
**PROPOSED AMENDMENTS TO THE
ARBITRATION & CONCILIATION ACT, 1996**

**COMMENTS & SUGGESTIONS ON THE
CONSULTATION PAPER**

BY



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INTRODUCTION:

The Ministry of Law & Justice, Government of India has released a Consultation Paper on proposed amendments to the Arbitration & Conciliation Act, 1996 (the “1996 Act”) on 08th April 2010, inviting comments and suggestions.

The Arbitration & Conciliation Act, 1996 was subjected to a comprehensive review by the Law Commission of India and many amendments were recommended to the Act as per its 176th Report. The Government after considering the recommendations, decided to accept almost all the recommendations and accordingly the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22nd December, 2003. The Bill was then referred to the Departmental Related Standing Committee and the Committee was of the view that the provisions of the Bill gave room for excessive intervention by the Courts in the arbitration proceedings and further expressed the view that since many provisions of the Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering the recommendations of the Committee. Therefore the said Bill was withdrawn from the Rajya Sabha. At that time it was decided that a new legislation will be brought in Parliament after undertaking an in depth examination of the various recommendations of the Committee.



In the meanwhile some difficulties in the applicability of the Act have been noticed as the Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which lead to conflicting views, some of which even defeated the main object of the legislation. Therefore by the Consultation Paper, amendments are proposed to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved.

The proposed changes to the Arbitration and Conciliation Act, 1996, as contained in the Consultation Paper, seek to answer the critics by attempting to bring the Indian setup in tune with the international expectations. The proposed changes are introduced to bring in a more positive and supportive attitude towards arbitration and to promote institutional arbitration, which will entail India to become one of the leading arbitration centers.

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PROPOSED AMENDMENTS:

Presented below are the proposed amendments:

(A) Application of Part I – Section 2(2):

It is proposed to amend Section 2(2) of the Arbitration and Conciliation Act, 1996 as follows:

“(2) This part shall apply only where the place of arbitration is in India. Provided that provisions of Sections 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act.”

(B) Amendment in Section 11:

It is proposed that Section 11 of the Arbitration and Conciliation Act, 1996 may be amended to the limited extent as follows:

- (a) In sub-Section (4) in clause (b) for the words, ‘by the Chief Justice or any person or institution designated by him’ the words “by the High Court or any person or institution designated by it” shall be substituted.
- (b) In sub-Section (5) for the words, “by the Chief Justice or any person or institution designated by him” the words “by the High Court or any person or institution designated by it” shall be substituted.
- (c) In sub-Section (6) for the words, “by the Chief Justice or any person or institution designated by him” the words “by the High Court or any person or institution designated by it” shall be substituted.
- (d) For sub-section (7), following sub-section shall be substituted namely:-



"A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the High Court or the person or institution designated by it shall be final and no appeal including a letter patent appeal shall lie against such decision."

- (e) In sub-Section (8) for the words, "by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.
- (f) In sub-Section (9) for the words, "the Chief Justice of India or any person or institution designated by him" the words "the Supreme Court or any person or institution designated by it" shall be substituted.
- (g) In sub-section (10) for the words, "The Chief Justice", the words, "High Court" shall be substituted.
- (h) In sub-Section (11), for the words, "the Chief Justice of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be", the words, "different High Courts or their designates, the High Court or its designate to which the request has been first made under the relevant subsection shall alone be" shall be substituted.
- (i) For sub-section (12) following sub-section shall be substituted, namely:-

"12(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "High Court" in those sub-sections shall be construed as a reference to the "Supreme Court".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal civil court referred in clause (e) of sub-Section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to that High Court."



- (j) After sub-section (12), following sub-sections shall be inserted, namely:- "(13) Notwithstanding anything contained in foregoing provisions in this Sections, where an application under this Section is made to the Supreme Court or High Court as the case may be for appointment of arbitrator in respect of 'Commercial Dispute of specified value', the Supreme Court or the High Court or their designate, as the case may be shall authorize any arbitration institution to make appointment for the arbitrator.

Explanation:- For the purpose of this sub-section, expression "Commercial Dispute" and "specified value" shall have same meaning assigned to them in the Commercial Division of High Court Act, 2009."

(14) An application made under this Section for appointment of arbitrator shall be disposed of by the Supreme Court or the High Court or their designate, as the case may be as expeditiously as possible and endeavour shall be made to dispose of the matter within sixty days from the date of service of notice on the opposite party."

(C) Amendment in Section 12:

Sub- Section (1) of Section 12 is proposed to be substituted as follows:

"(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances:

- (i) such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality; and
- (ii) such other circumstances as may be provided in the Rules made by the Central Government in this behalf."



(D) Amendment in Section 28:

It is proposed to substitute Sub-section (3) of Section 28 as follows:

“(3) In all cases, the arbitral tribunal shall take into account the terms of the contract and trade usage applicable to the transaction.”

(E) Amendment in Section 31 (7)(b) regarding rate of interest:

It is proposed to substitute clause (b) of Sub-Section (7) of Section 31 as follows:

“(b) A sum directed to be paid by arbitral award shall carry interest at the rate of one percent higher than the current rate of interest from the date of award to the date of payment.

Explanation- The expression “Current rate of interest” shall have same meaning as assigned to it under clause (b) of Section 2 of the Interest Act, 1978.”

(F) Amendment in Section 34 for providing meaning of “public policy of India” and for harmonising it with Sections 13 and 16:

It is proposed that the existing Explanation in section 34 be renumbered as Explanation I and after that Explanation as so renumbered the following Explanation shall be inserted.

“Explanation II- For the purposes of this section “an award is in conflict with the public policy of India” only in the following circumstances, namely:-

When the award is contrary to the-

- (i) fundamental policy of India; or**
- (ii) interests of India; or**
- (iii) justice or morality.”**

It is proposed to add following sub-clause (iii) in clause (b) of Sub-section (2) of Section 34-



“(iii) the application contains a plea questioning the decision of the arbitral tribunal rejecting –

- (a) a challenge made by the applicant under sub-section (2) of section 13;
or
- (b) a plea made under sub-section (2) or sub-section (3) of section 16,”

(G) Insertion of new Section 34A:

It is proposed to insert a new Section 34A as suggested by the Law Commission with some changes:

“34A. Application for setting aside arbitral award on additional ground of patent and serious illegality.-

- (1) Recourse to a Court against an arbitral award made in an arbitration other than an international commercial arbitration, can also be made by a party under subsection (1) of section 34 on the additional ground that there is a patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant.
- (2) Where the ground referred to in sub-section (1) is invoked in an application filed under sub-section (1) of section 34, while considering such ground, the Court must be satisfied that the illegality identified by the applicant is patent and serious and has caused or is likely to cause substantial injustice to the applicant.”

(H) Substitution of Section 36:

It is proposed to substitute Section 36 as follows:

“36. Enforcement of award.-

- (1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of subsections (2) to (4), the award shall be enforced



under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:

Provided that the Court shall, while considering the grant of stay, keep in mind the grounds for setting aside the award.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant interim measures not only against the parties to the award or in respect of the property which is the subject-matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified, or vacated, as the case may be, by the Court subject to such conditions, if any, as it may, after hearing the affected parties, deem fit."

(I) Arbitration relates to Commercial Disputes of specified value:

By a separate law it is proposed to constitute Commercial Division in the High Court. In the said law it is also proposed that the said Commercial Division will also entertain applications under Section 34 and Section 36 and appeals under section 37 of the Arbitration and Conciliation Act, 1996 where the arbitration relates to "Commercial Disputes" of specified value.



For this purpose, consequential amendment for amending definition of 'Court' in Section 2 of the Arbitration Act is also being amended.

As the application under Section 34 would be filed before the Commercial Division of the High Court, appeal against order passed by the Commercial Division under Section 37 would lie before the Supreme Court. For this purpose, the Lok Sabha has passed the "Commercial Division of High Courts Bill, 2009".

(J) Suggestion for Insertion of provision for implied arbitration agreement in commercial contract of high consideration value:

It is proposed to insert the following clause in the Arbitration and Conciliation Act, 1996:

- (i) Unless parties expressly and in writing agree otherwise, every commercial contract with a consideration of specified value (Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.
- (ii) Specified Arbitration Agreement as referred in clause (i) shall contain following clause:

"All disputes except (here specify the excepted disputes, if any) arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of (here specify the name of the approved arbitral institution) by one or more of the arbitrators appointed in accordance with the said Rules."
- (iii) Any arbitration agreement that differs from the said clause will stand modified along the lines of the specified arbitration agreement.
- (iv) Where the parties have failed to mention the Approved Arbitral Institution, High court will authorize to an Approved Arbitral Institution to appoint arbitrator within 30 days of the reference made to it by either party for this purpose.



- (v) In this Section “Commercial Contract” shall mean every contract involving exchange of goods or services for money or money’s worth and includes carriage of goods by road, rail, air, waterways, banking, insurance, transactions in stock exchanges and similar exchanges, forward markets, supply of energy, communication of information, postal, telegraphic, fax and Internet services, and the like.”

It may be pointed out that for inserting aforesaid provisions in the Arbitration & Conciliation Act, 1996, many provisions of the Act including Section 7 (which deals with arbitration agreement), Section 8, Section 2(1)(b) have to be amended.



COMMENTS ON PROPOSED AMENDMENTS:

The consequential changes on the Arbitration & conciliation Act, 1996, based on the proposed amendments will bring in changes to Sections 2(1)(e), 2(2), 11, 12(1), 28(3), 31(7)(b), 34(2)(b) and Explanation and 36. It would also insert a new Sec. 34A.

The proposed changes also empower the Central Government to prescribe by rules guidelines on conflict of interest on the lines of IBA guidelines for Sec. 12(1). The effect of "Commercial Division of High Courts Bill, 2009" will also bring in consequential changes in the Act.

The insertion of provision for implied arbitration agreement in commercial contract of high consideration value will bring in changes for Sections 2(1)(b), 7 and 8.

The proposed amendments are highly essential and will help to get over various conflicting decisions rendered on the interpretation of some of the sections of the Act by various High Courts and the apex court. The proposed changes will also promote institutional arbitration, which is highly necessary to improve professionalism and efficiency in the arbitration system. The proposed changes will also help to get over the criticism that "arbitration is one thing in India and another for the rest of the world". It is high time that the laws are made suitable to cater the requirements of global trade and commerce. There has been widespread criticism in the international arbitration community that many decisions runs contrary to the spirit of the New York Convention. As a result of this many foreign investors continued to select a seat outside India for arbitration, so as to mitigate against the risk of interference by the Indian courts.

We would like to propose a few more changes, so that the Act would provide a self contained code for ADR making it fast and effective and making it less prone to Court interventions. The parties signing the arbitration agreement or who relies on the Arbitration & Conciliation Act, 1996 should be instilled with the faith and confidence that the dispute resolution process will be guided by fair-play and universally recognized principles. To achieve the object of the legislation and to bring out the required changes proposed, it would be effective if the following proposals are also considered:



ADDITIONAL CHANGES PROPOSED:

Based on the changes made in the "Commercial Division of High Courts Act, 2009", the following amendments will have to be made in the Arbitration & Conciliation Act, 1996.

(1) Amendment in Section 2(1)(e):

In section 2, in sub-section (1), for clause (e), the following clause has to be substituted:

"(e) "Court", in relation to,

- (i) sections other than sections specified in sub-clause (ii) means:
 - (a) the principal Civil Court of original jurisdiction in a district, or
 - (b) any Court of coordinate jurisdiction to which the Court referred to in sub clause (a) transfers a matter brought before it, and includes the High Court in exercise of its original jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes; and
- (ii) sections 34, 36 and 37 where the arbitration is relating to commercial disputes of specified value, means the Commercial Division of the High Court constituted under sub-section (1) of section 3 of the Commercial Division of High Court Act, 2009.



(2) Amendment in Section 37:

In section 37, in sub-section (1), in clause (b), the following proviso shall be inserted, namely:-

“Provided that where the arbitration relates to a commercial dispute of specified value, the appeal shall lie to the Supreme Court in accordance with the provisions contained in section 13 of the Commercial Division of High Courts Act, 2009.”

To achieve the object of the legislation and to bring out the required changes proposed, it would be effective if the following proposals are also considered, so that the Act would provide a self contained code for ADR making it fast and effective and making it less prone to Court interventions.

(3) Amendment in Section 9:

Section 9 of the Arbitration & Conciliation Act, 1996, reads as follows:

“9. Interim measures etc. by Court.-

A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure or protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to



which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

In the case of Sec. 9, after an interim order is granted by the court, the Original Petition is normally disposed off by the court. In many cases the party who seeks the interim protection, fails to initiate the arbitral proceedings and the interim order of protection passed by the court becomes almost a final order. Since the OP is already disposed, the only remedy available for the party who has suffered the interim order of protection is to file a writ petition under Article 227 of the Constitution of India before the High Court.

Further once the interim order of protection is passed by the Court under S.9, even if the arbitral tribunal finds subsequently, that such order may have to be varied or modified, the arbitral tribunal finds that its power under Sec. 17, may not be effective to override or alter the orders given by the court under Sec.9. This also leads to failure of justice.

In order to remove the difficulties stated above, Sec. 9 of the Arbitration and Conciliation Act, 1996 could be amended as follows:

After sub-section (ii), the following sub-sections could be inserted.

“(iii) Where a party makes an application under sub-section (i) or (ii) for the grant of interim measures before the commencement of arbitration, the Court shall direct the party in whose favour the interim measure is granted, to take effective steps for the appointment of the arbitral tribunal in accordance with the procedure specified in section 11, within a period of thirty days from the date of such direction.



(iv) The Court may direct that if the steps referred to in sub-section (iii) are not taken within the specified period, the interim measure granted under section 9, shall stand vacated on the expiry of the said period:

Provided that the Court may, on sufficient cause being shown for the delay in taking such steps, extend the said period.

(v) Where an interim measure granted stands vacated under sub-section (iv), the Court may pass such further direction as to restitution as it may deem fit against the party in whose favour the interim measure was granted under this section.

(vi) While passing orders of interim protection under sub-sections (i) or (ii), the court may specify that the interim measure of protection granted, may be modified, altered or vacated, if the Arbitral Tribunal, after going through the evidence of the case, finds that such modification, alteration or cancellation is required for the ends of justice.”

(4) Amendment in Section 17:

Section 17 of the Arbitration & Conciliation Act, 1996, reads as follows:

“17. Interim measures ordered by arbitral tribunal.-

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).”

In accordance with the change proposed in Sec. 9, with regard to alteration in the interim order of protection, certain changes may be required in Sec. 17 for clarifying such powers to the Arbitral Tribunal.

Sec. 17 of the Arbitration and Conciliation Act, 1996 could be amended as follows:



After sub-section (2), the following sub-section could be inserted.

“(3) Where a party makes an application under sub-section (1), for which there is already an order under Sec. 9 by the court, then if the arbitral tribunal feels, after going through the evidence that such order should be modified, varied or vacated for the interest of justice and for the balance of convenience, shall pass appropriate orders under sub-section (1), modifying, varying or canceling such orders, with such conditions as it may deem fit in the circumstances of the case.

Provided that such modification, variation or cancellation shall not result in nullifying the execution of the award that may be passed against a party.”

(5) Amendment in Section 32:

Section 32 of the Arbitration & Conciliation Act, 1996, reads as follows:

“32. Termination of proceedings.-

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where:

- (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
- (b) the parties agree on the termination of the proceedings, or
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”



As per Sec. 31(5) of the Act, after the arbitral award is made, a signed copy shall be delivered to each party. At present there is no uniformity in procedure. In some cases, the arbitral tribunal gives the original stamped award to the claimant and in some cases the arbitral tribunal gives signed copies to the parties and retains the stamped award till its is called for by the court under Sec.34 or if there is no challenge, by the claimant before it is executed. The proper procedure could be to file the original stamped award in the Arbitration Division of the High Court or the Principal Civil Court of Original jurisdiction, as the case may be, which would deal with challenge under S.34 or execution under S.36 and to give signed copies to the parties. This obligation of filing the original stamped award could be given to the institution under Sec.6, if it is an institutional arbitration or to the arbitral tribunal if the arbitration is ad-hoc.

To achieve the above objective, Sec. 32 of the Arbitration and Conciliation Act, 1996 could be amended as follows:

After sub-section (3), the following sub-section could be inserted.

“(4). On passing of the final award, the original stamped award and a photocopy of the arbitral award duly signed on each page by the members of the arbitral tribunal, together with the original arbitral records shall be filed in the Principal Civil Court of Original jurisdiction in the District or if the arbitration is relating to commercial disputes of specified value, in the Arbitration Division of the High Court, by the arbitral tribunal or the institution under Sec.6, if so designated, within thirty days of the making of the award along with the list of papers comprising the arbitral records.

(5). Where the arbitral tribunal or institution, as the case may be, fails to file the original stamped award, photocopy of the arbitral award and the arbitral records under sub-section (4), any of the parties may give notice to the arbitral tribunal or institution to do so within a period of thirty days from the date of receipt of such notice, failing which the party may request the Principal Civil Court of Original jurisdiction in the District or if the arbitration is relating to commercial disputes of specified value, in the Arbitration Division of the High Court to direct the arbitral tribunal or the institution to file the award and records.”



(6) Suggestion for Insertion of provision for implied arbitration agreement in commercial contract of high consideration value:

In the proposed amendment to insert the provision for implied arbitration agreement in commercial contracts of high consideration value, sub-clause (i) provides as follows:

“(i) Unless parties expressly and in writing agree otherwise, every commercial contract with a consideration of specified value (Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.”

Here the discretion for the parties to “agree otherwise” would defeat the purpose of the section. We have seen in certain cases, especially in one-sided contracts like government contracts, the government banning arbitration clauses. Now since Sec. 12 regarding challenge of arbitrators is also governed by IBA guidelines, most of the financial companies, government departments, Navy etc. who appoints their designated officers as arbitrators, will try to avoid arbitrations. There are also instances where the government has passed legislations to revoke arbitration clauses already executed. For eg. “The Kerala Revocation of Arbitration Clauses and Reopening of Awards Act, 1998” [Act 12 of 1998], by which the government of Kerala cancelled arbitration clauses in agreements executed in terms of the local competitive bidding specification and revoked the authority of the arbitrators appointed under such agreements.

Therefore it would be preferable to change sub-clause (i) as follows:

“(i) Every commercial contract with a consideration of specified value (Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.”



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