

**THE ARBITRATION AMENDMENT ACT, 2019 AND THE CHANGING
ARBITRATION ECO-SYSTEM IN INDIA: NEEDS A RE-LOOK?**

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INTRODUCTION

Arbitration has always been a preferred mode of dispute resolution especially in commercial matters. For long, India has been striving to become a preferred seat of arbitration not only for domestic arbitration but also for international commercial arbitration since the enactment of Arbitration and Conciliation Act, 1996.³ In this endeavour, there have been several ups and downs noticed by the observers which were either due to certain judicial pronouncements or fallacies in the drafting of the Arbitration and Conciliation Act, 1996 itself.⁴ Soon it was realized both by the judiciary as well as by the legislature that they need to change the approach, if India has to become a preferred seat of arbitration. In this context, after various failed attempt to amend the Arbitration and Conciliation Act, 1996, major changes were introduced through the Arbitration and Conciliation Amendment Act, 2015. Immediately after this amendment, new problems were faced by the parties and need was felt to bring another amendment in the existing law.

In this backdrop, in order to overcome the existing lacunae and to boost the confidence of commercial entities to make India an international hub of arbitration, an expert committee headed by the Supreme Court judge (Retd.), Justice B. N. Srikrishna, which was assigned the charge to suggest improvement in the existing arbitration law. The committee submitted its report in July 2017⁵ suggestive of numerous actions for revamping the arbitration law in India. Its suggestion were mainly focused on facilitating the working of the institutional arbitration in India and removing few ambiguities in the Arbitration Amendment Act 2015. It is largely on the basis of Justice B. N. Srikrishna Committee report, the Central Government brought the Arbitration and Conciliation (Amendment) Act Bill, 2018 which was regarded as a noteworthy attempt by the Central Government to facilitate and streamline the working of

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³ The Arbitration and Conciliation Act, 1996, Act No.26 of 1996

⁴ Sumeet Kachwaha, The Indian Arbitration Law: Towards a New Jurisprudence, 10 INT. A.L.R. 13, 17 (2007)

⁵ Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (October 28, 2019 10:04 AM), <http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>

Institutional Arbitration in India and also to make India a preferred seat of arbitration both for domestic as well as international commercial arbitration. This Bill subsequently received the assent of the President on 9th August 2019 and became the part of the statute. The Central Government exercising its powers provided under section 1(2) of the Arbitration Amendment Act, 2019, appointed 30th August 2019 for the enforcement of different sections under the Arbitration Amendment Act 2019.

KEY FEATURES

There is no doubt that the Amendment Act, 2019 has been brought with the intention to refine and strengthen the existing Arbitration Law. In this regard, there are many new and innovative features that have been added to this which was demanded by several quarters. A few of the key changes are discussed below.

- **Arbitration Council of India (ACI):**

ACI is a statutory body sought to be established by the Amendment Act, 2019 which is given the mandate to grade arbitrary institutions and also to accredit Arbitrators by laying down the guidelines and rules in this regard. ACI is also entrusted with the task to recognise professional institutes providing accreditation of arbitrators.⁶ In addition to this, ACI is entrusted with the task to conduct training, workshops and different courses in the field of arbitration in association with law institutions/universities, law firms and arbitrary institutes.⁷ It is also mandated to establish and maintain a depository of arbitral awards made both in India and abroad.⁸ It will also work towards promotion and encouragement of arbitration and other ADR mechanisms in India.⁹ Since there was no such statutory body to regulate the conduct of arbitrary institutions and also for their accreditation, establishment of ACI is indeed a step in right direction.

- **Application of Arbitration Amendment Act 2015:**

To clarify on the application of the Arbitration Amendment Act 2015, a new provision by way of section 87 is incorporated to clarify that the Arbitration Amendment Act 2015 will apply to such arbitrary proceedings which were commenced after 23rd October 2015 or if parties explicitly approve the same. This section specifies that the courts can apply the provisions of the Arbitration Amendment Act 2015 only if the two situations as mentioned

⁶ Section 43 D (2) b

⁷ Section 43 D (2) d

⁸ Section 43 D (2) j

⁹ Section 43D (1)

are attracted. However, this newly introduced section 87 did not take into account the latest judgment of the Hon'ble Supreme Court of India on this very point i.e. BCCI v. Kochi Cricket Pvt. Ltd¹⁰ which decided otherwise on the point which is discussed in the latter part of this paper. This particular section has created more ambiguity than clarity on the point.

- **High Court and Supreme Court recognized Arbitrary Institutions:**

The 2019 Amendment Act has provided that the arbitration institutions duly recognized by the High Court/Supreme Court can be approached by the parties directly for appointment of arbitrator and in such case, parties are not required to file petition in the High Court/Supreme Court under section 11 of the Arbitration Act 1996 as it was required earlier.¹¹ It is mandated that those Institution Arbitration houses will have the power to appoint the arbitrator in international commercial arbitration if they are duly recognized by the Supreme court and for domestic arbitration, if they are duly recognized by the respective High Court.¹² This provision is indeed a welcoming step as it will not only decrease the avoidable burden of the courts but will also be expedient for the parties. This amendment, however, is yet to be notified.

- **Changes to the timelines provided under Section 29A:**

The 2015 Amendment Act had brought in the timeline of twelve months for the completion of arbitration proceedings and declaration of an award.¹³ It had also provided that the Arbitrator's mandate will come to an end automatically after twelve months are completed if the parties don't consent for the extension of arbitrator's mandate by another six months.¹⁴ Further, after completion of eighteen months, if the time limit is not extended by the court, arbitrator's mandate will abruptly end. However, through the Arbitration Amendment Act 2018, it is provided that the authorization of the arbitrator will be extended even after eighteen months till the petition filed before the court in this regard is decided.¹⁵ This provision is going to benefit all those arbitration proceedings which are going to be halted

¹⁰ 2018 (4) SCALE 502

¹¹ Section 11 (3A)

¹² Id

¹³ Section 29A(1)

¹⁴ Section 29A(4)

¹⁵ Id

due to completion of eighteen months as now they can continue their proceedings during the pendency of the decision of the court in this regard.

In addition to this, The 2019 Amendment Act further provides for calculating the time's line of twelve months not from the date of appointment of the arbitrators (unlike the 2015 Amendment Act) but from the date of end of the pleadings.¹⁶ The Arbitration Amendment Act 2019 provides for six months for completion of the pleadings and twelve months for the delivery of the arbitral award in case of domestic Arbitrations. These timelines as introduced by the Arbitration Amendment Act 2019 are however, not made applicable to the international commercial arbitration in India.

- **Confidentiality of the Arbitration Proceedings:**

Confidentiality is one of the unique features of arbitration. Because of the fact that the arbitration proceedings are private and confidential, many parties resort to arbitration. However, the Arbitration and Conciliation Act, 1996 did not have adequate provision on this. The 2019 Amendment Act has introduced a new Section 42A, which will ensure the confidentiality of the arbitration proceedings except for arbitral award¹⁷. This step will strengthen the confidence of parties and encourage them to opt India as a seat of arbitration. This provision has safeguarded the arbitrator for any of his/her act done in good faith¹⁸. This was a much needed provision and has been rightly acknowledged and incorporated in the law.

- **Reduced Scope of Section 17 interim injunction:**

As per the provisions of Arbitration Amendment Act, 2015 a party can move to the arbitrary tribunal at any time during the pendency of the arbitrary proceeding or at any time after the delivery of the arbitral award but before it is enforced.¹⁹ Through the Arbitration Amendment Act 2019, this power of arbitrary tribunal to entertain an application under section 17 of the Act has been confined to the date of the delivery of the final arbitral award.²⁰ As the mandate of the arbitrator automatically ends after the pronouncement of final award, through the

¹⁶ Supra note 12

¹⁷ Section 42A

¹⁸ Section 42B

¹⁹ Section 17(1)

²⁰ Id

Arbitration Amendment Act 2019, it is clarified that the arbitrary tribunal will not have any powers after the pronouncement of the award to grant any interim relief by making necessary amendments in section 17(1) of the Act. In such situation, after the award is delivered by the arbitrary tribunal, only the courts will have the powers to grant interim orders under Section 9 of the Arbitration Act.

- **Qualifications and Experience of Arbitrator:**

The 2019 Amendment Act has introduced a new schedule namely “Eighth Schedule” to the Arbitration Act, which provides exhaustive detail of qualifications required to become an arbitrator.²¹ This Eighth Schedule provides for 10 years’ experience as an advocate or an Officer of Indian Legal Service or a CA or an engineer who are eligible to become an arbitrator. It also provides the general standard applicable to the arbitrators. It however, failed to provide for law professor with considerable years of experience who could also be made eligible for becoming arbitrators. This would have increased a wide pool of professionals with varied experiences to be eligible for becoming arbitrator.

PROBLEMS WITH THE PROPOSED AMENDMENTS

- **Arbitration Council of India**

With regard to the Arbitration Council of India, Justice B.N. Srikrishna Committee had provided for a statutory institution which will have its members nominated by the CJI, the Central Government and also a well-regarded foreign professional. But, the Central Government did not take into account this recommendation of the Justice B.N. Srikrishna Committee and provided that the Arbitration Council of India will be a body only of members nominated by the Central Government only. It will have the Secretary to the Central Government’s two departments as ex officio members.²² Since the role of the ACI is very wide and its powers includes accreditation of the arbitrary institutions, it would have been better, had the involvement of the government official kept limited in the composition of ACI. This is all the more important when in a large volume of arbitration cases, government is a party to such matters.

²¹ Section 43J

²² Section 43C(1)

- **Applicability of the amendments**

The question of applicability of the Arbitration Amendment Act, 2015 was subject to lots of deliberation amongst stakeholders and also several inconsistent views taken by various High Courts on this. But when the Supreme Court of India was seized with the issue of applicability of Arbitration Amendment Act, 2015 in the case of BCCI v. Kochi Cricket Pvt. Ltd²³ it held that the Arbitration Amendment Act 2015 is prospective in its nature. The implication of this judgment of the Supreme Court was that the 2015 amendments were applicable to arbitrary tribunal and court proceedings started subsequent after the Arbitration Amendment Act 2015 came into force. It was also held in this case by the Supreme Court that the Arbitration Amendment Act, 2015 will apply to pending proceedings that might have been instituted before the Arbitration Amendment Act, 2015 came into existence but were pending on the date of the amendments came into force i.e. 23rd October, 2015. This case also provided that section 36 of the Arbitration Act, 1996 after its amendment will apply to pending applications for setting aside of arbitral awards under section 34 of the Arbitration Act 1996. This was to remove the problem of automatic stay on enforcement of arbitral award upon the filing of a setting aside application under section 34 of the Arbitration Act, 1996

However, through the Arbitration Amendment Act 2019 it is provided that the Arbitration Amendment Act 2015 will apply only to ‘arbitration proceedings started on or after the commencing of the Arbitration Amendment Act 2015 and to the court proceedings occurring out of such arbitration proceedings.’²⁴ It would have been wise on the part of the legislature that the law as stated in the above judgment of the Supreme Court is taken into account and the Arbitration Amendment Act 2019 should be amended in a manner that the judgment of the Supreme Court of India on this point is not negated and is retained.

- **The issue with Confidentiality requirement**

Through the Arbitration Amendment Act 2019, confidentiality has been made an essential feature of the Arbitration Act, 1996.²⁵ However, in other jurisdictions having provisions on confidentiality in their arbitration laws mostly provide for many exceptions in this regard. This aspect of the Arbitration Amendment Act 2019 should be re-looked as it should not bind

²³ Supra note 9

²⁴ Section 87(b)

²⁵ Section 42A

the parties to arbitration to such broad confidentiality requirements where they can not disclose anything. It should be subjected to party autonomy wherein parties should have the autonomy to determine their limits of confidentiality. Party autonomy as explained by the Redfern and Hunter in the following words:

"Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitrary institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition..."²⁶

In the backdrop of the seminal principle of party autonomy, it is also for the legislature important to understand that such provision of confidentiality should not be made a mandatory provision

Problem with the timeline under section 29A

In the Arbitration Amendment Act 2019, newly inserted provision of timeline for completion of pleadings within six months without any scope for an extension creates unnecessary limitation on the parties and the arbitrator to frame the arbitration proceedings as per their convenience. This is also against the seminal principle of party autonomy.²⁷ Further, it is also not clear from the provision that if the respondent who is also required to file a counter claim has to file it within these six months. Therefore, it is not clear as what could be the intention for providing six months' time for filing both statement of claim and its defence. It is therefore submitted that the pragmatic approach should have been in not dividing the time limits into different parts for different facets of the arbitrary proceeding. It would be pragmatic if simply an eighteen-month timeline for the completion of arbitrary proceeding is provided.

- Qualification of Arbitrators

The Arbitration Amendment Act 2019 is not very clear as to the implication of the Eighth Schedule through which the qualifications of the Arbitrators have been introduced. It indicates that only such persons who satisfy those requirements as specified in the schedule are qualified to act as arbitrators. But, when the Eighth schedule is read along with Section 43D of the Arbitration Act, 1996 it implies that the requirements are pertinent at the phase of

²⁶ Redfern and Hunter, Law and Practice of International Commercial Arbitration, 315 (4th ed., 2004)

²⁷ Id

accreditation only.²⁸ This vagueness can make the arbitral award susceptible to challenge under section 34 of the Act which may be delivered by the arbitrators who do not meet these qualification as specified in the schedule. Therefore, this entire provision requires to be re-looked and needs to be amended at the earliest to remove any complications to the parties in future.

- **Missed opportunity**

The Arbitration Amendment Act 2019 missed out to provide any provision for emergency arbitration. It is all the more important that despite an unambiguous recommendation in this regard by Justice B. N. Srikrishna Committee, the Central Government did not understand the veracity of its requirement under the Indian Arbitration Law. Provision for emergency arbitration is provided by almost all prominent jurisdictions abroad by introducing necessary amendments in their respective arbitration law.²⁹ It is therefore suggested, that if adequate provision with regard to emergency arbitration is incorporated in the Arbitration Act, 1996 it will raise its status and bring it at par with the International standards.

CONCLUDING REMARKS

Unquestionably, the Arbitration Amendment Act 2015 followed by the Arbitration Amendment Act 2019 aim at a more pragmatic and robust arbitration mechanism in India by overcoming the lacunae in the existing arbitration law. It is indeed laudable step towards achieving international standards of arbitration mechanism in India for domestic as well as international commercial arbitration and to make India a hub of international arbitration. It is also reflective of the willingness of the present government to rationalize the arbitration mechanism in India and make it at par with its other counterparts. However, to streamline the existing arbitration law and to minimize inconvenience to the future instigation which will be subjected to arbitration, certain loopholes as pointed out in this paper must be looked into to make the arbitration process in line with the international best practices.

In its existing form, the Arbitration Amendment Act 2019 creates more confusion than ironing out the discrepancies which is detrimental to the image of Indian arbitration law

²⁸ Section 43D(2)

²⁹ *See e.g.*, Singapore International Arbitration Center (SIAC) included the emergency arbitration provision in July 2010 only. The International Chamber of Commerce (ICC) included emergency arbitration provisions in the 2012 Rules through Article 29 and Appendix V. In the same manner, London Court of International Arbitration (LCIA) amended its Rules of 1988 in 2014 to provide provision for emergency arbitration through Article 9.

which already had a bad past no so long ago. By doing the necessary amendments as suggested in this paper, the government will further boost the confidence of the disputing parties to choose India as a preferred seat for arbitration. Any change made in the Arbitration Act 1996 is expected to build up the arbitration framework for the holistic development of the arbitration ecosystem in India and if the necessary changes as suggested in this paper are made, it will further strengthen the existing arbitration law in India.