IMPACT OF THE RECENT REFORMS ON INDIAN ARBITRATION LAW

ROHIT MOONKA,

Institute of Law, Nirma University (Ahmedabad, India)

SILKY MUKHERJEE,

Institute of Law, Nirma University (Ahmedabad, India)

DOI: 10.21684/2412-2343-2017-4-1-58-71

In order to give effect to the UNICITRAL Model Law on Arbitration and due to radical change in its economy as the result of the 1991 New Economic Policy (NEP) India enacted the 1996 Arbitration & Conciliation Act. This Act provides a pragmatic legal basis for resolution of commercial disputes outside the court procedures. It circumscribes the older laws and consolidates multiple legal norms dealing with arbitration. However, the experiences in application of this Act for the last 20 years suggest that it needs to be amended as it contains serious drawbacks primarily due to poor legal technique which necessitated excessive judicial interventions and judicial overreach having led to resentment among those willing to resort to alternative dispute resolution under this Act while keeping the seat of Arbitration in India. Several attempts were made by the successive governments aiming at amending the 1996 Act. Yet all those attempts failed. Finally the present Union Government under the leadership of the Prime Minister Mr. Narendra Modi was able to bring in sweeping changes in existing arbitration law. These changes were carried out with the commitment of the Government in doing business in India through the Ordinance route and proper legislative procedures which finally led to the amendments having come into force on January 1, 2016. This paper attempts to analyse the key changes brought through the 2015 Amendment Act and their impact on the application of arbitration law in India. Moreover, the authors overview the prospects of India to acquire the preferred position in International Commercial Arbitration in the future as envisioned by the present Modi Government.

Keywords: arbitration; India; judicial intervention; Arbitration Amendment Act, 2015.

Recommended citation: Rohit Moonka & Silky Mukherjee, *Impact of the Recent Reforms on Indian Arbitration Law*, 4(1) BRICS Law Journal 58–71 (2017).

Table of Contents

Introduction

The 1996 Arbitration & Conciliation Act (hereinafter "the 1996 Act") was first promulgated by way of issuing an Ordinance as a step in urgent economic reforms necessitated by new economic policy. 20 years later another ordinance was introduced, i.e., the 2015 Arbitration & Conciliation (Amendment) Ordinance, which amended the 1996 Act in order to bring it in line with international standards. For the last few years, arbitration has become an optimal choice for resolution of commercial disputes. However, over the last two decades the process of arbitration in particular in *ad hoc* domestic disputes becomes more alike the adversarial proceedings in India. Accompanied by high costs due to insufficient amount of trained and qualified arbitrators this dispute resolution process caused a growing sense of annoyance among its users. Due to these and other problems in application of the 1996 Act, the amendments were discussed by public authorities which are necessary in order to fill in its gaps and minimize the opportunities for its misinterpretation. Reports and suggestions where given by many bodies aimed at amending the 1996 Act. However, those suggestions could not sustain the pressing needs of modern practice. Two attempts were made to amend the 1996 Act in 2001 and in 2010, both unsuccessful and having not led to the Act being amended.

However, through the Ordinance the present Government took a robust step towards reinstating confidence of individuals and firms in investors and business community which is significant for optimizing the procedures of business transactions. The Ordinance included proposals of the Law Commission Report No. 246, released in the year 2015, which is a pre-cursor to this Ordinance[1] and subsequent Amendment Act. The Amendment Act also introduces unique provisions which have not so far been mentioned in leading arbitration statutes. Some of these provisions provide for extraordinary measures and other peculiar issues with *ad hoc* domestic arbitration including, e.g., the time limit for completing arbitration and arbitrators fees. The Amendment Act mandates that every arbitration held in India must result in an award within 12 months of the arbitral tribunal being constituted, with parties having the right to give an extension to it by another 6 months through mutual consent. Otherwise the mandate of tribunal terminates unless the court extends it imposing such conditions as it considers appropriate. The court can also penalize arbitrators by ordering reduction of their fees at the time of granting such extension. It is also the right of the court to change one or all the arbitrators at the time of granting extension. Moreover, the Amendment Act introduces other significant changes which cause a significant departure from the law having existed before, or clarify controversies, or confirm the rules which had evolved through judicial interpretations. This paper analyses the key changes brought by the Ordinance which had passed through the Parliament route, received the assent of the President of India on December 31, 2015, and been promulgated in the Official Gazette on January 1, 2016.

1. Applying Provisions of Part I for a Foreign Seated Arbitration

After the case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*[2] (BALCO Judgement) which puts a complete bar on Indian courts to exercise jurisdiction over foreign seated arbitrations. According to this judgment, on the basis of Sec. 2(2) of the 1996 Act, all the provisions under the Part I of the Act would apply when the arbitration is seated in India, and Indian courts cannot invoke any provisions under Part I of the Act with respect of foreign seated arbitration. Due to this practical difficulties were arising, especially with regard to granting interim injunction in a foreign seated arbitration by Indian courts.

---

[1] By virtue of Art. 123 of the Constitution of India, the President of India is empowered at any time, except when both Houses of Parliament are in session, if he is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require. Further, Ordinance promulgated under this Article shall have same force and effect as an Act of Parliament.

[2] (2012) 9 SCC 552.

To overcome this situation, a provision was included in Sec. 2(2) which grants to Indian courts jurisdiction in the context of seeking interim injunction in a foreign seated Arbitration, as well as assistance in collecting evidence in a foreign seated arbitration or making appeal for court orders.[3] However, this provision applies only if the parties express an agreement to use it. Noteworthy is the fact that the expression "only" has not been included in the mentioned Sec. 2(2) of the 1996 Act. The lack of the word "only" in the text of the Act was the primary cause for disagreements between the parties in the case of *Bhatia International v. Bulk Trading SA*.[4] That case led to the BALCO Judgement[5] where the Supreme Court of India held that the expression "only" in Art. 1(2) of the UNICITRAL Model Law had been used in view of the exceptions impressed upon in the said Article through the proviso. Since the said provision was lacking in the Act, the word "only" was not required in such a situation. Yet since the provision had been added it appears unjustified that the word "only" remains omitted and leading to unnecessary complications.

2. Court References to Arbitration and Widening the Meaning of Arbitration Agreements

The meaning of an arbitration significantly diminishes if the courts are allowed to adjudicate on the same subject matter. Therefore, the principal 1996 Act included provisions for referral mechanism when a judicial authority addressed with an arbitrable dispute had been required to refer the parties to arbitration upon an application of the party. However, it was dependent on several requirements which seriously impeded the process of issuing such court references. In particular, the party submitting an application should have submitted an original or a certified copy of the arbitration agreement to the court. However, the 2015 Act amended Sec. 8 having made this provision more pragmatic allowing "persons claiming through or under parties"[6] to apply for referral to arbitration which is in line with Sec. 45 even though the opinion of the judge is different. The amendment widened Sec. 8(2) by providing that if the original arbitration agreement or its certified copy is not available with the party applying for a reference to arbitration under sub-sec. (1), and

---

[3] "Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

[4] (2002) 4 SCC 105.

[5] *Supra* note 2.

[6] Sec. 8(1): "A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists."

the said agreement or certified copy is retained by the other party to that agreement, the applying party shall file such application alongside with a copy of the arbitration agreement and a petition to the court to call upon the other party to present the original arbitration agreement or its duly certified copy to the Court.

The amended Sec. 8 provides that the court can deny a reference to arbitration if it finds that no *prima facie* valid arbitration agreement exists. This power is different from the one stipulated by Sec. 11 and only prescribing examination of existence of the agreement. Considering applications under Sec. 11 of this Act does not presuppose delving into the issues of validity of such agreement. Different requirements set forth by Secs. 8 and 11 of the Act open avenues for nuanced judicial interpretation. In case of denial of reference under Sec. 8 a judicial appeal is possible under Sec. 37 of the Act. If the court does not refer the parties to arbitration, the arbitral tribunal can still exercise *kompetenz-kompetenz* under Sec. 16. Such legal ambiguity runs the risk of undermining the *kompetenz-kompetenz* rule under Sec. 16 by taking away the power of the arbitral tribunal.

3. Interim Injunction

It is not unusual for a party after obtaining an interim measures prior to commencement of the arbitration to simply sleep over the matter. This issue has been raised in many cases before the Supreme Court first in the case of *Sundaram Finance Ltd. v. Nepc India Ltd.*[7] providing that "before passing the interim order the court must be satisfied about existence of arbitration agreement and the applicant's 'manifest intention' to take the matter to arbitration. Court must pass a conditional order to ensure the effective steps are taken by the applicant for commencing the arbitration proceedings." Later in *Firm Ashok Traders v. Gurmukh Das Saluja*[8] the Supreme Court held that "under Section 9 of the Arbitration Act, the court should make sure that arbitral proceedings are actually contemplated or manifestly intended and positively going to commence within a reasonable time. The time gap between the filing of the Section 9 application and the commencement of arbitral proceedings should not be such as to destroy the proximity of relationship between the two events. The party cannot sleep over its rights under Section 9 and not commence arbitral proceedings." The rules given effect through the Supreme Court judgements are nowadays codified under the 2015 Amendment Act also specifying details regarding the time limit in which arbitration proceedings shall commence by inserting sub-clause 2 to Sec. 9 through the Amendment Act.[9]

---

[7] (1999) 2 SCC 479.

[8] (2004) 3 SCC 155.

[9] "Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."

In order to reduce court interventions and to restrict the courts' power to grant interim injunction after the constitution of arbitral tribunal, sub-clause 3 of Sec. 9 was introduced providing that "once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious." Through this provision the opportunities for the courts to deal with such applications are not excluded during the arbitration proceedings. However, the courts can grant injunctions only in exception circumstances. To give effect to this provision, the powers of arbitral tribunals has been equated with the powers of the court in giving interim injunction during the arbitration proceeding or at any time after making the arbitral award but before it is enforced, in accordance with Sec. 36 by inserting sub-clause 1 to Sec. 17 of the 2015 Amendment Act.[10] Furthermore, the interim order passed by arbitral tribunals is enforced in the same manner as an order of the court, i.e., through insertion of sub-clause 3 to Sec. 17 of the Amendment Act.[11]

This change is a positive development as it reduces court interventions with regard to granting interim injunctions, particularly during arbitration proceedings and after the delivery of award but before it is enforced. Since arbitral tribunal is the best instance to deal with the matter and it would be most appropriate that this power is exercised solely by the tribunals. Yet before the said amendments the arbitral tribunals did not have powers as courts to grant interim injunctions, the orders of tribunals were lacking legal force and the parties should have addressed the courts for interim injunctions. Since the amendments came into force the tribunals' power in line with the powers of courts is no more dependent on the choice of the parties but is a non-derogable provision. It will, therefore, minimize

---

[10] "17. (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal –

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(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."

[11] "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."

judicial intervention in granting injunctions during the stages of arbitration process, provided under Sec. 17.

4. Appointment of Arbitrators

Appointment of arbitrator(s) is the prerogative of the parties which they appoint on mutual consensus. Another contentious issue in the principal 1996 Act was the provision regarding appointment of arbitrator or arbitrators in case of a deadlock between the parties. In such cases, a party under Sec. 11 of that Act was entitled to approach the Chief Justice of the High Court of India as for domestic arbitration; Chief Justice of the Supreme Court as for international commercial arbitration; or any person or institution designate by the Chief Justice. However this appointment by the Chief Justice of the High Court/Supreme Court had become complicated as shown in two judgements of the Supreme Court of India. In the first judgment, i.e., *Konkan Railway Corpn. Ltd. & Anr. v. Rani Construction Pvt. Ltd.*[12] the Supreme Court held that the Chief Justice's or his designator's order under Sec. 11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a tribunal.[13]

However, this decision of the Supreme Court was overruled in the case of *S.B.P & Co*. v. *Patel Engineering Ltd.*[14], where the Court held that the power exercised by the Chief Justice of the High Court or the Chief Justice of India under Sec. 11(6) of the 1996 Arbitration & Conciliation Act is not of an administrative nature but it is a judicial power. It further held that while appointing arbitrators the Chief Justice is also empowered to decide on "his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators" and such a decision is final. This judgement was fundamentally flawed as it not only took away the power of arbitral tribunal to decide the validity of the arbitration agreement under Sec. 16 of the 1996 Act but also to make the order passed under Sec. 11 of the Act a judicial order that can hence be subject to appeal – which was beyond the legislative intent of the Act.

The 2015 Amendment Act attempted to nullify also the effect which was created by this case by the Supreme Court. The Act introduced a limitation in sub-sec. (6A) providing that the Supreme Court or the High Court shall limit its examination only with the existence of an arbitration agreement, and not with other issues such as, e.g., live claim, qualifications, conditions for exercise of power, etc.[15]

---

[12] AIR 2002 SC 778.

[13] *Id.*, para. 31.

[14] (2005) 8 SCC 618.

[15] "The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

The second case, i.e., the Patel Engineering case provided that hat the Chief Justice can delegate his/her power under Sec. 11 of the 1996 Act only to another judge of that court but not to any other person or institution considered to have judicial powers as judicial power can only be delegated to judicial authority. However, the 2015 Amendment Act took this aspect into account and specified in a new sub-sec. (6B) that "[T]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."

Thus, one of the main problems revealed under application of the said Sec. 11 is whether the function of the Chief Justice under this Section is an administrative function or a judicial function. The 2015 Amendment Act has ultimately solved this issue by replacing the "Chief Justice" with the "Supreme Court or High Court". The provision incorporated in sub-sec. (8) of this Sec. 11 required a prospective arbitrator to submit a declaration following Sec. 12 of the Act.[16] This provision ensures that a prospective arbitrator who due to his/her schedule may not be able to carry out an expedite arbitral proceedings will not be appointed. Another important addition was included in sub-sec. (14) of Sec. 11 stipulating that the High Court can formulate rules for the purpose of determining the fees of the arbitrators.[17] This provision which could possibly incorporate a fixed fee for ad-hoc arbitrations is unique for Indian legislation as matters relating to arbitrators' fees is not usually covered by any statutes in other states.

Moreover, new Fifth Schedule and Seventh Schedule were added in the 2015 Amendment Act. The Fifth Schedule touches upon the issue of independence and impartially of the arbitrators and lists the grounds justifying doubts in their independence or impartiality. Another list of grounds is stipulated by the Seventh Schedule and entails relationships between arbitrators and the parties or the counsel making an arbitrator ineligible for appointment. These two schedules listing grounds for challenging arbitrators are influenced by the IBA Guidelines on Conflict of Interest in International Arbitration. The 2015 Amendment Act also prohibits parties to agree in advance and appoint an arbitrator who had previously been an employee of either of the parties. These provisions ensure independence and impartiality of arbitrators to be appointed and the equal opportunities for parties to have a say in the appointment process regarding their arbitrators.

---

[16] "The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to –

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator."

[17] "For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule."

5. Time Limit for Arbitral Award

An entirely new Sec. 29A was introduced in the 2015 Amendment Act which stipulates a time limit for rendering an award in every arbitration process in India. The default time limit for making such and award should be provided within a period of 12 months starting from the date when the arbitral tribunal enters upon the reference. Here enter upon the reference means that from the day when the arbitrator(s) receive their letter of appointment in writing.[18] Parties may extend this period by consent for another period not exceeding 6 months.[19] If the award is not made within the prescribed time period of 12 months or within the mutually acceptable period, the mandate of the arbitrator(s) terminates unless the time period has been extended by the court on the basis of either an application by the party or due to a sufficient cause and on such terms and conditions which may be imposed by the court prior to or after the expiry of the period specified.[20] However, these rules are fortified by a provision, according to which if the court while granting the extension finds that proceeding delayed for reasons attributable to the arbitral tribunal, it may order a reduction of fees of arbitrator(s) not exceeding 5 percent for each month of such delay. However, the extension of period referred to in sub-sec. (4) may be granted upon an application of the parties and only due to sufficient cause and on such terms and conditions that may be imposed by the court. Under this Section the court can impose actual or exemplary costs upon any of the parties.[21] However, such a carrot and stick approach may not be conducive in every matter and can lead to unnecessary litigation before the courts which are already overburdened with other cases and may not be in a position to deliver judgment within the sixty days' time frame as prescribed under this Section.

6. Fast Track Arbitration

The 2015 Amendment Act also introduces a fast-track arbitration procedure to resolve disputes provided that such option is exercised prior to or at the time

---

[18] "29A. (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation. – For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment."

[19] "29A. (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months."

[20] "29A. (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period."

[21] Sub-sec. (8) to Sec. 29A.

of appointment of the arbitral tribunal. Its Sec. 29B[22] offers an option for expedite arbitration process. Pursuant to Sec. 29B(1), parties can agree to have their dispute resolved by in a fast track procedure which, according to Sec. 29B(4), requires the award to be made within 6 months starting from the date when the arbitral tribunal enters upon the reference. However, it is left to the parties to claim for such fast track arbitration. This provision could have more significant meaning if would also have provided for mandatory reference of cases involving smaller claim to such fast track arbitrator for speedier justice.

7. Imposition of Costs

The cost regime where "costs follow the event" which is practised internationally has been introduced in the 2015 Act in a new Sec. 31A. As follows from the explanation to this Sec. 31A(1), the costs are not limited to legal fees but also include travel expenses, witness expenses, and so on.[23] The imposition of costs also extends to every litigation arising from arbitration which had been addressed to by virtue of

---

[22] "(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties."

[23] "*Explanation*. – For the purpose of this sub-section, "costs" means reasonable costs relating to –

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award."

this amendment. Furthermore, it provides that an amount awarded by an arbitral tribunal will, unless otherwise specified by the arbitral tribunal, carry interest which shall be 2 percent more than the current rate of interest per annum from the date of the award to the date of payment.

8. Limiting the Scope of Setting Arbitral Award Aside

The new amendments primarily seek to clarify the meaning of public policy under Sec. 34 of the 2015 Act regarding the scope of review that courts should enter in, which remained a matter of concern for the last few years. Particularity after the decision in *ONGC v. Saw Pipes Ltd*.[24] and *ONGC v. Western Geco*[25], the explanation to Sec. 34(2)(b) clarified that an award is in conflict with the public policy of India only if, firstly, making of the award was induced or affected by fraud or corruption or was in violation of Sec. 75 or Sec. 81; or, secondly, it contradicts the fundamental policy of Indian law; or, thirdly, it contradicts the most basic concepts morality or justice. Moreover, an explanation specifies that in order to avoid any doubt, the test as to whether there is a contradiction with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Awards in arbitrations exclusively between Indian parties can be challenged on the ground of patent illegality but only if it is "on the face of the award" and without entering into a merits review and without re-appreciation of evidence.[26] A time limit has also been fixed to dispose-off the application filed under sub-sec. (6) of Sec. 34 of the 2015 Amendment Act[27] to minimize the delay in the disposal of such applications.

9. Issues Requiring Further Determination

Having removed many ambiguities, the 2015 Amendment Act still left several areas of concern unaddressed. Some of these major issued of concern are discussed below as the authors consider them urgent and requiring to be officially addressed.

9.1. Emergency Arbitrators

In India before the constitution of Arbitral tribunal the parties in arbitration process approach the courts under Sec. 9 of the Act for interim injunction. Although

---

[24] AIR 2003 SC 2629.

[25] (2014) 9 SCC 263.

[26] Sub-section (2A) to Sec. 34: "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."

[27] "An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party."

approaching the court for urgent interim relief before constitution of arbitral tribunal is a common practice, however approaching court is not considered as the best practice in a dispute involving arbitration as the primary reason to refer the dispute to arbitration is to avoid the rigours of the court system. Institution across the Globe introduce provisions for appointment of emergency arbitrators. For instance, under the 2013 Hong Kong International Arbitration Centre (HKIAC) Rules a party may seek emergency relief prior to the constitution of the arbitral tribunal. Such an application, if accepted by the parties, has to be decided in a time-bound manner by the HKIAC, following their rules. The same rule applies to cases involving other prominent institution arbitrations including the London Court of International Arbitration, the International Chamber of Commerce and the Singapore International Arbitration Centre. However, the 2015 Amendment Act is less elaborate with respect to addressing the issue of interim measures despite the fact that it reiterates a seminal objective of "minimal intervention of the courts in the arbitration." Needless to mention that if the Indian arbitration law fails to provide opportunity for utilizing emergency arbitrators the parties have no other option than addressing their disputes to the courts of law for immediate relief which does not meet the objective of the 2015 Act.

The Law Commission of India in its 246th Report which had acted as the precursor to this 2015 Amendment Act recommended amending this Act so that to provide statutory recognition for the concept of emergency arbitrators.[28] This amendment was intended to be introduced in Part I of the Act defining an arbitral tribunal as a sole arbitrator or a panel of arbitrators. The change that the Law Commission of India had put forward suggested broadening the definition of "arbitral tribunal" so that it would include provisions for appointment of emergency arbitrator or arbitrators under any institutional rules only. At the same time such a recommendation was not extending to *ad hoc* arbitration by the Law Commission of India. However, since this suggestion was not incorporated in the 2015 Amendment Act it still should be considered, at least by legal scholars.

9.2. Arbitrability of Disputes Involving Fraud

In its 246th Report the Law Commission of India recommended changes to Sec. 16 of the Arbitration Act, in order to empower the arbitral tribunals to resolve disputes invoking serious issues in applying law, i.e., complicated issues of fact-finding or allegations of fraud, corruption etc. True, the provisions of Secs. 8 and 11 of the Act were amended to the effect that the parties will be referred to arbitration "[N]otwithstanding any judgment, decree, or order of the Supreme Court..." Yet in order to overcome the

[28] Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act, 1996 (2014), at 37 (Mar. 10, 2017), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf.

conflicting judgments by the Supreme Court on whether or not questions of fraud are arbitrable, recommended changes to Sec. 16 of the Arbitration Act are desirable as they make this provision clearer while entitling arbitral tribunals with more powers. In the case of *Radhakrishnan v. Maestro Engineers*[29] a two-judge bench of the Supreme Court held that issues of fraud are not arbitrable. However, the Judge of the Supreme Court while considering an application under Sec. 11 of the Arbitration Act in *Swiss Timing Ltd. v. Organising Committee, Commonwealth Games*[30] held that the judgment in the Radhakrishnan case is *per incuriam* and therefore can't constitute a fair rule of law. When the parties stand before an arbitral tribunal, contrary to Secs. 8 or 11 of the Arbitration Act, and the arbitrator's jurisdiction is challenged by a party alleging that there are questions of fraud involved in dispute, it appears that the tribunal bound by the Radhakrishnan judgment should consequently find a lack of powers to consider questions of fraud. However, recently the Supreme Court of India in *A Ayyasamy v. A Paramasivam & Ors*[31] without overruling the Radhakrishnan judgment tried to clarify the debate. It held, firstly, that allegations of fraud are arbitrable unless they are serious and complex in nature and, secondly, unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud. Finally, it held that the decision in the Swiss Timing case did not overrule the Radhakrishnan. The judgment differentiates between "simplicitor fraud" and "serious fraud" concluding that while "serious fraud" is best left to be determined by the court, "simplicitor fraud" can be decided by the arbitral tribunal. Amending the said Sec. 16 consistent with the recommendations made by the Law Commission Report would help avoiding such contrivances. Yet the legislator opted not to use this opportunity.

Conclusion

The Ordinance Act and now the Amendment Act mark a change in legal thinking and legal practice. Such changes are significant steps towards optimizing arbitration procedure and arbitration jurisprudence as legal amendments gave many lacunas of the principal 1996 Act away nullifying judicial decisions that impeded proper application of arbitration rules in India. However, a note of caution is attached to these developments, i.e., the amendments require too short time frame for application of various rules in the arbitration process which are difficult to comply with in practice and running the risk of ending in unavoidable judicial dispute resolution. At the same time, clear-cut provisions encouraging institutional arbitration in India are still lacking while the said amendments repeat the details which are otherwise practised by the parties or institutions. Moreover, the experience of few other legislation in

[29] (2010) 1 SCC 72.

[30] (2014) 6 SCC 677.

[31] AIR 2016 SC 4675.

India (on other subjects) having time-line have not succeed in the past. It is doubtful that the time limits as prescribed by the 2015 Amendment Act would be followed by the courts of law in India which are already overburdened with pending cases and lacking adequate infrastructure as well as the necessary amount of judges. Yet apparently, much still depends on the approach of the courts of law dealing with matters subjected to arbitration in meeting the objectives of the 2015 Amendment Act. A next round of amendments can possibly consider this concern after analysing the effects of the recent changes.

References

Ahuja S. *Arbitration Involving India: Recent Developments*, 18(3) Asian Dispute Review (2016).

Canfield J. *Growing Pains and Coming-of-Age: The State of International Arbitration in India*, 14(3) Pepperdine Dispute Resolution Law Journal (2014).

Kachwaha S. *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 International Arbitration Law Review (2007).

Malhotra O.P. *The Law and Practice of Arbitration and Conciliation* (6th ed., Nagpur: LexisNexis Butterworths, 2013).

Mistelis L.A. *Seat of Arbitration and Indian Arbitration Law*, 4(2) Indian Journal of Arbitration Law (2015).

Patkar A. *Indian Arbitration Law: Legislating for Utopia*, 4(2) Indian Journal of Arbitration Law (2015).

Rebello A.P. *Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India*, 6(1) Cambridge Student Law Review (2010).

Rendeiro A.C. *Indian Arbitration and Public Policy*, 89 Texas Law Review (2011).

Srinivasan B. *Arbitration and the Supreme Court: A Tale of Discordance Between the Text and Judicial Determination*, 4 National University of Juridical Science Law Review (2011).

Sutton D.S.J. et al. *Russell on Arbitration* (23rd ed., London: Sweet & Maxwell, 2007).

Information about the authors

Rohit Moonka (Ahmedabad, India) – Assistant Professor of Law, Head of the Centre for ADR, Institute of Law, Nirma University (SG Highway, Ahmedabad, Gujarat, 382481, India; e-mail: rohitmoonka@gmail.com).

Silky Mukherjee (Ahmedabad, India) – Assistant Professor of Law, Institute of Law, Nirma University (SG Highway, Ahmedabad, Gujarat, 382481, India; e-mail: silkym.08@gmail.com).