

REFORMS IN INDIAN ARBITRATION LAWS IN 2015 – AN ANALYSIS FOR THE STAKEHOLDERS INVOLVED

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Abstract

This Paper analyses the reforms in the Indian arbitration regime with the Arbitration & Conciliation (Amendment) Bill, 2015 (“Bill”). The amendments flow from the 246th Law Commission Report. These include important changes such as the jurisdiction of Indian Courts once again being conferred in international commercial arbitrations, a message to the global investors that only High Courts in India shall deal with issues relating to international commercial arbitrations, the widening of the powers of arbitral tribunals at par with Indian Courts and in fact the limiting the scope of interference of Courts, efforts to create a balance in pre-arbitral judicial intervention. Furthermore, the paper covers the refreshing amendments relating to appointment of arbitrators and the importance being given to competence, neutrality & independence of arbitrators in future arbitrations in India, positive developments to speed up the arbitral process in India, amendments with respects to costs & interest to be awarded to parties by an arbitral tribunal and the factors to be considered for the same, narrowing down of the scope of challenge of arbitral awards and the issue of fraud which has not been covered in the Bill in spite of being recommended by the Law Commission Report.

Introduction – Economic Growth & the Indian Arbitration Regime

World economy has seen a major transformation in the last three decades. Trade and business has evolved and become easier and more accessible thanks to advancement in technology and

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spirited entrepreneurship in growing economies. Right from the brick and mortar style of doing business in a defined boundary, today the same is done on the online platform and businesses in true sense have become global and have no boundaries anymore. Not just the companies but business leaders are also becoming global citizens with their presence in many countries and geographic locations.

It is obvious that India being a country with tremendous potential is bound to be a part of this change. India was poised to be an economic powerhouse as per the studies conducted a couple of decades ago. While things may not have totally gone in the directions as they should ideally have, India has progressed and has a significant place and role in world trade and business in the 21st century. There has been a huge influx of foreign companies and businesses that have setup shop in India in one form or another. Thus it is important that the legal system of India needs to be developed and updated to cater to the needs of these global businesses.

Given the fact that the conventional litigation system through courts in India was time consuming, arbitration as a mechanism of dispute resolution was a ray of hope for commercial disputes in India. However, while the Indian Arbitration Act, 1940 was in place, jurists often commented that it had too many lacunae and was not helping India catch up with the changes required by the business environment and especially ones after liberalization. Though it was the first major consolidated arbitration legislation in India, it failed to deal with key issues such as enforcement of foreign awards leading to enactment of Arbitration (Protocol and Convention) Act, 1937 to deal with Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 to deal with New York Convention Awards; thus there being multiple legislations on inter-connected issues at the same time.

The Courts in India lamented over the working of the 1940 Act. In the case of *Guru Nanak Foundation v Rattan Singh*¹, the Supreme Court observed:

“Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 (“Act” for

¹ (1981) 4 SCC 634

short). However, 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..”²

The problems faced with the 1940 Act became more challenging after liberalization of the Indian economy in 1991. The economy had opened up to foreign investors and they required a stable business environment and a strong commitment to the rule of law which was lacking in India³. Therefore an updated and upgraded arbitration regime became the need of the hour in early 1990’s. The Indian Government in order to address the problems faced with the 1940 Act, enacted the Indian Arbitration and Conciliation Act, 1996 (the “Act” or the “1996 Act”) which came into force on 22.08.1996 after promulgating it as an ordinance earlier. The 1996 Act was based on the UNCITRAL model law and it continues to be the arbitration law in force in India till date. The 1996 Act repealed all three earlier laws (the 1937 Act, the 1940 Act and the 1967 Act and applied to (i) domestic arbitrations; (ii) enforcement of foreign awards; and (iii) conciliations⁴. While the 1996 Act was an improvement over the 1940 Act, over time the need developed to incorporate changes for remedying the problems faced in the arbitration regime in India even under this statute. While arbitration had always been offered as an alternative dispute resolution mechanism in India for faster disposal of cases at lower costs, the same only became a myth or a paradox as neither of these two really happened. Arbitration kept getting lengthier as a process and expensive due to the high fees charged by arbitrators and counsels.

The arbitration scenario in India became a subject of debates and discussions in the past decade. There was criticism on several aspects of arbitration in India right from the manner in which the proceedings were conducted especially in ad-hoc arbitrations, the delays at par with the conventional courts systems, the exorbitant costs to parties, judicial interference at several stages, challenges with respect to interim orders obtained by parties in courts, difficulties in enforcement of awards and finally the challenge procedure of the award which would typically

² Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

³ Ibid

⁴ Part I of the 1996 Act titled ‘Arbitration’ is general in nature. Part II deals with ‘Enforcement of Certain Foreign Awards’. Chapter I of Part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. Part III of the 1996 Act deals with Conciliation. Part IV of the 1996 Act deals with supplementary provisions

review the issues on merits and thus convert the process of arbitration into just another civil court litigation involving layers of appeals and thus inordinate delays. In fact, even the 246th Law Commission Report on the proposed amendments to the 1996 Act itself observed that “*Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated*”⁵.

To overcome and address these issues, several committees and panels were setup from time to time but nothing concrete emerged and recommendations to Governments remained as recommendations probably due to the lack of political will. Finally the Ministry of Law and Justice issued a Consultation Paper on April 08, 2010 inviting suggestions/comments from eminent lawyers, judges, industry members, institutions and various other sections of the government and other stakeholders. After receiving many written responses these were collated and studied in detail. The Ministry of Law and Justice thereafter held National Conferences in major cities in India, inviting suggestions on the Consultation Paper from various significant quarters including lawyers, judges, industry, arbitration institutions and the public at large. Subsequent to that, taking into account the comments and suggestions received in writing and expressed orally in the National Conferences and discussions held thereafter, the Ministry prepared draft proposals and subsequently a ‘Draft Note for the Cabinet’.

Thereafter the Ministry of Law and Justice requested the Law Commission to undertake a study of the amendment proposed to the Act in the ‘Draft Note for the Cabinet’. Accordingly the present reference came to the 246th Law Commission. The Law Commission set up an expert committee to study the proposed amendments and make suggestions accordingly. The Committee comprised of several eminent persons from the legal field. After much exchange of notes, suggestions, deliberations and discussions with experts in arbitration and in-depth study of

⁵ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

the issues involved, the Law Commission headed by Retired Justice Mr A.P.Shah released the 246th Report on proposed amendments to the arbitration law in India⁶.

There were several suggestions and recommendations made in this report. The said report came out in August 2014. The proposed amendments to the Act were intended to facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is showing commitments to improve its legal framework to obviate in disposal of cases. Moreover, India had been ranked at 178 out of 189 nations in the world in contract enforcement, and thus the Government deemed that this was high time that urgent steps were taken to facilitate quick enforcement of contracts, easy recovery of monetary claims, award of just compensation for damages suffered, reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity⁷.

However, as Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the “Arbitration and Conciliation (Amendment) Ordinance, 2015” (hereinafter referred to as “Ordinance”) on 23 October, 2015. Consequently, The Arbitration and Conciliation (Amendment) Bill, 2015 (hereinafter referred to as “Bill”) was introduced in Lok Sabha on 3rd December, 2015 by the Minister for Law and Justice, Mr. D.V. Sadananda Gowda and was passed on 17th December 2015 by a voice vote in Lok Sabha, and on the last day of the winter session being 23rd December in the Rajya Sabha, thus awaiting President’s assent and formal notification to become an Act.

We shall examine the key observations of the Law Commission Report, its recommendations and the amendments brought in by this Ordinance and subsequently the Bill based on the said Report and; whether these would help the arbitration scenario in India move towards global standards;

⁶ Ibid

⁷ The Arbitration and Conciliation (Amendment) Bill, 2015, Bill No 252 of 2015; Statement of Objects and Reasons

given that the present Indian Government is trying to project India as a business friendly nation and wants to promote the country as an arbitration hub as well.

A. JURISDICTION OF INDIAN COURTS ONCE AGAIN CONFERRED IN INTERNATIONAL COMMERCIAL ARBITRATIONS

The Law Commission Report makes a major distinction between the UNCITRAL Model Law and the 1996 Act of India wherein Article 1(2) of the UNCITRAL Model Law provides: “The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.” However, Section 2(2) of the Arbitration and Conciliation Act, 1996 contained in Part I of the Act, states that “This Part shall apply where the place of arbitration is in India.” This posed a question before the Supreme Court of India in the landmark cases *Bhatia International vs. Interbulk Trading SA* (hereinafter called “*Bhatia*”)⁸, and in *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.* (hereinafter called “*BALCO*”)⁹; whether the exclusion of the word “only” from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India?

The Supreme Court in *Bhatia*, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While *Bhatia* was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11 and 34 as well¹⁰. Thus as a result of these judicial pronouncements, Indian Courts became competent over time to provide interim reliefs pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India thus making the threshold of judicial intervention by Indian Courts very low in arbitrations held outside India. These powers existed unless Part I was expressly or impliedly

⁸ (2002) 4 SCC 105

⁹ (2012) 9 SCC 552

¹⁰ In the cases of *Venture Global v Satyam Computer*, (2008) 4 SCC 190; *Intel Technical Services v W.S. Atkins*, (2008) 10 SCC 308; *Citation Infowares Ltd v Equinox Corporation*, (2009) 7 SCC 220; *Dozco India v Doosan Infrastructure*, (2011) 6 SCC 179; *Videocon Industries v Union of India*, (2011) 6 SCC 161

excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad-hoc manner. However this position was overruled in the BALCO case¹¹.

The Supreme Court in BALCO decided that Parts I and II of the Act are mutually exclusive of each other. The Court held that the intention of Parliament was that the Act is territorial in nature and sections 9 and 34 would apply only when the seat of arbitration is in India. It was held in this landmark judgment that the seat is the “centre of gravity” of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by virtue of section 2(7), the award would be a “domestic award”.

The Supreme Court in BALCO recognized the “seat” of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between “seat” and “venue” was, therefore, recognized. In such a scenario, only if the seat was determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. The decision in BALCO was expressly given prospective effect and applied to arbitration agreements executed after the date of the said judgment¹².

However, while the decision in BALCO was a step in the right direction and would reduce judicial intervention in foreign arbitrations, the Commission felt that there were a few problematic areas left unaddressed. For example in a situation where the assets of a party are located in India, and there is a likelihood that the party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. Neither will the obtaining of an interim order from a foreign court or arbitral tribunal be effective to enforce due to its failure to qualify as a “judgment” or “decree”¹³; nor can contempt proceedings provide a practical remedy to the party seeking to enforce the interim relief obtained by it. Thus this

¹¹ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

¹² Bharat Aluminum and Co. vs. Kaiser Aluminium and Co; (2012) 9 SCC 552

¹³ For the purposes of sections 13 and 44A of the Code of Civil Procedure, 1908 (which provide a mechanism for enforcing foreign judgments)

would lead to situations wherein a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company¹⁴.

Thus upon contemplation and deliberations on situations as mentioned hereinabove and other practical difficulties; and in order to address them, the Bill has once again given Indian Courts jurisdiction over international commercial arbitrations even with seat of arbitration outside India with respect to provisions for interim reliefs granted by Courts (Sec 9), assistance that can be taken from Courts by arbitral tribunals for purposes of evidence (Sec 27) and in appeals against orders of a courts in Section 8 applications (Sec 37(1)(a)) and appeals to Supreme Courts against certain orders (Sec 37(3)).

While on one hand this can be seen as a clarification that the other provisions of Part I of the Act are not applicable to international commercial arbitrations; on the other, this once again brings in the interference of Indian courts in international commercial arbitrations, though in a limited manner. It would only be settled over time with pronouncements of the courts of India whether these limited provisions are actually progressive or having a counter-productive effect on international commercial arbitrations with seat of arbitration outside India. The author believes that these will be positive provided that the judicial pronouncements in coming years should not expand the scope of applicability of Part I of the Act to other provisions and thus dilute it back to the Bhatia era in arbitrations with “seat” outside India.

B. HIGH COURTS TO DEAL WITH ISSUES RELATING TO INTERNATIONAL COMMERCIAL ARBITRATIONS – A POSITIVE MESSAGE TO GLOBAL BUSINESS COMMUNITY

The Law Commission in its Report has stated that there was an urgent need of upgrading the judicial system in India especially in the context of international commercial arbitrations and investments treaty arbitrations wherein not only complex issues are involved, the stakes are high;

¹⁴ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

and the reputation of the country's judicial system is exposed to the global business community. In this background, the Commission recommended that in the case of international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant "Court" which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court, even where such a High Court does not exercise ordinary original jurisdiction.

The Bill has incorporated this recommendation and made it specific and clear that the definition of "Court" in the context of a domestic arbitration would be District court or High Court; however the same in the context of an international commercial arbitration would be only a High Court. These clarifications are provided vide amendments in Section 2(e) of the Act. There have been amendments in Sections 47¹⁵ and 56¹⁶ of the 1996 Act as well to define "Court" as only the High Court as these are provisions under Part II relating to enforcement of awards under the New York and Geneva Conventions. The intent here is that awards of international commercial arbitration should only be enforced through High Courts and not any courts inferior to them presumably for the reason that the High Courts would be more educated and sensitive of enforcements of foreign awards vis-à-vis civil courts at district level. Moreover enforcement procedure would be more accessible for a foreign party in a High Court than in a lower court in India.

The rationale of the Law Commission to recommend and for the Bill to incorporate this amendment is that litigations relating to international commercial arbitrations will be heard expeditiously and by commercially oriented judges at the High Court level. The Law Commission report noted that the award of the Arbitral Tribunal in *White Industries Australia Ltd. v the Republic of India*¹⁷, serves as a reminder to the Government to urgently implement

¹⁵ This provision under Part II relates to enforcement of awards under the New York Convention

¹⁶ This provision under Part II relates to enforcement of awards under the Geneva Convention

¹⁷ UNCITRAL, Final Award (November 30, 2011)

reforms to the judicial system in order to avoid substantial potential liabilities that might accrue from the delays presently inherent in the system¹⁸.

C. INTERIM MEASURES – POWERS OF COURTS NARROWER & TRIBUNAL'S WIDER

The arbitral tribunal has powers to grant interim measures of protection under Section 17 of the Act, unless the parties have excluded such power by agreement. Though this is an important provision, its effectiveness is compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal in India. The judicial pronouncements starting with *Sundaram Finance Ltd v. NEPC India Ltd.*¹⁹ have consistently held that though section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and therefore only section 9 gives the court powers to pass interim orders during the arbitration proceedings. Once again in a major decision in *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*²⁰, the Court had held that under section 17, no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof²¹.

The Delhi High Court made a sincere attempt to find a solution to this problem by its pronouncement in *Sri Krishan v. Anand*²², wherein it held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be "making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings" under section 27(5) of Act. Further, it devised that remedy of the aggrieved party would then be

¹⁸ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

¹⁹ (1999) 2 SCC 479

²⁰ (2004) 9 SCC 619

²¹ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

²² (2009) 3 Arb LR 447 (Del)

to apply to the arbitral tribunal for making a representation to the Court to mete out appropriate punishment. Once such a representation is received by the Court from the arbitral tribunal, the Court would be competent to deal with such party in default as if it is in contempt of an order of the Court, i.e., either under the provisions of the Contempt of Courts Act or under the relevant provisions²³ of Code of Civil Procedure, 1908²⁴.

The Law Commission after much deliberation on this issue arrived at a conclusion that it is important to provide teeth to the interim orders of the arbitral tribunal as well as to provide for their enforcement in line with the 2006 amendments to Article 17 of the UNCITRAL Model Law. The Commission also concluded that the route observed in the Delhi High Court judgment in *Sri Krishan v. Anand* is not a complete solution as it was a lengthy and circuitous way to enforce the interim protection obtained. Therefore, major amendments have been provided to section 17 of the 1996 Act which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the Orders of a Court²⁵.

In the above background, it is important to note that the provisions of Section 9 of the Act with respect to interim measures and protection was being over used and it wouldn't be out of place to say "misused" as a pressure tactic even before the arbitrations proceedings commenced and parties that obtained ex-parte interim orders under this provision would consciously not commence the arbitration proceedings thus in a way misusing the powers given under this section. The present amendment has dealt with this issue by setting a time frame of ninety days for commencing the arbitration proceedings from the date of any such order; and secondly has made the provision loud and clear that the courts shall not entertain such applications under Section 9 unless the Courts find that the circumstances that exist may not be remedied by the provisions under Section 17 wherein the arbitral tribunal can provide the same wide interim protection.

²³ Order 39 Rule 2A of the Code of Civil Procedure, 1908

²⁴ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

²⁵ Ibid

The amendments proposed under the new Section 17 make it virtually at par with the powers of the Courts under Section 9 of the Act. All interim measures that the courts have been granting over the years have been equally bestowed to the tribunal and these interim orders made by the tribunal would be enforceable as though an order of the Court under the Code of Civil Procedure, 1908. The legislative intent of the Bill is very clear that the intervention of courts has to be minimized and the tribunal and its powers shall be on par with that of courts giving it the sanctity of a court order and allow proper enforcement.

D. JUDICIARY & ARBITRATION – A BALANCE IN PRE-ARBITRAL JUDICIAL INTERVENTION & A MESSAGE TO INDIAN COURTS TO ADOPT A PRO-ARBITRATION APPROACH

Judicial intervention in arbitral proceedings prior to the commencement of the arbitration per se is in itself a significant issue that needed to be addressed in the present reforms. The three major interventions at the pre-arbitral stage include Court intervention under sections 8, 9 and 11 in Part I and Section 45 in Part II of the Act. Sections 8, 45 and 11 deal with “reference to arbitration” and “appointment of the tribunal” which affect the very constitution of the tribunal and functioning of the arbitral proceedings. Their operation has a direct and significant impact on the “conduct” of arbitrations. Section 9, however being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the “conduct” of the arbitration in the same way as the other provisions. The Commission has examined the working of these provisions in this context and has proposed certain amendments²⁶.

The key question that arose before the Supreme Court in *SBP v Patel Engineering*²⁷ was upon *scope* and *nature* of permissible pre-arbitral judicial intervention, in the context of section 11 of the Act and whether the powers under this section was a “judicial” or an “administrative” power. The Supreme Court held that the power to appoint an arbitrator under section 11 is a “judicial” power. The underlying issues in this judgment, relating to the scope of intervention, were

²⁶ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

²⁷ (2005) 8 SCC 618

subsequently clarified in *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.*²⁸, where the Supreme Court laid down three categories of issues to be decided upon thus bringing in clarity on this aspect. The Commission was of the view that, in this context, the same test regarding *scope* and *nature* of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act. The Supreme Court in *Shin Etsu Chemicals Co. Ltd. v Aksh Optifibre*²⁹, (in the context of section 45 of the Act and parameter of intervention), ruled in favour of looking at the issues/controversy only *prima facie*. The Commission in this background has recommended amendments to sections 8 and 11 of the 1996 Act³⁰.

The Law Commission in its Report has recommended major amendments to Section 8 of the Act; however the Bill has incorporated only a part of these; however having a significant impact on the applicability of the Section. The Report recommends a very basic and low threshold for a judicial authority to refer a matter before it to arbitration. A judicial authority shall refer a matter before it to arbitration provided it finds that *prima facie* a valid arbitration agreement exists.

The amendments in Section 8 of the law make provisions for referring a matter to arbitration that is before a judicial authority when one party claims that the dispute is to be governed by arbitration. The same has to be done irrespective of any decision by the Supreme Court or any other court unless the judicial authority finds that *prima facie* no valid arbitration agreement exists. This is a proposed amendment in 8(1) of the Act and while a minor amendment on the face of it; this would go a long mile in several civil and corporate disputes wherein parties try to wriggle out of arbitration and prolong the matter in a civil court. This amendment is a shot in the arm of the civil courts and judicial authorities to refer the matter to arbitration and thus a step towards saving time and costs for the parties.

Another supportive proviso that has been added in Section 8 in the Bill is to help a party making a reference of a dispute to arbitration before a civil court which for some reason does not have the original arbitration agreement. If the original or a certified copy of the agreement is retained

²⁸ (2009) 1 SCC 267

²⁹ (2005) 7 SCC 234

³⁰ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

by the other party, the referring party may make an application before the court with a copy of the agreement calling upon the other party to produce the original or its certified copy before the court. This proviso fills in a procedural lacunae often faced by parties wherein the party retaining the original agreement tried avoiding arbitration.

In fact the Bill also brings in an appeal provision under Section 37 against an order of a court refusing to refer the parties to arbitration under Section 8 of the Act. Thus the courts would be mindful when an application under Section 8 of the Act is before them and shall have a pro-arbitration approach to avoid appeals against their orders.

The *scope* of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the *nature* of intervention is concerned, the Commission recommends a limited prima facie satisfaction for the Court/Judicial Authority to see if an arbitration agreement exists and not beyond that. Thus if the Court/Judicial Authority is of a prima facie view that an arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. While the Commission had recommended the orders under Section 8 and 11 to be non-appealable³¹, Section 37 allows appeals against orders of Section 8³².

E. APPOINTMENT OF ARBITRATORS – COMPETENCE, NEUTRALITY & INDEPENDENCE STRESSED UPON

Section 11 provides for the appointment of arbitrators under the Act. The Commission realizing the time lost in pre-arbitration litigation such as Section 11 applications of appointment of arbitrators, has recommended in its Report an amendment whereby the powers of appointment of arbitrators being vested in the “Chief Justice” shall now be vested to the “High Court” and the “Supreme Court” respectively. It has thus been clarified that delegation of the power of “appointment” (as opposed to a finding regarding the existence/nullity of the arbitration

³¹ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

³² Amendment in Section 37(1)(a) of the Bill

agreement) shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions. The Commission has further recommended an amendment to remove the scope of appeal against orders of High Court or Supreme Court in Section 11 applications.

A key amendment here is the introduction of Sub-section (6A) to Section 11 which limits the scope of examination by the court before which the said application is made to the limited issue of existence of an arbitration agreement alone and nothing beyond that. Further, provisions are added in Sub-Section (8) to Section 11 whereby the court appointing the arbitrator shall seek certain disclosures in writing from the prospective arbitrator. These disclosures are dealt more elaborately in the new Section 12(1) which has strict norms for ensuring that the arbitrators appointed by courts have the highest degree of impartiality and independence. Another significant amendment brought in is the time frame whereby the court shall make an endeavor to dispose of such applications under Section 11 within sixty days from the date of service on the other side.

A connected and extremely important issue is that of neutrality of the arbitrator. There can be no two views that any judicial or quasi-judicial process including arbitration must be in accordance with principles of natural justice. Thus, in the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. The 1996 Act has been worded in such a manner giving wide connotation to neutrality. The test of neutrality is not whether given the circumstances, there is any *actual* bias; but, whether the circumstances in question give rise to any *justifiable apprehensions* of bias. Thus the threshold for bias is at a basic level and slightest apprehension can trigger Section 12(3) of the Act.

However the concept of neutrality, impartiality and independence of arbitrators in India has been compromised to a large extent in Government contracts awarding tenders, contracts from Public Sector Undertakings, etc. wherein usually an employee or a person associated with the said Company is nominated as arbitrator in the contract with the private party. The Supreme Court of India has consistently held that (See *Executive Engineer, Irrigation Division, Puri v. Gangaram*

*Chhapolia*³³; *Secretary to Government Transport Department, Madras v. Munusamy Mudaliar*³⁴; *International Authority of India v. K.D.Bali and Anr*³⁵; *S.Rajan v. State of Kerala*³⁶; *M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co. Ltd.*³⁷; *Union of India v. M.P.Gupta*³⁸; *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*³⁹) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable.

The Supreme Court, in *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.*⁴⁰, carved out a minor exception in situations when 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*”, and this exception was used by the Supreme Court in *Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence*⁴¹ and *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.*⁴², to appoint an independent arbitrator under section 11; however this was considered very narrow and is not enough as a proper benchmark of neutrality and independence of an arbitrator by the Law Commission⁴³.

The Supreme Court of India has tilted towards binding nature of contracts over procedural fairness which needed a review. Principles of impartiality and independence are supreme and

³³ 1984 (3) SCC 627

³⁴ 1988 (Supp) SCC 651

³⁵ 1988 (2) SCC 360

³⁶ 1992 (3) SCC 608

³⁷ 1996 (1) SCC 54

³⁸ (2004) 10 SCC 504

³⁹ 2007 (5) SCC 304

⁴⁰ 2009 8 SCC 520

⁴¹ AIR 2012 SC 817

⁴² (2012) 6 SCC 384

⁴³ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

have to be borne at every stage of the proceedings especially at the time of constitution of the tribunal as that would pave the way ahead for a fair conduct of proceedings. Even if party autonomy allows them to agree prior to the disputes in a manner which is in discord with principles of neutrality, the same needs to be addressed once the disputes have arisen. Certain minimum levels of independence and impartiality are required of the arbitral process regardless of the parties' apparent agreement. A reasonable law thus cannot 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. The Commission is of the view that 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. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a “prior” agreement between the parties at the time of the contract and before arising of the disputes. To address this concern, amendments at large have been recommended in the Law Commission Report and the Bill adopts most of them as is evident from amendments in sections 11 and 12 of the Act⁴⁴.

The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of a Schedule drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. In addition to this, another schedule has been proposed to be added in the Report and adopted by the Bill which incorporates categories from the Red list of the IBA Guidelines, whereby the person proposed to be appointed as an arbitrator shall be *ineligible* to be so appointed, *notwithstanding any prior agreement* to the contrary⁴⁵.

⁴⁴ Ibid

⁴⁵ Ibid

The Law Commission Report has respected party autonomy and in certain situations, parties have been allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule such as family arbitrations, etc., despite the existence of objective “justifiable doubts” regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed section 12 (5) by an express agreement in writing. However, in all other cases, the general rule in the proposed section 12 (5) must be followed. The Commission has also stressed that the High Court or its designate should give “due regard” to the contents of the disclosure made by a potential arbitrator under Section 12(1) of the Act in appointing the arbitrator⁴⁶.

In the above background, as per the amendments, a prospective arbitrator has to disclose in writing if he or she has had any relation of any kind with either parties, counsels, etc. that may give rise to doubts of the impartiality or independence of the said person. The two new schedules introduced in the Bill namely Schedule V and VII containing an exhaustive list of grounds which would act as a guideline in determining if there is any such possible conflict or relationship.

This provision would minimize if not eliminate one-sided arbitrations whereby typically a senior personnel or official of the company which is more powerful amongst the parties to the arbitration agreement is usually appointed as an arbitrator. This was common practice in building and engineering contracts, stock market contracts, etc. Public sector undertakings in India in most of their contracts would typically have their employee, a senior official designation named as an arbitrator. While the other side may be unhappy with this, it would be helpless as the courts in India have held that a party having signed a contract with eyes wide open could not dispute the appointment of the arbitrator under it later.

Another helpful amendment has been brought in Section 14 giving a provision for substituting the arbitrator when he becomes unable to perform his functions. The present version of the Act

⁴⁶ Ibid

merely identified the problem but didn't provide a solution or an option to overcome that which the amendment does, thus making the arbitral process progressive.

A key area of concern area in arbitrations in India especially ad-hoc arbitrations are the high costs associated with it – including the arbitrary and disproportionate fixation of fees by several arbitrators. The road to arbitration becoming a cost effective dispute resolution mechanism in India requires a rationalization of the fee structures for arbitrations. This issue was commented upon by the Supreme Court in *Union of India v. Singh Builders Syndicate*⁴⁷ wherein the court observed:

“There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee.”

The Commission has as a solution to this problem recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees is based on the fee schedule set by the successfully functioning Delhi High Court International Arbitration Centre. The Commission has further suggested that this schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they

⁴⁷ (2009) 4 SCC 523

continue to stay realistic. Finally the Commission has clarified that the schedule of fee recommended by it is applicable only to ad-hoc domestic arbitrations and not to international commercial arbitrations as they involve foreign parties who might have different values and standards for fees for arbitrators; and they are also not applicable to institutional arbitrations in India as they might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy⁴⁸.

The issue of fees payable to arbitrators appointed by Courts is addressed for the first time by introducing a proposed fourth schedule in the Bill giving a fee structure based on the quantum of dispute amount. This is a welcome change to the Indian arbitration scenario as ad-hoc arbitrations in India are more popular than institutional ones and since the issue of fees is seen as a sensitive subject, the same is not discussed with the tribunal or arbitrators before commencement of proceedings. There are times when parties are uncomfortable with the fee structures set by the tribunal but are unable to raise this issue. Also, fee slabs based on the quantum of the claim would deter parties from raising frivolous claims and counterclaims of astronomical sums.

F. SPEEDING UP THE ARBITRAL PROCESS

The Law Commission in its Report has observed that in spite of numerous provisions in the 1996 Act aimed at ensuring proper conduct of arbitral proceedings, the experience of arbitrating in India has been largely unsatisfactory for all stakeholders. Arbitration proceedings are held in the similar manner as Court proceedings with procedural formalities similar to conventional court proceedings. This has led to arbitration proceedings going on for years and the entire idea of a cost effective and fast method of dispute resolution is defeated.

Moreover, ad-hoc arbitrations are really expensive with “per sitting” fees of arbitrators, dates spread over long periods, proceedings continuing for years resulting in increase in costs and denial of justice. The Law Commission in its Report has stated that this entire scenario must

⁴⁸ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

undergo a change. To begin with, arbitrators must avoid purely formal sittings. The Commission highlights the legal position taken by the Delhi High Court that delay in passing an award can lead to such an award getting set aside in *Oil India Ltd v Essar Oil Ltd*.⁴⁹; *Union of India v Niko Resources Ltd*.⁵⁰; and *Peak Chemical Corporation Inc v NALCO*⁵¹. These decisions should act as a reminder to all arbitrators to hear and decide matters expeditiously, and within a reasonable period of time. The Commission has also recommended use of technology, like teleconferencing, video-conferencing etc., to replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings⁵².

In the above background, the Commission has proposed several amendments and most of these have been incorporated by the present Bill thus giving a major push to the manner in which arbitration proceedings are conducted in India. This Bill has made a genuine effort to address a major challenge that the arbitral processes in India is facing which is inordinate delay in completing the arbitration proceedings due to frequent adjournments and conducting of the proceedings like a civil court. A minor amendment in the form of a proviso to Section 24 (1) of the Act reflects this. Intent is clear that the arbitral tribunal shall as far as possible hold oral hearings for evidence or arguments as the case may be on a day-to-day basis and not grant adjournments unless a fair case is made out for the same. Further, there is a provision for the tribunal to impose costs on the party seeking unreasonable adjournments.

While these amendments may not change the entire scenario overnight, effects will be hopefully felt in the near future and the manner in which arbitrations shall be conducted. Even institutional and court annexed arbitration rules as and when are framed or amended to incorporate similar provisions shall take a cue from these for a setting up a faster process.

⁴⁹ OMP No 416/2004 dt 17.8.2012, Delhi High Court

⁵⁰ OMP No 192/2010 dt 2.7.2012, Delhi High Court

⁵¹ OMP 160/2005 No dt 7.2.2012, Delhi High Court

⁵² Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

A similar minor amendment in Section 25(b) of the Act empowers the tribunal to forfeit the right of a respondent in filing of the statement of defense when the respondent fails to do so. As per the present section, the tribunal could at best proceed with the arbitral proceedings and as a matter of practice, it is often seen that parties consciously do not appear for a major part of the proceedings and show up at a later stage stating that they were either not aware of the proceedings or did not get notice. Tribunals in India generally go on the basis of equity and thus tend to grant an opportunity to the respondent to file its statement of defence even at a belated stage. In this process, the party that has been attending the proceedings from the beginning suffers and the process is also delayed overall. Thus this amendment would help seal the issue at the appropriate stage once in for all.

Another major and refreshing change which has been introduced through Section 29(A) is the provision to complete the arbitration proceedings within a period of twelve months of entering reference. This period can be extended by another six months by the consent of the parties and any extension beyond that can only be made by the Courts. The Courts in granting any such extension would examine the reason for the delay and justification for the extension sought. Here lies a problem that since the mandate of the tribunal in the arbitral proceedings terminates at the end of this twelve or eighteen month period; the Respondent typically would delay the proceedings and cross the time limit thus landing up in the Courts for extension and delaying the matter there as Indian Courts are inundated with backlog of cases. The onus would be on courts to hear such applications for further extension within a reasonable time frame so that the arbitration proceedings see a practical conclusion; else this provision proposed will only add to the problems though it appears pro-arbitration on the face of it. However, the same has to be seen in the background of the overall Indian litigation scenario.

As per the Bill, Courts now have the powers to penalize the tribunal by reduction of its fee and to penalize the parties by imposing actual or exemplary costs on them. In addition to this, to incentivize faster adjudication of arbitration matters, the tribunals shall be entitled to additional fees as the parties may agree if they complete the arbitral process within six months of entering reference. This at least makes the entire process appear very commercial and may not go well with certain arbitrators.

The Courts have also been empowered to substitute one or all the arbitrators and the substituted arbitrators shall continue the proceedings from the stage already reached and it would not mean a fresh start once again. It would be apt here to make a reference to the provisions under Section 12 of the Bill wherein a prospective arbitrator is required to make a disclosure about his or her availability of time and whether he or she would be able to complete the arbitration proceeding within the period of twelve months. This would make the said arbitrator once appointed, accountable towards the court and the parties before it.

The Bill for the first time in India has introduced the concept of fast track arbitration in Section 29(B). As per this provision, if the parties to an agreement decide to adopt the procedure of fast track arbitration, the same shall be conducted on the basis of written pleadings, documents and submissions. This would be different from the usual proceedings as there would not be oral hearings and if there are any, the technical formalities can be dispensed with for the sake of expeditious progress of the matter and that the award can be rendered within six months of entering of reference by the parties. This format of arbitration is ideal for smaller disputes which are mainly based on documents. It would be highly beneficial for parties saving them time and costs.

On the aspect of early disposal of challenge proceedings of an award, the Commission has in its Report observed that challenges to arbitration awards under sections 34 and 48 are similarly kept pending for many years. In this context, the Commission has recommended amendments in sections 34 and 48 which would require that an application under those sections shall be disposed off expeditiously and in any event within a period of one year from the date of service of notice. While the Bill has brought in a change of this nature vide an amendment to Section 34 (challenge of domestic award), the same has not been reflected in the provision for enforcement of foreign awards under Section 48⁵³.

G. AMENDMENTS WITH RESPECTS TO COSTS & INTEREST TO BE AWARDED TO PARTIES

⁵³ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

Costs are an important element of concern for any party to litigation and the same applies to parties in arbitrations too. In fact costs in arbitration has several components such as arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. which makes it an expensive affair. The Law Commission in its report has put forth the concept that allocation of costs should be done in a manner reflecting the parties' success and failure in the arbitration. This logic is followed by the principle that the losing party pays costs; which the Commission believes shall also act as a deterrent against frivolous conduct and furthers compliance with contractual obligations. Therefore it has recommended comprehensive reforms in the costs regime which was proposed as Section 6A but incorporated as Section 31A in the Bill. This new regime is in spirit of the decision of the Supreme Court in Salem Advocate Bar Association v Union of India⁵⁴, and the Commission has expressed hope in its report that the judges and arbitrators would take advantage of these provisions, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration⁵⁵.

An important provision introduced in the new regime under proposed Section 31A is that while awarding costs, "conduct of the parties" shall also be a factor that the tribunal could take into account amongst other factors and also "if a reasonable offer to settle the dispute was refused by another party". From a practice view point, these provisions are immensely significant while they may appear a general guideline prime facie. In arbitrations, more often than not, parties tend to delay or drag proceedings when it suits them by seeking adjournments and raising technical pleas whenever possible thus not showing great conduct.

Moreover, it's a psychological satisfaction for a party to make an unrealistic claim or counterclaim of an astronomical sum especially for damages since they know that no court fee or stamp duty is accordingly levied. Moreover, since the arbitral tribunal's fee is decided in the first sitting usually, the claimant or respondent wants to maximize its' chances even if it is at the cost of making an unreasonable claim of a large sum of money. These issues would be addressed over

⁵⁴ AIR 2005 SC 3353

⁵⁵ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

time when the parties become aware that their conduct during the proceedings would be factored in when the costs are being awarded.

Also at times, when one party actually comes up with a proposal to settle the dispute, the other party is totally reluctant to accept the same. Even reasonable settlement proposals are rejected many a times due to unrealistic expectations of award of compensation or damages from the tribunal or at times even ego. It is time that the Indian arbitration scenario gives weightage to these factors now incorporated in the amendments and at least give a clear message to the parties that their conduct is being observed throughout the proceedings.

The Law Commission has also highlighted the contrary judicial pronouncements with respect to awarding of interest under the 1996 Act. The Supreme Court in *Renusagar Power Co Ltd v. General Electric*⁵⁶, held that awarding compound interest was not a violation of public policy of India with a justification the same was awarded in order to put the injured party in the same economic position it would have been in if the contract had been duly performed. The Supreme Court then in *State of Haryana v. L. Arora & Co.*⁵⁷, held that section 31(7) makes no reference to payment of compound interest. The decision in Arora's case was seen as being contrary to the statutory scheme of the Act and against decisions of the Supreme Court in *ONGC v. M.C. Clelland Engineers S.A*⁵⁸, and *UP Cooperative Federation Ltd v. Three Circles*⁵⁹. The Supreme Court, in *Hyder Consulting (U.K.) v. Governor of Orissa*⁶⁰ has referred this issue for determination to a three judge bench as it was leading to conflicting opinions. The Law Commission has recommended amendments to section 31 to clarify the scope of powers of the arbitral tribunal to award compound interest, as well as to rationalize the rate at which default interest ought to be awarded and move away from the existing rate of 18% to a market based determination in line with commercial realities. While the latter recommendation of moving to a

⁵⁶ 1994 Supp (1) SCC 644

⁵⁷ (2010) 3 SCC 690

⁵⁸ (1999) (4) SCC 327

⁵⁹ (2009) 10 SCC 374

⁶⁰ (2013) 2 SCC 719

realistic interest rate regime has been incorporated by the Bill; the issue of awarding compound interest and for what period it has to be awarded has not been incorporated.

The Bill introduces under Section 31 a concept of interest to be calculated at 2% above the current rate of interest prevalent on the date of the award and this current rate of interest is inferred from the Interest Act, 1978. There is a departure from the existing provision of providing 18% interest per annum from the date of award to the date of payment.

H. LIMITING THE SCOPE OF CHALLENGING AN AWARD

The provisions for setting aside and enforcements of awards post arbitrations proceedings in India under the 1996 Act was more or less the same for awards arising out of domestic and international commercial arbitrations. The languages of Section 34 dealing with setting aside a domestic award and a domestic award resulting from an international commercial arbitration; and that of section 48 dealing with conditions for enforcement of foreign awards are on similar lines. This led to problems and the Commission in its report highlighted the present levels of judicial intervention in both in India. The Commission has made a clear distinction between domestic and foreign awards in this context and accordingly made recommendations.

The Law Commission has recommended the addition of section 34 (2A) to deal with purely domestic awards, which may now also be set aside by the Court if the Court finds that such award is vitiated by “patent illegality appearing on the face of the award.” In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed *proviso* to the proposed section 34 (2A) that such “an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.” This would negate the unintended consequences of the decision of the Supreme Court in *ONGC vs. Saw Pipes Ltd*⁶¹, which, although was made in the context of a purely domestic award, was extended equally to both awards arising out of international commercial arbitrations as well as foreign awards leading to a wide misuse and weak regime of enforcement of foreign awards in India.

⁶¹ (2003) 5 SCC 705

Another amendment has been proposed to section 28(3) solely to remove the basis for the decision of the Supreme Court in *Saw Pipes* case and in order that any contravention of a term of the contract by the tribunal should not *ipso jure* result in rendering the award becoming capable of being set aside.

Even though the Supreme Court in *Shri Lal Mahal v Progetto Grano Spa*⁶², has held that the expansive construction accorded to the term “public policy” in *Saw Pipes* cannot apply to the use of the same term “public policy of India” in section 48(2)(b), the recommendations of the Commission go a step further and are intended to ensure that the legitimacy of court intervention to address patent illegalities in purely domestic awards is directly recognized by the addition of section 34 (2A) to the Act and is distinguished from foreign awards.

In this context, the Commission has further recommended the restriction of the scope of “public policy” in both sections 34 and 48 to bring the definition in line with that propounded by the Supreme Court in *Renusagar Power Plant Co Ltd v General Electric Co*⁶³, and the Commission has proposed a stricter provision whereby, an award can be set aside on public policy grounds *only* if it is opposed to the “fundamental policy of Indian law” or it is in conflict with “most basic notions of morality or justice”; whereby the reference to “interests of India” has been excluded to avoid the potential of interpretational misuse especially in the context of awards arising out of international commercial arbitrations. These amendments have been incorporated in the Bill and thus the scope of review to set aside an award has been made objective and narrower⁶⁴.

The Bill is progressive on this much criticized issue of challenging of arbitral awards in India. Judicial pronouncements have over the years expanded the grounds for challenging an arbitral award under the term “public policy”. The amendments in Section 34 of the Act restrain the present wide interpretation in setting aside domestic arbitral awards. Scope of conflict with public policy has been narrowed down to an award being induced by fraud or corruption, in

⁶² (2014) 2 SCC 433

⁶³ AIR 1994 SC 860

⁶⁴ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

conflict with fundamental policy of Indian law and basic notions of morality or justice as proposed in the Law Commission Report.

The Bill on the lines of the Law Commission's Report's observations further clarifies that a test whether an award is in conflict with fundamental policy of Indian law will not entail a review on the merits of the dispute and thus limits the re-appreciation of merits of the dispute at this stage; a problem which was plaguing the Indian arbitration scenario. There is further clarification that even when a challenge is made and the court finds that the award is vitiated by patent illegality on the face of the award, this would not entitle the courts to set aside an award on the ground of erroneous application of law or by re-appreciation of evidence.

Another positive amendment is the necessity to give prior notice to the other party in case of a challenge under Section 34, thus eliminating the possibility of moving ex-parte and obtaining a stay. Finally the legislature has fixed a time frame of one year for Courts to expeditiously dispose of such applications. Thus once again the legislative intent is made clear that the provisions under Section 34 for challenge of arbitral awards should be limited and even if there is a merit based challenge before the courts, the same shall not allow re-agitation of facts on merits and moreover the courts shall make endeavors to dispose these at the earliest.

The Bill has brought in similar changes in Sections 48 and 57 of the Act which are relevant to international commercial arbitration thus limiting the scope of challenge to foreign awards. Section 48 deals with the enforcement of awards under the New York Convention and Section 57 deals with enforcement of awards under the Geneva Convention.

Another welcome change in the Bill is that an application under Section 34 of the Act would not automatically effect a stay on the award and the courts shall while granting a stay shall have due regard as they would in the case of a money decree as per the provisions of the Code of Civil Procedure, 1908 which could also mean depositing of money by the unsuccessful party which has filed the challenge.

As per the provisions of Section 36 of the 1996 Act, the pendency of a section 34 (to set aside an arbitral award) petition renders an arbitral award unenforceable. The Supreme Court, in *National*

*Aluminum Co. Ltd. v. Pressteel & Fabrications*⁶⁵, held that by virtue of section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. The Bombay High Court in *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai*⁶⁶ applied the same principle to the powers of a Court under section 9 of the Act as well; thus confirming that an admission of a section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor. The Supreme Court in *National Aluminium Co Ltd's case* criticized the situation and observed that the practice of 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 with the court to put the parties on terms, defeated the very objective of the alternate dispute resolution system to which arbitration belongs. To address this major problem, the Commission has recommended important amendments to section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application under section 34⁶⁷.

This is a much required amendment to the Act as unsuccessful parties in Indian arbitration over the last decade or so would merely file a challenge under section 34 and the award would be stayed as a matter of practice. Thus the successful party in spite of having a favorable award was unable to enforce the same. This amendment along with others under Section 34 will hopefully discourage and reduce the appeals and challenges of arbitral awards.

I. ARBITRABILITY OF FRAUD – A KEY ISSUE NOT ADDRESSED

The Law Commission report addressed an often litigated issue of “arbitrability of fraud” which has seen conflicting and diverse judicial pronouncements; and recommended amendments in Section 16 of the Act to include a provision to state that the arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc. However

⁶⁵ (2004) 1 SCC 540

⁶⁶ 2014 (1) Arb LR 512 (Bom)

⁶⁷ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act, 1996

the same was not included in the Ordinance and hence in the Bill proposing the amendments.

Some major pronouncements on this subject started with *Radhakrishnan v. Maestro Engineers*⁶⁸, wherein the Supreme Court held that an issue of fraud is not arbitrable. This decision was based on the decision of the three judge bench of the Supreme Court in *Abdul Qadir v. Madhav Prabhakar*⁶⁹. This was followed by the Supreme Court's decision in *Bharat Rasiklal v. Gautam Rasiklal*⁷⁰, wherein the Court observed that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud.

There have in parallel been the more pro-arbitration line of judgments such as *Ivory Properties and Hotels Private Ltd v Nusli Neville Wadia*⁷¹ and *CS Ravishankar v. CK Ravishankar*⁷² wherein the Courts distinguished between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable. The Supreme Court in *Meguin GMBH v. Nandan Petrochem Ltd.*⁷³ proceeded ahead and appointed an arbitrator in a Section 11 application even though issues of fraud were involved. However the most recent judgment has been that of the Supreme Court in *Swiss Timing Ltd v Organising Committee*,⁷⁴ wherein it has been held that the law laid down in *Radhakrishnan v. Maestro Engineers* was not good law⁷⁵.

⁶⁸ 2010 1 SCC 72

⁶⁹ AIR 1962 SC 406

⁷⁰ (2012) 2 SCC 144

⁷¹ 2011 (2) Arb LR 479 (Bom)

⁷² 2011 (6) Kar LJ 417

⁷³ 2007 (5) R.A.J 239 (SC)

⁷⁴ Arbitration Petition No. 34/2013 dated 28.05.2014

⁷⁵ Law Commission of India, Report No.246, August, 2014 - Amendments to the Arbitration and Conciliation Act 1996

While the Law Commission had recommended insertion of a subsection (7) in Section 16 to address the challenges relating to arbitrability of fraud often raised before tribunals by giving the tribunal express powers to make an award or give a ruling notwithstanding that the dispute before it involves allegations of fraud; the Bill has decided to skip the proposed amendment and thus leaving this issue open and unaddressed which will continue to have an adverse effect on arbitration proceedings as there have been conflicting judicial pronouncements in the past before the *Swiss Timing Ltd v Organising Committee* decision.

Conclusion

The Commission had proposed to insert a new section 85-A to the Act, to clarify the scope of operation of each of the amendments with respect to pending arbitrations/proceedings. As a general rule, the Commission has suggested that the amendments will operate prospectively, except in certain cases as set out in section 85-A or otherwise set out in the amendment itself such as those with respect to Costs, second proviso in Section 24 with respect to conduct of prompt proceedings. However this section had not been incorporated in the Ordinance and there was some confusion and ambiguity over the prospective operability of some of the provisions especially those where judicial intervention is possible. A clarification on this has been provided by the Ministry of Law & Justice by inserting Section 25A to the Bill which clarifies that the amendments would not apply to arbitrations commenced before 23.10.2015 unless otherwise agreed to between the parties.

On an overall basis, the Bill has several progressive and required amendments. The Indian arbitration regime has been through phases of evolution and development wherein the law was first updated and brought on lines with UNCITRAL model law in 1996. However with court pronouncements and interpretations over the years, the system had been overwhelmed with several challenges which almost made the Indian arbitration scenario a ridiculed one or a laughing stock in the international arbitration community. The present Bill and its amendments bring with them a sense of hope for all the stakeholders right from businesses/litigants/parties, counsels, arbitrators and an overall positive message to the international and domestic business

community that the Indian Government is not just pro-arbitration but keen on an effective and efficient arbitration regime.

It would be pertinent to also highlight here that while legislative changes can only be starting point to improve the arbitration regime in India, attitude of various stakeholders is key and unless that also changes and moves progressively to bring it in line with international standards, the expected results would only remain a dream. Thus while the Government has done its part to bring in the reforms, it is now for us, the stakeholders to do our best keeping the spirit and legislative intent in mind and move India to a place of pride in the field of arbitration.

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