

The Arbitration and Conciliation (Amendment) Ordinance, 2015 makes major changes to the Arbitration & Conciliation Act, 1996

Introduction

India has never been a preferred jurisdiction either for conducting international commercial arbitration or for enforcing foreign arbitral awards. Accordingly, the Union Cabinet chaired by the Prime Minister, gave its approval for amendments to the Arbitration and Conciliation Bill, 2015 taking into consideration the Law Commission's recommendations. The Government of India decided to amend the Arbitration and Conciliation Act, 1996 by introducing the Arbitration and Conciliation (Amendment) Bill, 2015 in the Parliament in August this year. However, this Bill could not be passed then.

Article 123 of the Constitution of India empowers the President of India to legislate by Ordinances, to meet any circumstances that require immediate action, when both houses of the Parliament are not in session. An Ordinance promulgated by the President constitutes "law" during the period of its validity and has the same force and effect as an "Act of Parliament" or "Act of Legislature". The Ordinance making power can be exercised by the President only when both houses of Parliament, i.e. the Lok Sabha (lower house of the Parliament) and Rajya Sabha (upper house of the Parliament) are not in session. An Ordinance passed remains in force for a period of six (6) weeks from reassembly of the Parliament. Ordinances once passed should be tabled before both the houses of Parliament when it reassembles.

The Arbitration and Conciliation (Amendment) Ordinance, 2015 (Ordinance) was promulgated by the President of India on 23 October 2015 and came into force with immediate effect.

The Ordinance is aimed at giving the necessary impetus for ease of conducting arbitration in India and amends the provisions of both Part I (Domestic Arbitration) as well as Part II (Enforcement of Foreign Awards) of the Arbitration & Conciliation Act, 1996 (the 'Act'). It amends the Act, in a manner so as to enable speedy settlement of commercial disputes. Further, the scope of interference of Courts in cases of enforcement of domestic as well as foreign arbitral awards has been restricted in an exhaustive manner.

Material Changes in Part I (Domestic Arbitration)

- Section 2 (2) of the Act has been amended. A proviso has been inserted which provides that the provisions of Sections 9, 27 and 37 (1)(a) and (3) of the Act, shall also apply to International Commercial Arbitrations even if the place of arbitration is outside India, unless there is an agreement to the contrary. The aforesaid Sections deal with interim measures by Courts, Courts assistance in taking evidence and appealable orders respectively. This is a material change from the earlier position of law which provided that Part I of the Act will not apply to International Commercial Arbitrations seated outside India.
- Section 8 of the Act which provides for the power to refer parties to arbitration where there is an arbitration agreement, has been amended to the effect that in case of domestic arbitration, even non-signatories to an arbitration agreement may be joined as parties. Thus the decision of the Hon'ble Supreme Court in Chloro Controls (I) P.Ltd vs Severn Trent Water Purification 2013 (1) SCC 641 stands affirmed. Further, amendment of the aforesaid Section makes it mandatory for the concerned judicial authority to refer the parties to arbitration notwithstanding any judgment, decree or order of the Supreme Court or any other Court. The judicial authority may however refuse to refer the parties to arbitration in case it is of the opinion that prima facie no valid arbitration agreement exists.

- Section 9 of the Act which provides for interim measures by Court has been amended. The amendment in effect prohibits Courts from entertaining applications for interim measures in case an Arbitral Tribunal has been constituted. However, the prohibition is not absolute and Courts can consider the aforesaid application in case the remedy provided under Section 17 of the Act (interim measures ordered by Arbitral Tribunal) is not efficacious.
- Section 11 of the Act which deals with the appointment of Arbitrators, has been amended and the striking change has been substitution of the words “the Chief Justice or any person or institution designated by him” by “Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court”. The scope of power of the Courts has been restricted to examining the validity of the arbitration clause alone. There is a positive development for disposal of cases under the aforesaid Section, as the Ordinance has amended Section 11 by providing an express direction to dispose of cases under this Section as expeditiously as possible and an endeavor shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the Opposite Party.
- Another striking feature of the amendments made by the Ordinance has been a move towards fast track procedure. Section 29A has been added to the principal Act and provides for a twelve (12) month period from the arbitral tribunal entering reference for passing an arbitral award. The period may be further extended by a period of six (6) months with the consent of the parties. The Court may on application of any of the parties and on sufficient cause been shown further extend the period of passing the arbitral award. Prima-facie, the aforesaid Section goes to show that the Ordinance has increased the scope of interference by Courts’ in arbitration proceedings however such interference should be construed positively and in favor of arbitration laws in the Country. It is clear that the Ordinance has aimed at fast tracking resolution of disputes through arbitration. Section 29B has been introduced by the Ordinance which gives the much needed impetus for rapid and efficient adjudication of disputes through arbitration. It gives an option to parties to an arbitration agreement to have their dispute resolved by a fast track procedure thereby conforming themselves to an arbitration consisting of a sole arbitrator to be chosen by the parties. Ideally, in the aforesaid circumstance the award should be made within a period of six (6) months from the Arbitral Tribunal entering reference.
- Section 34 of the Act which provides for application for setting aside an arbitral award, has been amended by the Ordinance. The said amendment has listed three requisites as to when an arbitral award is deemed to be in conflict with the public policy of India. The Ordinance has visibly reduced the interference of Courts’ in enforcement of domestic arbitral awards by expressly stating that Courts shall not entail a review on the merits of the dispute while hearing challenges to an award. The Ordinance has however widened the scope of challenging the enforcement of a domestic arbitral award and consequently the decision of the Hon’ble Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd* (2003) 5 SCC 705 wherein the Court introduced the ground of patent illegality and provided that an award can be set aside under Section 34 of the Act in case the Court finds that the award is vitiated by patent illegality, stands affirmed. Further, Section 34 of the Act has been amended to ensure that a challenge to the award is disposed of by the courts within a period of one (1) year.
- Section 36 of the Act has been substituted by a fresh Section 36 under the Ordinance. The substituted Section makes a departure from the position under the principal Act by expressly providing that pendency of an application under Section 34 of the Act will not entail automatic suspension of enforcement of an arbitral award. An application under Section 34 of the Act shall not by itself render the award unenforceable unless the Court grants an order of stay of the operation of the arbitral award upon an application made to that effect by the concerned party. A perusal of the aforesaid negates the decision of the Hon’ble Supreme Court in *National Aluminium Co. Ltd v Pressteel & Fabrications*, (2004) 1 SCC 540, wherein the Court had ruled that pending a challenge under Section 34, there is an automatic stay on the operation of an arbitration award
- Section 37 of the Act which provides for appealable orders has been amended by the Ordinance. The effect of the amendment is that a party may appeal against an order of the Court refusing to refer the parties to arbitration under Section 8 of the Act. What would ensue from the aforementioned is that the scope of appeal under Section 37 of the Act has been widened and accordingly the Courts would adopt a pragmatic approach while dealing with cases under Section 8 of the Act.

- The Ordinance also prescribes the model fees for Arbitral Tribunals and lists out exhaustive conflict of interest and disclosure guidelines for the arbitrators.

Material Changes in Part II (International Commercial Arbitrations)

- Section 47 of the Act has been amended by the Ordinance. The said Section provides for evidence to be produced by the party applying for enforcement of a foreign arbitral award. The amended explanation of Section 47 has excluded from the meaning of “Court”, principal Civil Court of original jurisdiction in a district. The effect of the amendment is that the application under Section 47 shall lie to a High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject matter of a suit on its original civil jurisdiction and in other cases, in High Courts having jurisdiction to hear appeals from decrees of Courts subordinate to such High Courts.
- Section 48 of the Act which provides for conditions for enforcement of foreign awards has been amended by the Ordinance. The Ordinance has clearly listed three exhaustive conditions wherein a foreign arbitral award is in conflict with the public policy of India. The Ordinance amending the explanation to Section 48 expressly states that the Courts’ shall not entail a review on the merits of the dispute while hearing challenges to enforcement of a foreign arbitral award. In view thereof, the said amendment affirms the judgment of the Hon’ble Supreme Court in *Shri Lal Mahal Ltd. vs. Progetto Grano Spa* (2014) 2 SCC 433, wherein the Hon’ble Court observed that Courts cannot go into the merits of the award or have a ‘second look’ at foreign awards in the award enforcement stage.
- The Ordinance has allowed the Indian Courts to interfere in an International Commercial Arbitration even if the place of arbitration is outside India, to grant interim reliefs under Section 9, 27 and 37 of the Act unless there is an agreement to the contrary between the parties.

Further information

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Conclusion

The Ordinance has taken a major leap to make India as an arbitration hub and to replicate the success of international arbitral institutions like the London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC) and the International Chamber of Commerce (ICC).

In view of the amended Section 2(2) of the Act it is advisable for parties entering into contracts during the period of this Ordinance, wherein the seat of arbitration is outside India, to expressly exclude the applicability of Part I of the Arbitration and Conciliation Act, 1996 in order to oust the jurisdiction of Indian Courts in international commercial arbitrations.

The main objective of the present Ordinance is to ensure expeditious resolution of disputes through the arbitration. This Ordinance will remain in force for a period of six weeks from reassembling of Parliament. Both the Houses of the Parliament need to pass this Ordinance for it to become an Act. The present Government has the requisite majority to pass the Ordinance in the Lower House but lacks the same in the Upper House. In view of the recent political developments in India, the Government may face stiff resistance in the Parliament. However, this does not completely negate the chances of the same being passed as an Act by the Indian Parliament when it reconvenes for the Winter Session, which is likely to commence from 24 November 2015.