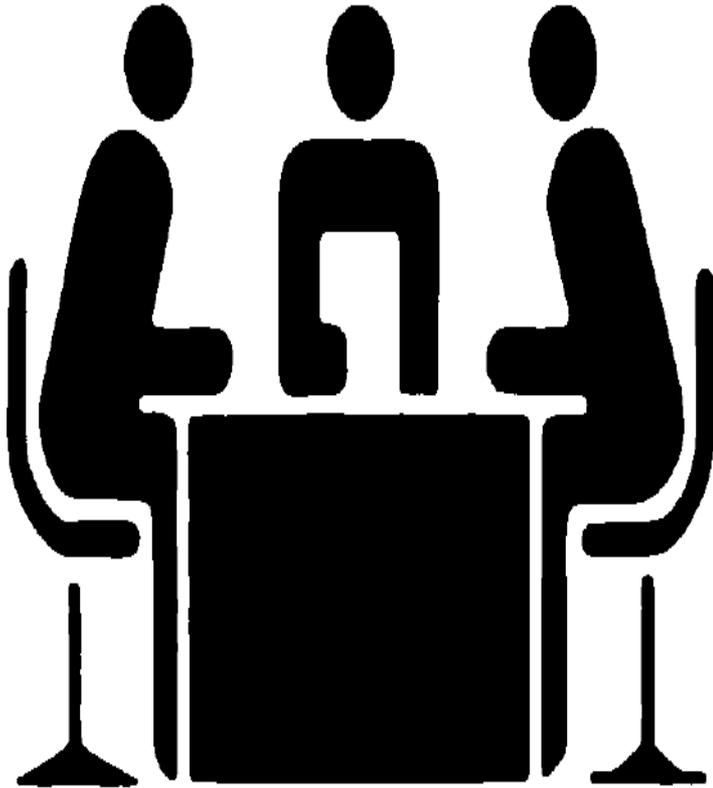


# ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

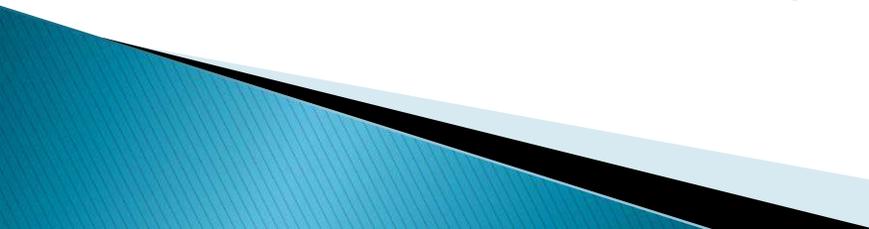
BY  
HMJ Prathiba M. Singh  
Judge, Delhi High Court

# ARBITRATION



- ▶ Arbitration has recently become a popular means of settlement of disputes globally as well as in India.
- ▶ Arbitrations are governed by the Arbitration and Conciliation Act, 1996.
- ▶ In 2015, a need was felt to take steps to amend this law and further hasten the process of dispute resolution in India.

# The 1996 Act – a brief history

- ▶ The Arbitration and Conciliation Act, 1996 came into force on 22<sup>nd</sup> August, 1996.
  - ▶ Intent of the legislature – to provide for an alternative to the long process of litigation prevalent in India, and provide for speedier resolution of disputes.
  - ▶ Intent also to project India as a hub for foreign investments.
  - ▶ The Act was divided into 4 parts, and for the first time, consolidated laws relating to domestic arbitration, conciliation, International commercial arbitration, and enforcement of Foreign Awards, all into one Act.
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# BALCO judgment – application of Part I

- ▶ On 6<sup>th</sup> September, 2012, a 5-judge bench of the Supreme Court, in *Bharat Aluminium Company v. Kaiser Aluminium Technical Services (2012) 9 SCC 552* (BALCO) held that in cases of international commercial arbitrations, where the seat of arbitration is outside India, Part I of the Act would not apply – heralding a new dawn for Indian arbitration.

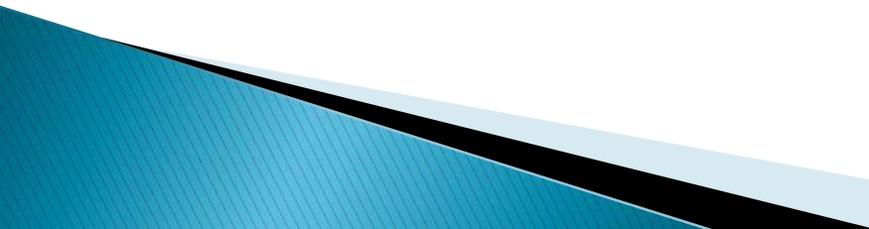


# BALCO judgment Cont...

It overruled the previous stand taken by the Supreme Court in *Bhatia International v. Bulk Trading SA* (2002) 4 SCC 105 which said that the curial jurisdiction of the courts under Part I of the Act would apply to all arbitrations, even those seated outside India.



# Legal Consequences of BALCO

- ▶ Consequences of the BALCO judgment are:
    - Indian Courts could not assert jurisdiction concerned with foreign-seated arbitrations under Sections 9, 11 and 34, mainly.
    - Not necessary for parties to expressly exclude the application of Part I for foreign seated arbitrations.
    - Part I would apply only to arbitrations seated in India, both domestic and foreign.
    - Negative consequence – there was no provision for seeking urgent interim reliefs in cases of foreign seated arbitrations in India.
- 

# Deficiencies with the 1996 Act

- ▶ The Act of 1996 was heavily criticised in India due to the following reasons:
  - The foremost criticism was the interpretive loopholes in the Act, which allowed interference of the Courts in arbitration proceedings, leaving the 'expeditious' mechanism for dispute resolution as time consuming as litigation, if not more so.



# Law Commission 246<sup>th</sup> Report

- ▶ 246<sup>th</sup> Report of the Law Commission made the following recommendations:
  - Amendment to Preamble to reaffirm the objectives of the Act –
    - fairness
    - speedy disposal
    - economy in dispute resolution.
  - Insertion of Section 6A – determination of imposition of costs and the quantum thereof.
  - Insertion of Sections 3A and 3B to bring it in conformity with UNCITRAL Model Law on International Commercial Arbitration.

# Law Commission 246<sup>th</sup> Report Cont...

- Reduction of role of Courts in granting interim relief under S. 9.
- Reforms in provisions regarding ‘independence and impartiality’ of arbitrators.
- If arbitrator fell under one of the categories in Schedule 5, he would be deemed not be able to perform his duties.
- Under Section 17, arbitral tribunal to be given the same powers as that of a Civil Court under the CPC in relation to grant of interim injunctions



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Law Commission of India

# Law Commission 246<sup>th</sup> Report Cont...

- Discouraging frequent and baseless adjournments and holding day to day hearings.
- Recommendation for addition of Sections 34(5) and 48(4) for expeditious disposal of disputes, within a period of 1 year



# Amendment Act, 2015

- ▶ Thus, based on the recommendations and the need of the hour, the Government promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 which received assent from the President on 23<sup>rd</sup> October, 2015.
- ▶ Thereafter, the Amendment Bill, 2015 was introduced in both houses of the Parliament and was subsequently passed by the Lok Sabha and Rajya Sabha on 17<sup>th</sup> December, 2015 and 23<sup>rd</sup> December, 2015, respectively.
- ▶ This Bill received the President's assent on 31<sup>st</sup> December, 2015 and the Arbitration and Conciliation (Amendment) Act, 2015 is deemed to have come into force on 23<sup>rd</sup> October, 2015

# Arbitration and Conciliation (Amendment) Act, 2015

- ▶ The Amendment made some major changes in the parent Act, some of which are as follows:
  - S. 2(2) – makes Part I applicable to foreign seated arbitrations, unless expressly excluded in the agreement.
  - S. 7 – arbitration agreement in electronic form will be deemed to be an “agreement in writing.”
  - S. 8 – authority shall refer the parties to arbitration, unless it finds that no valid arbitration agreement exists.

# Arbitration and Conciliation (Amendment) Act, 2015

- S.9 – Power to pass interim orders by Courts
  - If court passes order before commencement of arbitration;
  - Arbitration must commence within 90 days from date of such order.
  - Court to refrain from passing an order U/s 9 once arbitration starts;
  - Can do so only if efficacious remedy is not available under S. 17
- S.11 – appointment of arbitrators to be made by the Supreme Court/ High Courts,
- – 60 days time given to dispose of such applications

# Arbitration and Conciliation (Amendment) Act, 2015

- S.12 – Independence and Impartiality of arbitrators to be decided by examining
  - grounds enlisted in Schedule 5
  - categories enumerated in Schedule 7
- S.14 – if the mandate of an arbitrator is terminated, he is to be substituted by another.
- S. 17 – Gave tribunals same powers qua interim measures as available to courts under the CPC.
- S. 23 – empowers respondent to make counter-claim or plead a for set-off.

# Arbitration and Conciliation (Amendment) Act, 2015

- S. 24 – mandates tribunal to hold hearings on a day to day basis and preclude from granting many adjournments.
  - S. 25 – right to file statement of defence has to be forfeited, if time limits are not adhered to.
  - S. 28 – while making an award, the Tribunal to take into account the terms of the contract and trade usages whenever applicable.
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# Arbitration and Conciliation (Amendment) Act, 2015

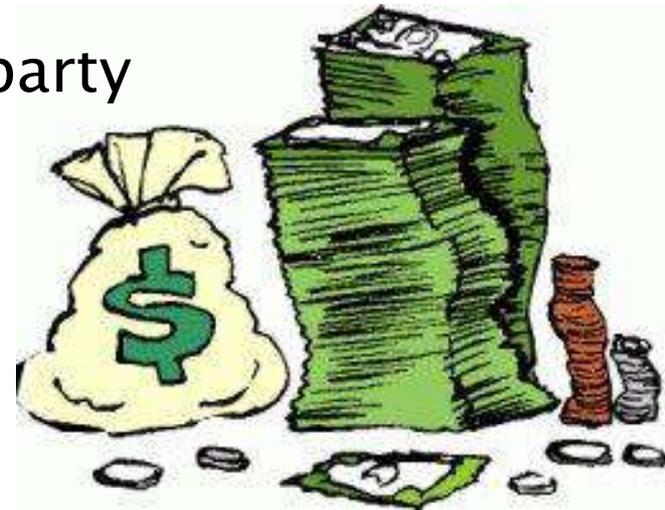


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- Sections 29A and 29B – with intent to fastrack proceedings
  - Time bound arbitrations – award to be rendered within 12 months from date of reference.
  - Extension for a maximum period of 6 months for completion.
  - Extension contingent on consent of parties and Court’s discretion.
  - Application for extension to be disposed of in 60 days.
  - Parties to agree to fastrack proceedings under S. 29B in advance, as also the fees payable to the arbitrator.

# Arbitration and Conciliation (Amendment) Act, 2015

- ▶ S. 31 – Sum directed to be paid as part of the award would carry an interest at the rate of 2% higher than current rate of interest.
- ▶ S. 31A – discretion to be exercised by Court or Tribunal to determine:
  - Whether costs are payable by a party
  - Amount of such costs
  - When they must be paid



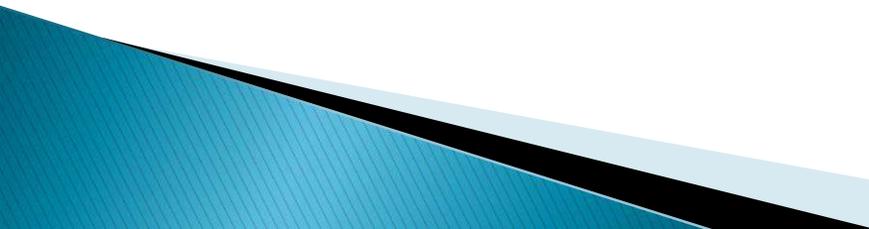
# Amendment to S. 34 of the Act

- ▶ Explanation 1 to S. 34(2)(b) – the award to be treated in conflict with ‘public policy’ only if it is:
  - Obtained by fraud
  - Violates confidentiality
  - Admissibility of evidence of conciliation proceedings
  - Controverts the fundamental policy of India law.
- Explanation 2 to S.34(2)(b) – for determining contravention of fundamental policy of India, no review of dispute on merits.

# Amendment to S. 34 of the Act

- ▶ Sub-section (2A) - ‘Patent Illegality’ added as an additional ground to challenge the award
  - ▶ Sub-section (5) - application can be filed only after giving notice to opposite party.
  - ▶ Sub-section (6) - Application to be disposed of in one year.
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# Amendment to Section 36 of the Act

- ▶ S. 36 – If application under S. 34 is not made within time limit specified, the award becomes final.
  - ▶ Mere filing of application under S. 34 would not render the award unenforceable and automatically stay the award.
  - ▶ A separate application needs to be filed praying for grant of stay of the Award.
- 

# Section 26 of the Amendment Act, 2015

- ▶ During the period between Ordinance and enactment, there was confusion as to whether the amendments applied to pending arbitration proceedings.
- ▶ Thus, Section 26 was introduced in the Amendment Act that states:

*“Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”*

# Section 26 of the Amendment Act

- ▶ Despite the aforementioned provision, Courts in India have differed on the applicability of the Amendment Act, 2015 to arbitral and arbitration-related court proceedings in various judgment.



# Electrosteel Castings v. Reacon Engineers

- ▶ In *Electrosteel Castings v. Reacon Engineers* [Application no. 1710/2015], a Single-Judge Bench of the Calcutta High Court held that since the Amendment Act was not applicable to arbitrations commencing prior to 23<sup>rd</sup> Oct 2015, the provisions of the Act as it stood prior to it would apply, and the award would be stayed automatically upon application made under S. 34.

# Tufan Chatterjee v. Rangan Dhar

- ▶ In *Tufan Chatterjee v. Rangan Dhar*, a Division Bench of the Calcutta High Court, on 2<sup>nd</sup> March, 2016 held that court proceedings related to arbitration which were pending when the amendments were notified would be governed by the amended act and not the unamended one.

# Nitya Ranjan Jena v. Tata Capital Financial Services

- ▶ A Single Judge of the Calcutta High Court, in order passed on 2<sup>nd</sup> March, 2016, held that no separate application for stay of award under S. 36 of the Act, would have to be filed in respect of an arbitral award which was challenged before 23<sup>rd</sup> October, 2015 in light of the addition of Section 26 of the Amendment Act, 2015.

# New Tirupur Area Development Corporation Ltd. v. M/s Hindustan Construction

- ▶ The Madras High Court in O.P. 931 / 2015 – *New Tirupur Area Development Corporation Ltd. v. M/s Hindustan Construction Co. Ltd.* dealt with interpretation and application of Section 34 after amendment.
- ▶ Held – S. 26 of the Amendment Act, 2015 is not applicable to post arbitral proceedings. Separate application under S. 36 needs to be filed.

# Ardee Infrastructure v. Anuradha Bhatia

- ▶ A similar question as in the aforesaid cases came before the Delhi High Court in FAO(OS) No. 221 / 2016 in *Ardee Infrastructure v. Anuradha Bhatia*.
- ▶ By its decision dated 6<sup>th</sup> January, 2017, the court held that “*the amended provisions would apply, if they are merely procedural and do not affect any Accrued right(s).*”
- ▶ In the present case, since both S.34 and S.36 certain affect the accrued rights of the parties and hence S.34 as it stood before the amendment would apply.

# Views of the Supreme Court

- ▶ In *Thyssen Stahlunion v. Steel Authority of India* (1999) 9 SCC 334, the Supreme Court, while interpreting the phrase ‘in relation to arbitral proceedings’ appearing in S.85(2)(a), held that the phrase cannot be given a narrow meaning, and would cover all proceedings before the Tribunal and the Courts which are required to be taken under the old Act (Arbitration Act, 1940, here)
- ▶ Since the phrase appears in S.26 of the Amendment Act, it can be said that it should apply to all proceedings initiated under the old Act of 1996. However, this question remains to be decided by the Supreme Court

# Other Amendments

- ▶ S. 37 – Appeal can be filed to the court on the following grounds:
  - Refusal to refer parties to arbitration u/s 8
  - Refusal to grant measure u/s 9
  - An order passed u/s 34

Similar amendments as above were made to Part II of the Act in provisions relating to challenging validity of the award and the appeal provisions, wherever applicable.

Thank you

