India's Arbitration Act: The Turbulent Teenage Years

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Introduction

The legislative journey of arbitration in India started with the Indian Arbitration Act, 1899,[1] followed by the Code of Civil Procedure, 1908.[2] Thereafter, India's arbitration landscape was a potpourri of Arbitration Act, 1940,[3] the Foreign Awards (Recognition and Enforcement) Act, 1961, and the Arbitration (Protocol and Convention) Act, 1937.

The inadequacies of this potpourri were often frowned upon by the courts and led to the development of a sentiment of acute mistrust of the arbitral process amongst aggrieved litigants.

The Supreme Court in *Guru Nanak Foundation v. Rattan Singh*[4] made many scathing observations vis-à-vis the 1940 Act, stating that "the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made lawyers laugh and legal philosophers weep".

It is from this extant petri dish of legislations that the Arbitration and Conciliation Act, 1996 (the "1996 Act"), was conceived, and like any newborn, it has had its teething problems in infancy and mood swings of the teens. As any parent would, the Legislature and the judiciary mollycoddled it and when required, disciplined it.

The latest disciplining of the 1996 Act has come in the form of The Arbitration and Conciliation (Amendment) Act, 2015 (the "2015 Amendment"), which sought to address various issues, including interim reliefs in India for foreign-seated arbitrations, recognition of the institutional arbitrations, accountability for the delays in arbitration process and curbing delays in court proceedings incidental to arbitration.

This article is an attempt to analyse some (and by no means all) of *the good the not so good and the unfinished* aspects of the extant 1996 Act (as amended by the 2015 Amendment).

"Taming the Shrew..."

Interim Protection in Foreign-Seated Arbitrations

Though *BALCO* (and various other judgements leading up to *BALCO*) was the proverbial knight in the shining armour and protector of the realm

[1] Applicable only in Presidency towns.

[2] Second Schedule of the Code of Civil Procedure, 1908, dealt entirely with arbitration.

[3] Based on the (English) Arbitration Act, 1934. The Act repealed the Arbitration Act, 1899, and the relevant provisions [Section 89 and Section 104(1)(a)–(f)] in the Code of Civil Procedure, 1908, including the Second Schedule thereof.

[4] 1982 SCR (1) 842.

of foreign-seated arbitration from the *uncalled interventions* by Indian courts, it had a dark side too. Post *BALCO*, it was certain that parties that had chosen a foreign seat of arbitration would have no *locus* to seek any interim reliefs from courts in India. This was especially problematic where assets of a party (either intending to dissipate them or take any other actions to defeat the award) were located in India. As the Law Commission in its 246 Report (which also formed the basis of the 2015 Amendment) noted, another party intending to proceed against such a party *would lack an efficacious remedy.* The report went on to elucidate:

> "The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a 'judgment' or 'decree' for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it. That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realise that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company."

This lacuna now stands addressed by virtue of a *proviso* added to Section 2(2) of the 1996 Act, which not only entitles a party to approach the Indian courts for interim reliefs in a foreign-seated arbitration, but also goes one step further by giving parties freedom to contract out of such entitlement.

Cynics may say (and incorrectly so) that the 2015 Amendment intends to turn the clock back to the pre-*BALCO* era when Bhatia International ruled the roost, but the foreign investors would surely not complain.

Referring Non-Signatories to Arbitration in Domestic Arbitrations

The Supreme Court in *Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc.*[5] clarified that under Section 45 of the 1996 Act, the court has the power to refer to arbitration a "party to an arbitration agreement" as well as "or any person claiming through or under such party". The Supreme Court held that the latter set of words would take within its ambit multiple and multi-party agreements and in appropriate circumstances may permit joinder in arbitration of a non-signatory to an arbitration agreement.

This decision was passed in the context of an agreement on foreign-seated arbitration under the New York Convention (Section 44 of the 1996 Act).

In the corresponding section for domestic arbitrations (Section 8 of the 1996 Act), the words "or any person claiming through or under such party" were conspicuous in their absence. This absence led to the Bombay High Court's decision in *Housing Development and Infrastructure Ltd. v. Mumbai International Airport Pvt. Ltd.*,[6] wherein it held that the ratio laid down in *Chloro Controls* shall not be applicable to domestic arbitration.

[5] 2013 1 SCC 641.

[6] 2013 Indlaw MUM 1102.

The 2015 Amendment has bridged this gap between reference to arbitration by courts in the case of foreign-seated and domestic arbitrations by the addition of the words "or any person claiming through or under him" in Section 8 of the 1996 Act, thus enabling non-signatory parties being referred to arbitration seated in India in appropriate circumstances.

Neutrality of Arbitrators and Disclosures

It had been a common norm that the one of the contracting parties (more so government departments) would retain the power to nominate a member of its own staff as an arbitrator.

The legality of such an agreement was tested repeatedly in courts and often upheld,[7] and the limited safeguard carved out by the Supreme Court in *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.*[8] that where the official or the person proposed to be appointed as the arbitrator "was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute", then, such a person or official would not be eligible to act as the arbitrator in relation to a dispute arising out of the subject contract.

The Supreme Court in *Denel Proprietary Ltd. v. Bharat Electronics Ltd. & Anr.*[9] held that where the managing director of a party is agreed to be appointed as an arbitrator under the agreement, he may not be in a position to act independently and so cannot be appointed by the courts, even if that implies deviation from the terms of the arbitration agreement.

Needless to say, the safeguards carved out by the Supreme Court were far from satisfactory and often led to a situation of perceived and, in many cases, actual failure of the tribunal to function in an impartial and independent manner from the inception of the arbitration. In many cases of such actual failure, a party would have to suffer the entirety of the arbitration proceeding, only to challenge the resulting award and have the same set aside, often many years later.

The Law Commission of India in its 246th Report,[10] while proposing to address this issue, observed:

> "A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed."

It went on to add:

> "The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes."

The resulting amendment enshrined in Section 12 refers to Schedule V of the 1996 Act, which sets out a list of non-exhaustive situations that – when seen in context of facts of a case – may give rise to *justifiable doubts* as to the independence and impartiality of a proposed arbitrator.

Schedule VII lists out a much more severe set of categories of relationships between an arbitrator and

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[7] *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*, 2007 (5) SCC 304.

[8] 2009 8 SCC 520.

[9] 2010 6 SCC 394.

[10] Available at: http://lawcommissionofindia.nic.in/reports/Report246.pdf (accessed on 30 September 2013).

a party or counsel – which make such an arbitrator *ineligible* to be appointed as an arbitrator.

These categories, novel to the 1996 Act, were conceptualised on the basis of the Red List and the Orange List promulgated by the IBA.[11] The entries in Schedule V would act as a guide in determining whether justifiable doubts as to the independence and impartiality of an arbitrator exist – leaving it upon the parties to challenge the appointment of such an arbitrator on the basis of such doubts (for such entries which form a part of Schedule V but not Schedule VII, the parties may chose not to challenge). Schedule VII categories, on the other hand, would disqualify a person from being appointed as an arbitrator notwithstanding party autonomy.

Curbing Delays in Courts and by Tribunals

The Supreme Court in *Guru Nanak Foundation v. Rattan Singh*[12] observed:

> "The proceedings under that Act have become highly technical accompanied by unending prolixity at every stage, providing a legal trap to the unwary. Informal Forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Court been clothed with 'legalese' of unforeseeable complexity."

This observation was in the context of the 1940 Act, but it is just as relevant for the 1996 Act (as it then stood).

At the pre-arbitration stage, the courts would often take years in appointing arbitrators under Section 11 of the 1996 Act. The domestic arbitration process thereafter itself was a prolonged affair, often conducted exactly like a litigation and taking many years to conclude. After conclusion of the arbitration, the losing party would often challenge the award and such a challenge would languish in courts for years. This last situation was further convoluted by Section 36 (as it stood prior to the 2015 Amendment), which provided for an automatic stay of the enforcement of the award upon mere admission of a challenge to the same. The Supreme Court,[13] criticising this, observed as follows:

> "[T]his automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."

This terrible trio of delays has made the arbitral process unattractive.

The Law Commission took note of the Supreme Court's observations while making its recommendations on amendments, and the 2015 Amendment has now sought to cure this (albeit only in context of the domestic arbitrations) by introducing the following amendments:

Section	Amendment
11(13)	An application made for the appointment of an arbitrator must be disposed of as expeditiously as possible and an endeavour ought to be made to dispose it of within 60 days.

[11] International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

[12] 1982 SCR (1) 842.

[13] *National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd. & Anr.*, (2004) 1 SCC 540.

Section	Amendment
29A	• The tribunal must give its award within 12 months of its formation; • If the tribunal delivers the award in 6 months itself, it would be entitled to receive additional fee; • Parties may, by consent or by showing sufficient cause, extend the 12-month period by an additional 6 months (an application made in this regard must be disposed of as expeditiously as possible and an endeavour ought to be made to dispose it of within 60 days); • The court is empowered to impose penalties on the arbitrators found guilty of delaying (in terms of reduction of its fee at 5% per month of delay); • The court is further empowered to impose actual or exemplary costs on parties found guilty of delay. This 12-month time limit has also become a cause for concern, as discussed later.
34(6)	An application for setting aside the arbitral award ought to be disposed of within one year.
36(2)	Filing of an application for setting aside the award would in itself not disentitle a party from seeking to enforce the award – unless the court grants a specific order staying the enforcement of the award.

Equating the Powers of the Arbitral Tribunal with the Court vis-à-vis Grant of Interim Reliefs and Enforcement of Such Interim Orders

The Supreme Court, while opining on the un-amended language of Section 17 of the 1996 Act (which dealt with the power of arbitral tribunals to grant interim reliefs), stated that the scope of interim measures to that may be granted under Section 17 were more limited than those which can be granted by a court under Section 9.[14] In *Sundaram Finance Ltd v. NEPC India Ltd.*,[15] the Supreme Court was of the view that though arbitral tribunal has the power to grant interim measures, such orders cannot be enforced as orders of the court. The latest amendment has now plugged these two loopholes.

Not only has the scope of interim measures which may be granted by a tribunal been equated with the interim measures which could have been granted by the court, but such interim orders have also been given the bite that they lacked – by making the interim orders passed by the tribunals enforceable as an order of the court.

Other Goodies

Fast-Track Procedure The parties can now opt to resolve their disputes via a fast-track mechanism set out in the 1996 Act itself, which would result in an award in as less as 6 months.

Regime for Costs The 1996 Act (as amended) now provides for a robust cost scheme based on the principle of loser pays.

Formal Recognition to Arbitral Institutions This recognition comes in the form of specific provisions provided under the 1996 Act (as amended) vis-à-vis appointment of arbitrators, determining their fees etc. The Law Commission, while suggesting such changes, noted that it was an attempt to "encourage the culture of institutional arbitration in India, which the Commission feels will go a long way to redress the institutional and systemic malaise that has seriously affected the growth of arbitration".

"A Comedy of Errors?"

Most amendments introduced by the 2015 Amendment have been welcomed by the arbitration community for their fairness, speed and cost efficiency, yet there are stumbling blocks which have already resulted in more problems than the good they set out to achieve.

[14] *M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, (2004) 9 SCC 619.

[15] (1999) 2 SCC 479.

Prospective/Retrospective Applicability of the Amendment Act, 2015

The main cause of grief post the 2015 Amendment is Section 26 of the 2015 Amendment, which states:

> "Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

It has become an interpretational nightmare for courts across the country, though most courts[16] appear to take the view that:

- Vis-à-vis arbitral proceedings, it applies only to such arbitrations which commenced after 23 October 2015.[17]
- Vis-à-vis court proceedings (Section 9 proceedings, Section 34 proceedings etc.) it applies to such court proceedings which are initiated after 23 October 2015 (even if the arbitration proceeding itself would have been initiated before 23 October 2015).

In *Electrosteel Castings Ltd. v. Reacon Engineers (India) Pvt. Ltd.,*[18] the Andhra Pradesh High Court took a diametrically opposite view that since the award was passed in July 2015, the 2015 Amendment would not apply to the petition for setting aside even if the latter was filed in November 2015.

The 12+6-Month Time Limit: Overambitious

The amendments made in the form of Section 29A mandating that the every reference to arbitration be completed within 12 months (further extendable by 6 months) appear to be overambitious. Most renowned institutions also cannot boast an average run time of less than 18 months to conclude arbitrations.

It has not yet been a year since the passage of the 2015 Amendment. A more realistic picture may come to light after 23 October 2016, when the said 12-month time period for the first such arbitrations commenced under the 1996 Act (as amended by the 2015 Amendment) would expire.

Apparent Mistakes

An unrectified and apparent mistake in a national legislation is not only a cause for embarrassment but it also undermines the colossal efforts of numerous individuals and organisations which culminated in the legislation. In case of the 2015 Amendment, one such mistake is apparent on its very first page.

The proviso added to Section 2(2) provides that provisions of Sections 9, 27, 37(1)(a) and 37(3) shall also apply to foreign-seated international commercial arbitrations (subject to an express agreement to the contrary).

However, Section 37(1)(a), as amended by the 2015 Amendment, can have no applicability in a foreign-seated arbitration as it deals with scenario where the court refuses to refer parties to arbitration under Section 8 of the 1996 Act – which itself is applicable only to domestic arbitrations.

It is obvious that the proviso was meant to apply to Section 37(1)(b) – which prior to the amendment stood as Section 37(1)(a) – but till the time it is corrected, by yet another amendment possibly, it appears that the innocent practitioners and litigants may be stuck with it.

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[16] *Rendezvous Sports World v. The Board of Control for Cricket in India & Ors* (Bombay High Court, judgment dated 14 June 2016); *New Tirupur Area Development Corporation Ltd. v. M/s Hindustan Construction Co. Ltd* (A. No. 7674 of 2015 in O.P. No. 931 of 2015); *Tufan Chatterjee v. Rangan Dhar,* AIR 2016 Cal 213;

[17] 23 October 2015 is the commencement date of the 2015 Amendment Act.

[18] AP No. 1710/2015 decided on 14 January 2016.

Conclusion: "The Unfinished..."

It is clear that the 2015 Amendment is not the end-all solution to the woes of the arbitral community. We now have four different systems of law governing arbitral proceedings:

- The 1940 Act: There are still cases pending in various courts relating to disputes which had arisen under the 1940 Act.
- The 1996 Act (pre-amendment and relating to arbitral agreement executed pre *BALCO*).
- The 1996 Act (pre-amendment and relating to arbitral agreement executed post *BALCO*).
- The 1996 Act (as amended by the 2015 Amendment).

And yet there is more....

No Time Limit for Making or Disposing Objections to Enforcement of Foreign Awards – As Was Done for Domestic Awards

The Law Commission in its 246th Report had recommended that a provision be made whereby a three-month time limit (from date of making the application for enforcement) would be set for taking any objections to the enforceability of the foreign award under Section 48 of the Act. It had further recommended that any such objections once taken should be disposed of by the courts within one year.

For reasons unknown, these recommendations were not accepted much to plight of the parties intending to enforce foreign awards in India.

Missed Opportunity for Setting Out Standards for Grant of Interim Reliefs

With the amendments made to Section 17 of the 1996 Act, the scope of interim reliefs that may be granted by the arbitral tribunal received its much needed teeth; however, the legislature (as well as the Law Commission) could have gone one step further in clarifying the standards that may be applicable to an arbitral tribunal while granting interim reliefs.

Ideally, the standards applied by national courts while granting interim measures (in suits etc.), such as application of standards specified in Order XXXVIII Rule 5 while granting security, ought not to be applied while granting security in arbitration proceedings.

Arbitration scholars of international repute, such as Gary B. Born[19] and Ali Yesilirmak,[20] suggest that instead of applying standards of national courts (which may be more stringent), the arbitral tribunal should normally require a party to demonstrate (a) risk of serious or irreparable harm; (b) urgency; (c) establishment of *prima facie* case and balance of convenience; and (d) no prejudgment on the merits of the case.

- These very standards have been incorporated in the UNCITRAL Model Law in 2002 in the form of Article 17A, yet the 1996 Act remains wanting of such corresponding amendments, thus relying heavily on the courts to set such standards.

The 1996 Act has survived its teens and has the scars to show for it. Though in its 20th year, it is still far from being a matured law we so need it be...

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[19] *International Commercial Arbitration* (2nd ed), pp. 2424–2563.

[20] *Provisional Measures in International Commercial Arbitration*, International Arbitration Law Library, Vol 12, pp. 159–236.