Dispute Resolution Hotline

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INDIA CONTINUES ITS MARCH TOWARDS A MODEL DISPUTE RESOLUTION REGIME

The Union Cabinet recently cleared bills proposing to amend the arbitration law and the jurisdiction of commercial courts in India. Both the bills are in line with India's aim of becoming a model arbitration friendly jurisdiction and improving the enforceability of contracts in India. The consistency in the steps taken by the Government of India - ranging from the Arbitration and Conciliation (Amendment) Act 2015 ("**2015 Amendment**"), establishment of commercial courts and constitution of the Srikrishna Committee followed by incorporation of the same in the Bill within a span of just three years, reflects the political will to rapidly reform the dispute resolution landscape of India. We herein discuss the key amendments as reflected in the recent press release.

1. ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018[1]

With the 2015 Amendment being the harbinger in transforming India into a hub of arbitration, the Government of India ("**GoI**") has rightfully identified the need to further the pro-arbitration landscape in India. The amendments are principally based on the recommendations of the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India ("**Srikrishna Committee Report**")[2]. Principally the report has made positive recommendations for reforming the arbitration ecosystem. However, caution should be exercised as some suggestions under the Srikrishna Committee Report may merit further consideration.

i. Arbitration Council of India ("**ACI**")

In line with the recommendations made by the Srikrishna Committee Report, the Bill proposes creation of ACI, an independent body corporate for grading and accreditation of arbitral institutions and to promote and encourage arbitration and other alternate dispute resolution mechanisms. Regarding the nature of the institution ACI - reference may be made to the Srikrishna Committee Report which clarifies that it is not intended to be a regulator and that any act of regulating arbitral institutions would adverse to party autonomy.

However, some scepticism is reserved with respect to the constitution of the ACI. The press release indicates that "*the Chairperson of ACI shall be a person who has been a Judge of the Supreme Court or Chief Justice or Judge of any High Court or any eminent person. Further, the other Members would include an eminent academician etc. besides other Government nominees.*" It may only be hoped that there is a limited involvement of the government considering that this may create a situation of conflict given that the government is one of the biggest litigators.

ii. Amendments to provisions pertaining to court-appointed arbitrators

To facilitate speedy appointment of arbitrators and to improve institutional arbitration, it is proposed that arbitral appointments would be made by the arbitral institutions (as recognised by the ACI) designated by the Supreme Court (for international commercial arbitrations) or the High Court (in other cases), thereby eliminating the requirement to approach the court for arbitral appointments. This is akin to the practice in other leading jurisdictions such as Singapore and Hong Kong, where the designated institutions are Singapore International Arbitration Centre[3] and Hong Kong International Arbitration Centre, respectively.

iii. Amendments to the time limit for making of an arbitral award[4]

Through the 2015 Amendment, a 12-month timeline was imposed on arbitrations seated in India. The Bill proposes exclusion of international commercial arbitrations from this timeline. It further extends the timeline by saying that it would start from the date of completion of pleadings as opposed to the date of constitution of the tribunal. While the idea behind extending the timeline may be valid, '*completion of pleadings*' is not a definite enough marker for calculation of timelines. As pleadings could be amended or filed at different stages, it would create another bone of contention between the parties and could eventually also defeat the purpose of setting a timeline. At this stage, it may be hoped that that Bill provides for a more concrete and objective criterion for determination of the timeline.

Additionally, considering the main objective of the Sri Krishna Report was to promote institutional arbitration, the concerns on the timeline can be addressed by simply not amending the 12 month timeline but stating that such timeline will be applicable to adhoc arbitrations to ensure timely adjudication and may not be applicable to institutional arbitration or give powers to institution to extend, if parties apply for the same.

iv. Amendments to ensure confidentiality by insertion of a new section 42A

This amendment is proposed to ensure that the arbitrator and the arbitral institutions maintain keep confidentiality of all arbitral proceedings except award (keeping in mind the enforcement of awards, and possible challenges to

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it). This would place India on the same pedestal with jurisdictions such as Hong Kong, France and New Zealand, which have express legislative provisions mandating confidentiality of arbitration proceedings.

v. Amendments to incorporate arbitral immunity

Further, a new section 42B protects an arbitrator from suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings.

Such arbitral immunity would provide safeguards to arbitrators against proceedings attacking their conduct in the course of the arbitral proceedings. Nevertheless, it may trigger frivolous proceedings by resentful parties, under the garb of 'bad faith', disrupting the arbitration.

vi. Clarifications to applicability of the 2015 Amendment

A new section 87 is proposed to be inserted to clarify that the 2015 Amendment would be prospective i.e. it would apply only to the arbitral proceedings commenced on or after the commencement of the 2015 Amendment (i.e. 23 October 2015) and to court proceedings arising out of or in relation to such arbitral proceedings.

However, pursuant to the conflicting views of various High Courts on the interpretation of the applicability of the 2015 Amendment, the matter is currently pending before the Supreme Court of India and a judgment on the issue is also awaited.

While the Srikrishna Committee Report has largely made positive suggestions, certain amendments made thereunder deserve further evaluation e.g. amendments proposed to Section 34 of the Arbitration and Conciliation Act 1996.[5] Considering that the Bill is based on the Srikrishna Committee Report, it is hoped that further consideration is given to such aspects

2. COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL DIVISION OF HIGH COURTS (AMENDMENT) BILL, 2018:

The Union Cabinet has also approved the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 for introduction in the Parliament which seeks to amend the pecuniary limit under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 ("**Commercial Courts Act**"), amongst other changes.[6] It is proposed to extend the applicability of the Commercial Courts Act, by reducing the specified value of a commercial dispute to INR 3 lakhs from the present limit of INR one crore. This change is backed up by the intention to provide efficient dispute resolution mechanisms even to commercial disputes of lesser value. This is in consonance with the parameters for resolution of commercial disputes as indicated in the *Doing Business* measures of the World Bank.[7] The World Bank in determining the ease of doing business ranking of a country takes into account the enforceability of contracts. To ascertain the level of contract enforcement, it measures (in case of India) cases of value of USD 5,000 or higher. It is from here that the value of INR 3 lakhs is adopted.

The Bill also calls for establishment of Commercial Courts at district Judge level in the cities of Chennai, Delhi, Kolkata, Mumbai and State of Himachal Pradesh (where the High Courts have ordinary original civil jurisdiction), thereby extending the benefits of the Commercial Courts Act to commercial disputes even at the district court level. Pecuniary limits for such commercial court is INR 3 lakhs and above, but not more than the usual pecuniary jurisdiction of the district court in the jurisdiction. Further, with the prospective effect given to the amendments, the present adjudicatory mechanism pertaining to commercial disputes, would remain undisturbed.

– Shweta Sahu, Ashish Kabra & Vyapak Desai
You can direct your queries or comments to the authors

[1] Press Release available here.

[2] For an analysis of the Srikrishna Committee Report, see, Kshama Loya, Ashish Kabra and Vyapak Desai, '*Arbitration in India: The Srikrishna Report – A Critique*' (2018) 20 (1) Asian Dispute Review 4–11

[3] (Singapore) International Arbitration Act – S. 8(2): "*The Chairman of the Singapore International Arbitration Centre shall be taken to have been specified as the authority competent to perform the functions under Article 11(3) and (4) of the Model Law.*"

[4] Arbitration and Conciliation Act 1996, s 29A: "*(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference…(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.*"

[5] Kshama Loya, Ashish Kabra and Vyapak Desai, '*Arbitration in India: The Srikrishna Report – A Critique*' (2018) 20 (1) Asian Dispute Review 8

[6] Press release available here.

[7] Available here.

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