AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

Please contact the following lawyers if you have questions about the contents of this legal update:

Palash Ranjan Gupta
Head, International Arbitration & India Desk
+63 09081746397
Palash.Gupta@collyerlaw.com

Azmul Haque
Managing Director
+65 6727 4669
Azmul.Haque@collyerlaw.com

INTRODUCTION

The [Indian] Arbitration and Conciliation Act, 1996 (the "**Act**") was last amended on 23 October 2015 by the Arbitration and Conciliation Amendment Act, 2015 (the "**2015 Amendment Act**") with the purpose of making the arbitration "*user friendly, cost effective and* [to] *ensure speedy disposal and neutrality of arbitrators*". However, certain issues relating to the practical enforcement of the 2015 Amendment Act remained and consequently, the Department of Legal Affairs, Ministry of Law and Justice appointed a high-level committee headed by Justice B.N. Srikrishna to suggest some reforms to the amended Act.

Pursuant to the findings of the Srikrishna Committee Report, the Arbitration and Conciliation (Amendment) Bill, 2018 was recently approved by the Union Cabinet to be introduced in the Parliament (the "**2018 Bill**"). The Press Information Bureau of India released a notification detailing the significant features of the 2018 Bill a few days ago (the "**Notification**").

This note briefly analyses the Notification and certain key features of the 2018 Bill in three sections. The first section deals with the efforts to further improve and speed up the arbitration process while seeking to retain a balance between speed and thoroughness. The second section analyzes the addition of the provisions relating to maintaining the confidentiality of arbitration proceedings without extending the same protection to the award. The third section discusses the insertion of the proposed section 87 of the Act and the ramifications of such insertions on the Supreme Court's decision in *BCCI v. Kochi Cricket Pvt. Ltd.*

SPEEDING UP THE ARBITRATION PROCESS

The 2018 Bill introduces provisions designed to speed up arbitration proceedings, while at the same time recognizing that in the interests of efficiency and thoroughness, it may not be possible to adhere to the

AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

strict timelines stipulated in the 2015 Amendment Act.

First, the 2018 Bill seeks to "*facilitate the speedy appointment of arbitrators*" through designated arbitral institutions without having to approach the courts. For International Commercial arbitration, parties unable to agree upon the appointment of an arbitrator shall have the option to directly approach arbitral institutions designated by the Supreme Court for such appointments and for domestic arbitration parties may approach arbitral institutions appointed by the High Court of appropriate jurisdiction.

These provisions are consistent with the procedures for the appointment of arbitrators as outlined in the rules of various international arbitration centers. Consequently, parties unable to reach a consensus are no longer compelled to approach a court and file an application for appointing an arbitrator in accordance with the previously applicable provisions of Section 11 of the Act- often a lengthier and slower process than the one envisaged under the 2018 Bill.

Further, the 2018 Bill proposes to amend sub section (1) of section 29A of the Act in terms of timelines prescribed for making awards. To recall, the 2015 Amendment Act had introduces section 29A to the Act pursuant to which awards were required to be made within 12 months of a tribunal entering reference. The time period for making an award, was extendable to 18 months, by consent of the parties involved and the approval of the court.

While the effort to reduce the amount of time to complete an arbitration was laudable, the amendment led to a concern that the newly implemented timelines were very strict and adhering to them would mean that parties did not have enough time to develop their case, carefully draft pleadings and prepare evidence. Similarly an arbitrator/panel didn't have enough time to appreciate such evidence appropriately before passing a considered award in complex disputes. Additionally the ramifications of missing the deadline stipulated under the section were significant as court interference in arbitration proceedings were likely to increase dramatically after 18 months. In a nod to these concerns the 2018 Bill proposes to commence the timelines, not from the time that reference was entered, but from the time that parties complete their pleadings. The proposed changes are appropriate as they still impose specific time based restrictions for a final award while making the timelines a little more realistic. It is interesting, however, that international commercial arbitrations have been excluded altogether from the restrictions, which will do nothing to address investor confidence relating to swift adjudication - so often the catalyst for proposed changes.

Finally, the 2018 Bill provides for the creation of an independent body- the Arbitration Council of India (the "**ACI**") whose primary function appears to be to grade arbitral institutions and accredit arbitrators through specified

AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

norms and to establish policies and guidelines geared towards operating and maintaining a professional and efficient institutionalized dispute resolution process. The intention, presumably, is to create specific policies, maintain professional standards and create some level of accountability for arbitration institutions and arbitrators. These are laudable objectives which ought to help develop institutionalized arbitration further *vis a vis* the current *ad hoc* arbitration regime which has certain well documented flaws in terms of time and cost.

THE ISSUE OF PRIVACY AND CONFIDENTIALITY

An interesting addition proposed by the 2018 Bill relates to the confidentiality of all arbitration proceedings except for the award. The change is proposed through the addition of a new section-42A. The proposed amendment is clear cut in its application and removes any potential confusion relating to the difference between private arbitration, where proceedings conducted are not open to the public but where the substantive pleadings and the awards are not confidential; and confidential proceedings where pleadings, evidence and awards are not available for review by the public altogether. There are some issues that arise from the proposed amendments worth discussing.

There has been significant discussion in the United States relating to the confidentiality of arbitration proceedings. Several commentators have opined that companies use private arbitration as a tool to avoid embarrassing litigation particularly in relation to employment claims, consumer grievances and class action suits, thereby depriving plaintiffs not just of their day in court but also of a way to embarrass a company with damaging revelations in open court. The latter is a powerful weapon in the hands of a plaintiff not able to compete financially with 'deep pocket' company. Thus, the argument goes, confidential arbitration is a mechanism used to chill dispute resolution in financially weaker plaintiffs.

By providing that arbitration proceedings are kept confidential, the 2018 Bill walks right into the middle of this debate. Some years ago, in 2014, writing as the "Deal Professor" in the *New York Times Dealbook*, Steven Davidoff Solomon discussed the story of ousted American Apparel CEO Dov Charney and asserted that "*[t]he real lesson from the ouster of Dov Charney…is the danger of arbitration clauses*." Solomon argued, in a story headlined "*Arbitration Clauses Let American Apparel Hide Misconduct*" that the firms aggressive use of arbitration clauses was to "*ensure that any dispute was kept quiet and protect the company from excessive damages*."[1] Solomon's assertions have

[1] Steven Davidoff Solomon, Arbitration Clauses Let American Apparel Hide Misconduct, N.Y. TIMES DEALBOOK (July 15, 2014), http://dealbook.nytimes.com/2014/07/15/arbitr

AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

been supported by a variety of commentators and interest groups. The Alliance for Justice stated in its publication *Arbitration Activism*: "*Open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity [and] keep their wrongdoing secret ….*".[2] Similarly, Myriam Gilles has contended that "*arbitration allows for no publicity of claims.… Indeed, any such disclosure would run counter to the promise of complete confidentiality, which is central to the institution of arbitration*."[3]

While acknowledging that dispute resolution processes in the United States are not the same as in India where, for example, consumer and employment related disputes are often adjudicated before tribunals separately constituted for such purposes, the primary concern relating to confidentiality remains the same. With the enactment of the proposed amendments, it is distinctly possible that large, deep pocket corporations will now endeavor to resolve disputes with employees, consumers and any other potential opposing party, through confidential arbitration where proceedings are kept a secret. Such secrecy, then, denying the opposing party the ability to embarrass the large corporations through damaging revelations in open court taking away a tool available to the 'small guy' to level the litigation playing field.

In truth, a big part of the issue may have been solved by stipulating that the final award passed shall not be confidential. Turning back to the United States context, the United States Court of Appeals, Eleventh Circuit, in a recent judgment passed on 26 December 2017 involving an arbitration between certain consumers, represented by David Johnson, and Key Bank National Association ("**Key Bank**") upheld a challenge by Johnson to an arbitration clause which required both parties to "*keep confidential any decision of an arbitrator.*" Johnson argued that this provision "*disproportionately favors Key Bank as a repeat participant in the arbitration process*." The Court agreed and stated, *inter alia*, that by keeping an award confidential "*The obvious informational advantage Key Bank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims…*" as Key Bank were repeat participants in arbitration processes often involving the same or a similar claim and because "*prospective claimants would have little context in which to assess the value of their cases*."
By not protecting the confidentiality of an award, the 2018 Bill balances out the

ation-clauses-let-american-apparel-hidemisconduct/?

[2] ALLIANCE FOR JUSTICE, ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM 5 (2013).

[3] Myriam Gilles, The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement 17 (2014) (paper presented at Pound Civil Justice Institute 2014 Forum for State Appellate Court Judges).

AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

need to keep dispute resolution proceedings confidential with the rights of parties or prospective litigants to understand that nature and ramifications of the disputes involving companies who have been involved in the disputes. A freely available award ought to provide enough information as necessary to the public and to parties in relation to the Company involved in the dispute, while still protecting the Company from a public scrutiny of embarrassing details or unfounded allegations aired at the adjudication proceedings. It is possible that the proposed amendments have struck a good balance in the context of the discussions above.

APPLICATION OF THE 2015 AMENDMENTS – THE SUPREME COURT AND SECTION 87

When the 2015 Amendment Act was enacted on 23 October 2015, there was uncertainty relating to the application of the amendments made. The most significant discussion perhaps related to the whether the 2015 amendments applied to court proceedings initiated after 23 October 2015 where the underlying arbitration had commenced prior to the date.

After conflicting judgments had been passed by various high courts with respect to the issue, the Supreme Court admitted a number of Special leave Petitions ("**SLP's**") seeking to clarify this point. The court clubbed the SLP's and in *Board of Cricket Control of India v. Kochi Cricket Private Limited* sought to clarify the point. Rendering judgment on 15 March 2018, the Supreme Court held that (i) arbitration proceedings that had commenced post the 2015 amendments would be governed by the amended act; (ii) the amended sections would only apply to arbitration proceedings commencing prior to the amendments, on the consent of all the Parties; and (iii) court proceedings arising post 23 October 2015 would be governed by the amended provisions irrespective of when the underlying arbitration was initiated. The judgment would have settled the issue had the 2018 Bill not proposed the inclusion of a new section-87- to the Arbitration Act- stipulating precisely the opposite position, namely: that the 2015 amendments: (i) would not apply to arbitration proceedings that had commenced before 23 October 2015; and (ii) would not apply to court proceedings related to arbitration commencing before the date.

The judgment in the BCCI case and the provisions of proposed section 87 totally contradict each other. Supreme Court justice Rohington Nariman, has requested the government to reconsider the proposed insertion of Section 87 and the Supreme Court has directed that copies of the Court's judgment be circulated to the government for it to reflect the principles laid down in the proposed Bill.

CONCLUSION

In conclusion, it appears that the 2018 Bill is quite balanced in relation to the issues it addresses. Attempts have been made to speed up the arbitration

AN ANALYSIS OF THE [INDIAN] ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

process through an easier path to appointing arbitrators. At the same time there is a recognition that hard timelines instituted under Section 29-A were unrealistic and that the time limits needed some easing. The changes recommended have largely been well thought out.

The confidentiality debate relating to arbitration proceedings may well have just kicked off. In house counsel of Indian corporations will probably take note of the proposed amendments and we may well see a rash of clauses providing for arbitration as the dispute resolution mechanism of choice in India. The concerns relating to misuse of these provisions are tempered by the fact that awards made or passed in confidential arbitration are not themselves confidential. The public and future, potential litigants will now have a clear idea on what issues have been raised in dispute and how they were resolved.

There's a way to go to clear up the arbitration versus court dichotomy in terms of granting significant autonomy to arbitrators and providing sanctity to awards and decisions. The 2018 Bill is a good continuation of the process.