ARBITRATION IN INDIA – THE WAY FORWARD

Introduction: The 2015 amendments to the Arbitration and Conciliation Act, 1996 ("**2015 Amendment Act**") were aimed at encouraging dispute resolution through arbitration and promoting arbitration as a quick and effective alternative to litigation and limit judicial intervention. However, a need was felt to further reform the arbitration regime in India and address certain issues that were faced with the introduction of the 2015 Amendment Act.

Domestic arbitrations mostly comprise of ad hoc arbitration. For a long time, a need was felt to promote institutional arbitration in India and strengthen the arbitral institutions in India. In this context, a High Level Committee chaired by Justice B. N. Srikrishna, Retired Judge, Supreme Court of India was set up to make India a robust centre for international and domestic arbitration. The Committee submitted its Report to the Government on 30th July, 2017 (the "**Committee Report**").

The Committee Report recognised that India has not fully embraced institutional arbitration as the preferred mode of arbitration and the caseload of Indian arbitral institutions like the Indian Council of Arbitration, the Delhi International Arbitration Centre, the Mumbai Centre for International Arbitration is significantly lower than the international arbitral institutions. Accordingly, the Committee Report recommended measures to promote institutional arbitration like Government support in setting up infrastructure for arbitral institutions, provisions to include mandatory reference of disputes with a value of more than INR 5 Crores to arbitral institutions, amongst others.

Key recommendations of the Committee Report for promoting India as an arbitration friendly jurisdiction included setting up of an Arbitration Promotion Council of India having representations from various stakeholders for grading arbitral institutions in India, creation of a specialist arbitration bar, creation of a specialist arbitration bench, application of Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (the "**Act**") to international arbitration as well, limiting the application of Section 29A of the Act to domestic arbitrations only and not international commercial arbitrations, providing a six month period for submission of pleadings, adding a new sub-section to Section 48 of the Act to provide that an application for enforcement of a foreign award shall be disposed of within a period of 1 year from the date the same is filed, immunity for arbitrators, confidentiality of arbitration proceedings, appointment of arbitrators to be made by arbitration institutions, provisions enabling recognition of emergency awards by emergency arbitrators, maintaining an electronic depository of arbitral awards, amongst others.

On 7th March, 2018, the Union Cabinet approved the Arbitration and Conciliation (Amendment) Bill, 2018 for introduction in Parliament with an objective to streamline the arbitration process and remove the practical difficulties faced by the amendments made to the Arbitration Act in 2015. The proposed amendments are based on the recommendations of the Committee Report.

Highlights and our analysis of the proposed amendments to the Act:

- Facilitating speedy appointment of arbitrators through designated arbitral institutions by the Supreme Court for international arbitration and the designated arbitral institutions by the High Court for other cases, without approaching the courts in this regard.

  We understand that approaching the arbitral institutions directly for appointment of arbitrators will lessen the burden of the High Courts and the Supreme Court, reduce the delays faced by the parties in appointing arbitrators and limit the court intervention in the arbitration process. However, it remains to be seen if the arbitral institutions will have powers

akin to Section 11 of the Arbitration and Conciliation Act, 1996 like courts and whether they will be given the power to adjudicate on matters where the validity or existence of arbitration agreement itself is in dispute.

- Setting up of an independent body namely, the Arbitration Council of India ("**ACI**") which will be an independent body corporate to grade arbitral institutions and accredit arbitrators by laying down norms, take steps to promote arbitration and other ADR mechanism, maintain professional standards in relation to arbitration and other ADR mechanisms. An electronic depository of all arbitral awards shall be maintained by the ACI.

  The Committee Report had recommended setting up of Arbitration Promotion Council of India ("**APCI"**), an autonomous body with representatives from industry bodies such as Confederation of Indian Industry, FICCI and the ASSOCHAM, the bar and the Government. It was recommended that the APCI shall have a Governing Board with members who have substantial experience in arbitration law and practice. A three-year term for each member of the Governing board was recommended. Besides, the Committee Report recommended that the APCI have a CEO having minimum qualifications as laid down therein and a professionally run Secretariat.

  The amendment to create the ACI is a welcome step and shall ensure that professional standards are maintained in arbitration and efficiency is improved. Accreditation of arbitrators is in recognition of the practice followed internationally where several bodies/ professional institutes like Singapore Institute of Arbitrators, the Resolution Institute, the British Columbia Arbitration and Mediation Institute exist to accredit arbitrators. However, it is essential that the constitution, functions and limitations of ACI be clearly defined in the Amendment Act.

- S. 29A(1) of the Act is proposed to be amended to exclude International Arbitrations and provide that the time limit to make an arbitral award in other arbitrations shall be within 12 months from the completion of pleadings of the parties.

  The time limit of 12 months (extendable by 6 months) was criticised for restricting party autonomy and taking a one-size-fits-all approach with no reference to the complexity of the matter. It was criticised for forcing the parties to approach the courts where arbitral proceedings were not completed within the stipulated timeline. The international arbitral institutions also criticised the timeline provided by S. 29A.

  It is proposed to amend sub section (1) of section 29A by excluding International Arbitrations from the bounds of timeline thereby endeavouring to follow rules of international arbitral institutions. As far as domestic arbitrations are concerned, it is proposed that the time period of 12 months should begin from completion of pleadings. Whilst the recommendations in relation to domestic arbitrations may well be justified, in our view, the same is under a threat of being diluted if there's leniency in condoning delays in filing of pleadings by parties.

- A new section 42A is proposed to be inserted to provide that the confidentiality of all arbitration proceedings except awards shall be maintained by the arbitrator and the arbitral institutions. Further, another section 42B is proposed to be inserted to provide immunity to arbitrators from suit or other legal proceedings for any action or omission done in good faith in the course of arbitral proceedings.

  It will be interesting to see how the provision of maintaining confidentiality will be reconciled with the requirement of a party whilst preparing an application under Section 9 or 27 of the Act.

In our view, the parties would necessarily have to rely upon arbitration proceedings whilst approaching the courts.

- **Applicability of the 2015 Amendment Act**

  A new section 87 is proposed to be inserted to clarify that unless parties agree otherwise, the 2015 Amendment Act shall only apply to arbitral proceedings which have commenced after the commencement of the 2015 Amendment Act i.e. after 23rd October, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings which have commenced after the commencement of the 2015 Amendment Act.

  Section 26 of the 2015 Amendment Act remained silent on the applicability of the 2015 Amendment Act to court proceedings in relation to arbitrations which commenced prior to 23rd October, 2015. Various High Courts in India have taken divergent views on the applicability of the 2015 Amendment Act. According to the Committee Report, uncertainty and prejudice to parties would prevail if the 2015 Amendment Act is permitted to apply to pending court proceedings related to arbitrations which commenced prior to 23rd October, 2015 and accordingly recommended to clarify Section 26 of the 2015 Amendment Act to apply to only arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings only.

  The proposed Section 87 was intended to put to rest the uncertainty created by the conflicting judgments of various High Courts regarding the applicability of the 2015 Amendment Act.

However, in a recent decision in ***Board of Control for Cricket in India v. Kochi Cricket Private Limited*** (SLP(C) Nos. 19545-19546 of 2016) dated 15th March, 2018, the Supreme Court has critiqued the proposed Section 87 on the ground that the said provision would bring a substantial number of court proceedings initiated on or after 23rd October, 2015 (in relation to arbitrations commenced prior to 23rd October, 2015) under the purview of the pre amendment regime "*resulting in delay of disposal of arbitral proceedings by increased interference of courts, which ultimately defeats the object of 1996 Act.*" While interpreting Section 26 of the 2015 Amendment Act, the Court observed that the provision has to be construed literally first, and then purposively and pragmatically. Accordingly, in relation to the applicability of the 2015 Amendment Act to Section 36 of the Act, the Court held that Section 26 of the Amendment Act makes it clear that the Amendment Act as a whole is prospective in nature, but has also gone on to clarify that Section 36 of the Act as substituted by the 2015 Amendment Act would apply even to pending Section 34 applications on the date of commencement of the 2015 Amendment Act. The Court further directed that a copy of its judgement be sent to the Ministry of Law and Justice and the Attorney General of India for consideration in view of the proposed amendment to the Arbitration Act.

The decision furthers the judiciary's intent to make India an arbitration friendly jurisdiction and extends the benefits of the progressive regime of the 2015 amendments to the court proceedings instituted prior to the introduction of the 2015 Amendment Act.

The content of this article is intended to provide a general guide to the subject matter and should not be construed as legal advice.