The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?

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The Arbitration & Conciliation (Amendment) Act, 2019 ("the 2019 Amendment"), which amends the Indian Arbitration & Conciliation Act, 1996 ("the Act"), came into force with effect from 9 August 2019. The Law Minister of India was recently quoted as saying in one of the press releases (after the Bill in support of the 2019 Amendment was introduced in the lower House of Parliament), that the government intended to make India a hub of domestic and international arbitration by bringing in changes in law for faster resolution of commercial disputes.

Now that the 2019 Amendment is here, this post critically analyzes some of its provisions to understand if it is indeed a step in the right direction for India to become a hub for international arbitration. The analysis and comments in this post are solely and exclusively from the standpoint of international arbitration.

Critical analysis of some key provisions of the 2019 Amendment

- **The designation and grading of arbitral institutions**

The 2019 Amendment introduces Section 11(3A) to the Act whereby the Supreme Court of India and the High Courts shall have the power to designate arbitral institutions, which have been graded by the Arbitration Council of India ("ACI") under Section 43-I (also introduced by the 2019 Amendment). The underlying idea is that instead of the court stepping in to appoint arbitrator(s) in cases where parties cannot reach an agreement, the courts will designate graded arbitral institutions to perform that task (per Sections 11(4)–(6) of the Act, as amended by the 2019 Amendment). The designation aspect has already been discussed and criticized on this blog. However, it is the grading aspect which I intend to deal with some detail.

The 2019 Amendment introduces Part 1A to the Act, which is titled as 'Arbitration Council of India' (Sections 43A to 43M) and which empowers the Central Government to establish the ACI by an official gazette notification (Section 43B). The ACI shall be composed of (i) a retired Supreme Court or High Court judge, appointed by the Central Government in consultation with the Chief Justice of India, as its Chairperson, (ii) an eminent arbitration practitioner nominated as the Central Government Member, (iii) an eminent academician having research and teaching experience in the field of arbitration, appointed by the Central Government in consultation with the Chairperson, as the Chairperson-Member, (iv) Secretary to the Central Government in the Department of Legal Affairs, Ministry of Law and Justice and (v) Secretary to the Central Government in the Department of Expenditure, Ministry of Finance – both as *ex officio* members, (vi) one representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government, as a part-time member, and (vii) Chief Executive Officer-Member-Secretary, *ex officio* (Section 43C(1)(a)–(f)). The ACI is *inter alia* entrusted with grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations (Section 43I).

The main drawback of this scheme is that it limits party autonomy in international arbitration through governmental and court interference. The ACI is a government body which shall regulate the institutionalization of arbitration in India and frame the policy for grading of arbitral institutions. The fact remains that the court's choice in designating an arbitral institution will be limited by the options presented

to it by the ACI. Consequently, the choice of a foreign party appearing before the Supreme Court and seeking appointment of an arbitrator will be limited to institutions which have ACI accreditation and to such arbitrators who may be on the panel of such arbitral institutions. The court will be equally handicapped in designating an ungraded institution – which has a global reputation for its facilities and quality of services and which wants to simply establish its local office in India, without going through the administrative hurdles of being graded by the ACI.

The 2019 Amendment, albeit aimed at institutionalizing the arbitration scene in India, leaves the discretion in the hands of courts and executive to decide who gets to be a part of this reform. Another problem associated with this governmental control over the institutionalization process is the (possible) nepotism, red-tapism, lack of objectivity and lack of transparency in the grading process. In my experience, a foreign party often prefers to stay away from an arbitration regime with significant degree of court or governmental interference. However, it is nonetheless a welcome move by the government to acknowledge that institutional arbitration is the only way ahead to attract foreign parties to include India as the seat in their arbitration agreements.

- **Timely conduct of proceedings**

As per the newly introduced Section 23(4), the statement of claim and defence shall be completed within a period of six months from the date of appointment of the arbitrator(s) and as per Proviso to the amended Section 29(1), the award in the matter of international commercial arbitration may be made as expeditiously as possible with an endeavour to deliver it within 12 months from the date of completion of pleadings under Section 23(4).

Whilst it is a welcome step – certainly with the right intent – it may lead to conflicts with the rules of an arbitral institution as it overlooks the procedural aspects inherent to a complex international arbitration. In international arbitration, the arbitrators routinely hold a case management hearing, and after consultation with the parties, issue an order on the procedural timetable for completion of pleadings, conduct of hearings etc. (*e.g.*, see Rule 24 of the 2017 ICC Arbitration Rules). However, if Section 23(4) restricts a tribunal from being in control of its proceedings, then it may be impossible to effectively conduct complex multi-party

arbitrations involving massive documents, where it may be practically impossible to complete pleadings in six months. Similarly, the autonomy of parties to decide on a more flexible procedural schedule will be severely limited. Most importantly, the parties will always be wary of the fate of an award where the time requirements of Section 23(4) are not strictly abided.

- **Confidentiality**

As per the newly introduced Section 42A, 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 implementation and enforcement of award.

The ICC recently released updates to its Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration, effective 1 January 2019 in which it stated that all awards made as from 1 January 2019 may be published, no less than two years after their notification, based on an opt-out procedure (paras. 40-46). Per the opt-out procedure, any party may at any time object to publication of an award, or request that the award be sanitized or redacted. In such a case, the award will either not be published or be sanitized or redacted in accordance with the parties' agreement.

This shows at the outset that India's practice in publishing the award is in line with globally established arbitral institutions. However, by not incorporating an opt-out scheme in Section 42A, the legislature missed the opportunity to bring clarity to the fate of an award in terms of its publication. Who will decide that the disclosure of an award is necessary for its implementation? Will it mean full disclosure or will parties be allowed to agree on a redacted award? These uncertainties, in my view, only add to the suspense.

- **Qualification of arbitrators**

The ACI is also entrusted with the function of reviewing the grading of arbitrators (Section 43D(2)(c)). The qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule, as introduced by the

2019 Amendment (Section 43J). The Eighth Schedule stipulates nine categories of persons (such as an Indian advocate or cost accountant or company secretary with certain level of experience or a government officer in certain cases *inter alia*) and only those are qualified to be an arbitrator.

Thus, a foreign scholar or foreign-registered lawyer or a retired foreign officer is outrightly disqualified to be an arbitrator under the 2019 Amendment. For obvious reasons, foreign parties will be discouraged to opt for Indian institutional arbitration where the choice of candidates as their potential arbitrators is limited by nationality, likelihood of lack of experience and specialization – both academic and professional – in handling international arbitrations.

Conclusion

In my previous blog post, I mentioned how India is often criticised as a "non-friendly" arbitration jurisdiction by the international community. The 2019 Amendment attempts to take this criticism head-on, however in my view, it makes more misses than hits in the process. Although a step in the right direction yet, India is far away from becoming a global arbitration hub.