ARBITRATION: A leap forward

The whole concept of Arbitration is not a new one. It has been there in our society since time immemorial. The whole idea of Arbitration shows a process through which the parties that are in dispute fully submit themselves to a person or a group of persons who shall decide their dispute and conclude it using relevant legal provisions and the award that would be awarded will bind the parties. The whole procedure of Arbitration in India can easily be traced back to the Model Commercial Arbitration which is adopted by the United Nation Commission on International Trade Law (UNICTRAL) in 1985.

We cannot deny the mere fact that the parties to disputes have discovered the advantages of resorting to Arbitration as opposed to the Court based adjudication which has, in turn led to the growth of Arbitration in India. However, India has still not emerged as a preferred destination for Arbitration for the world and so the government has proposed to introduce certain amendments in the Act to bring India on the global map and also to meet the need of the hour. Significant amount of amendments are being brought about in Arbitration and Conciliation Act, 1996 to bring India on the global level and also paving the way for India to come up as the next hub for International Commercial Arbitration.

Though there have been many changes in the Law of Arbitration and it still continues to evolve itself daily, the much needed recognition is still a long way to reach and is still a subject to sever critism. All this is mainly due to various reasons like heavy expenditures involved, delays and the approach that Indian Courts adopt.

The Law Commission in its 246th report on 'Amendments to the Arbitration and Conciliation Act, 1996', which came on August 2014, discussed about large scale changes to the Act which should have substantive impact upon the Arbitration in India. The Cabinet has also finally approved all of these recommendations which further was presented in the Parliament in form of the Arbitration Bill' 2015. The Bill for amendment was passed by the Parliament by both houses in its winter session, pursuant to which it has received Presidential assent on 31st of December 2015. Further, the Act was then notified in the Gazette of India on 1st January 2016 and has now come into force.

An Ordinance came into existence on 23rd October 2015, through which large scale changes were made to the Arbitration and Conciliation Act, 1996 with the whole intention expediting the process and reducing the Court interference came into the broad day light. The Ordinance was welcomed warmly but there was still a question which held a great deal of importance. It was whether the new rule is applied to the fresh Arbitration proceedings or to the old ones as well. This contention was brought into discussion through the Madras High Court in *Delphi TVS Diesel Systems vs. Union of India. W.P. No. 37355 of 2015*. A notice was issued to the Central Government seeking a clarification in whether the provisions of the Ordinance had a prospective or a retrospective application.

Similarly, Bombay High Court too in *Kochi Cricket vs. BCCI* issued a notice to examine the Ordinance dealing with setting aside of domestic awards would be applicable to the pending cases or not. The Ordinance in the form of the Bill was introduced in Lok Sabha on 3rd December 2015. Lok Sabha while passing the Bill clarified that it will not apply to the pending cases unless and until the parties otherwise mutually agree for it. On 17th December 2015, Law Minister, Mr. Sadananda Gowda made a statement clarifying the same. Further, clarifications were made in the Amendment Act which settled the issue that unless the parties to the dispute otherwise agree, the Amendment Act will not apply to Arbitrations that were initiated prior to the commencement of this Amendment Act.

Henceforth, the Bill was passed by Rajya Sabha on 23rd December, 2015 without any further debate. Apart from this single change, the Ordinance when transforming into an Act, does not see any other change.

But, the Ordinance has now been repealed and Section 27 of the Amendment Act saves all actions undertaken by the parties, pursuant to the Ordinance. So, despite Ordinance now been repealed still holds its validity in Law as it saves all actions undertaken by the parties. Therefore, Orders that are passed by Courts/Tribunals, Arbitration or any other actions still holds their validity in Law.

Further, the Amendment Act does not expressly clarify whether disputes involving fraud and criminality would be arbitral or not. The issue of parties that are to approach the Court for extension of time for completion of Arbitration proceeding has also not been dealt in the Amendment Act. Given the delays that are associated with the domestic Arbitration which is usually ad-hoc manner, the provisions may lead to Arbitration being blocked on the grounds that the period of 18 months has expired. This will lead to the Court's intervention which the arbitration proceedings generally avoid. So, the issue would unwillingly attract the attention of the courts in coming days and rulings/awards which would be given by the Indian Courts would particularly be of interest.

The bill also amends a number of relevant issues.

1. **Neutrality of Arbitrator**: Neutrality of the arbitrator was one of the major drawbacks of Indian arbitration. Most of the public sector arbitrations had this anomaly. It was also misused by many private financial companies. The arbitrator would be their own officer or a person appointed by them. The opposite party had absolutely no role in the selection of the arbitrator. In fact this is against the very concept of arbitration, which envisages an expeditious and effective resolution of disputes through a private forum of parties' choice, i.e., mutual trust reposed by the parties on the arbitrator, so that his decision is accepted as final and binding. The arbitrator should not only be fair and impartial but also should enjoy the confidence of the parties. How can there be confidence if the arbitrator is an officer or a person unilaterally appointed by one party? The courts were also not supportive in overcoming this grave illegality. The courts had taken the view that if a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the other party is appointed as arbitrator he will not be impartial. Even though the named arbitrator is an employee of one of the parties, it is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part.

   But the Court brought in some relief to this position later by holding that there can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract and if any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person. By the present amendment, the neutrality of Indian arbitrators has been made in par with international arbitrations. Similar to the IBA Guidelines on Conflicts of Interest in International Arbitration, **Schedule-V** relating to the grounds for justifiable doubts relating to the independence and impartiality of arbitrators and **Schedule-VII** relating to categories of ineligibility for appointment as arbitrator has been inserted under Section 12. Apart from this, a provision has been made whereby before the arbitrator is appointed, a disclosure regarding his impartiality has to be mandatorily given. This is required even for appointments made under Section 11 of the Act by the High Court or the Supreme Court. So finally we are able to demolish the demon of one-sided arbitrations, which was a blemish in the system.

2. **Time and Fee:** The enormous delay in completing arbitration proceedings was mainly attributed to the "per-sitting" fee charged by the arbitrator in ad-hoc arbitrations. The ease in which the arbitrators granted adjournments for the asking was something so nauseating. The duration of the "sitting" was also inexcusable – the maximum being 2 hours. Unlike institutional arbitrations where the fee is fixed and sitting is done on day-to-day basis, ad-hoc arbitrations were left to the whims of the arbitrators.

We have seen arbitrations going on for year's altogether and fee mounting above the actual claim. In fact the situation became so notorious that even the Supreme Court of India had to say that there is no doubt that the cost of arbitration becomes very high in many cases where retired Judges are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

The court also opined that it is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. The court found that Institutional arbitration has provided a solution, as the Arbitrators' fees is not fixed by the Arbitrators themselves, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. The present amendment has also helped to settle this issue by inserting **Schedule-IV**, under Section 11(14) prescribing a model fee and making a scheme for the High Court to frame rules accordingly. This provision is not made applicable to international arbitrations and also for institutional arbitrations, thereby giving importance to institutional arbitrations, party autonomy and quality of arbitrators. Similarly regarding fixation of time limit, a provision is made under **Sec. 12(1)(b),** where the arbitrator at the time of appointment itself has to give in writing a declaration that he is able to devote sufficient time for arbitration and that he will be able to complete the arbitration within 12 months. An amendment has also been made in Section 24 making it mandatory to hold arbitration hearing on a day-to-day basis and not to grant adjournments without valid reasons. Required amendments are also made by inserting a **new Section 29A**, where the award has to be made within a period of 12 months from the date of reference. There is an incentive if the arbitrator could finish the proceedings within 6 months, whereby he is entitled to receive additional fees. Similarly if the arbitrator overshoots the period, the parties can extent the time to a maximum of 6 months, but thereafter the mandate of the arbitrator gets terminated, unless extended by the court. While extending, if the court attributes the delay on the arbitrator, the court can either substitute the arbitrator or reduce the fee of the arbitrator. A provision is also made for fast track arbitration by inserting a **new section 29B**. The parties can opt for fast track procedure where the tribunal can decide on the basis of written pleadings, documents and submission filed by the parties without any oral hearing and the award has to be made within 6 months from the date of reference. Thus the ignoble Indian arbitration is getting a face lift, whereby serious attempts are made in the Arbitration Act to make it speedy and less expensive and promoting the concept of institutional arbitration for international and domestic arbitrations.

3. **Clarity for international arbitrations:** There were lots of complaints about the 1996 Act that it was meant just for domestic arbitrations and did not have effective provisions to support international arbitrations, especially procedural aspects covered under **Part I of the Act**. With a view to give procedural support for international arbitration, the Supreme Court held that when international arbitration is held in India the provisions of Part I would compulsory apply and in cases of international arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions and also held that a foreign award may be challenged under Part I of the Act. These judgments had created an outburst among the legal fraternity that the courts are going beyond the basic tenets of arbitration and these decisions will scare away international arbitrations from India. The situation was salvaged subsequently by the Supreme Court itself holding that Part I of the 1996 Act would have no application to International Commercial Arbitration held outside India, but shall apply to all arbitrations which take place within India. But there were some procedural problems faced as provision for interim protection and certain court assistance for proper conduct of arbitration were not available under the 1996 Act.

   Now through the amendments procedural backups are provided for international arbitrations. Provisions of **Sections 9, 27, 37(1)(a) and 37(3)** – i.e., provisions relating to interim

measures by courts, court assistance in taking evidence and appeals against orders under section 9 – are made applicable to international arbitrations, even if the place of arbitration is outside India and enforceable under **Part II of the Act**. Another important change that has been brought out in the case of international arbitration is that all applications to "court" has to be made to the High Court having jurisdiction rather than the principal civil court in the district.

4. **Challenge & Execution of Awards:** A major change that has been introduced in the **section 34** regarding challenge of awards is that a prior notice to the other party that the award is going to be challenged has been made mandatory and the party challenging the award has to file an affidavit endorsing compliance of the above requirement. Further the vagueness created by some of the decisions of the Supreme Court with respect to **"public policy"** as a ground of challenge has been clarified and restricted to fraud, corruption, contravention to fundamental policy of Indian law and conflict with the most basic notions of morality and justice. A striking change that has been brought out by this amendment in **Section 36** regarding execution of awards is that the automatic stay of execution during the pendency of Section 34 is taken away and after the period of time for challenging the award has expired, the award becomes immediately executable, unless the court grants an order of stay of the operation of the arbitral award. This will promote the use of arbitration in commercial disputes, as the parties will be able to enjoy the fruits of the award without the delays of pendency in courts.

5. **More power to the Arbitral Tribunal:** The amendment has also given more power to the Arbitral Tribunal to pass interim orders. The power of the court to give interim orders of protection under **Section 9** has been limited up to the constitution of the tribunal. Once the arbitral tribunal is constituted the tribunal gets powers under **Section 17** to pass interim orders and the said orders will be deemed to be orders of the court and shall be enforceable under the Civil Procedure Code in the same manner as a court order. Even though these powers were available to the arbitral tribunal under the 1996 Act, nobody dared to use it as it did not have the tooth of enforceability. It resulted in overcrowding the courts under Section 9, before, during or after the arbitral proceedings. This amendment will not only facilitate emergent orders of protection from the tribunal, which otherwise will consume lot of time in the court, but also help reduction of case pendency of Original Petitions in the District Courts as well as Arbitration Appeals in the High Court.

With the passing of the Bill which was an extremely important development there was also crystallization of number of important changes that were introduced in the Ordinance. The whole thing would have a positive impact in the arbitration landscape and as a result would improve India's image as an upcoming arbitration hub in coming years.