# PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

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## 1. Background

Recently the Law Commission of India (the "**Commission**") has submitted its 246th Report (the "**Report**") to the Law Ministry (the "**Ministry**") seeking amendment to the Arbitration and Conciliation Act, 1996 (the "**Act**").[1] Earlier in 2001, the Commission had submitted its 176th report to the Ministry and recommended various amendments to the Act. After considering the recommendations of the 176th Report, the Government decided to accept almost all such recommendations and accordingly, introduced the '*Arbitration and Conciliation (Amendment) Bill, 2003*' in the Rajya Sabha on December 22, 2003. Subsequently, in the wake of the report of the Justice Saraf Committee, the Bill was referred to the 'Department Related Standing Committee on Personnel, Public Grievances, Law and Justice' for a further analysis. It was said that the content of the Bill was insufficient and contentious and thus was withdrawn from the Rajya Sabha.

Later on the Commission came out with a Consultation Paper in 2010 and it formed an expert committee comprising of several eminent persons from the field of law to study the proposed amendments and make suggestions accordingly. Written responses were also received from various institutions like FICCI, CII and ASSOCHAM. After extensive deliberations and study, the Commission has now prepared the Report.

## 2. Brief Highlights of the Proposed Amendments

### 2.1. Institutional Arbitration in India

Under the current legal framework, arbitration in India may be conducted *ad hoc* or under institutional procedures and rules. An ad hoc arbitration is one which is not administered by any institution. The parties determine all the aspects of the arbitration themselves, for example the number of arbitrators, appointment of arbitrators, applicable law and the procedure for conducting the arbitration. An institutional arbitration is a specialised institution which intervenes and takes on the role of administrating the arbitration process. Such institutions have their own set of rules through which an arbitration is governed and its own form of administration to assist in the process of arbitration. Some well known arbitration institutions are Delhi High Court Arbitration Centre, Indian Arbitration Council,

[1] http://lawcommissionofindia.nic.in/reports/Report246.pdf

London Court of International Arbitration and International Chamber of Commerce. There are approximately 1200 such institutions worldwide.

Referring arbitration matters to arbitration institutions is not so prevalent in India and unfortunately has not really kick-started. The provisions of the Act have been drafted in such a manner that they neither promote nor discourage parties to consider institutional arbitration. The Commission has suggested such changes in the Act which will encourage the culture of institutional arbitration in India. It has also been suggested in the Report that amendments should be done in Section 11 of the Act so as to attract more parties towards institutional arbitration and necessary steps be taken to encourage the parties to refer their disputes to institutional arbitration. The High Courts should be given direct power under this section to refer any arbitration to the arbitration institutions. Also broadening the definition of "arbitral tribunal" as under Section 2(d) of the Act will be helpful in this regard.

In order to further encourage and establish the culture of institutional arbitration in India, the Commission believes it is important for trade bodies and commerce chambers to start new arbitration centres with their own rules, which can be modeled on the rules of the existing arbitration centres. The Government can also help by providing land and funds for establishment of new arbitration centres. It is important to start a dialogue between the legal community which is involved in the practice of arbitration, and the business community which comprise of the users of arbitration, in order that institutional arbitration takes wings. The Government may also consider formation of a specialised body, like an Arbitral Commission of India, which has representation from all the stakeholders of arbitration and which could be entrusted with the task of, inter alia, encouraging the spread of institutional arbitration in the country.

### 2.2. Fees of Arbitrators

> *"[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges… When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. One of the parties will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."*[2]
>
> Emphasis added by the authors

One of the main problems involved with ad hoc arbitration in India is regarding high fees charged by arbitrators. For arbitration to become cost effective, there needs to be some sort of classification of fees structure of the arbitrators. Arbitrators should not just be given the privilege of charging high fees arbitrarily and increasing the number of sittings so that they can earn per sitting. What the Commission has recommended is to come up with a model schedule of fees and empowering the High Court to frame appropriate rules for fixation of

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

fees for arbitrators and for which purpose it may take the said model schedule of fees into account. Such model schedule should be revised from time to time.

### 2.3. Conduct of Arbitration Proceedings

In the Report, the Commission has observed that there are a number of provisions provided in Chapter V the Act which deal with the conduct of arbitral proceedings. However, despite existing provisions in the Act which are aimed at ensuring proper conduct of arbitral proceedings, the Commission found that the experience of arbitrating in India has been largely unsatisfactory for all stakeholders.

Despite the provisions of Chapter V of the Act which provides enormous powers to an arbitral tribunal, the arbitrations these days are becoming a replica of Court proceedings. Such changes should be brought about in the Act, which an arbitral tribunal can use to reduce delay. There is ingrained problem in the Indian system, a culture of frequent adjournments where arbitration is treated as secondary by the lawyers, with priority being given to Court matters.

There have been a number of High Courts' and Supreme Court's decisions wherein the arbitrators have been nudged to hear and decide matters expeditiously, and within a reasonable period of time. Similarly, counsel for parties must refrain from seeking repeated adjournments or insisting upon frivolous hearings or leading long-winded and irrelevant evidence. The Commission has thus recommended the following:

- Addition of the second proviso to section 24 (1) to the Act, discouraging the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments.
- Addition to the preamble of the Act, demonstrating and re-affirming the Act's focus on achieving the objectives of speed and economy in resolution of disputes which does not directly affect the substantive rights and liabilities of parties, but serves as guidance for arbitral tribunals and Courts to interpret and work the provisions of the Act.

### 2.4. Pre-arbitral Judicial Intervention

The Act states the situations where the intervention of the Court is envisaged at the pre-arbitral stage, which includes Sections 8, 9 and 11 in the case of Part I (domestic) arbitrations and Section 45 in the case of Part II (international) arbitrations. Pre-arbitral Court intervention may be required to determine if an arbitration agreement exists or to appoint the arbitrators or for grant of interim relief. The Supreme Court in a number of cases[3] has deliberated upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. The primary question that required consideration in all these cases has been whether an order by the Chief Justice appointing an

[3] Konkan Railway v. Mehul Construction Co., 2000 (7) S.C.C. 201; Konkan Railway v Rani Construction, (2002) 2 S.C.C. 388; SBP & Co v Patel Engineering, 2005 (8) S.C.C. 618.

arbitrator is an administrative order or a judicial order. A judicial order is subject to judicial review where as administrative order is not subject to judicial review.

After a series of cases culminating in the decision in *SBP vs Patel Engineering*[4], the Supreme Court held that the power to appoint an arbitrator under Section 11 is a "judicial" power.

The Commission has suggested amendments to Sections 8 and 11 of the Act wherein the scope of judicial interventions should be restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is *prima facie* satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be.

The proposed amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 and 21 in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.

### 2.5. Power of the Tribunal to Order Interim Measure

Section 17 of the Act gives power to the arbitral tribunal to order interim measures of protection, unless the parties have excluded such power by agreement. This section ensures that even for the purpose of interim measures, the parties can approach the arbitral tribunal rather than awaiting for orders from the Court. The Supreme Court in *Sundaram Finance Ltd v. NEPC India Ltd.*[5] observed that though Section 17 gives the arbitral tribunal 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 arbitration proceedings. In a different case, the same Court held that under Section 17 of the Act no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof.[6]

Relying upon the Court's observation in the above discussed cases and some other cases[7], the Commission suggests amendments to Section 17 of the Act which would give teeth to the orders of the arbitral tribunal and the same would be statutorily enforceable in the same manner as the orders of a Court.

### 2.6. Judicial Interventions in Foreign Seated Arbitrations

Section 2(2) of the Act, contained in Part I (Sections 1 to 43) of the Act, states that "*This Part shall apply where the place of arbitration is in India*." The question therefore arose whether

[4] (2005) 8 SCC 618
[5] (1999) 2 SCC 479
[6] M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619
[7] Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del); Indiabulls Financial Services v. Jubilee Plots, OMP Nos 452-453/2009 Order dated 18.08.2009

the provisions relating to judicial intervention set forth in Part I of the Act apply to international arbitration. This has been discussed by the Supreme Court in several cases, where the main issue was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India. It was held in *Bhatia International vs. Interbulk Trading SA*[8] that Part I applied to arbitrations held outside India unless it was expressly or impliedly excluded. This principle was applied but with minor refinements by the Supreme Court in a plethora of cases including *Venture Global vs Satyam Computer*[9], *Indtel Technical Services vs W.S. Atkins*[10], *Citation Infowares Ltd vs Equinox Corporation*[11], *Dozco India vs Doosan Infrastructure*[12], and *Videocon Industries vs Union of India*[13].

In 2012, in its judgment in *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.*[14] ("**BALCO**"), a five-judge bench of the Supreme Court overruled all of the above judgment. It was held by the Supreme Court that Part I and II of the Act are mutually exclusive. The intention of the law makers was that the Act is territorial in nature and Section 9 and 34 will apply only when the seat of arbitration is in India. As a result of this uncertainty, clearing the position on the concept of territoriality in the Act is crucial. The Commission has sought to address this by way of proposed amendments to Sections 2(2), 2(2A), 20, 28 and 31 of the Act, which will clarify that power of judicial intervention will not apply to foreign arbitration.

### 2.7. Section 36 Amendments

Section 34 of the Act talks about setting aside of an arbitral award. Section 36 of the Act states that "*where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the court*". This means that an arbitral award becomes enforceable as a decree only after a Section 34 petition has been dismissed. The Supreme Court in *National Aluminum Co. Ltd. v. Pressteel & Fabrications*[15] observed that "*the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs*". In order to address this problem, certain amendments have been proposed by the Commission which provide that the award will not become unenforceable merely upon the making of an application under Section 34.

### 2.8. Setting Aside of Domestic Awards and Recognition/Enforcement of Foreign Awards

Section 34 of the Act deals with setting aside of domestic arbitral awards and a domestic award resulting from foreign commercial arbitration, whereas Section 48 of the Act deals

[8] (2002) 4 SCC 105
[9] (2008) 4 SCC 190
[10] (2008) 10 SCC 308
[11] (2009) 7 SCC 220
[12] (2011) 6 SCC 179
[13] (2011) 6 SCC 161
[14] (2012) 9 SCC 552
[15] (2004) 1 SCC 540

with the conditions for enforcement of awards. As the Act is currently drafted, it treats all three types of awards in the same manner. This has caused some problems. It is for this reason that the Commission has recommended the addition of Section 34(2A) to deal with purely domestic awards, which may be set aside by Court if it finds that such award is vitiated by "*patent illegality appearing on the face of the award*" except that "*an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence*."

Further, time and again Courts in several cases[16] have set aside awards on grounds of "public policy". The Commission has suggested restriction to the scope of "public policy" and that an award be set aside on such grounds only if it is opposed to the "fundamental policy of Indian law" or is in conflict with the "most basic notions of morality or justice".

### 2.9. Neutrality of Arbitrators

Section 12(3) lays down the test for neutrality of an arbitrator. As per the said Section,

> *"(3) An arbitrator may be challenged only if-*
> *(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*
> *(b) He does not possess the qualifications agreed to by the parties."*

The Act does not lay down any conditions to identify the "circumstances" which give rise to "justifiable doubts". The Supreme Court in a series of decisions[17] has held that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. The Court also held that the independence of arbitrators cannot be compromised at any stage of the proceeding.

In this regard, the Commission has suggested that there should be a certain level of independence and impartiality that should be required of the arbitration proceeding irrespective of the agreement of the parties. The Commission also suggested:

- the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts.
- the incorporation of provisions which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts.

## 3. Conclusion

[16] Shri Lal Mahal v Progetto Grano Spa, (2014) 2 SCC 433; Renusagar Power Plant Co Ltd v General Electric Co, AIR 1994 SC 860

[17] Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia, 1984 (3) SCC 627; Secretary to Government Transport Department, Madras v. Munusamy Mudaliar, 1988 (Supp) SCC 651; International Authority of India v. K.D. Bali and Anr, 1988 (2) SCC 360; S.Rajan v. State of Kerala, 1992 (3) SCC 608; M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd., 1996 (1) SCC 54; Union of India v. M.P. Gupta, (2004) 10 SCC 504; Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., 2007 (5) SCC 304).

The noted jurist Nani Palkiwala said that a legal redress in India is time-consuming enough to make infinity intelligible. Given the load and backlog of cases in our courts, it is self-evident that alternate dispute resolution mechanisms are to be encouraged.

However, as the disputes surrounding arbitration agreements referred to this article indicate, the Act suffers from a number of ambiguities and lacunae. These shortcomings are sought to be addressed by the proposed amendments. Accordingly, it is now incumbent upon the Ministry to introduce these amended statutory provisions. A revised statutory framework would provide a much-needed boost to arbitration as an alternative dispute resolution mechanism.