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International Arbitration Alert

India Revises the 1996 Arbitration Act

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On 23 October 2015, the President of India enacted an Ordinance that significantly revises the 1996 Indian Arbitration and Conciliation Act (the "Act"). The goal of the Ordinance is to improve the efficiency and reliability of arbitration as a private dispute-resolution mechanism in India. Among other things, it imposes strict time limits on when arbitrations must be concluded, limits court involvement (including with respect to jurisdictional issues), and allows parties to non-Indian seated arbitrations to obtain interim relief from Indian courts.

The Ordinance reflects many of the recommendations contained in a 2014 report by the Law Commission of India that sought to address perceived inadequacies in the Act.[1] While the Ordinance came into immediate effect, Parliament must approve the Ordinance during its winter session or the Ordinance will cease to have effect.

Key elements of the Ordinance are summarized below.

I. Efforts to Increase the Speed and Efficiency of Arbitral Procedures in Indian-Seated Arbitrations

Litigation in the Indian courts suffers from severely backlogged dockets,[2] and it may take up to 15 years to obtain a decision.[3] Because of this, commercial parties have looked to arbitration as an alternative. However, arbitration in India has suffered from some of the same efficiency issues as litigation, and has been plagued by "high costs and delays,"[4] and international parties have generally tried to avoid arbitrating in India when possible. To address these issues, there have been ongoing discussions of revising the Indian arbitration regime for nearly two decades, with the Law Commission publishing its first set of recommendations to reform the arbitration law in 2001.[5]

Many of the provisions in the Ordinance are intended to increase the speed and efficiency of arbitrations seated in India. Among other things, these revisions provide for:

- **Strict time limits for the arbitral tribunal to render a final award**: The Act did not previously require tribunals to observe any time limits for issuing a final award. The Ordinance introduces a new Section 29A which requires tribunals to render final awards

within 12 months of being constituted. Further, the new Section 12(1)(b) requires each arbitrator, at the time of appointment, to disclose any circumstances that may frustrate the arbitrator's ability to devote sufficient time to the arbitration and to render an award within 12 months.

The parties may agree to extend the time period by six months, but any further extensions must be approved by a court on a showing of "sufficient cause and on such terms and conditions as may be imposed by the Court," including reductions to the tribunal's fees by up to 5% per additional month and the substitution of one or more of the tribunal members.[6] Under Section 29A(4), absent an extension, a tribunal's failure to render its final award in a timely manner results in the termination of its mandate.

- **Fast-track arbitration procedure**: The Ordinance also permits parties to opt for an expedited or "fast track" arbitration procedure through a new Section 29B, where the tribunal must render its final award within six months of its constitution. The six-month time limit is subject to the same rules that otherwise apply to non-expedited arbitrations.[7]

  Under the Section 29B procedure, the arbitral tribunal must decide the case primarily on the basis of written pleadings, documents and submissions filed by the parties. An oral hearing may only be held if all the parties request it or if the tribunal deems it necessary to clarify issues. If the tribunal does hold an oral hearing, it can dispense with "technical formalities" (including, formal presentations and witness examinations) and employ a procedure that permits the "expeditious disposal of the case."[8]

- **Limits on hearing adjournments**: To discourage the current pervasive use of adjournments in hearings (with hearing days often held sporadically over long periods of time),[9] the Ordinance provides in Section 24(1) that an arbitral tribunal shall, to the extent possible, "hold oral hearings for the presentation of evidence or for oral argument on [a] day-to-day basis, and not grant any adjournments unless sufficient cause is made out." Tribunals also may impose costs (including exemplary costs) on a party seeking an adjournment "without any sufficient cause."[10]

- **Designating the High Court as the court of first instance for international commercial arbitrations**: For international commercial arbitrations (but not domestic arbitrations),[11] the amended Section 2(1)(e) makes the Indian High Court the court of first instance for any claims arising out of or related to arbitration, including jurisdictional challenges, arbitrator appointments, arbitrator challenges, litigation stays pending arbitration, interim relief, evidence disclosure, and set-aside applications.

  Prior to the Ordinance, the principal civil court of original jurisdiction in a district, i.e., the District Court, was the court of first instance. By centralizing this role for all international commercial arbitration-related court hearings at the High Court, the goal is that such hearings will proceed more expeditiously than they have in the past and will be decided by "commercially oriented" judges.[12]

II. Limited Judicial Intervention

The Ordinance also sets important limits on the Indian courts' ability to intervene in Indian-seated arbitrations following the constitution of an arbitral tribunal. In particular, it provides:

- **Limits on the courts' authority to grant interim relief following the constitution of an arbitral tribunal**: Prior to the Ordinance, courts and practitioners had interpreted Section 9 of the Act, which governs the courts' authority to grant interim relief in aid of an arbitration, to permit courts to grant interim relief even after the constitution of the tribunal. The Ordinance adds a new subparagraph (3) to Section 9, which limits courts'

authority to grant interim relief following the constitution of an arbitral tribunal. Section 9(3) provides that a court shall not entertain an application for interim relief following the constitution of the arbitral tribunal unless the court finds that circumstances exist under which the tribunal is unable to grant "efficacious" interim relief (although the Ordinance does not define "efficacious").

- **A new process for court appointment of arbitrators where a party fails to do so**: Prior to the Ordinance, if the parties to an international commercial arbitration were unable to agree on the appointment of an arbitrator, Sections 11(4) through 11(6) of the Act gave the Chief Justice of the Indian Supreme Court the authority to make the appointment. However, such appointment could only be made after determining whether the underlying claim was founded on a valid arbitration agreement and also whether the applicant was a party to that arbitration agreement.[13] The Ordinance changes this in two ways. First, it designates the High Court (rather than the Chief Justice) as the appointing authority. Second, it introduces a new Section 11(6A), which significantly confines the court's powers such that, now, when asked to appoint an arbitrator, the court may only consider whether an arbitration agreement exists (though the Ordinance does not state what standard a court must apply when making this determination).[14]

- **Standard of review for applications for referral to arbitration**: Section 8(1) of the Act, provides that a court must refer a dispute to arbitration, on application of any party, if the dispute "is the subject of an arbitration agreement." Prior to the Ordinance, courts typically engaged in a merits review to determine whether a valid arbitration agreement existed prior to referring a dispute to arbitration. The Ordinance adds new language to Section 8(1), which requires a court to refer a dispute to arbitration as long as *prima facie* evidence of a valid arbitration agreement exists. This preserves the tribunal's initial authority (or "*kompetenz-kompetenz*") to examine the existence and scope of its jurisdiction and determine it fully.

  The new Section 37(1)(a) creates a right of appeal on any decision that refuses to stay court proceedings in favor of arbitration. However, there is no right of appeal with respect to a decision that *grants* a stay of court proceedings in favor of arbitration.

III. Limited Scope of "Public Policy"

"Public policy" is a defense to the enforcement of arbitral awards under Section 48(2)(b) of the Act, and a ground to set aside awards in Indian-seated arbitrations under Section 34(2)(b)(ii) of the Act. Before the Ordinance came into effect, "public policy" was not defined in the Act, and Indian courts have been criticized for using "public policy" very broadly to set aside or refuse to enforce arbitral awards.[15]

In order to address this issue, the Ordinance defines "public policy" in newly introduced "Explanations" to Sections 34(2)(b) and 48(2)(b). "Public policy" may now only be invoked in limited instances: where the award: (i) was procured through fraud or corruption, (ii) contravenes a fundamental policy of Indian law, or (iii) conflicts with the most basic notions of morality or justice.[16] In addition, "public policy" is now defined consistently in the context of set-aside[17] and enforcement applications. This addresses concerns arising from the Indian Supreme Court's recent decisions in *ONGC v. Saw Pipes Ltd*,[18] and *Shri Lal Mahal v. Progetto Grano Spa*,[19] under which the scope of the term "public policy" was wider in the context of set-aside applications than it is in the context of enforcement applications.

While the Ordinance brings new clarity as to the scope of the public policy standard, some ambiguity remains. For example, the phrases "fundamental policy" and "basic notions of morality or justice" remain undefined, and it therefore remains to be seen how Indian courts apply those concepts.

IV. Arbitrator Challenges

The Ordinance also clarifies the law relating to challenges to arbitrators in two important respects.

First, the Ordinance provides greater clarity as to the circumstances in which an arbitrator may be challenged by a party. Section 12(3)(a) of the Act provides that an arbitrator in an Indian-seated arbitration may be challenged if circumstances exist that give "rise to justifiable doubts as to his independence or impartiality." The Ordinance includes a Fifth Schedule, which lists 34 grounds that "give rise to justifiable doubts as to the independence or impartiality of arbitrators," based on the International Bar Association Guidelines on the Conflicts of Interest in International Arbitration.[20]

Second, the new Section 12(5) read with the Seventh Schedule specifies 19 instances in which a potential arbitrator will, as a result of potential conflicts of interest, be ineligible for appointment. This includes instances where the potential arbitrator is a former or present employee of one of the parties, thus reversing a judicial trend that permitted employees of the government to sit as arbitrators in disputes involving the government.[21]

Although parties may waive any conflicts that result in ineligibility under the Seventh Schedule, they may do so only after a dispute has arisen and by written agreement.

V. Other Noteworthy Amendments to the Act

The Ordinance also contains a number of other notable amendments to the Act:

- **Judicial assistance with respect to foreign-seated arbitrations**: In *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc ("BALCO")*,[22] the Indian Supreme Court held that an Indian court could not exercise supervisory jurisdiction over foreign-seated arbitrations under Part I of the Act, including the power to set-aside foreign awards. While the decision achieved the important objective of preventing courts from interfering in foreign-seated arbitrations, its holding was arguably overbroad because it also prevented Indian courts from exercising their powers under Part I of the Act to aid arbitral proceedings (in particular, Section 9 on interim measures (e.g., injunctions, orders of preservation, and security), and Section 27 on assistance in taking evidence (e.g., compelling witnesses to give evidence in the arbitration)).

  The Ordinance limits the scope of *BALCO*'s holding by making clear, through the introduction of new language in Section 2(2) of the Act, that Indian courts may issue orders in aid of international commercial arbitrations, even if the seat of arbitration is outside India. These orders include interim measures, and orders to assist in taking evidence.

- **No automatic stay on enforcement pending a court's resolution of a set-aside application**: Prior to the Ordinance, the filing of a set-aside application automatically stayed enforcement of the arbitral award. Under the Ordinance, a set-aside application no longer automatically stays enforcement of the award. Instead, the new Section 36 requires a party to make a separate application to the court to stay enforcement pending the resolution of its set-aside application.

- **Enforceability of arbitral tribunals' interim measures orders**: Prior to the Ordinance, Section 17 of the Act provided tribunals with considerable discretion to grant interim relief, but the Act did not give parties the right to have a court enforce that relief.[23] The Ordinance amends Section 17 of the Act so that parties may now have interim orders from an arbitral tribunal enforced by a court under the provisions of the Indian Code of

Civil Procedure.[24]

- **"Loser pays" approach to costs**: The Ordinance introduces a new Section 31A to the Act that permits arbitral tribunals to award costs against the losing party in Indian-seated arbitrations. The tribunal may consider the conduct of the parties, the relative success of the parties on their claims, whether either party made a frivolous claim, and the parties' willingness to settle in good faith in allocating costs.

- **Schedule of tribunal fees**: Arbitration in India has the potential to be expensive, and this has been attributed to, among other things, "the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators."[25] The Ordinance addresses this by introducing a new Fourth Schedule which sets out a schedule of tribunal fees (the schedule is subject to regular revisions by the High Court). The Fourth Schedule applies only to domestic arbitrations (where all parties are Indian and the arbitration is seated in India) where parties have not elected institutional rules that include a fee schedule. The model fees set out in the Fourth Schedule are linked to the amount in dispute.

VI. Conclusion

The changes to the Indian Arbitration Act introduced by the Ordinance are an important step forward. They bring the Indian Arbitration Act in line with modern arbitration practice in important ways and provide a number of clarifications that should improve the efficiency of arbitral proceedings and court litigation related to arbitration in India. That said, there are a number of additional issues identified by the Law Commission that were not addressed in the Ordinance. For example, as explained above, it is unclear what standard of review the courts should adopt when appointing an arbitrator. Because of conflicting Supreme Court decisions, it is also uncertain whether an arbitral tribunal has the authority to make findings with respect to allegations of fraud (e.g., in the context of the validity of the arbitration agreement or the merits of the case) or whether such claims must be decided by a court.[26] As parties begin to use the amended Act, it will become clear how effectively the current changes address the issues highlighted by the Law Commission and whether there will be a need for additional reforms.

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1 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014.

2 Sourjya Bhowmick, "Justice has a Mountain to Climb of 31.3 million pending cases," dated 4 September 2014.

3 Ministry of Law and Justice, "National Legal Mission to Reduce Average Pendency Time from 15 Years to 3 Years," dated 23 June 2010.

4 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 3.

5 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at paras. 14-23.

6 Sections 29A(3) to (6) of the Act, as amended.

7 Section 29B(5) of the Act, as amended.

8 Section 29B(3)(d) of the Act, as amended.

9 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 15.

10 Proviso to Section 24 of the Act, as amended.

11 The Act defines "international commercial arbitrations" as one where at least one of the parties is not a national of, or incorporated in, India. See Section 2(1)(f) of the Act. By contrast, "domestic arbitrations"

are those where "none of the parties are in any way 'foreign.'" *See Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552, at para. 88.

12 A different ordinance, entitled the "Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015," attempts to improve the efficiency of the High Court in commercial cases through the creation of new commercial courts within the Indian High Court. These new commercial courts are expected to focus on commercial disputes, including cases that relate to agreements to arbitrate.

13 *National Insurance Co v. Boghara Polyfab Pvt Ltd* (2009) 1 SCC 267 at para. 17.1, relying on *SBP & Co. v. Patel Engineering Ltd* (2005) 8 SCC 618. The Chief Justice's inquiry could also extend to whether the claims were time-barred and/or whether the parties had concluded the relevant contract or transaction. *See National Insurance Co v. Boghara Polyfab Pvt Ltd* (2009) 1 SCC 267, at para. 17.2.

14 The Law Commission had recommended that the courts make a *prima facie* assessment of whether a valid arbitration agreement exists, but the Ordinance has not adopted that recommendation. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 33 and p. 45.

15 Law Commission of India, *Supplementary to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996: "Public Policy" Developments post-Report No. 246*, dated February 2015, at pp. 8-10.

16 The Law Commission notes that this amendment brought the legislation in line with the definition set out by the Supreme Court of India in *Renusagar Power Plant Co Ltd v. General Electric Co* (1994) AIR (SC) 860 at para. 66. Notably, however, the Law Commission departed from *Renusagar* by not extending "public policy" to include instances where enforcement would be contrary to the "interests of India." *See* Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 37.

17 However, in domestic arbitrations (where none of the parties are foreign), Section 34(2A) continues to recognize an additional ground of "patent illegality" as an aspect of public policy.

18 *ONGC v. Saw Pipes Ltd* (2003) 5 SCC 705.

19 *Shri Lal Mahal v. Progetto Grano Spa* (2014) 2 SCC 433.

20 The International Bar Association Guidelines set forth standards that are intended to be generally applicable regarding arbitrators' duty of impartiality and independence and details circumstances in which a conflict of interest may arise. The guidelines are not automatically binding upon courts and arbitral tribunals.

21 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at paras. 56-57.

22 *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.

23 Rather than authorize courts to enforce arbitral tribunals' interim-relief orders, the Act (as originally drafted) only required arbitral tribunals, on the application of a party, to raise a violation of an interim-relief order with a national court, which would in turn sanction a party for contempt. *Sri Krishan v. Anand* (2009) 3 Arb L. R. 447 (Del.) at para. 11. *See also* Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 48.

24 An interim order by the arbitral tribunal may be enforced as an order of the court under Section 36 read with Section 51 of the 1908 Indian Code of Civil Procedure. Section 36 states that "[t]he provisions of this Code relating to the execution of decree (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order)." Section 51 states that "subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree."

25 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at para. 10.

26 *Swiss Timing Ltd v. Organising Committee*, Arb. Pet. No. 34/2013, 28 May 2014; *Meguin GMBH v. Nandan Petrochem Ltd* (2007) R.A.J. 329; *Radhakrishnan v. Maestro Engineers* (2010) 1 SCC 72; *see also* Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996: Report No. 246*, dated August 2014, at paras. 50-52.

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