

ARBITRATION

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International Commercial Arbitration in India

Introduction

The lack of legal certainty, the costs attached as well as the time-consuming nature of the judicial process in has prompted the world towards alternative methods of dispute resolution. The world community at large has endeavored to create universally accepted norms to regulate arbitration proceedings. India has been no silent spectator in this aspect and is a signatory to key International Conventions governing the internationally accepted standards for Arbitration as well as specific provisions with respect to their enforceability etc. This approach by the Parliament has been in consonance with the government's initiative to bring big business names to set up shop in India. The major deterrent for global giants in setting up operations in India is the judicial framework, the absence of a proper process and the lack of judicial restraint exercised by the courts with respect to arbitration matters, specifically those involving a foreign entity. The Government, recognizing this has made considerable progress through the Arbitration & Conciliation (Amendment) Act, 2015 ("Amendment Act") as well as the introduction of the Arbitration & Conciliation (Amendment) Bill, 2018. ("Amendment Bill")

What is International Commercial Arbitration?

Before diving into the present scenario of International Commercial Arbitration in India, it would be useful to first better understand what entails International Commercial Arbitration. Arbitration that is the result of disputes arising out of a legal relationship, not necessarily contractual and is by the Indian laws deemed to be commercial is International Commercial Arbitration. The parties to such dispute are also of significance and in order for an arbitration to qualify as International Commercial Arbitration one of the parties must either be:

- a. An individual who is not of Indian nationality or habitually residing in India.
- b. A body Corporate Incorporated outside India.
- c. An association or body of individuals whose management and or control is not exercised by India.
- d. The Government of a Foreign Country.

Classification of International Commercial Arbitration

International Commercial Arbitration may also, for the ease of understanding be classified into two types- International Commercial Arbitration with a seat in India and International Commercial

Tuesday, 29 June 2018

Arbitration, conducted outside India. This distinction is critical in order to assess the applicability of Part I of the Arbitration & Conciliation Act, 1996 (“**the Act**”) as well as when the provisions under Part II of the Act in relation to the New York and Geneva Conventions shall be triggered.

International Commercial Arbitration with a seat in India, for all practical purposes, is treated *pari materia* to that of Domestic Arbitration and will be governed by the procedures and rules laid down in Part I of the Act. Thus, a party seeking to resolve an International Commercial Dispute in India would be required to send notice to the other party of their intention to resolve the matter through Arbitration in India and subsequently prefer an application under Section 8 of the act before a court of competent jurisdiction. This was the earlier position pertaining to International Commercial Arbitration. However, Parliament has sought to expedite the process as well as make it less cumbersome and they achieved this through the Arbitration & Conciliation (Amendment) Act, 2015. The amendment facilitated the creation of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes.

These courts created and established by virtue of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 were specifically designed to redress International Commercial Arbitration

related disputes. The act takes the liberty of exhaustively listing out the various matters that may be interpreted as “*commercial*” for the purpose of this act and by virtue of Section 10 of the said act, they have exclusive jurisdiction over International Commercial Arbitration disputes. These courts will enable expedited decision making and relevant expertise of the arbitral panel. This will no doubt bring about uniformity as well as clarity to a system that was avoided entirely because of a want of the aforementioned benefits. The Amendment Act also stipulated numerous time limits on disposal of matters and specifically excluded International Commercial Arbitration from the purview of this time limit as it was not feasible to create statutory time limits in international commercial matters.

Changes brought in by the Amendment Act

Similarly, the once toothless tiger that an Arbitral Tribunal was has been rectified and their status and statutory powers have significantly been widened. The Amendment Act empowers the tribunal to grant interim relief and it also alleviates the status of the awards to that of orders of the court. By virtue of this enhancement, any person acting in derogation of an order of the tribunal can be subject to contempt proceedings and this goes a long way in strengthening the institution.

The Amendment Act also sought to rectify some of the lacunae in the Act. Uncertainty was rampant with respect to the enforceability, interim relief etc. The Amendment Act put these concerns

Tuesday, 29 June 2018

to be extended by extending the applicability of Part I of the Act to International Commercial Arbitration conducted elsewhere than in India when there was an express contractual stipulation to that effect. Thus, if two parties contractually bound themselves to be subject to Part I of the Act, specifically the provisions pertaining to Interim Relief, Appeal and Rules of Evidence, a recital to that effect would enable the provisions of the Act to be applicable, provided that the country where the arbitration is being conducted is enforceable by virtue of Part II of the Act.

Proposed changes in the Amendment Bill

The Amendment Bill has also sought to incorporate some critical changes that have significant implications for International Commercial Arbitration. The government seeks to reinforce their pro-Arbitration position by putting in place mechanisms that seek to strengthen the Alternate Dispute Resolution Mechanism.

The establishment of an Arbitration Council of India will also regulate and improve the proceedings at large as well as the quality and standard of Arbitration professionals in India. The amendment also seeks to attribute confidentiality to the arbitration proceedings, except the arbitral award and also recommends immunity for arbitrators on the panel from prosecution for acts executed in good faith.

Conclusion

In the wake of an increasing number of international commercial transactions occurring within India and amongst foreign entities and Indian entities, the law is slowly but steadily adapting and moulding itself to mimic the prevalent circumstances and cater to the needs of the business community and create an environment that is conducive for economic growth and the recent amendments and judicial decisions have sought to reinforce and strengthen an already potent form of dispute resolution.

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Website: www.astrealegal.com Email: contact@astrealegal.com

Contact: +91 9822720483, +91 020 – 6510878

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