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Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act

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Prior to the amendment of the Indian Arbitration and Conciliation Act 1996 ("the Act"), India's journey towards becoming an international commercial hub that could rival Singapore and London was hampered by a largely ineffective Act and an arbitration regime that was afflicted with various problems including those of high costs and delays.

To address these issues, the Indian Government promulgated the Arbitration and Conciliation (Amendment) Bill 2015 which was passed by the *Lok Sabha* on 17 December 2015 and the *Rajya Sabha* on 23 December 2015 to 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 instil confidence in investors who were previously wary of choosing India as a seat of arbitration.

Critique of the Amendments

Although, most of the amendments to the Act have been welcomed by the arbitration community for their potential in increasing the fairness, speed and economy with which disputes are resolved by arbitration in India, two amendments in particular may end up being counterproductive.

1. *Reducing Delays*

One of the main amendments to the Act was the introduction of Section 29A, which was intended to reduce delays and the protracted timelines in Indian arbitrations through the imposition of strict timelines on the arbitral proceedings and the minimisation of court interference.

Section 29A provides that the arbitral tribunal must enter the award within 12 months from the date the tribunal entered reference with the option to extend the time period by a further 6 months with the mutual consent of all parties. However, after the expiry of that 18-month period, parties seeking a further extension would have to apply to the Indian courts, which may grant such an extension on

such terms and conditions as it may impose if it finds that there is sufficient cause. In the absence of such an extension, the mandate of the arbitral tribunal is terminated immediately and the court may appoint a new tribunal to continue the arbitration. On the other hand, even if the court grants an extension of the time period, if the court is of the view that the proceedings were delayed by the actions of the arbitral tribunal, the court has the power to order the reduction of fees of the arbitrators by up to 5% for each month of such delay.

However, although this amendment appears to, on its face, address the issue of protracted timelines in Indian arbitrations, further analysis shows that the process may be intrinsically flawed.

First, the arbitration cases come in a wide array of all shapes and sizes and setting a common timelines for all arbitrations ignores the vast range of variance in issues that may arise in arbitration. Further, given the intention to minimise court interference, requiring court approval for a further extension of time represents a step backwards in promoting the efficient disposal of arbitration cases by increasing, rather than decreasing, court involvement in on-going arbitrations and considering the already overburdened Indian court schedules, this amendment may end up prolonging protracted Indian arbitration timelines. Finally, one should not ignore the potential for the court's power to reduce the arbitrator's fees due to delay in the arbitration timelines to hang over the tribunal like a Sword of Damocles, unduly pressuring them to rush through the arbitration to render an award to meet the strict timeline.

1. *Appointment of Arbitrators by the Courts*

Another significant amendment was the introduction of Sections 11(13) and (14). Section 11(13) provides that an application for the court to appoint arbitrators must be disposed "as expeditiously as possible" and that "an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice to the opposite party" while Section 11(14) provides that "for the purpose of determination of fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame rules as may be necessary, after taking into consideration the rates specified in the fourth schedule".

Section 11(13) is likely to enable applications for the appointment of arbitrators to be dealt with in a timely manner, particularly since it provides that the power to appoint arbitrators can be delegated by the Supreme Court or the High Court to any person or institution.

However, the flaws and ambiguities of Section 11(14) and the Fourth Schedule are worth noting.

First, the model fees in the Fourth Schedule only vary according to the sum in dispute. Often, in practice, it can be very difficult to quantify the 'sum in dispute'. Further, even if the amounts claimed can be quantified, the question of whether the 'sum in dispute' relates only to the amount claimed by the Claimant or whether it will also include the amount counter-claimed by the Respondent is left open.

Second, the extent of the application of the Fourth Schedule is ambiguous. It is unclear whether the Fourth Schedule applies to (i) all arbitrations in India, (ii) all arbitrations initiated under Section 11, or (iii) all arbitrations initiated under Section 11 except fast-track arbitrations by a sole

arbitrator under Section 29B.

Finally, there is potential for the new Section 11(14) to be misused in *ad hoc* arbitrations. A party or parties to an arbitration agreement may intentionally fail to follow the relevant appointment procedure or to agree to on an arbitrator in order to take advantage of the Fourth Schedule fee structure, which may be significantly lower than the fee quotes by *ad hoc* arbitrators. Unfortunately, this also has the unintended effect of increasing judicial interference.

Conclusion

The amendments to the Act, though laudable, are only a first step towards making arbitration the preferred mode of dispute resolution in India. It must be acknowledged that increased efficiency in arbitration is unlikely to come solely from the imposition of top-down legislative change, especially one that is as inherently flawed as this one.

A change in the very culture of Indian arbitration is required.

For one, there needs to be a change in the perspective with which arbitration is viewed. The pool of Indian legal practitioners who specialise in the practice of arbitration has to grow, with arbitration viewed as the priority rather than playing second fiddle to Indian court litigation work.

And the pool of arbitrators needs to grow as well. Unfortunately, the tendency to appoint retired Indian judges as arbitrators is also stifling the growth of arbitration as a dispute resolution mechanism in India. What is needed is the growth of a community of arbitrators unfettered by the traditions of the Indian courts and focussed on growing arbitration in its own right.

The final, and most important, change needed is the minimization of judicial interference. *ONGC v Saw Pipes* has demonstrated how judicial interference in the arbitration process can take root when there is even the slightest ambiguity in arbitration law, with the interference being of such magnitude that legislative change is necessary to remedy it. Unfortunately, as shown above, even the recent amendments to the Act are riddled with many such ambiguities thereby providing the opportunity for further judicial interference.

It is only when the Indian arbitration culture has changed and these persisting problems have been addressed that arbitration will finally become the preferred mode of dispute resolution in India.

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