Arbitration reforms in India: End of the Endless Saga?

Analysis of the Ordinance:

Section of the Act	Brief description of the provision under the Act	Key changes in the Ordinance	NDA Analysis
Section 2 (1) - Definition	2 (e) "Court" Previously, the definition of court meant principal civil court of original jurisdiction in a district, and included the High Court in exercise of its ordinary original civil jurisdiction.	2 (e) "Court" The definition of 'Court' has been amended and substituted to include two different sub-sections in relation to domestic and international commercial arbitrations *whereby in international commercial arbitrations, seated in India*, jurisdiction is to be exercised only by the High Court.	This will work to impart a sense of confidence in parties to an international commercial arbitration. This amendment allows international commercial arbitrations seated in India to approach High Courts directly, thereby having access to qualified and experienced judges with commercial understanding of complex cross border disputes in the first instance itself thereby reducing delays in litigation.
Section 2(2) - Scope	Part 1 is applicable only when the place of arbitration is in India.	Part 1 is applicable when seat is in India. However, unless a contrary agreement is entered into, Sections 9, 27 and 37 (1) and (3) will be applicable to a foreign seated arbitration.	This amendment addresses the concern arising out of issues raised by the Supreme Court of India **("Supreme Court")** rulings in *Bhatia International*[1] and *Bharat Aluminum*[2]. In Bhatia International, the Supreme Court held that interim reliefs would be available unless Part I of the Act is expressly or impliedly excluded in the agreement. However, Bharat Aluminum clarified that if arbitration is seated outside India, interim reliefs cannot be sought from Indian courts. This created an issue since parties with arbitration seated outside India, would not have access to avail interim reliefs from an Indian court. Internationally jurisdictions such as Singapore (Section 12A of the International Arbitration Act) and U.K. (Section 2 of the Arbitration Act, 1996) provided for the flexibility to approach courts even if the arbitration was not located within

[1] Bhatia International v Bulk Trading SA (2002) 4 SCC 105
[2] Bharat Aluminium Co v. Kaiser Aluminium Technical Services (2012) 9 SCC 559

			their jurisdiction. The present amendment brings the Act at par with the other international enactments. This amendment would empower parties with foreign seated arbitrations to approach Indian courts in aid of foreign seated arbitration. The intention appears to be to facilitate interim protection to parties from an Indian court as interim protection awarded by the foreign-seated arbitral tribunals is not directly enforceable in India. Parties might consider re-negotiating their arbitration clauses depending on the facts involved and necessity to approach the Indian courts for interim protection.
Section 7 – Arbitration Agreement	For the purposes of the requirement of an arbitration agreement to be in writing, it was sufficient to have the same signed, recorded by means of a telecommunication which provides a record of the agreement.	In an attempt to bring Indian law in conformity with UNCITRAL Model Law, now an arbitration agreement can additionally be concluded by electronic communication.	Notably, in the Law Commission Report, an explanation was added to clarify the term 'electronic communication': meaning any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data inter-change (EDI), electronic mail, telegram, telex and telecopy. However, the explanation has not been incorporated in the Ordinance. In any event, this amendment will work to directly bring email and mobile communication including messengers within its ambit.
Section 8 – Power to refer parties to arbitration where there is an arbitration	A judicial authority is vested with the power to refer the parties to arbitration which is the subject matter of an arbitration	Under Section 8, the judicial authority shall refer the parties to arbitration, which is the subject-matter of an arbitration agreement; unless it finds that *prima*	The Ordinance narrows the scope of the judicial authority's power to examine merely the *prima facie* existence of a valid arbitration agreement which will reduce the threshold to refer a matter before the court to arbitration.

agreement.	agreement, provided such reference is sought not later than submission of the first statement on the substance of the dispute.	*facie* no valid arbitration agreement exists. Further, the party to the arbitration agreement would include *any person claiming through or under him* for the purposes of making such reference.	Taking heed from the judgment of the Supreme Court in *Chloro Controls*[3], which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded to also include persons claiming through or under such party. Thus, even non-signatories to an arbitration agreement insofar as domestic arbitration or Indian-seated international commercial arbitration may be able to take part in arbitration proceedings as long as they are proper and necessary parties to the agreement.[4]
Section 9 – Interim Measures by Court	Provides for interim measures before or during the arbitral proceedings or at any time after the making of the arbitral award prior to enforcement.	Post grant of interim protection under Section 9 of the Act, the arbitral proceedings must commence within a period of ninety days from the date of the interim protection order or within such time as court may determine. Further, post the constitution of arbitral tribunal, a Section 9 interim protection will not be entertained by the court unless the court finds circumstances exist which may not render the remedy provided under Section 17 efficacious.	This is a welcome development encouraging matters being referred to arbitral tribunal in an expedited manner and reducing judicial interference. It will also work to ensure that only parties desirous of having their dispute finally resolved will approach the court under Section 9 given the requirement of an impending arbitration. Further, with the amendments to Section 2 (2), interim relief can be sought from Indian courts even in foreign-seated arbitration. This will work to assuage foreign parties.
Section 11 – Appointment of Arbitrators	Provides for appointment of arbitrator in a domestic and international commercial arbitration.	The role of the Supreme Court in international commercial arbitration and High Court in domestic arbitration has been confined to the examination of the existence of an arbitration agreement.	The Ordinance has made appointment of an arbitrator an administrative decision to be carried out by the Supreme Court or the High Court, as the case may be and has imposed an obligation to dispose of the same as expeditiously as possible and even gone a step further to provide a

[3] Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
[4] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531

		Before appointing an arbitrator, the Supreme Court or the High Court, as the case may be, shall seek a disclosure in writing from the prospective arbitrator as to whether any circumstances exist which are likely to give rise to justifiable doubts as to his independence and impartiality. The application for appointment of the arbitrator before the Supreme Court or High Court, as the case may be, is required to be disposed of as expeditiously as possible and an endeavor shall be made to do so within a period of 60 days; such appointment would not amount to delegation of judicial power. A new section has been inserted pertaining to the model fee schedule for the Arbitrators as provided in the Fourth Schedule to the Act. The court is empowered frame rules as necessary for the purpose of determination of the fees of the tribunal in domestic ad-hoc arbitration only i.e. it will not have this power in case of international commercial arbitration or in case of institutional arbitration.	timeline of 60 days. There has always been a concern in India with respect to the time taken for appointment of arbitrators due to the existing jurisprudence and procedure. The time-frame for such appointment was usually 12-18 months. This amendment seeks to address this delay by introducing a time-line and clarifying the procedure of appointment to be an exercise of administrative power by the courts. The disclosure requirements, as detailed in the new Fifth Schedule, are an internationally accepted practice and are a step ahead in ensuring independence and impartiality of the arbitrators. Interestingly, whilst the threshold in a Section 8 application requires the court to merely examine the prima facie existence of a valid arbitration agreement, the threshold under Section 11 requires the court to confine itself to the examination of the existence of an arbitration agreement. Having different thresholds in these two sections may give rise to different interpretations.
Section 12 – Grounds for challenge	Provides for disclosure requirements by an	The disclosure requirements have been further strengthened and	The amendment requires written disclosures from the prospective arbitrator(s) based on international

	Arbitrator grounds for challenging appointment.	detailed guidelines have been provided under Fifth and Seventh Schedule to the Act. Further before taking on an appointment, the arbitrator will have to disclose his interests in writing as per the format prescribed in Sixth Schedule to the Act with respect to circumstances: (i) such as the existence of direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; **and** (ii) which are likely to affect the Arbitrators ability to devote sufficient time to the arbitration and in particular his ability to finish the entire arbitration within 12 months.	requirements as provided under the International Bar Association Guidelines on Conflicts of Interest in International Arbitrations. The requirements are codified as Schedules to the Act. In addition, there is a requirement to disclose the number of ongoing arbitrations. There is now a provision of a new Seventh Schedule which contains circumstances whereby an arbitrator is rendered ineligible for appointment; this can be waived only subsequent to the dispute having arisen by an agreement in writing.
Section 17 – Interim Measures by Arbitral Tribunal	The power of the arbitral tribunal was narrower than interim protection awarded under Section 9 of the Act.	Section 17 has been substituted and now, the arbitral tribunal has been given broad powers to order for interim measures of protection in respect of (i) preservation, interim custody or sale of any goods which are subject matter of the arbitration agreement; (ii) securing the amount in dispute in the arbitration; (iii) the detention, preservation or inspection of any property or thing which is subject-matter of the dispute in arbitration, or as to which	Section 17 has been suitably amended to provide the arbitration tribunal the same powers as a '*civil court*' in relation to grant of interim measures. This is a welcome step and will work to enable parties to obtain satisfactory and efficacious relief from an arbitral tribunal. There has been extensive confusion on the extent and scope of arbitrator's powers to grant interim relief and enforceability of such orders has proven difficult. This issue has been addressed by *pari materia* making the powers under Section 9 and 17 of the Act

		any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purposes of obtaining full information or evidence; and (iv) interim injunction or appointment of a receiver.	identical. Notably, the arbitral tribunal would have powers to grant interim relief post award but prior to its execution. Further, the order passed by a tribunal will be deemed to be an order of the court and will be enforceable under the Code of Civil Procedure, 1908, as if it were an order of the court, which provides clarity on its enforceability. The intention appears to be to vest significant powers with the arbitral tribunal and reduce the burden and backlog before the courts. However, in certain situations, a party will require to obtain an order of interim relief from a court only (e.g. injunctive relief against encashment of a bank guarantee).
Section 29A: Time limit for arbitral award	New insertion	An award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference and such period may be extended by a maximum period of six months by the parties. In the event the award is not made within the above mentioned period, the mandate of the arbitrator (s) shall terminate and extension if any to the arbitration process can only be granted by courts on sufficient cause being shown. The court also has the power to substitute one or all members of the arbitral tribunal and the new provision requires that the proceedings will continue from the stage already reached.	The intention is to ensure that the arbitral process is conducted in an expeditious manner; however a twelve month time frame for delivering an award may, practically, be too aggressive. The additional powers to substitute the arbitrators will work to ensure that the conduct of the arbitral tribunal is in check.

		Further, courts are vested 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.	
Section 29B: Fast track procedure	New insertion	Parties can before constitution of the arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure. Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have oral hearing, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing. The award in fast track procedure has to be made within six months from the date of the arbitral tribunal enters reference.	The amendments are akin to an expedited arbitration under various institutional rules. However, the major difference herein is that under the Ordinance, adoption of such expedited procedure is solely based on consent of the parties as opposed to the rules, wherein the designated authority may determine upon application by a single party whether expedited procedures should be followed or not
Section 31 – Form and contents of the Award	Provides the details as to the ingredients of an arbitral award.	There has been a departure from the statutory 18% p.a. as currently provided for in Section 31 of the Act. The amended rate is 2% per annum more than the current rate of interest, from the date of the award to the date of payment.[5]	In today's world, 18% p.a. (as the Act earlier provided for) was considered an exceptionally high rate of interest. Keeping the rate at 2% higher than the current rate, the Ordinance infuses a reality check on the rate of interest.
Section 31 A – Regime for costs		The new provision provides for comprehensive provisions	The Ordinance introduces a brand new comprehensive regime for costs which will be applicable to

[5] The expression current rate of interest shall have the same meaning as assigned to it under Clause (b) – Section 2 of the Interest Act, 1978.

		for costs regime to both arbitrators as well as courts. Interestingly, any agreement between the parties on the issue of costs of the arbitration will be valid only if such agreement is made after the dispute has arisen.	arbitrations as well as proceedings related to arbitration before the court. This will ensure minimizing frivolous and meritless litigation/arbitration, thereby increasing the efficiency and overall speed and efficacy of the arbitral process. This leads to the introduction of the 'costs follow the event' regime in India.
Section 34 – Application for setting aside arbitral award	Provides for grounds on which an arbitral award made under Part 1 can be set aside.	In the explanation, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice; A new section has been inserted providing that the award may be set aside if the court finds it vitiated by patent illegality which appears on the face of the award. For international commercial arbitrations seated in India, 'patent illegality' has been keep outside the purview of the arbitral challenge. An award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence. A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.	An application under Section 34 in relation to an international commercial arbitration seated in India will lie before the High Court which is a welcome development. It is a welcome development to keep "patent illegality" outside the purview of challenge in an international commercial arbitration seated in India. Prior notice requirement and timelines will ensure that ex-parte stay orders are not granted in a Section 34 challenge; and also to ensure that the challenge is disposed in a time bound manner.

		A challenge under this section can be filed only after providing prior notice to the opposite party. A challenge has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice referred above.	
Section 36 - Enforcement	Provides for enforcement of award seated in India	A challenge under Section 34 of the Act would not result in automatic stay in enforcement proceedings under Section 36 of the Act. Stay can be granted only on making a separate application, by a court order in writing, recording the reasons in accordance with the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908.	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. The Ordinance now requires parties to file an additional application and specifically seek a stay by demonstrating the need for such stay to an Indian court. Practically, it would operate as a deterrent against frivolous applications in light of the revised costs regime and also address the long outstanding issue of delay in enforcement of arbitral awards. Additionally, in entertaining a challenge to an arbitral award for payment of money, the court will have due regard to provisions of grant of stay of a money decree under the Code of Civil Procedure, 1908. This would include putting parties to terms including deposit of monies which would practically work to bring many disputes to an amicable resolution.
Section 48 – Conditions for enforcement of foreign awards	Provides for conditions for refusing enforcement of foreign awards.	In the explanation, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or	The tightening of the provisions seeking to challenge the enforcement of arbitral awards is a welcome move and will work to impart confidence in arbitration as an effective and speedy dispute

		corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice; It is not possible for the court to review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.	resolution mechanism for foreign parties.

In addition to the above provisions highlighted, the Ordinance has also addressed certain procedural issues with respect to forfeiting right to file Statement of Defence, if not done within the stipulated time-line, conducting oral hearings for the presentation of evidence or for oral arguments on continuous days and avoiding adjournments unless sufficient cause is made out. The Ordinance has introduced imposition of costs, including exemplary costs, on the party seeking the adjournment. Each of these new changes seeks to plug loopholes which have been seen during the arbitration process.

Missed Opportunity:

Most issues plaguing India`s arbitration law have been analyzed extensively and dealt with in the Ordinance. This is a welcome development and it is safe to say that India`s arbitration law is comparable with most developed arbitration regimes. However, there exist grey areas where the provisions could have been further streamlined to give effect to few additional changes.

1. The Law Commission Report had specifically provided that the amendments would apply prospectively i.e. only to fresh arbitrations and fresh applications, with certain exceptions. However, the Ordinance is silent in this respect, which will effectively open up Pandora's Box on the practical application of the provisions to on on-going arbitrations.

2. The Ordinance has provided detailed disclosure requirements for the arbitrators. However, it may not work effectively in an Indian context as such detailed disclosures would effectively reduce the existing pool of available arbitrators.

3. The Ordinance seeks to provide time-line within which applications are expected to be disposed of. A practical difficulty that is faced in India is one of dasti service. In such a situation indicative timelines provided may have no meaning and would be bypassed. A possible solution was to provide for email service which is also provided for and allowed under Code of Civil Procedure, 1908[6].

4. The Ordinance could have expressly provided the High Courts with the power to appoint arbitrators for international commercial arbitrations to reduce the burden of Supreme Court as it is only an administrative task.

[6] Order 5, Rule 9(3) of the Code of Civil Procedure, 1908

5. Although the position is settled by several cases decided by the Supreme Court, yet the Ordinance could have expressly codified and dealt with the issue of arbitrability of fraud as was suggested by the Law Commission Report.

6. The Ordinance does not deal with the issue of “Emergency Arbitrator” which was proposed by the Law Commission Report under the definition of ‘Arbitral Tribunal’. The Ordinance could have inserted appropriate language to bring it at par with international practice. However, the practical application of “Emergency Arbitrator” needs to be tested in the Indian context from the aspect of enforceability.

7. The Ordinance provides for a fast track procedure for resolving disputes in an expedited matter; however it has not dealt with mandatory reference in cases of disputes involving smaller claims. A mandatory expedited procedure for disputes below certain thresholds may work to reduce costs and thereby promote arbitration as an effective dispute resolution mechanism.

Conclusion:

The Ordinance attempts to identify and treat each loophole in the Act with clinical precision. Each amendment attempts to not only remedy the issues seen but also seeks to set the stage for arbitration in India to achieve a higher plane of growth. The amendments will certainly improve India`s standing in international arbitration community. The parties to an arbitration agreement should quickly take a decision as to the applicability of interim relief and court assistance in the process of evidence and accordingly amend the arbitration clause. Enforcement of contracts and dispute resolution is a key indicator for ease of business. The Ordinance seeks to achieve that and is in line with the efforts being undertaken to make India a hub for international arbitration.