Lexis®PSL ARBITRATION

India—emperor's new clothes? Arbitration and Conciliation (Amendment) Bill 2019

First published on Lexis®PSL Arbitration on 02/08/2019

Arbitration analysis: The Arbitration and Conciliation (Amendment) Bill, 2019 (2019 Bill) was introduced in the Rajya Sabha on 15 July 2019. The 2019 Bill was passed by the Rajya Sabha on 18 July 2019. This follows the Arbitration and Conciliation (Amendment) Bill, 2018 (the 2018 Bill) which was passed by the Lok Sabha on 10 August 2018 and was pending before the Rajya Sabha. However, the 2018 Bill lapsed as the 16th session of the Lok Sabha was dissolved. The same 2018 Bill, albeit a few minor changes, has now been introduced as the 2019 Bill. Vyapak Desai, Ashish Kabra and Bhavana Sunder of the International Litigation and Dispute Resolution team at Nishith Desai Associates discuss this development.

For analyses on the 2018 Bill, see: Lord Goldsmith QC urges India to re-think arbitration proposal and India—proposed amendments to arbitration law: a solution with many problems.

What are the practical implications of this development?

The 2019 Bill is largely the same as the 2018 Bill. The 2019 Bill:

- seeks to establish an 'Arbitration Council of India' for the purpose of grading of arbitral institutions and accreditation of arbitrators
- proposes to amend the start date for the computation of the 12-month time-limit for completion of arbitral proceedings to the date on which the statement of claim and defence are complete
- exempts international commercial arbitrations from the 12-month time-limit
- further introduces provisions on confidentiality of arbitral proceedings and immunity for arbitrators
- prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule
- statutorily overrules *BCCI v Kochi Cricket* and clarifies that Arbitration and Conciliation (Amendment) Act, 2015 would apply only to such proceedings where the arbitration commenced post October 23, 2015

What are the salient features of the 2019 Bill?

The 2019 Bill continues to retain the shortcomings of the 2018 Bill and would significantly undo the progress made towards the growth of arbitration in the country.

The following are the salient features of the 2019 Bill, along with critical analysis:

Arbitration Council of India

The 2019 Bill proposes the constitution of an Arbitration Council of India (the 'ACI')(Part IA, 2019 Bill). The

ACI would have functions such as grading arbitral institutions, recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps for making India a centre of domestic and international arbitrations. This is based on the recommendations of the High-Level Committee Report issued on 30 July 2017 under the chairmanship of Justice B.N. Srikrishna (the 'Committee Report'). However, the Bill departs from the recommendations on the following aspects:

Constitution of the ACI

Committee Recommendation	**2019 Bill**
A retired judge of the Supreme Court of India or a High Court who has substantial experience dealing with arbitration matters or has acted as an arbitrator, nominated by the Chief Justice of India	A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India-Chairperson
An eminent counsel having substantial knowledge and experience in institutional arbitration, both international and domestic, nominated by the Central Government	An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government-Member
An overseas arbitration practitioner having substantial knowledge and experience in international arbitration **nominated by the Attorney General for India**	An eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be **appointed by the Central Government** in consultation with the Chairperson-Member
A nominee from the Ministry of Law and Justice	Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary-Member, ex officio
A representative of commerce and industry who will be chosen on a rotation basis by the Ministry of Commerce and Industry	Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary-Member, ex officio
	One representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government-Part-time Member
	Chief Executive Officer-Member-Secretary, ex officio

Functions & Power of ACI

Committee Recommendation	**2019 Bill**
Review grading of arbitration institutions	Review grading of arbitral institutions and arbitrators
Should not regulate institutional arbitration or arbitral institutes	Power given to frame regulations for discharge of its broadly framed functions and duties

The 2019 Bill departs from the recommendations of the Committee Report and provides the ACI with broad powers to frame regulations. As the Government is the largest litigator in India, the proposals of the 2019 Bill risk the independence of arbitration in India.

Appointment of Arbitrator

The Committee Report recommended amendments to section 11 of the Arbitration and Conciliation Act, 1996 (the ACA 1996) to ensure speedy appointment of arbitrators (see p6 of the Committee Report)). In light of this recommendation, the 2019 Bill proposes to provide the Supreme Court and the High Court with the power to designate arbitral institutions which have been accredited by the ACI. The Supreme Court and the High Court can designate the appointment of arbitrators to such arbitral institutions (paragraph 3, 2019 Bill). This amendment is in line with practices followed in other arbitration-friendly jurisdictions such as Singapore (ss 9A(2), 2(1) and 8(2), International Arbitration Act (Chapter 143a) (Singapore)) and Hong Kong (ss 13(2) and 24, Arbitration Ordinance, [1 June 2011] LN 38 of 2011 (Hong Kong)), wherein appointment of arbitrators is designated to the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC) respectively.

Timelines

Time-limit for Completion of Arbitral Proceedings

The 2015 Amendment had introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. The 2019 Bill seeks to change the start date of this time limit to the date on which statement of claim and defence are completed (paragraph 6(a), 2019 Bill). The 2019 Bill further proposes that the filing of the statement of claim and defence should be done within a period of 6 months from the appointment of arbitrator(s)(paragraph 5, 2019 Bill).

The introduction of an additional six-month period for completion of pleadings is because in the Committee Report it is noted that arbitrators felt that 12-month timeline should take effect post completion of pleadings. The Committee Report does not discuss the reason why arbitrators have given this suggestion. However, it can be understood that due to *due process* concerns, arbitrators are constrained from taking strong procedural decisions in relation to completion of pleadings. Time taken by the parties in completing pleadings therefore takes up most part of the 12-month time-frame, leaving a very short period for completion of rest of the process.

However, the resolution of this concern by providing a six-month time frame for completion of statement of claim and defence will result in the creation of more issues. For instance, it is very common in arbitration proceedings for parties to bifurcate the issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing of statement of claim and defence would deprive parties of such flexibility and would effectively require them to file their complete pleadings at the very outset of the arbitration proceedings. Further, it is difficult to ascertain at what stage filing the statement claim and defence be considered as completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defence, or where a counter-claim is filed.

Effectively, the proposed amendment gives an 18-month timeline for completion of arbitration. It may be prudent to increase the overall time frame to 18-months and arbitrators should be encouraged to not be overly worried about due process challenges and to take decisions for conduct of arbitrations in an efficient manner.

Exemption for international commercial arbitration

The ACA 1996 contains a 12-month (extendable to 18 month) timeline for completion of arbitration proceedings for both international commercial arbitration and non-international commercial arbitration. The 2018 Bill had suggested a blanket exemption from this statutory time-limit for international commercial arbitration.

The 2019 Bill also proposes this exemption from the time-limits for international commercial arbitration. However, the 2019 Bill has also proposed a non-binding a proviso to this exemption stating that the award in an international commercial arbitration may be made as expeditiously as possible and an endeavour may be made to dispose of the matter within 12 months from the date of completion of pleadings. While this provision does not contain mandatory language, it may act as a guidance to parties and arbitrators to ensure the arbitral award is rendered within a period of 12 months from the date of completion of pleadings.

It is pertinent to note here that the timelines stipulated under the Arbitration and Conciliation (Amendment) Act, 2015 have worked well in practice. An exemption may only be justified for institutional international commercial arbitration where there is an inbuilt safeguard in form of the soft influence that institutions have over the arbitrator and arbitration proceedings. Institutions typically have the power to extend timelines under their respective rules and can effectively monitor time limits. In such situations, court interference may not be required. Therefore, a more suitable exemption on applicability of the time-limit could have been one which is determined based on whether the arbitration is institutional or *ad-hoc* in nature, rather than whether it is an international commercial arbitration or a domestic arbitration.

Confidentiality

The 2019 Bill introduces a provision on confidentiality (s42A, 2019 Bill). However, the 2019 Bill fails to adequately consider the recommendations of the Committee Report:

Committee Recommendation	**2019 Bill**
A new provision may be inserted providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority.	Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

The inadequacy of exceptions to the confidentiality obligation will give rise to multiple issues. For instance, the following circumstances would require disclosure and would not strictly fall within the scope of the exception proposed in the 2019 Bill:

- proceedings under ACA 1996, ss 9, 11, 14, 27 and 34
- where one party wishes to initiate criminal proceedings along with the arbitration
- where a party files for an anti-arbitration injunction before the civil court
- where a party approaches a government regulator on facts which also gives rise to a contractual dispute
- where information is proposed to be shared with third party experts (such as forensic, accounting, delay or quantum experts), or
- where information is required to be shared with a third-party funder to obtain funding for a claim

Arbitral Immunity

The 2019 Bill proposes immunity to arbitrators against suits or other legal proceedings for anything which is done in good faith or intended to be done under the ACA 1996 or the rules thereunder (s42B, 2019 Bill). The proposed amendment is in line with international practices in this regard. For instance, in Singapore, arbitrators are not to be held liable for negligence in the capacity of an arbitrator, and mistake in law, fact or proce-

dure in the course of arbitral proceedings or in the making of an arbitral award (s 25, International Arbitration Act (Chapter 143a) (Singapore), s20, Arbitration Act (Chapter 10) (Singapore)).

Application for Setting Aside Arbitral Award

The 2019 Bill proposes to amend the language in ACA 1996, s 34, which provides recourse to parties to set aside arbitral awards made in India. ACA 1996, s 34(2) presently reads that an arbitral award may be set aside by the Court only if the party making the application 'furnishes proof that' the party was under some incapacity, the arbitration agreement was not valid in law, etc. (ACA 1996, s 34(2)). The requirement to 'furnish proof' has created circumstances wherein the Courts have insisted that section 34 proceedings be conducted in the manner of a regular civil suit (page 65, the Committee Report). The Committee Report suggested an amendment to this provision after considering the Supreme Court's decision in *Fiza Developers & Inter-Trade P Ltd v. AMCI(I) Pvt. Ltd* (2009) 17 SCC 796, 2009 SC 567 (not reported by LexisNexis® UK), wherein the Supreme Court indicated that proceedings under section 34 may not have the facets of a normal civil suit.

The 2019 Bill proposes amend section 34 by requiring the party to establish 'proof on the basis of the record of the arbitral tribunal' instead of 'furnishing proof'. The proposed amendment is in line with the Supreme Court's decision in the case of *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi* (Civil Appeal No. 8367 of 2018) (not reported by LexisNexis® UK), wherein the Supreme Court held that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that is before the arbitrator.

The Supreme Court in the aforementioned case further held that 'if there are matters not contained in such record, and are relevant to the determination of issues arising under section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties.'

This position of the Supreme Court should ideally continue to hold good even after the proposed amendment by the 2019 Bill. The proposed amendment should not be interpreted as completely precluding the reliance on any record by parties other than the record of the arbitral tribunal, as there may be situations where parties may want to bring on record certain facts which came to light post the arbitral proceedings. A few examples of such record could be:

- facts regarding incapacity of party to the agreement, being of unsound mind or minor etc
- misrepresentation of facts (or fraud played) by a party in arbitration not then known to other party, or
- facts relating to impartiality/conflict of interest of the arbitrator, not then known to the innocent party

Arbitrator Qualifications

The 2019 Bill prescribes that the qualifications, experiences and norms for accreditation of arbitrators are specified in the Eighth Schedule (s 43J, 2019 Bill). The Eighth Schedule, however, commences with the phrase 'a person shall not be qualified to be an arbitrator unless.' Thus, although the proposed provision pertains to accreditation of arbitrators, the Eighth Schedule appears to be specifying minimum qualifications for a person to act as an arbitrator.

This proposed amendment is ambiguous, and may be interpreted imply that no foreign legal professional could act as an arbitrator in India, as one of the requirements under the Eighth Schedule is for the person to

be an advocate within the meaning of the Indian Advocates Act, 1961 (s 43J, 2019 Bill). This may discourage foreign parties from seating their arbitrations in India as the parties may not be able to appoint foreign legal professionals as arbitrators or otherwise would be stuck in litigation over the ambiguity prevalent between the language of proposed section 43J and the Eighth Schedule.

Applicability of 2015 Amendments

The 2019 Bill proposes to define the proceedings to which the amendments introduced by the Amendment Act will apply. The 2019 Bill aims to delete section 26 of the Amendment Act and clarify that the Amendment Act is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings (Statement of Objects and Reasons, 2019 Bill).

In doing so, the 2019 Bill seeks to overturn a decision of the Supreme Court in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd* Civil Appeal Nos.2879–2880 OF 2018 (Arising out of SLP (C) Nos.19545–19546 of 2016) (not reported by LexisNexis® UK) which settled the issue after significant debate. In the aforementioned case, the Supreme Court had held that section 26 would apply to arbitrations and court proceedings commencing post October 23, 2015. It also provided that amended section 36 of the ACA 1996 would apply to all proceedings effectively removing the automatic stay on enforcement of awards pursuant to filing of a set aside application which had plagued arbitration. An attempt to change the law on applicability of the Arbitration and Conciliation (Amendment) Act, 2015 runs the risk of creating chaos as thousands of proceedings across the country, several at a very advanced stage, and following the Supreme Court ruling, will be set at naught. For instance, proceedings which have followed the Supreme Court ruling and are now at the execution stage may get stalled. Such an amendment does not augur well with the objectives of certainty and predictability and in fact furthers the impediment in the arbitration process which had been identified.

Other Amendments

The 2019 Bill has proposed to amend ACA 1996, s 17 which provides for interim measures ordered by an arbitral tribunal. The ACA 1996 presently provides that a party may seek interim measures during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36 (ACA 1996, s 17). However, since arbitral tribunals become *functus officio* after the making of the final award (p 62–63, the Committee Report), the 2019 Bill proposes to delete the language ‘or at any time after making the arbitral award but before it is enforced in accordance with Section 36’.

ACA 1996, ss 37 and 50 provide for limited appeals from orders of arbitral tribunals and courts (ACA 1996, s 37). The Commercial Court Act, 2015 provides for a general right of appeal against the decisions of Commercial Courts and Commercial Divisions of High Courts, which created an inconsistent and wider a right of appeal to orders under the ACA 1996. Therefore, the 2019 proposes the language ‘Notwithstanding anything contained in any other law for the time being in force’ to the aforementioned sections in order to restrict the right to appeal to what is already provided in sections 37 and 50.

The 2019 Bill also proposes provisions to regulate removal of members in the ACI, vacancies in the ACI, and resignation of members of the ACI (ss 43E–G, 2019 Bill).

Concluding thoughts

The 2019 Bill, much like the 2018 Bill, is fraught with multiple issues and glaring inconsistencies with the Committee Report and judicial precedent. Further, the 2019 Bill proposes changes such as the creation of a government regulator through the ACI, which has no precedent in any arbitration-friendly jurisdiction.

While the aim of the 2019 Bill is to promote arbitration, and strengthen institutional arbitration in India, the proposed changes to the ACA 1996 may force India to take two steps back as an arbitration-friendly jurisdiction. The amendments under the 2019 Bill should be seriously reconsidered, as in its present form, it is likely to give rise to several serious issues. While some of these issues may be resolved over time through judgments of the court, it would be wise to resolve these ambiguities at this stage to avoid spending valuable judicial time and resources. Further, foreign parties may not be inclined to seat their arbitrations in India, till such time that these issues are resolved.

This article is republished, with kind permission of the authors, from their firm's website: here.