The impact of Arbitration and Conciliation (Amendment) Act, 2019

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Government of India to advance its dream of making India International Arbitration hub has brought in a few more changes to the procedural law of India Arbitration and Conciliation Act,1996 In addition to its effort to achieve the above said status it has come out with certain ideas to regulate the arbitration mechanism in India by creating a body Arbitration Council of India (ACI) to grade arbitral institutions and arbitrators, promote Arbitration, create awareness etc.,.In one way these amendments may streamline the arbitrations seated in India but on the other side too much control and regulation arbitration is taking India away from the internationally recognised best practices in Arbitration.

History of Arbitration in India: India became a signatory to New York Convention[2] and joined the global community to ensure reference to arbitration in case of disputes arising out of contracts having arbitration agreements and to enforce the arbitration awards arising out of the other member countries by a uniform procedure. India reserved its right to notify the territories recognized by it under the said convention based on reciprocity but this was the first milestone in the field of arbitration in India. It would be interesting to note that countries like UK (1975), USA(1970) and Singapore (1986) adopted New York Convention much later than India.

On 21.06.1985, United Nations Commission on International Trade Law adopted UNCITRAL model law[3] (United Nations document A/40/17, Annex-I). The above said model law was promoted by UNCITRAL to all countries more specifically the member countries of the above said New York Convention. The objective of promoting the above said model law was to create a uniform dispute resolution system globally to facilitate international trade. As of now, 74 states have adopted model law as the procedural law of their country.
At that point of time India had Arbitration Act[4] enacted in 1940 which was not efficient and was not in line with the Model Law also. India adopted the above said UNCITRAL model law with certain modifications so that the procedural law serves as a model or legislation on domestic arbitration as well as international arbitration. The above said law respected party autonomy in a big way and allowed parties to choose the number of arbitrators,

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[2] Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958

[3] UNCITRAL Model Law on International Arbitration,1985

[4] Arbitration Act,1940

appointment procedure, fee of the arbitrators, seat of arbitration, language of arbitration, procedural law, substantive law and law governing the arbitration agreement etc., jointly at the time of entering the arbitration agreement. The Act recognized the neutral governing law and neutral seat principles. Hence, the objective of the above said law was to join the global arbitration mechanism without creating any special provision that would hamper from India being chosen as a favorable arbitration seat by the parties from different countries. The said law also took special caution in ensuring minimum interference by the supervising courts. From the above it can be understood that India has been consistently aligning itself in line with the International requirements of international Arbitration.

The following are the major changes brought in by the Arbitration and Conciliation (Amendment) Act,2019.

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 is expected 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.

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 should 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. This amendment brings in a confusion since the Supreme Court of India has held that the said Amendment shall be applicable for arbitrations if there commended on or after 23rd October 2015 and also to court proceedings if they were commended on

or after 23rd October 2015, in the case of BCCI Vs Kochi Cricket Limited[5]. Based on the above Judgment various courts in India while admitting S.34 applications have ordered for pre-deposit of a certain percentage of award amount. Now because of this Amendment, uncertainty, inefficient enforcement mechanism and unnecessary increase of litigation would continue.

Disqualification of Foreign Arbitrators in India seated Arbitrations: 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 Charted 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. The Author of this article has challenged this Schedule by way of a Writ Petition in the Supreme Court of India and it is expected to be heard in the 2nd week of November 2019.

[5] (2018) SCC(6) 287