ROLE OF COURTS IN ARBITRATION: BEFORE, DURING AND POST RENDERING OF THE ARBITRAL AWARD
The object of arbitration is to ensure effective, quick and consensual decision making process evading the arduous process of courts.

Despite the independence, the support of court is inevitable in certain areas like pre-arbitral procedure, during arbitration proceedings and post arbitration. The paradox of arbitration is that it seeks the co-operation of the very judicial authorities from which it wants to free itself. Therefore it is necessary to carefully calibrate the balance between judicial intervention and judicial restraint.

This presentation aims to discuss in detail the enhanced intervention of courts in rendering arbitral award in three parts and the need for limitation of the role of courts for a proper balance to be maintained.
THREE STAGES

- Court’s intervention in arbitration happens in three stages

Stage I- *Pre Arbitral Procedure*

Stage II- *During the Arbitral Proceeding*

Stage III- *Post Arbitral Award*
DEFINITION OF COURT

- Section 2(1)(e) of the Arbitration and Conciliation (amendment) act 2015 defines court and its jurisdiction thereby giving comprehensible distinction between the international commercial arbitration and domestic arbitration.

- **Domestic arbitration:** The principal Civil Court of original “Court” jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

- **International arbitration:** ‘Court’ has been defined to mean only High Court of competent jurisdiction. District court will have no jurisdiction and the parties can expect speedier and efficacious determination of any issue directly by the High court which is better equipped in terms of handling commercial disputes.
STAGE I - PRE-ARBITRAL PROCEEDINGS
REFERENCE OF PARTIES TO ARBITRATION

- Pre arbitral procedure begins with the obligatory nature of the courts to “refer parties to arbitration”. It can be seen from the Section 8 in Part I and Section 45 of Part II of the Arbitration and Conciliation (amendment) Act 2015.

- Section 8 mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is subject matter of arbitration agreement. The sub-section(1) has been amended envisaging that notwithstanding any judgment, decree or order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that prima facie no valid arbitration agreement exists.
REFERENCE OF PARTIES TO ARBITRATION

- Section 45 states that notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

- If it were to be said that the finding of the court “in reference to arbitration” should be a final, determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to be in the halfway house. This evidently defeats the sole object of the Act, which is to enable expeditious arbitration without avoidable intervention by judicial authorities.
Establishment of Arbitration Tribunal

In the establishment of Arbitral Tribunal, Court interferes by the course of

- Appointment of Arbitrators
- Interim Relief by Courts & Arbitral Tribunals
APPOINTMENT OF ARBITRATOR

- As is reflected in the UNCITRAL Model Law and in most national laws, the court here uses its authority to give effect to the parties’ agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties.

- The operation of Section 11 of the Act has a direct and significant impact on the “conduct” of arbitrations. In SBP v Patel Engineering the Supreme Court held that the power to appoint an arbitrator under section 11 is a “judicial” power and not “administrative” power.
APPOINTMENT OF ARBITRATOR

- Section 11 of the 2015 Act makes it incumbent upon the Supreme Court or the High Court or a person designated by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party.

- This further enhances the role of courts in the arbitration proceeding, the act is not clear about the phrase “person designated” and the increase in limitation period from 30 days to 60 days for appointment will end up in delaying the arbitration proceedings.
**INTERIM RELIEFS BY COURT AND ARBITRAL TRIBUNAL**

- Grant of relief by the court comes in the pre-arbitral stage. The Arbitration and Conciliation (amendment) Act 2015 amends Section 9 to provide that arbitral proceedings must commence within 90 days of the order granting interim relief or within such further time as the Court may determine.

**Firm Ashok Traders v. Gurumukh Das Saluja**

- The Supreme Court in this case inter alia held that a party that has obtained relief under Section 9 pre constitution of the tribunal cannot sit and sleep over the relief, this relief is granted before, i.e. necessarily in contemplation of arbitration and therefore unreasonable delay would snap the relationship between the relief and the proceedings, in such cases, the Court may require the party to demonstrate its intention and the steps it proposes to take to commence arbitration.

- It may also impose conditions on the party and recall relief in cases of breach of such conditions.
INTERIM RELIEFS BY COURT AND ARBITRAL TRIBUNAL

- This amendment made has missed out on the opportunity as suggested by the Law Commission of India, to provide that such relief will automatically lapse upon the expiry of this period, to create the fear of losing interim protection in the minds of the parties. Going one step further, it could have also provided that fresh orders or extensions would not ordinarily be granted after the lapse of the initial order unless the applicant can demonstrate sufficient cause or that the delay was not attributable to him.

- The 2015 Act also makes orders under Section 17 enforceable as orders of the Court; earlier these were neither enforceable by the arbitrator nor the Courts, though the Delhi High Court found a way around this by holding that non-compliance of such orders would amount to contempt of the tribunal under the Act. However, making the orders enforceable as above is a simpler and better solution.
INTERIM RELIEFS BY COURT AND ARBITRAL TRIBUNAL

- The powers of arbitral tribunals are pari materia to that of the Courts under Section 9, to grant interim relief post-constitution of the tribunal; with a caveat that the Courts would continue to exercise this power where obtaining interim relief from the arbitral tribunal would not be efficacious.

- Interim relief under Section 9 may be granted by the Courts against a person who need not be a party to the arbitration agreement or to the arbitration proceedings because the power of the Courts under Section 9 is the same as in any other proceedings for interim relief and since the courts have evolved a practice of issuing interim orders qua third parties also, this power extends to Section 9 as well.

- In contrast to this, Section 17 can only be applied to the parties in arbitration. On shifting the powers of Section 9 to Section 17, these powers will no longer be exercisable against third parties and an argument can be made that in such cases it would not be efficacious, to seek relief under Section 17, and consequently, the Court can grant relief under Section 9.
Stage II- During Arbitral Proceedings
ASSISTANCE OF COURT IN TAKING EVIDENCE

- Evidence plays a vital role in arbitral proceedings similar to court proceedings, in establishing the case and is the most important basis for a just and fair award.

- The arbitrator is not compelled in any situation to get the assistance of court regarding evidence but the arbitration tribunal is under an obligation to do in certain circumstances because it has no powers to compel the attendance of witnesses who refuse to attend and give evidence.

- Arbitrators have full freedom to determine the admissibility, relevance, materiality and weight of evidence submitted by the parties. But, it lacks the power to order production of documents particularly in the possession of a third party even when such documents may be relevant to the matters in issue.
ASSISTANCE OF COURT IN TAKING EVIDENCE

- Section 27 of the Arbitration and Conciliation act of 1996 act on receipt of an application from the tribunal or a party, the court, within its competence, in accordance with the rules of taking evidence, may order that “the evidence be provided directly to the arbitral tribunal”. While making such order the court may “issue the same process to witnesses as it may issue in suits tried before it”. Before issuing a process, the court must be satisfied that it has appropriate jurisdiction and there is sufficient evidence against the person named to justify the issue.

- Section 27(5) provides that “the persons failing to attend in accordance with such process, or making any other default, or refusing to give evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the court on the representation of arbitral tribunal as they would incur for like offences tried before court”.
ASSISTANCE OF COURT IN TAKING EVIDENCE

- Section 32 of the Code of Civil Procedure of 1908 makes the coercive machinery of the state available for this purpose – “the court may compel the attendance of any person to whom a summons has been issued under Section 30 and for that purpose may – (a) issue a warrant for his arrest; (b) attach and sell his property; (c) impose a fine upon him not exceeding five hundred rupees; (d) order him to furnish security for his appearance and in default commit him to civil prison”.
ASSISTANCE OF COURT IN TAKING EVIDENCE

- The section needs to be changed drastically in order to make the taking of evidence during an arbitration proceeding more efficient because this section contributes to congestion of courts by making it necessary for the arbitrator to approach a court in order to issue summons to a witness. The current procedure requires that more powers should be given to arbitrators in this regard. The Arbitrators should be given the power to issue summons and constitute commissions and so on but not the power to punish anybody.

- This power should not be retained by the court alone; this will not only help in the efficient taking of evidence during an arbitration proceeding but also help to de-congest the courts. It will result in a situation where there will be no need to take the help of the court in taking evidence and the only area where the assistance of the court would be required would be to punish a party who does not answer the summons or give evidence after being ordered to by an arbitrator.
STAGE III- ROLE OF COURT POST ARBITRAL AWARD.
ROLE OF COURT IN SETTING ASIDE ARBITRAL AWARD.

- After the arbitral award is passed, an aggrieved party may apply for the setting aside of such award after issuing a prior notice to the other party.
- The grounds for setting aside under section 34 and conditions for refusal of enforcement section 48 are in pari materia.
- Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an international commercial arbitration whereas section 48 deals with conditions for enforcement of foreign awards.
ROLE OF COURT IN SETTING ASIDE ARBITRAL AWARD.

- The addition of section 34 (2A) Act, 2015 to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by “patent illegality appearing on the face of the award.”

- To provide a balance and to avoid excessive intervention, clarification has been made through proviso to the proposed section 34 (2A) that such “an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.”

- section 28(3) has been amended to remove any contravention of a term of the contract by the tribunal should not ipso jure result in rendering the award becoming capable of being set aside,
PUBLIC POLICY

➢ Any arbitral award which is in conflict with the public policy of India, it can be set aside but the Act has failed to define it.

➢ DEFINITION
   o Legal Glossary of the Ministry of Law, Justice and Company Affairs, - Public policy is a set of principles in accordance with which communities need to be regulated to achieve the good of the entire community of public.

➢ JUDICIAL INTERPRETATION
   o A narrow interpretation of the term was given in Gherulal Parekh v. Mahadeodas Maiya, Supreme Court in Central Inland Water Transport Corp. Ltd v. Brojo Nath Ganguly has given a wider interpretation on the pillars of public conscience, public good, and public interest.
PUBLIC POLICY

Shri Lal Mahal v Progetto Grano Spa

- Once again the interpretation of the term public policy was in question before the Supreme Court in this case.
- Court has felt the emergency need to restrict the scope of public policy in both sections 34 and 48 of the Act.
- This is to bring the definition in line with the definition propounded by the Supreme Court in Renusagar Power Plant Co Ltd v General Electric Co.
- Hence, it was held that “an award can be set aside on public policy grounds only if it is opposed to the “fundamental policy of Indian law” or it is in conflict with “most basic notions of morality or justice”.
Section 34(3) of the Act specifies a three-month time-period within which the application for setting aside an award has to be made, beginning with the day when the applicant receives the award.

A further period of 30 days can be given to him for filing the application, if the applicant can show that he was prevented by sufficient cause from making the application within three months.

Union of India v. Popular Construction Company

- Applicability of the provisions of Section 5 of Limitation Act to an application challenging an award under Section 34 of the Act?
- Court has barred the applicability of Section 5 of Limitation Act.
ENFORCEMENT OF AWARD

Prior to the promulgation of 2015 Act.

- Section 34 barred the enforcement of awards until the time-limit for Section 34 applications ran out or failed. Thus, mere filing an application within the limitation period of 30 days, acted as an automatic stay of the award.
- Section 9 of the Act, which contemplates interim measures of protection post the making of the award but before it is enforced under Section 36, is also of no assistance in this regard.
- Section 9 contemplates the power of the Courts to grant interim relief to protect the subject-matter of the arbitration agreement and not the award amount or the Petitioner's right to the receipt of the award.
ENFORCEMENT OF AWARD

After the promulgation 2015 Act

- Mandatorily requires parties to file a separate stay application, in which a conditional order may be passed by the Courts, having due regard to certain provisions of the CPC, with reasons recorded in writing.
- The applicant to demonstrate sufficient cause, causation of substantial loss and satisfactorily explain delays in the application.
- The Court may also consider whether or not the applicant has furnished security for due performance of the decree or order.
- Accordingly, the Courts are now clothed with sufficient powers to allow only legitimate challenges against awards and to make sure that, frivolous attempts at frustrating or delaying enforcement will cost the applicant.
CONCLUSION

- Judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration.

- Two reasons can be attributed to such delays:
  - First, the judicial system is over-burdened with work and is not sufficiently efficient to dispose of cases, especially commercial cases, with the speed and dispatch that is required.
  - Second, the bar for judicial intervention despite the existence of section 5 of the Act has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act.
CONCLUSION

• In most Courts, arbitration matters are kept pending for years altogether, and one of the reasons is the lack of dedicated benches looking at arbitration cases.

• The observation made by the Law Commission of India in this matter based on the experience in the Delhi High Court where there is a practice of having separate and dedicated benches for arbitration related cases. This has resulted not only in better and quicker decisions, but has also increased the confidence of the parties in choosing the jurisdiction of the Delhi High Court for dealing with arbitration related cases.

• The Government must consider this experience of the Delhi High Court thereby trying to maintain the delicate balance between the judicial enforcement and judicial restraint in arbitration
REFERENCES


REFERENCES


