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Vyapak Desai
International Litigation and Dispute Resolution Practice

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Key Features

PRE-ARBITRAL PROCEEDINGS

JURISDICTION

- The definition of 'court' has been amended and substituted to include two different sub-sections in relation to domestic and international commercial arbitrations. Whereby in international commercial arbitrations, seated in India as well as outside, jurisdiction is to be exercised only by the High Court.

INDEPENDENCE AND IMPARTIALITY

- The Amendment Act has introduced extensive guidelines in relation to the independence, impartiality, and fees of arbitrators, bringing it at par with international standards.
- Detailed schedule on ineligibility of arbitrators have been put in place.

INTERIM RELIEFS

- Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts in aid of foreign-seated arbitration;
- Interim reliefs granted by arbitral tribunals seated in India are deemed to be order of courts and are thus enforceable in the new regime.

Key Features (Contd.)

ARBITRAL PROCEEDINGS

EXPEDITIOUS DISPOSAL

- A twelve-month timeline for completion of arbitration seated in India has been prescribed.
- Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, appointment of arbitration, and challenge petitions;
- Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

COSTS

- Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India – introduction of ‘costs follow the event’ regime.

Key Features (Contd.)

POST-ARBITRAL PROCEEDINGS

CHALLENGE AND ENFORCEMENT

- In ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed;
- Upon filing a challenge, under Section 34 of the Act, there will not be any automatic stay on the execution of award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

Applicability

Section 26 of the Amendment Act provides:

"26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

the **Madras High Court** in *New Tripur Area Development Corporation Limited v. M/s. Hindustan Construction Co. Ltd. & Ors.*, has ruled that the language used in the Section 26 of the Amendment Act only refers to arbitral proceedings and not court proceedings due to deletion of the language "in relation to." Section 26 of the Amendment Act is not applicable to the stage post arbitral proceedings.

However, the **Calcutta High Court** in *Electrosteel Castings Limited v. Reacon Engineers (India) Private Ltd.* has given a contrary view, and held that the Amendment Act will not apply and Section 34 petitions in case of arbitration proceedings commenced prior to October 23, 2015, would act as automatic stay.

Issues and Missed Opportunities

DISCLOSURE REQUIREMENTS: International Standards conflicting with domestic reality

The Ordinance has provided detailed disclosure requirements for the arbitrators. However, it may not work effectively in an Indian context as such detailed disclosures would effectively reduce the existing pool of available arbitrators.

STRICT TIMELINES: Conflicts with procedures and practices

The Ordinance seeks to provide time-line within which applications are expected to be disposed of. A practical difficulty that is faced in India is one of dasti service. In such a situation indicative timelines provided may have no meaning and would be bypassed. A possible solution was to provide for email service which is also provided for and allowed under Code of Civil Procedure, 1908.

NON DELEGATION OF ADMINISTRATIVE POWER

The Ordinance could have expressly provided the High Courts with the power to appoint arbitrators for international commercial arbitrations to reduce the burden of Supreme Court as it is only an administrative task. 6 Order 5, Rule 9(3) of the Code of Civil Procedure, 1908.

Issues and Missed Opportunities

EMERGENCY ARBITRATOR

The Ordinance does not deal with the issue of “Emergency Arbitrator” which was proposed by the Law Commission Report under the definition of ‘Arbitral Tribunal’. The Ordinance could have inserted appropriate language to bring it at par with international practice. However, the practical application of “Emergency Arbitrator” needs to be tested in the Indian context from the aspect of enforceability.

EXPEDITED PROCEDURES: Option not Mandate

The Ordinance provides for a fast track procedure for resolving disputes in an expedited matter; however it has not dealt with mandatory reference in cases of disputes involving smaller claims. A mandatory expedited procedure for disputes below certain thresholds may work to reduce costs and thereby promote arbitration as an effective dispute resolution mechanism.

CONFIDENTIALITY

The Act is silent on the obligation of confidentiality. In the Indian scenario, wherein arbitrations are usually *ad hoc* (institutional rules are not applicable), this creates a problem as no specific obligation would bind parties to maintain confidentiality in spite of confidentiality being one the most important factors in parties’ choice of arbitration as the dispute resolution mechanism.

Issues and Missed Opportunities

NO SPECIFIED ARBITRAL INSTITUTION

Although several arbitration centres are operational under the auspices of various High Courts, there is no specific reference to a standard arbitration institution or rules. Such a provision would have supported the transition from *ad hoc* arbitration to institutional arbitration.

RETENTION OF 'PATENT ILLEGALITY' AS A GROUND FOR SETTING ASIDE DOMESTIC AWARD

Patent Illegality has been retained as a ground for setting aside awards in arbitrations seated in India. This would include international commercial arbitrations if the seat is in India. This variance from international arbitration practice could have been eliminated.

Comparison Between Institutional And Ad- Hoc Arbitration

AD- HOC ARBITRATION	INSTITUTIONAL ARBITRATION
Everything right from Rules to Procedure has to be decided by the parties	Rules and Procedures of the institution are taken and the parties are bound by them
Section 9	Fast track Rules
Since, every rule and procedure is decided by the parties it may contain flaws & loopholes	Rules are tried & tested and are carefully drafted by the institute's professional body and hence do not have chances of inherent flaws
It is extremely time consuming. Drafting the procedure itself may take up a considerable time	It is less time consuming as everything is set-out beforehand
Rules may be ill-drafted and chances of a party going to court whilst taking advantage of a pathological clause are more	There are less chances of taking advantage of such flaws
NOT RECOMMENDED	RECOMMENDED
Examples: N.A.	Examples: ICC, LCIA, SIAC etc

Thank You!

- distinctly different

Contact

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