Efficient Arbitration: One step closer

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Introduction

India has been moving towards revamping its arbitration regime since the last two decades and it is no secret that she desires to be the next hub for international commercial arbitration. The Arbitration and Conciliation Act, 1996 ("**Act**") was promulgated with a view to bring in winds of change but fell into a chasm of its own. A number of decisions from the courts in the last decade have resulted in the "seat" of the arbitration being heavily negotiated and, more often than not, ended up being Singapore, New York or London, the established global arbitration centres. Foreign investors and corporates doing business in India were just not ready to bear the risks associated with having the arbitration seated in India.

While the judiciary did play its part in turning a rather negative perception about Indian arbitration, however, keeping in tune with the spirits, last year *'The Law Commission of India's Report No. 246'* **("Law Commission Report")**[1] proposed path-breaking amendments to the Act and an overhaul to the arbitration scenario in India. The Law Commission Report has, with a view to improving the law relating to arbitration, tried to plug in several loopholes in the Act. The recent approval of the amendments to the Arbitration and Conciliation Bill, 2015, by the Union Cabinet chaired by the Prime Minister, Shri Narendra Modi, is a welcome move reflecting India's pro-arbitration approach. The amendments, if passed by the Parliament, would be a game-changer and enhance the faith of foreign investors towards arbitration in India.

The Arbitration and Conciliation Amendment Bill 2015

The Law Commission Report had suggested rigorous changes to the Act in order to make it more effective and with an aim to expedite the arbitral process. The key amendments approved by the Union Cabinet to the Arbitration and Conciliation Bill, 2015 ("**Bill**") based on the recommendations of the Law Commission Report would signal the start of a new era in the Indian arbitration regime, once cleared by the Parliament. Some major changes have been put forward including with respect to seeking interim reliefs, challenge to the arbitral award, appointment procedures and tackling delays and costs.

Key Amendments:-

(A) Interim Measures:

The Cabinet has now approved amendments to Section 17 of the Act for empowering the Arbitral Tribunal to grant interim measures which the Court is empowered to grant under Section 9, thus widening the powers. This move removes the differential nature of power to award interim measures under Section 9 (by the court) and Section 17 (by the Arbitral Tribunal) respectively.

Currently, there is no enforcement mechanism provided for orders passed by an Arbitral Tribunal under the Act. The Law Commission Report proposed to amend Section 17 of the Act with a view to expand the scope of the provisions but did not provide for enforceability of interim orders passed by arbitral tribunals. By way of a significant change, *the Union Cabinet has now approved an amendment that such orders would be*

enforceable in the same manner as if it is an order of Court. The fact that the Arbitral Tribunal is a toothless tiger may no longer subsist.

(B) Disclosure by Arbitrators:

The Cabinet approving the recommendations of the Law Commission Report to ensure neutrality, has sought to amend the provisions of Section 12 of the Act, mandating written disclosures in line with international standards, from the prospective arbitrator(s) with regard to any circumstances likely to give rise to justifiable doubts as to their independence or impartiality[2] and also added that if a person is having specified relationship, he shall be ineligible to be appointed as an arbitrator. This amendment approved by the Cabinet is based on recommendations of the Law Commission Report keeping global best practices in mind in accordance with the International Bar Association Guidelines on Conflicts of Interest.

(C) Delays: In Court and before the Tribunals

The interplay between the arbitral tribunal and the courts and the existing backlog before the courts has meant that the arbitral process has not been as efficient as one would have hoped. Legacy delays exist in various areas and the Union Cabinet, agreeing on the recommendations of the Law Commission Report, has sought to deal with each aspect in a systematic and analytical manner.

Fast Track Procedure

The Cabinet appears to have introduced the concept of a fast track arbitration allowing parties to resolve their disputes expeditiously within a period of six months, adopting the international arbitration norms in relation to expedited arbitration.

Appointment of an Arbitrator

The Law Commission Report struck a death blow to the law set down in *SBP & Co. v. Patel Engineering*[3] and proposed to make appointment of an arbitrator an *administrative* decision to be carried out by the High Court or the Supreme Court, as the case may be. In a welcome step, it also provided that such an application be endeavoured to be disposed of expeditiously, and also within a 60 day period, from service of notice. The Cabinet taking this ahead, without dealing with the issue of appointment being a judicial or administrative decision, approved the insertion of a new sub-section in Section 11 of the Act, incorporating the above recommendation on time-frame to speed the appointment process along quite nicely[4].

Time-frame for delivering award:

The Cabinet has also attempted to reduce the delay in the arbitration proceedings by approving insertion of a new provision requiring the Arbitral Tribunal to render its award within a period of 12 months. To incentivize and expedite the process, the Cabinet has also approved that arbitrators would be entitled to additional fees if award is made within a period of six months. The Cabinet, in an interesting move, has clarified that any further extension to the arbitration process can only be granted by courts on sufficient cause being shown and vested them with powers to impose reduction of fees not exceeding five percent for each month of delay, if the delay is attributable to the arbitral tribunal.

Challenges to arbitral awards:

The Cabinet, in approving the amendments on time-frame to dispose applications challenging the award have accepted the recommendation of Law Commission to dispose of the application expeditiously, within a period of one year, which would considerably reduce the time lost before courts.

(D) Costs

A regime of *actual* costs incurred was proposed along with detailed points for consideration of the court or arbitral tribunal by the Law Commission Report. The Cabinet has approved insertion of a new provision in the Act, Section 31A providing comprehensive provisions for costs regime to both arbitrators as well as courts.

This will ensure minimizing of frivolous and meritless litigation/arbitration, thereby increasing the efficiency and overall speed and efficacy of the arbitral process and revamp the entire approach to arbitration in India.

(E) Setting aside of domestic award –Section *34 of the Act*

With a view to do away with the unintended consequences caused by the Supreme Court's judgment in *ONGC v. Saw Pipes**[5]***, the Law Commission Report proposed a specific provision dealing with setting aside of a domestic award on the ground of *patent illegality*.[6] Interestingly, the proposed changes also recommended clarification on the term '*public policy of India'*, reducing its purport. The Cabinet has approved the amendments clarifying that a domestic award can be set aside under Section 34 of the Act on the ground of "*public policy of India*" only if it is in contravention with the fundamental policy of Indian Law or conflicts with the most basic notions of morality or justice or induced or affected by fraud or corruption.

(F) Section 36 of the Act: Automatic stay of enforcement

A possibly unintended consequence that emanated from earlier awards was an automatic stay once an application to set aside the award under Section 34 of the Act was filed before the Indian courts. This *automatic* stay did not even permit the court to impose terms upon the applicant. This situation has now been rectified by the Cabinet and it stands clarified that mere filing of an application for challenging the award would not automatically stay execution of the award. The Cabinet has now approved the amendment that an award can only be stayed where the Court passes any specific order on an application filed by the party. This would act as a deterrent against frivolous applications and also permits the courts to impose terms on the party challenging the award including the power to order deposit of amounts, prior to admission of the stay application.

In addition to the above key changes, several other amendments have also been proposed to the provisions of the Act in relation to definitions, arbitration agreement, appointment of arbitrators, completion of pleadings, enforcement of foreign awards to make the process more effective.

Conclusion

Most issues plaguing India`s arbitration law were analyzed extensively in the Law Commission Report. However, the amendments approved by the Cabinet seem to be focussed only on domestic arbitrations and have not delved deep into all aspects of international commercial arbitration. The fine text Bill is yet to be scrutinized to understand the other amendments sought and to what extent recommendations of the Law Commission Report has been considered. As with all things, the devil lies in the detail.

If the Bill is passed by the Parliament, India`s arbitration law will be comparable with that of developed arbitration regimes, amongst other things, making it easy for parties to seek interim relief and have speedy resolution of disputes. Each amendment approved by the Cabinet attempts to not only remedy the malady but also seeks to set up the stage for arbitration in India to achieve a higher plane of growth. It will be interesting to see how soon these amendments are passed in the Parliament and implemented given the current crisis that exists in Parliament. Approval of the amendments by the Cabinet will certainly impart confidence to foreign investors and is a stepping stone in the right direction.

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[1] The Law Commission Report was handed over to the Ministry of Law and Justice on August 5, 2014;

[2] Section 12 (1) (b) read with Seventh Schedule of the Act

[3] (2005) 8 SCC 518

[4] Section 11(13) of the Act

[5] (2003) 5 SCC 705;

[6] Section 34 (2A) of the Act