Dispute Resolution Hotline

August 11, 2014

A NEW INNINGS FOR ARBITRATION IN INDIA - OVERHAUL SUGGESTED FOR THE ARBITRATION & CONCILIATION ACT, 1996

- Law Commission releases proposed amendments to the Arbitration & Conciliation Act, 1996;
- Large-scale amendments are designed to plug major gaps identified over time and if implemented, will work to impart confidence in Indian arbitration;
- Recognition and boost to institutional arbitration;

The Law Commission of India, led by its Chairman Justice A.P. Shah[1], has released its proposed amendments[2] (**"Law Commission Report")** to the Arbitration & Conciliation Act, 1996 **("the Act")**. The Law Commission Report was handed over to the Ministry of Law and Justice suggesting a radical overhaul of the Act.

It may be recalled that in 2010, the Ministry of Law and Justice had released a consultation paper suggesting certain amendments to the Act. It was then felt that the consultation paper did not address the shortcomings of the Act. The Law Commission Report has, on the other hand, addressed a large number of concerns raised and if implemented, could prove to be a game-changer for arbitration in India.

HIGHLIGHTS OF THE LAW COMMISSION REPORT:

Areas of concerns which were identified and certain proposed amendments to address the concerns:

1. Institutional arbitration

The Law Commission Report (a) attempts to encourage the culture of institutional arbitration in India; (b) seeks to accord legal recognition to an '*emergency arbitrator*', the new norm in most institutional rules; (c) suggests that the Government consider formation of a specialized body which has representation from all stakeholders of arbitration, which body could be entrusted to encourage the spread of institutional arbitration.

2. Delays: In Court, before the Tribunals and risks under Bilateral Investment Treatises

Systemic delays do exist. The Law Commission Report seeks to deal with each issue in a systematic and analytical manner.

- Appointment of an arbitrator: The Law Commission Report proposes to make appointment of an arbitrator an *administrative* decision to be carried out by the High Court or the Supreme Court, as the case may be. This approach is designed to bring Indian arbitration in line with global best practices and also, to give effective meaning to the doctrine of *Kompetenz-kompetenz*. It is also provided that such an application be endeavored to be disposed of expeditiously, and also within a 60 day period, from service of notice. The issue of jurisdiction of the arbitral tribunal, if in question, could be raised before the arbitral tribunal. Though the Law Commission Report provides for a challenge of refusal to appoint an arbitrator under the Act, it does not provide for a situation where an arbitral tribunal holds that it has jurisdiction. Parties to arbitration will therefore need to go through the entire arbitral process before being able to challenge the jurisdiction of the arbitral tribunal itself.
- Challenges to arbitral awards: The Law Commission Report provides that such an application be endeavored to be disposed of expeditiously, and also within a 1 year day period, from service of notice. Moreover, in case of foreign awards, the Law Commission Report also has considered applications resisting the enforcement of a foreign award (under Section 48 of the Act) and incorporated similar timelines for (a) institution of an application resisting enforcement; and (b) disposal of such an application; under Section 48 of the Act. In a well-calculated move designed to give comfort to foreign investors and also to mitigate risks under bilateral investment treatises, any court-related proceedings emanating out of an international commercial arbitration (where one party to the matter is a foreign party) is proposed to be dealt with by the High Court. The threshold for judicial intervention is also sought to be raised.

Separately, the Law Commission Report also recommends that specialized and dedicated arbitration benches be constituted (as done in the Delhi High Court).

3. Costs

A regime of actual costs incurred is proposed alongwith detailed points for consideration of the court or arbitral tribunal based on Rule 44 of the Civil Procedure Rules of England. A general rule requiring a losing party to pay actual costs of the successful party, as proposed, would certainly inspire most parties to be reasonable about resolving disputes. Moreso, manufactured counterclaims and dilatory tactics would be minimized and thus, the overall speed and efficacy of the arbitral process would be bound to improve. By keeping a check on parties' conduct

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including potential offers to settle the disputes, the Law Commission Report seeks to cast an obligation upon each party to the proceeding to cooperate and be reasonable at each step.

4. Setting aside of domestic award & recognition/enforcement of foreign awards

- With a view to do away with the unintended uncertainties caused due to the Supreme Court's judgment in *ONGC Vs. Saw Pipes*[3], the Law Commission Report proposes a specific provision dealing with setting aside of a domestic award on the ground of *patent illegality*.
- In cases of foreign award and awards passed in international commercial arbitration in India, it is recommended that a narrower construct be given to *'public policy'*, so as to include only (i) fundamental policy of Indian law; and (ii) most basic notions of justice or morality;

Tightening of the provisions seeking to set aside or challenge the enforcement of arbitral awards is a welcome move and will work to impart confidence in arbitration as an effective and speedy dispute resolution mechanism. However, the inability to set aside an award passed in a domestic arbitration on erroneous application of the law will require extreme judicial care and discipline by the arbitral tribunals as such award may henceforth go unchecked. Further, the additional ground of patent illegality will not be available to international commercial arbitrations which may be seated in India.

5. Judicial intervention in foreign seated arbitration

The Law Commission Report acknowledges the lack of efficacious redress available to a party seeking protection of assets located in India, where an arbitration is seated abroad. It also acknowledges the issues caused due to the operation of two parallel trails, evolving out the precedents set out in *Bhatia International*[4] and *Balco*[5]. In this regard, a large number of changes are proposed whereby it provides that:

- Indian courts will exercise jurisdiction under Part 1 of the Act only when the seat of arbitration is within India;
- Certain provisions in Part 1 of the Act, such as Section 9 (interim relief), Section 27 (court assistance for taking evidence), Section 37(1)(a) and 37(3) (Appealable orders), will remain available to parties in a foreign seated arbitration;
- The proposed changes will not affect applications pending before any judicial authority, relying upon the law set out by *Bhatia*.
- Legal recognition be accorded to the terms '*seat*' and '*venue*', consistent with international usage;

It remains to be see how these proposed amendments will affect the rights of parties to foreign seated arbitrations, who have, relying on the law set out in *Bhatia*, explicitly agreed to exclude the application of Part 1 from their agreements.

6. Automatic stay of enforcement

Under Section 34 of the Act, an automatic stay of the award operated once an application to set aside the award was filed before an Indian court. The court was not permitted to impose terms upon the applicant for such stay. This situation is proposed to be rectified by: (a) requiring an applicant to specifically seek stay of an award; and (b) permitting a court to put a party to terms, keeping in mind the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908. If implemented, one could see applicants being directed to deposit the award amount or portion thereof prior to any stay of the award being granted, thus reducing the incentive to litigate.

7. Interim orders by the arbitral tribunal

The Law Commission Report proposes that:

- Once a court grants interim relief under Section 9 of the Act, arbitration proceedings should be commenced within 60 days thereafter failing which the interim relief will cease to operate.
- Once the arbitral tribunal is constituted, a court will not ordinarily entertain a petition under Section 9 until the applicant is able to demonstrate that relief under Section 17 (before the arbitral tribunal) would not be efficacious.

Currently, there is no enforcement mechanism provided for orders passed by an arbitral tribunal. The Law Commission Report proposed to amend Section 17 of the Act expanding the scope of the provisions and ensure that an interim order passed by an arbitral tribunal is treated as an order of the court. The Law Commission report doesn't provide for enforceability of interim orders passed by arbitral tribunals (both for emergency arbitrator and a duly constituted arbitral tribunal) in foreign seated arbitrations.

8. Arbitrability of fraud:

The Law Commission Report brings closure to the entire controversy by legislatively providing that allegations of fraud/corruption, complicated questions of fact or serious questions of law are expressly arbitrable. This will ensure that (a) there are no ingenious '*fraud*' defenses are raised with a view to bypass the arbitration agreement; (b) investors can allege fraud without having to fear that the allegation would be used to evade arbitration.

9. Disclosures by arbitrators

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

Significantly, the proposed arbitrator is also required to disclose if there exist circumstances that are likely to affect his ability to devote sufficient time and to complete the arbitration within 24 months and pass the award within 3 months thereafter. The disclosures also require the arbitrator to disclose his ongoing arbitrations. While the idea of requiring such a disclosure is certainly welcomed with open arms, there is no long stop provided requiring the tribunal to approach the court and seek additional time by demonstrating cause, should the 24 months (for completion of the

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arbitration proceedings) or 3 months (for passing of the award) be insufficient.

10. Parties to arbitration

Taking heed from the judgment of the Supreme Court of India in *Chloro Controls*[6], the definition of the word '*party*' to an arbitration agreement has been expanded to also include persons claiming through or under such party. This would mean that going forward, arbitration may not be limited simply to signatories of the arbitration agreement.

11. Power of the arbitral tribunal to award interest

Rationalizing the provision permitting grant of interest, the Law Commission Report proposes to move away from the statutory 18% p.a. as currently provided for in Section 31 of the Act and instead, move to a market based determination in line with commercial realities.

12. Arbitration agreement

In addition to other amendments, with a view to bring Indian law in conformity with UNCITRAL Model law, it is proposed that an arbitration agreement can additionally be concluded by electronic communication.

13. Statement of Defence

An amendment is proposed to grant discretion to the arbitral tribunal to treat the right of the Respondent to file a statement of defence as having been forfeited, where such statement is not filed within the prescribed time.

14. Arbitrator's fees

The Law Commission Report recommends, for domestic *ad hoc* arbitrations, a model schedule of fees, which will be updated regularly to ensure that they remain realistic. As international commercial arbitrations involve foreign parties who have different values and standards as well as institutional rules having their own schedule of fees, these recommendations do not, nor are asked to, capture the requirements of such arbitrations. It may be pertinent to note that international commercial arbitrations held in India do also share arbitrators from the same pool as domestic ad-hoc arbitrations and thus, the common issues raised of high arbitrator's fees may not be addressed insofar as international commercial arbitrations being held in India are concerned. Also, these are merely recommendations and are in no way binding upon any prospective arbitrators.

15. Conduct of arbitral proceedings

The Law Commission Report attempts to discourage the practice of frequent adjournments as well as seeks to push for continuous sittings of the tribunal for recording evidence and arguments. However, inspite of acknowledging that formal sittings merely for compliances should be avoided and use of technologies like video-conferencing and tele-conferencing be encouraged, the Law Commission Report fails to incorporate such recommendations in its proposed amendments.

CONCLUSION

The Law Commission Report attempts to identify and treat each malady plaguing arbitration in India with clinical precision. Each proposed amendment attempts to not only remedy the malady but also seeks to set up the stage for arbitration in India to achieve a higher plane of growth. There do remain certain gaps but this appears to be a well thought effort to plug larger issues affecting the country and if implemented, will certainly boost confidence in the Indian arbitration space.

Arbitration as a dispute resolution mechanism has not found favour due to a number of reasons. With a Government that is eyeing judicial reform, clear and precise amendments which are bound to find favour and impart confidence to foreign investors should find adequate backing. It will be interesting to see how soon, if at all, these amendments are implemented. The consequent acceptance and manner in which the proposed amendments will actually be interpreted by the judiciary is also something that only time will tell.

– Sahil Kanuga & Vyapak Desai
You can direct your queries or comments to the authors

[1] Former Chief Justice of the Madras and the Delhi High Courts;
[2] Law Commission Report No. 246 dated August 05, 2014;
[3] (2003) 5 SCC 705;
[4] (2002) 4 SCC 105;
[5] (2012) 9 SCC 552;
[6] (2013) 1 SCC 641;