Amendment to

The Indian Arbitration & Conciliation Act, 1996

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The President has passed an Ordinance to amend the Arbitration and Conciliation Act, 1996 on 23rd October, 2015. The Ordinance brings about several notable changes to the Act in an attempt to boost investor confidence in India. The Ordinance shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions.

The most notable changes promulgated are:

1. The definition of **"court"** for the purposes of the Act has been amended with respect to international commercial arbitration, for which **"court"** shall mean the High Court.

2. The definition of **"International Commercial Arbitration"** has been amended in Clause 2(1)(f)(iii) with the intention to determine the residence of a company based on its place of incorporation and not the place of central management/control. This further re-enforces the **"place of incorporation"** principle laid down by the Supreme Court in TDM Infrastructure Private Limited v. UE Development India Private Limited, (2008) 14 SCC 271, and adds greater certainty in case of companies having a different place of incorporation and place of exercise of central management and control.

3. It is further clarified in Section 2(2) that Part I of the Act shall apply where the place of arbitration is in India, provided that subject to an agreement to the contrary, the provision of Section 9, 27, 37(1)(a), 37(3) shall also apply to international commercial arbitration, even if the place of arbitration is outside India.

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4. Section 8 has been amended to provide that the judicial authority shall refer the parties to arbitration *"unless it finds that prima facie no valid arbitration agreement exists."* Furthermore sub-section (2) has also been amended to state that if the original arbitration agreement is not available with the party applying for the reference, then the party shall also file an application for production of the same.

5. The amendment provides that where the Court has granted an interim measure under Section 9(1), the arbitration should commence within 90 days from such order or such further time as the Court directs. Furthermore, once the arbitral tribunal is constituted, the Court shall not entertain an application for interim measures unless certain special circumstances exist.

6. Furthermore, Section 11 has been amended to provide that the an application for appointment of an arbitrator shall be disposed of by the High Court or the Supreme Court, as the case may be, expeditiously, with the Court endeavouring to do so within 60 days. Unfortunately, the recommendation of the Law Commission Report that this function be regarded as an administration decision by the Court, has not be implemented by the proposed amendment. This is rather ill-advised this controversy has created significant debate and delay in India **(Refer: SBP & Co. v. Patel Engineering (2005) 8 SCC 518)**.

7. Furthermore, Section 11(14) provides that the High Court may frame rules regarding the fees of the arbitral tribunal based on the rates specified in the fourth schedule.

8. Under Section 12 of the Act, a proposed arbitrator shall be required to disclose in writing about the existence of any interest of relationship which can create justifiable doubts regarding his neutrality. A fifth schedule has been added to the Act to incorporate grounds which shall guide in determining whether circumstances exist which give rise to justifiable doubts regarding the

arbitrator's independence or impartiality. This amendment has been brought into effect keeping in mind the international best practices, and to bring the Indian arbitration practice in conformity with the IBA Guidelines on Conflicts of Interest.

9. Under Section 17, the Tribunal shall be now empowered to grant all kinds of interim measures which the Court is empowered to grant under Section 9, and these orders *"shall be enforceable in the same manner as if it is an order of Court."* This will certainly add more teeth to the arbitral process in India.

10. A new provision, Section 29A shall impose a time restriction of 12 months on the Tribunal to make its award, with incentives being prescribed if the award is rendered in 6 months by the Tribunal. The 12 month time-period can be extended up to a period of 6 months by the Parties consensually, but after that the time-period can only be extended by the Court, on sufficient cause. The Court is empowered to reduce the fees of the Arbitrators if it finds that the delay was attributable to the Tribunal. This provision is not found in the arbitration laws of most countries since it can potentially interfere with justice in cases which are lengthy and complicated and need more time for resolution. Thus, it would be interesting to see how the Courts in India respond to it, in the event that the amendment is passed.

11. Section 29B has been inserted in the Act to make specific rules regarding fast-track procedure for dispute resolution. If the Parties agree to the same, the awards shall be given in 6 months.

12. The rate of interest prescribed in Section 31(7)(b) has been amended. Unless the award otherwise directs, the sum to be paid under the award shall carry a rate of interest, 2% higher than the current rate of interest.

13. A new regime for costs has been provided for in Section 31A of the Act.

14. The grounds for setting aside of an award under Section 34 (2) (b) of the Act, that is in cases where the award violates the public policy of India have been explained with the intention of negating the consequences of ONGC v. Saw Pipes (2003) 5 SCC 705 and ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263. The grounds for the same would be limited to the following four conditions:

- award was induced or affected by fraud or corruption,
- award is in contravention with the fundamental policy of Indian Law, (however this shall not entail a review on the merits of the dispute)
- award is in conflict with morality or justice.

For domestic awards, not arising from international commercial arbitration, an additional ground of challenge has been provided under Section 34(2A) – *"patent illegality on the fact of the award, provided that the award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence."*

Furthermore, the amendment provides that an application challenging an award need to be disposed of by the Court within one year.

15. Additionally, Section 36 has been amended to provide that the filing of an application under Section 34 to set aside an award will not automatically stay the execution of the award. The execution can only be stayed if the Court passes a specific order to that effect.

16. Section 37 has been amended to provide for the possibility of appeal from an order of a judicial authority, refusing to refer parties to arbitration under Section 8 of the Act.