"An Insight of Amendments Made In The Arbitration & Conciliation Act In Contemporary Indian Scenario And Its Relevance In Changing Mercantile Environment"

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Introduction

Arbitration as a component for dispute determination is wanted to relate with financial advance and maintain a strategic distance from delayed case. The development of the law of arbitration in India can be followed back to three enactments beginning from the arbitration act 1940, the arbitration (protocol and convention), 1937 and the foreign award (recognition and enforcement act) 1961 and this act of 1940 chiefly managed domestic arbitration and intercession of court was required in all phases of the proceedings, as the arbitration act of 1940 was felt to be old. To guarantee proceeded with impact to the arrangements of this act, parliament promulgated second arbitration and conciliation ordinance 1996.

After the ordinance was passed by the parliament and the arbitration and Conciliation Act, 1996 appeared. The plan of this enactment was to combine and correct the law identifying with local arbitration, international commercial arbitration and enforcement of foreign awards and it likewise enhances the instrument for the rapid determination of the disputes that emerge between the gatherings to a contract and in addition limits legal intercession. This act of 1996 has both procedural and substantive viewpoints; be that as it may, this Act is procedural in nature. To make our laws as per the laws received by United Nations Commission on International Trade Law (UNCITRAL), the said Act continues on the premise of UN model law. In any case. there were different evident extension for act of spontaneity in this act and to acquire greater clearness the arbitration laws and also make the arbitration procedure more disentangled there was a requirement for amendment prepare in this act, So an ordinance was proclaimed by the governing body known as (Arbitration and Conciliation (Amendment) Ordinance 2015) which was an endeavour towards making arbitration a favoured method of settlement and furthermore to decrease load on courts.

The Amendment Act is certainly an improvement towards culminating Indian Arbitration Law and has been hailed for giving fundamental main thrust to the advancement of the Indian arbitration administration. A modest endeavour has been made to give the experiences and fundamentally break down the amendments joined in the 2015 amendment act and its impact.

Critical Analysis of The Amendments Incorporated In The Arbitration And Conciliation (amendment) Act, 2015

•Interim Measures

•By Court

After the judgment of the Supreme Court in ***Bharat Aluminium and Co. v. Kaiser Aluminium and Co.*** ("**BALCO**") the Indian courts had no jurisdiction to intervene in arbitrations which were seated outside India. Post BALCO, if the assets of a party were located in India, and there was a likelihood of the dissipation of the assets, the other party could not approach the Indian courts for interim orders. Since the interim orders made by arbitral tribunals outside India could not be enforced in India, it created major

hurdles for parties who had chosen to arbitrate outside India. This anomaly has been addressed in the Amendment Act with the insertion of Section 2(2), which makes the provision for interim relief(s) also applicable in cases where the place of arbitration is outside India, subject to an agreement to the contrary. However, there are few concerns. This option is only applicable to parties to an "international commercial arbitration" with a seat outside India. This means that the protection will not be available to two Indian parties who choose to arbitrate outside India.

The amendments to section 9 envisage that if an interim order is passed by the court before the commencement of the arbitral proceedings then in such case the arbitration proceedings must commence within a period of 90 days from the date of the order or within the time as determined by the court. The court shall also not entertain any application under this section unless it finds that the circumstances exist which may not render the remedy under section 17 efficacious.

These amendments to this section are brought in order to avert delays in the commencement of the arbitral proceedings and also to ensure that parties to ultimately restore to arbitration mechanism and get their disputes settled through arbitration mechanism on merits. After the constitution of tribunal the powers under section 9 can be exercised only in case if the court has reason to believe that the remedies provided under section 17 are rendered inefficient.

•By Arbitral Tribunal

Amendments to section 17 of the Act provide for the power of issuing interim measures by the arbitral tribunal which are now congruent to the powers possessed by the courts. In order to reduce the intervention of courts and to facilitate the parties to arbitral tribunal, the amendment to this Act provides that once the arbitral tribunal has been constituted, the courts cannot entertain application for interim measures under section 9 unless there are circumstances which may not render the remedy of obtaining interim measures from arbitral tribunal inefficient. This can also be seen from the case ***Sri Tufa Chatterjee v. Sri Rangan dhar****that* even though an earlier application for interim relief may have been filed in Court, once arbitral proceedings have commenced and an arbitral tribunal has been appointed, interim relief would have to be sought before the learned Arbitrator. The Court would be deprived of its power to grant interim relief unless the Court is satisfied that circumstances exist, which may not render the remedy provided under Section 17 efficacious. In this case, there are no such circumstances. However, considering that the application for interim relief had been entertained long before the amendment and an interim order had been in force, the Court might have passed limited interim relief and remitted the parties to proceedings under Section 17 before the Arbitral Tribunal.

The amendment also gives clarity to the fact that such interim measures granted by the arbitral tribunal will have the same effect as that of the civil court under civil procedure code, 1908. This is a significant step as the interim orders passed by the arbitral tribunal under the previous arbitration act could not be statutorily enforced, whereas under the new arbitration act the arbitral tribunal has the power to order interim measures even after making of the arbitral award, but before it is enforced.

•Appointment of The Arbitrator

As far as the "appointment of an arbitrator" under section 11 is concerned the new arbitration law makes it necessary for the Supreme Court or High Court or the person designated by them to appoint the arbitrator within 60 days from the date of service of notice to the opposite party. As per this new act, the expression chief justice which is used in the earlier act has been replaced with Supreme Court or as the

case may be(high court or any person designated by such court). But the designation of any person or institution by Supreme Court for making the appointment of arbitrator shall not be considered as a delegation of judicial power by, as the ambit of powers conferred to a person or institution so designated shall only be limited to the appointment of arbitrator according to the provisions of this act, also the Supreme Court or the case may be(High Court) while considering the application regarding the appointment of arbitrator shall confine with the examination of the existing arbitration agreement as well as any person so designated shall be confined to the conditions specified in the arbitration agreement between the parties.

Under this section the new act also specifies that the decisions made by the Supreme Court or High Court or any person designated by such court shall be final and attempts have been also made to fix the fees payable to arbitrator and empower the High Court to frame rules as it may be necessary, after taking into consideration the provisions specified in the fourth schedule. The proposed amendments made to this section are to ensure that there is a expediting the process for appointment of the arbitrator and also to create the nexus between the provisions of section 11 and section 12(1) which did not exist earlier.

•Grounds For Challenge Regarding The Appointment Of Arbitrator

Amendment to section 12, as per new Act provides for the declaration on the part of arbitrator regarding his impartiality and independence. A schedule has also been inserted (fifth schedule) which gives rise to justifiable doubt to impartiality and independence of arbitrator. The circumstances given in the fifth schedule are very exhaustive and any person not falling under the said schedule is likely to be independent and impartial in all respects.

Although in the ***Reliance Communication Ltd. Vs. state of Bihar and Ors.*** The petitioner raised grievance under section 12 of this act which provides for an independent forum to decide the dispute as for the action taken by the facilitation council without embarking the conciliation itself and cannot be an independent forum. The court held that it is a misplaced apprehension if facilitation council satisfies all the conditions of section 12 and have no interest with the parties then it can be an independent body. The court found that this council has not followed the procedure of section 18 but on this ground, the court doesn't find any objection from the petitioner company and cannot ask them to refer to an alternate forum.

Also, another schedule (seventh schedule) is added and a provision has been inserted that in regard to any prior agreement of the parties, if the arbitrator's relationship with the parties or the counsel or the subject matter of dispute falls in any of the categories mentioned in the seventh schedule, it would act as an ineligibility to act as an arbitrator. However, subsequent to disputes having arisen, parties may by expressly entering into a written agreement waive the applicability of this provision.

•Time Limit For Arbitral Award And Fast Track Procedure

In order to address the criticism that arbitration is a time-consuming process in India, the amended arbitration act provides for time bound proceedings. As per the amended section 29A has been inserted which provides that an award should be passed by the arbitral tribunal within 12 months from the date from which the arbitral tribunal enters upon reference, but if the award is passed within 6 months from the date from which the arbitral tribunal enters upon reference, the Tribunal shall be entitled to receive such amount of additional fees as agreed by the parties. The parties can also extend this period for maximum six 6 months by their consent, after which the mandate of the arbitrator shall terminate unless the court will extend the period for sufficient cause or on such other terms as it may deem fit. Also while

extending the said period under this section if the court finds that the proceedings have been delayed for the reasons attributable to the arbitrator then the court may order reduction of the fees of the arbitrator up to 5% for each month. As well as the application for extension of time shall be disposed by the Court within 60 days from the service of notice to the opposite party.

According to the new ordinance section 29 B has also be inserted which gives party an option to opt for a fast track procedure at any stage of the arbitral proceedings under which the award has to be passed within 6 months from the date from which the arbitrators receive written notice of their appointment, if the award under this section is not made within the specified period then provisions of section 29A would be applicable. The dispute referred as per the provisions of this section shall be decided by the arbitral tribunal on the basis of the written pleadings, documents and submission filed by the parties without oral hearing and the arbitral tribunal also has the power to call for further clarification or information from the parties in addition to the pleadings and documents filed by the parties. Oral hearings can only be conducted if the parties to the arbitration make a request or if the arbitral tribunal considers it necessary for clarifying certain issues.

•Grounds For Challenging The Arbitral Award

The scope of "public policy" under section 34 has been narrowed down and as per the amended section an arbitral award can only be set aside on the ground that it is in conflict with the public policy of India if (i) the award was induced by fraud or corruption or was I violation of section 75or section 81 or (ii) it is in contravention of the fundamental policy of the Indian law or (iii) it is in conflict with the most basic notions of morality or justice. In **ONGC Limited v. Western Geco International Limited** The case, Supreme Court assumed the power to modify the subject matter of an award in the case of violation of the fundamental policy of Indian state. SC widened the scope of public policy and added new grounds:

1) Judicial authority shall take decision by applying judicial mind

2) Court shall adhere to the principles of natural justice

3) Court applied Wednesbury principle of unreasonableness, which says that if any decision is taken by a judicial authority is so irrational that a reasonable man would not have arrived at it. If any of the 3 grounds are violated then, Supreme Court can modify the award passed by the arbitrators.

As per the present amendment made in this section, it is also clear that to challenge an award on the ground of "patent illegality" can only be taken for domestic arbitration and not international arbitration. The new act also provides that the party filing an application for setting aside of an award can only be filed after issuing a prior notice to the other party. the party filing the application has to file an affidavit along with the application endorsing compliance with the requirement of service of prior notice to the opposite party. An application made under this section shall be disposed of within a period of one year from the date of which the notice is served upon to the opposite party.

•No Automatic Stay of The Arbitral Award Upon Filing of An Application To Challenge The Arbitral Tribunal

Prior to this amendment act mere filing a petition in order to challenge the arbitral award would result in an automatic stay of the arbitral award, due to which the court would take several years to decide the petition and it would also make arbitration mechanism time consuming and ineffective. But in the present scenario, the amendment act provides that there would be no automatic stay of the arbitral award and a separate application shall be filed for seeking a stay of the arbitral tribunal. Also when the time for making

an application for setting aside an arbitral award has been expired then such award shall be enforced in accordance with the provisions of the code of civil procedure, 1908. The new law also empowers the court that to grant a stay on the operation of an arbitral award for payment of money subject to the conditions of deposit of whole or a part of the awarded amount.

•Extensive Cost Regime

As per the amendment to section, 31 section 31 A has been inserted which gives wide powers to the arbitral tribunal to award costs. The arbitral tribunal can decide whether the costs are payable, the amount of costs that is to be paid and they are required to be paid. The provision further provides that the unsuccessful party will generally be ordered to pay the costs to the successful party and the costs may include the fees and expense of the arbitrators, courts and witness, legal fees and expenses, administrative costs of the institution and any other cost incurred in relation to the arbitral or court proceeding or the arbitral award. The conduct of parties along with the refusal of a party to unreasonably refuse, a reasonable offer of settlement made by the other party is also a determining factor in the awarding costs. In addition, the new Act lays down detailed parameters for deciding cost, besides providing that an agreement between the parties, that the whole or part of the cost of arbitration is to be paid by the party shall be effective only if such an agreement is made after the dispute in question had arisen. Therefore, a general clause in the agreement stating that cost shall be shared by the parties equally, will not inhibit the tribunal from passing the decision as to costs and making one of the parties to the proceedings to bear whole or as a part of such cost, as may be decided by the tribunal.

•Time Bound Proceedings

The amendment act provides faster timelines in order to make arbitration process more effective. The proviso to section 24 has been added which provides that the arbitral tribunal has to hold oral hearings for the evidence and oral arguments on day to day basis and not to grant any adjournments unless there is any sufficient cause being made out. The arbitral tribunal is also vested with the power to impose costs on the party seeking adjournment without any sufficient cause.

•Reference Of Parties To The Dispute To Arbitration

In Section 8, which mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is the subject matter of arbitration agreement. The sub-section(1) has been amended envisaging that notwithstanding any judgment, decree or order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists. This subsection is therefore substituted in order to examine the validity of the arbitration agreement and also to ensure that while making a reference to the arbitration, the judicial authority doesn't violate or contravene with any judgement, decree or order of the Supreme Court or any other court. As per the case, **Mahesh Kumar vs. Rajasthan state transport corporation** it was stated that the decision that the court finally makes under section 8 of this act in respect of referring the parties to arbitration is not appealable and it was also held that even if there is a valid arbitration agreement, lack of consent of the parties would allow the court to convert the arbitration to a suit and decide the dispute by applying CPC. When there is no consent the court will not refer the parties to arbitration, mere existence of an arbitration agreement doesn't bar the court's civil jurisdiction in the matter. Further in addition to this sub-section (2) has also been inserted and it is provided that where the original arbitration agreement or the certified copy is not available with the party making the application for reference to arbitration, in such

case the applying party shall file an application along with the copy of the arbitration agreement and a petition shall also be filed praying the court to call upon the other party to the agreement to produce the original arbitration agreement or its duly certified copy before the court. This sub- section inserted in order to extend the scope of this Act, to provide the remedy in cases where a party to the agreement willfully retains the original agreement or its certified copy from the party making an application with malafide intent.

Conclusion

Upon watchful investigation of the amendments conveyed to the 1996 Act, it is absolutely observed that the arbitration amendment Act is a positive stride towards making arbitration speedy and defeating the systemic discomfort of deferrals, high expenses and ineffectual determination of debate, which had tormented the arbitration administration in India. It is additionally apparent that arbitration has advanced throughout the years as the perfect instrument for settling question that would spare courts time and furthermore these new amendments has lessened the obstruction of the court in the arbitration proceedings. The new law additionally makes the statement by the arbitrator about his autonomy and fair-mindedness more sensible when contrasted with an exposed convention under the past administration. Making the arbitrator in charge of the postponement in the arbitration proceedings, for the reasons owing to him, would guarantee that the arbitrators don't take up arbitrations, which are past their abilities. Each arbitration is hence now in light of the quick utilization of the law and its advancement is a proof of its hugeness in the actual proceedings. In this manner arbitration has developed as the most favoured method of settling question, particularly in the corporate and modern domain