



Commercial arbitration in India and recent developments

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Abstract

The loss of faith in judicial system due to its inability to render the promised justice in time, people look for alternative mechanism of dispute resolution. Pending cases in various courts is a hurdle in ease of doing business in India leading to high impact on Indian economy. Arbitration is one such mechanism which can resolve the problems arising due to fast changing globalisation. And the recent trends among companies as not to drag disputes into courtrooms is one of the important reasons for growth of alternative dispute resolution such as arbitration and conciliation.

Keywords: arbitration, faith, developments, justice

Introduction

Arbitration is a procedure in which a dispute is submitted by agreement of the parties to one or more arbitrators who makes a binding decision on the dispute. In choosing arbitration the parties opt for private dispute resolution procedure instead of going to the court.

The Arbitration proceedings in India are governed by the Arbitration and Conciliation Act, 1996. The Indian Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Arbitration Rules 1976. The UNCITRAL Model Law was adopted in 1985 with the objective to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration

History of Arbitration in India

Before the Arbitration and Conciliation Act 1996 came into existence, Arbitration in India was governed by –

1. The Arbitration (Protocol and Convention Act 1937
2. The Indian Arbitration Act 1940 And
3. The Foreign Awards (Recognition and Enforcement) Act 1961.

The Arbitration Act 1940 governed all arbitrations that were held in India whether between International entities or National entities till 1996 Act came into existence. The need for the replacement of 1940 Act was due to liberalisation Scheme adopted by India.

Some of the short comings of 1940 acts are as follows

1. Interference of Court at any stage of proceedings of Arbitration
2. Act did not prohibit the parties from raising dispute relating to proceedings though parties have voluntarily adopted arbitration.
3. Award could be challenged on large number of grounds.

Due to this foreign parties were not interested in arbitration proceedings with party in India instead the foreign parties obtained award in foreign state which were members of

New York Convention Enforcement of Foreign Award and would enforce the same in India as India was the member for New York Convention. Such foreign awards are recognized in India and provided for their enforcement under Foreign Award (Recognition and Enforcement) Act 1961.

Liberalisation opened the doors for foreign Investors in India. There was continuous pressure from Foreign Investors and Indian Investors Community to modernise the Arbitration Laws and also that Conciliation be statutorily be recognised. Hence Arbitration and Conciliation Act 1996 came into existence by repealing the 1940 Act.

Arbitration and Conciliation Act 1996

The 1996 Act adopted the UNCITRAL MODEL LAW of Arbitration though with some modifications.

The Act has three significant parts -

Part-1: dealing with domestic arbitration and International commercial Arbitration,

Part-2: dealing with foreign awards and their enforcement and

Part-3: dealing with statutory provisions relating to conciliation.

The Objective of the Act is to provide speedy dispute resolution mechanism. But however the cross border trade contracts arbitrations end up being done either at Singapore, New York or London or not in India due to the procedures established by Indian Legal System.

To address this rising concern and to encourage arbitration for cost effective and time efficient method for resolving international commercial disputes in India, Changes or amendments are adopted to remove inordinate delays and backlogs.

Arbitration and Conciliation Amendment Act 2015

The amendment act 2015 has facilitated in clearing the major lacunae caused by the landmark judgement by Supreme Court in case of BALCO. Wherein there was a bar on Indian Courts from granting interim relief.

To clarify the issues arising with the objective of the Act, the recent amendments made to the 1996 Act in the year 2015 was introduced.

This amendment to the act provide

- Strict timeline for resolving the dispute
- Process of Appointment of an arbitrator
- Grounds to challenge the appointment of arbitrator for lack of independence and impartiality.
- Amendment provide for assistance from the Indian Courts even in foreign seated arbitrations in form of interim relief before commencement of the arbitrator.
- Introduction of the “Cost follow event” regime in the Act.

However these changes were not enough as this amendment did not address many lacunas present in the act. Therefore proposal for further changes was made by arbitration and conciliation amendment bill 2018.

Arbitration and Conciliation (Amendment) 2018

The arbitration and conciliation (Amendment) Bill 2018 was introduced to further amend the 1996 Act. It was introduced in parliament and was passed by the Lok Sabha on August 10th 2018.

Key feature of the Bill

1. Formation of Arbitration Council of India as an independent body corporate for grading and accreditation of arbitral institutions.
2. New provisions relating to confidentiality of arbitral proceedings and immunity to the arbitrations.
3. Bill has added the 8th Schedule to the Act wherein the qualifications, experience and accreditation norms are prescribed for an arbitrators.
4. Exclusion of International Commercial Arbitration from 12 months’ timeline for completion of the entire process. It further extends the timeline by stating that the timeline would start from date of completion of proceedings as against date of constitution of tribunal.

This amendment bill was adopted and passed by both the houses of parliament and came into force from 9 August 2019 amending the Indian Arbitration and Conciliation ACT 1996.

Critical Analysis of Key Amendments 2019

- 2019 amendment introduced section 11(3A) by which the Supreme court of India and High courts shall have power to designate arbitral institutions which have been graded by Arbitration Council of India under section 43I (introduced by amendment act 2019).
- Amendment act 2019 introduced PART 1A: ARBITRATION COUNCIL OF INDIA through section 43A to 43M
- Introduced section 23(4) for timely conduct of proceedings, within a period of 6 months from the date of appointment of arbitrator(s) in domestic matters and 12 months in case of international arbitration.
- Introduced Section 42A which states that the arbitrator, arbitral institutions and parties to arbitration agreement shall maintain confidentiality of all arbitral proceedings except in case of award, as it must be disclosed for its enforcement. (The ICC recently with effect from 1 January 2019 introduced a rule that any party may at any time object to publication of an award or request that the award be sanitized or redacted, in such case award will not be published)

- ACI is also entrusted with the function of reviewing the grading of arbitrators- section 43D (2) (C).
- Introduced section 43J which states the qualification experience of arbitrators.

Conclusion

This arbitration amendment is significant step in overcoming of delays and high costs of arbitration which has plagued the arbitration system in India. However these amendments will also have to withstand the scrutiny of Indian Courts which interpret the provisions.

Amendments are always needed to iron out the flaws in the acts to make it more effective. The new regime has started a new era for resolution of dispute in India. Only time will prove whether India will become one of the leader in International arbitration as it aspires

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