Institutional Arbitration Post the Arbitration and Conciliation (Amendment) Act, 2019: Whether A Way Forward or A Step Backwards?

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1. INTRODUCTION

The Central Government passed The Arbitration and Conciliation (Amendment) Act, 2019 (“Amendment Act, 2019”) amending the Arbitration and Conciliation Act, 1996 (“A&C Act”) with the aim of making India an international hub of Institutional Arbitration (“IA”). But the various provisions of the Amendment Act, 2019 seem dubious in its attempt to fulfill that aim. In this research paper, the author will undertake a stepwise analysis of how IA can be strengthened in India and what role the Amendment Act, 2019 will play in bringing the arbitral institutions in India in line with international arbitration. For the same, the author will rely on an empirical research and analysis as well.

2. THEORETICAL BACKGROUND

Institutional Arbitration versus Ad-Hoc Arbitration

It is not uncommon for a civil suit to take years to be resolved in Indian Courts. No wonder 91% of the companies prefer alternative dispute resolution making arbitration a kind of private form of litigation aiming at quick redressal of disputes. An ad-hoc arbitration is not administered by any institution and therefore, the parties are required to determine all aspects of the arbitration such as the number of arbitrators, manner of their appointment, place and seat of the arbitration and such other procedures for conducting the arbitration, etc. 95% of arbitration in India is done through ad-hoc arbitration as opposed to IA. Both are recognized forms of arbitration under UNCITRAL Model Law on International Commercial Arbitration, 1985 (“UNCITRAL Model Law”). According to a survey, companies having arbitration experience claimed that disputes around the

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constitution of the arbitral tribunal was one of the top reasons extending the length of arbitral proceedings. But so far, ad-hoc arbitration has been inefficient in upholding the aim of effective arbitration proceedings in India. Lack of qualified arbitrators, administrative hurdles and multiple stages in a proceeding increasing further cost and poor awards leading to judicial intervention are a few amongst the many drawbacks that ad-hoc arbitration is plagued with. Thus, the flexibility which ad-hoc arbitration provides will not necessarily produce greater efficiency, rather it creates complex proceedings due to lack of expertise and organisation. This has paved the way for the need of IA in India.

**Institutional Arbitration - The Need of The Hour**

IA, as opposed to ad-hoc arbitration, is popular and accepted worldwide. For example; centers such as Singapore International Arbitration Center (“SIAC”), London Court of International Arbitration (“LCIA”) etc. are popular forums for resolution of disputes. It does not come as a surprise that in 2019, total Indian parties involved in SIAC were 485 becoming the top foreign users of SIAC whereas in 2016 LCIA closed its Indian branch due to shortage of cases. This shows that Indian parties generally preferred ad-hoc arbitration over IA, and when opting for IA, exhibited a marked preference for institutions set up outside India.

IA is deemed to be based on expertise, efficiency and an organised set-up providing varying degrees of credible administrative support. It has pre-decided rules, fees determination policies and an administration acting as a connection between parties, disclosing necessary information while maintaining party autonomy. It provides a pool of experienced arbitrators, renders case management systems with effective use of e-services and helps in appointment of arbitral tribunal. This, thus, makes the process much easier than ad-hoc arbitration. A prominent step towards institutionalizing arbitration in India was taken by the Supreme Court when it asked Mumbai Center for International Arbitration (“MCIA”) to appoint arbitrators in an international arbitration dispute between Sun Pharmaceuticals Industries Ltd. and Nigeria-based Falma Organics Ltd. invoking Section 11 of the A&C Act.

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In the author’s opinion, institutionalising arbitration in India should have a two-fold objective; first, to save Indian parties from going outside and second, to attract foreign parties to opt for arbitration in India. But unfortunately, till date there is no arbitral institution in India of a global repute. This points at a need for one with international standards. In furtherance of the same, the Indian government introduced the Amendment Act, 2019 on the basis of recommendations of the Justice B.N. Srikrishna Committee Report (2017) (“Srikrishna Committee Report”).

3. Results of Empirical Survey

The authors conducted an empirical survey in the form of two questionnaires through google forms. The first one is a survey of 130 law students across India and the second one covers the responses of 10 legal professionals working in ADR.

Finding

6 out of 10 legal professionals agreed that the Amendment Act, 2019 has the potential to bring significant development in IA. But the opinion changed when 7 of them were doubtful about whether the Amendment Act, 2019 could help in solving domestic and international disputes post lock-down. Vikas Mahendra, one of the legal professionals who participated in the survey and was also one of the contributors to the Srikrishna Committee Report, opined that the Amendment Act, 2019 will not help in improving IA condition. Other professionals were quite dicey about implementation of a few provisions of the Amendment Act, 2019. Let us discuss these provisions in detail.
Debatable Provisions of the Amendment Act, 2019

The survey raises a concern about the implementation of the Amendment Act, 2019. On close scrutiny of the provisions of the Amendment Act, 2019, it appears to be a case of noble intentions but with a misplaced approach. The Srikrishna Committee Report laid down emphasis on three things for improvement of IA in its report; i) government support; ii) awareness of IA; and iii) reform in the statutory regime. While a few of these provisions have a positive potential, others are contrary to what the committee suggested which casts a doubt about its impact on improving the condition of the arbitral institutions in India. A few of such provisions are stated below:

1) Formation of Arbitration Council of India ("the Council")

The Amendment Act, 2019 lays down the formation of the Council for grading of arbitral institutions and arbitrators and to boost IA in India. But the Council has its own drawbacks. The Council has become a non-independent regulatory body giving power to

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the Central Government in the form of appointment\textsuperscript{10}, removal\textsuperscript{11} of members. The salaries and allowances will also be financed and prescribed by the central government from time to time\textsuperscript{12}. It potentially paves the way for corruption and political favoritisms, especially when the fact that the government is the biggest litigator in the country is factored in. Of the seven members forming a part of the Council as “members”, at least six are appointed/nominated by the Central Government.\textsuperscript{13} The Amendment Act, 2019 thus, has departed from the recommendation of the Srikrishna Committee Report in various ways. Where the committee recommended grading of only arbitral institutes, the bill included both institutes and arbitrators. Apart from a major change in the incorporation of the recommendation of appointment provisions, the bill gives power to the council to frame regulations which was not recommended by the committee. Ideally, a stakeholder approach in appointment, i.e. the arbitral institutes, government representatives etc having a combined say in appointment should have been adopted, rather than the method currently followed. Additionally, the Council should have been an independent regulatory body getting initial financial assistance from the government and later financed by its stakeholders i.e., parties, arbitrators, arbitral institutions as suggested by Srikrishna Committee Report such as CIETAC in China or HKIAC in Hong Kong.

2) **Amendment to Section 11 of the A&C Act, 1996**

The Supreme Court and High Court can designate an arbitral institution which will be graded by the Council to appoint arbitrators.\textsuperscript{14} But the High Courts of states having no graded arbitral institutions will maintain a panel of arbitrators consisting of retired judges or senior counsels.\textsuperscript{15} Generally, the credibility of such judges and counsels as arbitrator is debatable. Hence, the very aim of institutionalizing arbitration gets defeated. This problem can be resolved by having a regional branch maintaining a chamber of arbitrators of either the Council or New Delhi International Arbitration Center (“NDIAC”) which has been

\begin{itemize}
\item \textsuperscript{10} A&C Act, 1996, §43C (as amended by ACA 2019, §10)
\item \textsuperscript{11} A&C Act, 1996, §43G(1) (as amended by ACA 2019, §10)
\item \textsuperscript{12} A&C Act, 1996, §43C(3) (as amended by ACA 2019, §10)
\item \textsuperscript{13} A&C Act, 1996, §43C(1) (as amended by ACA 2019, §10)
\item \textsuperscript{14} A&C Act, 1996, §11(3A) (as amended by ACA 2019, §3)
\item \textsuperscript{15} \textit{Id.}
\end{itemize}
nationalised through **The New Delhi International Arbitration Center Act, 2019** or any other arbitral institution conducting ADR in other states not having an arbitral institution.

3) **Fixed timelines for passing of award under Section 29A**

The Amendment Act, 2019 amended Section 29A by fixing a timeline of 12 months for the announcement of arbitral awards commencing from the date of completion of pleadings which is further extendable to 6 months. Though this provision might play a progressive role in ad-hoc arbitration which is infamous for lengthy proceedings, it might act as a restriction for arbitral institutions. Institutions have the power of extending and monitoring timelines as per complexity of disputes under their respective rules. Further, this provision is neither in conformity with **UNCITRAL Model Law** nor with the **ICC Rules of Arbitration**\(^\text{16}\) or **SIAC** or **LCIA**. Hence, the author suggests that the legislation be amended to create a suitable exemption for institutional arbitrations which are already governed by their own rules.\(^\text{17}\) The provision for fixed timelines should be made applicable only to the ad-hoc arbitrations.

4) **Excluding foreign registered lawyers as arbitrators.**

Apart from unclear grading criteria, the Eighth Schedule of the Amendment Act, 2019 provides vague criteria for qualification of arbitrators. Accordingly, it indirectly bars foreign legal professionals to practice as arbitrators. This narrow-minded approach will surely discourage the foreign parties to choose India as an international seat since the choice of arbitrators will become highly restricted. On one hand we envisage more participation of foreign parties in India while on other hand we restrict their participation with inception of such abovementioned clauses. This will surely not bring favourable results for international commercial arbitration.

Most of the sections of the Amendment Act, 2019 are yet to be notified. Surely some sections of the Amendment Act, 2019 bring hope such as immunity of arbitrators,\(^\text{18}\) maintenance of an

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\(^\text{16}\) ICC Arbitration Rules 2017, §27  
\(^\text{18}\) A&C Act, 1996, §42B (as amended by ACA 2019, §10)
The arbitration proceedings are conducted in an electronic depository of the awards\textsuperscript{19} or decision of fee structure of the tribunal by arbitral institution\textsuperscript{20} while others such as Section 87 got struck down before its inception by the Supreme Court on grounds of being unconstitutional in *Hindustan Construction Company Limited & Another v. Union of India & Another.*\textsuperscript{21} The provisions of the Amendment Act, 2019 may be susceptible to further challenge before the Courts, pushing the fate of IA in India under the clouds of doubt. The legislature should aim at ensuring that there are lucid provisions in place which make the system of IA in India robust and workable.

**The Way Ahead.**

Indian arbitration culture should have two-fold aims; first is the shift from ad-hoc to IA and second to empower arbitral institutions. IA’s development depends on two important pillars. *First,* on the statutory backup with least judicial and governmental interference and *second,* awareness. Indian arbitration statutory provisions so enshrined should align with international provisions to build the Indian arbitration culture worldwide. The Council aims at promotion of alternative dispute resolution (“ADR”) mechanisms. The first step should be an awareness among young professionals and law universities. This will also help in removing misconceptions regarding IA being costly and only favorable for big companies and firms. Considering the depletion of cost efficiency in ad-hoc arbitration and the set of advantages that IA provides, it will surely make IA a preference for various groups in different types of disputes.

Young professionals will also play a major role in awareness of arbitration culture in India. In the survey, out of 130 law students, more than 3/4th of them suggested alternative dispute mechanisms individually or in combination as the best solution for pending cases in India.

\textsuperscript{19} A&C Act, 1996, § 43D(2)(j) (as amended by ACA 2019, §10)

\textsuperscript{20} A&C Act, 1996, §11(14) (as amended by ACA 2019)

\textsuperscript{21} *Hindustan Construction Company Ltd. v Union of India* (2019) SCC Online SC 1520
84% of them were aware of IA and as a recommendation most of them described the importance of new age arbitrators as integral for future IA development. Today arbitration culture is changing where lawyers are shifting from a half time to full time arbitrator. Budding and young lawyers should be encouraged for ADR practice; preventing litigation. This also brings to the fore where both arbitration and litigation lawyers should complement each other advocating and encouraging practices which seem suitable for a certain suit.

Conclusion.

Today no one can say which regime or institution or mechanism will work well post-lockdown. However, there is a confidence that ADR (including mediation along with arbitration) will play a major role in resolution of commercial disputes. Only when the foundation of arbitral institutions in India is strong, will the parties have trust and faith in the working of ADR mechanisms. Whether the Amendment Act, 2019 will prove to be a catalyst for IA development or not will be decided on how the future unveils itself. While few provisions of the Amendment Act, 2019 seem dubious, others will surely contribute to the aim of institutionalising arbitration in India. A big shift in dispute mechanism tactics in India is the need of the hour considering the overburdened judiciary and the ambiguous dispute resolution machinery. As it is rightly said that "Rome was not built in a day" hence rather having a skyrocket aim of making India an international hub in a short glimpse of time, focus should be on gradual development of IA in India from its previous nascent stage.