

Speech delivered by Mr. Rajiv Dutta, Senior Advocate at the Rule of Law Convention - 2015 organized by the Bar Association of India on 06.12.2015 at the India Habitat Centre, New Delhi.

Recent Arbitration Ordinance and Creation of Commercial Courts Division – A Critical Look

Certainly today, India is passing through a very significant phase in its effort to streamline the entire judicial set up in the country.

Be it in the field of appointment of Judges to the Supreme Court and the High Courts or making aggressive amendments to improve upon the existing delivery system in order to boost the confidence of the investors and also the common litigants whose cases are pending in the Courts for a very long time.

Although, in its efforts to improve the system "first and the foremost task" that ought to have been done has yet not been done, which is to appoint the requisite number of Judges in the entire country. Somehow that is always taking a back seat the reasons are well known.

Topic today is to present to you a critical look of the two amendments brought out in the Arbitration and Conciliation (Amendment) Ordinance, 2015 and Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts by way of promulgating Ordinances. It is foregone conclusion that the amendments will definitely have a positive impact, but it is also not understood as to why it was done in a hurry.

Both the Ordinances were brought out by way of promulgating Ordinances under Article 123 of the Constitution of India on 23rd October, 2015 just before the Winter Session of the Parliament was to begin. A better and democratic way would have been achieved by

introducing the Bills in the Parliament. A healthy debate which would have resulted in streamlining both the Legislations.

However, we have to leave this to the wisdom of the Government and the President of India. All that I can say is that by not following the recommendations of the Law Commission fully and by short-circuiting democratic parliamentary process a clear set back as occurred in both the amendments.

Both the Arbitration and Conciliation (Amendment) Ordinance, 2015 and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance are an outcome of extensive reports by the Law Commission of India to encourage commercial dispute resolution in India through arbitration or commercial litigation. The 246th Report and the 253rd Report of the Law Commission of India deal with arbitration and commercial courts respectively and much of the ordinances have been incorporated from these reports. But, in the case of the Arbitration Ordinance there are clear deviations from the recommendations of the Report.

Let me now present to you some of the issues which have left much to be desired in both the legislations. I will take up the Arbitration and Amendment Ordinance first.

Since I have to confine myself to the topic of the day. I will first begin by saying that there are very many aspects or features which are notable and are significant such as amendments to Section 2 (2) extending the applicability of Sections 9, 27 and 37 (1)(a) and (3) containing in Part - I of the 1996 Act to International Commercial Arbitrations.

Amendment to Section 8 which allows even non-signatories to an Arbitration Agreement to be joined as parties in a domestic arbitration.

The further amendment to Section 8 makes it compulsory to refer parties to arbitration irrespective of the decision of the Supreme Court or any other Court, if the judicial authority finds valid arbitration clause.

Section 9 is amended to restrain the courts from entertaining an Application for interim relief once arbitration has commenced. The Ordinance requires the appointment of an Arbitrator by the Courts to be completed expeditiously, preferably within a period of 60 days.

The scope of the Courts power under Section 11 has been restricted to examining the validity of the Arbitration Clause alone and no further.

The Ordinance amends Section 12 to include an obligation requiring a potential Arbitrator to make an express disclosure on conflicts. The courts at the time of appointing an Arbitrator are also empowered to demand a full disclosure on conflicts. Schedules 5 and 7 to the Ordinance contains an exhaustive list of grounds which will assist in determining all issues of conflict. Parties are however empowered to waive any objections of conflict by consent.

The Ordinance introduces a comprehensive fee structure for Arbitrators. The High Courts are empowered to frame necessary rules in this regard.

Section 17 of the Arbitration & Conciliation Act has been amended to ensure that interim relief including that of injunction granted by an Arbitrator will be effective and enforceable as an Order of the Court.

The Ordinance provides for time bound arbitrations. A Tribunal is obligated to deliver the final award within a period of 12 months. This can be extended by consent for additional 6 months by the parties. Any further extensions will require Court consent. The

Courts on being approached for an extension are empowered to reduce the fee payable to an Arbitrator by up to 5% for each month of delay and can also substitute an Arbitrator.

The provision for fast track settlement of disputes is also provided, which requires the Tribunal to pass an award within 6 months. The Ordinance also provides an incentive to the Arbitrators in case they decide the matter within a period of 6 months. They will be entitled to an additional fee payable to the Tribunal by consent of the parties.

The Ordinance through Section 31 (A) also introduces an expensive cost regime. Costs are not compulsory but are at the discretion of the Tribunal.

To ensure restraint in setting aside domestic awards, the Ordinance restricts the meaning of public policy which is limited to :-

- a. making of an award was induced by fraud or corruption or;
- b. where an award is in conflict with the fundamental policy of Indian Law or;
- c. an award is in conflict with the most basic notions of morality or justice.

Similar amendments have also been introduced in Sections 48 and 57 making the test of public policy a uniform one for domestic and international awards.

Section 34 has been further amended to ensure that a challenge to the award is disposed of by the courts within a period of one year.

Section 36 is amended to permit operation of an award pending a challenge. The court under Section 36(3) is empowered to stay the operation of the award on such terms and conditions as it deems fit which could include taking a money deposit from the losing party.

Having brought out the essential features in the Ordinance, I will now deal into my criticism of the Ordinance.

CRITICISMS

Arbitration Ordinance

- No explicit amendment to the Act to recognize the arbitrability of fraud as per the recommendation of the Law Commission. This was a much needed amendment to the A&C Act as allegations of fraud had become a easy method of avoiding arbitration. There are conflicting views on this by the Supreme Court.
- (S.29A) Though the Law Commission had recommended against having any deadline for the completion of arbitration as seeking any extension would lead to a fresh set of litigation before the Court and leads to court intervention in arbitral proceedings. The earlier Arbitration Act, 1940 also had a time limit for the conduct of the arbitration, but experience shows that this section lead to much litigation with parties disagreeing on extending the time for a tribunal leading to a situation where the courts were having supervisory jurisdiction over arbitrations, such a scenario would be damaging to the independence of arbitration.
- There is no basis for the creation of fee schedule only for ad-hoc arbitration while allowing arbitral institutions to continue charging exorbitant rates. While government interference is avoided now in market prices of even essential commodities, this arbitrary decision in setting the price for arbitrators might only discourage the growth of arbitration in India.
- The Conciliation part of the Act is entirely ignored, whereas streamlining of conciliation too would have encouraged ADR in India. There is a need for a separate legislation to deal with

Mediation and the joining of the hip with arbitration must be avoided. Quick, satisfactory and final resolution of commercial disputes is possible with mediation.

- The amendment to section 8 excluding Supreme Court decisions is vague and would lead to much confusion of its interpretation. This further points to the conflict being created by the executive with the judiciary by the usage of wrong language in a statute. It also shows how the government has disregarded recommendations of expert bodies, whether it was the Venkatachaliah Commission's recommendation for the composition of the NJAC or the Law Commission's recommendation for the Arbitration and Conciliation (Amendment) Bill [Ordinance]
- The Ordinance has not clarified on its applicability on arbitrations initiated prior to the ordinance, i.e., for eg. if the time limit applies to existing arbitrations initiated before the Ordinance. This question has already now being considered by the Madras High Court in the WP No.37355/2015- *Delphi TVS Diesel System Ltd v. Union of India* , clearly the unnecessary urgency shown to introduce a change through the form of an ordinance has given a half baked ordinance which is a unsatisfactory outcome and leading to more court interference.
- A separate legislation for international arbitration would have been a more appropriate method to encourage arbitration than this web of connecting Part I and Part II of the A&C Act. A separate legislation would help in encouraging international arbitration to have its seat in India.

Commercial Courts Ordinance

The key features of the Commercial Courts Ordinance which are notable are as follows:-

1. Wide meaning of 'Commercial Dispute'.
2. Specialized Commercial Courts at various levels.
3. Commercial Dispute value threshold limited it to Rs. 1,00,00,000/- (Rupees One Crore)
4. Existing Commercial Disputes to be transferred.
5. Jurisdiction over arbitrations:
6. Consequent amendments to CPC
7. Fixed Timelines to ensure prompt resolution of disputes in the following manner:-
 - (a) The maximum period for filing a written statement has been set at 120 days upon the expiry of which the defendant's right to file a written statement shall stand forfeited.
 - (b) All appeals to the Commercial Appellate Division must be made within a period of 60 days from the date of the impugned judgement and the appellate division must endeavour to dispose of the same within 6 months from when it is filed.
 - (c) A plaintiff seeking to adduce additional documents must make an application for the same within 30 days of filing the suit.
 - (d) All applications seeking leave to deliver interrogatories must be decided within 7 days from the date on which they are filed.
 - (e) Interrogatories shall be answered by affidavit to be filed within 10 days, however such period is extendable by the court.

- (f) All parties must complete inspection of all documents disclosed within 30 days of the filing of the written statement.
- (g) Any directions sought by parties for inspection of documents must be disposed of within 30 days of filing an application for such directions.
- (h) Inspection of documents must be completed within 5 days of the passing of an order allowing inspection.
- (i) Parties must submit their statements of admission/denial of all disclosed documents within 15 days of completion of the inspection. The court however has the discretion to fix any other such time as it deems fit for submission of these statements.
- (j) Any party served with a notice to produce documents may be given up to 15 days to submit the relevant documents.
- (k) The first case management hearing is to be held within four weeks from the submission of admission/denial of documents by all parties to the suit.
- (l) Arguments must be concluded within 6 months from the date of the first case management hearing
- (m) Written arguments under distinct heads are to be submitted by the parties within 4 weeks of the commencement of oral arguments. Thereafter, the court may allow revised written arguments to be filed within one week after conclusion of oral arguments.
- (n) The court must pronounce judgement within 90 days of conclusion of arguments.

The direction of the Ordinance and some of the provisions it contains could go a long way towards achieving early resolution of Commercial Disputes, and instill a sense of confidence in the business and investor community. However, as the threshold of the pecuniary jurisdiction of the Specialized Commercial Courts as prescribed in the Ordinance is low, this may put a strain on such courts, such that adherence to certain timelines might become a practical challenge. Further, there appear to be problems in the Ordinance in respect of the potentially overlapping jurisdiction of the Commercial Divisions proposed for in the five High Courts exercising original jurisdiction and the Commercial Appellate Divisions within those High Courts in relation to arbitration matters.

Now coming to the short comings or the features which in my opinion are lacking in the amendment

- The pecuniary limit at Rs. 1,00,00,000/- (Rupees One Crore), would mean that the work load of the commercial division would be tremendous and the intended quick resolution of the dispute might be hampered.
- Creation of separate divisions in the district court would also require that the judges in the courts are well trained in commercial laws and can handle the additional pressure to maintain the time limit as per the ordinance. This would require investment in judges and serious training in the amended procedure, as the CPC has been amended by the Ordinance for such commercial cases.
- The creation of such courts by the method of ordinance has left much to be desired as any investment or changes might be nullified if the Government does not succeed in converting this Ordinance in to an Act. The expenditure and training of judges for creating separate commercial divisions would be nought if the Ordinance fails to become an Act.

- Though creation of commercial courts and divisions is something borrowed from the UK, Singapore etc. The social and economic circumstances of those countries permit such concentration of judges to decide these very widely defined commercial disputes.
- The real solution is to increase the number of judges in the system, fill the vacancies currently existing of Judges, this would mean more judges can be allocated in High Courts for Original Side Work and in the district courts to reduce pendency in courts for all types of litigants.
- This ordinance seems to be a knee jerk reaction to the White Industries decision, which held the delay in deciding the commercial matter violated BITs signed by India, but might now be the best answer to quicker resolution of disputes
- Though it has been more than a month since the promulgation of the Ordinance, most of the States have not constituted these courts and defeats the unnecessary urgency show by the government in bringing this Commercial Court Ordinance.

Before I close, I would like to inform you that the Supreme Court on 16.11.2015 in the case of 'Reliance Industries Limited and others Vs. Union of India' Petition for Arbitration (Civil) No. 1 of 2015 has passed an order whereby the judgment on the Ordinance has been reserved.

Similarly, the High Court of Madras on 24.11.2015 in the case of 'Delphi TVS Diesel System Ltd. Vs. Union of India' - Writ Petition No. 37355 of 2015 has reserved an order on the question of the applicability of the Arbitration Ordinance retrospective.
