

De Jure

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**THE ARBITRATION AND CONCILIATION
(AMENDMENT) ACT, 2015**



INTRODUCTION

- Government's efforts to improve India's rank on the index of ease of doing business and ease of dispute resolution are aimed at improving the business climate of the country.
- The promulgation of the Arbitration and Conciliation (Amendment) Ordinance, 2015 amending certain provisions of the Arbitration and Conciliation Act 1996, was a step towards providing ease of dispute resolution in India. Now, with the Arbitration and Conciliation (Amendment) Act, 2015 ("**ACT**") being passed it will help in revamping the dispute resolution mechanism in India, boosting in turn the confidence of domestic and foreign businesses investments in India and making India a preferred seat of arbitration. The Act is to govern all arbitral proceedings commenced on or after October 23, 2015. Some of the key amendments to the Act are highlighted below.

COURT IN INTERNATIONAL ARBITRATION AND APPLICABILITY OF PART I OF THE ACT TO FOREIGN SEATED ARBITRATION.

- Under the Act, Court, in case of international commercial arbitration, means the High Court in exercise of its ordinary original civil jurisdiction and in Courts where ordinary original civil jurisdiction is not present it means the High Court having jurisdiction to hear appeals from subordinate Courts¹. Part I of the Act applies to arbitrations where seat is in India. Also, unless a contrary agreement is entered between parties, interim measures by Court, Court assistance in taking evidence and appeals from order granting or refusing interim measures by Courts will also be applicable to a foreign seated arbitration.

VALID AGREEMENT BY ELECTRONIC MEANS

- An arbitration agreement contained in the form of communication through electronic means is now to be treated as a valid arbitration agreement.² This brings the Act in conformity with the UNCITRAL Model Law³.



¹ Section 2(e) of the Act.

² Section 7(4)(b) of the Act.

³ United Nations Commission on International Trade Law

NARROWED SCOPE OF INTERVENTION BY JUDICIAL AUTHORITY

- A judicial authority is required to refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists⁴. Where the original arbitration agreement or its certified copy is not available with a party applying for arbitration, such party can call upon the other party to produce the same by filing an Application alongwith the copy of the arbitration agreement. Further, an order refusing to refer the parties to arbitration is now appeal able under the Act⁵. This will expedite the matter to be referred to arbitration.

INTERIM MEASURES BY THE COURT TO BE FOLLOWED BY COMMENCEMENT OF ARBITRATION PROCEEDINGS

- Where any order for interim protection has been passed by a Court under the Act prior to the commencement of the arbitration proceedings, the arbitration proceedings have to commence within a period of ninety days from the date of such order or such further time as the Court may determine⁶.
- Once the arbitral tribunal has been constituted, Court will not entertain an application for interim measure unless the Court finds that the remedy provided under interim measures before the arbitral tribunal may not be efficacious. This will encourage matters being referred to arbitral tribunal in an expedited manner and reduce judicial interference.



APPOINTMENT OF ARBITRATOR

- In case of international commercial arbitration, the power to appoint an arbitrator is now with the Hon'ble Supreme Court of India instead of respective designated Chief Justices⁷.
- An application for appointment of arbitrator is to be disposed as expeditiously as possible and an endeavour is to be made to dispose of the matter within a period of sixty days from the date of service of notice to the opposite party and scope of inquiry for appointment under the Act has been confined to examination of the existence of an arbitration agreement only. This will help in resolving a long pending concern with respect to appointment of arbitrator, which currently takes about eighteen months to twenty four months.

4 Section 8 of the Act.
5 Section 37 of the Act.
6 Section 9 of the Act
7 Section 11 of the Act

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- No appeal (including a Letters Patent Appeal) will lie against a decision of the Court under appointment.
 - Brief guidelines are provided under the Act to determine whether the circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.
 - Broad disclosures are to be made by the arbitrator and the Act provides that any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories as specified in the fifth schedule of the Act shall be ineligible to be appointed as an arbitrator. The said disclosures are internationally accepted principles and a welcome step in ensuring the independence of the arbitrator.

DISCLOSURES OF INTEREST BY ARBITRATOR

- An obligation has been cast upon the prospective arbitrator to make an express disclosure on circumstances which are likely to give rise to doubts regarding his independence or impartiality; or grounds which may affect his ability to complete the arbitration within twelve months. Schedule seven to the Act contains a detailed list as to what would give rise to doubts about the independence of the arbitrator or impartiality⁸.
- Schedule seven of the Act lists the circumstances in which a person would be ineligible to act as an arbitrator despite any prior contract to the contrary. Parties can, however, waive the said provisions relating to ineligibility, by making an express agreement in writing after the disputes have arisen. The said requirements are now in consonance with the guidelines provided under the International Bar Association on conflict of interest in international arbitration.

ENFORCEABILITY OF INTERIM MEASURES BY THE ARBITRAL TRIBUNAL

- ⁹The arbitral tribunal now has power under the Act to grant interim measures which are similar to those of the Court. Such interim measures can be granted by the arbitral tribunal during the arbitral proceedings or at any time after making the arbitral award, but before it is enforced under the Act¹⁰. Interim orders passed by arbitral would be enforceable under the Code of Civil Procedure, 1908 ("**CPC**") as if it were an order

⁸ Section 12 of the Act

⁹ Section 17 of the Act

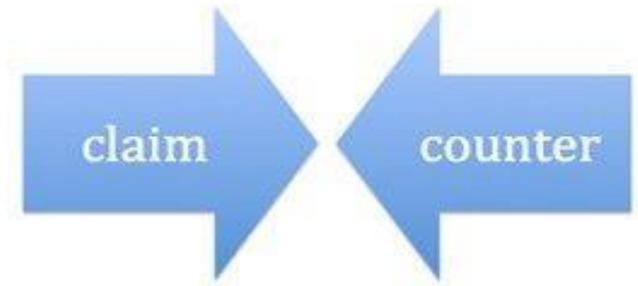
¹⁰ Section 36 of the Act

order of the court. The arbitral tribunal will have the power to order the following interim measures:

- appointment of a guardian for a minor or person of unsound mind;
- measures protecting goods, or amount of money, or property which is subject matter of the dispute; and
- Interim injunction or appointment of receiver and such other measures for protection.
- The said amendments will solve the long pending issue and confusion on the arbitrator's powers to grant interim reliefs and will enable parties to obtain efficacious remedy before the tribunal.

COUNTER CLAIM BY RESPONDENT UNDER THE ACT

- A provision has been inserted in the Act allowing the respondent to, in support of his case, submit a counterclaim or plead set-off which is to be adjudicated upon by the arbitral tribunal¹¹. The arbitral tribunal may impose exemplary costs on party seeking adjournments without any sufficient cause¹².



RULES APPLICABLE FOR MAKING OF THE AWARD UNDER THE ACT

- The arbitral tribunal is to take into account the terms of the contract and trade usages applicable to the transaction while deciding and making an award¹³.

TIME BOUND ARBITRATIONS AND FAST TRACK PROCEDURE

- The arbitral tribunal is required, as far as possible, to hold day to day hearings for evidence or oral arguments and not grant an adjournment without sufficient cause.
- The arbitral tribunal is to make the award within twelve months from the date the arbitral tribunal has received notice in writing of its appointment. The parties may, by consent, extend the aforesaid period by six months

¹¹ Section 12 of the Act

¹² Section 17 of the Act

¹³ Section 36 of the Act

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- If the award is not made within the said period of eighteen months, then the mandate of arbitrator is to terminate unless, the Court extends the period, prior to or after expiry of the said period on an application by a party, and if such delay is due to the arbitrator or tribunal as the case may be then the Court may order reduction of fees of the arbitrator by an amount not exceeding five percent for each month of such delay. The intention here is to conduct arbitral proceedings in an expeditious manner. However, only time will tell whether these changes will practically work.
 - To encourage speedy disposal of the arbitration proceedings, the arbitral tribunal is entitled to receive additional fees as the parties may agree, provided the award is made within six months of the initiation of the arbitration proceedings.
 - The parties may, prior to or at the time of appointment of the arbitral tribunal, agree to a fast track procedure where the arbitral tribunal will consist of a sole arbitrator, who will decide the dispute on basis of written pleadings, documents and submissions filed by the parties without any oral hearing (oral hearing may be held if all parties request or arbitral tribunal considers it necessary). The award is to be made within a period of six months¹⁴.

RATE OF INTEREST, WHEN AWARD IS SILENT AND PROVISIONS REGARDING COMPUTATION OF COST UNDER THE ACT

- An amount awarded by the arbitral tribunal will, unless otherwise specified by the arbitral tribunal, carry interest at 2% p.a. more than the current rate of interest, from the date of the award to the date of payment. This amendment has been done to keep in mind that the earlier rate of interest 18% was too high and needed checks and balances for the same.
- Computation of cost to be awarded to the parties under the Act are to include factors like conduct of parties, whether frivolous counter claims are made, whether reasonable offer to settle dispute is refused by any party, etc¹⁵. The said amendments will ensure that frivolous arbitrations are not filed and in turn this will expedite the entire arbitral process.

¹⁴ Section 29 of the Act.

¹⁵ Section 31 of the Act

SCOPE OF PUBLIC POLICY LIMITED AND TIME BOUND DISPOSAL OF CHALLENGE TO AWARD

- The Act seeks to restrict the challenge to an award on the ground of public policy only on the following grounds:-
 - a. making of an award was induced or affected by fraud or corruption or was in violation of confidentiality;
 - b. award is in contravention of fundamental policy of Indian law which does not entail a review on merits of the dispute; or
 - c. award is in conflict with the most basic notions of morality or justice.
- The award can also be set aside if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.
- A petition under this Act for setting aside the award is to be filed by a party only after issuing a prior notice to the other party. The party serving the petition needs to file an affidavit stating that the said compliance has been done. Such Petition to set aside the award is to be disposed of by the Court within a period of one year. This is a welcome change in the said amendment which talks about the issuance of prior notice which will enable the other party to avoid any orders passed against them without being heard¹⁶.

NO AUTOMATIC STAY ON ENFORCEMENT OF AWARD BY ONLY FILING PETITION TO CHALLENGE THE AWARD

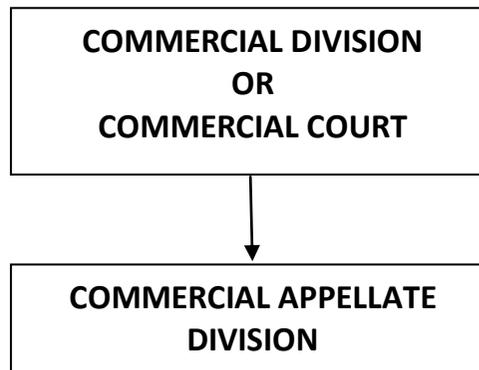
- Mere filing of an application to set aside an award will not itself render the award unenforceable. Party seeking stay on operation of an award, is required to file separate application for the same. Hence, unless stayed, the award will be enforceable after expiry of period prescribed to challenge the award. The filing of such an application may be deterrent factor for the party so as to avoid any frivolous litigation and can also amount to imposing costs as discussed above.
- The Court, while considering the application for grant of stay in case of an arbitral award, may direct the party to deposit, the amount disputed or furnish such security in respect thereof as the Court may think fit under the provisions of CPC¹⁷.

¹⁶ Section 34 and Section 48 of the Act.

¹⁷ Section 36 of the Act.

ARBITRATION V/S THE COMMERCIAL COURTS, COMMERCIAL DIVISION AND COMMERCIAL APPELLATE DIVISION OF HIGH COURTS ACT, 2015 ("COMMERCIAL ACT")

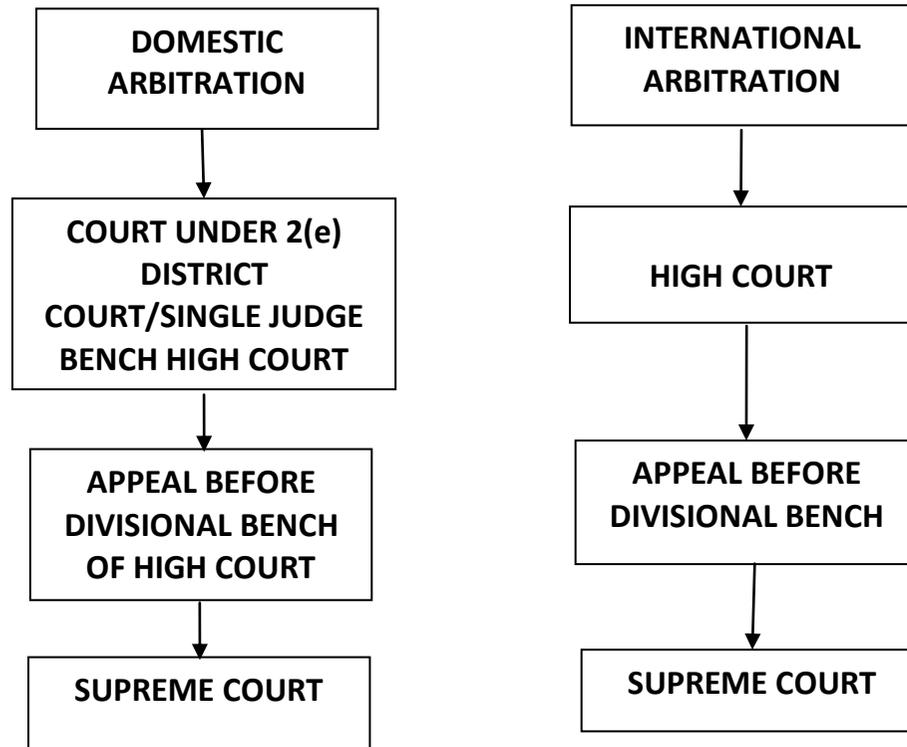
- ¹⁸The definition of Commercial Disputes is very wide and essentially covers every commercial transaction including general commercial contracts, shareholder and joint venture agreements, intellectual property rights, contracts relating to movable and immovable property, natural resources etc. of a Specified Value or such higher value, as may be notified by the Central Government¹⁹.
- Commercial Act provides that all applications and appeals arising out of an international commercial arbitration and out of domestic arbitration of such Specified Value that have been filed in the High Court having original jurisdiction shall be heard by the Commercial Division (single judge). Appeals from such Commercial Division will be heard and disposed off by the Commercial Appellate Division and any such applications and appeals arising out of a domestic arbitration other than international commercial arbitration of such Specified Value would lie before any principal civil court (other than a High Court) which will be heard and disposed of by a Commercial Court exercising territorial jurisdiction.
- Following is the flowchart to understand the above:-



¹⁸ As defined in section 2(c) of the Commercial Act.

¹⁹ As defined in section 2(i) of the Commercial Act.

- In case of arbitration which is below the Specified Value, following would be the hierarchy of the Courts where petition/appeals would lie:



CONCLUSION

We hope that the above amendments in the Act are welcomed and play a key role in shaping the arbitration in India and concluding the arbitration process expediently thereby making India as a preferred seat of arbitration.

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