

Report on the Proposal for Amendment of the Arbitration Act, 2001, for Including a Provision Relating to Interim Measures by Court

On the basis of the report of the Law Commission submitted to the Government, the Arbitration Act, 2001 (Act I of 2001) (সালিস আইন, ২০০১) (২০০১ সনের ১ নং আইন) was enacted by Parliament with a view to updating the law on arbitration. The Act came into force 9 April, 2001.

Of late, some senior members of the Supreme Court Bar Association including Syed Ishtiaq Ahmed, Bar-at-Law, Mr. Amir-Ul-Islam, Bar-at-Law, Mr. Rafiqul Haq, Bar-at-Law, Mr. Hafizullah, Advocate, etc., have been representing to the Commission that taking advantage of the absence of a specific provision in the Act empowering the Court to take interim measures before constitution of the arbitral tribunal, unscrupulous parties are likely to defeat the enforcement of an arbitral award by alienating or destroying their properties. Mr. Rafiqul Haq, Bar-at-Law, also wrote a formal letter addressed to Mr. Justice Naimuddin Ahmed, Member, Law Commission, for drawing attention of the Law Commission to this aspect of the matter.

Accordingly, the Law Commission examined the সালিস আইন, ২০০১ (Arbitration Act, 2001). The Commission also consulted the English, Indian and Sri Lankan laws on arbitration in this respect.

It appeared that no provision had been made in the সালিস আইন, ২০০১, empowering the Court to take interim measures. The Commission also felt that the absence of a specific provision to this effect would be likely to create difficulties in enforcing an arbitral award.

Accordingly, the Commission prepared two separate drafts proposing amendment to the সালিস আইন, ২০০১. The drafts were circulated among various sections of the legal profession. Several members of the Supreme Court Bar Association also held verbal discussion with the Commission. The Commission duly considered their opinions and the valuable suggestions made by them.

In the Act, the arbitral tribunal, (after it is constituted), is empowered to take interim measures during the arbitral proceedings.¹⁴ The absence of a provision to take such measures before constitution of the arbitral tribunal and after making of an arbitral award may provide an unscrupulous party an opportunity to defeat the award that may be made against it. The English law and the Indian law have empowered the Court to take such interim measures.¹⁵

We feel that a provision empowering the Court to take interim measures should be included in the সালিস আইন, ২০০১ in order to prevent an unscrupulous party's attempt to defeat enforcement of an award.

Recommendation

It is, accordingly, recommended that the সালিস আইন, ২০০১ (২০০১ সনের ১ নং আইন) may be amended as follows:-

In the সালিস আইন, ২০০১ (২০০১ সনের ১ নং আইন), after section 10, insert the following section,-

“10A.- Interim measures by Court and High Court Division.- (1)

Unless otherwise agreed by the parties,

on the application of a party, the Court may, in the case of a domestic arbitration, and the High Court Division may, in the case of an international commercial arbitration, before or during an arbitral proceedings or at any time after making of the arbitral award but before its enforcement under section 44 or under section 45, as the case may be, make orders:

- (a) for the appointment of guardian for a minor or person of unsound mind for the purposes of the arbitral proceedings;
- (b) for an interim measure of protection in respect of any one or more of the following matters, namely:-

¹⁴ সালিস আইন ২০০১, section 21

¹⁵ (English) Arbitration Act, 1950, section 12 (6).
(Indian) Arbitration and Conciliation Act, 1996, section 9.

- (i) the preservation, interim custody or sale of any goods or property which are the subject-matter of the arbitration agreement;
- (ii) the prevention of removal or disposal of any property by any party with a view to defeat the enforcement of an arbitral award;
- (iii) securing the amount in dispute in the arbitration;
- (iv) the detention, preservation, inspection, photographing or custody 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;
- (v) interim injunction;
- (vi) appointment of receiver;
- (vii) such other interim measure of protection as may appear to the Court or the High Court Division, as the case may be, to be just and convenient.

(2) In making orders under sub-section (1), the Court or the High Court Division, as the case may be, shall have the same powers as it has for the purposes of, and in relation to, any legal proceedings before it.

(3) The Court or the High Court Division, as the case may be, shall, before making an order under sub-section (1) on the application of a party, issue notice on the other party:

Provided that the Court or the High Court Division, as the case may be, may, where it appears that the object of making the order under sub-section (1) would be defeated by the delay, dispense with such notice.

(4) The Court or the High Court Division, as the case may be, shall act under this section only if it is satisfied that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(5) If the Court or the High Court Division, as the case may be, so orders, an order made under sub-section (1) shall cease to have effect in whole or in part on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(6) The Court or the High Court Division, as the case may be, may, if it thinks fit, rescind, vary or modify at any time an order made by it under sub-section (1).

(On leave)
(Justice A.K.M. Sadeque)
Member

(Justice Naimuddin Ahmed)
Member

(Justice A.T.M. Afzal)
Chairman