

## **The Arbitration and Conciliation (Amendment) Act, 2019**

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The Arbitration and Conciliation (Amendment) Bill, 2019 was introduced in Rajya Sabha (Upper House of Parliament of India) by the Minister for Law and Justice, Mr. Ravi Shankar Prasad, on July 15, 2019, Rajya Sabha passed the said bill on 18th July 2019. Subsequently, Lok Sabha (Lower House of Parliament of India) passed the above said bill on 1st August 2019. It seeks to amend the Arbitration and Conciliation Act, 1996. It further got the assent of the President of India on 09th August 2019 and hence the said Act came into effect from 1st of August 2019. The above said Act has brought in various important changes to the 1996 Act.

Arbitration Council of India (ACI): The Act seeks to establish an independent body called the Arbitration Council of India (ACI) for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. Its functions include: (i) framing policies for grading arbitral institutions and accrediting arbitrators, (ii) making policies for the establishment, operation and maintenance of uniform professional standards for all alternate dispute redressal matters, and (iii) maintaining a depository of arbitral awards (judgments) made in India and abroad. The said Institution ACI have to take all such measures as may be necessary to promote and encourage arbitration and mediation, conciliation and other alternative dispute resolution mechanism and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration in India. Hence, ACI is going to be a regulator as well as an institution promoting ADR in India. Even though arbitration is a private mechanism where regulation should be less, in countries like India, such supervision will help the frame work to develop and grow.

The ACI will consist of a Chairperson who is either: (i) a Judge of the Supreme Court; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in conduct of arbitration. Other members will include an eminent arbitration practitioner, an academician with experience in arbitration, and government appointees.

ACI is expected to do various function including (a) Grading of Arbitral Institutions (b) Regulate Accreditation of arbitrators by Institutions (c) Promote Institutional arbitration (d) Establish and maintain Depository of Arbitral awards (e) Advise Central Government on ADR related matters etc., ACI can make various regulations under the Act. Hence, ACI is going to play a major Role in developing, regulating and promoting arbitration in India.

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**Arbitral Institutions:** The Amendment Act has also defined the Arbitral Institutions as “an arbitral institution designated by the Supreme Court or a High Court under this Act. Such a definition may require the foreign arbitral Institutions including ICC, SIAC, LCIA etc., to register with the Supreme Court of India/ High Courts. Moreover, the said foreign institutions may have to create and maintain certain infrastructure as specified under ACI. The foreign arbitral institutions are administering India seated International arbitrations as well as domestic arbitrations using hotel meeting rooms as of now. Such regulations may also create confusions while adopting the rules of Arbitral Institutions. Anyhow India will be better than China because, PRC does not permit Foreign Arbitral Institutions to administer arbitrations seated in China.

**Appointment of arbitrators by Institutions for Adhoc Arbitrations:** Under the un-amended 1996 Act, parties were free to appoint arbitrators and in case of disagreement on an appointment, the parties had to approach High Court for Domestic arbitrations and Supreme Court in case of International Arbitrations under S.11 of the Act. Such a procedure burdened the Courts and courts took 3 to 6 months to complete appointments. But the amendment empowers the empanelled Arbitral institutions to appoint the Arbitrators for adhoc arbitrations on an application from the parties. While appointing such arbitrators, Institutions will fix the fee of the Arbitrators as specified in Schedule IV of the Act. The Institutions have to complete appointment within 30 days from the date of receipt of request for appointment of Arbitrator.

**Fees for Arbitrators:** The amending Act directs parties to follow Schedule IV of the Act for adhoc arbitrations, if the parties do not have a pre-decided arbitration Fee schedule. But the said fee schedule shall not be applicable to Institutional Arbitrations, in which arbitral institutions may fix a lower or a higher fee schedule. Hence, the Act expressly recognises the party autonomy regarding fixing of arbitrator fees jointly by the parties.

**Timelines for conclusion of Arbitration Proceedings:** The Act, provided for a 12 months’ period for conclusion of the arbitration proceedings from the date of formation of the Arbitral Tribunal. In addition to that parties had the power to jointly extend the above said period by 6 months and if more time is required only Courts had the power to extend the time. The said law was applicable to India seated International Arbitrations also. But the 2019 Act relaxes the time lines by calculating the said 12 months from the date of completion of pleadings. Completion of pleadings means filing of the Statement of claim (SOC) & Statement of Defence (SOD). The said completion of pleadings should be completed within 6 months from the date of formation of the Tribunal. The 2019 Act also gives an exemption to the international arbitrations seated in India from the said timelines.

**Interim orders by Arbitral tribunals:** As per Section 17 of the Act, Arbitral tribunals could pass interim orders at any time from the date of formation till the award is executed under Section 36 of the Act. But the Arbitral tribunal becomes functus officio after passing the award and

hence, 2019 amendment restricts the power to pass interim orders only till the passing of the award. Hence, if a party requires an interim protection after passing of the award, it requires to approach the appropriate court having powers under S.9 of the Act. Hence application under Section 9 of the Act, can be entertained by the Courts either prior to formation of Arbitral tribunals or after passing of the award.

**Furnishing of Additional Proof in S.34 Proceedings:** The Act, provided for a requirement of “furnishing of proof” in support of the grounds taken in the Section 34 application. The said provision was wrongly understood by courts and demanded the parties to furnish additional proof. But, Supreme Court of India recently settled the law holding that the Courts should confine their examination only to the arbitral records while exercising their powers under Section.34 of the Act. Hence, in the line of the above said Judgment, in S.34 the words “furnishes proof” are replaced by the words “establishes on the basis of record of the Arbitral tribunal”.

**Confidentiality of proceedings:** The 2019 Act, provides that all details of arbitration proceedings will be kept confidential except for the details of the arbitral award in certain circumstances. Disclosure of the arbitral award will only be made where it is necessary for implementing or enforcing the award. Hence, India joins the list of countries that keep arbitration proceedings confidential.

**Applicability of Arbitration and Conciliation (Amendment) Act, 2015:** The 2019 Act clarifies that the 2015 Act shall only apply to arbitral proceedings which started on or after October 23, 2015.

**Qualification for Arbitrators:** The 2019 Act prescribes qualification for Arbitrators, which in the opinion of the author, is an unnecessary exercise taken by Government, because it will seriously affect the rights of the parties to choose the arbitrator of their choice, which is known as ‘party autonomy’ in arbitration. Moreover, the said Schedule VIII excludes Foreign lawyers, Foreign Chartered Accountants and Foreign Cost accounts from the eligible categories of persons who are eligible to be appointed as Arbitrators for India seated Arbitrations. Government of India promoting itself as a hub for international arbitration should have avoided defining eligibility for arbitrators. This provision is going to make a huge problem for the India seated International Arbitrations, if not amended immediately.