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# Amendments to Arbitration and Conciliation Act, 1996

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*The Arbitration and Conciliation Act, 1996 ("Act") has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("Ordinance"), promulgated by the President of India on October 23, 2015. The 1996 Act was enacted for ensuring party autonomy and minimal court intervention in arbitration and greater coherence and consistency between domestic arbitration law and international practices. Despite this, arbitration in India continues to be ad hoc, expensive and long drawn. Many foreign investors have been hesitant to invest in India, due to the various delays associated with the judicial system of the country and often suffer from excessive court intervention in arbitrations. The Ordinance introduces several significant changes to the 1996 Act. The object of these changes is to expedite the arbitration process and minimize court intervention in arbitration process and address some of the issues, such as delays, prolixity and high costs, which have been bane of arbitrations in India.*

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## Introduction

The Arbitration and Conciliation Act, 1996 ("Act") has been amended by the Arbitration and Conciliation (Amendment) Ordinance, 2015 ("Ordinance"), promulgated by the President of India on October 23, 2015.

The 1996 Act was enacted for ensuring party autonomy and minimal court intervention in arbitration and greater coherence and consistency between domestic arbitration law and international practices. Despite this, arbitration in India continues to be ad hoc, expensive and long drawn. Many foreign investors have been hesitant to invest in India, due to the various delays associated with the judicial system of the country and often suffer from excessive court intervention in arbitrations.

The Ordinance introduces several significant changes to the 1996 Act. The object of these changes is to expedite the arbitration process and minimize court intervention in arbitration process and address some of the issues, such as delays, prolixity and high costs, which have been bane of arbitrations in India. The Ordinance is an attempt to make arbitration a preferred mode for settlement of commercial disputes and to make India a hub of international commercial arbitration. With the amendments, arbitrations in India are sought to be made more user-friendly and cost effective mode of dispute resolution.

The major changes brought about by the Ordinance are as follows:

1 In Section 2(1) (e) of the Act, the Ordinance has divided the definition of "court" in two parts. For the purpose of arbitration other than international commercial arbitration "court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, whereas for the purpose of international commercial arbitration "court" means the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.

2 Amendment to s. 8 now allows even nonsignatories to an arbitration agreement to be joined as parties in a domestic arbitration. The amendment effectively negates the decision of the Supreme Court in Sukanya Holdings v Jayesh H Panda 2003 (5) SCC 531, where it had ruled that joinder of nonsignatories to an arbitration agreement was not permissible.

3 Further amended s. 8 now requires that the judicial authority compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause exists. The amendment essentially nullifies the judgment of the Supreme Court in N. Radhakrishnan v Maestro Engineers 2010 1 SCC 72, where it was held that serious allegations of fraud are not arbitrable. The Amendment will also have implications for the Supreme Court's decision in Booz Allen Hamilton v SBI Home finance (2011) 5 SCC 53 wherein it had listed disputes that were not arbitrable.

4 **Interim Measures**

The Ordinance introduces a paradigm shift in the mode and method of grant of interim measures in an arbitration proceeding.

Recent judicial decision (Bharat Aluminum Co v. Kaiser Aluminum Technical Services, Supreme Court (2012) 9 SCC 552) had held that Part I of the Act (which, inter alia, includes provisions on seeking interim reliefs before a Court in India) would not apply to foreign seated arbitrations. The Ordinance has inserted a provision to section 2 of the Act, whereby, sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 (all falling in Part I of the Act) have been made applicable to international commercial arbitrations, even if the place of arbitration is outside India. As a result a party to an arbitration proceeding will be able to approach Courts in India for interim reliefs before the

commencement of an arbitration proceeding, even if the seat of such arbitration is not in India.

Importantly, under the newly inserted section 9(3), a Court cannot, as a matter of course, entertain an application for interim measure once an arbitral tribunal has been constituted, unless the Court finds that circumstances exist which may not render the remedy available under section 17 of the Act, i.e. approaching the arbitral tribunal for interim measures, efficacious. The intention of the Legislature is to limit the involvement of Courts in an arbitration proceeding thereby making such proceedings swift and effective.

Another important change introduced by the Ordinance is the power of an arbitral tribunal to grant interim reliefs. Though the original section 17 of the Act afforded an arbitral tribunal the power to grant interim measures, it definitely did lack the teeth. In this regard the Supreme Court of India had held that though section 17 of the Act gave an arbitral tribunal the power to pass interim orders, but the same could not be enforced as an order of a Court (M/s. Sundaram Finance v. M/s. NEPC India Ltd., AIR 1999 SC 565, and M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., AIR 2004 SC 1344). The Ordinance has substituted section 17 by a new section which ensures that an order passed by an arbitral tribunal under section 17 will now be deemed to be an order of the Court and shall be enforceable under the Code of Civil Procedure, 1908. Moreover, once the arbitral tribunal is constituted, all applications seeking interim measures would now be directed to it and not the Court.


### Strict Timelines

The Ordinance brings about some strict timelines in completion of arbitration proceedings. Proceedings before Courts have also been made time-bound.

#### *i. Commencing arbitration proceedings after obtaining an interim order from a Court*

In order to discourage litigants who obtain an interim order under section 9 of the Act, but do not commence arbitration proceedings, a timeline of 90 (ninety) days to commence arbitration proceedings after obtaining an order under section 9 of the Act has been introduced.

#### *ii. Application to set aside an arbitral award*

An application to set aside an arbitral award under Section 34 of the Act has to be disposed of by the Court within a period of 1 (one) year from its filing.

#### *iii. Application for appointment of an arbitrator*

The Ordinance provides that the Chief Justice of the High Court or the Chief Justice of the Supreme Court of India, in an application for appointment of an arbitrator, can only confine themselves to ascertaining that a valid arbitration agreement exists. Such application is required to be disposed of within a period of 60 (sixty) days.

#### *iv. Completion of arbitration proceedings*

As far as arbitration proceedings are concerned, newly introduced section 29A of the Act mandates completion of arbitration proceedings within a period of 12 months of entering into a reference. Amended section 12 of the Act now requires an arbitrator to make a specific disclosure if there are circumstances which would affect his ability to complete the arbitration proceeding within the period of 12 months.

Further, amended section 24 of the Act now empowers the arbitrator to impose exemplary costs on a party that seeks an adjournment before the arbitral tribunal without citing sufficient cause.

The parties to an arbitration may, however, by consent, extend the period for making an arbitration award for a further period not exceeding 6 (six) months. In case of expiry of the extended period, the mandate of the arbitral tribunal will stand terminated, unless a Court grants a further extension of the period, upon an application of the parties to the arbitration proceeding. When the Court grants an extension of time as above, it may substitute some or all of the arbitrators.


### Fast Track Arbitrations

The Ordinance introduces a fast track arbitration proceeding. Newly introduced section 29B of the

Act provides for an option whereby the parties to an arbitration agreement may mutually decide to appoint a sole arbitrator who decides the dispute on the basis of written pleadings, documents and submissions. Oral hearing and technical formalities may be dispensed with for the sake of an expeditious disposal. An award has to be rendered within a period of six months of entering into a reference.

## 7 Challenging an Award

### *Public Policy*

Section 34 of the Act provides that an arbitral award may be set aside if it is contrary to 'public policy'. In Section 34, the Explanation in sub-section (2) is substituted by Explanation (1) and (2) clarifying that an award will be in conflict with the public policy of India, only if:

(i) The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) It is in contravention with the fundamental policy of Indian law (Explanation 2 provides that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute); or

(iii) It is in conflict with the most basic notions of morality or justice.

Explanation (2A) is also inserted to provide that an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award provided it shall not be set aside merely on the ground of an erroneous application of law or by reappreciation of evidence. Similar changes are also made in Section 48 of the Act.

The Supreme Court of India in ONGC v. Saw Pipes (2003) had expanded the test of 'public policy' to mean an award that violates the statutory provisions of Indian law or even the terms of the contract in some cases. Such an award would be considered as 'patently illegal' and therefore in violation of public policy. This interpretation practically afforded the losing party an opportunity to reagitate the merits of the case.

The Ordinance, however, clarifies that an award will be in conflict with the public policy of India, only in certain circumstances, such as if the award is induced or affected by fraud or corruption, or is in contravention with the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. Further, the Ordinance provides that a determination of whether there is a contravention with the fundamental policy of Indian law cannot entail a review of the merits of the dispute. This amendment seeks to limit the reappreciation of the merits of the dispute at the stage of challenge to the award before the Court.

Hence, the Legislature has fundamentally reduced the scope of the inquiry by the judiciary into the question of violation of 'public policy'.

### *Patent illegality*

Another amendment brought about by the Ordinance is that an arbitral award can be set aside by a Court if the award is vitiated by patent illegality appearing on the face of the award.

However, an award cannot be set aside merely on the ground of an erroneous application of law or by reappreciation of evidence.

No automatic Stay on enforcement of an award: The court under s. 36(3) is empowered to stay the operation of the award on such terms and conditions as it deems fit. This could include taking a money deposit from the losing party. The Ordinance provides that the mere filing of an application challenging an arbitration award would not automatically stay the execution of the award. The execution of an award will only be stayed when the Court passes any specific order of stay on an application by a party to the proceeding.

## 8 Ensuring Impartiality of an Arbitrator

The Ordinance gives foremost importance to the impartiality of an arbitrator. Original Section 12 of the Act necessitated an arbitrator to disclose in writing circumstances likely to give rise to

justifiable doubts as to his independence or impartiality. Section 12 (1) is substituted to provide in detail the circumstances which a person appointed as arbitrator must disclose.

Schedule 5 is also added to the Act which provides the guidelines to determine whether the circumstances exists which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Schedule 6 is also added which provides the form in which such disclosure should be made. Section 12(5) along with the Seventh Schedule is inserted which provides that any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh schedule shall be ineligible to be appointed as an arbitrator.

The Ordinance specifies in elaborate detail the circumstances which may lead to such justifiable doubts. The newly inserted Fifth Schedule of the Act lists 34 (thirty four) such grounds which shall act as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. It is now important to see how proximate the arbitrator is to a party to the proceeding and/or the party's lawyer.


### Arbitration Fees

In a very significant step, the Ordinance provides a cap on the fees to be paid to an arbitrator, barring international commercial arbitrations and institutional arbitrations. The Ordinance introduces a comprehensive fee structure for arbitrators. The High Courts are empowered under amended section 11 to frame necessary rules in this regard keeping in mind Schedule 4 to the Ordinance, which contains a model fee structure. Fees range from Rs 45,000 to Rs 19,87,500 depending upon the quantum of the dispute. This does not apply to international commercial arbitrations and institutional arbitrations.


The Ordinance through s. 31 A also introduces an expensive costs regime. Costs usually are not compulsory and are at the discretion of the tribunal. The new provision lays down various factors to be considered by the tribunal at the time of determining the quantum of costs these include the result of the case, the conduct of parties, whether a party has made a frivolous counter claim leading to delay and whether any reasonable offer to settle the dispute is made by a party and refused by other party.

## Conclusion

The Ordinance will be placed before the winter session of Parliament and if approved, will be converted in to an Act. Ordinarily the Ordinance will remain in force for a period of 6 weeks from the day the winter session of parliament begins. If the Ordinance is not approved by the parliament, the Government can repromulgate it till such time that the approval of the Parliament is obtained.

The Ordinance is a major initiative aimed at radically overhauling the arbitration regime in India. The Government endeavour is commendable as arbitrations in India will become the speedy process as it was supposed to be and the Ordinance espouses the best practices in arbitration across the globe. Furthermore, the ambit for judicial interpretation is narrowed and fair certainty has been brought to the Act.

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