The Indian Arbitration and Conciliation (Amendment) Act 2019—a reflection

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Arbitration analysis: Vyapak Desai, Ashish Kabra, and Bhavana Sunder at Nishith Desai Associates, consider the key points of the Indian Arbitration and Conciliation (Amendment) Act 2019 (AC(A)A 2019) and some of the main implications.

Original news

India—Arbitration and Conciliation (Amendment) Act 2019 receives Presidential assent, LNB News 19/08/2019 13

On 9 August 2019, the President of India gave his assent to AC(A)A 2019, which amends the Arbitration and Conciliation Act 1996. AC(A)A 2019 has also been published in the Official Gazette of India.

What's the background to AC(A)A 2019, including the motivations for reform?

AC(A)A 2019 was introduced after considering the recommendations of the Report of the High-Level Committee to Review the Institutionalizing of Arbitration Mechanism in India issued on 30 July 2017 under the chairmanship of retired Justice B.N. Srikrishna (the Committee Report). This Committee was established to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a roadmap for making India a robust centre for international and domestic arbitration.

AC(A)A 2019 was introduced with a view to make India a hub of institutional arbitration for both domestic and international arbitration (Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Bill 2019).

What are the key changes introduced by AC(A)A 2019?

AC(A)A 2019 brings about several key changes to the arbitration landscape in India. AC(A)A 2019 seeks to establish the Arbitration Council of India (ACI), which would exercise powers such as grading arbitral institutions, recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations. Further, AC(A)A 2019 amends the Arbitration and Conciliation (Amendment) Act 2015 (AC(A)A 2015) by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the ACI with the power to appoint arbitrators.

AC(A)A 2015 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. AC(A)A 2019 amends the start date of this time limit to the date on which statement of claim and defence are completed. AC(A)A 2019 also excludes 'international commercial arbitration' from this time-limit to complete arbitration proceedings.

AC(A)A 2019 also introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators. AC(A)A 2019 further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule.

Importantly, AC(A)A 2019 also clarifies the scope of applicability of AC(A)A 2015. AC(A)A 2019 provides that AC(A)A 2015, which entered into force on 23 October 2015, 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.

What are the implications (legally and practically) of AC(A)A 2019? Anything negative or missed opportunities?

The impact of AC(A)A 2019 on the arbitration landscape in India, positive or negative, is controversial. While AC(A)A 2019 aims to provide certification to arbitral institutions and arbitrators through grading and accreditation by the ACI, the constitution of the ACI itself is largely government-dominated, which may risk the independence of arbitration in India. Further, it would be critical for such a body to consist of genuine proactive experts in the field and not suffer from the typical government lethargy.

AC(A)A 2019 also overturns a recent 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 which settled the issue of the applicability of AC(A)A 2015 after significant debate. The Supreme Court had held that AC(A)A 2015 would apply to arbitrations and court proceedings commencing post October 23, 2015. It also provided that amended AC(A)A 2015, s 36 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 in India. An attempt to change the law on applicability of AC(A)A 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 affected.

The Committee Report had also suggested certain positive amendments to AC(A)A 2015 which have not been implemented in AC(A)A 2019. For instance, the Committee Report had suggested including express provisions for the recognition of emergency arbitration and emergency awards.

AC(A)A 2019 also may have missed the opportunity to provide adequate exceptions to the obligation of confidentiality. Further, due to an inconsistency in the statute, the Eighth Schedule to AC(A)A 2019 could be interpreted to indicate that foreign legal professionals cannot act as arbitrators in India. These issues and inconsistencies have been discussed in further detail in the below responses.

To which disputes with AC(A)A 2019 apply? When does it enter into force?

AC(A)A 2019 was passed on 9 August 2019. AC(A)A 2019 states that the Central Government may notify a date for the provisions of AC(A)A 2019 to enter into force.

AC(A)A 2019 does not expressly specify which disputes it is applicable to. The various amendments in AC(A)A 2019 would have to be individually interpreted to understand whether that amendment is substantive, procedural or clarificatory in nature. Judicial interpretation on this aspect should provide clarity on the applicability of the amendments.

On August 30, 2019, the Central Government notified AC(A)A, 2019, ss 1, 4 –9, 11–13,15. The notified amendments include amendments relating to the timeline for arbitration, confidentiality and applicability of the 2015 Amendments. The provisions pertaining to the ACI have not been notified yet.

Are the changes positive for India as a seat of arbitration? Anything in particular that international arbitration practitioners should be aware of?

AC(A)A 2019 has brought about several positive changes which are in line with international practices. In an attempt to reduce judicial backlog, AC(A)A 2019 provides the Supreme Court and the High Court the ability to designate arbitral institutions for appointment of arbitrators. AC(A)A 2019 also provides immunity to arbitrators against suits or other legal proceedings for actions done in good faith.

AC(A)A 2019 also brings about certain clarificatory changes. AC(A)A 2019 amends AC(A)A 2015, s 17, which earlier authorised the arbitral tribunal to order interim measures during the arbitral proceedings or after making the arbitral award. Since arbitral tribunals become functus officio after making the final award, AC(A)A 2019 now provides that interim measures can be ordered by an arbitral tribunal only during the arbitral proceedings. Further, there was an inconsistency between the AC(A)A 2015 and the Commercial Court Act 2015 as the latter statute provided a wider right of appeal to orders under AC(A)A 2015. This issue has been resolved as AC(A)A 2019 has inserted language to give primacy with regard to the appeal provisions.

However, international arbitration practitioners should be aware of certain inconsistencies in AC(A)A 2019 which may affect their India-seated arbitrations.

AC(A)A 2019 states that the qualifications, experiences and norms for accreditation of arbitrators are specified in the Eighth Schedule. The Eighth Schedule, however, commences with the phrase 'a person shall not be qualified to be an arbitrator unless…'. Thus, although the provision pertains to accreditation of arbitrators, the Eighth Schedule appears to be specifying minimum qualifications for a person to act as an arbitrator. This amendment is ambiguous and may be interpreted to imply that no foreign legal professional can act as an arbitrator in India, as one of the requirements under the Eight Schedule is for the person to be an advocate within the meaning of the Indian Advocates Act 1961.

Further, AC(A)A 2019 provides a blanket provision of confidentiality of arbitration proceedings without considering adequate exceptions to the obligation of confidentiality. In this context, it remains to be seen how arbitration related court proceedings (such as seeking interim injunction) may be initiated, how criminal proceedings (along with the arbitration) may be initiated, how anti-arbitration injunction proceedings may be filed and how information may be shared with experts and third-party funders for conducting the claim.

Thus, there are some drawbacks in AC(A)A 2019 that should be addressed through judicial interpretation. This may cause foreign parties to await clarity on AC(A)A 2019 prior to seating their arbitrations in India.

Interviewed by Alex Heshmaty.

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