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Arbitration in India: A New Beginning

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The recently promulgated Arbitration and Conciliation (Amendment) Ordinance 2015 (the "**Ordinance**") marks a significant change in the arbitration landscape of India. Most significantly, the Ordinance (a statutory enactment in exercise of an extraordinary power granted to the President to act when the parliament is not in session) seeks to restrain judicial intervention in arbitration and tackle inordinate delay with arbitration-related court actions. The amendments, though well intentioned, are not without concern.

Key Amendments

Applicability

The Ordinance is stated to come into force with immediate effect. However, it is not specifically stated as to whether the provisions would apply to pending arbitrations and/or judicial proceedings dealing with the issues that are the subject of the amendments. Pending clarification, this is likely to give rise to some uncertainty. However, since the Ordinance has not been specifically made prospective, it is likely to be interpreted as applying to arbitrations initiated pursuant to existing arbitration agreements (although there is some basis to argue otherwise).

The amendments affirm the line of distinction between purely domestic arbitration involving Indian parties ("**Domestic Arbitration**"), arbitrations having an international element but seated in India ("**International Arbitration**"), and arbitrations seated outside of India ("**Foreign Arbitration**"). The provisions of the Arbitration and Conciliation Act 1996 ("**Act**") (other than Part II of the Act dealing with enforcement) are normally not applicable to Foreign Arbitrations, except where specifically provided.

The Ordinance clarifies that an arbitration would be a Domestic Arbitration even if one of the parties to the arbitration has its central business and management outside India. This amendment affirms the ruling of the Supreme Court in *TDM Infrastructure* and affords primacy to the place of incorporation of a company.

Reference to Arbitration

The Ordinance now permits "*any person claiming through or under*" a party to the arbitration to seek reference of a dispute the subject of an arbitration agreement to arbitration. This clarifies a string of slightly inconsistent rulings of the Indian courts and provides that even non-signatories to an arbitration agreement may be able to seek reference to arbitration under appropriate

circumstances.

The Ordinance also requires the courts to refer parties to arbitration if, *prima facie*, an arbitration agreement is found to exist. This amendment will prevent an extended inquiry by the courts on the validity of the arbitration agreement (as was frequently done), and leave these issues to be determined by the arbitral tribunal.

Appointment of Arbitrators

Previously, due to a string of Supreme Court decisions including the decision in *Patel Engineering*, appointment of an arbitrator by the Indian courts was considered a judicial function. This was interpreted to mean that courts enjoyed broad powers to inquire into the validity of arbitration agreements prior to appointing arbitrators. The Ordinance clarifies that the power to appoint arbitrators is not a judicial function.

The Ordinance also clarifies that the power to appoint arbitrators can be delegated by the Supreme Court or the High Court to any person or institution. This is an important statutory recognition of the role of institutions in arbitral proceedings.

The Ordinance requires the courts to aim to dispose of an application for appointment of arbitrators within 60 days from the date of service of notice to the other party.

The Ordinance also clarifies the grounds available to challenge appointment of arbitrators on grounds that the appointment raises justifiable doubts as to his/her impartiality or independence. The amended Act contains two schedules that list various grounds for challenge – which appear to be heavily influenced by the IBA Guidelines on Conflict of Interest in International Arbitration.

The amended Act also makes it impermissible for parties to agree in advance to appoint an arbitrator who has previously been an employee of either party. Provisions such as these, which were a standard feature of a number of State contracts will now no longer be valid.

Court Assistance to Arbitration

The Ordinance now clarifies that the courts' power to grant interim relief in aid of arbitration is available prior to initiating arbitration, provided the parties actually initiate arbitration within 90 days from the date of obtaining interim relief from the court. This is in contrast to recent decisions in other countries where courts have recognised the courts' power to grant interim relief even if arbitration is not in contemplation.

The Ordinance also clarifies that the courts' power to order interim relief is only available if the arbitral tribunal is not in a position to grant efficacious interim protection.

Significantly, the Ordinance makes interim orders granted by arbitral tribunals enforceable in Indian courts. This amendment will give more teeth to arbitral tribunals' orders and minimise the need to approach courts to obtain an enforceable order.

Court Assistance to Foreign Arbitration

Following the Supreme Court ruling in *Bharat Aluminum*, foreign parties were concerned that by choosing to arbitrate outside of India they were unable to seek interim protection from Indian

courts. The Ordinance now specifically recognises that parties to a Foreign Arbitration can seek the assistance of Indian courts for interim protection and for obtaining evidence, unless they specifically exclude the jurisdiction of the Indian courts to provide such assistance.

The Ordinance however suggests that Indian Courts will only provide assistance if the seat of arbitration is in a country which India recognises in its official Gazette as being a reciprocating territory for the purposes of the Act.

Conduct of Arbitrations

A controversial provision in the Ordinance is the requirement for arbitrations to be completed within 12 months. Parties are free to agree to extend this period by up to 6 months. Any further extension can only be sought by making a court application. In such proceedings the court has the power to replace recalcitrant arbitrators, impose penalties by reducing arbitrators' fees and impose exemplary costs on parties. The Ordinance requires the courts to endeavour to decide such applications within 60 days. Mandatory stipulations of this nature, which do not account for differences in the complexity of arbitrations are likely to attract criticism. Further, the requirement to approach the courts to seek an extension in each case is likely to increase court interference.

Significantly, a new provision allows parties to choose fast-track arbitration. In such proceedings the arbitrator is required to render an award within 6 months from his/her appointment. The default rule is for a decision to be rendered based on written pleadings with an oral hearing being permitted only if both parties so request or if the arbitrator finds it necessary.

Interest and Costs

The Ordinance makes certain amendments to the arbitrators' power to order interest. It prescribes a default rule of awarding interest post-award at market rate (as periodically determined by the Reserve Bank of India) plus 2%.

The Ordinance also contains detailed provisions relating to ordering of costs. It stipulates that the court/arbitral tribunal can only order "reasonable" costs for legal fees, witness attendance, institution fees etc. The Ordinance also provides that the default rule is for an unsuccessful party to bear costs. The court/tribunal is free to deviate from this default rule for reasons to be recorded in writing and after considering the circumstances detailed in the Act.

Setting Aside and Enforcement

The scheme of the Ordinance confirms the principle laid down in *Bharat Aluminum*, which clarified that Indian courts do not have the power to set-aside awards rendered in Foreign Arbitrations.

The Ordinance also narrows the scope of the public policy ground for setting aside arbitral awards and challenging enforcement to circumstances where: the making of an award is vitiated by fraud or corruption; the award violates the fundamental policy of India and; the award is opposed to basic notions of justice or morality. The Ordinance further clarifies that the court cannot review an award on merits while considering whether the award is opposed to the fundamental policy of India.

The Ordinance specifically provides that 'patent illegality' as a ground for setting aside awards will

only be available for Domestic Arbitrations. Even here, the Ordinance provides that an award may not be set aside merely on grounds that the tribunal erroneously applied the law or by re-appreciating evidence.

In a further bid to avoid frivolous challenges, the Ordinance provides that an application to set aside an award would not automatically stay enforcement. The Ordinance further provides that where payment of money is the subject of an award, stay on enforcement shall be granted only upon furnishing the sums in dispute as deposit or by furnishing sufficient security.

Conclusion

The intentions of the Ordinance are clear and laudable. It seeks to make India a more arbitration friendly jurisdiction – both for India seated and foreign seated arbitration. The content however needs further refinement and clarity; and the language, a further review.

The Ordinance will expire (subject to re-promulgation) if the amendments are not accepted by the Indian parliament within six weeks from the start of the parliament's Winter Session this November. Given that most political parties have expressed support, it is hoped that the parliament will accept the changes now long overdue and in the process smoothen the edges.

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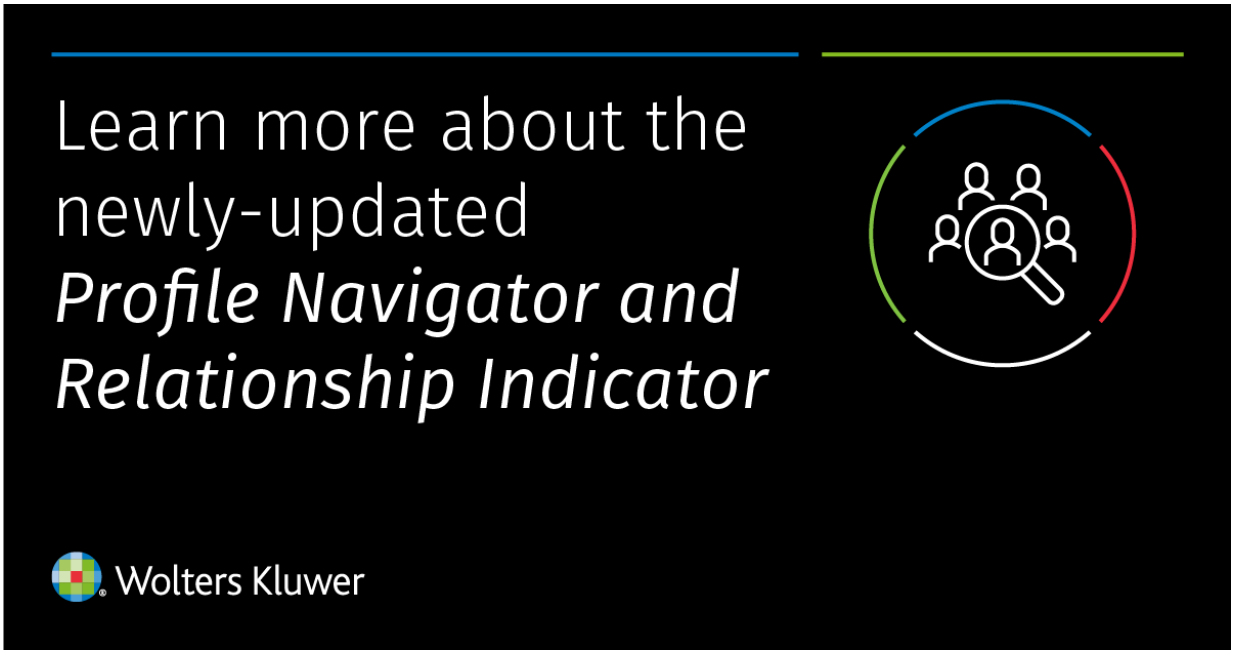

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