

Law Commission Report on Arbitration

The Law Commission of India proposed various amendments to the Arbitration and Conciliation Act, 1996 through its Report (No. 246) released on August 5th, 2014. The Report follows the fall out of the Arbitration and Conciliation (Amendment) Bill, 2003. The proposed Amendments if implemented would result in a major overhaul of the existing set-up and would increase faith in Indian Arbitration.

The major suggestions include:

Systemic Push to Institutional Arbitration:

- The scope of the definition of “arbitral tribunal” under section 2(d) be expanded to include “emergency arbitrators”.
- Section 11 be amended, so that the Supreme Court and the High Courts’ while acting in the exercise of their jurisdiction under section 11 would have a chance to encourage parties to refer their disputes to institutional arbitration.
- Trade bodies and Commerce Chambers set up new arbitration centers with their own rules.
- A specialized body be set up by the Government of India which has representation from all stakeholders of arbitration in India, and such body is to be entrusted with the responsibility of ensuring the spread of institutional arbitration in India.

Controlling Delay

- The Preamble be amended to re-affirm the Act’s focus on achieving the objectives of speed and economy.
- Dedicated benches be set up across India to deal with arbitration related matters.
- Section 24(1) be amended, for discouraging frequent adjournments by parties.
- The Appointment of an Arbitrator under section 11, be done by the Supreme Court/High Court and not the Chief Justice, and the same be considered an administrative function of the courts.
- Section 11 be amended (addition of sub clause 13) to ensure that an application for the Appointment of an Arbitrator be disposed of within 60 days of the service of notice on the other party.
- Section 11 (7) be amended to make the decision of the High Court regarding existing/nullity of the arbitration agreement and the appointment of an arbitrator final and non appealable.
- Section 34 and section 48 be amended (addition of sub clause 5 sub clause 4 respectively) to ensure that Challenges to Awards are disposed off expeditiously and within a period of one year from the service of notice on the other party.
- Section 48 be amended (addition of sub clause 3) to ensure that parties take

their remedies under this section seriously and approach a judicial forum expeditiously and not by way of an afterthought.

- In ongoing International Commercial Arbitration matters, the High Courts' be given direct jurisdiction, and the parties are not required to approach the lower courts.
- The Tribunal be granted the power to treat the right of the Respondent to file a statement of defence as having been forfeited, where such statement is not filed within the prescribed time.

Revised provisions for setting aside Domestic Awards/Enforcement of Foreign Awards

- Section 34 be amended (addition of sub clause 2A) to make provision to set aside an award for *patent illegality*. However, in such a case, an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence. That said, the provision would deal purely with domestic awards, to ensure that judicial intervention in Foreign Awards is not as much as is legitimately so in Domestic Awards.
- The scope of “public policy” under section 34 and section 48 be curtailed. An award would be set aside on public policy grounds only if it violates “the fundamental policy of Indian law” or is in conflict with “the most basic notions of morality or justice”.

Lesser Judicial Intervention in Foreign Seated Awards

- Indian Courts be allowed to exercise jurisdiction under Part I only when the seat of arbitration is in India (Reinforcing the BALCO judgment).
- Certain provisions of Part I be made available to Foreign Seated Arbitrations. These include section 9, section 27, section 37 (1) (a) and Section 37 (3).

Preventing automatic stay of an award upon admission of challenge

- Section 36 be amended to ensure that an award does not become unenforceable by virtue of an application under section 34.

Giving teeth to Interim Measures by the Tribunal

- Section 17 be amended to ensure that interim measures taken by Tribunals have the effect of Court Orders.

Allowing arbitrability of Fraud

- Section 16 be amended to make issues of Fraud arbitrable.

Controlling Arbitrators' Fees

- A Model Schedule of Fees, be created for domestic ad-hoc arbitrations.

Ensuring neutrality of Arbitrators

- Arbitrators be required to make certain prescribed disclosures on Conflicts of

Interest in the concerned matter.

- Arbitrators be required to make certain prescribed disclosures on the ability to devote time to the concerned matter.

Enlargement of the definition of “Party”

- The definition of the word ‘party’ to an arbitration agreement be expanded to include persons claiming through or under such party. (Reinforcing the Chloro Controls judgment)

Power of Tribunals to award Costs and Interests

- The Tribunal be empowered to impose Costs.
- The Tribunal be empowered to grant Compound Interest at a rate that is in line with the market realities.

Accepting new technology

- Arbitration Agreements be allowed to be concluded by electronic modes of communication.

The suggestions of the Commission are intended to bring about a major revamp in Indian Arbitration. Though the Arbitration & Conciliation Act of 1996 was enacted with the intent of ensuring speedy justice at affordable rates, the gaps in the Act have made it impossible to achieve what was intended. That said, an attempt has been made, to cover those gaps, and make India a truly ‘arbitration friendly country’. If all goes well, India could well be the next hub for international arbitration.

SEBI (AMENDMENT) SECOND ORDINANCE, 2013

The SEBI (Amendment) Second Ordinance (“**Ordinance**”), 2013 was promulgated by the President of India on 18th July, 2013. The same was notified in the Gazette of India on August 25th, 2014. The Ordinance introduces crucial changes in the Securities Exchange Board of India Act, 1992 (“**SEBI Act**”), Depositories Act, 1996 and Securities Contracts (Regulation) Act, 1956 (“**SCRA**”). The need for these changes stems from the various scams such as the Saradha and Sahara scams which duped a large number of investors resulting in losses amounting to many crores of rupees. In response to the grievances of the multitudes of investors in such scams, the Parliament has empowered SEBI with wide powers of search, seizure and investigation and greater autonomy in the enforcement of these powers and conducting speedy trials.

The Ordinance is focused on widening the powers of SEBI and rectifying the ambiguities in the powers that the regulatory body is capable of exercising. SEBI’s scope of calling for information has been extended. It can now call for information

regarding any transaction in securities under investigation from any person as opposed to only from banks and other authorities mentioned in the previous provision. Further, this power of SEBI extends to authorities outside India as well for the purpose of prevention and detection of violations of its regulations. Moreover, SEBI's powers of investigation, search and seizure have also been extended. Previously, the investigation, search and seizure were subject to judicial authorization. These powers can now be exercised by the authority of the Chairman itself without any judicial clearance, considerably expediting the investigation process.

The next vital amendment pertains to Collective investment scheme (“**CIS**”) defined in section 11AA of the SEBI Act. The Ordinance empowers SEBI to regulate all persons involved in pooling funds and engaging in investment schemes having a corpus of 100 crores or above and brings within its ambit all funds even if they are not registered under the SEBI Regulations, provided they are not expressly excluded under 11AA(3). It has been seen in various cases brought under the SEBI scanner that unregistered entities offering investment schemes claimed not to be subjected to SEBI's jurisdiction as they did not technically fall under the definition of CIS (the previous provision a CIS referred only to companies). The inclusion of the term 'person' instead of 'company' tightens the surveillance of ponzi schemes and gives little room for persons involved in inviting funds or dealing in securities to escape the clutches of the watchdog and shirk their responsibilities towards the investors, thus giving greater security to such investors.

Further, a new section 15JB has been inserted providing for settlement proceedings for offences and violations of the SEBI Regulations. This amendment is introduced to give effect to the SEBI's guidelines for consent orders and composition of offences. Further, SEBI's powers of disgorgement and enforcement have been introduced. The enforcement powers conferred upon SEBI enable the recovery officer to undertake attachment and sale of the defaulter's movable/immovable property, bank accounts, appointing a receiver for the management of the person's movable and immovable properties including arrest and detention of the person in prison. These powers further embolden the regulatory status of SEBI and expedite the process of recovery and disgorgement, emphasizing the protection of investors as the main object of the authority. The above account of the changes brought by the 2013 Ordinance encapsulates the powerful status of the regulatory authority and its role in investor protection.

News 10 @ a glance

**London Court of International
Arbitration releases new rules**

The London Court of International Arbitration (LCIA) published its new arbitration rules, which would apply to arbitrations commenced after October 1st, 2014. LCIA believes that the new rules would modernize and improve upon the existing version, reinforcing the LCIA as one of the world's leading providers of efficient international arbitration services. It may be noted that the basic structure of the LCIA hasn't changed much, but the new provisions on the Emergency Arbitrator Mechanism, the Conduct of Legal representatives etc. has ensured that the LCIA Rules are contemporary and distinctly innovative.

Competition Commission of India's (CCI) issues a Rs 2544 Crore Order Against 14 Auto Companies

A complaint was filed in the Competition Commission of India to investigate into the anti-competitive practices in the auto spare parts industry. It was complained that 3 automobile companies including Honda, Volkswagen and Fiat were restricting the availability of spare parts and after-sales services. CCI took note of the complaint and ordered an investigation not just against the three (3) but eleven (11) other automobile companies.

CCI found that the 14 car companies were guilty on two counts:

- entering into anti-competitive agreements with their suppliers
- abusing their dominant position

Securities and Exchange Board of India (SEBI) issues Circular on Core Settlement Guarantee Fund, Default Waterfall and Stress Testing.

Securities and Exchange Board of India (SEBI) has issued a circular **CIR/MRD/DRMNP/25/2014** dated August 27, 2014 prescribing norms for Core Settlement Guarantee Fund (Core SGF), Default Waterfall and Stress Testing. These guidelines are aimed at enhancing the robustness of the present risk management system of the clearing corporations (CCs) to enable them to deal with defaults of the clearing members much more effectively.

Supreme Court Directs DLF to Deposit Rs. 630 Crores

The Supreme Court of India directed DLF to deposit Rs. 630 crore in the next three months, while the court hears its petition against a Competition Commission of India order fining it for alleged unfair business practices. DLF needs to pay Rs. 50 crore within three weeks and the balance Rs. 580 crore in three months. The fine of Rs. 630 crore was imposed on DLF after Competition Commission found that the company is guilty of violating fair trade norms in 2011.

SEBI permits purchase and sale

of securities other than shares or convertible debentures of an Indian Company by a Person Resident Outside India

Securities and Exchange Board of India (SEBI) registered Foreign Institutional Investors (FIIs), Qualified Foreign Investors (QFIs), Registered Foreign Portfolio Investors (RFPIs) and long term investors registered with SEBI, will be eligible to purchase government securities directly from the issuer of such securities or purchase securities from the registered stock broker on a recognised Stock Exchange in India. However, such purchase will be subject to such terms and conditions as mentioned therein and such limits as prescribed for the same by Reserve Bank of India (RBI) and SEBI from time to time.

Raised FDI limit for defence notified

The Department of Industrial Policy and promotion (DIPP) has notified the changes to the Foreign Direct Investment Policy for defence. The FDI limit has been raised from 26 to 49 %, and any investment above that would require government approval. Investment proposals exceeding Rs. 1200 crores and beyond the limit of 49% would require the approval of the Cabinet Committee of Economic Affairs (CCEA).

Companies (Meetings of Board

and its powers) Rules, 2014 amended

Rules 3, 4 and 15 of the Companies (Meetings of Board and its powers) Rules 2014 have been amended.

The most important of them are the changes made to Rule 15, whereby the limits with respect to Related Party Contracts/Arrangements have been altered.

MCA notifies the Company Law Settlement Scheme 2014

Corporates that have defaulted in filing Annual Returns and Annual Financial Statements and are consequentially liable to be penalised under the new Companies Act, 2013 have been provided with a 'one time opportunity' to make good their default by filing these annual documents, avoiding prosecution and paying a much lesser additional amount. This opportunity shall remain available only till the 15th of October, 2014.

RBI allows issue of equity shares against repayment of dues

Indian Companies which can accept FDI under the automatic route may now issue equity shares to foreign residents against any funds payable by the Indian Company, which does not require prior approval of the Govt. of India or the RBI. The issue of equity shares must comply with the extant FDI guidelines on sectoral caps, pricing guidelines etc.

SEBI Relaxes corporate governance norms

The Securities and Exchange Board of India has relaxed certain Corporate Governance norms. Major changes include areas such as in the applicability criteria of Clause 49, provision for appointment of at least 1 Woman Director, provisions relating to Independent Directors and Related Party Transactions.