THE ARBITRATION AND CONCILIATION (AMENDMENT ACT), 2015- Introducing an Indirect Regulatory Regime for Arbitrators in India

Mala Sharma
Advocate, Gauhati High Court

The effectiveness of the international arbitration regime lies in its intrinsic ability to adapt to the changing requirements of its users and time. In fact the inbuilt potential of the international arbitration regime to evolve and meet changing requirements is one the main reasons for its tremendous success.

Recently, arbitration has come under heavy criticism particularly in relation to authority of arbitrators and the lack of regulation. Arbitrators are bestowed with immunity due to the functional similarity with judges. However, unlike judges, arbitrators do not function under an institutional context where they can become accountable. Scholars point out that in arbitration, privately appointed arbitrators/tribunals render decisions without being subjected to the checks faced by national courts on issues that can have public law implications. Furthermore, one cannot miss the underlying concern that how can private actors (privately appointed arbitrators, paid and retained by the parties) sometimes, deliver awards that go beyond the disputing parties and affect third parties.

The international arbitration community has been very receptive to these constructive criticisms and acted on them to improve the regime not just for itself and its users but also for the growth of arbitration jurisprudence. Various regulatory mechanisms including State and self regulatory mechanisms are being suggested- such as introduction of an appeal mechanism, introduction of binding codes of conduct and proposed certification of arbitrators and improving transparency.

Internationally, to strengthen its legitimacy, the arbitration community has in the past resorted to several self-regulatory measures, such as adoption of the IBA Rules of Ethics for International Arbitrators in 1987 and the IBA Guidelines on Conflicts of Interest in 2014.[1] The Arbitration and Conciliation (Amendment Act), 2015 adopts the lists contained in the above named Guidelines, thereby paving a way for regulating arbitrators.

Indian Scenario

In India, the Arbitration and Conciliation (Amendment) Act, 2015 received Presidential assent on 31st of December 2015 and is deemed to have come into force on the 23rd October 2015 ("Amendment Act")[2]. The Amendment Act addresses several emerging concerns in relation to arbitration in India. The Amendment Act now requires prospective arbitrators to disclose in writing any circumstances that may give rise to justifiable doubts as to their independence or impartiality. Fifth Schedule of the Act accordingly provides various grounds

[1] The IBA Guidelines on Conflicts of Interest is available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
[2] Available at http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf

which may be construed as conflict of interest and which an arbitrator must disclose. Seventh Schedule contains the circumstances, presence of which makes the arbitrator ineligible for appointment in respect of disputes to which the circumstances apply. Several circumstances mentioned in the both the schedules overlap.

The Amendment Act retains the grounds of independence and impartiality for challenging arbitrators and which is in conformity with international practice.

The Amendment Act amends Section 12 (grounds of challenging an arbitrator) and requires prospective arbitrators to disclose in writing any circumstances that may give rise to justifiable doubts as to their independence or impartiality. Section 12 (1) states circumstances such as "*the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and... which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months*" shall be disclosed by a prospective arbitrator in writing.

The second explanation to Section 12(1) states that the disclosure to be made by the arbitrator in the form specified in the Sixth Schedule. Sixth Schedule contains the format for the arbitrator to disclose/list out the circumstances mentioned in Section 12 (1). Whereas, the above is a welcome step, it would have been more effective if the said schedule would have provided for questionnaire(s) seeking disclosure of objective facts rather than relying on the prospective arbitrator's subjective judgment as to his own qualifications "*with the provision that deliberately erroneous answers will engage the arbitrator's personal liability*".[3]

Section 12 (2) imposes a continuing obligation on the arbitrator to disclose such circumstances "*throughout the arbitral proceedings*" A plain reading of the Act, clarifies that an arbitrator can be challenged under Section 12 (3), on grounds of justifiable doubts as to his independence or impartiality or that he does not possess the qualifications agreed to by the parties. Subject to any agreement between the parties, a party who intends to challenge an arbitrator shall within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances under Section 12 (3), send a written statement of reasons for the challenge to the arbitral tribunal. If this challenge before the arbitral tribunal fails, the arbitral tribunal shall continue the arbitral proceedings and make an award. Once the award is made, the party challenging the arbitrator may make an application for setting aside the award in accordance with Section 34 of the Act.

Sub clause (5) of Section 12 inserted by the amendments states that "*Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.*" The Seventh Schedule contains the circumstances,

[3] Hans Smit, Delinquent Arbitrators and Arbitration Counsel 20 Am. Rev. Int'l Arb. 43.

presence of which makes the arbitrator ineligible for appointment. It is interesting to note that the amendments give parties the autonomy to waive the applicability of this sub section after dispute has arisen. Should parties agree to waive the application of this subsection prior to the dispute, it may not be enough. In such a case, the waiver of applicability of this subsection shall have to be reiterated after the dispute arises in case of those prospective arbitrators whose circumstances come within the purview of this subsection.

Therefore, one can safely conclude that that despite the absence of a framework for arbitral liability in India, the amendments do pave a way for an indirect regulation of arbitral conduct- at least for disclosures of conflict of interest. It may not be enough to check all the inequities that has crept into the system[4], but at the same time one can hardly miss the growing optimism to improve the arbitration regime in India.

CONCLUSION

Today "*arbitration community has developed an entirely new set of expectations about arbitrator conduct*".[5] With arbitration supposedly becoming a 'service industry',[6] the 'status of the arbitrator'[7] certainly needs to be revisited. Presumably, any analysis would have to begin with defining the relationship between the arbitrating parties qua the arbitrators and arbitral institutions.

In India despite lacking a more robust regulatory mechanism in relation to arbitrators, the grounds for challenging arbitrators have assumed significance and fared prominently under the amendments. Given that the Indian judiciary plays a significant role in interpreting and in turn developing the law, it would be interesting[8] to see how Section 12 and relevant schedule(s) of the Arbitration and Conciliation (Amendment) Act, 2015 are interpreted in due course of time.

[4] See reports of fake 'arbitral centres/tribunals' at http://timesofindia.indiatimes.com/city/chennai/HC-restrains-Coimbatore-hoax-tribunals/articleshow/7650927.cms

[5] Catherine Rogers, *What if the Ghost of Christmas Present Visited the International Arbitration Community of 1995?* available at http://kluwerarbitrationblog.com/2015/12/26/what-if-the-ghost-of-christmas-present-visited-the-international-arbitration-community-of-1995/.

[6] Fernando Dias Simões, *The Global Market of International Commercial Arbitration in Commercial Arbitration between China and the Portuguese- Speaking World*, Kluwer Law International (2014).

[7] Gary Born, *Rights and Duties of International Arbitrators*, in International Commercial Arbitration, 2nd edition, Kluwer Law International 1962 – 2050 (2014).

[8] The new provisions relating to appointment of employees (of parties) as arbitrators was addressed by the Punjab & Haryana High Court in the case of *Reliance Infrastructure Ltd* v. *Haryana Power Generation Corporation Ltd*. [2016(6)ArbLR480(P&H), MANU/PH/2405/2016].