INTERNATIONAL COMMERCIAL ARBITRATION

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1. INTRODUCTION

Growing international trade and investment is tagged along by growth in cross-border commercial disputes. Provided with the need for an effective dispute resolution mechanism, international arbitration has become evident as the better option for settling cross-border commercial disputes and preserving business relationships. With an inflow of foreign investments, overseas commercial transactions, and open-ended economic policies acting as a catalyst, international commercial disputes entailing India are constantly rising. This has drawn colossal focus from the international community on India's international arbitration regime.

Due to inevitable controversial decisions by the Indian judiciary in the last years, especially in cases involving a foreign party, the international community has been vigilant on the development of arbitration laws in India. The Indian judiciary has often been denounced for its interference in

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international arbitrations and extra territorial application of domestic laws to foreign-seated arbitrations.

Nevertheless, the latest developments in the arbitration jurisprudence in and out of recent court decisions undoubtedly indicate the support of the judiciary in delegating India to adopt international best practices. Courts have adopted a pro-arbitration approach and a series of pro-arbitration rulings by the Supreme Court of India and High Courts have tried to change the arbitration landscape completely in India. From 2012 to 2015, the Supreme Court conveyed various landmark rulings taking a much needed pro-arbitration approach such as proclaiming the Indian arbitration law to be seat-centric; detaching the Indian judiciary's power to interfere with arbitrations seated outside India; mentioning non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy in foreign-seated arbitration; and determining that even fraud is arbitrable.

In betterment of measures taken by the Indian government in support of the 'ease of doing business in India', and after two terminated attempts in 2001 and 2010 to amend the arbitration law, on October 23, 2015, the President of India spreaded the Arbitration and Conciliation (Amendment) Ordinance, 2015. The Ordinance embodied the nub of major rulings passed in the last two decades, as well as most of the recommendations

of 246th Law Commission Report, and have explicated the major controversies that arose in recent years.

Subsequently, on December 17, 2015 and December 23, 2015 respectively, the Arbitration and Conciliation (Amendment) Bill, 2015 was passed by the Lok Sabha and Rajya Sabha respectively, with minor additions to the amendments instituted by the Ordinance. On December 31, 2015, the President of India signed the Bill and afterwards, gazette notification was made on January 1, 2016. Accordingly, the Arbitration and Conciliation (Amendment) Act, 2015 came into effect, from October 23, 2015. The Amendment Act is applicable prospectively to the arbitral proceedings commenced after October 23, 2015.

This paper aims to give an outline of the position of Indian law on international commercial arbitration both seated within and outside India and examines the recent judicial decisions in this field. The changes inserted by the Amendment Act are a step in the right direction in certifying that India moves towards being an arbitration friendly nation. This paper also throws light on the potential barriers faced by parties who are governed by the Act, with the new law in place.

2. INDIAN ARBITRATION REGIME

2.1. History of Arbitration in India

Until the Arbitration and Conciliation Act, 1996, the law governing arbitration in India comprise mainly of three statutes:

a) The Arbitration (Protocol and Convention) Act, 1937

b) The Indian Arbitration Act, 1940 and

c) The Foreign Awards (Recognition and Enforcement) Act, 1961.

The 1940 Act was the general law governing arbitration in India and resembled the English Arbitration Act of 1934.

2.2. Background to the Arbitration and Conciliation Act, 1996

To tackle these concerns and with an essential motive to coax arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international sphere, India in 1996, embraced a new legislation modeled on the Model Law in the form of the Arbitration and Conciliation Act, 1996. The Act was also brought in to give a speedy and effective dispute resolution apparatus to the existing judicial system, which was marred with inordinate delays and a backlog of cases.

3. SCHEME OF THE ACT

The Act has three meaningful parts. Part I of the Act tackles with domestic arbitrations and ICA when the arbitration is seated in India. Thus, arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated related to a domestic arbitration. Part II of the Act deals with only foreign awards[1] and imposition under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or Convention on the Execution of Foreign Arbitral Awards, 1927 and Part III of the Act is a statutory incarnation of conciliation provisions.

In Part I, Section 8 controls the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, and 28 to 33 manages the conduct of arbitration, Section 34 regulates the challenge to the award and Sections 35, and 36 tunes the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37, and 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary.[2]

The courts have found that Chapters III to VI, specifically. Section 10 to 33 of Part 1 of the Act, include curial or

[1] A foreign award is award delivered in an arbitration seated out- side India.
[2] Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 2012 (9) SCC 552.

procedural law which parties would have independence to opt out from. The other Chapters of Part I of the Act form part of the proper law[3], accordingly, making those provisions non-derogable by parties subjected to Part I, even by contract.

Part II, on the other hand controls arbitration only in respect to the inception and identification/enforcement of a foreign award and no provisions under the same can be derogated by a contract between two parties.[4]

The intent of the Act is to provide a speedy and cost-effective dispute resolution mechanism, which would give parties irrefutability in their disputes. In 1996, the Act was passed with an outlook to bring in changes, but fell into a quarrel of its own. A number of decisions from the courts slowly but surely certified that the preferred seat in any cross-border contract was always a deeply consulted point and, more often than not, ended up being either Singapore, New York, or London, the established global arbitration centers. Foreign investors and corporates doing business in India were just not ready to risk the Indian legal system.

[3] Anita Garg v. M/S. Glencore Grain Rotterdam B.V., 2011(4) ARBLR 59 (Delhi).

[4] Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 2012 (9) SCC 552.

4. ARBITRATION AND CONCILIATION AMENDMENT ACT, 2015

The amendments presented by the Amendment Act have made remarkable changes to the Act and are in the right direction for explaining several issues keeping in mind the aims of the Act.

The Amendment Act issues strict timelines for execution of the arbitral proceedings along with the extent for resolving disputes by a fast track mechanism. In addition to the insertion of new provisions, the Amendment

Act has also proposed certain amendments to the existing provisions with regard to the process of appointment of an arbitrator and described the grounds of challenge of an arbitrator for lack of independence and impartiality. The Amendment Act, as a welcome move, supports for assistance from Indian courts even in foreign-seated arbitrations in the form of interim relief before the commencement of the arbitration. Further, the introduction of the 'cost follow the event' regime in the Act has been inserted to bring it in line with international standards. The process of enforcement and execution under the Act has also been efficient so that challenge petitions do not operate as an automatic stay on the execution process.

Below, the Amendment Act introduces the snapshots to the major amendments:

4.1. Pre-arbitral proceedings

4.1.1. *Independence and impartiality*

a) The Amendment Act has initiated comprehensive guidelines in relation to the independence, impartiality, and fees of arbitrators, bringing it at par with international standards.

b) Appointment of arbitrators to be done by Supreme Court in case of international commercial arbitrations and respective High Courts in case of domestic arbitrations purely in an administrative capacity.

c) Applications for appointment of an arbitrator to be disposed of expeditiously and endeavor to be made to dispose of within a period of (60) sixty days from date of service of notice on the opposite party.

d) Detailed schedule on ineligibility of arbitrators have been put in place.

4.1.2. *Interim reliefs*

a) Flexibility has been granted to parties with foreign- seated arbitrations to approach Indian courts in aid of foreign seated arbitration;
b) Section 9 applications to be made directly before High Court in case of international commercial arbitrations seated in India as well as outside.
c) Interim reliefs granted by arbitral tribunals seated in India are deemed to be order of courts and are thus enforceable in the new regime.
d) Post grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

4.2. **Arbitral proceedings**

4.2.1. *Expeditious disposal*

a) A twelve-month timeline for completion of arbitration seated in India has been prescribed.
b) Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, appointment of arbitrator, and challenge petitions;

c) Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

4.2.2. *Costs*

Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India – introduction of 'costs follow the event' regime.

4.3. **Post-arbitral proceedings**

4.3.1. *Challenge and enforcement*

a) In ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed;

b) Section 34 petitions to be filed directly before High Court in case of international commercial arbitrations seated in India.

c) Section 34 petitions to be disposed of expeditiously and in any event within a period of one year from date on which notice is served on opposite party.

d) Upon filing a challenge, under Section 34 of the Act, there will not be any automatic stay on the execution of award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

5. INTERNATIONAL COMMERCIAL ARBITRATION: MEANING

Section 2(1)(f) of the Act interprets an ICA to mean one arising from a legal relationship which must be considered commercial[5] where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under Indian law, arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA, and consequently subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act would have no relevance on the parties but the parties would be subject to Part II of the Act.

The Amendment Act has removed the words 'a company' from the purview of the definition thereby hindering the definition of ICA only to the body of individuals or association. Thereafter, by deduction, it has been made clear that if a company has its place of incorporation as India then central management and control would be inapt as far as its determination of being an "international commercial arbitration" is concerned.

[5] 'Commercial' should be construed broadly having regard to the manifold activities, which are an integral part of international trade today (R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136).

The Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. V. UE Development India Pvt. Ltd*. decided the scope of this section,[6]wherein, despite TDM Infrastructure Pvt. Ltd. having a foreign control, it was negotiated that, "a company incorporated in India can only have Indian nationality for the purpose of the Act."

Consequently, though the Act recognizes companies controlled by foreign hands as a foreign body corporate, the Supreme Court has eliminated its application to companies registered in India and having Indian nationality. Hence, in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act, such corporation would not be regarded as a foreign corporation.

6. ARBITRABILITY UNDER INDIAN LAW

Arbitrability is one of the matters where the contractual and jurisdictional aspects of international commercial arbitration meet head on. It includes the simple question of what type of issues can and cannot be submitted to arbitration.

[6] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd, 2008 (14) SCC 271.

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*.[7] the Supreme Court examined the concept of Arbitrability in detail and held that the term 'Arbitrability' had distinct meanings in different contexts: (a) disputes capable of being judged through arbitration, (b) disputes covered by the arbitration agreement, (c) disputes that parties have mentioned to arbitration. It stated that in principle, any quarrel than can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand eliminated from resolution by a private forum. Such non-arbitrable disputes include: (i) disputes relating to rights and liabilities which improves or arise out of criminal offences; (ii) matrimonial disputes connecting to divorce, judicial separation, restitution of conjugal rights, or child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters and (vi) expulsion or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

[7] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd, 2011 (5) SCC 532.

Also, the Supreme Court has discussed in *N. Radhakrishnan v. M/S Maestro Engineers*[8] that, where plea of fraud and serious malpractices are alleged, the court can only settle the matter and such a situation cannot be mentioned to an arbitrator. The Supreme Court also noticed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has restricted jurisdiction. The courts are more provided to adjudicate serious and complex allegations and are capable in offering a wider range of reliefs to the parties in dispute.

But the Supreme Court in Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi[9] and World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd.[10] embraced that allegations of fraud are not a bar to mention parties to a foreign-seated arbitration and that the only bars to denote parties to foreign-seated arbitrations are those, which are specified in Section 45 of Act. For instance, in cases where the arbitration agreement is either (i) null and void; or (ii) non-functional (iii) incapable of being performed. Thus, it appears that though allegations of fraud are not arbitrable in

[8] N. Radhakrishnan v. M/S Maestro Engineers, 2010 (1) SCC 72.
[9] Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi, 2014 (6) SCC 677.
[10] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd., AIR 2014 SC 968.

ICA's with a seat in India the same bar would not apply to ICA's with a foreign seat.

Hence, there may be a certain degree of difference in the law of Arbitrability in India when equated to other jurisdictions. The distinctive treatment of domestic and international commercial arbitrations with regard to Arbitrability of issues makes it vital to find out whether the disputes referred to arbitration are arbitrable under law in arbitration involving Indian parties. Failure of the dispute being arbitrable may lead to the award being rendered unenforceable in India on grounds of breach of public policy of India.

7. INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN INDIA

As per the 2015 QMUL International Arbitration Survey, the five most preferable and broadly used seats for international commercial arbitration are London, Paris, Hong Kong, Singapore, and Geneva. For example, out of all disputes put forward to SIAC, one of the highest numbers of filings was generated from India.[11] Despite an elevated number of Indian parties opting for arbitration to settle their disputes, the number

[11] http://www.siac.org.sg (Sept. 2, 2016). There were 91 parties, which used SIAC in the year 2015, being the highest foreign nationality contributing to the SIAC caseload.

of such international arbitrations with seat in India has not grown notably. The laws applicable to ICA when seat of arbitration is India are dealt with below.

7.1. Notice of arbitration

Arbitration is said to have begun when the notice of arbitration needs the other party to take steps in connection with the arbitration or do something on his part in the matter of arbitration. Under Section 21 of the Act, a notice of arbitration has to be carried out to the other party, appealing that the dispute be referred to arbitration. The day, on which the respondent receives the notice, arbitral proceedings commence under the Act. In Notice of Arbitration, a party conveys:

a) An intention to refer the dispute to arbitration; and
b) The need that other party should do something on his part in that regard. This will overall be enough to define the commencement of arbitration under the Act.

7.1.1. *Applicability of Amendment Act*

The date of beginning of the arbitration in accordance with Section 21 of the Act is pivotal with regards the applicability of the Amendment Act. In the event, the date of commencement

is after October 23, 2015, the provisions of the Amendment Act will be relevant, as against the Act with respect to arbitral proceedings.

7.2. Referral to arbitration

Under Part I, the courts can denote the parties to arbitration if the subject matters of the dispute is controlled by the arbitration agreement. Section 8 of the Act supplies that if an action is brought before a judicial authority, which is subject-matter of an arbitration, upon an application by a party, the judicial authority is bound to mention the dispute to arbitration.

It is important to note that the above application must be made by the party either before or at the time of making his first statement on the substance of the dispute and the application shall be accompanied by a duly certified or original copy of the arbitration agreement.

7.2.1. *Applicability of Amendment Act*

The Amendment Act confines the scope of the judicial authority's power to inspect the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a

matter before the court to an arbitration for purposes of arbitrations commenced on or after October 23, 2015.

More importantly, taking heed from the judgment of the Supreme Court in *Chloro Controls*[12], which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded under the Amendment Act to also include persons claiming through or under such party.

Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or Indian seated ICA, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement.[13]

7.3. Interim reliefs

Under the Act, the parties can seek interim relief from courts and arbitral tribunals under Section 9 and 17 respectively.

A party may, before, or during arbitral proceedings or at any time after the making of the Arbitral Award but before it is enforced, apply to a court for seeking interim measures and

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

protections including interim injunctions under Section 9 of the Act.

The Arbitral Tribunal in accordance with Section 17 can also provide interim measures of protection or ask a party to provide appropriate security in connection with the matter of dispute, as is found appropriate during the course of the arbitral proceedings. However the powers of the Arbitral Tribunal were narrow compared to the powers of the court under Section 9 of the Act.

7.3.1. *Applicability of Amendment Act*

The Amendment Act has made important changes, which will affect the granting of interim relief in an arbitration proceedings commenced after October 23, 2015.

7.4. **Interim reliefs under Section 9**

If an arbitral tribunal has been constituted, the court will not entertain an application for interim protection under Section 9 of the Act unless the court finds that circumstances exist which may not render the remedy pro- vided under Section 17 ineffective.

Post the grant of interim protection under Section 9 of the Act, the arbitral proceedings must start off within a period of 90

days from the date of the interim protection order or within such time as the court may determine.

7.5. Interim reliefs under Section 17

Section17 has been revised to provide the Arbitral Tribunal the same powers as a 'civil court' in relation to the grant of interim measures. Remarkably, the Arbitral Tribunal would have powers to grant interim relief post award but prior to its execution. Further, the order passed by an Arbitral Tribunal in arbitrations seated in India will be regarded as to be an order of the court and will be enforceable under the Code of Civil Procedure, 1908 as if it were an order of the court, which provides clarity on its enforceability.

The intention seems to be to entrust significant powers with the Arbitral Tribunal and lessen the burden and backlog before the courts. There has been extensive confusion on the extent and scope of arbitrator's powers to grant interim relief, and enforceability of such orders has demonstrated difficult. This issue has been aptly addressed by making the enforceability of orders issued under Section 9 and 17 of the Act similar in case of domestic and international commercial arbitrations seated in India. However, in certain situations, a party will be in need to obtain an order of interim relief from a court only.

7.6. Appointment of Arbitrators

The parties are free to agree on a procedure for appointing the arbitrator(s). The agreement can provide for a tribunal consisting of three arbitrators and each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator.[14] If one of the parties does not appoint an Arbitrator within 30 days, or if two appointed Arbitrators do not appoint third Arbitrator within 30 days, the party can request Chief Justice of India ("CJI") to appoint an Arbitrator in case of international commercial arbitrations.[15] The CJI can authorize any person or institution to appoint an Arbitrator. Some High Courts have authorized District Judge to appoint an Arbitrator. In case of domestic arbitrations, application has to be made to Chief Justice of respective High Court within whose jurisdiction the parties are situated.[16]

7.6.1. *Applicability of Amendment Act*

If one of the parties does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint third arbitrator within 30 days, the party can request the Supreme

[14] Arbitration and Conciliation Act, 2015, §11(3).
[15] *Id*, §11(4).
[16] *Id*, §11(12).

Court or relevant High Court (as applicable) to appoint an arbitrator. [17]The Supreme Court/High Court can authorize any person or institution to appoint an arbitrator.[18] In case of an ICA, the application for appointment of arbitrator has to be made to the Supreme Court and in case of a domestic arbitration, the respective High Courts having territorial jurisdiction will appoint the Arbitrator.

The Amendment Act empowers the Supreme Court in an India-seated ICA and High Courts in domestic arbitration to examine the existence of an arbitration agreement at the time of making such appointment. [19] This should be noted against the threshold contained in a Section 8 application for referring a dispute to arbitration, which empowers a court only to merely examine the prima facie existence of an arbitration agreement.

The application for appointment of the arbitrator before the Supreme Court or High Court, as the case may be, is required to be disposed of as expeditiously as possible and an endeavor shall be made to do so within a period of 60 days; such appointment would not amount to delegation of judicial power and is to be treated as an administrative decision.

[17] *Id*, §11(6).
[18] *Id*, §11(6)(b).
[19] *Id*, §11(6)(a).

There has always been a concern in India with respect to the time taken for appointment of arbitrators due to the existing jurisprudence and procedure. The time frame for such appointment was usually 12- 18 months. This amendment seeks to address this delay by introducing a timeline and clarifying the procedure of appointment to be an exercise of administrative power by the courts.

7.7. Challenge to Appointment of Arbitrator

An arbitrator is supposed to be independent and impartial. If there are situations due to which his independence or impartiality can be challenged, he must reveal the circumstances before his appointment.[20] Engagement of an arbitrator can be challenged only if –

a) Situation exist that leads to justifiable doubts as to his independence or impartiality; or,
b) He does not have the qualifications agreed upon by the parties.[21]

The question to appointment has to be settled by the arbitrator himself. If he does not accept the challenge, the proceedings can go further and the arbitrator can make the arbitral award.

[20] *Id*, §12(1).
[21] *Id*, §12(3).

However, in such case, application for setting aside the arbitral award can be made to the court under Section 34 of the Act. If the court consents to the challenge, the arbitral award can be set aside.[22] Thus, even if the arbitrator does not take up the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to the court. The arbitration can continue and challenge can be made in court only after the arbitral award is made.

7.7.1. *Applicability of Amendment Act*

The Amendment Act provides a structure for disclosure in the new Fifth Schedule. Such disclosure is in agreement with internationally accepted practices to be made relevant for arbitration proceedings commenced on or after October 23, 2015.

In the Amendment Act, the lawmakers have scheduled scenarios in Seventh Schedule, which may follow in justifiable doubts as to the independence and impartiality of an arbitrator such as 'relationship with the parties, counsel or the subject matter of the dispute, such as that of the employee of one of the parties'.[23] This is an symptomatic list in addition to banning situations that have been affirmed by case law such as the

[22] *Id*, §13(6).
[23] §11(5) of the Act inserted by the Amendment Act.

holding of the Supreme Court that the arbitrator cannot be qualified to arbitrate if he is the part of the contract.[24]

7.8. **Challenge to Jurisdiction**

Under Section 16 of the Act, an Arbitral Tribunal has capability to rule on its own jurisdiction, which incorporates ruling on any objections with respect to the existence or validity of the arbitration agreement. The doctrine of *'competence-competence'* extends to jurisdiction on the Arbitrators to adjudicate challenges to the arbitration clause itself. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr,*[25] the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act.

7.9. **Hearings and Written Proceedings**

After submission of pleadings, unless the parties agree otherwise, the Arbitral Tribunal can determine whether there will be an oral hearing or whether proceedings can be conducted on the basis of documents and other materials.

[24] Indian Oil Corporation Ltd. v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520.
[25] S.B.P. and Co. v. Patel Engineering Ltd. and Anr, 2005 (8) SCC 618.

However, if one of the parties requests the Arbitral Tribunal for a hearing, adequate advance notice of hearing should be given to both the parties.[26] Thus, unless one party requests, oral hearing is not compulsory.

7.9.1. *Applicability of Amendment Act*

For the speedy conclusion of the arbitration proceedings a provision has been introduced by the Amendment Act on the conduct of *'oral proceedings'* and appointing of *'sufficient cause'* in order to search for suspensions. The amended provision has also made a room for the tribunal to foist costs incorporating cautionary costs in case the party fails to provide enough reasoning for the adjournment sought.

The Amendment Act authorizes the time limit for conduct and behaviour of the arbitral proceedings have been efficient and arbitrators instructed to finish the entire arbitration proceedings within a span of 12 (twelve) months from the date the Arbitral Tribunal enter upon the reference.[27] However, a 6 months extension may be bestowed to the arbitrator by mutual consent of the parties.[28] Beyond 6 months, any additional extension

[26] Arbitration and Conciliation Act, 1996, §24.
[27] *Id*, §29A(1).
[28] *Id*, §29A(3) .

may be granted to the arbitrator at the judgment of the court [29] or else the proceedings shall stand discontinued.[30] An application for extension of time towards completion of arbitral proceedings has to be disposed of expeditiously.[31] There is also a proviso made for conferring on additional fees, as consented upon by the parties, to them for passing the award within the time span of 6 months.[32]

7.10. Fast Track Procedure

The Amendment Act has put new provisions to facilitate an expedited settlement of disputes based only on documents subject to the agreement of the parties. The tribunal for this purpose composes only of a sole arbitrator who shall be chosen by the parties.[33]

For the expressed purpose, the time limit for making an award under this section has been covered at 6 months from the date the Arbitral Tribunal enters upon the reference.[34]

[29] *Id*, §29A(5).
[30] *Id*, §29A(4).
[31] *Id*, §29A(9) – the section endeavours the application to be disposed of within a period of 60 days.
[32] *Id*, §29A(2).
[33] *Id*, §29B(2).
[34] *Id*, §29B(4).

Parties can before constitution of the Arbitral Tribunal, admit in writing to manage arbitration under a fast track procedure.[35] Under the fast track procedure, unless the parties otherwise make an appeal for oral hearing or if the arbitral tribunal considers it essential to have oral hearing, the Arbitral Tribunal shall ask for the dispute on the basis of written pleadings, records and presentations filed by the parties without any oral hearing.[36]

7.11. Settlement during Arbitration

It is allowable for parties to reach at a mutual settlement even when the arbitration proceedings are going on. In fact, even the tribunal can make attempts to encourage mutual settlement.

If parties settle the dispute by mutual agreement, the arbitration shall come to an end. However, if both parties and the Arbitral Tribunal agree, the settlement can be taken down in the form of an arbitral award on agreed terms, which is then known as consent award. Such arbitral award shall have the same force as any other arbitral award.[37]

[35] *Id*, §29B(1).
[36] *Id*, §29B(3).
[37] *Id*, §30.

7.12. **Arbitral Award**

A settlement of an Arbitral Tribunal is termed as 'Arbitral Award'. An arbitral award includes interim awards. But it does not include interim orders passed by arbitral tribunals under Section 17. Arbitrator can decide the dispute "in justice and in good faith" only if both the parties expressly authorize him to do so.[38] The decision of Arbitral Tribunal will be by majority.[39] The Arbitral Award shall be in writing and signed by all the members of the tribunal.[40] It must state the causes for the award unless the parties have agreed that no reason for the award is to be given.[41] The Award should be dated and the place where it is made should be mentioned. A copy of the award should be given to each party. Arbitral Tribunals can also make interim awards.[42]

Under Section 30 of the Act, even in the lacking of any provision in the arbitration agreement, the Arbitral Tribunal can, with the explicit consent of the parties, negotiate or conciliate with the parties, to resolve the disputes mentioned for arbitration.

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[38] *Id*, §28(2).
[39] *Id*, §29.
[40] *Id*, §31(1).
[41] *Id*, §31(3).
[42] *Id*, §31(6).

7.13. Challenge to an Award

Section 34 makes facilities for the manner and reasons for challenge of the arbitral award. The time period for the challenge is before the expiry of 3 months from the date of receipt of the arbitral award. If that period runs out, the award holder can apply for execution of the arbitral award as a decree of the court. But as long as this period has not elapsed, enforcement is not possible.

Under Section 34 of the Act, a party can challenge the arbitral award on the following grounds-

a) The parties to the agreement are under some incapacity;
b) The agreement is void;
c) The award contains decisions on matters beyond the scope of the arbitration agreement;
d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
e) The award has been set aside or suspended by a competent authority of the country in which it was made;
f) The subject matter of dispute cannot be settled by arbitration under Indian law; or
g) The enforcement of the award would be contrary to Indian public policy.

7.13.1. *Applicability of Amendment Act*

The Amendment Act has added an explanation to Section 34 of the Act. Within the clarification, public policy of Asian nation has been processed to mean solely if: (a) the creating of the award was induced or suffering from fraud or corruption or was in violation of Section 75 or 81; or (b) it's in dispute with the elemental policy of Indian law; or (c) it's in dispute with the foremost basic notions of the morality or justice. The Amendment Act clarifies that an award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence.[43] A court will not review the deserves of the dispute when deciding whether or not the award is in dispute with the elemental policy of Indian law.[44] The change Act has conjointly introduced a brand new section providing that the award is also put aside if the court finds that it's vitiated by patent unlawfulness, that seems on the face of the award just in case of domestic arbitrations. For ICA sitting in Asian nation, 'patent illegality' has been keep outside the range of the mediation challenge.[45] A challenge beneath this

[43] Proviso to §34(2A) of the Arbitration and Conciliation Act, 2015.
[44] Explanation 2 to §48 of the Arbitration and Conciliation Act, 2015.
[45] Arbitration and Conciliation Act, 2015, §34(2A).

section may be filed solely when providing previous notice to the alternative party.[46]

A challenge has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice referred above.[47] The amended section conjointly states that wherever the time for creating associate application beneath Section 34 has invalid, then subject to the provisions of the CPC, the award may be implemented.

Under the Act, there was associate automatic keep once associate application to line aside the award beneath Section 34 of the Act was filed before the Indian courts. The change Act currently needs parties to file an extra application associated specifically obtain a keep by demonstrating the requirement for such keep to an Indian court.

8. EMERGING ISSUES IN INDIAN ARBITRATION LAWS

In the immediate years, there has been a lot of eagerness on some of the known issues involving the arbitration laws in India, such as (a) prospective applicability of the Amendment Act; (b) whether two Indian parties can select a foreign seat of arbitration; (c) whether it is possible to arbitrate a dispute arising over allegations of oppression and mismanagement.

[46] *Id*, §34(5).
[47] *Id*, §34(6).

8.1. Prospective applicability of the amendment act

In the recent past, the Madras High Court in *New Tripur Area Development Corporation Limited v .M/s. Hindustan Construction Co. Ltd. & Ors*.[48] has ruled that the language used in the Section 26 of the Amendment Act only mentions to arbitral proceedings and not court proceedings due to removing of the language *"in relation to."* Section 26 of the Amendment Act is not applicable to the stage post arbitral proceedings.

However, the Calcutta High Court in *Electrosteel Castings Limited v. Reacon Engineers (India) Private Ltd.*[49] has given a opposing view, and held that the Amendment Act will not apply and Section 34 petitions in case of arbitration proceedings commenced prior to October 23, 2015, would act as automatic stay.

8.2. Conundrum surrounding two Indian parties having a foreign seat of arbitration

Even though this issue has been sermonized by a number of High Courts in the past, there is still no clarity on ability of

[48] New Tripur Area Development Corporation Limited v .M/s. Hindustan Construction Co. Ltd. & Ors. Application No. 7674 of 2015 in O.P. No. 931 of 2015.

[49] Electrosteel Castings Limited v. Reacon Engineers (India) Private Ltd., Judgment in Arbitration Petition No. 1710/2015, (Jan 14, 2016).

two Indian parties to select a foreign seat of arbitration. In *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.,*[50] the Bombay High Court opined that two Indian parties picking up a foreign seat and a foreign law governing the arbitration agreement could be considered to be contrary to public policy of the country.

Recently, in the case of *Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd*.,[51] the Madhya Pradesh High Court held that two Indian parties might conduct arbitration in a foreign seat under English law.

The Madhya Pradesh High Court primarily relied on the ruling in the case of *Atlas Exports Industries v. Kotak & Company*,[52] wherein the Supreme Court ruled that two Indian parties could contract to have a foreign-seated arbitration; although, the judgment was in context of the 1940 Arbitration Act. An appeal has been filed challenging this decision and is pending adjudication before the Supreme Court.

However, one must be cautious of the ruling in TDM Infrastructure, 100 wherein the court held that two Indian

[50] Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd., Judgment in Arbitration Petition No. 910/2013,(June 12, 2015).
[51] Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd., Judgment in First Appeal No. 310/2015,(Sept. 11, 2015).
[52] Atlas Exports Industries v. Kotak & Company, (1999) 7 SCC 61.

parties could not derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign law.

8.3. Arbitrability of oppression and mismanagement cases

The Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra* delivered a landmark judgment on this issue,[53] wherein the court ruled that disputes concerning oppression and mismanagement cannot be arbitrated, and must be adjudicated upon by the judicial authority itself. However, in case the judicial authority finds that the petition is mala fide or annoying and is an attempt to avoid an arbitration clause; the dispute must be referred to arbitration. Probably, this could have an unintended influence on the prima facie standard in section 8, as amended and introduced by the Amendment Act.

The Bombay High Court submitted that a petition under Sections 397 and 398 of the Companies Act, 1953 might consist of conduct of clandestine non-contractual actions that ends in the mismanagement of the company's affairs or in the oppression of the minority shareholders, or both.

In such cases, even if there is an arbitration agreement, it is not essential that every single act must, ipso facto, connect with

[53] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.

that arbitration agreement. Moreover, the fact that the dispute might influence rights of third parties who are not even the party to the arbitration agreement offers such disputes non-arbitrable. In addition to the above emerging issues, please find enclosed Annexure containing detailed list of our hotlines, which cover the analysis of the recent judgments and issues faced in the arbitration regime in India.

9. CONCLUSION

An invasive economy needs a reliable stable dispute resolution method so as to be able to attract foreign investment. With the intense backlog before Indian courts, industrial players in Asian country and abroad have developed a powerful preference to resolve disputes via arbitration.

In spite of Asian country being one in all the first signatories of the big apple Convention, arbitration in Asian country has not continually maintained with international best practices. However, the last 5 years have seen a major positive modification in approach. Courts and legislators have acted with a read to transfer Indian arbitration law in line with international observe.

With the pro-arbitration approach of the courts and therefore the modification Act in situ, there's cause to seem forward to

best practices being adopted in Indian arbitration law within the close to future. Exciting Times Square measure ahead for Indian arbitration jurisprudence and our courts square measure able to attack many matters addressing the interpretation of the modification Act.