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THE RECENT AMENDMENTS TO SECTION 8 AND 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996: A PRO-ARBITRATION MOVE OR NOT

BY - VARSHA GULAYA

Introduction

The key feature which has made arbitration, a viable and attractive option is the speedy resolution of disputes in comparison to the normal court's procedure. In, India, the Arbitration and Conciliation Act, 1996 (hereinafter referred ad "1996 Act") was introduced to facilitate the arbitration process. However, with time it was understood that the certain provisions of the 1996 Act acted as impediment in the smooth conclusion of arbitration process as earliest as possible. This hindered India's position as "arbitration-friendly" nation in comparison to others at global level.

In 2015 and 2019, the Parliament of India introduced two amendments which have made sea changes in the arbitration process and made it friendly and less time consuming. The author will deal with both the amendments, especially in the context of section 8 and section 11 of the 1996 Act in two parts below.

I. Reforming section 8 vis a vis 2015 amendment: A Promising change

Section 8 of the 1996 Act titled, "Power to refer to arbitration where there is an arbitration agreement" works in two ways - One, it restricts the "judicial authority" from proceeding in a matter, in presence of valid arbitration agreement; and, second, it gives an opportunity to parties to waive its right to arbitrate generated from arbitration agreement by either, bringing an action before a judicial authority or by omitting to make a reference of arbitration agreement timely before the judicial authority.

In order to comprehend the important changes that section 8 brought forth, it becomes impertinent to compare the provision before and after the amendment. The author does so in the following manner: -

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	Components of section 8 before 2015 Amendment	Components of section 8 after 2015 Amendment
Section 8(1)	- A judicial authority before which an action is brought in a matter which is subject of an arbitration agreement - Shall if a party - so applies not later than when submitting his first statement on the substance of the dispute - refer the parties to arbitration	- A judicial authority before which an action is brought in a matter which is subject of an arbitration agreement - Shall, if a party *to the arbitration agreement or person claiming through or under him* - so applies not later *than the date of* submitting his first statement on the substance of the dispute - then notwithstanding any judgment, decree or order of the Supreme Court or any Court - refer the parties to arbitration - unless it finds that prima facie no valid arbitration agreement exists

In addition to substitution of sub-section (1) of section 8, the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred as "Amendment Act, 2015") to the 1996 Act introduces a proviso to section 8(2) stipulating that in absence of original arbitration agreement or a certified copy with the party making reference for arbitration under section 8(1) and if they are retained by other party, then party making reference shall file a petition in the court along with the copy of arbitration agreement praying to call upon the other party to produce the original arbitration agreement or certified copy before the court.

The 246th Law Commission Report of 2014, highlights that judicial intervention in the process

Arbitration acts a pariah in India and has discouraged many at global level to choose India for arbitration. Despite the existence of section 5, which limits the extent of judicial intervention only to situations where it is so expressly provided in the act. This salutary provision has lost its effectiveness in light of the gaps present in such express provisions. At

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international level, active role played by judiciary is heavily criticised as it runs contrary to the party autonomy principle and deters the otherwise speedy process of arbitration.

The Statement of Objects and Reasons to the 2015 amendment provides an insight into logic behind it. It states, *"... The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases."*.

After discussing the rationale and objectives of Amendment Act, 2015, let's see the nature of changes brought by it.

In this regard, decision in Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Ors[1] of the Apex Court is important, wherein it was held-

> *"Arbitration and Conciliation (Amendment) Act, 2015 has brought in amendment to Section 8 to make it in line with Section 45 of the Act ... Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments –*
>
> *(i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement;*
>
> *(ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis;*
>
> *(iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and*
>
> *(iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. ..."*

In **SSIPL Lifestyle Private Limited v. Vama Apparels (India) Private Limited & anr.**[2], the High Court of Delhi analyzed the time limit for making referral under section 8 under the principal in the following words –

> *"...under the unamended provision, the objection as to the existence of the arbitration clause could be taken anytime (i) prior to the filing of the written*

[1] 2018 SCC OnLine SC 487.
[2] Decided by Delhi High Court on February 19, 2020.

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> *statement (ii) in the written statement (iii) along with the written statement. So long as the written statement was not filed, Section 8 application could be filed…"*

And, after a thorough perusal of the amendment act, 2015 stated that the intention of the amendment was to "*to tighten the time limit within which arbitration proceedings should commence and conclude"*. In this context, change of terminology from "when" to the 'date of" signifies that date of submitting the written statement that is statement on substance of dispute must be adhered to. Hence outer limit for filing under section 8 is same as that of filing of written statement in a civil suit.

And, in Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd[3], the Court discussed the impact of the 2015 amendment act on ambit of examination of arbitration agreement by the judicial authority under section 8, by observing,

> *"Section 8 states that the judicial review at the stage of reference is prima facie and not final. … The court, Under Sections 8 … has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding…. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer". The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*
>
> *244.5.1. Whether the arbitration agreement was in writing? Or*
>
> *244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*
>
> *244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*
>
> *244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable? …"*

[3] MANU/SC/0160/2021.

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II. Reforming Section 11 vis a vis Amendment 2015 & 2019: A Promising Prospect

Section 11 titled, "Appointment of arbitrators" is a guiding provision with respect to the procedure to be followed while appointing the arbitrators. This section is based on the Article 11 of the United Nation Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985. This provision recognises one of foundational principle of arbitration, i.e., principle of party autonomy. The whole essence of arbitration process, in real, displays protection of party autonomy in number of matters. And, one of such matter, is appointment or selection of arbitrator or procedure for the same.

Even, during the Hague Conference in 1907, it was noted that, "the right of choosing one's own judge is a right which is of the very essence of the arbitral justice"[4].

Thus, the importance of selection of arbitrator cannot be over-emphasized. Hence, now it becomes necessary to analyse, how and in what manner the Arbitration Amendment Act, 2015 and of 2019 brought changes in the already existing system provided under the 1996 Act.

Before proceeding what is important to take note is that section 3 of Arbitration amendment act, 2019 which provides for amendment in section 11 is yet to be enforced.

For the convenience, author has drawn up a table comparing the some of the important changes below –

	Components of Section 11 in the principal 1996 Act	Components of Section 11 after Arbitration Amendment Act, 2015	Components of Section 11 after Arbitration Amendment Act, 2019
Section 11(3A)			The 2019 amendment introduced section 11 (3A). In crux this sub-section empowers the Supreme Court and the High Court to designate arbitral institutions (which are graded by the Council under section 43-I) for purpose of this Act. To this are attached two

[4] Scott, The Proceedings of the Hague Peace Conference, Translation of the Official Texts, II The Conference of 1907, Meetings of the First Commission 2 (1921) (L. Bourgeois).

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			provisos. 1st Proviso, envisages that where no graded arbitral institutions are available in the High Court jurisdiction, then CJ High Court may employ arbitrator from the panel of arbitrators maintained by the HC for the purpose of this Act. And, such arbitrators shall be deemed to be arbitral institution. 2nd proviso, provides that CJ of HC may review the panel of arbitrators from time to time.
Section 11(4)	On failure of parties to appoint an arbitrator or the two appointed arbitrators fail to appoint the third arbitrator, if appointment procedure under section 11(3) applies, then appointment shall be made upon request of party by - The Chief Justice, or - the person or institution designated by him	On the failure of parties to appoint an arbitrator or the two appointed arbitrators fail to appoint the third arbitrator, if appointment procedure under section 11(3) applies, then appointment shall be made upon request of party by - Supreme Court, or - High Court, or - Any person or institution designated by such court	On the failure of parties to appoint an arbitrator or the two appointed arbitrators fail to appoint the third arbitrator, if appointment procedure under section 11(3) applies, then the appointment shall be made - On the application by the party - By the Arbitral institution designated by the Supreme Court (in case of International Commercial arbitration) or by the High Court (in cases other than International commercial arbitration)
Section	On failure of parties	On failure of parties to	On failure of parties to agree on

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11(5)	to agree on procedure for appointing arbitrator(s) u/s 11(2), the appointment shall be made on request of the party by – - The Chief Justice, or - the person or institution designated by him	agree on procedure for appointing arbitrator(s) u/s 11(2), the appointment shall be made on request of the party by – - Supreme Court, or - High Court, or - Any person or institution designated by such court	procedure for appointing arbitrator(s) u/s 11(2), the appointment shall be made – - On application of the party - In accordance with provision contained in s. 11(4).
Section 11(6)	Where, under an appointment procedure agreed upon by the parties, in case of failure as per clause (a), (b) or (c), then any party may request to – - The Chief Justice, or - the person or institution designated by him unless other means for securing the appointment is provided in the agreement	Where, under an appointment procedure agreed upon by the parties, in case of failure as per clause (a), (b) or (c), then any party may request to- - Supreme Court, or - High Court, or - Any person or institution designated by such court unless other means for securing the appointment is provided in the agreement	Where, under an appointment procedure agreed upon by the parties, in case of failure as per clause (a), (b) or (c), then the appointment shall be made - On the application by the party - By the Arbitral institution designated by the Supreme Court (in case of International Commercial arbitration) or by the High Court (in cases other than International commercial arbitration) unless other means for securing the appointment is provided in the agreement
Section		Inserted	Omitted

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11(6A)			
Section 7	The decision on matter entrusted by Section 11(4) or 11(5) or 11(6) to- - The Chief Justice, or - Person or institution designated by him Shall be final	The decision on matter entrusted by Section 11(4) or 11(5) or 11(6) to- - The Supreme Court, or - The High Court, or - Any person or institution designated by such court Is final and no appeal including LPA shall lie against such decision	Omitted
Section 11(13)		Inserted. It provided that an application made under section 11 shall be expeditiously disposed and endeavour shall be made to dispose within 60 days from date of service of notice on opposite party	Substituted for – "An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party."

From the comparison above, it can be summarised that the key transformation made in the section 11 are –

a) The onus of appointing arbitrator(s) has been shifted first from Chief Justice or his designated person to the Supreme Court, High Court, or designated person or institution by it (2016) to arbitral institution designated by Supreme Court or High Court (2019).

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b) The designation of arbitral institution will be from the list of graded by Arbitration Council of India.

c) The scope of interference by the judiciary was restricted only to determination of the existence of an arbitration agreement (2015) to now absolute removal of this provision (2019).

d) Time limit for disposing application under section 11 was first directed to be disposed of expeditiously with an endeavour to dispose within 60 days (2016). Now, in it must be disposed within 30 days (2019).

Therefore, the legislative intent behind these amendments has been to minimise the interference or supervisory control of courts in arbitration process. As, time spent litigating before the court hinders the effectiveness of the arbitration process and is disliked by parties who aim to settle their disputes expeditiously.

The whole impact of these amendments can be envisaged only after considering how it evolved and what prompted such change. Before 2015, the Supreme Court after juggling between the categorisation of power to appoint arbitrator(s) as either "judicial" or "administrative" finally settled on "judicial" power. However, what disturbed the proponents of pro-arbitration was the "expansive" scope of interference contemplated by the court while appointing arbitrator(s). As, at times, the courts in enthusiasm went on to decide on arbitration agreement, its validity, limitation issue and other matters which ultimately resulted in extended judicial proceeding and interference which was never acceptable in arbitration. With this approach, the whole purpose of choosing arbitration was turning out to be frustrated.

Hence, it can be said these circumstances pushed the legislature, to draw a line on courts interference and limited it only to the extent of "examination of an arbitration agreement" regardless of any decision passed by the court by virtue of 2015 amendment. It also provided finality to the decisions made under section 11. This take was later affirmed by the Supreme Court in DuroFelguera, SA v. Gangavaram Port Ltd.[5] Resultantly, amendment has been applauded around the world as it made arbitration process smooth by removing the unnecessary freedom of interference.

[5] (2017) 9 SCC 729. Reference can also be made to Parsvnath Developers Limited & anr v. Rail Land Development Authority decided by Delhi High Court on May 18, 2020.

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The author further submits that amendment act of 2019 though not yet enforced is inspired by the default procedure of appointment of arbitrator followed in other nations, which are the prominent favoured destination for arbitration. The amendment 2019 gives impetus to the institutional arbitration. And, with this neither Supreme Court nor High Court would be tasked to appoint arbitrator. In turn, provisions introduced in by amendment of 2015, such as, section 11(6A) and Section (7) would be rendered futile.

Recently, in March 2021, the Supreme Court has discussed the implication of the amendment acts on section 11 in the case of Bharat Sanchar Nigam Ltd. & anr. v. M/S Nortel Network India Private Ltd.[6] Here, the division bench discussed in detail section 11, from the rationale behind granting Chief Justice power to appoint arbitrators to ensure credibility; to SBP & Co. v. Patel Engineering Ltd..[7], where the constitution bench expanded scope of inquiry u/s. 11. This case was further supported by National Insurance Co. Ltd v. Boghara Polyfab Pvt. Ltd.[8] which went a step ahead by noting three kind of preliminary issues which are to be decided by Court when dealing with section 11. After amendment of 2015, the scope of inquiry was limited in view of insertion of Section 11(6A). The effect being, except the question of "existence of the arbitration agreement" all other questions were left for the arbitral tribunal to decide. This gave a boost to doctrine of "Kompetenz-kompetenz" in India. Later, the decisions of Mayavati Trading Company Private Ltd. v. Pradyut Dev Burman[9] and Uttarakhand Purv Sainik Kalyan Nigam v. Northern Coal Field[10] backed the limited intervention by court at pre-arbitral stage.

The Bharat Sanchar case[11] also analysed the 2019 amendment and observed, *"… it will result in the deletion of sub-section (6A), and the default power will be exercised by arbitral institutions designated by the Supreme Court, or the High Court, as the case may be…".* However, this case can be seen as giving wings to permissive inquiry of existence of arbitration agreement. As, the Court had observed, *"… It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference…"*

[6] Decided by Supreme Court on March 10, 2021.
[7] (2005) 8 SCC 618. This case has been overruled.
[8] (2009) 1 SCC 267.
[9] (2019) 8 SCC 714.
[10] (2020) 2 SCC 455.
[11] Supra note 6.

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Conclusion

The author, undoubtedly, is of the opinion, that the amendments of 2015 and 2019 to the Arbitration and Conciliation Act have upped the position of India in field of arbitration internationally. Section 8 and section 11 of the 1996 Act deals with the pre-arbitral stage. The principal 1996 Act never contemplated that with time judicial oversight would increase enormously even before the start of arbitration. But with time, it was realised that such a position has jeopardized prospect of making India – an arbitration hub. Troubled with this, the legislature in 2015 brought momentous changes which will enable efficient and smooth disposal at the pre-arbitral stage by limiting interference by judiciary which mostly resulted in prolonging the arbitration procedure. To further eschew the role of courts, the amendment of 2019 has proposed replacing courts with arbitral institution to decide matter falling under section 11.

To conclude, the amendments have indeed pushed India towards pro-arbitration country group, like Singapore, Hong Kong and others. But, courts in one way or another have equipped themselves with power to extend the acceptable restrictive interference, intentionally or unintentionally, for example, in the Bharat Sanchar (2021) case. Amendment of 2019 though far-reaching and pivotal in making India more arbitration friendly, is yet to withstand the test of time.