LEGAL ALERT

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BRIEF OVERVIEW OF PROPOSED CHANGES IN THE ARBITRATION AND CONCILIATION ACT, 1996 ("ACT")

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Dear Readers,

Welcome to the August 2015 edition of Legal Alert.

In this issue, we have presented a Brief Overview Of Proposed Changes in The Arbitration And Conciliation Act, 1996 by the Law Commission Report.

We hope you find this issue interesting and informative.

We look forward to your suggestions and feedback at info@rsplaw.in

Best Regards

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Managing Partner

INTRODUCTION

- The Indian Judiciary has been criticised for a domineering approach in arbitration, particularly when it involves a foreign party. Some recent judgments passed by the Indian courts have created some controversy and confusion on the law governing arbitration. Arbitration in India is inundated by unreasonable delays, high costs, and delay in enforcement of the award.
- With an increase in cross border transactions and open economic, financial policies and as promised, by the Modi Government "Make in India policy", commercial disputes will be steadily rising in India. The newly elected Government at the Centre is aiming towards improving the rank of India in the index of Ease of Doing Business and ease of dispute resolution is a critical factor in improving the business climate of the country.
- Taking note of these, and to make India the preferred seat of Arbitration, the Law Commission of India headed by its Chairman Justice A.P. Shah has submitted its 246th report to the Ministry

of Law and Justice (the "Commission Report") in August 2014. Further, a Supplementary Commission Report ("Supplementary Commission Report") was also submitted in February 2015. Law Commission's recommendations in its Commission Report and Supplementary Commission Report were meant mainly to introduce fairness, speed, economy in the resolution of disputes through arbitration, the same was considered imperative to stem the gradual, though steady shift away from India as a preferred seat of international commercial arbitration in favour of more investor friendly jurisdictions like Singapore, Hong Kong etc.

- The confidence, trust and faith of the parties to resolve disputes through Arbitration has eroded significantly over a period of time therefore, suggesting changes to the Act will have a significant impact on Arbitration in India.

BRIEF PROPOSED CHANGES IN THE ACT

INTERVENTION BY COURTS IN FOREIGN SEATED ARBITRATION

- The Commission Report has armoured the judgment of the Hon'ble Supreme Court of India in Bharat Aluminium and Co. v. Kaiser Aluminum and Co., (2012) 9 SCC 552. The Commission Report has recommended that:
  (a) the Indian courts will have jurisdiction under Part I of the Act, only when the seat of arbitration is within India;
  (b) certain provisions in Part I of the Act, such as Section 9 (interim relief), Section 27 (court assistance for evidence), Section 37(1)(a) (appealable orders), will remain available to parties in a foreign seated arbitration; and
  (c) legal recognition be accorded to the terms "seat" and "venue", consistent with international usage. The proposed changes will not affect applications pending before any judicial authority, relying upon the law set out by Bhatia International v. Interbulk Trading SA, (2002) 4 SCC 105.

SUGGESTED AMENDMENT TO SECTION 7 OF THE ACT

- The suggested amendment is kept in mind so as to bring Indian law in conformity with the UNCITRAL Model Law on International Commercial Arbitration and clarifies that an arbitration agreement can be concluded by way of Electronic Communication. Electronic Communication would mean "any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical

or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex and telecopy."

INTERIM MEASURES UNDER SECTION 9 OF THE ACT

- The Commission Report has recommended that once the Arbitral Tribunal has been constituted, the Court shall not entertain an application under Section 9 of the Act for interim measures unless circumstances exist making the remedy under Section 17 not efficacious; clarified the wide range of powers of the Arbitral Tribunal to grant interim measures and provided interim orders of the arbitral tribunal to be enforced like court orders.

NO AUTOMATIC STAY OF THE ARBITRAL AWARD

- The Commission Report recommends amendments to do away with the present situation where the mere filing of a challenge petition to the arbitral award under Section 34 of the Act acts as an automatic stay of the award. It has been recommended that an application has to be filed seeking to stay the operation of the award and the court is required to record reasons in writing for grant of such stay. While considering the grant of stay, the provisions for stay of money decree under the provisions of Code of Civil Procedure, 1908 would apply.

ENCOURAGES INSTITUTIONAL ARBITRATION

- The Commission Report has suggested:-
  (a) The promotion and encouragement of the culture of institutional arbitration in India;
  (b) Recommended that the High Court and the Supreme Court while acting in exercise of jurisdiction under Section 11 of the Act take steps to refer disputes to institutionalized arbitration; and recommends legal sanction to "emergency arbitrator", which is a popular and effective remedy in leading international arbitration institutions.

SPEEDY PROCEEDINGS

- The Commission Report has recommended that an application for appointment of an arbitrator be disposed of within 60 (sixty) days from the date of service of notice on the opposite party; arbitration proceedings shall be commenced within 60 (sixty) days from the day of grant of interim measures failing which the interim measure of protection shall cease to operate; challenges to arbitral awards shall be decided expeditiously and in any event within a period of 1 (one) year from the date of notice to the respondent; arbitrator shall disclose whether he is in a position to finish the arbitration with 24 (twenty four) months and render award within 3 (three) months; and the arbitral tribunal should hold proceedings on continuous days and no

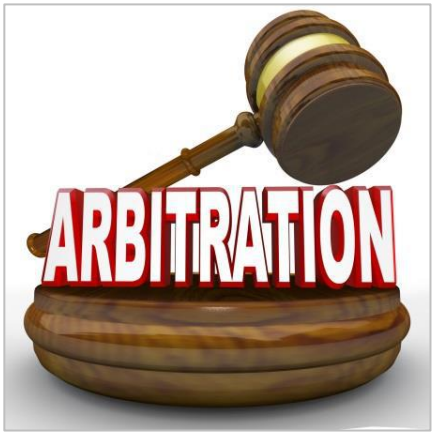
adjournments shall be granted unless sufficient cause if made out and costs may be imposed on the party seeking adjournment.

SETTING ASIDE OF DOMESTIC AWARD AND RECOGNITION/ENFORCEMENT OF FOREIGN AWARDS

- The Commission Report has recommended that in cases of foreign awards and awards passed arising out of international commercial arbitration in India, a narrower construct be given to "public policy", as so to include only: (a) the fundamental policy of Indian law; and (b) the most basic notions of justice or morality. With a view to do away with the unintended uncertainties caused by the Supreme Court's judgment in ONGC v. Saw Pipes, (2003) 5 SCC 705, the Commission Report has proposed specific provisions dealing with setting aside of the domestic award on grounds of patent illegality. The test of "patent illegality on the face of the award" has been restricted only to domestic awards not resulting from an international commercial arbitration.
- Further, after almost a month after the initial Commission Report, in or around September 2014, the term “Fundamental policy of India” was expanded by the Supreme Court in the case of ONGC Ltd vs Western Geco International Ltd. The Hon’ble Supreme Court of India went ahead to include the Wednesbury principle under the public policy test under section 34 of the Act among other judicial principles. This judgment was considered in the Supplementary commission report and the Commission was of the view that Court’s power in the aforesaid case is rather widened than it be minimizing which is also contrary to international practice. The Supplementary commission report to overcome this has recommended that the proposed section 34(2) (2) (b) (ii) and explanations of the Act be substituted by the following Explanation "For the avoidance of doubt 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".

REDUCES SCOPE FOR OBJECTIONS AT THE TIME OF APPOINTING ARBITRATORS AND REFERRING THE DISPUTE TO ARBITRATION

- It has been suggested that questions regarding the existence of an arbitration agreement (that are raised in proceedings under Section 8 and 11 of the Act) shall be referred to arbitration and the arbitral tribunal shall decide such issues.



PARTIES TO ARBITRATION

- In view of the judgment of the Supreme Court in Chloro Control India Private Limited v. Severn Trent Water Purification Inc and others, (2013) 1 SCC 641, the definition of the word "party" to an arbitration agreement has been expanded to also include persons claiming through or under such party. Therefore, even non-signatories to the arbitration agreement may be covered in cases involving inter-related contracts or, group companies. This would mean that going forward; arbitration may not be limited simply to signatories of the arbitration agreement.

ARBITRABILITY OF FRAUD

- A distinction has been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable as held in Ivory Properties and Hotels Private Ltd v Nusli Neville Wadia, 2011 (2) Arb LR 479 (Bom); . Further, the Supreme Court in Meguin GMBH v. Nandan Petrochem Ltd. 2007 (5) R.A.J 239 (SC) in the context of an application filed under section 11 of the Act has gone ahead and appointed an arbitrator even though issues of fraud were involved.
- A two judge bench of the Hon'ble Supreme Court, while adjudicating on an application under Section 8 of the Act, in case of Radhakrishnan v. Maestro Engineers,2010 1 SCC 72 held that an issue of fraud is not arbitrable. However, recently the Supreme Court in its judgment in Swiss Timing Ltd v Organising Committee Arbitration. Pet. No. 34/2013 dated May 28, 2014, in a similar case of exercising jurisdiction under section 11 of the Act, held that the judgment in Radhakrishnan is per incuriam and referred the matter to Arbitration.
- The Commission Report now recommends that questions of fraud, serious questions of fact and law are expressly arbitrable, putting a rest to the perplexity created by the aforesaid judgments of the Supreme Court.

DISCLOSURE BY THE ARBITRATOR

- The independence and neutrality of the arbitrator is critical to the entire arbitration process, therefore Commission Report has recommended that the Fourth and Fifth Schedule be inserted to set out grounds that give rise to justifiable doubts as to the independence or impartiality of arbitrator and the conflict of standards based on the IBA guidelines. The arbitrator is required to make certain disclosures to ensure that independence and neutrality standards are met. The arbitrator is also required to disclose if there exist circumstances that are likely to affect his ability to devote sufficient time and to complete the arbitration within 24 (twenty four) months and pass the award within 3 (three) months thereafter. The disclosures also require the arbitrator to disclose his ongoing arbitrations.

POWER TO AWARD INTEREST AND COSTS

- The Commission Report recommends that the conduct of parties will be a determining factor in awarding costs including the refusal of a party to unreasonably refuse a reasonable offer of settlement made by the other party. Further, the Commission Report has recommended amendments to Section 31 of the Act to clarify the powers of the arbitral tribunal to grant compound interest as well as to rationalise the rate at which default interest ought to be awarded and move away from the statutory 18% (eighteen percent) interest in the present regime to a market based determination in line with commercial realities.

FEES OF THE ARBITRATOR

- The Commission Report has recommended addition of the Sixth Schedule suggesting model fees in case of domestic ad-hoc arbitration other than international commercial arbitration with a view to ensure that the arbitration process does not become very expensive.

OUR VIEW

In April, 2015, Government had moved an Ordinance before the Hon'ble President of India who had rejected the Cabinet's changes to the Act due to the absence of major changes like amendments on costs, emergency arbitrators, grounds for challenge and interim measures ordered by arbitral tribunal etc which were not forming part of the proposed Bill on Arbitration and Conciliation. However, as recently as August 26,2015 the Union Cabinet, gave its approval for amendments to the Arbitration and Conciliation Bill, 2015 taking into consideration the aforesaid Law Commission Report and Supplementary Commission's Report based on recommendations and suggestions received from stake holders.

While these events are being watched closely by International investors which are being perceived as a sign of good things to come. All of this will go a long way in establishing India as an arbitration hub and a preferred seat of Arbitration. The only challenge now to see is how soon the Bill comes into effect.

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