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Law Commission's Report to Revamp the Indian Arbitration Experience

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The Law Commission of India under the chairmanship of Justice AP Shah had constituted an expert committee to work on the 246th Report on "Amendment to the Arbitration and Conciliation Act, 1996" which was recently submitted to the Government of India. In this piece, Ashutosh Ray, who was a part of the expert committee, covers for the larger international audience, the important suggestions and amendments recommended by the Commission.

Tackling Delay in Courts

The most serious problem currently faced, especially by foreign parties, is the time taken once an arbitration matter reaches court. The Commission has made various proposals to address this issue including that of raising the bar for judicial intervention at various stages of the arbitral process. The Commission has recommended dedicated benches across India akin to the Delhi model to deal with arbitration-related cases expeditiously. The Government has been asked to request Chief Justices of High Courts to this effect. To further restrict cases being instituted as a dilatory tactic, there is a proposal to impose actual costs in frivolous and misconceived actions.

The appointment of an arbitrator under Section 11 has been changed from the Chief Justice to the High Court(HC) and Supreme Court (SC), and it has been particularly clarified that delegation of power of appointment shall not be regarded as a judicial act. This is to substantially cut down the time taken at the threshold of the arbitration if one of the parties does not appoint an arbitrator.

An amendment has been proposed to make the decision of a HC non-appealable where an arbitrator has been appointed. Another proposed amendment in the same context requires the court to make an endeavor to dispose of the matter within sixty days from the service of notice.

As to the challenge to an arbitral award under Section 34 and 48, a proposed amendment requires the matters to be mandatorily disposed in any event within one year from the date of service of notice.

To accelerate ongoing international commercial arbitration matters both in India and abroad, and to instill the confidence of foreign investors, the High Courts would have direct jurisdiction and a party need not approach the lower courts. This proposal also tranquilizes the effects introduced by the White Industries Investment Treaty Arbitration where the delay in the courts led to India being held responsible under a Bilateral Investment Treaty. (More on this case here)

As per the proposal, while there shall be no appeal on reference to arbitration under Section 8 or appointment of an arbitrator under Section 11, an appeal can be maintained under Section 37 only if the court refuses to refer to parties to arbitration.

Enforcement of Foreign Awards; Restrain in Setting Aside of Domestic Awards

Hitherto the criteria for setting aside an award seated in India under Section 34 and refusing enforcement of a foreign award under Section 48 has been identical, thus, making foreign awards subject to unreasonable judicial intervention and scrutiny. Under the proposal, while an award between two Indian parties may be set aside on the basis of Patent Illegality, "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." A restriction has been given to the meaning of "public policy". Hence, as per the proposal, an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice". It is clear from the proposal that the threshold for intervention in international arbitrations would be far higher than a purely domestic award. There has been explicit clarification that any contravention of a term of a contract by the tribunal should not *ipso jure* result in the award being liable of setting aside.

Reinforcing BALCO Minus the Maladies

While the celebrated *BALCO* case [(2012) 9 SCC 552] was a revolutionary judgment which set the stage for positive sentiments in favour of India internationally, it gave rise to few glaring concerns. These concerns have been addressed by the Commission. The issue that a party in a foreign-seated arbitration could not apply to the court for interim measures under Section 9 to secure the assets or for assistance in taking evidence has now been redressed as the parties may make express agreement to incorporate the relevant sections to avail of the benefits. The Commission's proposal also addresses the concern of *BALCO*'s application only to future signed agreements.

Tackling Delay in Arbitral Tribunals

In many cases, it is seen that there are several arbitrations under the same arbitration agreement thus creating a multiplicity of proceedings and consequent delay in final adjudication of the dispute. To put an end to this practice, the Commission has proposed an explanation in the Act to ensure that counterclaims and set off can be adjudicated upon by a tribunal without seeking a separate or new reference by the respondent, as long as it falls within the scope of the original arbitration agreement. That apart, the Commission has also suggested mandatory disclosure by prospective arbitrators to ensure their availability to expeditiously complete the proceedings in a time-bound manner. This suggestion would be of tremendous help especially in ad-hoc arbitrations.

Encouraging Institutional Arbitration

The Commission has suggested promotion of institutional arbitration by recommending appropriate proposals which it hopes will be used by the SC and HCs to promote institutional arbitration. It further proposes to accord legislative sanction to the institutions such as ICC and SIAC which provide for "Emergency arbitrator" by broadening the definition of "arbitral tribunal".

The Commission has encouraged the establishment of able and efficient institutions across the

nation while recommending support from the government in terms of initial funds and land for the establishment of such institutions. It has discussed a novel idea of having an Arbitral Commission of India which would encourage the spreading of institutional arbitration in India.

Better Conduct of Arbitral Proceedings

The Commission has taken into cognizance that the conduct of the arbitrations has been unsatisfactory and has therefore indicated diligent usage of the existing provisions in Chapter V of the Arbitration and Conciliation Act, 1996 (the Act) by the arbitral tribunals. In the Report, the Commission has condemned the culture of frequent adjournments in arbitrations and has called for a cultural revolution within the arbitration community. It has recommended a conscious use of technology to aid the process of arbitration. An amendment has been suggested to discourage the practice of frequent adjournments and to ensure continuous sittings of the tribunal. To further bolster this objective, the Commission has also proposed appropriate addition on this issue to the preamble of the Act.

No Automatic Stay of Enforcement of the Award upon Admission of Challenge

The Commission has proposed to rectify the mischief of the automatic stay of enforcement of an award upon the admission of challenge in the court. The proposed amendment in this regard provides that an award will not become unenforceable merely upon filing an application under section 34.

Power of Tribunal to Order Interim Measures

The 2006 amendments to Article 17 of the UNCITRAL Model Law give wide powers to the arbitral tribunal to order interim measures. Although the Report does not recommend it *pari materia*, it follows a similar line, hence, giving sufficient power to the orders of the arbitral tribunal under Section 17. These orders would be enforceable in the same manner as the orders of a court.

Fraud Issues: Now Arbitrable

The Commission has categorically recommended that issues of fraud be made arbitrable and has, for this reason, proposed an appropriate amendment to that effect.

No More Employee Arbitrator in Government Contracts

As the situation has been, in most of the contracts between private parties and the government entities, the appointment of an employee of the government as an arbitrator was permissible. However, the Commission attempts to stop that practice. For this reason, as per the proposal, while disclosure is required at the stage of possible appointment in terms of Red and Orange lists of the IBA guidelines as incorporated in the Fourth Schedule, a person would be ineligible to become an arbitrator and will be considered ineligible *de jure* even if appointed, as per the Fifth Schedule which is based on the Red List of the said IBA Guidelines.

However, the Commission understands it important to restore party autonomy and therefore in certain situations, it allows the parties to waive even ineligibility. It is the proposal that in certain situations, subsequent to disputes having arisen between them, the parties may waive the applicability of the Fifth Schedule by an express agreement in writing.

Definition of "Party" Enlarged

The Commission has proposed a change in the definition of "party" to recognize the right of a "person claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. Although this was decided by the SC in principle, the Commission thought it best to propose it in the definition clause of the Act explicitly for the avoidance of any further ambiguity.

Liberty on the Tribunal to Award Compound Interest

The question of future interest being payable not only on the principal sum but also on the interest accrued till the date of the award remains contentious and has been referred to a three-judge bench. The Commission in this context has proposed an appropriate amendment to clarify the ambit of powers of the arbitral tribunal to award compound interest. Along with that, it has proposed to rationalize the rate of default interest of existing 18% to a market-based determination.

Courts and Tribunals Empowered to Impose Costs

An amendment has been proposed to bring comprehensive reforms to the prevailing costs regime applicable to arbitrators as well as related litigation in court. The provision allows the arbitral tribunal as well as the courts to award costs based on a rational and realistic criterion. The Commission hopes that judges and the arbitrators would explain the "rules of the game" to the parties well in advance so as to avoid frivolous litigation and arbitration.

Controlling Arbitrators' Fees

The Commission has recommended a model schedule of fees while empowering the HC to frame appropriate rules for fixation of fees and revise it at suitable intervals. This recommendation is however strictly restricted to domestic arbitrations which are ad-hoc in nature. This recommendation is to allay the fear of high costs related to arbitration and to promote usage of arbitration as a mode of settlement of disputes between Indian parties.

The Commission has strived to address the various concerns and red flags in the functioning of the existing Act while being sensitive to the Indian idiosyncrasy, to prepare this report. The new Government has promised early introduction of the amendments bill in the parliament. While these events appear to be an omen of good times to come, the international community can only wait for early incorporation of the Commission's recommendations.

This entry was posted on Saturday, August 23rd, 2014 at 8:51 am and is filed under Arbitration, Arbitration Act, Arbitration Institutions and Rules, Arbitration Proceedings, India
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