New Age Arbitration – The Future of Dispute Resolution in India!

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LEGAL AND TAX COUNSELING WORLDWIDE

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Introduction

One of the primary reasons why arbitration clauses are seen in international commercial contracts is that multinational corporations and governmental entities engaged in international trade prefer not to litigate in the other party's 'home' court. Parties prefer arbitration as it has certain advantages like neutrality, speedy resolution of dispute, choice of arbitral panel, etc. Party autonomy and Indian courts consistently reducing interference in arbitral proceedings, have also paved the way for international commercial arbitration to become the preferred dispute resolution mechanism.

The Evolution

Arbitration in India has come a long way from the enactment of the Arbitration and Conciliation Act, 1996 ("Act") to the newly introduced Arbitration Amendment Bill, 2018 ("Arbitration Bill"). The Indian government, to address the concerns of the international community and encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes, enacted the Act based on the UNCITRAL Model Law. While the Act did introduce changes in the Indian dispute resolution environment, it also saw the rise of judicial over-reach, uncertainty and a significant delay in arbitral time-lines. Some judgments of the Supreme Court opened the door and permitted Indian courts to 'interfere' in foreign seated arbitrations, including permitting them to set aside awards passed by foreign seated arbitral tribunals under Section 34 (setting aside of domestic awards) of the Act. These rulings were heavily criticized by the international community due to the extra-territorial application of domestic laws, which defeated the very purpose and basic concepts of international arbitration.

The answer from the Court

To remedy the situation, the Supreme Court, in a five-judge bench decision in Bharat Aluminum Co v. Kaiser Aluminum Technical Services ("BALCO"), overruled Bhatia International and Venture Global and laid down a new law, amongst other things, introducing a blanket rule that Part I of the Act had no application to arbitrations seated outside India, irrespective of the fact whether parties chose to apply the Act or not. However, the Supreme Court making the applicability of BALCO principles prospective, caused scope for more confusion and resulted in the evolution of two parallel streams of law in India. This led to a situation where there was no ability for parties to approach an Indian court for any interim relief in aid of a foreign seated arbitration.

The 2015 Amendments: A step towards an ideal world

The Law Commission of India's Report No. 246 ("Law Commission Report") was introduced, to address the loopholes and bring arbitration in India at par with international standards. The Law Commission Report proposed path-breaking amendments to the Act and an overhaul to the arbitration scenario in India. The amendments were well received by the global arbitral community but also came with its own implementation challenges.

One of the main causes of concern has been the inter-play of amended Section 34 and 36 of the Act. Prior to the amendment, mere filing of a Section 34 petition led to an automatic stay on an arbitral award. This automatic stay did not even permit the court to impose any terms or conditions. The Supreme Court in one of its earlier ruling had heavily criticized it and held that the automatic stay imposed a disability upon a successful award-holder preventing them from enforcing the award if an application under Section 34 is pending. It prevented the award-holder from enjoying the fruits of its success merely because the unsuccessful award-debtor filed an application to challenge the award. This situation was proposed to be rectified by requiring an applicant to specifically seek stay of an award and permitting a court to put a party to terms. However, different high courts adopted contradictory views.

The issue was finally put to rest recently by the Supreme Court in Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd. Judgment debtors can no longer enjoy an automatic stay on the execution of the arbitral award irrespective of whether their challenge against the award was filed prior to or post the commencement of the Amendment Act. The Supreme Court, amongst other things, held that execution of a decree pertains to the realm of procedure and there is no substantive right vested in a judgment debtor to resist execution. A specific application for stay (of the award) would need to be filed and this would apply even in cases where an application for setting aside an award was pending as on the date of commencement of the Amendment Act.

Arbitration and Conciliation (Amendment) Bill, 2018: A mis-adventure?

While the Supreme Court was dealing with this controversial issue, the Cabinet, with the intention to end this confusion approved the Arbitration and Conciliation (Amendment) Bill, 2018 ("Arbitration Bill") to be introduced before the Parliament, clarifying that the Amendment Act shall not apply to court proceedings commenced prior to or after the enactment of the Amendment Act. The Supreme Court acknowledged the aim and intention of the changes in the Arbitration Bill, but felt that it would also lead to inapplicability of the Amendment Act. It has thus forwarded its recommendations to the Law Ministry for consideration, to adhere to the basic intent and objective of the Act, in line with the Law Commission Report.

These are certain concerns in the proposed amendments:

- The Arbitration Bill still fails to provide a clear answer on its applicability adding to the existing confusion on law applicable to arbitration and court proceedings.
- The Arbitration Bill seeks to exclude international arbitration from being concluded within the prescribed time-frame under the Amendment Act. While the reason for this is not clear, this is possibly a misguided attempt at remedying the fact that the time-lines were made applicable to institutional arbitration.
- The segregation on time-lines for completion of arbitral proceedings has introduced subjectivity and scope for parties to misuse the provisions. The Government could have chosen a more objective criterion, one which is possibly less susceptible to the vagaries of creative interpretation, to determine the point at which the time clock begins or merely extend the time-line from 12 months to 18 or 24 months.

If the recommendations of the Supreme Court are not taken into consideration and the proposed amendments are enacted, then there may be a plethora of issues leading to confusion and further delay. One hopes that better sense prevails and the recommendations are considered and taken on board before the Arbitration Bill comes into force.

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