



## The ripening of arbitration in India

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### Abstract

The theory of 'Arbitration' is fundamentally a legal alternative to the process of litigation wherein, parties to the agreement assents to bow their disagreements to one or more arbitrators to resolute their dispute/variances. The object of arbitration is to obtain a fair and just resolution of disputes between the parties by an impartial/independent third party without unnecessary delay. It allows the parties to choose an exclusive mechanism for dispute resolution rather than an extensive, expensive and prolonged procedure of court litigation. This article establishes the precise meaning of the phenomenon of "Arbitration" and also outlines the advancement of the same in India, since its inception.

**Keywords:** arbitration, arbitral award, model law, history/development of arbitration in India, party autonomy

### Introduction

*"Arbitration, an act of arbitrating. The investigation and determination of a cause by an unofficial person, or by person mutually chosen by the contending parties."*

Joseph E. Worcester <sup>[1]</sup>

The definition of Arbitration since its foundation has been subjected to constant amendments by various philosophers. However, the definition in layman terms can be structured as a private mechanism where disputing parties to the agreement agree that one or several individuals, known as arbitrators, can make a binding decision about the dispute after receiving substantial evidences and hearing arguments from both the contracting parties. It is a quicker, simpler and more economical way to settle disputes outside the courts, thereby saving time, money and resources at the same time. Besides this, the working of the arbitration legislation is made with such an intention to minimise judicial intervention in the arbitral proceedings, relieving the strain on an overburdened legal system while providing disputants with a somewhat informal method of resolving their differences. Moreover, the decision of the Arbitrators, known as an award, is final and binding on both the parties, resulting in less chance of disobeying the award. As a result, parties who want a prompt and rapid solution to their dispute prefer to settle their grievances here. The law of Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. However, in *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Other* <sup>[4]</sup>, the Supreme court distinguished some of the non-arbitrable disputes by stating that the classes of actions that operates *in rem* which are rights exercisable against the world can be adjudicated only by courts and public tribunals and not by the arbitrators. In the said case, the Supreme Court set down certain examples of non-arbitrable disputes such as

1. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
2. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child

custody;

3. matters of guardianship;
4. insolvency and winding up;
5. testamentary matters, such as the grant of probate, letters of administration and succession certificates;
6. eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute; and
7. Disputes relating to trust, trustees and beneficiaries arising out of a trust deed.

### On the Indian Historical Horizon

History has been the witness that the principal of Alternate Dispute Resolution has its genesis from the ancient India. Since time immemorial, it was well known practise of resolving a dispute by raising it before a third person. It gained its statutory recognition from the phase where the elders of the village sat under a tree to settle disputes between the villagers. In such scenarios, any of the parties to the dispute, if not satisfied with the former's decision, then they could go on an appeal to the Court of law and ultimately to the King itself. There was, in fact, a provision for appeals of arbitral awards to the higher authorities. In addition to that, there was a grading system in place for the arbitrators. Even the ancient texts of Yajnavalka, depict the three types of popular court (Puga, Sreni, Kula) in addition to the regular official courts. Moreover, Narada states that law suits may be decided by the village councils (Kulani). Sreni means 'corporations' and Puga means 'assemblies. All these, at that point of time, were a prevalent form of alternate dispute resolution that flourished before the beginning of British rule <sup>[5]</sup>. In the British period, arbitration was recognised by the Bengal Regulation of 1772, 1780, 1781 and the Cornwallis Regulation of 1787, which continued with the Regulation of 1793, the Madras Regulation of 1816 and the Bombay Regulation of 1827. Eventually, in 1859, the Civil Code of the courts was codified with arrangements for arbitration. This was trailed by the Codes for Civil Procedure (CPC) of 1877 and 1882 <sup>[6]</sup>. Be that as it may, there was no significant change in the

law identified with arbitration in these amendments. Following that, the Indian Arbitration Act of 1899 was enacted, but this made no difference to the issues at the heart of the lawsuits. It handled arbitration by agreement without the intervention of the court, and this was only in presidential towns. Further, it didn't permit arbitration in disputes which were being adjudicated through a suit. Following that, in the mid-twenties, the Civil Justice Committee was formed to report on the machinery of 'Civil Justice' in the Country. The committee made suggestions for modification of arbitration laws. However, owing to anticipation of taking cues from the British Arbitration Laws, the Britishers, eventually in 1938, designated an official to reconsider the previous Arbitration Law, which was deemed voluminous and complicated. As a result, the primary Arbitration Act for the country was enacted in 1940. The enactment of the empowered amended arbitration act in the year 1940 is considered to be a significant year in the history of the law of arbitration. The amended act was a consolidated and amended law relating to arbitration as contained in the Indian Arbitration Act, 1899 and the second schedule of the Code of Civil Procedure 1908. It was largely based on the English Arbitration Act, 1934 and came into force on 1<sup>st</sup> of July, 1940. It was mainly amended with the intention of providing for a simple, speedy and less expensive alternative system of dispute resolution without the inter reference of the Court. However, the 1940 Act dealt only with domestic arbitration, but was silent on the enforcement of foreign awards. As a matter of fact, a separate law, the Foreign Awards (Recognition and Enforcement) Act, 1961 applied to the enforcement of awards under the Geneva Convention, 1927 and the New York Conventions, to which India was a signatory. Moreover, the intervention to the court is necessary in all the three stages of arbitration in the tribunal, i.e., prior to the reference of the dispute, in the course of the proceedings, and after the award has been passed. Eventually, the act lost its essence as delays in settling disputes and court intervention hindered the very purpose of arbitration as a means for expeditious resolution of the disputes. After the functioning of this Act was discovered to be unsatisfactory, the Law Commission of India criticized various questions related to practical difficulties which obstruct the smooth functioning of arbitral procedures. Eventually, the Law Commission recommended amendments to certain provisions of the Act rather than reworking the entire framework.

### **The Need of the Moment**

The UNCITRAL Secretariat, the Asian African Legal Consultative Committee (AALCC), the International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce (ICC) held a meeting to initiate steps leading to the establishment of uniform standards of arbitral procedure in the interest of International Commercial Arbitration<sup>[7]</sup>. The planning of a Model Law on arbitration was viewed as the most appropriate approach to accomplish the ideal uniformity throughout the globe. The full content of this Model Law was adopted on 21st June, 1985 by UNCITRAL<sup>[8]</sup>. This is a striking inheritance given by the United Nations to International Commercial Arbitration, which has also guided the Indian Law. India, adopted the Model Law in its entirety in the 1996 Act.

On the other hand, despite the best efforts of the legislature to make India a centre of arbitration, the 1940 Act suffered from various drawbacks. The Act proved to be an ineffective framework which included high costs, delayed resolution and too much intervention by the Courts. The Act did not comprehensively cover international and commercial arbitration along with domestic, resultant in its inability to attract foreign investments/investors, the reliability of the Indian legal system to provide a swift dispute resolution mechanism. The Indian trade and industry also urge for drastic changes in the stipulations of law.

Along with the above discrepancies, India, in 1991, with the value of the rupee plunging to new lows, the current account deficit at an all-time high and inflation running at nearly a ten-percent annual clip, is in serious economic trouble. As a result of all these problems, India has sought to reform its foreign investment policy. The economic collapse triggered many changes in India, its government, and its economy. With the adoption of the New Industrial Policy 1991 (NIP)<sup>[9]</sup>, India took steps to relieve industry of its industrial policies and overregulation. This was a significant step in attracting foreign investment and opening India to the world. The objectives of the NIP were to attract foreign investment by releasing industry from the bonds of India's restrictive administration and to upgrade the country's technology but allowing foreign ventures. The new trade policy encouraged exports and made imports simpler. The Government has allowed numerous tax incentives to encourage investment and development. Also, privatization of many sectors of the economy was permitted. From the arbitration perspective, the government sought to initiate the reworking of the erstwhile laws of arbitration to address the problems of enforcement and reduce opportunities for judicial intervention in arbitration in India. The government believes that the stronger the legislation in the country after privatization will encourage more foreign investment in India. With this view, the government, in 1995, appointed a committee to examine the history and the laws formerly governing arbitration in India. Consequently, the Arbitration and Conciliation Act, 1996, based on the 1985 United Nations International Commission on International Trade Law (UNCITRAL) model law and rules, was enacted<sup>[10]</sup>.

### **The Advent of the Arbitration and Conciliation Act, 1996<sup>[11]</sup>**

The new act of 1996 has given rise to a total transformation of the Arbitration law of India. Its intention was to promote arbitration as a cost and time-effective system for the settlement of disputes by correcting the deficiencies noticed in the earlier Act. The act was enacted to consolidate and amend the law relating to domestic arbitration, International commercial arbitration, enforcement of foreign arbitral awards, and also to define the law relating to conciliation and to matters connected therewith or incidental thereto. Moreover, the new legislation is intended to develop confidence among foreign parties interested in investing in India or in going for joint ventures, foreign investment, the transfer of technology and foreign collaborations. The Act is a self-sufficient code as it contains both the substantive and procedural aspects of arbitration in India by laying down the procedure for admission, termination and conduct of proceedings as well as the rules regarding jurisdiction, evidence and filing of an appeal. The act is divided into four parts: Part I of the Act lays down rules for domestic

arbitration which can only be applied if the seat or place of arbitration is within the territorial limits of India. Part II of the Arbitration and Conciliation Act defines a foreign award and provides the manner/mode for the execution of a foreign award. It is largely restricted to the enforcement of foreign awards governed by the New York Convention or the Geneva Convention. Part II is, thus, (by its very nature) not a complete code. Part III provides for the rules regarding conciliation and Part IV contains certain supplemental provisions <sup>[12]</sup>.

### **Salient features of the Arbitration and Conciliation Act, 1996**

The following are some of its salient features:

#### **Replacement of three old statute**

The Act was enacted to consolidate, define, and amend the law in relation to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards, repealing all three previous statutes previously in force- the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1940.

#### **Arbitration agreement as *Sine Qua Non* condition**

The arbitration agreement serves as the foundation for the parties to submit all disputes that have arisen or may arise between them to arbitration. Thus, the parties can make a provision for arbitration at the time of contracting, with the intent that if a dispute arises in the future, the dispute can be referred to an arbitrator in accordance with the agreement. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement must be in writing and must be signed by both parties.

#### **Doctrine of party autonomy**

Various provisions of the Act give paramount importance to party autonomy as parties can decide the number of arbitrators and their appointment, and also determine the rules of procedure, place of arbitration, language of arbitration and rules applicable to the substance of the dispute.

#### **Appointment of an Arbitrator**

The Act provides that the parties are free to determine the number or the appointment of the arbitrator or arbitrators. They can mutually agree on a procedure for arbitrators. However, if the parties fail to do so, then each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as the presiding arbitrator. Further, if one of the parties does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint a third arbitrator within 30 days, the party can request the Chief Justice to appoint an arbitrator. The Chief Justice can authorize any person or institution to appoint an arbitrator.

#### **Interim Measures <sup>[13]</sup> of Protection**

The arbitration law delegates the arbitral tribunal to make orders for interim relief measures. Indian law on arbitration also provides that in cases where the dispute is arbitrable, a party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is

enforced, either party may apply to a court for interim measures of protection or to provide appropriate security in connection with the measures ordered.

#### **Minimal Interference of the Court of law**

One of the basic objectives behind the enactment of the Arbitration and Conciliation Act, 1996 was to reduce the scope of judicial intervention. The law was written in such a way that the party could easily access the court almost at any stage of the arbitration and stall the arbitral proceedings simply by disputing the arbitral proceeding and obtaining a stay order on the enforcement of the arbitral award. As a result, the courts have developed a culture of overseeing arbitration proceedings rather than elevating arbitration to the status of an alternative dispute resolution mechanism. However, by enacting this act, the approach to the court has been limited to the conditions in the Act and nothing else. In some cases, if an objection is raised by the party, the decision on that objection can be given by the Arbitral Tribunal itself. The arbitration proceedings have continued following the decision, and the aggrieved party may approach the court only after the Arbitral Award is issued. Appeals to the court are now only permitted on limited grounds. Of course, the Tribunals cannot be given unrestricted powers, and the courts' supervision cannot be eliminated entirely.

#### **Law of Limitation Applicable**

The law of limitation is essentially a statute in the civil law system, which prescribes a period, maximum or minimum, before or after the occurrence of an event, in which legal action can be commenced. According to Section 43 (1) of the Act <sup>[14]</sup>, "the Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to court proceedings. The application of the Limitation Act is intended to determine the limitation of a dispute, such as the commencement of arbitration proceedings or the applicability of the Limitation Act to arbitration proceedings. For example, if an arbitration is not commenced by issuing a notice for arbitration within the limitation period from the date of accrual of the right to sue, then the claim will become a time-barred claim.

#### **Reasoned arbitral award**

An arbitration award or arbitral award is a determination on the merits by an arbitration tribunal in an arbitration, and is analogous to a judgment/decision in a court of law. Unlike the previous law of arbitration, it must state the reasons for the award unless the parties have agreed that no reason for the award is to be given. The award should be in writing and signed by the members of the tribunal. The award should be dated and the place where it was made should be mentioned. Copies of the award should be given to each party. An interim award can also be made by the tribunal.

#### **Finality of arbitral award**

Every award passed by an arbitral tribunal is final and binding on the parties unless challenged and set aside in the case of domestic and foreign arbitration. There can be no appeal against the award and the only recourse available against it is to challenge the award on the limited grounds provided under the act.

#### **Enforcement of arbitral award**

An arbitral award is enforceable in the case of domestic

arbitration and in the case of foreign arbitration, in the same manner as if it were a decree of the Court.

As indicated above, the Act of 1996 was enacted with the primary purpose of providing speedy and effective resolution of disputes through arbitration with the intent to reduce the burden on the courts, and to do so, the legislature did its best to attain the goals of the act. However, since its enactment, it has experienced many challenges which led to various practical problems on the road to making India an arbitration hub. Observing the lacunas of the earlier arbitration regime, the Law Commission of India submitted its 246th report <sup>[15]</sup> in August 2014, recommending numerous changes to the Arbitration Act. Ultimately, on 23 October, 2015, the President of India promulgated an ordinance to bring crucial changes into force to overcome the shortcomings. However, the amendments were proposed through an ordinance which ultimately led to a lot of confusion and uncertainty. Therefore, the legislature reworked and transformed them into the Arbitration and Conciliation (Amendment) Act, 2015.

### **The Revamped of the Arbitration and Conciliation (Amendment) Act, 2015 <sup>[16]</sup>**

Almost two decades later, amending the Act by the legislature is the most appreciated action in order to provide the much-needed power for the growth of the Indian arbitration regime. The amended act came into force on 23rd October, 2015 with a view to facilitating the enforcement of contracts in an effective manner, speedy recovery of claims, reducing the burden of cases in the courts and simplifying the process of dispute resolution through arbitration, so as to attract foreign investments by projecting India as an investor-friendly country having a sound legal structure.

### **Reforms brought by the Arbitration and Conciliation (Amendment) Act, 2015**

#### **Exclusive Jurisdiction of High Court over matters of International Commercial Arbitration**

Above all, the most welcome amendment introduced is with respect to the definition of the expression 'Court'. The amended act clears up the ambiguity between international commercial arbitration and domestic arbitration with regard to the definition of 'court'. The amendment bifurcates the definition and clearly sets out that, unlike other arbitrations, in the context of international commercial arbitration, only the High Court, exercising its ordinary original civil jurisdiction, will qualify as a "Court". Accordingly, as per the new law, for the purpose of International commercial arbitration, the district court will have no jurisdiction to hear appeals from decrees of courts subordinate to it and the parties can expect speedier and efficacious determination of any issue directly by the approaching high court, which is better equipped in terms of handling commercial disputes.

#### **Power of the Court to refer parties to arbitration**

The amended law mandates judicial authorities to refer the parties to arbitration when there is a valid arbitration agreement, unless it finds prima facie that no arbitration agreement exists. Section 8(1) of the Act <sup>[17]</sup> has been amended to state that, notwithstanding any judgment, decree, or order of the Supreme Court or any other court, the judicial authority shall refer the parties to arbitration unless it finds that no valid arbitration agreement exists prima

facie. According to the purpose of amending this section, the courts, before making such referrals, are now discouraged from irrationally referring parties to arbitration unless the Court satisfies itself that all parties to the said action are parties to the arbitration agreement, and that the arbitration agreement is not null and void, prima facie. A provision has also been made for the party who applies for reference to the matter to arbitration, to apply to the Court for a direction of production of the arbitration agreement or certified copy thereof in the event the party applying for reference to the disputes to arbitration is not in the possession of the arbitration agreement and the opposite party has the same.

### **Expansion of the power of arbitral tribunal to grant interim measures**

The new act, unlike the previous act, enhanced the powers of the arbitral tribunal to grant interim measures of protection during the arbitral proceedings or at any time after making the arbitral award, but before it is enforced. The intention behind this was to empower the arbitral tribunal and reduce court intervention. It states that once the tribunal is constituted, an application for relief must be made only to such a tribunal, unless the party seeking such relief can prove that the arbitral tribunal is unable to provide a similar effective remedy. Further, any order issued by the arbitral tribunal for the grant of interim measures shall be deemed to be an order of the court, and shall be enforceable in the same manner as if it were an order of the court, under the Code of Civil Procedure, 1908. Furthermore, a time-bound procedure has also been introduced whereby when the court passes any interim measure under the said Section, the arbitral proceedings must commence within 90 days or within a time period specified by the Court of the passing of such interim measures. In addition, following the landmark judicial decision of the Supreme Court of India in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services, Supreme Court* <sup>[18]</sup>, which held that Part I of the Act (which includes provisions on seeking interim relief before a Court in India, among other things) would not apply to foreign arbitrations. It depicts the major lacuna in the context of offshore arbitration as it creates a bar on Indian courts granting interim relief to the matters where the seat of arbitration is not in India. However, the amended act resolves this issue by inserting a proviso to Section 2 of the Act, which makes Sections 9 (granting of interim relief), 27 (collection of evidence), and clauses (a) of sub-section (1) and (3) of Section 37 <sup>[19]</sup> (appealable orders) applicable to international commercial arbitrations, even if the place of arbitration is outside India. Therefore, even if the seat of such an arbitration is not in India, a party to an arbitration proceeding will be able to approach the court in India for interim relief before the commencement of an arbitration proceeding.

### **Appointment of Arbitrators**

In terms of the appointment of arbitrators in section 11 of the previous act, if the parties or co-arbitrators are unable to reach an agreement to appoint arbitrators, they can only apply to the Chief Justice of India and the Chief Justice of the High Court for such an appointment. However, the amended law delegates the said power to the Supreme Court or the High Court or a person designated by them to appoint such arbitrators. As per the new Act, the expressions 'Chief

Justice of India' and 'Chief Justice of the High Court' used in earlier provisions have been replaced by the Supreme Court or, as the case may be, the High Court, respectively. Moreover, unlike the Principal Act, the New Act provides that an application for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court as expeditiously as possible, and an endeavour shall be made to dispose of the matter within 60 days from the date of service of notice on the opposite party. Furthermore, the judgement of the Supreme Court or the High Court is final, and only a Special Leave Petition to the Supreme Court can be filed in response to such an order for the appointment of an arbitrator.

#### **Grounds for Challenge for independence of arbitrators**

The amended Act ensures the neutrality of arbitrators, such that, before the appointment of an arbitrator by the court, a person who is approached in connection with the possible appointment of an arbitrator is required to disclose in writing his independence and impartiality towards the existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. As a result, the act adopts the IBA Guidelines on Conflicts of Interest in International Arbitration<sup>[20]</sup> as a set of norms. The Fifth and Seventh Schedules have been added as a guide to determining the circumstances of the arbitrator's ineligibility. According to the said Act, such a person must also reveal any circumstances that may jeopardise his capacity to spend adequate time on the arbitration and complete it within the period of 12 months or the time frame set therein.

#### **Time Bound Procedure for Arbitral Proceedings**

The Amended Statute intends to provide for time-bound arbitration in response to complaints that India's arbitration regime is a long-drawn-out procedure that defies the very existence of the arbitration act. The arbitral tribunal must make an award within 12 months of the date it enters upon reference under the amended laws. This period can be extended by the parties for up to another 6 months with their mutual consent, after which the arbitrator's mandate will expire unless the Court extends it for reasonable cause or on such other terms as it sees suitable. The arbitral tribunal has been vested with the power to impose heavy costs for adjournments without sufficient cause. In addition, when extending the timeframe, the Court may mandate a reduction in the arbitrator's costs of up to 5% for each month of delay due to the arbitrator's fault. In addition, the application for a time extension must be decided by the Court within 60 days after the date of notice to the opposing party. The amended law also states that parties may opt for a fast-track approach to resolving a dispute at any stage of an arbitral action, in which case the tribunal must issue an award within six months. Unless the parties request it or the tribunal thinks it necessary to explain particular matters, the tribunal will adjudicate the dispute on the basis of written pleadings, documents, and submissions provided by the parties. If the tribunal resolves the case within six months, additional fees may be paid to the arbitrator with the parties' approval.

#### **Grounds for Challenging of an arbitral award**

The reasons for setting aside a judgement are limited, and they mostly concern the arbitration procedure and natural

justice principles. The introduction of expression in regards to the scope of public policy is possibly the most abused provision in the Act. As per the new amendment, an award passed in an international arbitration can only be set aside on the ground that it is against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention of the fundamental policy of Indian law; (iii) it is in conflict with the basic notions of morality and justice. The amendment makes it clear that the additional ground of "patent illegality" can only be used to challenge an arbitral award in domestic arbitration, not international arbitration. In February 2015, the Law Commission submitted its Supplementary Report, whose recommendations were accepted and incorporated through the insertion of Section 2A of the Act, in response to the Supreme Court's decision in *ONGC Limited v. Western Geco International Limited*<sup>[21]</sup> (which expanded the scope of "public policy" to include the Wednesbury principle of reasonableness<sup>[22]</sup>, requiring a review of the merits of the arbitral award). In terms of this amended provision, an award cannot be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence. The amended Act further stipulates that an application for the setting aside of an award can only be brought after the opposite party has been given prior notice. Along with the application, the party filing it must provide an affidavit attesting to compliance with the need for prior notice to the other party. The application under Section 34 of the Act has a one-year time limit for disposal from the date of service of the advance notice on the other parties. Significantly, the new Act has no provision for the court or the parties to extend the one-year deadline for deciding the application under Section 34 of the Act.

#### **No Automatic stay of the arbitral award when the award is challenged**

The amended law intends to close a loophole in the previous Act, which allowed for an automatic stay of an arbitral award simply by filing a challenge petition against it. The court would eventually take several years to decide the petition, making the arbitration procedure inefficient and time-consuming. An award is not automatically stopped by filing an application to set aside the award under Section 34 of the Act, according to the Ordinance. If an application is made for the purpose by one of the parties, the Court must issue a particular order staying the execution of the award. As a result, the Court is now obligated to record grounds for granting a stay, and the CPC has been applied. This means that the losing party will be obliged to deposit a portion or the entire amount of the arbitral award, as determined by the court. Since the passage of the Arbitration and Conciliation Act of 1996, the Indian legislature has demonstrated its desire to keep up with the growing popularity of arbitration as a preferred mode of dispute resolution in commercial matters, for which the legal framework surrounding arbitration in India has undergone a paradigm shift in recent years. The 2019 Amendment Act is, without a doubt, a step toward making India a more arbitration-friendly country. The government began these efforts in 2015 with the introduction of The Arbitration and Conciliation (Amendment) Act, 2015, which was the first step towards amending the 1996 Arbitration and Conciliation Act.

#### **The Reformation of the Arbitration and Conciliation**

**(Amended) Act, 2019** <sup>[23]</sup>

The amendment to the Act of 2019, which got the President's assent on August 09, 2019, makes significant modifications, some of which are detailed in this article.

**Establishment of an Arbitration Council of India**

The 2019 Act envisages the establishment of an independent body called the Arbitration Council of India ('Council') in order to promote institutional arbitration in India. The Supreme Court (in the circumstances of international commercial arbitration) and the High Court (in cases of arbitration other than international commercial arbitration) have the authority to appoint arbitral institutions. A newly formed Arbitration Council of India will rate these arbitral institutes. In the absence of a graded arbitral institution, the Chief Justice of the relevant High Court may appoint a panel of arbitrators to carry out the tasks and duties of an arbitral institution. The Chief Justice has the authority to review the panel of arbitrators from time to time. The arbitral institution will decide on the appointment of an arbitrator or arbitrators within 30 days of receiving notice from the other party. The fees and method of payment to the arbitral tribunal will also be determined by the arbitral institution. The Council's responsibilities include promoting and encouraging arbitration and all other forms of alternative conflict resolution, as well as developing a policies and guidelines for the formation, operation, and maintenance of uniform professional standards in arbitration. The Council is required to grade arbitral institutions based on criteria such as infrastructure, arbitrator quality and performance, and adherence to time constraints for the resolution of domestic and international commercial arbitrations.

**Appointment of Arbitrator**

The Council also has the authority to examine arbitrator grades, which are governed by the Indian Arbitration and Conciliation Act 1996's Eighth Schedule, which specifies the qualifications, experience, and norms for arbitrator accreditation. The Eighth Schedule lists nine types of arbitration credentials, including being an Indian advocate, chartered accountant, cost accountant, or company secretary with a specified level of expertise. The Eighth Schedule also lays forth the general requirements for an arbitrator, which include, among other things, having a good reputation for fairness and honesty, being impartial and unbiased, and not having any conflicts of interest. However, the conditions outlined in the Eighth Schedule exclude foreign registered lawyers and retired foreign officers from serving as arbitrators. The concept is that instead of the Honourable Courts appointing arbitrators in circumstances where the parties cannot agree, the courts will assign the responsibility to arbitral institutions graded by the Arbitration Council of India.

**Time limits for completion of Arbitral proceedings**

The Amendment Act establishes deadlines for filing pleadings, issuing arbitral awards, and granting time extensions. As per the newly introduced Section 23(4) of the Act, parties to an arbitration must finish their pleadings (statements of claim and defence) within six months of the day the arbitrator(s) gets written notice of their appointment. Further, in cases other than international commercial arbitrations, the arbitral tribunal must pass an award within

twelve months of the completion of pleadings, according to the modified Section 29A of the Act. The proviso to this section specifies that in the instance of an international commercial arbitration, an award may be made as quickly as feasible, and every effort should be taken to conclude the proceedings within twelve months of the pleadings being completed. However, time spent submitting a response [in cases where there are no counterclaims] or a reply to a counterclaim (in circumstances where there are counterclaims) is not counted as time spent completing the pleading under Section 23 (4) of the Act. Furthermore, if an application for a time extension is pending, the arbitrator's mandate will be extended until the application is resolved.

**Confidentiality**

As per the newly introduced Section 42A of the Act, introduced the concept of confidentiality in the Indian Arbitration regime, as per which the parties are required to maintain confidentiality of all arbitral proceedings except in case where such disclosure is necessary for implementation and enforcement of the award.

**Applicability of Arbitration and Conciliation Act, 2015**

In order to resist the conflict between section 26 and 87 of the Act, the amended act deleted the former and inserted the latter to explain that the 2015 Amendment Act applies in the following circumstances:

- Arbitrations that began on or after the 23rd of October 2015, the date on which the 2015 Amendment took effect; and
- Court procedures arise out of or in relation to such arbitral proceedings.

The Amendment Act makes it clear that it only applies to arbitral proceedings that began on or after October 23, 2015, as well as any court proceedings that arise from those arbitral proceedings. The amended law aims to overrule the position laid out by the Supreme Court's decision in the *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.* <sup>[24]</sup> The Supreme Court ruled in the aforementioned case that Section 26 of the Act would apply to arbitrations and court proceedings that began after October 23, 2015. It also stated that the amended Section 36 of the Act would apply to all proceedings, essentially removing the automatic stay on award enforcement following the filing of a set aside action, which had been a problem for arbitration.

**The Arbitration and Conciliation (Amendment) Act, 2020** <sup>[25]</sup>

Once again, the Arbitration and Conciliation (Amendment) Act, 2020 was proclaimed by the President of India on November 4, 2020, amending sections 36 (Enforcement) and 43-J (Norms for accreditation) of the Arbitration and Conciliation Act, 1996. The Act also omits the Arbitration Act's eighth schedule, which deals with arbitrator qualifications and experience.

Following are the changes:

**Unconditional stay of enforcement of arbitral award if the court finds fraud or corruption**

A proviso to Section 36 of the Act has been added, stating that where a prima-facie case of fraud or corruption has been established, the Court must give an unconditional stay. If the agreement or award is contested and proven to be

influenced by fraud or corruption, an unconditional stay will be issued. This amendment only applies to challenges to Indian-seated awards; it does not apply to international arbitral awards, which are administered by a separate part of the Arbitration Act. According to section 48 of the Arbitration Act, Indian courts have the authority to refuse implementation of a foreign arbitral award if they conclude that the award was inspired or influenced by fraud.

### Accreditation of arbitrators

The Arbitration and Conciliation (Amendment) Act, 2019 required the establishment of an independent body, the Arbitration Council of India, to recognise professional institutions that accredit arbitrators (section 43-J). Section 43-J of the Act is covered by Part I-A and has yet to take effect. The eighth schedule of the Amendment Act of 2019 includes broad rules for arbitrator accreditation, including the following:

- The arbitrator must be impartial and neutral.
- The arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, making and enforcing arbitral awards, domestic and international legal system on arbitration and international best practices.
- The arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

As a result, the Act's Eighth Schedule, which deals with an arbitrator's qualifications and experience, has been substituted for qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.

### The Present Act- Arbitration and Conciliation (Amendment) Act, 2021 <sup>[26]</sup>

Further, the Arbitration & Conciliation (Amendment) Act, 2021 is a recent addition in order to make India an arbitration hub. The Act has two major changes as a result of the modification. The first is to allow awards to be automatically stayed in certain circumstances if the court finds prima facie evidence that the contract on which the award is based was tainted by "fraud" and "corruption."

### Automatic stay on awards

The 1996 Act allowed a party to file an application to set aside an arbitral award (i.e., the order given in an arbitration proceeding). Courts have interpreted this provision to mean that an automatic stay on an arbitral award was granted the moment an application to set aside an arbitral award was filed in court. In 2015, the Act was amended to state that an arbitral award would not be automatically stayed merely because an application was made to a court to set aside the arbitral award. The amendment specifies that a stay on the arbitral award can be provided (even during the pendency of the setting aside of the application) if the court is satisfied that: (i) the relevant arbitration agreement or contract, or (ii) the making of the award, was induced, or effected by fraud or corruption. This change will be effective on October 23, 2015.

### Qualifications of arbitrators

The Act specified certain qualifications, experience, and

accreditation norms for arbitrators in a separate schedule. The requirements under the schedule include that the arbitrator must be: (i) an advocate under the Advocates Act, 1961 with 10 years of experience, or (ii) an officer of the Indian Legal Service, among others. Further, the general norms applicable to arbitrators include that they must be conversant with the Constitution of India. The Bill eliminates the arbitrator schedule and states that the qualifications, experience, and standards for arbitration accreditation will be specified in regulations.

### Conclusion to Development

The Arbitration and Conciliation Act, 1996 in India has been subject to numerous amendments in an attempt to make India a pro-arbitration centre and an effective commercial destination by establishing a comprehensive dispute resolution framework that improves the ease of doing business in India. Thus, after examining the various aspects of the legal mechanism, I conclude that the amendments made by all acts will be a millstone for Indian business growth, and we hope that they will play a significant role in resolving disputes in a timely and expedient manner between various industries, whether international or domestic.

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  13. Under Section 9, the court has wide powers to grant interim measures of protection as may appear to the court to be just and convenient, including for preservation, interim custody or sale of goods which are the subject matter of arbitration, for securing the amount in dispute, interim injunction, appointment of a receiver or guardian, etc.
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