

Meaning of "Court"

I. Section 2 (1) (e) – Bare Text

a) Under The Arbitration and Conciliation Act, 1996

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having 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.

b) Under The Arbitration and Conciliation (Amendment) Ordinance, 2015¹

"Court" means-

- i. *in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having 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;*
- ii. *in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court.*

II. Introduction

The Arbitration & Conciliation (Amendment) Ordinance, 2015 (for short **"Ordinance"**) amends section 2(1)(e) to provide a new definition to "Court" for international commercial arbitration, i.e. with respect to arbitration seated in India but involving at least one foreign party. In such cases, all references to "Court" will now mean the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject-matter of the arbitration or a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court, with respect to subject matter of arbitration.

III. The object behind amending and bifurcating the definition of "Court"

The definition of 'Court' has been amended so as to ensure that no court lower than the High Court can have any jurisdiction to entertain any applications arising out of an arbitration seated in India but involving at least one foreign party. The experience in the past has been that given the size of India, on the basis of earlier definition, foreign parties could find themselves in remote corners of the country to seek or defend interim measures, or when awards were challenged. In all International Commercial Arbitrations (for short "ICA"), High Courts have been made the exclusive forum for reliefs under the Arbitration and Conciliation Act, 1996 (For short **"1996 Act"**), which was earlier the Principal Civil Court. Law Commission

¹ Available on <http://lawmin.nic.in/la/Arbitration.pdf>

vide its 246th Report recommended that, this would ensure that ICA, involving foreign parties, will be heard expeditiously and by commercially oriented judges at the High Court level. This is important not just for providing confidence to foreign investors, but to mitigate the risk faced by the Government of India from claims by foreign investors under the relevant Investment Treaty negotiated by the Government of India with other countries.²

IV. The meaning of the term Court under the Act in case of International Commercial Arbitration

For the purpose of International Commercial Arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. International Commercial Arbitration can be further divided into two parts. They are as follows:

a) International Commercial Arbitrations Seated in India

Currently, arbitration in India is seen to be protracted, expensive and suffering from excessive court intervention. The Ordinance seeks to give remedy to these issues. Accordingly, in an international commercial arbitration, as per the Ordinance, 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. Court inferior to High Court shall not have the jurisdiction to entertain arbitration application involving one foreign party. In a bid to extend credence to rulings on the subject, the omission of the words "a company or" from sub-clause (iii) in the definition of international commercial arbitration, seeks to crystallize the definition of a foreign party. From now on, the jurisdiction of incorporation shall be the sole determining factor of whether or not the body corporate or corporate constitutes a foreign party bringing the arbitration within the ambit of international commercial arbitration.

b) Foreign Seated International Commercial Arbitrations

The legal framework prior to the Ordinance had been interpreted by Indian courts to allow for Indian court intervention in certain instances even if the parties had agreed to seat their international commercial arbitrations outside of India. The Ordinance seeks to streamline and expedite procedures for ICAs Seated outside India through the following key changes:

- Currently, based on judicial precedent, all arbitration agreements entered into after September 6, 2012, providing for a foreign seated ICA, are *per se* excluded from the jurisdiction of Indian courts. In other words, a foreign seated ICA is outside the purview of an Indian court's jurisdiction.
- Consequently, parties cannot seek interim relief and assistance in taking evidence from Indian courts in support of the arbitration. The Ordinance now expressly provides that unless the parties have excluded the jurisdiction of Indian courts by a specific agreement, Indian courts (through the High Courts in each Indian

² 246th report of Law Commission of India available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf>

state) are empowered to grant interim relief and render assistance in taking evidence in a foreign seated ICA.

- Following the decision of the Indian Supreme Court in [Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc.](#) (2012) 9 SCC 552 (“**Kaiser**”), Indian Courts could not grant interim relief in foreign seated arbitrations. The Ordinance allows Indian Courts to grant interim relief (Section 9) and assist in the taking of evidence (Section 27), even when the seat of arbitration is outside India.
- The Ordinance requires that foreign arbitral awards be enforced by High Courts and not by any lower court in India.

V. Meaning of the term Court under the Act in case of arbitration other than International Commercial Arbitration

In so far as domestic arbitration is concerned, the definition of “Court” is the same as was in the 1996 Act. The principal Civil Court of original jurisdiction or the High Court shall have jurisdiction.

In the case of State of West Bengal & Ors vs. Associated Contractors, the Court considered whether the Supreme Court is a ‘Court’ under Section 2(1)(e) of the 1996 Act and observed that *“There are a variety of reasons as to why the Supreme Court cannot possibly be considered to be “court” within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. Firstly, as noted above, the definition is exhaustive and recognizes only one of two possible courts that could be “court” for the purpose of Section 2(1)(e).”*

VI. Conclusion

The amendment has differentiated the definition of court on the basis of the type of Arbitration. The new definition now makes a distinction between domestic and international commercial arbitration. Thus, the amendment seeks to incorporate radical changes which render the law conducive to commercial investment opportunities. However, the actual effects of all the amendments will come to light in due course of time.