

Impact of the Arbitration and Conciliation (Amendment) Act 2019 on Arbitration Practices

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Abstract

The Arbitration and Conciliation (Amendment) Act 2019 has significantly impacted arbitration practices in India, with the objective of promoting a more efficient and transparent dispute resolution process. Key changes include the establishment of the Arbitration Council of India (ACI) to regulate and grade arbitral institutions, ensuring higher standards in arbitration proceedings. The amendment emphasizes time-bound resolution by reducing the arbitral award timeframe to six months for international arbitrations and tightening deadlines for domestic arbitrations, aiming to reduce delays. It also clarifies the powers of arbitral tribunals, providing greater autonomy and limiting court intervention, fostering a more streamlined arbitration process. Additionally, provisions around the appointment of arbitrators have been strengthened to enhance impartiality and independence, with an emphasis on institutional arbitration over ad hoc processes. The Amendment Act also addresses concerns about confidentiality and immunity of arbitrators, which further strengthens the integrity of arbitration practices in India. These changes align with global best practices, making India a more attractive destination for international arbitration, contributing to a robust alternative dispute resolution framework. However, some challenges remain, such as effective implementation of the amendments and ensuring that arbitral institutions are properly accredited and functioning as intended.

Keywords: Arbitration Council of India (ACI), Interim injunction, Arbitration agreement, International Standards, Institutional arbitration

Introduction

The Arbitration and Conciliation (Amendment) Act 2019 has significantly impacted arbitration practices in India, with the objective of promoting a more efficient and transparent dispute resolution process. Key changes include the establishment of the Arbitration Council of India (ACI) to regulate and grade arbitral institutions, ensuring higher standards in arbitration proceedings. The amendment emphasizes time-bound resolution by reducing the arbitral award timeframe to six months for international arbitrations and tightening deadlines for domestic arbitrations, aiming to reduce delays. It also clarifies the powers of arbitral tribunals, providing greater autonomy and limiting court intervention, fostering a more streamlined arbitration process. Additionally, provisions around the appointment of arbitrators have been strengthened to enhance impartiality and independence, with an emphasis on institutional arbitration over ad hoc processes. The Amendment Act also addresses concerns about confidentiality and immunity of arbitrators, which further strengthens the integrity of arbitration practices in India. These changes align with global best practices, making India a more attractive destination for international arbitration, contributing to a robust alternative dispute resolution framework. However, some challenges remain,

such as effective implementation of the amendments and ensuring that arbitral institutions are properly accredited and functioning as intended.

Arbitration Council of India (ACI)

The Arbitration and Conciliation (Amendment) Act 2019 introduced the establishment of the Arbitration Council of India (ACI), a significant step toward institutionalizing and regulating arbitration in India. The ACI was created with the primary objective of promoting arbitration as an efficient and reliable method for dispute resolution, both domestically and internationally. By grading arbitral institutions and accrediting arbitrators, the ACI seeks to standardize arbitration practices and elevate the quality of arbitration proceedings in India.

The council's role extends beyond mere regulation, as it also aims to establish benchmarks for institutional arbitration by setting guidelines and best practices. It is responsible for ensuring the independence and impartiality of arbitrators, enhancing their credibility and reliability. This step is particularly important in fostering trust among domestic and international parties seeking arbitration in India. Moreover, by promoting institutional arbitration over ad hoc practices, the ACI helps streamline dispute resolution and reduce the uncertainties often associated with ad hoc arbitrations. The ACI also plays a vital role in training and certifying arbitrators, thereby improving their expertise and professionalism. The council's focus on transparency, efficiency, and the integrity of arbitration proceedings aligns with international arbitration standards, positioning India as a more attractive venue for global arbitration. The introduction of the ACI marks a pivotal change in the Indian arbitration landscape, providing much-needed oversight and fostering the growth of arbitration as an alternative dispute resolution mechanism.

Applying Provisions of Part I for a Foreign Seated Arbitration

The BALCO decision excludes Indian courts from exercising jurisdiction over arbitrations conducted outside of India. This applies universally, without exceptions for arbitrations held within India, meaning Indian courts cannot intervene in matters where the arbitration seat is outside the country. Consequently, Indian courts face challenges in issuing interim or temporary orders for arbitrations with a foreign seat. However, under Section 2(2), Indian courts are now empowered to issue interim protective orders, assist in evidence collection, and entertain appeals in international arbitrations, provided both parties consent to such intervention. Notably, the word "only" is absent from Section 2(2) of the 1996 Act, which became a point of contention in the case *Bhatia International v. Bulk Trading SA* [374]. The absence of this term was identified as a critical issue, prompting the Supreme Court of India to incorporate the word "only" into Article 1(2) of the UNCITRAL Model Law, based on the exclusions outlined in the proviso. Since the Act did not originally contain the word, its inclusion was deemed unnecessary. However, removing the term "only" after the clause was enacted has led to unnecessary confusion and complications, raising fairness concerns in the interpretation of the law.

Court References to Arbitration and Widening the Meaning of Arbitration Agreements

The value of arbitration diminishes significantly when courts have concurrent jurisdiction over issues intended for arbitration. To address this, the 1996 Act introduced referral procedures that required courts to direct parties to arbitration upon request. However, delays in court referrals occurred for various reasons. A party seeking arbitration was required to submit an original or certified copy of the arbitration agreement. Under Section 45, as amended by the 2015 Act, individuals claiming through or under the parties may now initiate arbitration. If the

applicant lacks the original or certified copy of the arbitration agreement, but the other party possesses it, the applicant must submit a petition requesting the court to compel the other party to present the original agreement during the hearing.

If a judge determines that no valid arbitration agreement exists, Section 8 allows the court to deny arbitration. Section 12, unlike Section 11, permits only a review of the agreement's legality. It is not necessary to assess the validity of the agreement under Section 11 when considering petitions. The interpretation of Sections 8 and 11 by courts can vary. A denial under Section 8 is appealable. Moreover, the arbitral tribunal has the authority to apply the kompetenz-kompetenz principle under Section 16, regardless of whether the court has referred the parties to arbitration.

Interim injunction

It is uncommon for a party to delay initiating arbitration once temporary relief has been granted. Before granting an interim injunction, the court must be satisfied that a valid arbitration agreement exists and that the petitioner genuinely intends to pursue arbitration, as established in *Sundaram Finance Ltd. v. Npc India Ltd.* Arbitration proceedings are subject to a prerequisite, which necessitates that the court issue a conditional order. In *Firm Ashok Traders v. Gurmukh Das Saluja*, Section 9 of the Arbitration Act mandates that courts determine whether arbitration is genuinely anticipated, clearly intended, and likely to commence within a reasonable timeframe. To maintain proximity between the two events, Section 9 applications should ideally be filed shortly after the arbitration process begins. A party cannot simply rely on temporary relief and neglect to pursue arbitration, especially concerning Section 9 rights. The 2015 Amendment Act codifies Supreme Court rulings and establishes a time limit for initiating arbitration by adding sub-clause 2 to Section 9. Additionally, sub-clause 3 of the amended Section 9 restricts the courts' ability to issue injunctions before an arbitral tribunal is constituted. Once the tribunal is established, subsection (1) ceases to apply, and the court must assess whether conditions exist that could render Section 17 ineffective. Section 9 does not interfere with ongoing arbitration proceedings, and courts retain the authority to resolve any related appeals. In exceptional cases, courts may still issue injunctions. Subclause 1 of Section 17. of the 2015 Amendment Act grants courts the power to issue interim injunctions during or after the arbitration process, prior to the enforcement of the arbitral award, thus equating the powers of arbitration tribunals and courts. The implementation of tribunal interim orders as court orders is facilitated by the addition of sub-clause 3 to Section 17.

Appointment of arbitrator

When parties agree, an arbitrator can be appointed by mutual consent. The original 1996 Act included a provision allowing for the appointment of an independent third party to resolve disputes if the parties failed to agree on an arbitrator. In such cases, any Chief Justice of the Indian High Court or Supreme Court, or any individual or institution designated by them, could be approached to request arbitration in India. However, the process of selecting a Chief Justice has become more complex, as highlighted by two Supreme Court decisions. In *Konkan Railway Corpn. Ltd. & Anr. v. Rani Construction Pvt. Ltd.*, the Supreme Court ruled that the Chief Justice's decision to appoint an arbitrator under Section 11 is not an adjudicatory order, and the Chief Justice or their designee is not considered a tribunal.

Section 11(6) of the 1996 Arbitration and Conciliation Act [384] grants the Chief Justice of the High Court or the Chief Justice of India the authority to exercise judicial powers, determining the existence of a valid arbitration agreement, the presence of a live claim, and whether the necessary conditions for exercising that power are met. This decision is binding on all these matters. In response to this ruling, the 2015 Amendment Act sought to counter its effects by limiting the scope of court review under Section 11(6A) of the Act to arbitration agreements alone, excluding issues such as claims, arbitrators' qualifications, or conditions for exercising authority.

Under the 2015 Amendment Act, only a judge of the relevant court can delegate judicial authority to another judge, preventing others from transferring jurisdiction. This principle was upheld in *Patel Engineering*, where the designation of any person or institution for Section 11 purposes was clarified not to constitute judicial authority under the new sub-section (6B) of the Amendment Act. One of the critical debates under Section 11 concerns whether the Chief Justice's role is administrative or judicial in nature. The 2015 Amendment Act resolved this issue by replacing the Chief Justice with the Supreme Court or High Court. Section 11 [386] also requires prospective arbitrators to submit a declaration, in accordance with Section 12 of the Act, to be eligible for appointment. Additionally, arbitrators who are unable to conduct timely arbitral proceedings due to scheduling conflicts are disqualified from appointment. The High Court is authorized to set guidelines for arbitrator fees under Section 11's sub-section (14).

Unlike other countries, where arbitrator fees are rarely regulated, India's fixed fee structure for ad-hoc arbitrations is distinctive. The 2015 Amendment Act also introduced the Fifth and Seventh Schedules. The Fifth Schedule addresses arbitrators' independence and impartiality, listing the grounds for questioning these qualities. The Seventh Schedule adds further restrictions, such as relationships between arbitrators, parties, or counsel that would prevent an arbitrator's appointment. These schedules are influenced by the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration. Moreover, the 2015 Amendment Act prohibits parties from pre-selecting an arbitrator who has previously been nominated by one of the parties. These provisions ensure that parties can trust in the impartiality and independence of their chosen arbitrators.

Alignment with International Arbitration Standards

The Arbitration and Conciliation (Amendment) Act 2019 has significantly enhanced India's alignment with international arbitration standards, positioning the country as a more attractive hub for global arbitration. One of the key changes introduced by the Act is the recognition and enforcement of foreign arbitral awards, which is now more streamlined and consistent with international practices. By minimizing judicial interference in arbitration matters, the Act reinforces the principle of autonomy in arbitration, which is a cornerstone of international arbitration frameworks like the UNCITRAL Model Law. The introduction of the Arbitration Council of India (ACI) further strengthens this alignment by promoting transparency, standardizing procedures, and accrediting arbitral institutions, which brings India's arbitration ecosystem closer to international benchmarks. Additionally, the Act places a strong emphasis on institutional arbitration over ad hoc practices, which is in line with global arbitration trends that favor the predictability and structure offered by established arbitral institutions. The time-bound resolution of disputes and the enforceability of arbitral tribunal interim orders as court orders are other critical aspects that align with international arbitration standards, providing parties with greater certainty and efficiency. Moreover, the Act adopts key principles from internationally recognized guidelines, such as the

International Bar Association (IBA) Guidelines on Conflicts of Interest, ensuring that arbitrators remain independent and impartial. These provisions enhance the credibility of India's arbitration process on the global stage, encouraging foreign investors and international corporations to choose India as a destination for dispute resolution. This alignment with international standards fosters trust and confidence in the Indian arbitration system, bolstering its global competitiveness.

Implications of the arbitration and conciliation (amendment) act, 2021

The Arbitration and Conciliation (Amendment) Act 2021 introduced significant changes to India's arbitration framework, with implications for both domestic and international arbitration practices. One of the most critical amendments relates to the provision that allows courts to stay the enforcement of arbitral awards if they find a prima facie case of fraud or corruption. This amendment ensures that awards tainted by fraudulent or corrupt practices do not get enforced until such issues are properly investigated. While this provides an important safeguard, it also raises concerns about increased judicial intervention, which could potentially delay arbitration proceedings and affect the finality of arbitral awards.

Another important aspect of the 2021 Amendment is the change regarding the qualifications of arbitrators. It removes the controversial provision introduced in the 2019 Act that required arbitrators to hold specific qualifications. This amendment allows for more flexibility in the appointment of arbitrators, particularly in international arbitrations, where parties may prefer experts from diverse backgrounds to serve as arbitrators. The removal of such rigid qualification requirements is seen as a move to attract more global arbitration cases to India. The 2021 Amendment affects the Arbitration Council of India (ACI) by placing greater emphasis on institutional arbitration, with the ACI playing a key role in promoting and regulating arbitral institutions. This could lead to the strengthening of institutional arbitration in India, which is often seen as more reliable and predictable than ad hoc arbitration. The 2021 Amendment has also been criticized for potentially increasing court involvement in arbitration, especially with the provision for staying awards on grounds of fraud or corruption. This could be seen as a step backward in terms of minimizing judicial intervention, a principle that is essential for maintaining arbitration's efficiency and autonomy. Overall, the 2021 Amendment aims to strengthen arbitration in India but brings both benefits and challenges, particularly in balancing judicial oversight with the autonomy of the arbitration process.

Conclusion

In conclusion, the Arbitration and Conciliation (Amendment) Act 2019 has had a profound impact on arbitration practices in India, marking a significant step towards enhancing efficiency, transparency, and global competitiveness in the field of alternative dispute resolution. The establishment of the Arbitration Council of India (ACI) has played a pivotal role in standardizing arbitration practices and improving the quality of arbitral institutions and arbitrators. This promotes greater trust and reliability in the arbitration process, both domestically and internationally. The introduction of time-bound arbitration, especially in domestic cases, has reduced delays and encouraged faster dispute resolution, aligning with global best practices. By empowering arbitral tribunals to issue enforceable interim orders and limiting court intervention, the Act has bolstered the autonomy of arbitration, reinforcing its role as a swift and effective method of resolving disputes. The emphasis on institutional arbitration over ad hoc processes is a crucial shift, likely to improve the consistency and predictability of arbitration

outcomes. The provisions for confidentiality and arbitrator immunity further strengthen the integrity of arbitration, making it a more appealing option for commercial entities. While the Act addresses many concerns, challenges remain, particularly regarding the effective implementation of these reforms and ensuring that arbitral institutions are properly accredited and regulated. Despite these challenges, the Arbitration and Conciliation (Amendment) Act 2019 represents a significant advancement in India's arbitration framework, making it a more robust and internationally aligned system that can handle complex commercial disputes efficiently and fairly.

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