

2015 Amendment to the Arbitration and Conciliation Act, 1996

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Introduction

The Arbitration and Conciliation Act, 1996 (“Act”) has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 (“Ordinance”), promulgated by the President of India on October 23, 2015.

The Ordinance has introduced significant changes to the Act and seeks to address some of the issues, such as delays and high costs, which have been affecting arbitrations in India.

The Ordinance is an attempt to make arbitration a preferred mode for settlement of commercial disputes and to make India a hub of international commercial arbitration. With the amendments, arbitrations in India are sought to be made more user-friendly and cost effective. The major changes brought about by the Ordinance are summarized in this update.

Interim Measures

The Ordinance introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding.

Recent judicial decisions (*Bharat Aluminum Co v. Kaiser Aluminum Technical Services*, Supreme Court (2012) 9 SCC 552) had held that Part I of the Act (which, inter alia, includes provisions on seeking interim reliefs before a Court in India) would not apply to foreign seated arbitrations. The Ordinance has inserted a proviso to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Ordinance is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the saber-tooth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court (*M/s. Sundaram Finance v. M/s. NEPC India Ltd.*, AIR 1999 SC 565,

and *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, AIR 2004 SC 1344). The Ordinance has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, as discussed above, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.

Strict Timelines

The Ordinance brings about some strict timelines in completion of arbitration proceedings. Proceedings before Courts have also been made time-bound.

Commencing arbitration proceedings after obtaining an interim order from a Court

In order to discourage litigants who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced.

Application to set aside an arbitral award

An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing.

Application for appointment of an arbitrator

The Ordinance provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days.

Completion of arbitration proceedings

As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 (twelve) months of entering into a reference. Amended section 12 of the Act now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 (twelve) months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause.

The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators.

Fast Track Arbitrations

The Ordinance introduces a fast track arbitration proceeding.

Newly introduced section 29B of the Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of 6 (six) months of entering into a reference.

Challenging an Award

Public Policy

Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'.

The Supreme Court of India in *ONGC v. Saw Pipes* (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to re-agitate the merits of the case. Though in a very recent judgment, the Supreme Court noted that while the merits of an arbitral award can be scrutinized when a challenge is made on grounds that an arbitral award has violated 'public policy', there were limitations as to the extent to which, such a re-evaluation can be conducted.

The Ordinance, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Ordinance provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the re-appreciation of the merits of the dispute at the stage of challenge to the award before the Court.

Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

Patent illegality

Another amendment brought about by the Ordinance is that an arbitral award can be set aside by a Court if the award is vitiated by patent illegality appearing on the face of the award.

However, an award cannot be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence.

Stay on enforcement of an award

The Ordinance provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding.

Ensuring Impartiality of an Arbitrator

The Ordinance gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The Ordinance specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted fifth schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.

Arbitration Fees

In a very significant step, the Ordinance provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The amendment to Section 11 of the Act empowers the concerned High Court to frame rules to determine the fees of the Arbitral Tribunal and the mode of such payment. The rates specified in the newly inserted fourth schedule have to be considered.

The Definition of 'Court'

Original Section 2(e) of the Act provided a single definition of "Court", which meant a District Court, or the High Court exercising its ordinary original civil jurisdiction, as the case may be. The Ordinance, however, bifurcates the definition and clearly specifies that unlike other arbitrations, in case of international commercial arbitrations, only a High Court exercising its ordinary original civil jurisdiction will qualify as a "Court".