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LAW OF ARBITRATION IN INDIA - THE CHANGING LANDSCAPE

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INTRODUCTION

The law of arbitration in India has been evolving to complement the needs of India's globalizing economy. India's intent to elevate arbitration as the preferred mode of dispute resolution, for both international and domestic businesses operating in India, has been well documented in the recent past. Over the past few years, there have been catena of pro arbitration judgments passed by the various High Courts and the Supreme Court of India, as well as legislative amendments to the Arbitration and Conciliation Act, 1996 **("the Act")** through the Arbitration and Conciliation (Amendment) Act, 2015 **("Amendment Act")** (the Act, as amended by the Amendment Act, will be referred to as the **"Amended Act"**).

At the emergence of the new arbitral regime, we brought to you an analysis of amendments proposed under the Arbitration & Conciliation (Amendment) Ordinance, 2015. The Amendment Act eventually received the President's assent on December 31, 2015, and the Amended Act retrospectively came into effect from October 31, 2015. After two abandoned attempts to amend the law of arbitration in India – in 2001 and in 2002, the Amended Act has been a remarkable step towards remedying the blemishes to the law of arbitration in India.

We have reflected on the recent changes in the arbitration landscape in India since the introduction of the Amended Act and analyzed the impact of these amendments in both legal and practical terms. Previously, a brewing cause of concern for litigants was the surge in court intervention in arbitration proceedings in India, particularly ad hoc arbitrations. Over the last two years, the courts have made a conscious effort to follow the policy of minimal intervention, portraying India as both an arbitration friendly jurisdiction and a viable seat for arbitration proceedings.

THE MEANING OF 'COURT' FOR THE PURPOSE OF "INTERNATIONAL COMMERCIAL ARBITRATIONS"

Prior to the Amendment Act, in cases where in the High Courts did not exercise ordinary civil jurisdiction, the Principal Civil Court (i.e. the court subordinate to the High Court) would qualify as the applicable "court" for international commercial arbitrations.

The Amendment Act has expanded the definition of the term "Court" to include the High Court as the court of first instance for international commercial arbitrations (where at least one party is a foreign party), instead of the lower judicial courts.[1] Hence, the High Courts shall now exercise jurisdiction in all cases of international commercial arbitration. This amendment will ensure that court matters pertaining to international commercial arbitrations are heard expeditiously, by commercially oriented and experienced judges. The amended provision essentially spares a foreign party with little knowledge of the legal system in India from having to litigate in the lower judicial courts, in remote areas of the country.

[1] Section 2(1)(e)(ii) of the Amended Act

THE CONCEPT OF 'JURIDICIAL SEAT' IN INDIA

Through *Indus Mobile*[2] the Supreme Court applied the international concept of 'juridical seat' in cases of domestic arbitration in India. The Supreme Court ruled that once the seat of arbitration is designated under a contract, it is akin to an exclusive jurisdiction clause and held, that the moment the "seat" is determined, the fact that the seat is at Mumbai, would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between parties.

In *Devyani International*[3], while the arbitration clause in the agreement fixed the "seat" of arbitration as Delhi, it also vested the courts at Mumbai with exclusive jurisdiction. Interestingly, despite vesting courts at Mumbai with exclusive jurisdiction and despite the cause of action having arisen in Mumbai, the court solely relied upon the position taken in *Indus Mobile*[4], and held that the since the seat of arbitration is Delhi, the courts at Delhi would have exclusive jurisdiction to adjudicate the dispute between the parties. In *Antrix Corporation*[5], the Delhi High Court has taken a contrary view and has distinguished *Indus Mobile*[6] on the ground that in *Indus Mobile*[7], parties specified the seat of arbitration as well as expressly granted exclusive jurisdiction to the courts at Mumbai whereas, in *Antrix Corporation*[8], while the seat was Delhi, exclusive jurisdiction was not conferred on the courts at Delhi. Based on this distinction, the Delhi High Court held that since the cause of action arose in Bangalore, courts at Delhi as well as Bangalore would have jurisdiction.

In *Roger Shashoua*[9], the Supreme Court ruled that *"venue cannot be equated with the seat/place of arbitration*" and when a court finds there is prescription for venue, the court must adjudge the facts of each case to determine the juridical seat. The Supreme Court found that since London was designated as the "venue", in the absence of anything to the contrary, the "seat" was also London.

In context of international commercial arbitrations, agreements which only designate the "venue" of arbitration and not the "seat" have often surfaced in Indian courts. In *Hardy Exploration*[10], the arbitration agreement fixed the "venue" for holding the arbitration sittings but remained silent on the "seat". In an effort to lay down the principles in determining the "seat" of arbitration when the "venue" is predetermined in the arbitration agreement, the Supreme Court has referred the *Hardy Exploration* case to a larger bench.

While drafting arbitration clauses, parties ought to carefully choose the seat of the

[2] Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
[3] Devyani International Ltd. v. Siddhivinayak Builders and Developers, 2017 SCC Online Del 11156
[4] Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
[5] Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2018 SCC OnLine Del 9338
[6] Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
[7] Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors, AIR 2017 SC 2105
[8] Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2018 SCC OnLine Del 9338
[9] Roger Shashoua v. Mukesh Sharma, 2017 SCC Online SC 697
[10] Union of India v. Hardy Exploration and Production (Inc.) India, 2018 SCC On Line SC 474

arbitration. Further, parties ought to specifically confer exclusive jurisdiction on courts of a particular place. In our experience, conferring exclusive jurisdiction on courts of the seat of arbitration will reduce the possibility of conflict on this issue in the arbitral proceedings.

SCOPE OF "INTERNATIONAL COMMERCIAL ARBITRATIONS"

Section 2(1)(f) of the Act earlier listed the criteria for an arbitration to qualify as an "international commercial arbitration". For an arbitration to qualify as an "international commercial arbitration", under the earlier Act, one party was necessarily required to be a foreign party, i.e. a foreign national, a foreign resident, a body corporate incorporated outside India, or a company or an association or body of individuals whose central management and control is outside India.

Therefore, the criteria for a body corporate/company to qualify as a foreign party was obscure in the Act i.e. while the Act provided that the place of incorporation of a company was a determinant factor, subsequently the Act also provided that the place of central management of the company would be a determinative factor.

The Amendment Act, has done away with the criteria that a company whose central management and control is outside India would also qualify as a foreign party for an "international commercial arbitration", and clarified that the place of incorporation shall be the only deciding factor in determining the nationality of a company.

TERRITORIAL APPLICABILITY OF THE ACT

The famed *Bharat Aluminium* judgment[11] specifically disallowed the availability of provisions of Part I of the Act to foreign seated arbitrations. This adversely impacted the ability of a foreign party to get interim relief against an Indian party or assets located in India, in support of a foreign seated arbitration. Section 2(2) of the Amended Act has now extended the applicability of certain provisions of Part I of the Act, namely, Section 9 (interim measures by court), Section 27 (court's assistance in taking evidence), and Section 37(1) (a) and Section 37(3) (appealable orders), to "international commercial arbitrations" seated outside India, unless expressly excluded by parties through an agreement.

POWERS OF THE COURTS

The Amendment Act has redefined the scope and nature of the role of the courts while referring parties to arbitration. In the Amended Act, the acceptable judicial intervention is minimal and limited to examining the existence of a *prima facie* arbitration agreement.

With respect to the powers of the court to grant interim reliefs, the legislature has made provisions to preclude parties from unnecessarily seeking intervention of the court to grant interim measures. For instance, once the tribunal is constituted, a party shall not seek interim relief from the court, unless the tribunal is unable to grant an efficacious remedy.

REFERRING PARTIES TO ARBITRATION

[11] Bharat Aluminum Company Limited v. Kaiser Aluminum, (2012) 9 SCC 552

Section 8 of the Act provided that a judicial authority must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement, if the party seeking reference makes an application "*not later than when submitting his first statement on the substance of the dispute*." However, the Act was not clear on the scope of analysis required by the courts in deciding whether a valid arbitration agreement existed between the parties.

In the new regime, Section 8(1) of the Amended Act specifies that unless the judicial authority finds that *prima facie* no valid arbitration agreement exists, it must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement. Thereby, reducing discretion of the courts in determining whether a valid arbitration agreement exists, before referring the parties to arbitration. Indeed, courts can always leave it up to the arbitral tribunals to determine whether a valid arbitration agreement exists between the parties, under section 16 of the Act – based on the principle of '*kompetenz-kompetenz*.' For now, all the courts need to see is that there is a *prima-facie* arbitration agreement – its validity is of no consequence and is for the arbitral tribunals to determine, based on evaluation of relevant evidence.

DEFINITION OF "PARTY"

It is also worth noting that Section 8 of the Amended Act also allows "*any person claiming through or under him [the party to an arbitration agreement]*" to file an application under this Section. Given the change in the language of the provision to allow a party and "*any person claiming through/ under him*" to file an application for a reference to arbitration, judicial authorities now have an option to allow non-signatories to be joined as parties in appropriate cases. While this amendment expands the definition of the term 'party' under Section 8 of the Act, the definition of 'party' has not been altered in relation to other provisions of the Amended Act, such as Sections 9 and 11.

TIME FRAME TO FILE AN APPLICATION UNDER SECTION 8

Previously, the Act provided than an application under Section 8 shall be filed "*not later than when submitting his first statement on the substance of the dispute*"[12].

The Amendment Act has clarified the timeline to file an application by substituting "*not later than when*" with "*not later than the date of submitting his first statement on the substance of the dispute*". The court has interpreted the impact of this change in language in *Parasramka Holdings.*[13]

In *Parasramka Holdings,*[14] a preliminary objection highlighting the existence of an arbitration clause was made in the written statement of a suit, filed before the courts.

The Delhi High Court adjudicated upon the question whether the said preliminary objection in the written statement could be treated as an application to refer disputes to arbitration under the amended Section 8. The question arose in light of the change in language in relation to application for reference to arbitration in Section 8(1) of the Act, from "*not later than when submitting his first statement on the substance of the dispute*" to "*not later than the date of*

[12] Section 7(4) of the Amended Act

[13] Parasramka Holdings Pvt. Ltd. & Ors. v. Ambience Private Ltd. & Anr., SCC OnLine Del 6573

[14] Parasramka Holdings Pvt. Ltd. & Ors. v. Ambience Private Ltd. & Anr., SCC OnLine Del 6573

submitting his first statement on the substance of the dispute".

INTERIM MEASURES BY COURT

The legislature has taken steps to ensure that interim measures can only be granted if parties really intend to pursue arbitration. Under the newly inserted Section 9 (2), the Amended Act provides that in the event a petition is filed in courts to obtain interim relief prior to initiation of arbitration, the party filing such petition shall commence the arbitration within a period of 90 days from the date it has obtained an order of interim relief.

The Amendment Act has also sought to rule out unnecessary intervention of courts during arbitral proceedings. As per the newly inserted 9 (3) of the Amended Act, once an arbitral tribunal has been constituted, the court shall not entertain an application for interim relief unless it finds that the interim relief sought from the arbitral tribunal under Section 17 of the Amended Act would not be efficacious.

In our experience, in the presence of a valid arbitration agreement between the parties, the courts are consciously referring applications filed under section 9 of the Amended Act before the court, to an arbitral tribunal under section 17 of the Amended Act. As time is of essence, while making an order converting the application filed under section 9 of the Amended Act to an application under section 17 of the Act, the courts are even appointing the arbitrator with the consent of the parties.

The Calcutta High Court, in *Bishnu Kumar,*[15]clarified that the court's power under Section 9 (3) is not automatically barred by constitution of an arbitral tribunal and that the court may grant relief if it finds that an order of interim relief by the tribunal would be inefficacious.

INTERIM MEASURES PENDING ENFORCEMENT OF FOREIGN AWARDS

Adopting the pro-arbitration spirit of the Amended Act, the Bombay High Court in the case of *Aircon Beibars*[16] has secured the amounts due from a judgment debtor under a foreign award, pending enforcement of the award in India, by way of Section 9 of the Amended Act. The Bombay High Court through this order sought to ensure that the interests of a foreign award holders are protected pending enforcement.

In *TRAMMO DMCC*[17] , the Bombay High Court allowed the holder of a foreign award to apply for interim relief in the court which enjoyed jurisdiction over the assets of the judgment debtor. The decision saves the award holder from the unnecessary hassle of deciding which court to approach, i.e. the court which enjoys jurisdiction over subject matter of arbitration or the court which enjoys jurisdiction over the location of the assets to be used for enforcement.

EMERGENCY ARBITRATIONS

While the Amendment Act has sought to reduce the scope of the court's role in granting interim relief in relation to arbitrations, it has failed to codify a globally

[15] Bishnu Kumar Yadav v. M.L. Soni & Sons & Ors., AIR 2016 Cal 47

[16] Aircon Beibars FZE v. Heligo Charters Pvt. Ltd., 2017 SCC Online Bom 631

[17] Trammo DMCC (formerly Known as Transammonia DMCC) v. Nagarjuna Fertilizers & Chemicals Ltd., 2017 SCC OnLine Bom 8676

recognised concept of emergency arbitrations, which, under various institutional arbitration rules, can be approached for interim relief before the arbitral tribunal is appointed. This omission in recognising emergency arbitrators and the awards granted by them is conspicuous, given that institutional arbitration rules in India provide for emergency arbitrations for e.g. Mumbai Center for International Arbitration ("**MCIA**") Rules, 2016 and Indian Council for Arbitration Rules, 2005.

While Indian courts have granted interim reliefs in relation to foreign seated arbitrations under Section 9 of the Act, in cases of enforcement of interim reliefs in a foreign seated emergency arbitration, for example in *Raffles Design*[18] and *Avitel*[19], the courts till date have ruled that eventually a suit may have to be filed in Indian courts for seeking enforcement of such awards, or the courts may consider granting similar interim relief as the emergency arbitrator, after scrutinizing the merits of the interim relief sought, under a separate Section 9 application filed in Indian courts.

PROPOSED ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

The Union Cabinet on 7 March 2018, approved the Bill. The Bill aims to amend the Act to improve institutional arbitrations in India by establishing an independent body to lay down standards, make the arbitration process more party friendly, cost effective, and to ensure timely disposal of arbitration cases.

The Bill has proposed to allow parties to directly approach arbitral institutions designated by the Supreme Court for international commercial arbitration and in other cases the concerned High Courts, for the appointment of arbitrators.

FORMATION OF THE ARBITRATION COUNCIL OF INDIA

The Bill provides for creation of an independent body namely the Arbitration Council of India (**"ACI"**) to grade arbitral institution and accredit arbitrators by laying down norms, and take all such steps as may be necessary, to promote arbitration, conciliation, mediation and other ADR Mechanism. The ACI shall be a body corporate and shall maintain an electronic depository of all arbitral awards.

TIMELINE FOR ARBITRATIONS

The Bill proposes to amend sub section (1) of Section 29-A to exclude international arbitrations from the bounds of timeline, and to amend the timeline to make an arbitral award in other arbitrations within 12 months from the completion of the pleadings by the parties.

APPLICABILITY OF THE AMENDMENT ACT

With the proposed insertion of Section 87 in the Act, the legislature also seeks to clarify the issues surrounding the applicability of the Amendment Act. The bill proposes that unless parties agree, the Amendment Act shall apply only to arbitral proceedings including related court proceedings, which commenced on or after the date the Amendment Act came into force.

[18]Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors., 2016 SCC OnLine Del 5521

[19] HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. & Ors, 2014 SCC OnLine Bom 102

As highlighted above, the Supreme Court in *Board of Control for Cricket in India*[20] held that the amended Section 36, would be applicable to applications filed under Section 34 of the Act (i.e. court proceedings), even if such applications were filed before the date of commencement of the Amendment Act. Interestingly, the Supreme Court has directed the legislature to reconsider Section 87 of the Bill in light of its decision in *Board of Control for Cricket in India.*[21] While the Bill has been passed by the Cabinet, if enacted, this Bill will contradict the ruling of the Supreme Court with respect to applications filed under Section 34 of the Act.

CONCLUSION

The Amendment Act, coupled with the efforts made by the Indian courts, is facilitating India's image makeover as an arbitration friendly jurisdiction. Not only have the Indian courts consciously implemented the provisions of the Amendment Act, they have adopted and extended the pro-arbitration stance to the un-amended provisions of the Act which helps bolster arbitration practice in India.

For example, the apex court's decision in *Centrotrade Minerals,*[22] upholding the validity of two-tiered arbitration structure which provided for an appellate arbitration reaffirms the principle of party autonomy. The Delhi High Court's decision in *GMR Energy,*[23] recognising the arbitral tribunal's competence to pierce the corporate veil to include non-signatories to an arbitration, shows the courts' inclination towards globally recognised concept of minimal intervention in arbitral process. Further, the courts inclination to involve arbitral institutes in the proceedings is visible from Supreme Court's decision in *Sun Pharmaceuticals,*[24] wherein the court directed MCIA to appoint an arbitrator in an international commercial dispute. The apex court herein delegated its appointment powers to an "*institution des7gnited by such Court*" as per the Amendment Act.

The foregoing decisions are welcome additions to the jurisprudence on the law of arbitration in India and read with the Amendment Act, they visibly reflect the efforts of both, the judiciary and the government, to make India an arbitration friendly jurisdiction

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[20] *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.*, Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

[21] *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.*, Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

[22] *Centrotrade Minerals and Metals Inc.* v. *Hindustan Copper Ltd.*, (2017) 2 SCC 228

[23] *GMR Energy Limited* v. *Doosan Power Systems India Private Limited*, 2017 SCC Online Del 11625

[24] *Sun Pharmaceutical Industries Ltd., Mumbai* v. *M/s Falma Organics Ltd. Nigeria*, 2017 SCC OnLine SC 1200