CHANGING ARBITRATION LAWS IN INDIA

The Union Cabinet in India has passed an Ordinance to amend the Arbitration & Conciliation Act 1996, addressing a large number of concerns and if such Ordinance is approved by the President, could prove to be a major transformation of Arbitration & Conciliation law in India. On the basis of Law Commission Report No.246 of August 2014, we bring you the major benefits, if the proposed Ordinance is in line with the said Report.

Key Takeaways

1. **INSTITUTIONAL ARBITRATION IN INDIA**
   It will encourage the culture like institutional arbitration in India, legal recognition to emergency arbitrator and formation of body which is entrusted to encourage institutional arbitration

2. **FEES OF ARBITRATORS**
   It will provide for a model schedule of fees and empower the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The schedule of fees would require regular updating, and must be reviewed every 3-4 years to ensure that they continue to stay realistic. This recommendation is however purely restricted to domestic, ad hoc, arbitration.

3. **CONDUCT OF ARBITRAL PROCEEDINGS**
   By proposing an addition of the second proviso to section 24 (1) to the Act, which is intended to discourage the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments. Further, a conscious use of technology, like teleconferencing, video-conferencing etc., will be encouraged and the same can easily replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings.

4. **NEUTRALITY OF ARBITRATORS**
   It proposes the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts.

5. **SETTING ASIDE OF DOMESTIC AWARDS AND RECOGNITION/ENFORCEMENT OF FOREIGN AWARDS**
   It proposes amendment to ensures that purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by **"patent illegality appearing on the face of the award."**

Further it is recommended that an award can be set aside on public policy grounds only if it is opposed to the **"fundamental policy of Indian law"** or it is in conflict with **"most basic notions of morality or justice."**

6. JUDICIAL INTERVENTIONS IN FOREIGN SEATED ARBITRATIONS

The proposed amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rules ***Bhatia International*** *case*, and re-enforces the ***"seat centricity"*** principle of **BALCO** case**.** However, applications that are already pending in an Indian court and which have been filed on the basis of the Bhatia International *case* rule, should be protected.

The proposed amendment ensures that the default rate of interest is in line with prevailing commercial realities and not an arbitrary figure of 18%.

7. AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE

The proposed amendment ensures that the award will not become unenforceable merely upon the making of an application under section 34.

8. REGIME FOR COSTS

A regime of actual costs incurred is proposed alongwith detailed points for consideration of the court or arbitral tribunal based on Rule 44 of the Civil Procedure Rules of England. A general rule requiring a losing party to pay actual costs of the successful party, as proposed, would certainly inspire most parties to be reasonable about resolving disputes. Moreso, manufactured counterclaims and dilatory tactics would be minimized and thus, the overall speed and efficacy of the arbitral process would be bound to improve.

9. **DELAYS IN COURTS, BEFORE THE TRIBUNAL AND INVESTMENT TREATY RISK**

It proposes changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" shall not be regarded as a judicial act.

It further recommends an amendment to section 11 (7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been appointed, and as such are non-appealable. It further proposes the addition of section 11 (13) which require the Court to make an endeavour to dispose of the matter within sixty days from the service of notice on the opposite part.

Similarly, It recommends addition of sections 34(5) and 48(4) which would require that an application under those sections shall be disposed off expeditiously and in any event within a period of one year from the date of service of notice.

In addition, a new Explanation has been proposed to section 23 of the Act in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent, provided that the same falls within the scope of the arbitration agreement. It also recommends mandatory disclosures by the prospective arbitrators in relation to their ability to devote sufficient time to complete the arbitration and render the award expeditiously.

10. OTHER AMENDMENTS

10.1 The proposed amendment ensures that even a "non-signatory" can be said to be a "party" to an arbitration agreement.

10.2 The proposed amendment ensures that an arbitration agreement must concern "subject matter capable of settlement by arbitration." This gives statutory recognition to the doctrine of arbitrability.

10.3 The proposed amendment clarify that where, on the default on the Respondent in communicating his statement of defence, the arbitral tribunal shall also (in addition to having the 36 right to continue with the arbitration) have the discretion to treat the right of such Respondent to file a statement of defence as having been forfeited.

We wait to see the final version of the Ordinance after it receives the assent of the President, it is expected that it would make settlement of contractual disputes easier and cost effective.

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