

The Arbitration and Conciliation (Amendment) Act, 2019 – Entering a New Domain

Background

The Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment Act), as a bill, was passed by the lower house of Parliament (Lok Sabha) on 1 August 2019 and passed by the upper house of Parliament (Rajya Sabha) on 18 July 2019. Soon after, on 9 August 2019, the 2019 Amendment Act received the assent of the President and was published as Act No. 33 of 2019. Thereafter, certain sections of the 2019 Amendment Act were notified on 30 August 2019.

The 2019 Amendment Act has been one of the most awaited and commented legislation amendments in recent times, dividing opinions alike since it was first tabled in Lok Sabha on 10 August 2018. However, its passing was delayed due to the lapse of the 16th session of the Lok Sabha.

The 2019 Amendment Act encapsulates various recommendations made by the High Level Committee (Committee) formed under the Chairmanship of Justice B N Srikrishna, Retired Judge, Supreme Court of India which submitted its Report on 30 July 2017. The Committee was constituted by the Central Government in order to eliminate some challenges/ difficulties with respect to the Arbitration and Conciliation (Amendment) Act 2015 (“**2015 Amendment Act**”) and rationalize institutional arbitration vis-a-vis ad hoc arbitration.

The 2019 Amendment Act further addresses measures to make the arbitration procedure more robust and friendly, with a clear emphasis to address the ease of doing business ranking, as well as making India a hub for international commercial arbitrations. The 2019 Amendment Act also aims on streamlining and encouraging institutional arbitration by establishing an independent body and promoting ADR in India as detailed subsequently in this article. Perhaps the biggest takeaway of the 2019 Amendment Act is that it is a move towards institutionalising arbitration in India.

Key Highlights

The 2019 Amendment Act, has brought in some significant, changes including Appointment of Arbitrators by Arbitral Institution instead of courts in India, setting up of the Arbitration Council of India, introducing time-lines of six months for filing pleadings, making international arbitrations beyond the purview of the twelve months adjudication period prescribed under S. 29 and altering the scope of Section 17, Section 45, Section 50 of the Arbitration Act and lastly introducing Section 87 to clarify the prospective effect of the 2015 Amendment Act, despite the comments of the Hon’ble Supreme Court in *Board of Cricket Control in India v Kochi Cricket Private Limited and Ors.* ((2018) 6 SCC 287 (BCCI Judgment)).

A brief description of the key highlights of the 2019 Amendment Act are as under:

- APPOINTMENT BY ARBITRAL INSTITUTION: The 2019 Amendment Act proposes an appointment procedure by arbitral institutions designated specifically by the Supreme Court in cases of International Commercial Arbitration and the High Court in the other cases wherever the Council has graded arbitral institutions. Alternatively, it provides for maintaining the panel of arbitrators by the Chief Justice of the concerned High Court for discharging function of the arbitral institutions.

These arbitral institutions shall be graded by ACI on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations. Other salient features of the arbitral institution include:

- a. the proposed section 11 clarifies that in a situation wherein more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made shall be competent to appoint.
- b. application made under this section shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party

It is interesting to note that different institutions have different appointment procedures, empanelled arbitrators and the inter-play of how the choice of the institution may in future, have a significant impact in the choice of seats by parties.

However, the sections of the 2019 Amendment Act that pertain to the appointment of arbitrators by arbitral institutions and any other changes made to the procedure under Section 11 of Arbitration Act have not yet been notified.

- CONSTITUTION OF ARBITRATION COUNCIL OF INDIA (ACI): The 2019 Amendment Act mandates establishment of the ACI as a body corporate. Clause 10 of the 2019 Amendment Act proposes to insert new sections 43A to 43M in the Arbitration Act for incorporating the ACI. ACI shall *inter alia* carry out the following functions:

- a. framing policies to grade arbitral institutions and accredit arbitrators (as per the qualifications and norms contained in the Eighth Schedule, as inserted *vide* the 2019 Amendment Act);

- b. to evolve policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all the matters relating to arbitration and ADR mechanism;
- c. hold training, workshops, etc. in areas of arbitration
- d. to establish and maintain an electronic depository of all the arbitral awards made in India (the 2018 version of the Amendment Act included the maintenance of arbitral awards made overseas, but the current version thereof has excluded the same); and
- e. to promote and encourage ADR Mechanisms.

The ACI shall consist of a Chairperson and other Members that would include an eminent academician etc. besides other Government nominees. The Chairperson shall be a person who has been a Judge of the Supreme Court or Chief Justice or Judge of any High Court or any eminent person.

Further, any acts/proceedings by the Council cannot be declared invalid for reasons such as: (i) vacancy/defect in the ACI's constitution; (ii) defect in the appointment of a Member of the ACI; or (iii) procedural irregularities which have no bearing on the merits of a case.

The scope of the ACI still remains to be seen as it has been kept open to such other functions as may be decided by the Central Government in clause (l) of the new proposed provision.

However, it is pertinent to note that the provisions relating to the operations and composition of the ACI have not been notified either.

- AMENDMENT TO SECTION 23: Sub clause 4 has been added to the Section which requires statement of claim and defence to be completed within a period of 6 months from the date of constitution of the Tribunal.

However, the said provision does not deal with counter-claims and the defence thereto, nor Rejoinders and sur-rejoinders in some cases, hence how the arbitrators and practitioners actually deal with this in existing arbitrations would be interesting to see.

Further, in cases where parties wish to split the liability and quantum claims, it will need to be seen how the same can be implemented under the new framework.

These provisions have been notified, with effect from 30 August 2019.

- AMENDMENT TO SECTION 29A: Section 29A of Arbitration Act mandates that an award shall be passed in a matter within 12 months of the arbitral tribunal entering upon the reference and that the parties may, by consent, extend the time for making an award by another six months. The 2019 Amendment Act proposes the following amendments to sub section (1) of section 29A:
- a. international commercial arbitrations shall be excluded from the purview of the timeline provided in the section, but parties thereto must endeavour to adhere to the same; and
 - b. For other arbitrations, the time limit for arbitral award shall be within 12 months from the completion of the pleadings of the parties under section 23(4) of the Arbitration Act instead of the existing period of 12 months that starts from the date on which arbitral tribunal enters upon the reference.

These provisions have been notified, with effect from 30 August 2019.

- INSERTION OF SECTION 42A - CONFIDENTIALITY: The 2019 Amendment Act proposes to insert a new section - 42A wherein the arbitration proceedings shall be kept confidential by the arbitrator and the arbitral institutions, except the award where its disclosure is necessary for the purpose of implementation and enforcement of award.

It would be interesting to see how pleadings or documents received in arbitration are used in other proceedings. There are instances of parties using the pleadings in arbitration to file anti-arbitration injunction suits in India and thus, the manner in which Courts address this issue would be interesting.

These provisions have been notified, with effect from 30 August 2019.

INSERTION OF SECTION 42B – PROTECTION TO ARBITRATORS: Section 42B proposes to protect an Arbitrator for acts and/or omission done during the arbitration proceedings i.e. the arbitrator shall not be subject to a suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings.

These provisions have been notified, with effect from 30 August 2019.

INSERTION OF SECTION 87 – APPLICABILITY OF 2015 AMENDMENT ACT: This proposed section is by way of a clarification to a long-standing debate of the prospective/ retrospective effect of the 2015 Amendment Act i.e. the applicability of the 2015 Amendment Act basis the arbitration proceedings being commenced prior or subsequent to the amendment. It is clarified herein

that 2015 Amendment Act shall not apply to (i) the arbitral proceedings that have commenced prior to the introduction of the 2015 Amendment Act as well as to (ii) the Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings have commenced prior to or after the commencement of the 2015 Amendment Act, unless parties agree otherwise. It is clarified in proposed section 87(b) that the 2015 Amendment Act shall only apply to arbitral proceedings that have commenced on or after the introduction of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

These provisions have been notified, with effect from 30 August 2019, which indicates the legislature's desire to clarify and end this debate as soon as possible.

- **THE EIGHTH SCHEDULE:** The Eight Schedule, as included in the Arbitration Act vide the 2019 Amendment Act provides objective clarity by way of standardized eligibility requirements for the appointment of an individual as an arbitrator. However, there are two possible issues with the contents thereof: (a) they prima facie bar the possibility of the appointment of a foreign lawyer as an arbitrator, which is likely to act as an obstacle for the promotion of India-seated international commercial arbitrations; and (b) while they provide for positive requirements and eligibility conditions, they do not incorporate specific, objective disqualifications, as enumerated in soft law instruments like the International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014, despite their applicability and importance being extolled by the courts, such as in the case of *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd* ((2017) 4 SCC 665).

However, this Schedule has yet to be notified, because it must be read in tandem with the provisions regarding the appointment of arbitrators.

The Question remains:

The proposed section 87(b) is in conflict with the recent judgment of Hon'ble Supreme Court in the BCCI Judgment, wherein the Supreme Court has held that has held that 2015 Amendment Act will apply to applications which are pending in various courts for challenging the award and were filed before the commencement of the 2015 Amendment Act.

With respect to the issue of prospective application of the 2015 Amendment Act, there were conflicting opinions, not only between different High Courts, but even within the same high court. Some of the crucial judgments being the Madras High Court in *New Tirupur Area Development Corporation Ltd v M/s Hindustan Construction*

Co. Ltd (A. No. 7674 of 2016) and Calcutta High Court in *Tufan Chatterjee v Rangan Dhar (AIR 2016 Cal 213)*, which have previously held that the prospective applicability of the 2015 Amendment Act would be limited to ‘*arbitral proceedings*’ and not to ‘*court proceedings*’. The Bombay High Court in *Rendezvous Sports World v the Board of Control for Cricket in India (2017 (2) BomCR 113)*, took a slightly different view, wherein it was held that “*it makes no difference if the application under Section 34 filed by the award-debtor was prior to 23rd October, 2015*”.

For these reasons, the court has directed that the copy of the BCCI judgment to be sent to the Ministry of Law and Justice and the learned Attorney General for India so as to incorporate the views taken by the court in the 2019 Amendment Act. Now with the passing of the 2019 Amendment Act, we hope that the controversy on this issue will be put to rest.

Comment:

The 2019 Amendment Act is definitely a step forward in promoting the institutional arbitration in India along with streamlining and overcoming some of the challenges faced after the enactment of the 2015 Amendment Act. The 2019 Amendment Act takes the arbitration practice and laws into a new domain, with substantial safeguards and regulations to further plug the holes and ensure a robust and sustainable mechanism to support the growth of arbitration in India.

The 2019 Amendment Act however did not take into consideration some recommendations by the Committee notably on incorporating the International Bar Association (IBA) Rules on evidence. Further, how the amendments are actually implemented would be key to gauge its success in future. The scope, composition, functioning of ACI remains to be seen and implementation thereof in practice. The actual manner of implementation of the ACI would determine if it becomes a deemed regulator of arbitration institutions in India of sorts or facilitates mushrooming of arbitration institutions in all those states in India, which do not have the same at the moment and promote it as a whole. These will only be clarified on the notification of provisions pertaining to the same. We look forward to the interesting times that the 2019 Amendment Act shall usher in the arbitration diaspora and the changing landscape thereof in India.

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