

THE ARBITRATION & CONCILIATION (AMENDMENT) ACT 2019: GOOD INTENTIONS, BAD OUTCOMES

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ABSTRACT

The arbitration jurisprudence in India has been ever evolving since the enactment of the Arbitration and Conciliation Act, 1996 (“**the Act**”), with judiciary as well as the legislature contributing immensely to its development. After the round of amendments in 2015, there was a need felt for another round of amendments to rectify some of the mistakes made in 2015 as well as to push the case of institutional arbitration in India, which has been ignored for a long time. It is in this context and based on recommendations of a high-level committee that the legislature introduced the Arbitration & Conciliation (Amendment) Act 2019, which has since partially come into force on 9th August 2019 and has made a flurry of changes to the existing arbitration jurisprudence and structure in India. Whilst most of these changes have been made with good intentions to promote institutional arbitration in India and to make India an attractive destination for international arbitrations, some of these changes are bound to have the opposite effect and adversely affect the progress of arbitration as a means of dispute resolution in India. In this paper, we will analyze the major changes made to the Act by the Arbitration & Conciliation (Amendment) Act 2019 and study its possible outcomes on the current arbitration jurisprudence in India.

INTRODUCTION

This past decade has seen massive overhaul of arbitration jurisprudence and structure resulting in tremendous growth of domestic and international arbitrations in India. This growth can be largely credited to timely amendmentsⁱ by the legislature to the Arbitration and Conciliation Act 1996 (“**Act**”) and progressive judgments by the judiciary. In same spirit, although after much delayⁱⁱ, the Act was once again amended by enacting the Arbitration & Conciliation (Amendment) Act 2019 (“**Amendment Act**”). The Amendment Act making a whole host of changes to the existing arbitration jurisprudence and structure came into force on 9th August 2019ⁱⁱⁱ after receiving the assent of President of India. Although only few sections have been notified as on today,^{iv} the Amendment Act has received praise and criticism in equal measure.

In this paper we will discuss and analyze major changes to arbitration jurisprudence made by the Amendment Act.

BACKGROUND

After introduction of the Arbitration and Conciliation Act, 1996 (“**the Act**”) in 1996 and the first round of reforms in 2015, this much anticipated Amendment Act is the second round of reforms carried out to improve arbitration jurisprudence and structure in India. The Act was previously amended by Arbitration and Conciliation (Amendment) Act 2015 (“**2015 Amendments**”) with aim of making arbitration a preferred mode of settlement of commercial disputes. Although the 2015 Amendments were welcomed at the time, and paved the way for a progressive arbitration regime, a lot of lacunae were left unattended that needed to be addressed by legislative intervention. The 2015 Amendments also came with its own set of challenges, some of which were resolved by the judiciary but need a permanent fix by the legislature. This Amendment Act is a realization of recommendations contained report submitted by High-Level Committee^v relating to identifying the roadblocks to the development of institutional arbitration, examining specific issues affecting the Indian arbitration landscape, and preparing a roadmap for making India a robust centre for international and domestic arbitration.

ANALYSIS OF THE AMENDMENT ACT

Formation of Bureaucratic Arbitration Council of India

Amendment Act has created an unnecessary bureaucratic regulatory mechanism in the form of Arbitration Council of India (“ACI”), although relevant sections^{vi} are yet to be notified.

ACI^{vii} is comprised^{viii} of Government ‘nominated’ retired Judge – as chairperson, eminent arbitration practitioners & academician – as members, Secretary of Departments of Legal Affairs and of Expenditure along with a CEO – as ex-officio members, and sole representative of commerce and industry – as part-time member. The composition makes it clear that ACI consists of only one member from commerce and industry, with rest being from bureaucracy or Government nominated, making ACI essentially a ‘Government’ body regulating arbitration in India. There is no precedent in any progressive arbitration regimes of such an arbitration watch-dog and is largely seen as regressive step project set to have an adverse effect.

ACI has been entrusted with extremely vague, but noble, functions^{ix} like promotion & encouraging arbitration, holding workshops & trainings, ensuring satisfactory level of arbitration, providing forum etc. However, in absence of any specifications for carrying out these functions, they are merely a dead letter. In any event, there is no particular need for government to handle these functions when the private industry is already undertaking most of these functions without any expenditure to the tax payer. Further, in order to promote institutional arbitration, ACI has been vested with power to make recommendations regarding personnel, training and infrastructure of arbitral institutions and power to conduct examination, and training. Unfortunately, Amendment Act neither contemplates any industry participation, nor specifies details regarding courses/examinations, especially considering that presently there are no additional qualifications required for being an arbitrator or to practice arbitration in India.

Further, reprehensible and abhorrent concept of grading arbitration^x institutions and recognizing institutes accrediting arbitrators has been introduced with wide unfettered powers to ACI to frame and review policies creating fear regarding independence of the ACI. The Government^{xi} given essentially given itself power to influence the arbitration to which it is a party.

ACI is also tasked with maintaining depository^{xii} of awards, which will inevitably and severely compromise privacy & confidentiality of parties, especially without any opt-out/redaction option, as is available with major arbitration institution. This step will discourage the parties from choosing India as a seat of arbitration.

By introducing bureaucratic structure around arbitration under guise of promoting institutional arbitration, Government has effectively created parallel court system. Party autonomy, the cornerstone of arbitration, has been affected as arbitration institutions chosen by parties are heavily regulated by Government, defeating the purpose of arbitration over inefficient traditional courts. ACI creates compliance requirements which will ultimately add to cost, hampering development of arbitration institutions.

In light of the above, it is advisable that the ACI should be a self-regulatory industry body comprised of independent retired Judges, arbitration practitioners – both counsels and solicitors, and academicians, with powers limited to making timely recommendations to for promotion of arbitration, and certainly with no wide discretionary powers. It would be best of the Government does not interfere in the functioning of arbitration institutions and arbitrators and let the market forces decide their fate. The depository of arbitral awards although seems like a good idea, on closer examination it may discourage parties from adopting arbitration as a mode of dispute resolution as it goes against the principles of party autonomy and privacy on which arbitration as a mechanism stands upon. In any case, it is expected that some of provisions related to the ACI may come under scrutiny of courts and at that time one hopes that the courts will step in to sort out the discrepancies and inadequacies of ACI.

Designation of Arbitration Institutions and Appointment of Arbitrators

Amendment Act has added^{xiii} the definition of ‘arbitral institution’^{xiv} and has further proposed that power of appointment of the arbitrator and/or arbitral tribunal, in event parties are unable to agree, to be exercised by ACI-graded arbitral institutions^{xv} designated by courts^{xvi}. In absence of any ACI-graded arbitral institution, panel of arbitrators maintained by courts^{xvii} will discharge the power of appointment. Albeit this manner of appointment is leaf out of progressive arbitration regimes^{xviii}, it fails to prescribe stringent eligibility checklist and limit the number of arbitration institutions that can be designated by courts, thereby compromising

on quality of arbitration institutions. Whilst, understandable that India being a vast country^{xxix}, having one or two arbitration institutions for appointment is not feasible, the least that could have been done was to limit arbitration institutions designated by each court. Amendment Act essentially leaves it open for the courts to start the designation for practically innumerable arbitration institutions, with no specification on what grade will be considered eligible to be designated. There are also no details given as to what the grading will be based on, especially in case of new and upcoming arbitration institutions with no much history. Instead of letting the market decide as to the efficacy and effectiveness of an arbitration institutions, the Government has unnecessarily given power to courts to grade and designate these arbitration institutions, which will essentially be discharged by bureaucrats in these courts, inviting inevitable red-tape and corruption.

Eligibility Requirements for Arbitrator

The Amendment Act has inserted Eighth Schedule^{xx} providing standardized eligibility requirements as to qualifications, experience and norms for accreditation for appointment as arbitrator. However, there is a bar on appointment of a foreign lawyer as an arbitrator, thereby hampering the growth of India-seated international commercial arbitrations. While the Eighth provide for positive requirements and eligibility conditions, they do not incorporate specific, objective disqualifications.

Interim Relief after passing of the Award

Previously, arbitrator^{xxi} as well as court^{xxii} was empowered to grant interim measures after the passing of Award leading to inevitable confusion. The Amendment Act resolves the overlap of authority and resolves confusion by removing the power of arbitrator to grant interim measures^{xxiii}. This is a welcome change as it eliminates the overlap of authority between the court and the arbitrator.

Timelines & Extensions

The court mandated timelines and extensions^{xxiv} for completion of arbitration, which is unique to the arbitration experience in India, has now been amended by the Amendment Act. In order to prevent parties from delaying the arbitration for filing of pleadings, amended Section 23^{xxv} of the Act prescribes that Statement of Claim and Defense be filed 6 months from the

appointment of arbitrator. However, there are no specifications regarding counter-claims pleadings, rejoinders and sur-rejoinders, leading to confusion.

Further, now^{xxvi} time-limit of twelve-months (extendable by six-months with consent of parties) for completion of arbitration will commence from date of expiry of six-months' time for filing the pleadings as opposed to from date of appointment of arbitrator. In view thereof, maximum time-limit for completion of arbitration, without approaching court for extension, is extended from eighteen-months to twenty-four months. Additionally, the amended section now states that when an application for extension is pending before the courts, the mandate of the arbitrator will continue until the disposal of the application, thus the arbitration will now continue without any interruptions or breaks due to expiry of mandate of the arbitrator^{xxvii}.

The statutory timelines/extensions will inevitably conflict with arbitral institutions rules which overlook procedure, leaving arbitrator at the mercy of courts and affecting ability to manage arbitration. Further, the six-month period for filing pleadings isn't viable in case of complex multi-party arbitrations involving voluminous/technical documentation. There exists confusion regarding validity, or lack thereof, of awards when timelines are not complied. Further, it affects ability of party to mutually decide flexible schedule and creates affects ability bifurcate arbitration into two stages – the preliminary stage, being pleadings and award on interim or jurisdictional issues and then, the final stage, comprising of pleadings and award on substantive issues on merits. Further, statutory timelines/extensions have been made inapplicable to international commercial arbitrations^{xxviii}.

Another view is that statutory timelines/extensions are unique, aiding India in acquiring global recognition as seat of arbitration, and that eliminating the same will force non-Indian parties consider seat outside of India for expeditious court proceedings relating to arbitration. The court mandated timelines and extensions for completion of arbitration, which is unique to the arbitration experience in India, has now been amended by the Amendment Act.

Challenge to the award

Amendment Act replaces^{xxix} "furnishes proof that", with "establishes on the basis of the record of the arbitral tribunal that" in Section 34 of the Act, thus clarifying that parties must rely only on record of tribunal when challenging award before courts.

Further, dichotomy between Section 37 and 50 providing limited appeals from orders of courts and Commercial Court Act, 2015 providing for general right of appeal against the orders of High Courts has been resolved by inserting non-obstante clause restricting right to appeal to Sections 37 and 50.

Confidentiality of proceedings and protection of action taken in good faith

In order to keep pace with the international practices, Amendment Act has introduced Section 42A prescribing that the arbitrator, the arbitral institution as well as the parties will be required to maintain confidentiality of all arbitral proceedings with only exception being disclosures made for enforcement of award. Although, this is a welcome move, there is no clarity as to if parties will be allowed to disclose pleadings or documents from the arbitration in other connected legal proceedings, especially proceedings challenging the award. This amendment requires more clarity by the Legislature through comprehensive regulations.

Section 42B has been introduced to prevent the initiation of any suit or legal proceeding against an arbitrator for any action taken in good faith.

Applicability of 2015 Amendments^{xxx}

Prior to 2015 Amendments, there would be an automatic stay on execution of award when it was challenged^{xxxi}. This meant award could not be enforced till the challenge was dismissed by courts. 2015 Amendments removed this automatic stay, ensuring that stay on execution of award would be granted only on application by the party and on merit, often subject to deposit of part-amount under the award. On the question of this particular amendment of 2015 Amendments, the Supreme Court of India in *BCCI v. Kochi Cricket Private Limited*^{xxxii} interpreting Section 26^{xxxiii} clarified 2015 Amendments will apply to court proceedings which have commenced in relation to arbitration proceedings on or after 23rd October 2015^{xxxiv} and further that this amendment would be applicable challenges to the award challenged even before October 23, 2015, as execution is procedural right, and there can be no vested right to

resist the execution. Subsequently, the Legislature in all its wisdom vide the Amendment Act sought to delete Section 26, and introduced Section 87^{xxxv} providing that, unless otherwise agreed, 2015 Amendments shall not apply to arbitration proceedings, including to court proceedings arising out of/ in relation thereto, commenced before 23rd October 2015^{xxxvi} thereby expressly overruling the aforesaid judgement by the Supreme Court of India. Recently, in response to the Amendment Act, Supreme Court of India struck down^{xxxvii} Section 87 as being manifestly arbitrary and in violation of Article 14 of the Constitution^{xxxviii} thereby reverting to position prior to the Amendment Act. Although striking down of Section 87 of the Act has caused celebration, this interventionist role of Supreme Court of India to overturn the will of the Parliament is a grave cause of concern.

CONCLUSION

Amendment Act is a classic example of the saying that the road to hell is paved with good intentions. Although the effort in being proactive to anticipate challenges and promoting institutional arbitration in India is commendable, the unintended consequences need to be examined and rectified. There are possibilities that the Amendment Act might go against the aim of promoting India as a suitable venue for international arbitrations. It is advisable that the legislature involves industry in a lengthy consultation process before settling the draft of amendments. One is hopeful that the judiciary will fill in the gaps left by the legislature with progressive judgments and that legislature will give a serious re-look and rectify some of the glaring inconsistencies. India needs a more liberal and progressive arbitration regime, if she has to establish herself as a premier destination for international commercial arbitration in south Asia. Whilst the Amendment Act has definitely made some positive strides with respect to promotion of institutional arbitration, the next round of reforms in arbitration will hold a key to the development of arbitration, especially given the lofty aim of making India a robust center of international commercial arbitration.

REFERENCES

- ⁱ The Act was amended in 2015 for undoing the effect of certain bad judicial precedents, limiting judicial intervention and strengthening the arbitration jurisprudence by making it more liberal and progressive.
- ⁱⁱ The Arbitration and Conciliation (Amendment) Bill 2018 was initially tabled in Lok Sabha on 10th August 2018. However, passing of the same was delayed due to the lapse of the 16th session of the Lok Sabha.
- ⁱⁱⁱ The Amendment Act was introduced as Arbitration and Conciliation (Amendment) Bill in *Rajya Sabha* (Upper House of Indian Parliament) on 15th July 2019. Thereafter, it was first passed by *Rajya Sabha* on 18th July 2019 and then by *Lok Sabha* (Lower House of Indian Parliament) on 1st August 2019 and later received the assent of the President of India on 9th August 2019 and was subsequently published as Act No. 33 of 2019 in the Gazette of India.
- ^{iv} Except Sections 2, 3, 10, 14 and 16, all the Sections of the Amendment Act have been notified on 30 August 2019
- ^v The Government of India had appointed a High-Level Committee was under the Chairmanship of the Hon'ble Mr. Justice B. N. Srikrishna (Retired). The Committee submitted its report to the then Law Minister of India, Mr. Ravi Shankar Prasad, on 30th July 2017.
- ^{vi} Part 1A, Sections 43A to 43M inserted by the Amendment Act
- ^{vii} The ACI is a body corporate with Head Office in New Delhi.
- ^{viii} Section 43C inserted by the Amendment Act
- ^{ix} Section 43D (1) & (2) inserted by the Amendment Act
- ^x Section 43D & 43I inserted by the Amendment Act
- ^{xi} In India, the Government is the biggest litigator. The Government companies are part of major national and international arbitrations in India.
- ^{xii} Section 43D (2) (j) inserted by the Amendment Act
- ^{xiii} The term 'arbitration institution' is defined by inserting Section 2 (1) (ca) to the Act by the Amendment Act.
- ^{xiv} arbitral institution designated by the Supreme Court or a High Court under the Act
- ^{xv} By inserting Section 11 (3A) to the Act.
- ^{xvi} Prior to the Amendment Act, the power of appointment of arbitrator/arbitral tribunal was with the concerned High Court in case of domestic arbitration and Supreme Court of India in case of International Commercial Arbitration. Under the Amendment Act, the concerned High Court will designate and grade arbitration institution for domestic arbitration within its jurisdiction and Supreme Court of India will designate and grade arbitration institution for international commercial arbitration
- ^{xvii} The panel of arbitrators will be maintained by the Chief Justice of concerned High Court
- ^{xviii} Singapore's International Arbitration Act provides for only Singapore International Arbitration Center (SIAC) as appointing authority, and Hong Kong's Arbitration Ordinance provides for only Hong Kong International Arbitration Center (HKIAC) as appointing authority.
- ^{xix} One Supreme Court of India and twenty-nine High Courts with their own territorial jurisdiction.
- ^{xx} By inserting Eighth Schedule to the Act
- ^{xxi} under Section 17
- ^{xxii} under Section 9
- ^{xxiii} Relevant wordings of Section 17 granting arbitrator power to grant interim measures after the passing of Award were removed by the Amendment Act
- ^{xxiv} Section 29A of the Act deals with timelines and extensions.
- ^{xxv} Section 23 (4) of the Act inserted by the Amendment Act
- ^{xxvi} Section 29A (1) of the Act as amended by the Amendment Act
- ^{xxvii} Section 29A (4) of the Act as amended by the Amendment Act
- ^{xxviii} Section 29A (1) of the Act as amended by the Amendment Act
- ^{xxix} Section 24 as amended by the Amendment Act.
- ^{xxx} Arbitration and Conciliation (Amendment) Act, 2015.
- ^{xxxi} Under Section 34 of the Act
- ^{xxxii} (2018) 6 SCC 287
- ^{xxxiii} Inserted by the Arbitration & Conciliation (Amendment) Act, 2015. "*Section 26: Act not to apply to pending arbitral proceedings- Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the*

parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

^{xxxiv} commencement date of the Arbitration and Conciliation (Amendment) Act, 2015.

^{xxxv} Inserted by the Amendment Act. “*Section 87: Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall— (a) not apply to— (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; (ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; (b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.*”

^{xxxvi} Commencement date of the Arbitration and Conciliation (Amendment) Act, 2015.

^{xxxvii} *Hindustan Construction Company Limited & Anr. v. Union of India*, Writ Petition (Civil) No. 1074 of 2019

^{xxxviii} Constitution of India, “*Article 14: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*”

