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Introduction to Law of Arbitration in India

International Commercial Arbitration (ICA) in India is governed by the Arbitration and Conciliation Act, 1996 (Act) which recognizes the rights of parties to enter into ICA where the dispute arises out of commercial legal relationship, whether contractual or not. There have been two legislative amendments to the Act viz. 2015 amendment and the 2019 amendment. The background and circumstance that led to the two amendments are discussed below.

For an arbitration to be ICA, at least one of the parties must be a foreign entity or a juristic entity having its central management or exercise of control in a foreign country. In arbitration, the parties are free to determine the seat and choice of law that would be applicable to their contractual relationships and arising disputes.

The Act deals with the domestic arbitration and ICA under separate parts. Part I of the Act lays down exhaustive framework to facilitate the procedural aspects in the domestic set up and Part II provides for the enforcement of foreign arbitral awards within the Indian jurisdiction. It does so by providing for the enforcement of awards governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) under Chapter I of Part II of the Act and for those governed by the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) under Chapter II of Part II of the Act.

In both instances, parties to the arbitral award must move the Court for enforcement of the award and establish that doing so would not be contrary to the public policy of India. The Act provides for limited grounds under which enforcement of foreign arbitral awards may be refused, such as that the arbitral award was set at nullity in the jurisdiction where it was passed or was passed contrary to the law to which it was subject or that it was obtained by fraud, coercion or undue influence etc.

The law commission of India, while evaluating the Act in 2014 and early 2015, noted a peculiar trend where the Indian Courts by giving an expansive definition to 'public policy' indulged in re-examination of facts and frequently interfered with arbitral awards on the grounds of patent illegality and public policy. Accordingly, in its 246th Report and the Supplementary Report to 246th Report on amendments to the Act, the law commission recommended that the gamut of public policy in the context of ICA should be limited to exclude patent illegality. The law commission also recommended that the concept of 'public policy' should be narrowly interpreted in both domestic arbitration as well as ICA.

Further, there were several recommendations made with a view to promote India as a preferred seat of arbitration, including extending applicability of provisions of Part I relating to seeking interim measures, taking of evidence and appeals to foreign seated arbitrations as well. Accordingly, the Act was amended by Arbitration and Conciliation (Amendment) Act, 2015.

Subsequently, a high level committee chaired by Justice B.N. Srikrishna was constituted with an aim to examine the existing regime and suggest a way forward to make India the next big hub for domestic and international arbitration (HLC).

Incorporating the recommendations made by the HLC in its Report of July 2017, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted to further amend the Act. Now, though speedy disposal is encouraged, strict timelines for completion of ICA proceedings that were inserted by the 2015 amendment have been removed. Further, in case parties to an ICA are unable to appoint an arbitrator, they may approach the Supreme Court for such appointment.

Judicial precedents spanning over the course of two decades, three reports by law committees and two legislative amendments to the Act are all marked by a proactive approach of the stakeholders to streamline the process of arbitration in India to suit the contemporary landscape, facilitate ease of parties and reinforcing their confidence in the arbitral regime in India.