THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015: MAKING INDIA AN ARBITRATION FRIENDLY SEAT

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ABSTRACT

This article analysis the Arbitration and Conciliation (Amendment) Act, 2015, by which the legislature has amended the Arbitration & Conciliation Act, 1996 ("the Principal Act"). The Principal Act was brought in to complement the economic reforms undertaken by the Government then. Since the Indian economy was being liberalised to attract foreign investment, it had to be backed by a sound legal framework.

The gaps under the Principal Act later discovered were manifold, primarily concerning inordinate delays & unnecessary procedures. The 246th Law Commission discussed the lacunae at length and suggested amendments to the Principal Act. In pursuance thereof, amendments have been carried out in the Principal Act and the amended Act offers interesting times ahead in the realm of dispute resolution. An attempt has been made to understand the amendments & compare them to the Principal Act while trying to gauge the effect thereof. A section wise analysis of the amendments have been made.

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1. PROLOGUE

The Government of India has amended the Arbitration and Conciliation Act, 1996 ("the Principal Act" or "the Act") by the Arbitration and Conciliation (Amendment) Act, 2015 ("the Amendment Act")[3]. Given the nature of the amendments, it is likely that arbitration as a means of dispute resolution, will be the preferred means of dispute resolutions. The amendments in the Principal Act are essentially based on the 246th Report of the Law Commission of India ("the Law Commission Report")[4].

The Government in the recent past has undertaken a lot of initiatives to bring in more foreign investments. While it is necessary to strike all the right chords administratively, it is equally important to have a legal framework that reposes faith in foreign investors. The Amendment Act can be seen as one such step towards the same. Before discussing the Amendment Act, let us examine as to what led to the Principal Act being amended.

2. THE GENESIS OF ARBITRATION & CONCILIATION ACT, 1996

2.1. Indian Economy prior to and post 1991:

Until 1991, the Indian economy had been a closed one, with strict State control over most of the industries, with negligible private participation & minimal foreign investment. India faced a huge Balance of Payment (BOP) crisis in the year 1991. The government took some drastic reformative steps to liberalize the Indian economy by removing government monopoly, reduced tariffs & interest rates. However, the government now required a strong legal framework to supplement these economic reforms & incoming foreign investment, by way of enactment of legislations. During this period, arbitration had become a globally

[3] The Arbitration and Conciliation (Amendment) Act, 2015.

[4] The Law Commission of India Report, Two Hundred and Forty Sixth Report on Amendments to the Arbitration and Conciliation Act, 1996, (2014), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf, (last accessed 28 July 2016).

accepted means of dispute resolution and the Arbitration Act, 1940 was proving to be insufficient to meet the contemporary challenges.

2.2. The Arbitration & Conciliation Act, 1996:

The Principal Act was hence brought in as a means to adhere to the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Arbitration Rules, 1976 ("the Model Law"). The Statement of Objects & Reasons provided that the Model Law was adopted for establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. Clearly, the intention of the legislature was to establish an investor friendly regime which would ensure settling of commercial disputes expeditiously and instil confidence in foreign investors. As noted by the Law Commission in its report, although the Principal Act had been in place for two decades and arbitration had emerged as a frequently chosen alternative to litigation, it had become afflicted with various problems including those of high costs and delays.[5]

3. THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

In order to strengthen the existing law on arbitration while dealing with the existing issues & anomalies, the following Amendments set out below have been brought in to the Principal Act.

3.1. Definition of "Court":

While the 1996 Act was enacted with the purpose of minimising judicial intervention, it failed to do so, in part due to the delays faced in Courts owing to the burden of backlog of cases. In part, the scheme of the 1996 Act was such that a foreign entity choosing to resolve a dispute through arbitration would have to resort to the lower Courts at various stages of the arbitration adding to the delays which effectively neutralised the benefits of arbitration. For instance, for seeking interim measures, the appointment of an arbitral tribunal, for an application for the Court's assistance in taking of evidence, setting aside of an arbitral award under section 34, or, even the enforcement of an arbitral award. This coupled with the plunging threshold for intervention by the Courts defeated the purpose of choosing a swift alternative dispute resolution mechanism.

[5] Ibid, Chapter-II, Introduction to Proposed Amendments, at 8.

The first important amendment in the Principal Act is hence under Section 2, i.e., the definition clause, wherein the definition of 'Court' has been amended, so as to clearly distinguish a purely domestic arbitration, i.e. seated in India with Indian parties, from an international commercial arbitration seated in India or a foreign country, and to vest jurisdiction solely in High Courts to entertain disputes pertaining to international commercial arbitrations[6]. This step will do away with the scepticism in relation to District Courts, given the diversity in languages and other parameters in India. The Law Commission's rationale for amending this section is to ensure that international commercial arbitrations will be heard expeditiously and by commercially oriented Judges at the High Court level. It also means that irrespective of whether a High Court has original jurisdiction or not, it shall have the power to entertain an issue arising in relation to international commercial arbitration, even in its Appellate capacity.

3.2. Scope of Part 1:

The 1996 Act is divided into four parts, part 1 applicable to arbitrations taking place in India and part 2 applicable to arbitrations taking place in convention countries, viz. international commercial arbitrations. The scope of Part 1 is described under sub-section (2) of Section 2 of the 1996 Act,

"*This part shall apply where the place of arbitration is in India.*"

This section is modelled on the Article 1(2) of the UNCITRAL Model Law, which embodies the principle of seat of arbitration, i.e. arbitration in the territory of the state.

"*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, the interpretation given to sub-section (2) of Section 2 over time, blurred the difference between the geographical venue of arbitration and the seat of arbitration. Whether or not the principle of seat of arbitration has been embodied into this provision, gained further importance when the Supreme Court in Bhatia International v. Interbulk Trading SA[7] ("Bhatia International") interpreted sub-section (2) to read

[6] The Arbitration and Conciliation (Amendment) Act, 2015, s. 2.

[7] *Bhatia International* v. *Inter-Bulk Trading SA*, (2002) 4 SCC 105.

as Part 1 being compulsorily applicable to arbitrations seated in India, and also applicable to those seated outside India, unless expressly or impliedly excluded by an agreement. The consequence of this interpretation was that the threshold for intervention by the Courts in arbitrations seated outside India reduced to a level that the Courts were able to even set aside foreign awards.[8] Thereafter, a five-judge bench of the Supreme Court, in Bharat Aluminum and Co. v. Kaiser Aluminum and Co.[9] ("BALCO"), corrected this interpretation and decided that Part 1 and Part 2 were mutually exclusive of one another.

While BALCO v Kaiser Aluminium was a welcome judgment, the interpretation given to Section 2(2) rendered the applicability of Part 1 of the 1996 Act only to arbitrations seated in India. This meant that none of the provisions under Part 1 would be available to parties in an arbitration seated outside India, i.e. international arbitrations, even if, for instance, one of the parties is Indian or where one of the parties has assets located in India. The parties to such an arbitration hence would have no recourse in the likelihood of the India based party or party having assets in India, disposing of their assets either prior or pending the arbitration, likely to hamper the proceedings.

Therefore, to address this shortcoming, the Amendment Act by way of a proviso extends the scope of section 9 (interim measures by the Court), section 27 (Court assistance in taking of evidence), section 37(1) (a) and section 37(3) (appealable orders) to arbitrations where the award to be made or made, fulfils the recognition and enforcement criteria under the Part 2. A pertinent point is that this amendment recognizes the territorial principle apart from ensuring that the parties to an arbitration where Part 2 is applicable, are not left remediless.

3.3. Power to refer parties to arbitration:

Under the 1996 Act regime, the judicial authority before which an application under section 8 was preferred was mandated to refer the parties to arbitration. The only requirement was to see whether there existed an arbitration agreement.[10] However, the Supreme Court's

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[8] *Venture Global Engineering* v. *Satyam Computer Services Ltd & Anr.*, (2008) 4 SCC 190; *Videocon Industries* v. *Union of India*, (2011) 6 SCC 161.

[9] *Bharat Aluminium & Co.* v. *Kaiser Aluminium & Co.*, (2012) 9 SCC 552.

[10] The Arbitration and Conciliation Act, 1996, s. 8(2).

decision in SBP & Co. v. Patel Engineering Ltd[11], where it propounded that the Courts were to decide certain jurisdictional issues before appointing an arbitral tribunal in an application under section 11, extended this requirement even to section 8. This paved the way for judicial intervention even in the pre-arbitration stage.

To address this shortcoming, the Law Commission recommended the approach of the Supreme Court in Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre[12], where only a prima facie examination has been favoured in an application for reference to arbitration under section 45. The Amendment Act has therefore recognized this approach and confined the role of the judiciary under section 8 by way of substitution of sub-section (1). It now states that a judicial authority can refer any of the contesting parties or *any person claiming through or under him* to arbitration *notwithstanding any judgment, decree or order of the Supreme Court or any Court, unless it finds that prima facie no valid arbitration agreement exists.* The crucial changes contained herein are:

3.3.1. 'Prima facie' review -

Firstly, the role of the judicial authority has been confined to a prima facie review of the existence and validity of the arbitration agreement. The intention behind this seems to have been to restrict any intervention on jurisdictional issues, as noted by the Supreme Court in Sundaram Finance Ltd. v. T Thankam[13]. The non-obstante clause thereafter has been added to override the effect of any past or pending cases affecting such applications. This also means that the question of arbitrability of the matter has largely been left to be decided by the arbitral tribunal, unless the parties contest the validity of the agreement before the Court, or the Court finds fraud or such other elements that vitiate the arbitration agreement.

3.3.2. 'Any person claiming through or under a party'

Further, the amendment imports the language of section 45 which allows persons claiming through or under the signatories to apply for the reference. This overrules the decision in Sukanya Holdings[14] and

[11] *SBP & Co.* v. *Patel Engineering Ltd.*, (2005) 8 SCC 618.

[12] *Shin Etsu Chemicals Co. Ltd.* v. *Aksh Optifibre*, (2005) 7 SCC 234.

[13] *Sundaram Finance Ltd.* v. *T Thankam*, (2015) 2 SCC 66.

[14] *Sukanya Holdings Pvt. Ltd.* v. *Jayesh H Pandya & Anr.*, (2003) 5 SCC 531.

recognizes the principles of the decision in Chloro Controls v. Severn Trent Water Purification[15] which is applicable only to Part 2. In the latter case, the group of companies doctrine was applied to bind 'non-signatories' to the arbitration agreement. The amendment records this by broadening the scope of 'parties' so as to include any person claiming through the party to the arbitration agreement, such as successors-of-interest of such parties. The Law Commission noted that in case of unincorporated entities, where the issue of 'personality' is a difficult legal question, a closed definition of parties can create further difficulties.

3.3.3. 'Copy of the arbitration agreement'

The second major change in section 8 is with regard to production of the Arbitration Agreement between the parties. It was previously contemplated that an application under section 8, i.e., to refer the parties to arbitration was to be accompanied by the original arbitration agreement or a duly certified copy thereof, failing which, such application was liable to be rejected. In government contracts, or contracts between the state/state agency/instrumentality where the State is employer and a private party (being a concessionaires, contractor etc.) there is a general trend that the State doesn't provide a copy of the original agreement or a certified copy of the agreement. What is provided is a photo-copy of the agreement. This proved to be a big hurdle where a section 8 application was preferred by the private party.

However, a proviso has been now added to sub-section (2) of Section 8, which provides that *where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court*. Therefore, now an application under section 8 will not be defeated on the mere technicality of non-production of original agreement/certified copies.

[15] *Chloro Controls* v. *Severn Trent Water Purification*, (2013) 1 SCC 641.

3.4. Interim Relief by the Courts:

Another important amendment is to section 9 of the Principal Act, where two new sub-sections, viz. section 9(2) and 9(3) have been added with the objective of reducing the role of Courts and empowering the arbitral tribunals.

3.4.1. 'Invoking arbitration within 90 days'

Section 9(2) prescribes that arbitration has to commence within a period of 90 days from the date of passing of any interim-order/measure of protection under section 9(1).[16] A lot of parties invoke arbitration by serving a notice to the other party merely in order to approach a Court for interim protection under section 9, so as to portray their 'manifest intention' to arbitrate. Once such protection is granted, they are reluctant in commencement of arbitration and enjoy the fruits of an interim order in an unfettered manner. A large number of petitions are pending on account of this in various courts in India, and it is about time this is changed.

Section 9(2) intends to change that in as much as it mandates a time frame for the parties to commence arbitration post passing of an interim order. An extension to this time period may be granted by the Court at its discretion upon examining the facts and circumstance of a case, hence, the parties will remain under compulsion to commence arbitration expeditiously. However, the amendment does not provide for an automatic vacation of an interim protection if the parties fail to commence arbitration within 90 days.

3.4.2. 'Empowering the arbitral tribunal'

Another important aspect of this amendment is to reduce intervention by Courts where the arbitral tribunal is empowered to grant interim relief.[17] Following the Amendment, it is now a general rule that the Courts are not to interfere in on-going arbitration proceedings, or where the arbitral tribunal has been appointed, if a party tries to circumvent the same by applying for interim relief under section 9(1). However, an exception has been provided to this bar in cases where it appears to the Court that resort to section 17 is likely to render the

[16] The Arbitration and Conciliation (Amendment) Act, 2015, s. 9(2).

[17] The Arbitration and Conciliation (Amendment) Act, 2015, s. 9(3).

party remediless. The intention of the legislature here is to have a check-and-balances mechanism while ensuring that Courts come in to picture only in extreme circumstances. The purpose of this amendment is to ensure that parties eventually resolve their disputes through a proper adjudication on merits by an arbitral tribunal without resorting to or adopting means which render an arbitration clause redundant.

3.5. Appointment of Arbitrator:

In cases where parties are unable to appoint an arbitral tribunal consensually, the Principal Act provided for filing an application under section 11 for the appointment. For domestic arbitrations, this power had been vested with the High Courts, 'the Chief Justice or a person designated by him' to be precise, while for international commercial arbitrations, the same had been vested with the Supreme Court through 'the Chief Justice of India, or any persona designated by him'. With the passage of time, the power of appointment of an arbitral tribunal assumed more of a judicial role than a supplemental one. This broadened the scope for pre-arbitration judicial intervention to such levels that Courts began delving into questions of accord and satisfaction of contractual obligations[18], which was intended to be the domain of the arbitral tribunal by the Act. This gave rise to the debate whether this power is a judicial one or an administrative one and became the subject of judicial interpretations. The Supreme Court in Konkan Railway Corporation Ltd. v. Rani Construction[19] held that power to appoint arbitrator is an administrative power. However in SBP & Co. v. Patel Engineering[20] the Court took a contrary view and held that the power to appoint an arbitrator by the Chief Justice of India or his designate is a 'judicial power'.

Section 11 of the Amendment Act however strives to confine this role only to a prima facie test of determination of the existence of the arbitration agreement. The amendment substitutes the expressions 'Chief Justice or any person or institution designated by him' in sub-sections (4), (5) and (6) with 'the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court' respectively. It also substitutes 'Chief Justice of India or the person or institution designated by him' with the words, 'the Supreme Court or

[18] *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267.

[19] *Konkan Railway Corporation Ltd.* v. *Rani Construction*, AIR 2000 SC 2821.

[20] Supra *note* 9.

the person or institution designated by that Court' under sub-section (9).

The amendment further makes it clear by amending sub-section (7) that the decision made by the Supreme Court, or as the case may be, the High Court or the person or institution designated by such Court shall be final and not amenable to appeal including a Letters Patent Appeal. However, a Special Leave Petition (SLP) has not specifically been barred from the purview of this section.

Another important feature of this amendment is fixing of a time-line for appointment of arbitrator by the Supreme Courts and High Courts.[21] A bare perusal of the sub-section suggests that the period of 60 days for appointment of an arbitrator by the Supreme Court or High Court (as the case may be) is only guiding in nature and not mandatory, even so, the presence of a recommendatory time line will have a bearing on petitions filed henceforth under this section.

3.6. Fees Structure:

Another aspect of cost effectiveness of arbitration is in terms of the fees charged by an arbitral tribunal. Under the 1996 Act regime, high costs arose from the unilateral and excessive fees charged by arbitral tribunals to which the parties were usually unable to express their objection.[22] To address this concern, the Amendment Act has laid down a model-fee structure for arbitrators by inserting a new Schedule IV[23]. There is now a cap on fees depending upon the sum in dispute. A sole arbitrator will be entitled to an additional amount of 25% additional amount. This will allow predictability of costs for the parties deciding to go for arbitration. It also gives an idea to rival parties to assess how viable it would be to initiate arbitral proceedings. However, these caps are not applicable to international commercial arbitrations and in cases other than international commercial arbitrations, where the parties have mutually set a fee structure.

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[21] The Arbitration and Conciliation (Amendment) Act, 2015, s. 11 (13).

[22] *Union of India* v. *Singh Builders Syndicate*, (2009) 4 SCC 523.

[23] The Arbitration and Conciliation (Amendment) Act, 2015, s. 11(14), Sch. IV.

3.7. Independence & Impartiality of arbitrators:

Section 12 of the Principal Act was modelled on Article 12 of the Model Law, which leaves the determination of circumstances likely to give rise to justifiable doubts as to independence or impartiality of the arbitrator, on the reasonability test. The article also gave a lot of room to the parties to model their requirements in an arbitrator. Prior to the onset of the 1996 Act, the practice of appointing persons associated with one of the parties, commonly, an employee, as the arbitrator, had evolved, supported by Supreme Court cases upholding the binding terms of the contract.[24] This trend needed a check as it seriously undermined the principles of natural justice, thereby the arbitration itself. The Law Commission makes a pertinent point in favour of the need for impartiality and independence of arbitrators as against party autonomy.[25]

The Amendment takes care of this concern by dispensing with subjectivity and providing an illustrative list of situations that may qualify as circumstances giving rise to justifiable doubts as to independence and impartiality of the arbitrator. This list under a new Schedule V[26] is based on the Orange List of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines")[27]. As per the new section 12(1), this list will come into picture where an arbitrator files a mandatory declaration regarding two things, one, his independence and impartiality in terms of the circumstances referred to above, and, second, his ability to complete the entire proceedings within twelve months.[28] The disclosure is to be made by the arbitrator in a form specified in the new Schedule VI[29]. However, a person to be appointed as an arbitrator will be deemed ineligible when he/she shares relationships with the parties, counsel or the subject-matter of the

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[24] *Indian Oil Corporation Ltd.* v. *Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520; *Ladli Construction Co.* v. *Punjab Police Housing Corp Ltd.*, (2012) 4 SCC 609.

[25] Supra *note* 2, at 30.

[26] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. V.

[27] *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014, IBA Council, International Bar Association, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines, (last accessed 29 July 2016).

[28] The Arbitration and Conciliation (Amendment) Act, 2015, s. 12 (1).

[29] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. VI.

dispute[30]. The list for this purpose has been inserted under a new Schedule VII[31], which is based on the Red List of the IBA Guidelines[32]. The section also seeks to ensure that the arbitrator devotes enough time to the proceedings so that the same are completed within 12 months.

3.8. Interim measures by Arbitral Tribunal:

Under the scheme of the Principal Act, an arbitral tribunal could merely order a party to take interim measures of protection. If such order was not complied with, all that an arbitral tribunal could do was to refer such contemptuous action to the relevant Court upon an application under section 27(5) by the aggrieved party, and it was the Court which could determine the question of contempt. This lacuna was also recorded by the Supreme Court in Sundaram Finance Ltd. v. NEPC[33] that while an arbitral tribunal has the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that section 9 gives the Court power to pass interim orders during the arbitration proceedings.

Another crucial amendment that has hence been brought in is, enforceability of orders passed by an arbitral tribunal. Section 17 (ii) (e) of the Amendment Act provides that the tribunal shall have power to pass an interim order in accordance with section 17(ii) (a) to (d) and sub-clause *(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.* Further, section 17(2) has been added which provides that "*subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.*"

As against the Principal act, the Amendment act empowers a tribunal to enforce its orders. Therefore, parties will think twice before flouting any order passed by a tribunal. This also compliments with the

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[30] The Arbitration and Conciliation (Amendment) Act, 2015, s. 12(5).

[31] The Arbitration and Conciliation (Amendment) Act, 2015, Sch. VII.

[32] Supra *note* 23.

[33] *Sundaram Finance Ltd.* v. *NEPC*, (1999) 2 SCC 479; *M.D. Army Welfare Housing Organization* v. *Sumangal Services Pvt. Ltd.*, (2004) 9 SCC 619.

amendment to section 9 whereby the Courts will refrain from entertaining applications where the arbitral tribunal is capable of granting relief to the parties.

3.9. Curtailing unnecessary adjournments:

Another measure which the Amendment act brings in is to expedite arbitral proceedings by putting an end to unnecessary adjournments by empowering the arbitral tribunal to hold oral hearings on a day to day basis.[34] The discretion whether to hold oral hearings or not, no more remains solely with the parties. Furthermore and importantly, failure to attend hearings or seeking adjournments without a sufficient cause can attract costs including exemplary costs. Therefore, parties will avoid seeking unnecessary adjournments.

3.10. Timeline for passing of an award:

We now come to, perhaps, the most important amendment in the Amendment Act, which is likely to attract a lot of positive responses from stake-holders as well as practitioners, arbitrators, etc. The Amendment Act has provided a time frame of 12 months for completion of arbitration proceedings, for which a new section 29A has been added. An arbitrator is mandated to finish arbitral proceedings and make an award within a period of 12 months from the date of reference. If an award is made within 6 months instead then the arbitrator is entitled to additional fee (to be decided mutually by the parties), which incentivizes the arbitrators to finish off the proceedings expeditiously. However, under section 29A(3), the parties have been bestowed with a discretion of extending the term of 12 months by a further period of 6 months by mutual consent. Beyond 18 months (12 months as stipulated in 29A (1) and 6 months in 29A (3) only a Court can extend the period.

If an award is not made within such period (12 months, if not extended or 18 months) then the mandate of the tribunal shall stand terminated. If a court comes to the finding that the delay in completion of arbitration as per the prescribed timelines has been caused on account of the tribunal, it can reduce the fee of the arbitrator(s) by a maximum of 5% per month for each month's delay.[35] It is to be noted that a

[34] The Arbitration and Conciliation (Amendment) Act, 2015, s. 24(1) *proviso*.

[35] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (4).

further extension as contemplated under section 29A (3) can be granted only on a sufficient cause made out by any of the parties on such conditions as the Court may impose.[36] Courts may also impose actual or exemplary costs on the parties.[37] Any such application made to the Court by a party is to be decided by the Court within a period of sixty days from the date of service of notice on the opposite party.[38]

The Amendment also provides that in cases where one or all of the arbitrators are substituted, then the proceedings shall continue from the stage where the arbitrator(s) left them and will not start afresh. It has been seen in a lot of cases that where arbitrators are substituted, the new arbitrator(s) start the proceedings afresh, which is a time consuming & costly affair for the parties. A thorough attempt has been made to ensure that the proceedings don't drag for years and are concluded as expeditiously as possible. Through this system the Courts can monitor any inordinate/intentional/unreasonable delay beyond a period of 18 months.

On the flip side, 18 months may not be sufficient for cases involving complex technical issues and extensive documentation, such that in such cases sufficient time is required to review the voluminous documents, take expert opinions, etc. Beyond the period of 18 months, a Court must be approached to extend the time limit further. It must be borne in mind that this section empowers the Courts to impose penalties on both, the arbitrators as well as the parties in case of delay. The Courts must exercise discretion with caution, depending upon the facts and circumstances of the case and grant extension accordingly. An application to the Court for further extension could also be a time consuming affair. In this manner, the section ensures that there will not be any frivolous applications for extension of time.

3.11. Fast Track Procedure:

Among the important objectives of the Amendment Act, one is to make the arbitration process more fruitful by introducing streamlining measures and another is to make it cost effective for its users. At times, the cost of the arbitration borne by the party or parties, as the case may be, exceeds the value of the arbitration or the claims brought forward

[36] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (5).

[37] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (8).

[38] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29A (9).

by the parties. The Amendment Act introduces a Fast Track Procedure by way of section 29B that is based on 'documents only arbitrations' to cater to these objectives. Such type of an arbitration is suited to straightforward and simple cases of facts, and where all the relevant evidence can be found in documents such that the need for hearings can be bypassed. The arbitral tribunal makes the award solely on the basis of the written submissions made by the parties with oral submissions only if deemed necessary, all within 6 months from the date of reference. It is also at the hearings stage that the proceedings usually encounter delays in the form of adjournments that then shoot up the costs, which this fast track procedure aims to dodge. Such an arbitration will be suitable in both cases involving small amounts, such as consumer disputes, or high value transactions, where both the parties are willingly seeking a prompt resolution such as disputes in the financial sector relating to trading activities, etc., or disputes in the construction sector relating to price escalation, work fronts, etc.

3.11.1. Invoking the procedure

Parties to an arbitration agreement choosing to resolve their disputes through the fast track procedure can do so, at any stage, before or during the appointment of the arbitral tribunal, and by a written agreement referring to the resolution of disputes by the fast track procedure.[39] The parties may agree for an arbitral tribunal consisting of a sole arbitrator which is to be chosen by them.[40] While a sole arbitrator is preferable for expeditiously moving through the proceedings, the provision does not make it mandatory to have a sole arbitrator which becomes beneficial where the parties do not agree on one.

3.11.2. Conducting the proceedings

After the appointment, the arbitral tribunal shall follow the procedure for conducting a fast track arbitration prescribed under sub-section (3) of section 29B. The sub-section mandates only certain basic rules to be followed by the arbitral tribunal, much of the procedure has been left to be agreed upon by the parties. The provision does not specify the length of the submissions to be made and again leaves it open for the parties to agree upon or the arbitral tribunal to instruct. The submissions must include all written pleadings, relevant documents,

[39] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (1).

[40] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (2).

evidences and expert reports, wherever necessary.[41] However, an endeavour to focus the submissions on the precise issues and material facts without compromising on their clarity must be made. Further, the arbitral tribunal can call for any further information from the parties in addition to that already filed, or furthermore, hold oral hearings where the parties so request or the arbitral tribunal considers it necessary for clarifications.[42] Formalities for conducting oral hearings may be dispensed with,[43] in spite of which, it will be pertinent for the arbitral tribunal to distinguish between a real need to be fully heard in the matter as against an unnecessary prolongation of the proceedings.

3.11.3. Award

The award shall be made within a period of 6 months from the date the arbitral tribunal is appointed by the parties.[44] If a tribunal is unable to make the award within the stipulated time frame, the provisions for extension of time limit as under section 29A shall be applicable.[45]

The section is silent on interim measures and understandably so, because in a procedure spanning 6 months or less, resort to interim measures will delay proceedings as against the purpose of this section. A successful fast track procedure arbitration is hence, dependent upon the willingness and the cooperation of the parties.

3.12. Interest on Award:

The power to award interest found under section 34 of the Civil Procedure Code, 1908 ("CPC") was embodied into section 31(7) of the 1996 Act and bifurcated into two categories – pre-award and post-award. However, the power of the arbitral tribunal to award this interest became a moot point in a lot of judgments of the Supreme Court.[46] The Supreme Court, in State of Haryana v. S L Arora[47] held that section

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[41] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (a).

[42] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (b) & (c).

[43] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (3) (d).

[44] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (4).

[45] The Arbitration and Conciliation (Amendment) Act, 2015, s. 29B (5).

[46] *U.P. Cooperative Federation Ltd.* v. *Three Circles*, (2009) 10 SCC 374; *Hyder Consulting (UK)* v. *Governor of Orissa*, (2013) 2 SCC 719; *Indian Hume Pipe Co. Ltd.* v. *State of Rajasthan*, (2009) 10 SCC 187.

[47] *State of Haryana* v. *S L Arora*, (2010) 3 SCC 690.

31(7)(b) did not empower the arbitral tribunal to award compound interest, which meant that interest could not be awarded on the portion of the sum awarded as pre-award interest. This essentially went in contradiction to section 31(7). Later, in a three-judge bench decision of the Supreme Court[48], the majority disagreed with the S L Arora case and found that the meaning of 'sum' in section 31(7)(b) was intended to include both the principal sum and the pre-award interest and hence, the arbitral tribunal could again award interest on the entire sum.

An amendment has now been brought in by way of clause (b) sub-section (7)[49], incorporating this interpretation and setting forth a rate that is gauged by the current rate of interest, plus 2% rather than the strict prescription at 18%, hence aiming for functionality and longevity of the provision.

3.13. Regime for Costs:

The Amendment Act introduces a new provision governing the awarding of costs by the arbitral tribunals and also the Courts. In line with the objective of making arbitration, a more robust and cost effective means, the need for this provision arises from the lacuna in the 1996 Act that did not allow the arbitral tribunal to apportion the costs incurred by the parties on the basis of the success of theirs claims. Until now, they were apportioned on the basis of the principles in CPC, consequently, the losing party only paid a fraction of the actual costs incurred by the winning party. The new section adopts 'costs follow the event' rule as the general rule, an exception to which may require a separate order with reasons. The arbitral tribunal or the Court, as the case may be, is also provided with guidelines for the apportioning the costs.[50]

Further, the Courts and the arbitral tribunal have also been empowered to take into account the conduct of the parties. The threat of suffering the arbitration/litigation costs incurred by the winning party on account of frivolous or excessive claims brought forward will act as a deterrent to delaying techniques employed by the parties, for instance, challenging the appointment of arbitral tribunal, correctness of the award, setting

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[48] *Hyder Consulting (UK)* v. *Governor of Orissa*, (2013) 2 SCC 719.

[49] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31 (7) (b).

[50] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (4).

aside the award, etc.[51] Reflecting the relative success and failure of the parties, this rule will also bring in predictability. Finally, the provision enables the parties to pre-meditate the costs by allowing an agreement, however to be made after the dispute has arisen, for apportioning the costs of the arbitration between the parties.[52]

3.14. Challenging the award & the "public policy" question:

Unlike litigation, arbitration does not have a provision for appeal & an award under the 1996 Act could be challenged only on procedural grounds provided under section 34 of Part 1. One of the grounds for challenge, apart from procedure, is when the arbitral award is in conflict with the public policy of India[53]. Whereas an explanation provides a guiding description to public policy of India, over the years, the interpretation by Courts has broadened its scope, as a result, lowering the threshold for intervention and for a successful challenge by the losing party.

The term 'public policy'[54] was first described by the Supreme Court in Renusagar Power Plant Co. Ltd. v. General Electrical Co.[55] ("Renusagar case"), where it was held that a foreign award could be refused enforcement only if it was contrary to the fundamental policy of Indian law, or interests of India, or justice or morality. The Supreme Court, adopting these three grounds into domestic arbitration, in ONGC v. Saw Pipes[56] ("Saw Pipes case") further broadened the scope to include 'patent illegality'. An award would be considered 'patently illegal' if it violated the substantive laws of India, as in this case, the terms of the contract which would then be in contravention of section 28(3) of the 1996 Act. This expanding definition of 'public policy of India' concerned the foreign stakeholders when as a consequence of Bhatia International and Venture Global v. Satyam Computers[57], the scope of challenge under section 34 expanded in such a manner that even foreign

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[51] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (3).

[52] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31A (5).

[53] The Arbitration and Conciliation (Amendment) Act, 2015, s. 34 (b) (iv).

[54] Foreign Awards (Recognition and Enforcement) Act, 1961, s. 7(1) (b) (ii).

[55] *Renusagar Power Plant Co. Ltd.* v. *General Electrical Co.*, AIR 1994 SC 860.

[56] *ONGC* v. *Saw Pipes*, (2003) 5 SCC 705.

[57] *Venture Global* v. *Satyam Computers*, (2008) 4 SCC 190.

awards could to be subjected to the 'patent illegality' test under public policy which is discussed further in detail in heading of foreign awards.

The consequence of the Saw Pipes case was to allow the parties to present their case afresh and the Courts to re-open the case and re-appreciate the evidence so as to prolong the adjudication process and frustrate the objective of choosing arbitration. However, the Supreme Court in a recent case[58] steered back in the pro-arbitration direction while interpreting and providing guidelines for the grounds under public policy thereby increasing the threshold for judicial intervention in domestic arbitration. The most important interpretations being that, firstly, the arbitral tribunal is the sole judge of the quality and quantity of evidence, and secondly, the Courts are not empowered to act as appellate forum to set aside awards on the ground of errors of fact unless the approach had been arbitrary or capricious, or shocks the conscience of the Court. This decision is also applicable to domestic awards in an international arbitration, where the arbitration pre-dates the BALCO decision, thus assuaging concerns of foreign stakeholders involved in such arbitrations.

3.14.1. Amendment of 2015 -

The Amendment to section 34 rationalizes and reduces the scope of intervention by the Courts in a challenge proceeding under the ground of public policy of India. An award can no longer be challenged on the vague ground of 'interests of India'. It also mandates that testing an award will not entail a review on the merits of the dispute. Further, to restore the intended consequence of the Saw Pipes case, the new sub-section (2A)[59] distinguishes between a purely domestic award and a domestic award in an international arbitration, whereby only the former can be set aside by the Courts if the award is vitiated by patent illegality. Therefore, a purely domestic award that contravenes, either, the substantive law of India such that it goes to the root of the matter and not simply of a trivial nature, or, the Arbitration Act itself, or the terms of the contract, will be found to be vitiated by patent illegality.

The Amendment offers predictability by directing the applicant to give a prior-notice to the other party, along with an affidavit recording this compliance. It mandates that the application be disposed of within a

[58] *Associate Builders* v. *Delhi Development Authority*, 2014 (4) ARBLR 307(SC).

[59] The Arbitration and Conciliation (Amendment) Act, 2015, s. 31 (2A).

period of one year from the date of notice to the other party. A pertinent point here is that Courts are not empowered to extend this period. This will ensure that the applications are not an afterthought, with fewer chances of delay in hearing of the matter, and removal of the possibility of an ex-parte hearing or the applicant adopting any delaying techniques.

3.15. Enforcement of Awards:

Under the Principal Act, before making an application for enforcement, the parties were required to wait for a three month period from the date of the award to lapse. The award would then be enforceable under CPC as if it were a decree of the Court. An application under section 34 in the meantime, would however cause an automatic stay on the enforcement until such application was disposed of.

This mandatory provision meant that it incentivized the losing party to delay the enforcement process. Until recently, the threshold for judicial intervention was low enough to contribute to the delay in the enforcement process. This coupled with the backlog of cases in the Courts incapacitates the winning party, consequently frustrating the entire point of choosing a swift dispute resolution mechanism such as arbitration.[60]

Amendment to Section 34 dispenses with the automatic stay on enforcement of the arbitral award in case of an application under section 34. An applicant is now required to make a separate application for stay before the Court which shall grant a stay at its discretion for reasons recorded in writing.[61] In case of an arbitral award for payment of money, the Court may grant a stay on the same grounds as a money decree. This will ensure that the parties do not challenge the arbitral award before the Courts as an afterthought or with the intention only to delay.

3.16. Appeals:

Amended Section 37 empowers parties to appeal against orders refusing to refer the parties to an arbitration in an application under section 8.[62]

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[60] *National Aluminum Co. Ltd.* v. *Pressteel & Fabrications*, (2004) 1 SCC 540.

[61] The Arbitration and Conciliation (Amendment) Act, 2015, s. 36 (2).

[62] The Arbitration and Conciliation (Amendment) Act, 2015, s. 37 (a).

3.17. Enforcement of Foreign Awards:

Section 47 under Part 2 of the 1996 Act (New York Convention awards) and Section 56 under Part 3 of the 1996 Act (Geneva Convention awards) have been modified to record the amendment to the definition of 'Court' under section 2(e) of the Act, which has the effect of granting jurisdiction to the High Courts for matters relating to international commercial arbitrations. The amendment now enables a party with a foreign arbitral award to apply for enforcement directly before the High Court which are better equipped to handle international commercial arbitration cases and even have dedicated benches in some states.

Section 48 caters to the New York Convention awards and section 57 caters to the Geneva Convention awards. The conditions for enforcement under both sections prescribe a public policy test akin to section 34. Section 34 however deals with the validity of an arbitral award that is not yet final and executable whereas section 48 and 57 deal with the conditions for enforcing a final and executable arbitral award. Even so, these sections have been subjected to the same interpretations as section 34 in recent judgments, especially concerning the spectrum of the public policy test, which have been discussed below.

The patent illegality test laid down the Supreme Court in the Saw Pipes case was inaptly extended to conditions for refusing enforcement to foreign awards by the Supreme Court in the Phulchand Exports Ltd. v. O.O.O. Patriot[63], where it was held that the term 'public policy of India' under sections 34 and 48 are basically the same in scope and substance. This meant that the parties could now challenge a foreign award on the extensive grounds provided under public policy test and practically reargue the matter. The Courts would then engage in a review of the matter to examine whether the award was vitiated by patent illegality and hence against the public policy of India.

This approach was then steered by the Supreme Court in recent Shri Lal Mahal Ltd. v. Progetto Grano Spa[64], where it refused to apply the same test of public policy as under section 34. It propounded that an award challenged under section 34 had not attained finality in contrast with a final and binding award for enforcement under section 48. The Courts under a section 34 application have the jurisdiction to decide the validity

[63] *Phulchand Exports Ltd.* v. *O.O.O. Patriot*, (2011) 10 SCC 300.

[64] *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*, (2014) 2 SCC 433.

of an award which then attains finality and enforceability. Section 48 does not empower Courts to act as an appellate forum and delve into the merits. The Amendment narrows down the scope of the public policy test and goes back to the Renusagar case approach, however dispensing with the reference to 'interests of India'.[65]

Therefore, a foreign award will only be in conflict with public policy of India if the making of the award is induced by fraud or corruption or in violation of section 75 or 81, or in contravention of the fundamental policy of Indian law, or, most basic notions of morality or justice. The provision mandates that the public policy test will not entail a review on the merits.[66] This clarification streamlines the procedure for enforcement of foreign awards in India, aiming for making arbitration the preferred means for an effective dispute resolution mechanism for foreign stakeholders.

4. CONCLUSION:

The Amendment Act is indeed a welcome change for the dispute resolution canvas in India, a lot will however depend on its implementation. One of the primary objectives of the Amendment was to reduce judicial intervention and remove superfluous procedural requirements such that choosing arbitration becomes an efficacious form of dispute resolution.

Judicial intervention in arbitral proceedings has been reduced at all stages of arbitration, beginning from pre-reference to enforcement of the award. For some stages, the role of the Courts has been confined by prescribing the limits whereas at some stages by providing a time frame for disposing of the matter before them. The empowerment of the arbitral tribunal by enabling them to enforce their orders in the same manner as the Courts for the purpose of the proceedings before it, is another such step in the right direction albeit a departure from the Model Law. The Amendment also offers clarity in applicability of public policy to purely domestic arbitrations, India seated international commercial arbitrations and foreign seated ones. There is also now a section dedicated to resolution of disputes through the fast track procedure that dispenses with the need for conducting hearings. The Amendment hence manages to create a balance between court

[65] The Arbitration and Conciliation (Amendment) Act, 2015, s. 48 (2), *Explanation 1*.

[66] *Ibid.*

intervention and the arbitral process. The inclusion of the Red and Orange Lists of the IBA Guidelines on Conflicts of Interest in International Arbitration is also one such step that strives to create a balance between procedural fairness and party autonomy.

Another highlight of the amendment is the 18 month time frame for concluding proceedings and making of an award. How effective the time limits are, is something that can be assessed only after the results of the amendments emerge. Till such time it can definitely be considered as an earnest endeavour on part of the legislature to expedite procedures.

A few of the provisions of the amendment are likely to invite some scepticism. For instance, the flipside to the 18 month time line is that once the time line is transgressed, one has to approach the Court by way filing an application for an extension of time. This step will require an examination by the Court on a lot of parameters that will affect the arbitration process. The backlog of cases and listing issues at the Court may also add to the delays affecting the arbitration. Also, this time frame may prove to be inadequate for various shapes and sizes of arbitrations, some of which may require a thorough study of voluminous documents or expertise to understand the facts.

Another point which the Amendment overlooks is the requirement of an amendment to section 32, which renders an arbitral tribunal *functus officio* once the final arbitral award is made. The amended section 17 runs contrary to this, by empowering the arbitral tribunal to order interim measures even after making the final arbitral award, i.e. termination of the proceedings, up until its enforcement. It will have to be seen how the Courts interpret this provision.

One of the reasons for parties to choose arbitration over litigation is the privacy and confidentiality that arbitration offers. The obligation of confidentiality has been recorded by a lot of legislations world over including some of the arbitral institutes in India. However, the Act provides a recourse only as a challenge under section 34(2) (b), so a party would have to first wait for the proceedings to conclude. The Amendment was an opportunity to introduce a provision making it an obligation and to provide for a remedy in case of a breach.

However, there are a lot of positives to take away from the Amendment Act and the Amendment Act is likely complement economic reforms & instil confidence in stake-holders.