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Law Commission's Report Reinforces the Pro-Arbitration Trends in India

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During the last few years, a series of court decisions in India have strengthened the pro-arbitration stance in the Indian judiciary. In *BALCO* (2012), the Supreme Court of India limited the supervisory jurisdiction of the Indian courts regarding arbitrations seated outside India. Since *BALCO*, further decisions of the Supreme Court and High Courts of India have elaborated on issues such as the remit of "public policy of India" in enforcement of foreign arbitral awards (*Shri Lal Mahal v Progetto Grano Spa* (2013), reference to issues relating to fraud to arbitration (*WSG v MSM Satellite (2014) and Swiss Timing v Organising Committee* (2014)), and doctrine of severability in arbitration (*Mulheim Pipecoatings v Welspun Fintrade* (2013)).

However, a number of thorny issues still remain in Indian arbitration. Some of these issues, discussed below, are purely legal. Others relate to larger questions of policy and practice. The Indian Law Commission's Report on Amendments to Arbitration and Conciliation Act 1996, issued in August 2014, as discussed on this blog previously, is a step further in the pro-arbitration trends and the legislative amendments proposed by the Law Commissions appear to reinforce the pro-arbitration practices in India.

The Law Commission's Report deals with some of the commonplace issues in arbitrations in India, which range widely from cultural issues in the arbitration community (*"… culture of frequent adjournment where arbitration is treated as secondary by the lawyers…"*) to legal questions such as the scope of "public policy of India" to set aside an arbitral award issued in India. Dealing with these issues, the Law Commission proposes a wide array of legislative amendments to the Arbitration and Conciliation Act 1996 ("Arbitration Act").

The Law Commission's Report is candid in discussing some of the controversial decisions of the Supreme Court of India. Perhaps, the most critical of these decisions is *SBP v Patel Engineering* (2005) and related cases, where the Supreme Court held that the court's power to appoint arbitrators under section 11 of the Arbitration Act is a "judicial power" rather than administrative. The courts, therefore, in exercise of its power to appoint an arbitrator, may look at wide-ranging issues including the validity of the arbitration agreement (and even at issues such as limitation period regarding the claim). In practice, lengthy delays have ensued because of this judicial undertaking. The Law Commission recommends that the court's authority should be limited: *"if the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration…"* and the court's decisions should not be appealable.

The Law Commission's Report also deals with the "gaps" which were left with the Supreme Court's decision in *BALCO*. As many noted when the decision came out, the effect of *BALCO* is that where the assets of a party are in India and the arbitration is seated outside India, the court's refusal to exercise jurisdiction under section 9 may leave the party with no adequate avenue for interim relief. The Law Commission recommends that the courts should have power to issue interim relief in cases where the award is likely to be enforced in India.

The court's power in India to issue interim relief has been slightly controversial in the past. The Law Commission suggests limit on the court's power to issue interim relief and recommends that once the arbitral tribunal is constituted, the courts should not ordinarily entertain an application for interim relief. In such cases, the parties should approach the arbitral tribunal to seek interim relief. The Law Commission strengthens the tribunal's authority to issue interim relief by providing for effective enforcement of the tribunal's interim orders as if they were orders of the court, providing *"teeth to the interim order of the arbitral tribunal"*.

The Law Commission's proposals reinforce the rising trend and popularity of "emergency arbitrator" provisions. The proposed amendments suggest that the definition of arbitrator shall include emergency arbitrator where the arbitration is conducted under the rules providing for emergency arbitration. This provision, which has parallels in Singapore and Hong Kong, will further strengthen the increased use of emergency arbitrator provisions. Indian parties are already frequent users of emergency arbitrator provisions under the SIAC Rules; in 2013, the SIAC reported that 9 out of 34 emergency arbitrator applications involved Indian parties.

Other major amendments proposed by the Law Commission include:

• The restriction on the scope of public policy of India as a ground for setting aside arbitral awards and recognition/enforcement of arbitral awards: the Law Commission suggests the courts may set aside an award or refuse recognition/enforcement on grounds of public policy if: (a) the making of the award was induced or affected by fraud of corruption; (b) it is in contravention with the fundamental policy of Indian law; and (c) it is in conflict with the most basic notions of morality or justice;

• While the Law Commission does not suggest doing away with the ground of patent illegality as part of "public policy of India" to set aside a domestic arbitral award, the Law Commission suggests a clarification that *"an award shall not be set aside merely on grounds of an erroneous application of law or by re-appreciating evidence"*;

• The parties' application to the court to set aside the arbitral award shall not operate as an automatic stay; the courts have the discretion to grant stay of the operation of the award upon an application by a party;

• The arbitrators shall be subjected to higher requirements of neutrality and impartiality; prospective arbitrator shall provide disclosures on matters, which are drawn from the Red and Orange lists of the *IBA Guidelines on Conflicts of Interest in International Arbitration* to treated as a "guide" to determine whether circumstances exist to give rise to justifiable doubts as to independence or impartiality of an arbitrator; and

• The definition of "party" to be revised to include *"any person claiming through or under such party"* to provide for multi-contract and multi-party arbitrations.

The Law Commission's recommendations may not result in amendments to the Arbitration Act any time soon. India is a large country with a bicameral legislature. Amendments to arbitration law may not be top priority for the government at present.

The Law Commission's Report, however, reflects the rising expectations of the users of international arbitration in India and provides a considered critique of the court's opinions in the area of arbitration. One would expect the courts will take note of the Law Commission's recommendation and remove some of the hurdles in the arbitration process in India as far as may be possible through judicial intervention.

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