. Severn Trent Water Purification Inc. [(2013) 1 SCC 641]*, the Supreme Court, after taking into consideration the language used in section 45 of the Act permitted joinder of non-signatories to the arbitration. However, due to the distinction between the language used in section 8 and section 45, a non-signatory could not seek reference to arbitration in arbitration seated in India. In the case of *Housing Development and Infrastructure Ltd. vs. Mumbai International Airport Pvt. Ltd.* [2013 Indlaw MUM 1102], the Bombay High Court held that Section 45 provides for reference to arbitration by one of the parties "or any person claiming through or under him" whereas section 8 does not contain these words. Therefore the ratio laid down in *Chloro Controls* shall not be applicable to domestic arbitration. The Amendment seeks to add these very words so as to give the courts an option to allow non-signatories to be joined as parties in appropriate cases.
- However, the amendment empowering the Court to refer the matter to arbitration notwithstanding any judgment, decree or order of the Supreme Court or any Court is vague and could be problematic. It seems to be an attempt to address various decisions which have taken a view on arbitrability of disputes such as *N. Radhakrishnan vs. Maestro Engineers [(2010) 1 SCC 72]*, *Booz Allen & Hamilton Inc vs. SBI and Home Finance Ltd. [(2011) 5 SCC 532]*, and *Sukanya Holdings Pvt. Ltd. vs. Jayesh H Pandya [(2003) 5 SCC 531].* However, it is difficult to predict whether courts will interpret this exclusion to be sufficient to negate the distinct and different principles outlined in these decisions based on unique reasoning in each case.
- *N. Radhakrishnan* related to arbitrability of disputes where allegations of fraud were involved. It held that such disputes were not fit for adjudication through arbitration. In subsequent decisions, this was not strictly followed, with *Swiss Timing Ltd. vs. Commonwealth Games 2010 Organizing Committee [(2014) 6 SCC 677]* holding that the decision was *per incuriam* a larger bench of the apex court. It was necessary to clarify that allegation of fraud does not make a dispute non-arbitrable. The Law Commission had recommended a specific explanation to section 16 in this respect which has not been accepted. In our view, courts are likely to interpret the new section 8 provision as clarifying that fraud allegations do not make disputes non-arbitrable.

(contd.)

- The Report further proposed the insertion of a proviso after sub-section (1) and two explanations:
  - The proposed proviso states that no such reference shall be made in cases where-
    - The parties to the action who are not parties to the arbitration agreement, are necessary parties to the action;
    - The judicial authority finds that the arbitration agreement does not exist or is null and void.
  - The proposed Explanation 1 provides that a judicial authority shall refer the parties to arbitration if it is *prima facie* satisfied about the existence of an arbitration agreement and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16 which shall decide the same as a preliminary issue.
  - The proposed Explanation 2 provides that any pleading in relation to any interim application filed before the judicial authority shall not be treated to be a statement on the substance of the dispute.

ELP Comments

(contd.)

- In *Booz Allen*, the apex court held that disputes with respect to rights *in rem* would not usually be arbitrable. It is not clear whether the amendment seeks to change this, but in our view it is unlikely to achieve that result. Courts are more likely to hold that an arbitration agreement with respect to a right *in rem* is simply not valid.
- In *Sukanya Holdings*, the court had held that unless the entire "matter" or dispute was held to be arbitrable, a part of it could not be bifurcated and referred to arbitration. Specific suggestions by the Law Commission to negate the effect of this ruling have not been adopted. Again, it is unclear whether the amendment seeks to negate *Sukanya Holdings*, but if it does, it might fail to achieve the result. It is possible for courts to take the view that an arbitration agreement requiring a *lis* to be divided is invalid.

SECTION 9 AND SECTION 17: INTERIM MEASURES

Amendment Introduced

- Sub-section (2) has been added to section 9 which states that if the Court passes an order for interim measures before the commencement of arbitral proceedings, the arbitral proceedings shall be commenced within 90 days from the date of such order, or within such further time as the Court may determine.
- Sub-section (3) has been added to section 9 stating that, once the arbitral tribunal has been constituted, the Court shall not entertain an application under the said section, unless the Court finds that the remedy under section 17 would not be efficacious.
- The powers of the Court to grant interim measures on matters set out under sub-clause (a) to (e) of section 9(ii) have now been extended to the tribunal under section 17. Therefore, the tribunal shall now have the same powers to make orders for interim measures as the Court.
- Section 17 now provides that an order of the arbitral tribunal under section 17 shall be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908 ("**CPC**"), in the same manner as if it were an order of the Court.

ELP Comments

- The tribunal's powers to grant interim measures have been clarified by the Amendment and aligned with those of the Court under section 9. This would have been necessary in light of the new provision which makes the tribunal the default forum for granting interim measures once the tribunal is in place. Some courts have been following this as a practice and have directed parties to approach the tribunal, if the tribunal has already been constituted, instead of contending applications for interim measures before the court. This approach makes sense since the tribunal is best placed being seized of the dispute.

(contd.)

Effect of the Amendment

- If the Court passes an order for interim measures before the commencement of arbitral proceedings, it will now have to specify a timeline within which the arbitration should be commenced, which by default has been provided as 90 days.

- Once the tribunal has been constituted, parties will have to approach the tribunal under section 17 for interim measures and will not be permitted to approach the court under section 9. Courts can only entertain such an application if it is convinced that an order of the tribunal will not be efficacious.

- An order of the arbitral tribunal granting interim measures can now be enforced by courts as if it was an order of the court.

Comparison with the 246th Law Commission Report

- The Amendment partly adopted the recommendations of the Law Commission. With respect to sub-section (2) of section 9, the Amendment increased the time period to 90 days, instead of 60 days, as suggested by the Law Commission. More importantly, the Amendment did not adopt the recommendation of the Law Commission, which provided that the interim measure would lapse if the arbitral proceedings are not commenced within 60 days.

ELP Comments

(contd.)

- It is not uncommon for parties to obtain urgent interim measures prior to commencement of arbitration and then drag their feet in commencing the arbitral proceedings. Since the interim measures are meant to be in aid of arbitration, it is sensible that interim measures are granted only in cases where parties have real intention to pursue an arbitration. However, by omitting the sentence recommended by the Law Commission stating that the interim measures would lapse on the expiry of the said period, the Amendment has taken the teeth out of this clause. Though, it is likely that even though it has not been specifically included, courts might interpret the provision such that non-adherence will amount to vacation of the interim protection.
- The Amendment and the Law Commission have failed to take into account the development of provisions with respect to emergency arbitrators in many institutional rules. In the recent amendment to the Singapore law, the definition of 'arbitrator' was amended to provide for this. It would have been helpful if section 17 had provided that interim measures by emergency arbitrators will also be enforceable in the same manner as orders of the tribunal. This will now have to await interpretation by the courts, and it is likely that courts will recognize emergency arbitrators' orders in the same manner.

SECTION 11 AND 11A: APPOINTMENT OF ARBITRATORS

Amendment Introduced

- The Amendment has replaced the words "Chief Justice" with either "Supreme Court" or "High Court", as applicable.

- Sub-section 6A has been added stating that, while considering an application for appointment of an arbitrator, the Supreme Court or the High Court shall confine itself to the examination of the existence of the arbitration agreement.

- Sub-section 6B has been added stating that, the designation of any person by the Supreme Court or the High Court for the purposes of this section shall not be regarded as a delegation of judicial power.

- Sub-section 7 has been amended to provide that the decision of the Supreme Court or the High Court under sub-sections (4), (5) and (6) shall be final and no appeal including Letters Patent Appeal shall lie against such decision.

- In addition to the existing factors to be considered by the Supreme Court or the High Court for appointment of the arbitrator as set out in sub-section 8, the said sub-section now also provides that, before appointing an arbitrator,

the Supreme Court or the High Court shall first seek a disclosure in writing from the prospective arbitrator in terms of section 12(1).

- Sub-section 13 has been inserted which states that the Supreme Court or the High Court shall endeavour to dispose of the application within 60 days from the date of service of notice on the opposite party.

- Sub-section 14 has been inserted which states that the High Courts may frame rules for the purpose of determination of fee of the tribunal, after taking into consideration the rates specified in a new schedule added to the Act. The Explanation to the said sub-section provides that it would not be applicable to institutional arbitration where the fees are provided for or determined in accordance with institutional rules.

- The Amendment has also introduced a new provision, section 11A, which provides the procedure for amending the Fourth Schedule (providing suggested fees) as and when the Central Government deems necessary.

Effect of the Amendment

- When an application for appointment of arbitrator is filed before the Supreme Court or High Court, the Court will only look into the question of existence of the arbitration agreement.

- The Supreme Court or High Court may designate any other person or institution to make the appointment under this section and such delegation cannot be challenged on the ground that it amounts to delegation of judicial duties.

- No appeal, including a Letters Patent Appeal, will lie against the decision of the Supreme Court or High Court with regard to appointment of arbitrator.

- Courts, through a declaration in writing prior to appointment, need to ensure that the person being appointed satisfies the criteria for independence and impartiality under the Act

ELP Comments

- One of the main points of contention that arose under section 11 over the years is whether the function of the Chief Justice under the said section is an administrative function or a judicial function. An argument raised in *S.B.P & Co. vs. Patel Engineering Ltd.[(2005) 8 SCC 618]* in this regard was that, since section 11 specifically vests the power of appointment of arbitrator on the Chief Justice and not on the court itself, the function was an administrative function. However, the Court rejected this argument and ultimately held that it was a judicial function. Recently, the issue arose once again when the Supreme Court in *State of West Bengal vs. Associated Contractors [AIR 2015 SC 260]* held that since the Chief Justice is not a "court"; a decision under section 11 is not a decision of the court and hence, will not have precedential value. The Amendment has now finally laid this issue to rest by replacing "Chief Justice" with Supreme Court or High Court.
- The *Patel Engineering* decision conferred wide powers on the Chief Justice in deciding existence and validity of the arbitration agreement. The Court held that the Chief Justice has the power to decide on *"his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators"* and such decision is final.
  The Amendment has sought to rein in the scope set out by the Court in *Patel Engineering* by providing that the Supreme Court or High Court shall limit its examination only to the existence of the arbitration agreement, and not on issues such as live claim, qualifications, conditions for exercise of power etc. However, it would have been best to include the Law Commission's recommendation clarifying that the finality as to whether the tribunal has jurisdiction would be left to the tribunal under section 16 – especially in light of a contrary position currently as held by a 7 judge bench of the apex court.
- In *Patel Engineering* it was held that the Chief Justice can delegate his/her power under section 11 only to another judge of that court. The Amendment now clearly provides that the Supreme Court or the High Court may designate any other person or institution for the purposes of section 11 and further clarifies that such a designation will not be deemed a delegation of judicial power. This enables the possibility for courts to, on a case to case basis, or through standing rules / instructions, appoint institutions or expert bodies to appoint arbitrators in appropriate cases.
- In *Patel Engineering* the majority held that no appeal will lie against a decision under section 11 except under Article 136 of the Constitution. The Amendment reaffirms this position by providing that the decision of the Supreme Court or High Court under sub-section (4), (5) and (6) of section 11 is final and no appeal including Letters Patent Appeal shall lie against such a decision.

(contd.)

and that they have sufficient time to dedicate to the arbitration.

- If the High Courts frame rules under sub-section 14 for the purpose of determination of the fee of arbitrators, all arbitrators appointed in ad hoc domestic arbitrations will be governed by the same. Therefore, there will be a cap on the fee that an arbitrator may charge in an ad-hoc domestic arbitration, which will be based on the sum in dispute.

Comparison with the 246th Law Commission Report

- The amendments to this section have largely conformed to the recommendations by the Law Commission. One notable deviation is with regard to sub-section 6A. In the Law Commission Report it was recommended that the High Court shall appoint an arbitrator on an application filed under this section, unless it is determined that the arbitration agreement does not exist or is null and void. Further, the Explanation I in the Law Commission Report states that the High Court will appoint the arbitrator as long as it is *prima facie* satisfied that the arbitration agreement exists, and leave the final determination of the issue to the arbitrator under section 16. However, this Explanation has not been inserted in the Amendment.

ELP Comments

(contd.)

- A much-needed provision that has been included under sub-section 11 is the requirement for a prospective arbitrator to submit a declaration as provided under section 12. This will help ensure that an arbitrator who may not be able to expeditiously carry out the arbitral proceedings owing to his/her schedule, will not be appointed.
- An interesting addition to section 11 is the provision for the High Court to formulate rules for the purpose of determination of the fee of the arbitrators. This provision, which could potentially lead to a fixed fee schedule being imposed on ad-hoc domestic arbitrations, is a peculiarity of the Indian legislation, as matters relating to arbitrator fees are not usually covered in any legislation and are left to parties or institutions. However, it is understandable in light of the practice currently prevalent in domestic ad hoc arbitrations where arbitrator fees are charged on per hearing basis, which often results in arbitration becoming an extremely expensive proposition in India.
- The provision relating to fees, however, poses a practical problem given the federal nature of jurisdiction of Indian courts – in a case where the cause of action arises under the jurisdiction of multiple High Courts; it is unclear how the parties would decide on which High Court rules to apply. In light of this, parties should consider specifying one of the potential High Courts as an exclusive court with respect to their contract, akin to an exclusive jurisdiction clause.

SECTION 12: GROUNDS FOR CHALLENGE

Amendment Introduced

- Sub-section 1 has been amended to provide that a prospective arbitrator has to disclose in writing in the form specified in a new schedule to the Act: (a) the existence of any past or present relationship with either of the parties or the subject matter of the dispute which is likely to give rise to justifiable doubts as to his independence and impartiality; and (b) any circumstances which are likely to affect his ability to complete the entire arbitration within 12 months.

- Explanation I provides that "the grounds stated in Fifth Schedule shall guide in determining whether circumstances exists which give rise to justifiable doubts as to the independence or impartiality of an arbitrator."

ELP Comments

- The amendments have been inspired by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"). India is probably one of the first countries to adopt the guidelines by the IBA and incorporate the same into its domestic law.
- The contents of the Fifth Schedule incorporate the Red and Orange lists of the IBA Guidelines. Further, the Seventh Schedule incorporates the provisions of the waivable and non-waivable Red List of the IBA Guidelines.

(contd.)

- A new sub-section has been added stating that any person whose relationship with the parties, or the counsel, or the subject matter of the dispute falls within the categories specified in a new schedule now added to the Act, will not be eligible for appointment as an arbitrator. However, parties may waive the applicability of this provision by an agreement in writing subsequent to the disputes arising.

Effect of the Amendment

- If any of the grounds set out in the Fifth Schedule exist, or if the prospective arbitrator is aware that he may not be able to devote enough time to the arbitration, he has to make a disclosure in writing to the parties when he is approached for appointment as an arbitrator.

- If any of the grounds set out in the Seventh Schedule exist, the prospective arbitrator is automatically ineligible for appointment.

- Employee of one of the parties, for instance, would be disqualified to act as an arbitrator – except if this is waived after the dispute has arisen.

Comparison with the 246th Law Commission Report

- The changes under the Amendment are substantially similar to the recommendations of the Law Commission. The only difference is in section sub-section (b) of section 12(1). The Law Commission recommended that the said clause should state "*which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to finish the entire arbitration within 24 months and render an award within 3 months from such date*". However, the clause was not adopted, probably in light of the introduction of section 29A.

ELP Comments

(contd.)

- The Act had the same provision for independence and impartiality as the Model Law. However, a strange situation had come to be in India, wherein an existing or ex-employee of one of the parties is often appointed as the arbitrator (particularly in contracts with government entities). The only restriction the Supreme Court put on this was that the said employee should not be involved in the contract in question.*[Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520]* The Amendment now provides a list of relationships which are deemed to disqualify a person from appointment as an arbitrator. This includes, as the first item, being an employee of one of the parties.
- Although the amendments to section 12 are extremely positive, one other phenomenon that has not received attention is that of right of unilateral appointment – something which has become a menace in Indian contracts with unequal bargaining powers. In most advanced jurisdictions, such unilateral right of appointment is considered against public policy and not enforced – but Indian law has permitted this. However, the Amendment has not addressed the aspect of unilateral right to appoint the arbitral tribunal.
- The Amendment also does not provide a remedy in case an arbitrator appointed is otherwise disqualified under the new provision. The current default provision is to challenge the arbitrator by way of an application before the tribunal itself and if rejected, to make it a ground for challenge of the award. But the relevant provision in section 13 only refers to grounds under section 12(3). Section 13 has not been amended to refer to the new ground under section 12(5). Additionally, the power that Law Commission had recommended to be granted under section 14 to remove an arbitrator as being *de jure* unable to act on account of disqualification under new section 12(5) has not been accepted. Therefore, the current amended Act does not provide a remedy for violation of section 12(5) and this is a lacuna that needs to be corrected or clarified through judicial interpretation.

SECTION 14: FAILURE OR IMPOSSIBILITY TO ACT

Amendment Introduced

- The Amendment introduced the following change to section 14:

> "14. Failure or impossibility to act – (1) ~~The mandate of an arbitrator shall terminate if~~ **The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if** –

…." [emphasis supplied]

Effect of the Amendment

- If a party files an application before the Court for termination of the mandate of an arbitrator under section 14, and the Court sees it as a fit case for termination, the same Court can also appoint a new arbitrator to substitute the former.

Comparison with the 246th Law Commission Report

- The change under the Amendment was made in accordance with the recommendations of the Law Commission.
- The Law Commission also recommended the addition of an Explanation after sub-section 1 of sub-clause (b) – "Where an arbitrator whose relationship with the parties, Counsel or the subject matter of the dispute falls under one of the categories set out in the Fifth Schedule, such an arbitrator shall be deemed to be "de jure unable to perform his functions". However, this explanation has not been added.

ELP Comments

- Under the Act it was argued that section 14 provided only for termination of the mandate of the arbitrator and not for the appointment of a new arbitrator. Therefore, in some cases, once the Court declared that the arbitrator's mandate ought to be terminated, the party was required to separately file a section 11 for appointment of a new arbitrator. The change through the Amendment now takes care of this.
- In not adopting the recommendation by the Law Commission with respect to the explanation, and also failing to amend section 13, the Amendment has created a lacuna. Now, a party who becomes aware that the grounds under the Seventh Schedule arise with regard to the arbitrator, can neither approach the Court under section 14 for termination of his mandate, nor challenge the appointment before the arbitrator himself in accordance with section 13.
- There is also some controversy as to whether it can be contended that an arbitrator's lack of impartiality or independence makes him *de jure* disqualified under existing section 14 provision, which has resulted in conflicting decisions of different High Courts. [*See, e.g. Hasmukhlal H. Doshi vs Justice M. L. Pendse, (2000) 3 BomCR 67; Decon India (P) Ltd. vs Union of India, 2003 SCC Online Cal 448; State of AP vs Subhash Projects & Marketing Ltd., (2007) 1 ArbLR 189 (P&H); Progressive Career Academy Pvt. Ltd. vs FIITJEE Ltd., 2011 SCC Online Del 2271].* The Amendment was an opportunity to clarify this issue, which has been missed.

SECTION 23: STATEMENTS OF CLAIM AND DEFENCE

Amendment Introduced

- The following sub-section was added after sub-section (2):

  "(2A) The respondent, in support of his case, may also submit a counter claim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement"

Effect of the Amendment

- The Respondent can file its counterclaim against the Claimant, if any, in the same arbitration, and need not initiate another arbitral proceeding.

Comparison with the 246th Law Commission Report

- The amendment has been carried out based on the recommendations of the Law Commission.

ELP Comments

- This amendment codifies what is already being followed in practice. The note to this section in the Law Commission Report provides that this amendment has been suggested *"so to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement, in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation".*
- This should also prevent the practice now prevalent in many ad hoc domestic disputes where tribunals consider the counterclaim as a separate reference and often charge additional fees for the same.

SECTION 24: HEARING AND WRITTEN PROCEEDING

Amendment Introduced

- The following proviso was added after the proviso to sub-section (1):

  "Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on 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 adjournment without any sufficient cause"

ELP Comments

- This amendment, like that of section 29A, is another attempt under the Amendment at ensuring that the arbitral proceedings are concluded expeditiously.

Effect of the Amendment

- Tribunal may impose costs for seeking frivolous adjournments.

Comparison with the 246th Law Commission Report

- The amendment has been carried out based on the recommendations of the Law Commission.

SECTION 25: DEFAULT OF A PARTY

Amendment Introduced

- Clause (b) of section 25 has been amended to provide that if the respondent fails to communicate his statement of defence in accordance with sub-section (1) of section 23, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.

ELP Comments

- This is primarily a clarificatory provision, as the law as it stood did not prevent the arbitrator from taking this view. However, tribunals would usually be reluctant to take such view to avoid challenge of the award on the ground that a party was not "otherwise allowed to present its case", which is a ground for setting aside an award under section 34.
- This amendment is also clearly reflective of the seriousness with which the issues of delay in arbitration proceedings have been addressed and will help in ensuring that the parties do not resort to any dilatory tactics when it comes to arbitration proceedings.

Effect of the Amendment

- The arbitral tribunal shall now (in addition to the right to continue the proceedings) have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.

Comparison with the 246thLaw Commission Report

- The recommendations of the Law Commission in this regard have been accepted and duly incorporated in the Amendment.

SECTION 28: RULES APPLICABLE TO SUBSTANCE OF DISPUTE

Amendment Introduced

- For sub-section (3), the following sub-section shall be substituted, namely:-

"(3) While deciding and making an award, the arbitral tribunal shall, in all cases, **take into account** the terms of the contract and trade usages applicable to the transaction." [emphasis supplied]

Effect of the Amendment

- The effect of this amendment is that simply because an award is not strictly "in accordance with" the terms of the contract would not make it ipso facto *"patently illegal"* and liable for being set aside under section 34 – which is the interpretation this provision had earlier received.

Comparison with the 246th Law Commission Report

- The Law Commission had also proposed a clarification to sub-section (1) of this provision such that it was to be read as "Where the seat of arbitration is in India". This recommendation was in consonance with the proposed amendment to section 20 of the Act and was intended to make the wording of the Act consistent with the international usage of the concept of a "seat" of arbitration and create a legislative distinction between "seat" and "venue" of arbitration. However this recommendation has not been provided for in the Amendment.
- The amendment to sub-section (3) however has been duly incorporated in the Amendment and is consistent with the recommendation of the Law Commission.

ELP Comments

- This amendment was intended to negate the effect of the ratio laid down by the Supreme Court in *ONGC Ltd. vs. Saw Pipes Ltd. [(2003) 5 SCC 705].* In this case, the Supreme Court, after taking into consideration the words *"in accordance with the contract"* used in section 28(3), held that any contravention of the terms of the contract renders the award violative of section 28(3) of the Act and is therefore subject to the Court's interference under section 34.

SECTION 29A: TIME LIMIT FOR ARBITRAL AWARD

Amendment Introduced

- An entirely new section, i.e. section 29A has been inserted which provides a time limit for rendering an award in every arbitration seated in India.
- The default time limit for making the award has been provided at 12 months from the date the arbitral tribunal enters upon the reference. It has also been clarified that for the purpose of this section the arbitral tribunal shall be deemed to have entered the reference on the date on which the arbitrator (or all the arbitrators, as the case may be), have received notice in writing of their appointment.
- Parties may by consent extend the period for a further period not exceeding 6 months.
- If the award is not made within the prescribed time period of 12 months or within the mutually extended period, the mandate of the arbitrator(s) shall terminate unless the time period has been

ELP Comments

- This amendment will turn out to be of most far reaching consequence in the conduct of arbitrations in India. Media reports suggest that the then Law Commission Chairman was opposed to this idea, but the government has implemented it nonetheless.
- The manner in which ad hoc arbitration is usually conducted in India leaves a lot to be desired. It is not uncommon for arbitrations to go on for more than 4 to 5 years. Unlike the international practice, hearings are held in diffused manner over long periods of time. No time limits either for cross-examination or for arguments are prescribed and lawyers often misuse the discretion. No one can deny that the situation was extraordinary and now it seems, the executive has prescribed an extraordinary solution.

(contd.)

extended by the Court, on an application by either party only for sufficient cause and on such terms and conditions as may be imposed by the Court – prior to or after the expiry of the period so specified.

- While granting the extension, if the Court finds that proceedings have been delayed for reasons attributable to the arbitral tribunal, then it may order a reduction of fees of arbitrator(s) not exceeding 5 per cent for each month of such delay.

- An extension application shall be disposed of by the Court as expeditiously as possible and it shall endeavour to dispose of the matter within a period of 60 days from the date of service of notice on the opposite party.

- While extending the period, the Court can substitute one or all of the arbitrators while extending the period and in the event of such substitution, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and arbitrator(s) appointed under the said provision shall be deemed to have received the said evidence and material. Sub-section (7) further clarifies this by including a deeming provision whereby the reconstituted tribunal shall be in continuation of the previously appointed tribunal.

- As an incentive, it has also been provided that if the award is made within a period of 6 months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

ELP Comments

(contd.)

- Many of the problems that plague the conduct of adhoc domestic arbitration in India originate from the traditional approach to trials in Indian courts. For instance, recording of evidence is neither time bound nor does it usually happen on a day to day basis in Indian courts. It is not unheard of for jurisdictions to provide extraordinary provisions to counter traditional or cultural roadblocks. For instance, Chinese law only recognizes institutional arbitration. On similar lines, this provision, if it succeeds in achieving its intent, might prove to be a peculiarity of Indian legislation – fit to deal with a peculiar Indian problem.
- The 12 month deadline, however, is overambitious and impractical. Even in the most efficient international arbitrations, in a simple dispute, 18 months is rather the norm. In a more complicated dispute, 24 months or longer is not unusual. A more practical deadline would be 24 months, with 6 months extension on parties' agreement.
- Another factor to consider is the institutional delay in Indian courts, which is often beyond the control of the courts and the judges, given the sheer number of cases on their docket. A solution that entails lining up before the court to determine future action is a problem in itself. One of the ways could be for the arbitration to continue notwithstanding the pendency of an extension application, instead of an automatic cessation of tribunal's mandate.
- Another aspect is the court's power to prescribe penalty on arbitrator's fee. Not only would it be strange to penalize arbitrators without hearing them, but if that was to happen it would be undesirable. To have arbitrators participate in a dispute before the Court as to who was responsible for the delays would not bode well for the spirit of the arbitral process.
- The provisions dealing with penalty on fees also upsets the equation between tribunals and courts – in the modern view on arbitration, this equation should be that of partners towards a common goal of providing efficient and effective redressal to commercial disputes. This provision puts the courts and tribunals in an adversarial position, which can never be good for the development of a healthy participatory role.

- It has been left open for the court to impose actual or exemplary costs upon any of the parties under this section.

Effect of the Amendment

- As per this provision, the arbitrators will now be required to render the award in a time bound manner. Ordinarily, an arbitrator will be required to make an award with 12 months from the date the arbitral tribunal enters upon the reference unless the time period is extended in accordance with this provision i.e. by the parties by consent for a maximum of 6 months or by the Court upon an application made by either party.

- This amendment also gives scope for judicial intervention by enabling the Courts to grant an extension on certain terms and conditions including reduction of the arbitrator's fees (if it is found that delay is attributable to the

arbitral tribunal). The Court also has the power to substitute arbitrators while extending the period and impose actual/exemplary costs on any of the parties. In effect, arbitrations seated in India will now be conducted under close supervision of courts as to their timelines.

Comparison with the 246th Law Commission Report

- This provision was not recommended by the Law Commission.

SECTION 29B: FAST TRACK PROCEDURE

Amendment Introduced

- An entirely new section, i.e. section 29B has been inserted providing for fast track procedure for arbitration.
- Under this provision, notwithstanding anything contained in the Act, the parties to an arbitration agreement may (before or at the time of the appointment of arbitral tribunal), agree in writing to have their dispute resolved by a fast track procedure.
- The parties may, while agreeing for the fast track procedure, agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.
- The fast track procedure to be followed by an arbitral tribunal has been more particularly described in sub-section (3) that provides:

  a) The dispute shall be decided on the basis of written pleadings, documents and submissions filed by the parties without any oral hearings.
  b) The arbitral tribunal has the power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them.
  c) An oral hearing may be held only on a request made by all the parties or if it is considered necessary by the arbitral tribunal for clarifying certain issues.
  d) In an oral hearing is held, the arbitral tribunal may dispense with any technical formalities and adopt such procedure as deemed appropriate for expeditious disposal of the case.

- The time limit for making an award under this section has been capped at 6 months from the date the arbitral tribunal enters upon the reference. In case the award is not made within the prescribed time period, the provisions of sub-sections (3) to (9) of section 29 A will be applicable.
- It has been further provided that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

ELP Comments

- This provision has been inserted to facilitate a speedier settlement of dispute based purely on documents if the parties so agree, and is synonymous with the provisions of various arbitral institutions.
- This now provides parties with an option to choose fast track procedure even if they do not wish to subject their arbitration to any institutional rules.
- The provision can be used even by parties to existing disputes if they mutually agree to apply this procedure.

Effect of the Amendment

- The Parties will now have the option to choose a faster procedure for conduct of the arbitration proceedings.

- The fast track proceedings will be conducted in accordance with the procedure specified in the section and will be more of a document based arbitration with less emphasis on oral hearings. Therefore, arbitral tribunal shall decide the dispute on the basis of the pleadings, documents and submissions filed by the parties and oral hearings will be held only upon the application by both the parties or if the tribunal deems it necessary.

- The provision is in line with the provisions in section 29A which provides for time period within which an award has to be made under this section and the consequence for non adherence with the said time period is the same as that provided in section 29A.

Comparison with the 246th Law Commission Report

- This provision was not recommended by the Law Commission.

SECTION 31: FORM AND CONTENTS OF ARBITRAL AWARDS (INTEREST AND COSTS)

Amendment Introduced

- Sub-section (7), clause (b) of section 31 has been amended and it now provides that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of 2 percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

- The Amendment has also added an Explanation to the said sub-section clarifying that the expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978.

- Sub- section (8) has been amended and it provides that the costs of arbitration shall be determined by the arbitral tribunal in accordance with section 31A.

Effect of the Amendment

- The default post-award interest rate has been changed from the 18 per cent per annum, and the sums awarded shall now carry an interest at the rate of 2 per cent higher than the current rate of interest prevalent on the date of award for post-award period – if the tribunal does not provide anything in this regard.

- Sub-section (8) has also been suitably amended in view of the insertion of section 31A and the costs of arbitration will now therefore be determined under section 31A of the Act.

Comparison with the 246th Law Commission Report

- The recommendations in regard to default post-award interest rate and costs have been accepted and duly incorporated in the Amendment.

- However, the Law Commission Report had also recommended an insertion of another explanation to sub-section (7) stating that the expression "sums directed to be paid by an arbitral award" includes the interest awarded in accordance with section 31(7)(a). This recommendation was intended at "legislatively overruling" the decision of *State of Haryana vs. S.L. Arora [(2010) 3 SCC 690]* but has not been included in the Amendment.

ELP Comments

- The amendments to section 31(7) are indeed welcome as the existing provision was often criticized as being penal and without reference to commercial realities.
- In light of *Hyder Consulting (UK) Limited vs. State of Orissa [(2015) 2 SCC 189]* having overruled *S. L. Arora* case, the Law Commission recommendation in this respect was not necessary, and has therefore not been implemented.

SECTION 31A: REGIME FOR COSTS

Amendment Introduced

- A new section 31A has been added. It stipulates a common regime for costs under the Act – both for arbitration proceedings and litigations arising out of arbitration.

- Sub-section (1) provides that in relation to any arbitration proceeding, or arbitration related court proceedings under any of the provisions of this Act, the Court or the arbitral tribunal shall have the discretion to determine the liability to pay costs, the amount and also the time when such costs are to be paid, notwithstanding the provisions of the CPC.

- The "costs" for the purposes of this sub-section have been defined vide an Explanation to mean reasonable costs relating to:

  - The fees and expenses of the arbitrators, courts and witnesses;
  - Legal fees and expenses;
  - Any administration fees of the institution supervising the arbitration; and
  - Any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

- Sub-section (2) provides that if the Court or arbitral tribunal decides to make order as to payment of costs:

  - As a general rule, the unsuccessful party will be ordered to pay costs to the successful party; or
  - The Court or the arbitral tribunal may however make a different order after recording the reasons in writing.
  - Sub-Section (3) provides for all the circumstances to be take into account while determining the costs which includes:
  - The conduct of all the parties;
  - Whether a party has partly succeeded in the case;
  - Whether the party has made a frivolous counter claim leading to delay in disposal of the arbitral proceedings;
  - Whether any reasonable offer to settle the dispute has been made by a party and refused by the other.

- Sub-Section (4) enables the Court or the arbitral tribunal to make any order under this section including the order that party shall pay the following:

  - A proportion of another party's costs;
  - A stated amount in respect of another party's costs;
  - Costs from or until a certain date only;
  - Costs incurred before the proceedings have begun;
  - Costs relating to particular steps taken in the proceedings;
  - Costs relating to only a distinct part of the proceedings;
  - Interest on costs from or until a certain date.

ELP Comments

- These amendments are significant and effectively establish the principle of "Cost Follows the Event" for governing all arbitration proceedings/arbitration related court litigation. This principle is a part of English law.
- This is a welcome addition and was necessary in the Indian context considering the fact that traditionally the Indian Courts have not granted actual costs to the parties. Now, by virtue of this amendment, the Courts and arbitral tribunals will have a clear guide to exercising their discretion in awarding costs, which is completely different from traditional principles under CPC.
- Also, the circumstances provided for in sub-section (3) are well intended and is in line with the rules of various arbitral institutions. Such a provision will ensure efficient conduct of the proceedings by disincentivizing inequitable or *mala fide* conduct on the part of either of the parties. This may also result in more disputes being settled, since parties would be forced to take costs of arbitration seriously.
- In light of these provisions, parties must factor in costs as part of their strategy and should consider 'Without Prejudice save as to interest and costs' offers at an appropriate stage as is common in international arbitrations.

- Sub-section (5) provides that an agreement between parties regarding the liability to pay whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.

Effect of the Amendment

- In view of the said provision, the costs for arbitration for any arbitration/arbitration related proceedings and including the costs provided for in section 31(8), shall now be determined in accordance with section 31A which empowers the Court/ arbitral tribunal to grant the actual costs relating to arbitration incurred by the parties and clarify all the relevant factors that ought to be considered.

Comparison with the 246th Law Commission Report

- The Law Commission Report had provided for insertion of a new section 6A which has been accepted and duly incorporated in the Amendment as section 31A.

SECTION 34: CHALLENGE AGAINST ARBITRAL AWARDS

Amendment Introduced

- The explanation to section 34(2)(b) has been substituted to clarify that an award is in conflict with the public policy of India only if the award:
  - was induced or affected by fraud or corruption or in violation of section 75 (confidentiality) or section 81 (admissibility of evidence of conciliation proceedings in other proceedings) [which is the existing 'explanation' under the Act];
  - is in contravention with the fundamental policy of Indian law or
  - is in conflict with the most basic notions of morality and justice;

- Another explanation has been added to the same provision to clarify that no review on merits can be done by a court for determining whether the award is in contravention with the fundamental policy of India.

- A new sub-section has been added to provide that an award in an arbitration exclusively between Indian parties can be set aside if it is vitiated by patent illegality appearing on the face of the award. However, it has been clarified that an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence.

- An application for setting aside an award can only be filed before a Court after issuing prior notice to the other party and courts must endeavor to dispose of such application expeditiously and not later than one year from the date on which the notice is served on the other party.

ELP Comments

- The amendments primarily seek to clarify the meaning of public policy under section 34 and the scope of review that courts should enter.
- A ground of patent illegality was introduced by the *Saw Pipes* case, which considered it to be a part of 'public policy'. In various decisions subsequently, the scope of that interpretation had been restricted. However, the amendment has completely done away with that interpretation when it comes to international arbitration awards (reverting to the interpretation in *Renusagar Power Plant Co. Ltd. vs. General Electric Company [AIR 1994 SC 860]*) – which is positive as it assures foreign parties a hands-off approach towards arbitration awards.

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Effect of the Amendment

- Awards arising out of international arbitration seated in India cannot be challenged on the ground of patent illegality.
- In determining whether an award is in conflict with the public policy of India, courts are not to enter into a review of merits.
- Awards in arbitrations exclusively between Indian parties can be challenged on the ground of patent illegality, but only if it is "on the face of the award" and without entering into a merits review and without re-appreciation of evidence.
- The net effect should be that courts will take a hands-off approach in international arbitration and a summary approach, even on grounds of patent illegality, with respect to purely domestic awards.
- Challenge petitions are to be concluded within 1 year. Therefore, if courts lower than a High Court are likely to take longer, they will need to seek extension from the High Court.

Comparison with the 246th Law Commission Report

- The Amendment has adopted the recommendations of the Law Commission.

ELP Comments

(contd.)

- In retaining the patent illegality ground for purely domestic awards, albeit with appropriate reservations, the amendment addresses the concern that the development of commercial laws such as law of contract, etc. has stunted since most commercial disputes go to arbitration and awards are not allowed to be reviewed on grounds of law. In a final and binding adjudication process such as arbitration, Courts should be allowed to play some role, however limited, in how Indian law is applied. The attempt seems to be to replicate, in some manner, the section 69 effect under the English Arbitration Act. However, it will be interesting to see how Indian courts limit or expand their view of 'patent illegality'
- In a recent decision by a three judge bench of the Supreme Court in *ONGC vs. Western Geco [(2014) 9 SCC 263],* the term "fundamental policy of Indian law" had received a very detailed and arguably expansive exposition. Therefore, the clarification in the amendment that in determining whether an award violates it, courts are not to enter in any merits review is welcome and very timely.
- Challenge application in India at present can languish even up to 3 to 4 years in the court of first instance. Therefore, a timeline of 1year is welcome. While it is likely that a strict adherence will not be possible given the huge pendency in courts, such provision will give courts sufficient fulcrum to enforce tight deadlines.

SECTION 36: ENFORCEMENT

Amendment Introduced

- The Amendment has provided that unless the Court grants a stay of the operation of the award on a separate application requesting a stay, mere filing of an application to set aside the arbitral award will not render the award unenforceable.
- The Amendment gives the Court the discretion to impose such conditions as it deems fit, while deciding an application for stay of an award.

ELP Comments

- Not only did the present law provide for an automatic stay, it was not possible for courts to impose any condition such as depositing part of the arbitral sum prior to the challenge application under section 34 being decided, as was held in the *National Aluminium Co. Ltd. vs. Pressteel & Fabrications (P) Ltd. [(2004) 1 SCC 540].* The Amendment now provides that the Court may grant a stay of the operation of an award on such conditions as it deems fit. Thus, Court has been given the discretion to impose conditions prior to granting a stay, including a direction for deposit.

Effect of the Amendment

- It changes the current position of law where mere filing of an application under section 34 amounted to a default stay on the enforcement of the award. It has now been provided that stay of the award needs to be sought and Court can grant stay on whole or part of

the award. The party challenging the award will be required to file a separate application for stay of the award.

- While deciding application for stay, the Court may impose such conditions as it deems fit.

Comparison with the 246th Law Commission Report

- The Amendment has adopted the recommendations of the Law Commission.

SECTION 37: APPEALABLE ORDERS

Amendment Introduced

- In addition to the orders from which appeals were earlier allowed before the Court, an order refusing to refer parties to arbitration under section 8 has also been added.

Effect of the Amendment

- Orders refusing to refer parties to arbitration under section 8 are now appealable under section 37. Prior to the Amendment, a review under the provisions of the CPC was allowed through judicial interpretation from these orders.

Comparison with the 246th Law Commission Report

- The Amendment has partially adopted the recommendations of the Law Commission. The Law Commission Report also recommended inserting an appeal from an order refusing to appoint an arbitrator in a domestic arbitration. This recommendation has not been incorporated in the Amendment.

ELP Comments

- Pertinently, an appeal is not provided from all orders under Section 8 and has been permitted only from an order refusing to refer parties to arbitration. Thus, in cases where parties are directed to proceed with arbitration, no appeal is allowed. This provision is akin to the provision of section 37(2) which provides for an appeal from an order accepting the plea referred to in section 16(2) and section 16(3) but not if the tribunal holds that it has jurisdiction.
- In light of this amendment, it should be expected that courts will no longer entertain review applications from orders under section 8.

SECTION 47 AND 56: EVIDENCE WHEN SEEKING ENFORCEMENT OF FOREIGN AWARD

Amendment Introduced

- The Explanations in these sections have been amended. The provision now states that in this section and all the following sections in the Chapter, "Court" means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in the High Courts having jurisdiction to hear appeals from decrees of courts subordinate to such High Courts.

Effect of the Amendment

- This provision ensures that in the case of enforcement of a foreign award, jurisdiction will be exercised by the High Court in all cases and foreign parties will not need to chase the asset in remote corners of India.

ELP Comments

- In all cases involving foreign parties, whether the arbitration be seated in India or outside, the legislative policy applied through these amendments is to make the High Courts the court of first instance. It goes with the policy initiative on "ease of doing business in India". However, as noted above, there is some potential danger in overloading the High Courts without a parallel institutional change in terms of number of judges and other measures necessary to reduce the pendency of cases.

Comparison with the 246th Law Commission Report

- The recommendation contained in the Law Commission Report with regard to section 47 has been duly accepted and incorporated in the Amendment.
- The Law Commission did not make any recommendation with regard to section 56.

SECTION 48 AND 57: CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARDS

Amendment Introduced

- In section 48 and 57 of the Act, explanation to sub-section (2) and explanation to sub-section (1) respectively have been substituted with the following explanations:
  - Explanation 1 provides that an award is in conflict with the public policy of India, only if:
    - The making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
    - It is in contravention with the fundamental policy of Indian law; or
    - It is in conflict with the basic notions of morality and justice.
    - Explanation 2 clarifies that the test whether there is contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Effect of the Amendment

- This amendment is only a clarification, and reaffirms the judicial interpretation laid down by the Supreme Court.

Comparison with the 246th Law Commission Report

- The recommendation contained in the Law Commission Report with regard to amendment of sub-section (2) of section 48 has been duly accepted and incorporated in the Amendment.
- However, there were other recommendations in the Report wherein sub-section (3) was re-numbered as sub-section (5) and the following provisions were proposed to be inserted:
  - Sub-section (3) prescribes a three month limitation period for raising an objection under this section, starting from the date on which the party making such objections received notice of application under section 47.
  - Sub-section (4) prescribes a maximum period of 1 year from the date of service of notice issued pursuant to an application under section 47, for disposal of objections under this section.
  - Sub-section (6) provides that the cost regime provided in section 6A shall apply to proceedings in relation to section 47 and 48 of the Act.

  These recommendations however have not been accepted.
- The Law Commission did not make any recommendation with regard to section 57.

ELP Comments

- The amendment seeks to give legislative clarity to the principle outlined in *Shree Lal Mahal Ltd. v Progetto Grano SpA [(2014) 2 SCC 433]*, which had overruled *Phulchand Exports Ltd. v OOO Patriot [(2011) 10 SCC 300]* which had included patent illegality as a ground to refuse enforcement of foreign awards.
- It is also welcome that the potentially expansive principles regarding the fundamental policy of India in the *Western Geco* case in the context of challenge of award has been prevented by clarifying that no merits review is to be undertaken under this provision.

POTENTIAL APPLICABILITY TO EXISTING PROCEEDINGS

One of the most important and most contentious aspects of any amending statute is its applicability to existing proceedings or the effect it potentially has on vested rights. It is therefore common for amending statutes to clarify this position. However, the Ordinance had completely left the field open, except in the case of section 12, wherein the applicability of the said section had been categorically set out. This is despite the fact that the Law Commission had recommended the inclusion of a transitory provision to clarify the scope of operation of each of the amendments with respect to pending proceedings. However, the oversight was soon recognized and addressed when the Bill was discussed in the Parliament. The Amendment provides that nothing contained in the amending statute will apply to any arbitration proceedings commenced prior to 23 October 2015.

Clarification that the amendments will not apply retrospectively is welcome, in particular when compared to the confusion that the lack of it caused in the short time while the Ordinance held ground. However, in our view, a more robust suggestion was contained in the Law Commission Report, non-adoption of which is intriguing. It is not entirely clear as to why, with respect to court proceedings that may be initiated under the Act (such as appointment of arbitrator, interim measures, assistance in seeking evidence, challenge of award, etc.) the date of commencement of arbitration proceeding should be the cut-off date for applicability of the amended provision. In our view, the amendments should have been made applicable to all proceedings initiated after 23 October 2015, i.e. in respect to provisions such as S. 9, S. 11, S. 27, and S. 34, it would be the date of filing of such application and not the date of commencement of arbitration which would have been more preferable. Law Commission had in this respect recommended a distinction between 'fresh arbitration' and 'fresh application', which was sensible and would have made immediate effect on how arbitration related court proceedings are dealt with by the courts.

THE 246TH LAW COMMISSION REPORT

The Law Commission had recommended the following provision, which has not been adopted by the Amendment:

> "***Transitory provisions .—(1)*** *Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to* ***fresh arbitrations and fresh applications****, except in the following situations –*
>
> *(a) the provisions of section 6-A shall apply to all pending proceedings and arbitrations.*
>
> *Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.*
>
> *(b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.*
>
> *(c) the provisions of second proviso to section 24 shall apply to all pending arbitrations.*
>
> *(2) For the purposes of the instant section,—*
>
> *(a)* ***"fresh arbitrations"*** *mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.*

(b) ***"fresh applications"*** *mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014."*

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ELP is a leading full-service Indian law firm established in the year 2001 by eminent lawyers from diverse fields. ELP brings to the table a unique combination of professionals which constitutes of lawyers, chartered accountants, cost accountants, economists and company secretaries; enabling us to offer services with a seamless cross-practice experience and top-of-the-line expertise to our clients.

ELP has a unique positioning amongst law firms in India from the perspective of offering comprehensive services across the entire spectrum of transactional, advisory, litigation, regulatory, and tax matters. Our areas of expertise include Banking & Finance; Competition Law & Policy; Corporate & Commercial; Hospitality; Infrastructure; International Trade & Customs; Litigation & Dispute Resolution; Private Equity & Venture Capital; Securities Laws & Capital Markets; Tax; and Telecommunication, Media & Technology.

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- RSG India Report 2015 on Law Firms in India

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- Legalera Awards 2015

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- ASIAN-MENA COUNSEL Firms of the Year 2012 Awards

Top Tier Firm for Dispute Resolution in India
- The Legal 500 Asia-Pacific 2016

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Tax litigation has been the forte of ELP since its inception. ELP handles over 400 cases on an annual basis dealing with Customs, Excise, Service Tax, VAT, Foreign Trade Policy, Transfer Pricing and other allied laws, rules & regulations. Professionals at ELP appear before various authorities ranging from Commissioners to various High Courts and the Supreme Court of India.

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ELP is recognized as the first choice for clients facing regulatory issues. Our team frequently handles complex cases, where client's interests are threatened by regulatory action or faced with compliance issues. We have been representing clients in various fora such as the SAT, TDSAT, Electricity Tribunal, RBI, and National Green Tribunal. We have also helped clients in defending themselves effectively before various regulatory and criminal investigating agencies including the CBI and EOW. We often advise and represent clients in matters involving allegations of white collar crime such as corruption, fraud, cartel defence and corporate investigations.

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ELP has established itself as one of the most competent and unique commercial litigation teams in India. Our approach is always tempered with understanding of clients' businesses and the commercial exigencies that lead them to litigation. The approach is to devise a comprehensive strategy from the outset of every case. We have often successfully obtained interim reliefs for our clients within a span of 24 to 48 hours from being briefed of the crisis faced by them.

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ELP offers disputes expertise to clients from the very inception of their commercial activities. Our team has been involved with many of clients' projects during their entire term and effectively safeguarded their interests through timely strategic inputs. Our team anticipates, prevents, and minimizes exposure of clients to potential disputes thereby significantly reducing costs and increasing operational efficiency. The team’s expertise in dispute management permeates our entire dispute resolution offering and we take pride in seeking alternate commercially beneficial solutions for our clients.

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