ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 - KEY CHANGES AND CIRCUMSTANCES LEADING TO THE AMENDMENTS

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Abstract

The President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 on October 23, 2015 with a view to amend the Arbitration and Conciliation Act, 1996 ("Act of 1996") in order to make arbitration in India user friendly, cost effective and a preferred method of dispute resolution along with facilitating speedy disposal of cases[1]. The Arbitration and Conciliation (Amendment) Bill, 2015 was passed in the Lok Sabha and Rajya Sabha on December 17, 2015 and December 23, 2015 after which it received the President's assent on December 31, 2015 and came to be known as the Arbitration and Conciliation (Amendment) Act, 2015 ("Act of 2015"). The Act is deemed to come into force from October 23, 2015 which is the day the ordinance was originally promulgated. The Act was notified in the official gazette of India on January 1, 2016 and will not have a retrospective effect unless otherwise agreed upon to by the parties to the arbitration.

Introduction

Arbitration is a form of an alternate dispute resolution mechanism wherein disputes are settled privately, by mutual agreement of parties instead of going to court or without any judicial interference. International commercial arbitration has been the most sought after and chosen method by transnational parties to settle business disputes as it offers the benefit of not going through the hassles of court procedure. Disputes in an international arbitration are settled in a city chosen mutually by both the countries. Some of the famous hubs for international commercial arbitration are Paris, Honkong, Singapore, Geneva, New York and London[2]. India's arbitration laws concerned with domestic as well as international commercial arbitration are enshrined in the Arbitration and Conciliation Act, 1996. The main

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1 Amendments to the Arbitration and Conciliation Bill, 2015, Press Information Bureau of India, August 26, 2015.

2 Anurag K. Agarwal, Making India an International Commercial Hub, LiveMint, October 5, 2015.

objective of this act was to make the country's dispute resolution mechanism in conformity with that of international standards. The Act is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976 and UNCITRAL Conciliation Rules, 1980[3]. By formulation of the Act of 1996, role of the court was considerably minimized with any agreement having an arbitration clause directly referred to arbitration without any judicial interference, except as per the provisions of the Act of 1996. There is no procedure as such to conduct an arbitration proceeding. The arbitrator appointed to adjudicate the proceeding may conduct it in whatever manner he considers fitting with the only condition that he must treat all the parties equally and give them a fair opportunity to be heard. In an International Commercial Arbitration, parties can assign any governing law for the dispute in question, however in case of a domestic arbitration; the laws of India will apply. The Supreme Court in *TDM Infrastructure (P) Ltd.* v. *UE Development India (P) Ltd.*[4] held that arbitration proceedings between companies incorporated in India cannot choose any other law than that of India's as the governing law for their arbitration irrespective of where the management or control of the company is exercised from. As of 2016, India is also a contracting party to the New York Convention for enforcement of Arbitral Awards, making it possible for arbitral awards to be enforced by courts in nearly every nation in the world[5]. In 2012, the face of international commercial arbitration in India changed with the Supreme Court's judgment in the case of *Bharat Aluminium Co* v. *Kaiser Aluminium Technical Services Inc*[6] or most famously referred to as the BALCO Judgment.

The principal laid down by the Supreme Court in the BALCO judgment in brief was:

1. In case of an international commercial arbitration with a seat outside India, no application for interim relief would be maintainable in India and the Indian Courts do not have the authority to grant any relief in such a case.
2. Awards granted in an International Commercial Arbitration will be subject to the jurisdiction of Indian Courts only when the

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[3] Arbitration in India, Sumeet Kachwaha and Dharmendra Rautray, Kachwaha and Partners.

[4] *TDM Infrastructure (P) Ltd.* v. *UE Development India (P)*, 2008 (2) Arb LR 439 (SC).

[5] http://www.newyorkconvention.org/countries.

[6] *Bharat Aluminium Co* v. *Kaiser Aluminium Technical Services* Inc (2012) 9 SCC 552.

awards are sought to be enforced in India and are passed in accordance with Part II of the Act of 1996.

3. It would be upon the contents of each agreement to ascertain whether the selected foreign seat would be construed as only providing for a "venue" where the hearing would be held with the Arbitration and Conciliation Act, 1996 being the crucial law or if the chosen foreign seat would be construed as providing a venue and that country's arbitration law being chosen as the governing law. The Supreme Court held that Part I of the Act of 1996 would be application only if the agreement is construed to provide for the venue of the arbitration being in India. In an arbitration where the venue is outside India, Part I would be inapplicable to the extent it is conflicting or inconsistent with the arbitration law of the seat even if the agreement specifies that the Act of 1996 shall govern the arbitration proceedings[7].

Arbitration and Conciliation (Amendment) Act, 2015

a. Need for Amendment

The Indian Government has been taking considerable steps time and again to make India also an international commercial arbitration hub similar to the likes of Paris, Geneva or New York. Arbitration laws of India have been under foreign scrutiny since a long time now. The interference of the judiciary in the international commercial arbitration process has often been criticized and has led to dwindling of the confidence of foreign investors posing as major threat to foreign business in India. This delay in judicial process led to the first investment arbitration claim against the country in the case of *White Industries* v. *Republic of India*[8], wherein the decision was pronounced against the country. The Arbitration of 1996 was passed with the main intention of expediting the process of solving disputes between parties with minimum court interference. Though the Supreme Court has delivered some landmark judgments which support a pro-arbitration approach, 10 (ten) years down the line, the objective of the Act of 1996 was far from achieved. The major issue with arbitration in India is that, most of the arbitral awards are challenged until they reach the highest court of the land thus ultimately resulting in interference of the court, making the dispute settlement process more time consuming and defeating

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7 Bijoy Lakshmi Das and Harsimran Singh, Commercial Arbitration in India- an update, Mondaq.com, January 6, 2014 http://www.mondaq.com/india/x/284570/Arbitration+Dispute+Resolution/Commercial+Arbitration+In+India+An+Update.

8 *White Industries* v. *Republic of India*, Final Award, November 30th, 2011.

the overall objective and purpose of the legislation. This was also one of the reasons why foreign business leaders were wary of choosing India as a seat of arbitration. Even Indian companies who entered into contracts with international investors and foreign players preferred execution of awards and arbitration proceedings in a jurisdiction other than India[9]. To make matters worse, renowned international arbitral institutions like, International Chamber of Commerce (ICC) Paris, the London Court of International Arbitration and The Singapore International Arbitration Centre, set up offices and started providing their services locally. The amendment to the Act of 1996 was a move that was the need of the hour in light of the Modi government's agenda to improve ease of doing business of India[10].

b. Overview of Amendments

The key changes that have been brought about by the Arbitration and Conciliation (Amendment) Act, 2015[11] are:

1. The definition of "court" in Section 2 has been amended to refer only to a High Court in the case of International Commercial Arbitration.
2. The provisions for granting Interim relief (Section 9), Court assistance in taking evidence (Section 27) and Appeals (specifically, clause (a) of sub-section (1) and sub-section (3) of section 37) shall from now on also be applicable to international commercial arbitrations.
3. The provision for setting aside an award on grounds of public policy has been modified to include those awards that are i) in contravention with the fundamental policy of Indian law or ii) in conflict with the notions of morality or justice, in addition to the grounds already specified in the Act.
4. The Act of 2015 has imposed strict time limits for the conclusion of arbitral process. The arbitral tribunal has to make its award within twelve (12) months, which can be further extended to a period of six (6) months. If the award is made with six (6) months, the arbitral tribunal will receive extra fees. However if the award is delayed beyond the specified time because of the arbitral tribunal, the fees of the arbitral

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9 Anurag K. Agarwal, Making India an International Commercial Hub, LiveMint, October 5, 2015.

10 Nicholas Peacock, Danny Surtani, Pritika Advani, Herbert Smith Freehills, Amendments to the Indian Arbitration Act now effective, November 5, 2015 http://hsfnotes.com/arbitration/2015/11/05/amendments-to-the-indian-arbitration-act-now-effective/.

11 Arbitration and Conciliation (Amendment) Act, 2015.

tribunal will be reduced by up to five percent (5%) for each month of delay.

5. The parties to arbitration can also choose to conclude the proceeding in a fast track manner. The award in such a proceeding would be granted within six (6) months.
6. Any challenge to an arbitral award must be disposed off within a period of 1 (one) year.
7. Section 17 of the erstwhile Act of 1996 has been substituted for a new section 17 wherein the arbitral tribunal has been given same powers to pass interim measures as the court an order of the tribunal under this section shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as it was an order of the court.
8. To Act of 2015 confers upon the Supreme Court or High Court powers to appoint an arbitrator on application made by the parties. In an event such an application is made, the court should expediently dispose of such application within sixty (60) days.
9. A complete cost regime has been introduced by section 31A of the Act of 2015 wherein the court or arbitral tribunal shall have the power to determine costs on the principals of the losing party bearing the costs or the court or arbitral tribunal may make a different order for reasons to be recorded in writing.
10. Section 36 in the Act of 1996 has been substituted by a new Section 36 wherein if the time for making an application to set aside an arbitral award has elapsed, then such an award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 in the same manner as it was a decree of the court. However, filing of an application to set aside an arbitral award shall not render the award unenforceable unless the court grants an order to stay the operation of the said arbitral award.

Conclusion

The amendment of the arbitration and conciliation act, 1996 has facilitated in clearing the major lacunae caused by the landmark Supreme Court judgment in the case of BALCO (supra) wherein there was a bar on Indian courts from granting interim relief and assist in collecting evidence in the case of international commercial arbitrations[12]. This glitch has now been resolved with

[12] Nicholas Peacock, Danny Surtani, Pritika Advani, Herbert Smith Freehills, Amendments to the Indian Arbitration Act now effective, November 5, 2015 http://hsfnotes.com/arbitration/2015/11/05/amendments-to-the-indian-arbitration-act-now-effective/.

the applicability of section 9 and section 27 to international commercial arbitrations as well. With the amendment of the definition of "courts" to refer only to a High Court in the case of an international commercial arbitration, parties to an international commercial arbitration will not have to approach lower courts to look for relief. By the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 the government seeks to expedite the arbitral process and help the government to achieve its goal of making India a seat for international commercial arbitration like the other major business and financial districts of the world. The Act of 2015 will also help in regaining the lost confidence of the foreign investors in the Indian judicial and arbitral system.