

Insight to the Arbitration and Conciliation (Amendment) Act, 2019

Ever since the enactment of Arbitration and Conciliation Act 1996 (“Act”), Indian Legislature has been showing its intent to keep pace with the growing popularity of arbitration as preferred mode of dispute resolution in commercial matters. Two recent amendments in the Act bear testimony to India’s commitment to make India conducive for international and domestic arbitrations. The latest amendment of 2019, received the assent of the President of India on 9th August, 2019, provides for important changes, crucial ones are discussed in this article.

Arbitration Council of India

- ❖ The amendment act introduces regulatory mechanism in the field of arbitration and provides for adding Part IA (Section 43A to Section 43M) to the Act, which makes provision of constitution of Arbitration Council of India (“**Council**”). The Council shall take necessary measures to promote and encourage arbitration, mediation, conciliation and other alternative dispute resolution mechanism and for that purpose frame policy guideline for the establishment, operation and maintenance of uniform professional standard in respect of matters relating to arbitration.
- ❖ The Council of India shall frame policy for grading the arbitral institutions and shall make policies guidelines etc. to ensure satisfactory levels of arbitrations and conciliations.

Appointment of Arbitrator – Section 11

- ❖ The function of appointment of arbitrator, which were till date were being performed by Supreme Court of India or the High Court, will now be performed by arbitral institutions to be designated by Supreme Court and High Courts.
- ❖ Supreme Court of India will designate the arbitral institution for appointment of arbitrator (s) in international commercial arbitration whereas the High Courts will designate arbitral institutions within their respective jurisdictions for appointing arbitrators in cases of domestic arbitrations. In case there is no arbitral



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institution within jurisdiction of a High Court, such High Court can maintain a panel of arbitrators to perform the functions of arbitral institution.

- ❖ The arbitral institutions to be designated by Supreme Court or the High Court would be those which have been graded by the Council.
- ❖ The arbitral institution is mandated to dispose of an application for appointment of arbitrator within 30 days from the date of service of notice on the opposite party.
- ❖ The arbitral institutions shall determine fee of the arbitrators as per the rate specified in Fourth Schedule in case of domestic arbitrations unless parties have agreed for payment of fee as per rules of an arbitral institution. Fee provided in the Fourth Schedule shall not apply in case of international commercial arbitration.
- ❖ The amendment to Section 11 have provided for deletion of Section 11 (6A) as well as Section 11 (7) but retains provision of Section 11 (6B). The net effect is that arbitral institutions shall not perform any judicial function while appointing the arbitrators. With deletion of Section 11 (6A), arbitral institution is not confined to examining only the existence of an agreement between the parties while appointing the arbitrator. As Section 11 (7), attaching finality to the decision on appointment of arbitrator, has also been deleted, present amendment opens up avenues for challenging the decision on appointment of arbitrator(s) by way of proceedings other than filing Special Leave Petition before Supreme Court of India.

Timeline for making the award- Section 29A and Section 23

- ❖ The amendment takes the international commercial arbitrations out of the time limitations provided under Section 29A(1).
- ❖ The amended Act introduces Section 23 (4), which provides that statement of claim and Statement of defense shall be completed within a period of six months from the date the arbitrator received notice of their appointment.
- ❖ Time period of one year for making of the award as provided under Section 29A(1) shall begin from the date of completion of pleadings (statement of claim and statement of defense) only. Therefore, six month is the maximum time permissible for completion of pleading and the time period of one year for making of award shall commence irrespective of non-completion of pleadings within the said period. Conversely, if the pleading are completed before six months, the time period of one year for making of award shall commence forthwith the completion of the pleading.
- ❖ Notably, the time spent in filing of rejoinder [in cases without any counter claims) or rejoinder to counter claim (in cases with counter claims) will not be considered as time spent in completion of pleading under Section 23 (4)].
- ❖ The amendment also provides that during the period an application for enlargement of time for making of award is pending before the court under Section 29 (5), the mandate of the arbitrator shall continue till disposal of the application. This amendment will help the tribunal to continue the proceedings without waiting for court's decision on enlargement of time for making of award under Section 29(5).

Prospective application of amendments introduced by Amendment Act of 2015

- ❖ The amendment act introduces Section 87 to provide that 2015 amendments shall not apply with arbitration proceedings commenced *before* 23rd October, 2015. Similarly, 2015 amendments shall not apply to court proceedings arising out of or in relation to arbitration proceedings commenced before 23rd October, 2015 irrespective of whether such court proceedings were commenced prior to or after 23rd October, 2015.
- ❖ 2015 amendment shall only apply to arbitration proceedings commenced *on or after* 23rd October, 2015 and to the court proceedings arising out of or in relation to the arbitration proceedings commenced on or after 23rd October, 2015.

Other amendments

- ❖ Amendment to Section 17 provides that arbitral tribunal shall have no power to pass any interim measures after making the award. In such a situation, interim protection can be sought only from the court.
- ❖ Amendment to Section 34 clarifies that at the stage of challenging the award, court will not see any material other than record of the arbitral tribunal. This amendment shall help in cases where the courts in some part of the country record evidence at the stage of petition under Section 34 of the Act. Now Act provides that recording of evidence is not permissible.
- ❖ In Section 37 of the principal Act, expression “*Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie.....*” has been incorporated in Section 37 (1). This is aimed restricting the scope of appeal and preventing courts from exercising power under any other provision of law for the time being in force against any orders (appealable or not in terms of Section 37 of the Act) that may be passed in relation to the arbitration proceedings.
- ❖ The Amendment Act introduces Sections 42A & 42B respectively. Section 42A provides for maintaining confidentiality of arbitration proceedings by the arbitrators, arbitral institutions and the parties to arbitration, where Section 42B protects the arbitrators from any legal proceedings against acts done in good faith.
- ❖ Schedule 8 has been added which provides for qualification of the arbitrators. However, it appears that such qualifications are meant for those arbitrators who would be associated with the arbitral institutions and not the arbitrators who are appointed by the parties directly, without interference of the arbitral institutions.
- ❖ The Amendment Act 2019 has been published in the gazette only for general information. Section 1(2) provides that the Amendment Act shall come into force on such date as the Central Government may by notification appoint. It further provides that Central Government can appoint different dates for different provision of this Act.

Conclusions

The 2019 amendment acts clearly aims at removing the difficulties which were being faced during the conduct of arbitration proceedings and the court proceedings arising therefrom. With separate time frame for completion of pleading, arbitral tribunal will have full period of one year for conducting the trial and passing the award. With increase in role of arbitral institutions,

institutional arbitrations as against ad hoc arbitration is likely to get a boost. Clarification with respect of applicability of 2015 with prospective effect will go a long way in eliminating confusion. It is, however, felt that legislature needs to consider providing upper age limit for any person to be appointed as arbitrator. Even the fee provided in the Fourth Schedule could be made binding in the absence of any agreement to the contrary between the parties.

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