

The Arbitration and Conciliation (Amendment) Ordinance, 2015: A Primer

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In what is being termed as a significant move towards creating a more effective arbitration regime, the President of India promulgated the Arbitration and Conciliation Amendment Ordinance^[1] (the 'Ordinance') on Friday, October 23rd, 2015 following the recommendations of the 246th Report of the Law Commission of India.

The Ordinance has with immediate effect brought into force amendments to Sections 2(1)(e), 2(1)(f)(iii), 7, 8, 9, 11, 12, 14, 23, 24, 25, 28, 31, 37, 47, 48, 56, 57 of the Arbitration and Conciliation Act, 1996 (the "Act"). Further, Sections 17 and 36 have been substituted with new sections and Sections 11A, 29A, 29B, 31A and the Fourth, Fifth, Sixth and Seventh Schedules have been inserted into the Act.

The most notable amendments and additions to the Act include the following:

Definition of 'Court' under Section 2(1)(e) of the Act:

For International Commercial Arbitrations, the definition of 'Court' has been amended to mean the High Court exercising its ordinary original civil jurisdiction in the matter. Originally, the principal civil court of original jurisdiction in a district has the jurisdiction. The amendment is a relief to foreign parties as they can directly approach High Court and doesn't have to litigate in remote parts of the country.

Definition of International Commercial Arbitration under Section 2 (1)(f)(iii)

As per the earlier definition, if the control and management of a company is based in overseas, it can be a criterion to determine whether one of the parties is not an Indian. The Ordinance deletes 'company' from this category. Accordingly, if a company is registered in India, it will be considered as an Indian party, even if its management is based in overseas.

Reducing burden of Courts and increasing independence of Arbitrators: Amendments to Interim Reliefs under Section 9 and Section 17 of the Act.

Perhaps the most significant amendments, which have been brought in by the Ordinance to the existing Act, are the amendments pertaining to interim measures.

Interim measures by a Court are granted under Section 9 of the Act, while Interim measures by an arbitral tribunal are granted under Section 17 of the Act.

The amendments which been brought through the Ordinance come in the light of recent judgments of the apex court, specifically *Bharat Aluminum Co v. Kaiser Aluminum Technical Services*, (2012) 9 SCC 552.

Firstly, a proviso to sub-section (2) of the Section 2 has been inserted which provides that unless there is an agreement to the contrary, provisions of Section 9 (interim relief), 27 (assistance of court for taking evidence), 37 (appeals from the said orders) shall be applicable to international commercial arbitrations, even if the place of arbitration is outside India and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of the Ordinance. This would essentially means that unless parties agree otherwise, they may approach the Courts in India for interim reliefs even in cases of International Commercial Arbitrations. Prior to the Ordinance, there was an absolute bar for Indian courts for entertaining such matters if the place of arbitration in India.

More significant are the amendments to Section 9 of the Act, which has been expanded by adding sub sections (2) and (3). Sub-section (2) stipulates that arbitration proceedings shall be commenced within a period of 90 days from the order of interim relief by a Court or such other time period as the Court may determine. Further, sub-section (3), in a sense limits the scope of Section 9 by stipulating that once the arbitral tribunal has been constituted, the Court shall not entertain an application under Section 9 unless the Court finds existence of circumstances which may render the remedy provided under Section 17 of the Act inefficacious.

In line with the recommendations of the law commission, the amendment to Section 17 brought in through the Ordinance signifies the intention of the lawmakers to increase the independence and powers of the arbitral tribunal. Section 17 has been substituted with a new section which empowers the arbitral tribunal to grant all kinds of interim measures which the Court is empowered to grant under Section 9 and such orders shall be '*enforceable in the same manner as if it is an order of Court*'. This amendment read with the amendment to Section 9 ends ambiguity, which existed regarding the enforcement of orders passed under Section 17 and signals a shift towards greater independence and power for arbitral tribunals and may lead to lessening the burden on Courts for granting interim measures.

Ensuring Neutrality of Arbitrators: Appointment of Arbitrator under Section 11 and 12, Insertion of Section 11A and Fourth, Fifth, Sixth and Seventh Schedules to the Act.

Other significant changes brought in through the Ordinance are the amendments and additions to Section 11 and 12 of the Act which deal with appointment of arbitrators and grounds for challenge to the appointment of arbitrators, respectively. Briefly, apart from other changes to Section 11 which deals with appointment of arbitrator, the section has amended to the effect that an application for appointment of an arbitrator shall be disposed off by the High Court or the Supreme Court as expeditiously as possible and an endeavor should be made to dispose of the matter within 60 days. The Ordinance has also introduced a model fee/rate schedule for determination of fees for the arbitral tribunal and the manner of payment thereof.

Ensuring neutrality and impartiality of the arbitrator appears to have assumed much importance and substantial amendments have been made to Section 12 of the Act, which deals with grounds of challenge of the arbitrator. The amendments brought in through the Ordinance effectively increase and enlarge the scope of grounds of challenge to the appointment of the arbitrator. The amendments to the section now provide that when a person is approached in connections with his possible appointment as an arbitrator, he shall disclose in writing as per the form specified in the Sixth Schedule, his direct or indirect existence, of any past or present relationship, or interest in any of the parties or to the subject matter in the dispute whether financial, business, professional or other kind which is likely to give rise to justifiable disputes as to his independence or impartiality or which are likely to affect his ability to devote sufficient time to the arbitration or his ability to complete the entire arbitration within a period of 12 months. Moreover, any person whose relationship falls under any of the categories/grounds specified in the Seventh Schedule which shall be ineligible to be appointed as an arbitrator.

The Fifth Schedule has also been added which essentially lays down the grounds, which give rise to justifiable doubts as to the independence or impartiality of arbitrators. Several grounds are enumerated under the each of headings namely the arbitrator's relationship with the parties or counsel, relationship of the arbitrator to the dispute, the arbitrator's direct or indirect interest in the dispute, previous services for one of the parties or involvement in the case, relationship between an arbitrator and another arbitrator or counsel, relationship between arbitrator and party and others involved in the arbitration and other circumstances.

Simplifying Arbitral Proceedings

The Ordinance also shows a clear intention to fast track arbitration proceedings and places significant emphasis to expedite arbitration proceedings. Section 24 of the Act has been amended to stipulate that hearings of arbitrations shall, as far as possible, be held on a day to day basis and adjournments are not to be granted by the arbitral tribunal unless sufficient cause is made out. Section 28 of the Act has been amended by insertion of a new provision, which stipulates that the arbitral tribunal shall make its award within a period of 12 months from the date of commencement of proceedings which may be extended by up to 6 months by the parties. Thereafter, it can only be extended by the Court on sufficient cause. The Court, while extending such period, may also order reduction of fees of arbitrator(s) not exceeding 5 percent for each month of delay if the Court finds that the proceedings have been delayed for reasons attributable to the arbitral tribunal. If the award is made within a period of 6 months, the arbitrator may get additional fees on the parties agreeing to the same.

The Ordinance has also introduced the concept of fast track procedure for conducting arbitration whereby parties to the dispute may agree on resolving their dispute through fast track procedure and the arbitral award in such cases shall be given in 6 months period.

Another significant amendment is the insertion of Section 31A, which provides a comprehensive provision for costs regime which is applicable both to arbitrators as well as related litigation in Court.

Clarity regarding 'Public Policy' under Section 34

Section 34 of the Act has also been amended to restrict the term 'Public Policy of India' as a ground for challenging the arbitral award. An award can be challenged on this ground only if the award was induced or affected by fraud or corruption or it is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice.

Upgrading enforcement of Arbitral Awards under Section 36

The Ordinance has also amended Section 36 of the Act, which deals with enforcement of the arbitral award. In line with the move towards simplifying arbitral proceedings, Section 36 has been amended to provide that the application to challenge the award is to be disposed of by the Court within 1 year. Further, another significant amendment to Section 36 is that mere filing of an application for challenging the award would not automatically stay execution of the award and an arbitral award can only be stayed where the Court passed any specific order on an application filed by the party.

Apart from the amendments discussed, the Ordinance has also brought into effect consequential changes in Sections 47, 48, 56, 57 of the Act.

Conclusion

The changes brought in through Ordinance are intended and expected to improve the process of conducting arbitrations by making them expeditious and more effective while also steadily reducing the interference of courts. What remains to be seen is the extent to which the ends sought to be achieved are ultimately accomplished.

[1] Available at <http://www.egazette.nic.in/WriteReadData/2015/166406.pdf>