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INDIAN ARBITRATION REGIME; HERALD A NEW EPOCH

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"Every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter. We balance inconvenience, we give and take, we remit some rights that we may enjoy others; and we chose to be happy citizens rather than subtle disputants".

Edmund Burke (Speech on Conciliation with America, 22 March 1775.)

ABSTRACT

The Indian judiciary has laid down various laws, which narrow the front through which Indian courts can intervene in arbitral procedures an arbitration regime that was afflicted with various problems including those of high costs and delays. To compliment that, the Government has also been cognizant of the urgent need to restrict judicial scrutiny, both during the pendency of arbitration, and after an award is made. In order to address these challenges, the Law Commission came up with its 246th Report on proposed amendments to the Arbitration and Conciliation Act, 1996and Government passed the, The Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act"), which is most certainly a welcome change and has been addressed for providing the much needed impulse to the growth of the Indian arbitration regime. Despite some deviations, the Amendment Act is largely in consonance with the Law Commission Report and the Arbitration Ordinance. However, there have been lapses in drafting the new law, and some more steps could have been taken by the law makers to ensure that India does indeed become the international commercial hub This paper, therefore, seeks to analyze the challenges that the Indian arbitration regime has faced in the previous few years and discuss how the Supreme Court's intervention in the 2014 has sought to address them and to provide perceptions and critically evaluates the Amendment Act with suggestions to make the Arbitration Act more operative.

KEYWORDS: Herald a New Epoch

INTRODUCTION

Arbitration arguably assumes one of the most important roles in commercial agreements. It is the only efficient tool to tackle the disputes arising out of such agreements. The cross-border activities in the trade and commerce have over the years increased exponentially. Parties from different cultural backgrounds and nationalities understand the importance of a speedy and unbiased mechanism to resolve the differences, which may emerge during the performance of their respective obligations in an agreement. The introduction of The Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act') make arbitration a preferred mode for settlement of commercial disputes by making arbitration more user-friendly and cost effective, hoping that that would lead to the more expeditious disposal of cases. This, in turn, was intended to improve the 'ease of doing business' in India and thereby impart confidence in investors who were previously

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wary of choosing India as a seat of arbitration.

Historical Development

Arbitration is an oldest concept in the history from Bible to Nayay Panchayat in India.

In Holy Bible, Chapter XXXI, lines 36 and 37; "Now that you have ransacked all my things, have you found a single object taken from your belongings? If so, produce it here before your kinsmen and mine, and let them decide between us two." Jacob and Laban referring to settle the dispute to a third party is based on the idea of arbitration[2] Authors like Barrett & Barrett[3]have commented that arbitration has been carried as far back from 337 B.C. where Philip the 2nd, father of Great Alexander also resolve territorial disputes through arbitration in the treaties. The indication of personal arbitration may be traced back to the Roman and Canon law.[4] George Washington of United States of America had an arbitration clause over probate disputes in his will.[5]

India has seen a rapid evolution of the arbitration law much to the likes of all since there has been a long and persistent unwillingness of parties to pursue traditional court based litigation for the purpose of resolution of commercial disputes..[6] In 1859, arbitration included in Civil Procedure Code by a new section 89, Sec.104 (1) (a) to (f) and Schedule II. Was included which is about outside court Settlement of disputes.

In India Panchayati system is the clear manifestation of Arbitration system where the head of the village with the help of elderly persons taking decision to resolve any kind of dispute. Their decision was final. Even though the historical presence of arbitration in India can be traced way back in the 18th century, however the first legislation, which brought its formal significance across the country, was the Arbitration Act, 1940. The act primarily dealt with the domestic awards and the foreign awards were taken care by the Arbitration (Protocol and Convention) Act, 1937 for the Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 for the New York Convention.

According to a survey conducted by PricewaterhouseCoopers, about 61% of the companies in India engaging in commercial transaction within India and abroad have a dispute resolution policy that involves alternative dispute resolution mechanisms like arbitration and conciliation[7].

The Arbitration and Conciliation Act, 1996 (hereinafter "**the Act**"), is an act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, and to define the law relating to conciliation and for matters connected therewith or incidental thereto.

However the arbitration process failed to be recognized as a fair judicial trial by many and the courts often interfered wherever there was a slight suspicion of mistrust on arbitration process..

To address the needs of India as a liberalizing economy, the Arbitration and Conciliation Act, 1996 was passed based on the United Nations Commission on International Trade Law ("**UNCITRAL**)" Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980.

[2]http://www.vatican.va/archive/ENG0839/_PX.HTM
[3]Barrett & Barrett, A History of Alternate Dispute Resolution: The story of a political, social and cultural movement (Jossey-Bass) San Francisco, 2004
[4] http://lexarbitri.blogspot.com/2010/10/panchayats-as-adr-mechanism-guest-post.html
[5]http://www.flprobatelitigation.com/2008/08/articles/new-probate-cases/will-and-trust-contests/george-washington-on-arbitration-of-probate-disputes/
[6] http://www.icaindia.co.in/icanet/quterli/apr-june2002/ica5.html
[7]https://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

Brief Scheme of the Arbitration Act

Part I of the Act lays down the general principals and definitions surrounding arbitration and deals with enforcement of awards from arbitration seated in India. The awards passed in such arbitrations are called '**Domestic Awards'** and such awards are challengeable and enforceable under the Part I of the Act. Part I of the Indian Arbitration Act has no application to arbitrations with seat of arbitration outside India irrespective of whether parties chose to apply the Indian Arbitration Act or not.

Part II of the Act deals with 'Enforcement of Certain Foreign Awards'. Part II is concerned with enforcement of both, the New York Convention Awards and Geneva Convention Awards. The awards passed in these arbitrations are called '**Foreign Awards'** and these awards cannot be challenged under the Part I of the Act. Part III of the Act provides the law relating to Conciliation and Part IV of the Act deals with supplementary provisions.

There are also three Schedules in the Act. The First Schedule refers to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, Second Schedule refers to Protocol on Arbitration Clauses and the Third Schedule refers to the Convention on the Execution of Foreign Arbitration Awards.

Evolution of the Current Arbitration Regime and New Surfacing Issues

The Act despite being a comprehensive legislation with respect to domestic arbitration has been facing severe judicial scrutiny from time to time, especially with respect to international arbitration. Initially it was opined that the Part I of the Act governed not only the domestic arbitration but also covered the international arbitration. As a result, the Indian courts substantially intervened during not only the enforcement stage of the arbitral award, but also during the pendency of the arbitration proceedings. This defeated the very purpose of the Act and added to the already heightened investor dissatisfaction in the country. The Supreme Court in *Bharat Aluminum Co. Vs. Kaiser Aluminium Technical Service*[8]("**BALCO**")eventually adopted the territoriality principle as laid down in the UNCITRAL Model Law, thereby restricting the applicability of the Part I of the Act to the arbitrations taking place in India (irrespective of whether such arbitrations takes place between Indian parties or between the Indian and foreign parties).As a result, in cases of international arbitration held outside India, Part I of the Act would apply unless the parties expressly or impliedly exclude application of all or any of its provisions. [9]

Since BALCO, a lot has changed and numerous issues have surfaced. A number of such issues were attempted to be addressed by the Supreme Court, which has known to have taken a pro-arbitration stance during the past few years. Such major developments that have taken place in the year 2014 are discussed and analyzed in the next section of this paper.

Major Developments & Judicial Pronouncements in 2014

Whether a challenge to an arbitral award could continue in two courts simultaneously?

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[8]***Bharat Aluminum Co. Vs. Kaiser Aluminium Technical Service Inc.- Civil Appeal No. 7019 of 2005***

[9]**ttp://www.mondaq.com/india/x/226610/Arbitration+Dispute+Resolution/Substantive+Law+vs+Curial+Law+In+International+Commercial+Arbitration**

Two Domestic Courts

The Supreme Court in *Executive Engineer* v *Atlanta Limited*[10] clarified that adjudication of a controversy by two different courts would lead to different conclusions. Therefore, logic and common-sense demands that adjudication can only be done by one jurisdictional court. The Court further clarified that if there is a conflict of jurisdiction between a High Court and a District Court vis-à-vis a challenge to an award, preference would be given to the High Court exercising jurisdiction.

Arbitrability of Fraud& Arbitration during Pendency of Criminal Proceedings[11]

Foreign Seated Arbitration

On a very interesting issue, that has remained to be a vexed during the past few years, the Supreme Court in *World Sports Group* v *MSM Satellite (Singapore) Pte. Ltd.*[12]took a stance, which favors arbitrability of fraud. The question in this case was whether the Indian courts could intervene in a foreign seated arbitration because the Facilitation Deed, which formed the basis of the contract, was under dispute, was subject matter of a fraud dispute in Indian courts.

The Supreme Court held that the Arbitration Act allows the Indian courts to intervene in foreign-seated arbitration proceedings only when the arbitration agreement is null, void or inoperative. It concluded that an Indian court couldn't refuse to refer the parties to arbitration on the grounds that allegations of fraud could only be enquired by the Court and not the arbitrators.

Domestic Arbitration

Arbitrability of fraud in domestic arbitrations was governed by an older judgment of the Supreme Court in *N. Radhakrishnan v Maestro Engineers*[13]. The Supreme Court in this case held that arbitral tribunals do not have the jurisdiction to decide complex issues of facts, which require to be adjudicated arising out allegations of fraud.[14] The Supreme Court in *Swizz Timing Ltd.* v *Commonwealth Games 2010 Organizing Committee*[15] took a different view. In *Swizz Timing*, criminal charges were pending against the chairman of the Commonwealth Organizing Committee, and therefore, validity of the contract was in question. The Supreme Court asserted that policy of least-intervention must be adopted to support arbitration process, rather than shut it at the initial stage itself. Therefore, it held that the proceedings must be allowed to continue and decide the issue of fraud.

The Seat and Venue Debate

The seat of arbitration is the country whose law is chosen as the curial law (law of arbitration) by the parties. As a result, the Courts, which are within the seat of arbitration, would have exclusive jurisdiction over the arbitration process. For example, if two parties decide to be bound by the Indian Arbitration Act and decide the proceedings to take place in Netherlands, the seat of arbitration would be India, the curial law would be the Indian Arbitration Act and the venue of arbitration would be Netherlands. Indian courts would have exclusive supervisory jurisdiction over such a proceeding.

[10] AIR 2014 SC 1094
[11] http://indiacorplaw.blogspot.in/2014/02/last-month-supreme-court-decided_17.html
[12] Text of the Judgement, http://judis.nic.in/supremecourt/imgs1.aspx?filename=41175
[13] Civil Appeal 7019 of 2009
[14] http://kluwerarbitrationblog.com/blog/2014/02/13/the-back-and-forth-of-the-arbitrability-of-fraud-in-india/
[15] (2014) 6 SCC 677

In *Enercon India Ltd.* v. *Enercon GmbH*[16], the Supreme Court was confronted with a situation where the parties chose Indian law as the governing / curial law of the arbitration proceedings and London as the venue of arbitration. Since the choice of seat was not clear from the agreement, the Court observed that the seat normally carries with it, the choice of curial law, and it would be safe to assume that India was intended to be the seat of arbitration. The question that arose was that since the proceedings are held in London, whether the courts in England would have concurrent jurisdiction over the arbitration proceedings.

The Supreme Court observed that such a situation would have a risk of conflicting judgments of different jurisdictions and, therefore, held that only the Courts in India would have exclusive jurisdiction over the proceedings.

Can an Unconcluded Contract Have a Valid Arbitration Agreement?

The Supreme Court in *Enercon*, continuing its pro-arbitration approach towards interpreting arbitration agreements, held that the courts must strive to make a seemingly unworkable arbitration agreement workable. The Court further observed that concept of seperability must be employed to view the underlying arbitration agreement as a separate agreement. Furthermore, the validity of the arbitration agreement must be left to the tribunal's decision.

Challenge to Arbitral Awards on Grounds of Being Opposed to 'Fundamental Public Policy of India' – A Step Backward

An arbitral award from an arbitration seated in India could be set aside under S. 34 for being violative of 'public policy' of India. The ambit of 'public policy' was first expounded in *Oil & Natural Gas Corporation of India v. Saw Pipes Limited.*[17]In Saw Pipes, the term 'public policy' was given a broad ambit and, it was held that an award could be set aside by an Indian court if the same is against the fundamental policy of Indian law, interest or morality, or is patently illegal.

In, what could be perceived as broadening the ambit of public policy even further, the Supreme Court in *Oil & Natural Gas Corporation of India* v. *Western Geco International Ltd*., for the first time, attempted to define the expression 'fundamental policy of India'. The Supreme Court in this case held that if in a challenge to an award, it is proved that the arbitrators while coming to the decision, did not act in a judicial manner, failed to apply the principles of natural justice, or failed the *Wednesd bury* test of reasonableness, the award could be set aside under Section 34 of the Act. Moving away from the principle of least intervention that the Supreme Court has otherwise repeatedly accepted in challenges to arbitral awards, this could open a "Pandora's box" of illegitimate claims against arbitral awards on arguable grounds such as unreasonableness, illegality or incorrect contractual interpretations.

The Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act")

With a view to revamp the present arbitration regime in India, and bring it to the level of best international practices, New arbitration act objective is to provide speedier and effective dispute resolution which could help India to attract international investors and meet international standards of arbitration .The important changes focus on interim measures, jurisdiction of the national courts, conduct of arbitrators, providing a time limitation to arbitral proceedings, narrowing scope for setting aside an award and providing faster mechanisms to resolve disputes through arbitration.

[16] (2014) 5 SCC 1
[17]http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/International_Commercial_Arbitration.pdf

The act was hailed but one of the argumentative issue by The Madras High Court in *Delhi TVS Diesel Systems v Union of India*2015W.P. No. 37355 issued a notice to the Central Government seeking a clarification on whether the provisions of the Ordinance had a prospective or a retrospective application.[18]

The Lok Sabha while passing the bill has clarified that it will not apply to pending cases unless parties agree otherwise.[19]

Subsequently section 26 was introduced in the Amendment Act which settles the issue that unless the parties agree otherwise, the Amendment Act will not apply to arbitrations that were initiated prior to the commencement of this Amendment Act. Section 1(2) of the Amendment Act states that it shall be deemed to be applicable from 23 October 2015.[20]

- The foremost and primary welcome amendment introduced by the act is the definition of expression 'Court'. The amended law makes a perfect difference between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'. In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. Accordingly, in an international commercial arbitration, as per the new law, district court will have no jurisdiction in terms of handling commercial disputes.
- A proviso to Section 2(2) has been added which envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27(taking of evidence), and Section 37(1)(a), 37(3) shall also apply to international commercial arbitrations, even if the seat of arbitration is outside.
- Section 8 sub-section (1) has been amended envisaging refer the parties to the arbitration unless it finds that prima facie no valid arbitration agreement exists. A provision has also been introduced to enabling the party to which is not in the possession of the arbitration agreement and the opposite party has the same, apply to the Court for a direction of production of the arbitration agreement or certified copy,
- Section 9(2)of the Act now provides interim measures, that the arbitration has to commence within a period of 90 days from the date on which an order under Section 9 has been obtained by a party or within such further time as the court may determine ,the aim is that the parties eventually route to arbitration process to resolve their disputes on merit through arbitration
- Section 11 of the act has introduced modifications in the appointment of an arbitrator.
- The court while considering an application under Sections 11(4), 11(5) or 11(6), shall notwithstanding any judgment, decree or order of any court, confine itself only to the existence of an arbitration agreement. the Act also provides that in cases where an arbitrator has to be appointed for an International Commercial

[18]Tuli&Taimni ,"India: Arbitration & Conciliation (Amendment) Act, 2015 Passed By Parliament http://www.mondaq.com/india/x/455538/Arbitration+Dispute+Resolution/Arbitration+Conciliation+Amendment+Act+2015+passed+by+Parliament, January 4th 2016

[19] "Bills On Commercial Courts, Arbitration Passed By Parliament"http://www.ndtv.com/india-news/bills-on-commercial-courts-arbitration-passed-by-parliament-1258238,December 23rd 2015

[20]Tuli&Taimni ,"India: Arbitration & Conciliation (Amendment) Act, 2015 Passed By Parliament http://www.mondaq.com/india/x/455538/Arbitration+Dispute+Resolution/Arbitration+Conciliation+Amendment+Act+2015+passed+by+Parliament, January 4th 2016

Arbitration, the court for such purposes shall be the Supreme Court. The appointment of an arbitrator shall be disposed off within 60 days.

- Section 12 further provides that before appointing an arbitrator, the court shall seek a disclosure in writing from the prospective arbitrator to clarify any justifiable doubts as regards his independence or impartiality. Schedules has been introduced which lists the grounds that would give rise to justifiable doubt ensure the independence and impartiality of arbitrator (5TH Fifth Schedule, 7TH schedule)
- Introduction of fee cap to ensure that the arbitration process become less expensive. So in the payment to the arbitral tribunal fee cap with a maximum of Three Million (INR) and when the commercial value of the dispute exceeds Two Hundred Million (INR).
- The Amendment in Section 17 of the Act envisages the tribunal with the power to provide interim measures, because previously interim orders of the tribunal were not enforceable
- The act introduces a provision in section 29A, which requires an arbitral tribunal to make its award within 12 months. This may be extended by a 6 month period. If an award is made within 6 months, the arbitral tribunal will receive additional fees. If it is delayed beyond the specified time because of the arbitral tribunal, the fees of the arbitrator will be reduced, up to 5%, for each month of delay.
- Section 29B,of the Act provides for a fast track procedure of arbitration. This procedure, if adopted by the parties, provides that the arbitration shall decide the dispute and pass an award within 6 months from the date of reference. The tribunal shall decide the dispute only on the basis of written pleadings, documents and submissions and no oral hearing shall be conducted unless requested by both the parties or such hearing is called for the tribunal to seek certain clarification, as may be required
- The Act has amended Section 34 of the Act to now include a new provision Section 34(2)(b) which provides that an award shall be in conflict with the public policy of India, will set aside by court and includes if the awards affected by fraud or corruption under 75 or 81 of the act and those in violation of confidentiality and admissibility of evidence provisions in the Act. And in contravention with the fundamental policy of Indian Law or conflict with the notions of morality or justice, in addition to the grounds already specified in the Act. Under new inserted section 34(2)award is vitiated by patent illegality in the case of International Commercial Arbitration
- The newly inserted Section 36(2), A proviso has been provided and states that while considering an application for grant of stay of an award for payment of money, the court shall have due regard to the provision for grant of stay of money decree under the Code of Civil Procedure, 1908;
- The amendment to clauses (a) and (b) of Section 37(1) of the Act has been broadened to by including under section 8 Refused to refer the parties to arbitration, under section 9 grants any measure and under section 34 set aside of arbitral award

The key amendments are only with regard to Sections 47, 48, 56 and 57 of the Act wherein explanations and provisos have been suitably amended to be in consonance with the amendments as made to the provision of Part I of the

Act

CONCLUSIONS

The new act is a result of series of judgments delivered by the Supreme Court and various high courts of India, The range of judgments delivered by the Supreme Court and various High Courts has continued to employ the policy of 'least intervention' in most of its judgments. One impediment has, however, been the varied interpretation that is given to the term 'public policy' for setting aside domestic and international awards.

The confusion that is created with the range of judgments in the preceding few years, however, would settle should the Arbitration Act is amended and the lacunae in the legislations are properly addressed. The amendments to the Arbitration act, as discusses above, are aimed towards quick and smooth disposal of arbitration cases before various district courts and high courts in the country. It is a part of the larger scheme of reforms that the Government proposes to introduce to improve India's ranking in the 'Ease of Doing Business' index.

Another such important reform would be imposition of actual costs incurred on the losing party. This would open a range of legal complications, such as, the effect of counter-claims on imposition of actual costs, calculation of actual costs, especially when the challenge to an award or the proceedings itself are found to be legitimate and non-frivolous. Since some of these proposed changes are borrowed from foreign jurisdictions (such as English arbitration law) and some are inventions based on judicial experiences. Therefore, the Courts would have to make use of wide range of international jurisprudence in order to apply these changes in the Indian context effectively. The cost of enforcing contract, the time required for its enforcement, the cost of lawyers involved etc. add to the woes that foreign investors have to face in order to conduct their businesses in India. If arbitration has to be seen as an effective alternative to traditional court-based litigation for enforcement of contracts, the legal environment surrounding it must be made conducive to encourage and promote it. The key to save it from being overtaken by the never-ending court proceedings is to restrict the intervention of the court with stringent procedures, limited substantive grounds of intervention, time-bound disposal of cases and effective measures to curb oppressive and frivolous litigations.

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