# Arbitration and Conciliation (Amendment) Bill, 2018: For better or worse?

## 1. Introduction

The World Bank's Doing Business Report 2019 has ranked India at 163 out of 190 economies on the ease of enforcing contracts.[1] This indicator measures the efficiency and quality of commercial dispute resolution. It employs the quality of judicial processes index to assess whether an economy has adopted good practices in its court system across 4 areas: **(a)** court structure and proceedings, **(b)** case management, **(c)** court automation, and **(d)** alternate dispute resolution. The index ranges from 0 to 18, where higher value indicates better judicial processes. Currently, India's score is 10.5, thereby indicating gaps in dispute resolution mechanism. India's rank suggests poor quality of judicial processes and lack of speedy disposal of commercial disputes.

It cannot be overemphasized that dispute resolution process has significant impact on the global perception of "doing business" in India. Realizing this, the Indian government wants to promote India as a hub for domestic and international commercial arbitration, speedy dispute resolution and an investor-friendly jurisdiction. Further, to encourage disputing parties to adopt arbitration, stakeholders have long felt the need to strengthen institutional arbitration mechanism. Accordingly, a high-level committee was set up to propose further amendments to the Arbitration and Conciliation Act, 1996 ("**ACA**") which submitted its report on July 30, 2017 ("**HLC Report**"). Pursuant to the committee's recommendations, the Arbitration and Conciliation (Amendment) Bill, 2018 ("**Bill**") was introduced in the lower house of the Indian parliament ("**Lok Sabha**") on July 18, 2018. On August 10, 2018, the Lok Sabha passed it without any modifications. Presently, the Bill is pending for approval from the upper house Rajya Sabha, before it finally becomes the law. This newsletter aims to examine selective key amendments proposed in the Bill and their impact on India's arbitration landscape.

## 2. Establishment of Arbitration Council of India

The HLC Report states that there are over 35 arbitral institutions currently functioning in India.[2] Yet, companies prefer ad-hoc arbitration as it offers them flexibility and greater control over the arbitral process. Stakeholders argue that poor infrastructure, poor quality of arbitrators, lack of modern and updated arbitral rules, inefficiency in arbitral process are some key reasons why companies do not favor institutional arbitration. Hence, the Bill envisages creation of an overarching body called the Arbitration Council of India ("**ACI**") which would frame policies and guidelines for establishment and operation of arbitral institutions. Part IA of the Bill deals with ACI and contains provisions related to its composition, officer appointments and their duties, norms for grading of institutions, accreditation of arbitrators and related matters.

ACI's primary role would be to grade institutions on the basis of: **(a)** infrastructure, **(b)** quality and caliber of arbitrators, **(c)** performance and compliance of time limits for disposal of

[1] Available at http://www.doingbusiness.org/en/data/exploreeconomies/india (last accessed on January 12, 2019)

[2] Some of the prominent ones are: (a) Indian Council of Arbitration (ICA), (b) Mumbai Centre for International Arbitration (MCIA), (c) International Centre for Alternative Dispute Resolution (ICADR). Further, on January 4, 2019, the Lok Sabha passed New Delhi International Arbitration Centre Bill, 2018 which seeks to establish NDIAC as another arbitral institution

domestic or international commercial arbitration. This is a welcome step towards creating a robust institutional arbitration ecosystem. Such grading will help to set minimum standards for functioning of institutions and create a benchmark to assess their quality. Additionally, the Bill also seeks to amend section 11 of ACA which provides for court's assistance in appointment of arbitrators upon a party's request. Presently, where parties fail to appoint a sole arbitrator or two appointed arbitrators fail to agree on the third arbitrator, a party can approach either the Supreme Court ("**SC**") or the concerned High Court ("**HC**") for such appointment. However, once the Bill is notified, such appointments shall be made by the institution designated by the SC for international commercial arbitration or by HC in domestic arbitration under section 11. The intent is to ensure speedy appointment of arbitrators with minimum judicial involvement. Further, appointment of arbitrators from graded institutions will assure parties of their credibility, efficiency and ability to deliver better quality of awards thereby encouraging institutional arbitration. Hence, the grading process assumes great significance for an effective arbitral process.

ACI will establish norms for accreditation of arbitrators provided under a new Eighth Schedule. These require potential arbitrators to have sound knowledge of contract law, robust understanding of both domestic and international best practices on arbitration, etc. However, they are silent on how arbitrators will acquire such knowledge and understanding. Arbitrators are also expected to avoid any potential conflict connected with the dispute. While there needs to be more clarity on the prescribed norms, accreditation of arbitrators will prove beneficial in creating a well-qualified and experienced pool.

Section 43C of the Bill provides that ACI shall consist of a Chairperson and 7 other members, all appointed or nominated by the Central Government. The HLC Report recommended that it should function as an autonomous and self-regulatory body. It envisaged that government's role should be limited to providing infrastructural support, financial assistance, and promotion of arbitral institutions. However, a government appointed council suggests potential risk of its involvement in day-to-day functioning of ACI. Whether ACI will be truly autonomous remains to be seen, but the hope is that it will be truly independent and sans government influence.

## 3. Setting aside of arbitral award: Requirement to "furnish proof" dispensed with

Presently, section 34(2)(a) of ACA provides that an arbitral award may be set aside *only if* the party making the application "furnishes proof" of any of the grounds mentioned therein. The question of degree of such "proof" was settled by the SC while construing an exclusive jurisdiction clause in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*[3] In that case, SC held that "proof" under section 34(2)(a) should be furnished "*only by way of an affidavit of facts not already contained in the record of the proceedings before the arbitrator.*" The SC cautioned against holding a "mini-trial" by framing issues, giving parties an opportunity to lead evidence and cross-examine witnesses since this would amount to re-adjudication thereby defeating the purpose of speedy resolution. In an earlier judgment[4] of the Delhi HC, the judge held that "*there is no requirement under Section 34 for parties to lead evidence. The record of the arbitrator was held to be sufficient in order to furnish proof of whether grounds under Section 34 were made out.*" In light of the above jurisprudence, the Bill envisages that the

[3] (2017) 7 SCC 678

[4] Sandeep Kumar v. Dr. Ashok Hans (2004) 3 Arb LR 306. See also: Sial Bioenergie v. SBEC Systems AIR 2005 Del 95, WEB Technologies and Net Solutions Pvt. Ltd. v. M/s Gati Ltd. and Anr. 2012 SCC online Cal 4271

party making an application on grounds specified under section 34(2)(a) would now only be required to establish any of the grounds "*on the basis of the record of the arbitral tribunal*." This amendment will help to prevent recalcitrant parties from adopting dilatory tactics and ensure compliance with the mandate under section 34(6) to dispose such applications within 12 months.

## 4. Clarification on applicability of 2015 amendments

Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 ("**ACAA 2015**") governs its applicability on arbitral proceedings commenced before October 23, 2015, the date when ACAA 2015 came into force ("**Effective Date**"). The section read as: "*nothing contained in this act shall apply to 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*." While a plain reading of section 26 indicated that ACAA 2015 would not apply to arbitrations commenced before the Effective Date its application on related proceedings was unclear. Further, Indian courts have divergent views regarding the interpretation of section 26. Some HCs hold that ACAA 2015 shall not apply to court actions arising out of arbitrations commenced before the Effective Date,[5] while others observe that it shall apply to all pending and fresh court actions regarding such arbitrations.[6]

To clarify the application of ACAA 2015, the Bill has omitted section 26 and inserted a new section 87 which shall apply retrospectively from the Effective Date. Pursuant to this section, unless parties agree otherwise, ACAA 2015 amendments shall **apply** to arbitrations commenced from the Effective Date and related proceedings; and shall **not apply** to arbitrations commenced earlier and related proceedings, notwithstanding when they commenced.

The key concern with section 87 is its retrospective application of ACAA 2015. The objective of ACAA 2015 was to remove difficulties caused by conflicting interpretations of Indian courts regarding provisions of ACA, which caused delays and excessive court interference in arbitration matters. If it comes into force in its current form, section 87 will have a cascading effect on all court actions for arbitrations commenced before the Effective Date, thereby negating the impact of all important 2015 amendments. These include, introduction of strict timeline for disposal of section 34 applications, court's power to order interim measure of protection under section 9, stay on enforcement of award under section 36, etc. In *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.*,[7] the SC examined section 87 of the Bill and cautioned against its retrospective application. While examining the objective behind introduction of ACAA 2015, it noted that goal was to make arbitration "more user-friendly, cost effective and lead to expeditious disposal of cases." The apex court made the point that the government should not disregard the foregoing object and took the view that if the proposed section 87 is applied retrospectively, then "*immediate effect of section 87 would be to put all the important amendments made by the Amendment Act on a back-burner.*" The SC observed that such an interpretation would defeat the objective of speedy disposal of arbitral disputes with least court interference. In other words, such an amendment

[5] Electrosteel Castings Limited v. Reacon Engineers (India) Private Limited (2016) 2 CALLT 277 (HC), Pragat Akshay Urja Limited Company v. State of M.P. and Ors (2017) 1 ARBLR 408 (MP)
[6] New Tirupur Area Development v. Hindustan Construction Company Ltd. (A. No. 7674 of 2015 in O.P. No. 931 of 2015 – decided on January 27, 2016), Rendezvous Sports World and Ors v. The Board of Control for Cricket in India and Ors 2017 (2) Bom CR 113
[7] AIR 2018 SC 1549

would strike at the very spirit of ACA and the ACAA 2015. The foregoing view is indeed correct and, hopefully, the Rajya Sabha shall pay due consideration to the important assessment and revise the draft accordingly to remove the retrospective application.

## 5. Timeline for completion of arbitral proceedings

Section 29A(1) of ACA stipulates that an arbitral award must be made within 12 months from the date on which the arbitrator(s) receives notice of appointment. Parties may mutually extend the time by 6 months. If they do not agree, either of them can approach the court for such extension. The purpose of a strict timeline is to speed up the process.

The Bill proposes to amend section 29A as: "*the award in matters other than international commercial arbitration shall be made within a period of 12 months from the date of completion of pleadings under sub-section (4) of Section 23.*" Section 23 of ACA provides the manner in which parties need to file their statement of claim and defence and the timeline may be agreed. However, there is no fixed statutory timeline for completing the pleadings. The Bill seeks to amend section 23 and has introduced a 6-month timeline within which the statements of claim and defence have to be filed computed from the date the arbitrator(s) receive notice of appointment. Ambiguity still remains as the Bill does not clarify whether "pleadings" would include counter-claim, reply, rejoinder (if a party wishes to file one), and amendments to statements of claim and defence. Presumably, by not referring specifically is indicative of the intent to exclude them. Then, the Bill is silent on what would happen where the claimant delays filing the claim, narrowing the time within which the defendant would have to file its defence and thereby cause prejudice.

## 6. Conclusion

The Bill presupposes that development and promotion of arbitral institutions will propel India on the path of becoming a global arbitration hub. The proposed reforms aim to overhaul India's arbitration regime by making it more aligned with international best practices. Additionally, there is a clear intent to create a pro-arbitration environment by further limiting judicial intervention in the arbitral process. These changes are important in the light of improving India's position on the ease of doing business rankings. Once it comes into force, the Bill will boost confidence among foreign companies to choose India as their seat of arbitration. While this newsletter only touches upon selective amendments, parties must also consider new provisions like confidentiality obligations, immunity for arbitrators, etc. While there is some ambiguity, but, overall, the Bill is indeed a step in the right direction to make India an arbitration hub.

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