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India: Arbitration And Conciliation (Amendment) Act, 2019- An Attempt To Further Promote Arbitration

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Article by Rajat Jariwal and Ria Himmatramka
Khaitan & Co

Introduction

Latest in the series of attempts by the Indian Government to promote India as an arbitration-friendly destination after the New Delhi International Arbitration Centre Act, 2019 is the Arbitration and Conciliation (Amendment) Act, 2019 (Amendment Act / 2019 Amendments) that received the Presidential assent on 9 August 2019. Two predominant features underlying most changes brought about by the Amendment Act are – (i) an attempt to further reduce the scope of judicial intervention in arbitration and proceedings in connection thereto; and (ii) an attempt to expedite the arbitration process; both being quintessential characteristics of arbitration as an effective alternative to court proceedings for disputes resolution. In the interests of specificity and brevity, we have limited the scope of this article to a critical scrutiny of the significant changes brought by the Amendment Act and the practical implications of the same. The article should not be envisaged as an information primer for the entirety of the Amendment Act.

- Revamp of appointment procedure for Arbitrators under Section 11

The most significant change brought by the Amendment Act is to completely remove the scope of judicial intervention at the stage of appointment of arbitrators by providing for appointment of arbitrators by arbitral institutions designated by the Supreme Court and High Court in this regard. The Amendment Act provides for setting up of an Arbitration Council of India that is entrusted with the grading of arbitral institutions and various other tasks with the aim to promote arbitration in India.[1] From among these graded arbitral institutions, the Supreme Court or the High Court shall designate certain arbitral institutions for the purpose of appointment of arbitrators under Section 11 of Arbitration and Conciliation Act, 1996 (the Act). An application for appointment of arbitrators that was originally moved before the High Court or Supreme Court[2] is now required to be moved before such designated arbitral institutions.

While it may be presumptive at this stage to comment on the nature of power conferred upon arbitral institutions, this amendment can be seen as an attempt to bring the provision for appointment of arbitrators at par with those existing in international jurisdictions such as Singapore and Hongkong[3]. Though the power under Section 11 of the Act was initially concluded by the Supreme Court to be a judicial power[4], its entrustment to a body designated by the Supreme Court / High Court dilutes its nature and tilts the weight towards the administrative side. It remains open for the Arbitration Council of India to include corresponding provision(s) akin to the now repealed Section 11(6-A) for scrutiny of arbitration agreement by the designated arbitral institutions in the regulations it frames for functioning of the designated institutions.

While this amendment may expedite the process of arbitration as the appointment of arbitrators is likely to be much faster now with limited scope of judicial enquiry[5], its implications in case of frivolous and wrongful references to arbitration might be to the contrary and might subject the opposite side to needless arbitration especially in cases where there is no valid arbitration agreement.[6]

The Amendment Act does not provide any guidelines for the composition or the procedure to be adopted by arbitral institutions for the appointment of arbitrators. The Arbitration Council of India set up under Part 1A is entrusted with the task of framing regulations for the same. It is only when such regulations are formulated that the exact nature of power conferred upon the

designated institutions and its practical implications would be clear. For now, the limited takeaway remains the abrogation of power of the courts to appoint arbitrators under Section 11 of the Act with the aim to reduce the scope of judicial intervention in arbitration.

- Limitation on challenge to arbitral award under Section 34

An interesting amendment to Section 34 of the Act seeks to further limit the scope of judicial intervention at the post arbitral award stage. Prior to the 2019 Amendment, any party seeking to challenge the arbitral award under Section 34(2) was required to "furnish proof" with respect to the ground on which it was seeking the setting aside of the arbitral award. The amended Section 34 now restricts the ability of the parties to furnish any fresh proof before the court of challenge and restricts the scrutiny of the court to "the record of the arbitral tribunal". That is to say, no fresh evidence can be led at the stage of a Section 34 challenge application before a court.

Practically, this necessitates that any challenge that is sought to be raised before the court prospectively at the post award stage is raised first before the arbitral tribunal or at least the document that is sought to be relied upon before the court is subjected to the scrutiny of the arbitral tribunal during the course of the arbitration proceedings. This move places a significant limitation upon the courts to, at the post award stage, address only those challenges to an arbitral award that were raised during the course of arbitration (for instance, grounds like challenge to the validity of arbitration agreement, no proper notice, etc.), thereby limiting the scope of judicial intervention.

This move may be instrumental in expediting the dispute resolution process as not only will there be limited scope of challenge but also, lesser judicial time will be spent in scrutinizing the challenge and the veracity of the evidence relied upon for the challenge.

- All interim measures of protection post final award to be granted under Section 9

A welcome change *vide* the Amendment Act is the removal of the clause "*or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36*"[7] in Section 17 of the Act which means that all interim measures post award but prior to its enforcement will be dealt with by the concerned court under Section 9 or Section 36 (read with the provisions of Civil Procedure Code).

Prior to the 2019 Amendments, there was an overlap of authority between the court and the arbitral tribunal under Section 9 and Section 17, respectively, as both could be approached for interim measures of protection once the final award had been made and was awaiting enforcement. The amendment clarifies the anomaly by restricting the forum that can be approached for post award interim measure of protection to courts under Section 9 of the Act. This position also fits well with the existing arbitration structure envisaged under the Act wherein the arbitral tribunal becomes *functus officio* upon pronouncement of the final arbitral award.[8]

- Stricter timelines for completion of the arbitration process

In an attempt to expedite the dispute resolution process, the Amendment Act proposes a strict timeline of twelve months from the date of completion of pleadings (and not from the date of reference to arbitration, as was prescribed in the original Act) under Section 29A of the Act. It is interesting to note that this timeline is strict for all arbitrations except international commercial arbitrations. The timeline remains prescriptive for the latter. It may be assumed that this is an attempt to assuage concerns regarding the Indian arbitration regime being too rigid and limiting scope for flexibility, which arose after the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment Act) introduced stringent timelines for completion of arbitration proceedings.

Another welcome change to guard against notorious parties attempting to delay arbitration proceedings is the insertion in Section 23 of the Act which requires parties to complete pleadings within six months from the date when the arbitral tribunal was appointed. This ensures that no party, on the pretext of supplementary pleadings, continues to delay arbitral proceedings. While amendments to pleadings can still be made at any stage of the arbitral proceedings, it remains to be seen if arbitrators will exercise their discretion in refusing to allow amendments to pleadings post the expiry of the period of six months.

- Clarification of anomaly created by Section 26 of the 2015 Amendment Act

One of the most significant amendments in the nature of clarification of an existing legal position is the insertion of Section 87 which clarifies the confusion regarding the application of the 2015 Amendment Act created by Section 26 therein. According to Section 26 of the 2015 Amendment Act, the amendments brought by the 2015 Amendment Act were to apply to the ongoing arbitration proceedings upon agreement to that effect of both the parties. With respect to the court proceedings arising in connection to such arbitration proceedings, the Supreme Court, in the judgment in Board of Control for Cricket in India v Kochi Cricket (P.) Ltd.[9] in the context of Section 36 of the Act and in Ssangyong Engineering and Construction Co. Ltd. v National Highways Authority of India[10] in the context of Section 34 of the Act, clarified that the 2015 amendments were retrospective in the sense that they were applicable to the court proceedings arising out of or in relation to arbitral proceedings commenced before the introduction of the 2015 Amendment Act. This invited some criticism as the 2015 amendments quite significantly

overhauled the post arbitral award regime and subjecting parties to the overhauled mechanism irrespective of their agreement to this effect fell foul of one of the most important tenets of arbitration - party autonomy.

Section 87 seeks to address this concern. Section 87 is applicable retrospectively, i.e. deemed to have taken effect from 23 October 2015 (the date on which 2015 Amendments came into effect) and clarifies that the 2015 amendments will be applicable "only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and the court proceedings arising out of or in relation to such arbitral proceedings".

- Setting up of Arbitration Council of India[11]

This move is inspired by the aim to promote arbitration as a viable alternative dispute resolution mechanism in India along with placing India as an arbitration friendly jurisdiction on the global map. The central body envisaged under the Amendment Act consists of representatives from not only the legal field but also representatives from the industrial and commercial sectors in an attempt to develop arbitration in a business-friendly manner. The body corporate structure of the Arbitration Council of India envisaged under the Amendment Act is entrusted with wide responsibilities. Among others, these include framing policies for governing the grading of arbitral institutions, developing mechanism for accreditation of creditors, providing norms for conduct of arbitrations. As such, in furtherance of the objective of promoting arbitration in the country, the Arbitration Council of India is aimed as a guiding and standard setting body in the field of arbitration. This move is likely to ensure a dedicated and experts-guided regulation of arbitration and reduce the scope of judicial intervention in terms of setting standards / guidelines for conduct of arbitration while adequately accounting for the interests and concerns of India Inc. with respect to arbitration.

- Schedule VIII- Qualifications to be an Arbitrator

While the existing trend in arbitration in India has been to appoint a retired High Court / Supreme Court judge as an arbitrator, the Amendment Act, while laying down qualifications to be an arbitrator, subtly expands the available choices for arbitrators by allowing any advocate, chartered accountant, cost accountant, company secretary or those engaged in technical / scientific field with a minimum of ten years' experience to be an arbitrator provided they satisfy certain general norms that have been made applicable to an arbitrator. These norms include neutrality, fairness, integrity, impartiality, absence of conflict of interest and basic knowledge of law and contracts. This is a reaffirmation of the fact that arbitration involves dispute resolution not just in terms of strictures of law but also with due consideration to industry and business practices. The latter is often overlooked in judicial determination of disputes and can be adequately addressed by appointing field experts as arbitrators. The introduction of qualifications *vide* Schedule VIII also offers guidance in terms of who can be an arbitrator - an otherwise unregulated territory till now.

Conclusion

While the Amendment Act does not clearly specify so, the nature of amendments proposed suggests that it is prospective in nature[12] except where it is mentioned otherwise (for instance, Section 13 of the Amendment Act clearly provides it to be retrospective). The Amendment Act has also introduced some other amendments which are welcomed and are in the interests of an efficient arbitration regime, such as the need to maintain confidentiality[13], privileges to the arbitrator with respect to act done in good faith and in accordance with the Act[14], reduction of standard of scrutiny under Section 45 of the Act to make it pari materia with the enquiry under Section 8[15], etc. While the amendments are good-intentioned and seem promising in terms of promoting arbitration, the real implications are contingent upon their implementation and the timely setting up of the Arbitration Council of India.

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[1] The role and constitution of Arbitration Council of India is discussed more elaborately in the latter part of this article.

[2] Section 11 of the Arbitration and Conciliation Act, 1996.

[3] In these jurisdictions, the designated arbitral institutions, i.e. Singapore International Arbitration Centre (SIAC) in case of Singapore and Hong Kong International Arbitration Centre (HKIAC) in case of Hong Kong have been entrusted with the responsibility of appointment of arbitrators in cases of disputes in that regard.

[4] Konkan Railways v Rani Construction (2002) 2 SCC 388; SBP & Co. v Patel Engineering (2005) 8 SCC 618

[5] Sections 8, 9 and 11 of the Arbitration and Conciliation Act, 1996 were the most commonly used sections for seeking judicial intervention at the pre-arbitration stage. The Arbitration and Conciliation (Amendment) Act, 2015 also mandates that appointment of arbitrators be made by the designated institutions within 30 days as opposed to the *prescriptive* 60 days' period under the existing Section 11 of the Arbitration and Conciliation Act, 1996.

[6] This is subject to any appeal mechanism that may be introduced for challenge to the decision of the designate body appointing arbitrator *vide* the regulations to be formulated by the Arbitration Council of India.

[7] This was introduced in Section 17 *vide* the Arbitration and Conciliation (Amendment) Act, 2015.

[8] Section 32(3) of the Arbitration and Conciliation Act, 1996.

[9] (2018) 6 SCC 287.

[10] 2019 (3) Arb. LR 152 (SC).

[11] Section 10, Arbitration and Conciliation (Amendment) Act 2019 - Insertion of Part 1A.

[12] For instance, the strict timeline for completion of pleadings in arbitration, limited challenge under Section 34 of the Arbitration and Conciliation Act, 1996, etc.

[13] Insertion of Section 42A to the Arbitration and Conciliation Act, 1996.

[14] Insertion of Section 42B to the Arbitration and Conciliation Act, 1996.

[15] Section 11, Arbitration and Conciliation (Amendment) Act, 2019.

The content of this document do not necessarily reflect the views/position of Khaitan & Co but remain solely those of the author(s). For any further queries or follow up please contact Khaitan & Co at legalalerts@khaitanco.com

Contributor
Rajat Jariwal

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Authors

Rajat Jariwal

Ria Himmatramka