Has The Law Commission Done Enough?

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By: Vyapak Desai, Partner - Nishith Desai Associates

An analysis of the proposed amendments to Arbitration and Conciliation Act, 1996

Introduction:

The recent Law Commission Report is aimed at taking drastic and reform-oriented steps to bring Indian arbitration law at par with global standards and provide for an effective mechanism for resolving disputes with minimum court interference. Arbitration has emerged as the preferred option for resolving international commercial disputes and preserving business relationships. One of the main reasons why arbitration clauses are seen in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party's 'home' court/country. This is not just because of any perceived bias - there are also other advantages (e.g. neutrality, speedy resolution of dispute, choice of arbitral panel etc.). The other convincing reason lies in the treaty obligations that exist for enforcing arbitration awards across national boundaries. In contrast, it may be difficult to enforce a judgment of a court in another country as there are no multilateral treaties covering the reciprocal enforcement of court judgments. Insofar as India is concerned, it recognizes and has notified about 48 countries insofar as the recognition and enforcement of foreign arbitral awards is concerned. Comparatively, judgments passed only in about 11 countries are enforceable in India on a reciprocal basis.

With exponential growth in cross-border commercial transactions and open-ended economic policies acting as a catalyst, there has been no dearth of international commercial disputes involving Indian parties. In 2012, Singapore International Arbitration Centre **("SIAC")** recorded a 25% growth in cases, and the highest number of filings was generated by mainland Chinese parties with India as close second. Other comparable arbitral institutions like London Court of International Arbitration **("LCIA")** and the International Chamber of Commerce **("ICC")** have seen a huge rise in International Arbitration disputes involving Indian parties. So much so that LCIA, keeping long-term growth prospects in mind, have opened LCIA India, an arbitral institution based in New Delhi. SIAC opened its first overseas office in Mumbai in 2013. Clearly, India and Indian parties are on the international arbitration radar.

The manner in which arbitration evolved under the Arbitration Act 1940 is a matter of legal folklore. Suffice it to say, dispute resolution was anything but speedy and efficient. 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 slowly but surely ensured that the preferred seat in any cross-border contract was always a heavily negotiated point and, more often than not, ended up being either Singapore, New York or London, the global arbitration centres. Foreign investors and corporates doing business in India were just not ready to risk the Indian legal system.

This scenario is fast changing and the attitude of the Indian judiciary towards arbitration is rapidly moving towards India being an arbitration-friendly destination. Never before has

one seen so many pro-arbitration rulings by Indian courts. From 2012 to 2014, the Indian Supreme Court has, amongst other decisions, declared the Indian arbitration law to be seat centric, removed Indian judiciary's power to interfere with arbitrations seated outside India, referred non-parties to an arbitration agreement to settle disputes through arbitration, defined the scope of public policy in foreign seated arbitration, held that fraud is arbitrable (rather remarkably and may not necessarily be in line with judicial decorum) and has created a stir in the international community.

While the judiciary did play its part in turning a rather negative perception about Indian arbitration, keeping in tune with the spirits, recently 'The Law Commission of India's Report No. 246' **("Law Commission Report")**[1] proposed amendments to the Act. The Law Commission Report intends improving the law relating to arbitration. One may recall that an attempt was made in 2010, wherein Ministry of Law and Justice had released a consultation paper suggesting certain amendments to the Act. In legal circles, it was felt that the consultation paper fell woefully short of addressing the shortcomings that the Act had thrown up in its relatively short life. Out of the ash that was the consultation paper, arose public debate and discussions which have now culminated into the Law Commission Report. The question now is, will the Law Commission Report also fail to meet the expectations? Or is it the medicine that the doctor ordered for Indian arbitration?

Highlights of the Law Commission Report:

A) Key Changes in the definition of Act:

The Law Commission Report has suggested key changes in the definition of the Act. Broadly the same can be categorized as under:

1. Arbitral Tribunal:

The Law Commission has proposed inclusion of the term 'Emergency Arbitrators' under the definition of 'Arbitral Tribunal[2]'. This is indeed significant and consistent with the approach taken by other arbitral institutions worldwide. Notably, SIAC and LCIA Rules provide for an Emergency Arbitrator[3] who is appointed for the limited purpose of granting urgent reliefs, within a stipulated time frame. Later, it is up to the arbitral tribunal when constituted to vary, confirm or reject the findings of the Emergency Arbitrator. The Law Commission Report, however, does not provide for the enforceability of interim orders passed by arbitral tribunals (both for emergency arbitrator and a duly constituted arbitral tribunal) in foreign seated arbitrations.

2. Court:

The definition of 'Court' is proposed to be amended whereby in international commercial arbitration, jurisdiction is to be exercised by the High Court (as against a District Court). This proposal, should it be accepted, will work to impart a sense of confidence in parties to an international commercial arbitration where the nature of such contracts may require a judge with a commercial bent of mind, who see such and interpret such contracts more often and thus are better placed to deal with issues emanating from such contracts.

3. International Commercial Arbitration:

The term '…a company…' has been proposed to be deleted from Section 2 (f) (iii) of the Act since the same is already covered under Section 2 (f) (ii) of the Act. The intention is to determine the residence of a company based on its place of incorporation, and not the place of central management/control. This further supports the 'place of incorporation' principle as laid down by the Supreme Court in TDM Infrastructure[4], and adds greater certainty in case of companies having a different place of incorporation and place of exercise of central management and control.

4. Seat of Arbitration:

The definition of 'seat of arbitration' is proposed to be incorporated so as to make 'seat of arbitration' distinct from venue of arbitration. Similarly, Section 20 of the Act has been proposed to be modified to bring in a clear distinction between 'seat' and 'venue' of

arbitration. This is consistent with the law laid down by Supreme Court of India ("Supreme Court") in Bharat Aluminium Co v. Kaiser Aluminium Technical Services[5], where the Court made Indian arbitration law seat-centric and also discussed the difference between seat and venue of arbitration. This proposed amendment is also in line with globally used terminology.

5. Parties to arbitration:

Taking heed from the judgment of the Supreme Court of India in Chloro Controls[6], the definition of the word 'party' to an arbitration agreement has been expanded to also include persons claiming through or under such party. Thus, event non-signatories to an arbitration agreement may be able to take part in arbitration proceedings.

6. Scope of Part I of the Act:

The scope of Part I of the Act ("Part I") has been clarified and jurisdiction under Part I can be exercised only when the seat of arbitration is located in India. To this effect, it over-rules what is laid down in Bhatia International[7] and re-enforces the 'seat centric' principle of BALCO.[8] However, unless agreed by parties to the contrary, Section 9 (interim relief), Section 27 (court assistance for taking evidence), Section 37(1)(a) and 37(3) (Appealable orders) will apply in international commercial arbitrations, when the seat of arbitration is seated outside India. Indian Courts can therefore exercise jurisdictions with respect to these provisions even where the seat of arbitration is outside India. Notably, this has been given a prospective effect so as not to frustrate the pending applications and on-going arbitration proceedings. The proposed changes will not affect applications pending before any judicial authority, relying upon the law set out by Bhatia[9]. It appears that these amendments might also affect arbitration agreements where parties have impliedly excluded the provisions of Part 1 of the Act.

B) Interim Measures:

Interim measures or protections can be accorded by the Court under Section 9 of the Act or by the Tribunal under Section 17 of the Act. Under the existing regime, there lies a difference in the scope of the power available to Court under Section 9 of the Act vis-à-vis power of the Tribunal under Section 17 of the Act[10]. However, the new changes, if effected, will bring in significant changes in grant of interim measures in any arbitration and will confer the same powers to Section 17, as applicable under Section 9 of the Act.

1. Section 9 of the Act:

Section 9 of the Act is proposed to be made applicable to international commercial arbitration even when it is seated abroad, unless parties agree to the contrary;
In order to ensure timely initiation of the arbitration proceedings by the parties when granted interim measure of protection, it is proposed that arbitral proceedings shall be commenced within 60 days from the date of grant of interim measure order by the Court or within such shorter or further time as indicated by the Court, failing which the interim measure of protection shall cease to operate. This will ensure that arbitration proceedings commence even when relief under Section 9 has been obtained by a party.
In order to reduce the role of the Court for grant of interim measures, once the Tribunal has been constituted, the Court shall ordinarily not entertain an Application for interim measures unless circumstances exist owing to which the remedy under Section 17 is not efficacious. This amendment is also consistent with the spirit of UNCITRAL Model Law as amended in 2006. Further, this streamlines the process and in effect avoids interference of Courts to encourage arbitration.

2. Section 17 of the Act:

Section 17 has been proposed to be suitably amended to provide the Tribunal the same powers as a civil court in relation to grant of interim measures. Therefore, there would not exist differential nature of power to award interim measures under Section 9 and 17 of the Act. Notably, the Tribunal would have powers to grant interim relief post award.
The 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 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.

C) Delays: In Court, before the Tribunals and risks under Bilateral Investment Treatises

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. Delays exist in various areas and the Law Commission Report seeks to deal with each aspect in a systematic and analytical manner.

1. Appointment of an arbitrator:

The Law Commission Report strikes a death blow to the law set down in SBP & Co. Vs. Patel Engineering[11] and proposes 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. Similar changes have been proposed in applications under Section 8 of the Act, which deals with the power to refer to arbitration. This approach is designed to bring Indian arbitration in line with global best practices and also, to give effective meaning to the doctrine of Kompetenz-kompetenz, which stood diluted thanks to the evolution of caselaw in India. In a welcome step, it is also provided that such an application be endeavored to be disposed of expeditiously, and also within a 60 day period, from service of notice. Should this be implemented, it would work to speed the appointment process along quite nicely[12].

2. Jurisdiction of the Tribunal:

Section 16 (2A) is proposed to be incorporated wherein a plea that the arbitral tribunal does not have jurisdiction shall be decided by the Tribunal as a preliminary issue, unless this is also the main issue for determination in the arbitration. This amendment is proposed to ensure that the issues of jurisdiction should be decided by the arbitral tribunal.

3. Challenges to arbitral awards:

The Law Commission Report provides that an application challenging the award be endeavored to be disposed of expeditiously, and also within a 1 year period, from service of notice[13]. In case of foreign awards, the Law Commission Report also has considered applications challenging the enforcement of a foreign award (under Section 48 of the Act) and incorporated similar timelines for (a) institution of an application challenging enforcement; and (b) disposal of such an application; in Section 48.

4. Hearing and Written Proceedings - Section 24-:

It has been proposed that the Tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on continuous days, and not grant any adjournments unless sufficient cause is made out and may impose costs, including exemplary costs, on the party seeking the adjournment. This amendment is to ensure expeditious hearings in the arbitration and to avoid unnecessary adjournments.

5. An amendment has been proposed to grant discretion to the arbitral tribunal to treat the right of the Respondent to file a statement of defence as having been forfeited, where such statement is not filed within the prescribed time.[14] Once in force, this will ensure that parties comply with timelines set out by the tribunal.

6. No appeal from Section 37 of the Act will be maintainable as a letters patent appeal, and only appeal to Supreme Court of India can be preferred by parties aggrieved from an order under Section 37 of the Act. This is aimed to reduce delays by removing the scope of the

parties to file letters patent appeal.

7. Separately, the Law Commission Report has also recommended for specialized and dedicated arbitration benches be constituted (as done in the Delhi High Court).

D) Costs

A regime of actual costs incurred is proposed along with detailed points for consideration of the court or arbitral tribunal based on Rule 44 of the Civil Procedure Rules of England. A general rule requiring a losing party to pay actual costs of the successful party, as proposed, would certainly inspire most parties to be reasonable about resolving disputes. Moreso, manufactured counterclaims and dilatory tactics would be minimized and thus, the overall speed and efficacy of the arbitral process is bound to improve. By keeping a check on parties' conduct including potential offers to settle the disputes, the Law Commission Report seeks to cast an obligation upon each party to the proceeding to cooperate and be reasonable at each step. The main objective of including the 'costs follow the event' regime is to disincentivize the filing of frivolous claims/ applications. Should this be implemented, it would certainly operate as a game changer for Indian arbitration and related court litigation.

E) Setting aside of domestic award & recognition/enforcement of foreign awards

1. Section 34 of the Act – Challenging an Arbitral Award:

With a view to do away with the unintended uncertainties caused by the Supreme Court's judgment in ONGC Vs. Saw Pipes[15], the Law Commission Report proposes a specific provision dealing with setting aside of a domestic award on the ground of patent illegality.[16]
Interestingly, the proposed changes also recommend for clarification on the term 'public policy of India'. It will be limited to include i) contravention with the fundamental policy of Indian law; and ii) conflict with most basic notions of morality or justice.
Certain key changes have been suggested to tighten the procedure for an application under Section 34 of the Act. The amended provision would require the party to file an application, only after issuing a prior Notice to the other party and such an Application shall be accompanied by an affidavit from the Applicant endorsing compliance with this requirement[17].

2. Section 48 of the Act – Resisting Enforcement of an Award:

In cases of foreign award and awards passed in international commercial arbitration in India, it is recommended that a narrower construct be given to 'public policy', so as to include only (i) fundamental policy of Indian law; and (ii) most basic notions of justice or morality.[18]
Tightening of the provisions seeking to set aside or challenge the enforcement of arbitral awards is a welcome move and will work to impart confidence in arbitration as an effective and speedy dispute resolution mechanism.

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. The backlog prevalent before our courts ensured that once application was filed, the applicant would continue laughing at the plight of the award holder. This situation is proposed to be rectified by requiring an applicant to specifically seek stay of an award and permitting a court to put a party to terms, keeping in mind the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908. If implemented, one could see applicants being directed to cough up the award amount or portion thereof prior to admission of their stay application. Practically, it would also operate as a deterrent against frivolous applications in light of the revised costs regime.

G) Arbitrability of fraud:

The Law Commission Report attempts to bring to closure the entire controversy by legislatively providing that allegations of fraud/corruption, complicated questions of fact or serious questions of law are expressly arbitrable[19]. Although initially the Supreme Court had held in N. Radhakrishnan v. M/s Maestro Engineers[20] that where allegations of fraud and serious malpractices are alleged, the matter can only be settled by the Court and such a situation cannot be referred to an arbitrator. Subsequently, the Supreme Court in World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd,[21] and Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010[22]. has held that, allegations of fraud are not a bar to refer parties to a foreign seated arbitration and held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of Act i.e. in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. Therefore, the proposed amendment is consistent with the law laid down by the Supreme Court.

H) Challenging appointment of an Arbitrator:

In line with international practice, before an Arbitrator's appointment, it has been proposed that he disclose in writing any circumstances i) such as 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 24 months and render an award within 3 months from such date; is sufficient for challenging the appointment of an arbitrator.

The Law Commission Report has further proposed amendments with a view to address the issue of neutrality of arbitrators. The proposed amendments require written disclosures from the prospective arbitrator(s) with regard to any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.[23] The nature of circumstances has also been detailed and there is an additional layer of checks and balances provided which is incorporation, as a guide, of the red and orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitrations as Schedules to the Act. There is an express bar of certain persons also provided for which is waivable, but only after disputes have arisen and that too only by an express agreement in writing. This is done keeping in mind party autonomy, the grundnorm of arbitration[24].

I) Power of the arbitral tribunal to award interest

Rationalizing the provision permitting grant of interest, the Law Commission Report proposes to move away from the statutory 18% p.a. as currently provided for in Section 31 of the Act and instead, move to a market based determination in line with commercial realities. The suggested rate is 2% per annum more than the current rate of interest, from the date of the award to the date of payment.[25]

J) Arbitration agreement

In addition to other amendments, with a view to bring Indian law in conformity with UNCITRAL Model law, it is proposed that an arbitration agreement can additionally be concluded by electronic communication.[26] An explanation has been added to clarify the term 'electronic communication' means 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.

K) Statement of Defence:

An explanation is proposed to be added to Section 23 of the Act, wherein in when a Respondent in an arbitration proceedings submits a counter claim or pleads a set off, it shall be treated as being within the scope of reference and be adjudicated upon by the arbitral tribunal eve if it did not fall within the scope of initial reference, as long as it arises out of the arbitration agreement. The purpose is 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.

L) Applicability of the Amendments:

Section 85A is proposed to be introduced in the Act and states that the provisions of the Act (as amended) will be prospective in operation shall apply only to fresh arbitrations[27] and fresh applications[28], except in the following situations:
a. the provisions of Section 6-A[29] shall apply to all pending proceedings and arbitrations.
b. the provisions of Section 16 sub-section (7)[30] 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[31] shall apply to all pending arbitrations.

Possible improvements in the Amendments:

Most issues plaguing India`s arbitration law have been analyzed extensively and dealt with in the proposed amendments. If it is pushed through, India`s arbitration law will be comparable with any developed arbitration regime. However, there exist potential grey areas where the provisions can be further streamlined to give effect to few additional changes.

i) In light of the fact that enforcement of an award in India does take time, the enforcing court should have some degree of latitude in awarding interest for the time an application for enforcement of the award is pending. While interest is usually something awarded by the tribunal and set out in the award itself, the peculiar state of affairs in India does require some relief on this front.

ii) The Law Commission Report could consider providing a manner by which interim orders passed in a foreign seated arbitration are enforced.

iii) To appoint an arbitrator, an application is proposed to be decided within a 60 day period, from service of notice. Although this is a welcome development, serving a Notice issued by the Court (typically effecting dasti service or service through Hague Convention) can take years. Therefore, the sixty days' deadline will have no meaning and appointment will inevitably get delayed. Even in the present scenario it takes nearly one year or even more to have an arbitrator appointed by the Court thereby defeating the whole concept of a speedy dispute redressal mechanism. A possible solution is to give effect to email service, which is also allowed by Civil Procedure Code, 1908[32]. Generally, leave of the Court has to be taken to affect such a service but if it is statutorily codified then this will further expedite the process.

iv) The power to appoint an arbitrator should be given to the High Courts for international commercial arbitrations. Notably, this is only an administrative task and could be done expeditiously.

Conclusion

One possible alternative could have been to follow a hybrid system in the Act, by creating two different chapters for domestic and international arbitration respectively (or even two separate and distinct statutes). However, the effect of BALCO judgment (i.e. making Indian arbitration law seat centric etc.) and consequent amendments proposed in the Law Commission Report would have to undergo significant changes and therefore it is not suggested that India adopts the hybrid approach like other major arbitration friendly jurisdictions (e.g. Singapore and France).

Irrespective of few suggestions pointed out above, the Law Commission Report attempts to identify and treat each malady plaguing arbitration in India with clinical precision. Each proposed amendment 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. If implemented, the amendments will improve India`s standing in international arbitration community. Arbitration as a dispute resolution mechanism has not found the favour it should and could find due to a number of reasons. With a Government that is eyeing judicial reform, clear and precise amendments which are bound to find favour and impart confidence to foreign investors should find adequate backing.

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

2 Section 2(d) of the Act

3 LCIA Rules: Article 9B (LCIA Rules 2014 – to come into effect from October 1, 2014); SIAC Rules: Schedule 1 to SIAC Rules 2013.

4 TDM Infrastructure Private v. UE Development India Pvt. Ltd, (2008) 14 SCC 271

5 (2012) 9 SCC 649

6 Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.

7 Bhatia International v. Bulk Trading SA ('Bhatia') (2002) 4 SCC 105.

8 Bharat Aluminium Co v. Kaiser Aluminium Technical Services ('BALCO') (2012) 9 SCC 649.

9 Ibid

10 Intertol Ics Cecons.O & M Co. Pvt. Ltd. v. National Highways Authority of India, (2013) ILR 2 Delhi 1018: 2013(1) ARBL 515 (Delhi) – it was held that Section 17 Powers are narrower than Section 9 of the Act.

11 (2005) 8 SCC 518

12 Section 11(13) of the Act

13 Section 34 (5) of the Act

14 Section 25 of the Act

15 (2003) 5 SCC 705;

16 Section 34 (2A) of the Act

17 Section 34 (4) of the Act

18 Explanation to Section 48 (2) of the Act

19 Section 16 (7) of the Act

20 2010 (1) SCC 72

21 AIR 2014 SC 968

22 (2014) 6 SCC 677

23 Section 12 (1) (b) read with Seventh Schedule to the Act.

24 Section 12 read with Fourth and Fifth Schedule to the Act.

25 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.

26 Section 7 of the Act

27 Section 85 (2) (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

28 Section 85 (2) (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

29 Regime for Costs

30 Serious question of law, complicated questions of fact or allegations of fraud, corruption etc. are arbitrable.

31 Hearing and written procedure

32 Order 5, Rule 9(3)

Alipak Banerjee, Payel Chatterjee and Sahil Kanuga from Nishith Desai Associates also contributed to this article