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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

INDIA AS AN ABRITRATION HUB POST-2019 AMENDMENTS

(By Megha Shawani & Dishti Sharma)

ABSTRACT

Initially, In India court litigation has always been a first choice for solving all sort of disputes. leaving our judiciary overburdened with piles and piled of cases. Which, further made people opt for a different method of resolving disputes in an amicable manner. After much needed awareness in the country india seems to have a really high scope of popularising ADR as dispute settlement mechanism that could cater to a larger and economically diverse population. The main idea behind popularising such a method was because of it being and effective and efficient manner. The idea behind writing this research article is to spread our view points over the scope of India becoming an Arbitration Hub post 2019 amendments while analysing the overall developments in the field of Arbitration. The overall developments are always an appreciable attempt at overcoming certain issues being faced prior. The 2019 Amendment Act has its strengths and its flaws but all in all it passes as a convincing enough change that could help in the transformation of India into a global arbitration hub, with the right implementation.

INTRODUCTION

Since its emergence in India, the court litigation system had always been a popular choice for people who had the resources and time to avail. However, the jurists of India were still keen on establishing an alternate system of dispute resolution outside the court that could cater to a larger and economically diverse population. The idea was to search for a system that was less expensive, of informal nature and offered a speedy redressal to disputes as compared to the typical court procedures. The concept of arbitration was then established in India during the late nineteenth century and it was first officially recognised under 'The Arbitration Act, 1899'. Despite the act being established, arbitration could still not be resorted to by a large section of the Indian population as this procedure was only limited to the three presidency towns of Calcutta, Bombay and Madras. To overcome the factor of inaccessibility of The Arbitration Act, 1899, a new code of civil procedure was sanctioned in the year 1908 that covered the provisions of arbitration under Section 89, Section 104(1)(a) to (f) and Schedule 2 of the code. The provisions of arbitration under this code were widely accessible in the parts of India where provisions of the 1899 act were not. To further improve on the technical

aspects of these acts, 'The Arbitration Act, 1940' was enacted. A statement made by Justice D.A. Desai in the case of, "Guru Nanak Foundation v. Rattan Singh, (1981) 4 SCC 634, that read as, "The way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep.", made the inadequacy of the 1940 act quite evident. In the later years, as India started adapting to the model of Liberalization, Privatization and Globalization, the demand and need for arbitration in the country began to rise. Due to this industrial revolution, a surge in the foreign direct investment was noticed in the country and there was an expeditious growth in global trade and value of India. The rise in global economic growth was demanding for a stable and effective system of arbitration to provide a good business environment and to make economic practices and economic dispute resolution steady and easy. This growing demand for expedited economic litigation led to the establishment of 'Arbitration and Conciliation Act, 1996'. This act came with a lot of improvements over the 1940 act, however, it failed to fulfil the initial requirements of being economical and independent of the judiciary. In spite of putting ample amount of effort to make India an established arbitration hub, the legislature failed tremendously in doing so, due to the inadequacy of the 1996 act. Followed by this, the 'Arbitration & Conciliation (Amendment) Act, 2015' was passed. This amendment mainly focused on reducing the interference of courts in arbitral proceedings and making them more independent. The 2015 amendment was successful in dealing with many issues, however, it still stood incompetent in solving certain technical issues persisting in the arbitral procedures. The legislature yet again failed to achieve its dream of establishing India as a global arbitration hub due to its tone-deaf approach of promoting Ad-Hoc arbitration but ignoring Institutional arbitration. Due to the current crisis of Covid-19 pandemic, there has been a sudden boom in the demand of Arbitration as a method of dispute resolution globally. In the wake of the pandemic, the proceedings have taken a form of Online Dispute Resolution (ODR) process, wherein arbitration proceedings are being conducted over an online platform for smooth and convenient redressal to disputes. Many Law firms and Arbitration firms in India are resorting to ODR methods for an uninterrupted dispute resolution process, giving rise to Ad-hoc arbitration in India. However, the lack of provisions regarding institutional arbitration in the 2015 amendment is creating a blockage in growth of Institutional arbitration as compared to that of Ad-hoc arbitration. Considering these facts, the 'Arbitration and Conciliation (Amendment) Act, 2019' has been passed and the Arbitration Council of India (ACI) has been introduced in the country. This amendment along with its other agendas, also focuses on the functioning and promotion of Institutional Arbitration in the country and it brings back the hope of legislature to create a global standing of India as an arbitration hub.

BACKGROUND

The aim of The Arbitration and Conciliation Act, 1996 was to amalgamate laws relating to Arbitration and define Conciliation, to form a homogenous framework that will administer the rules given in the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL regulations on Conciliation, to produce a significant settlement of disputes. The Arbitration and Conciliation Act, 1996, is a self-contained code. It deals with substantive and procedural attributes of Arbitration in India, laying down the process for initiation, dissolution, and the overall conduct of proceedings and the regulations regarding jurisdiction, evidence, and filing of an appeal.

The Act is divided into four parts:

1st Arbitration based on UNCITRAL model laws (Sections – 1 – 43)

2nd Enforcement of specific foreign awards [New York Convention Awards; Geneva Convention awards] Sections- 44 – 60

3rd Conciliation (Sections- 61-81)

4th Supplementary provisions (Sections- 82-87)

And it consists of 8 schedules

In the prolongation of the aims given in the Preamble to the Act, the following are some of its salient facets:

- The Act highlights the significance of the Arbitration Agreement, without which arbitration proceedings cannot be instituted. The arbitration agreement is a clause in a contract or an agreement between parties stating that it will be referred to Arbitration if there is any dispute.
- The Act states that the arbitration agreement or arbitration clause must contain the following information; the subject matter of dispute, timing of dispute (past/present/future), number of arbitrators (sole arbitrator/odd number of arbitrators), qualifications of arbitrators, jurisdiction and composition of the Tribunal
- The Act gives power to the parties to choose the seat of the arbitral Tribunal or the venue of the arbitration proceedings place of Arbitration, to be held by the Tribunal
- The parties can select the rules relating to the conduct of the arbitral Tribunal and if so, must be mentioned in the arbitration agreement or arbitration clause
- The Act permits the parties to choose the substantive law to be applied by the arbitration tribunal, and this must also be specified in the arbitration agreement

- The Act also mentions that the arbitration agreement must contain provisions regarding the tenure of the Arbitration and the termination of this tenure

The Act also notes the tribunals' power and functions, eradicates the umpiring system (breaking of a deadlock in an arbitration proceeding), permits new forms of Conciliation, and provides for the determination of awards by the arbitrators, gives rules for international applicability, and augments powers of the arbitrators.

After much uproar, the Arbitration and Conciliation Act, 1996, gets amended. The Arbitration and Conciliation (Amendment) Act, 2015, which received the President of India's consent on December 31, 2015, and viewed to have come into force on October 23, 2015, has suggested extensive changes Arbitration Act. The road to the Amendment Act has been rather grueling. The Arbitration Act was enacted in the year 1996 to offer speedy and effective dispute resolution through Arbitration or Conciliation and minimize the burden on courts. Nevertheless, Arbitration's experience in India has been subject to penetrating analysis over the years, leaving the parties contemplating whether or not to assimilate arbitration clauses. Taking note of the disparagements in the earlier arbitration regime, the Law Commission had submitted its Report No.246 in August 2014, advocating several modifications to the Arbitration Act. On 23 October 2015, the President of India endorsed an ordinance ("**Arbitration Ordinance**") to force many of these amendments to the Arbitration Act. As the amendments were obtained through a law, misperception and indecision still predominated; there was no precision on whether such modifications would be potential or reflective in operation. The Amendment Act was most certainly a welcome move and has been acclaimed for providing the much-needed momentum to the Indian arbitration regime's growth. Despite some eccentricities, the Amendment Act is mainly in accordance with the Law Commission Report and the Arbitration Ordinance. Nonetheless, there have been slipups in drafting the new law, and a few more steps could have been taken by the lawmakers to guarantee that India does indeed become the next arbitration hub.

FEATURES OF 2015 AMENDMENTS

- Definition of Court in S.2 has been amended to refer only to the High Court in International Commercial Arbitration.
- Provision for granting Interim relief S.9 court assistance in taking evidence & S.37(b) when relates to appeals & S.27 will now apply to International Commercial Arbitration as well.
- Fast track arbitration proceedings within six months.
- Any challenge about arbitral awards must be disposed of within one year.

- The Act has imposed a strict timeline for the conclusion of arbitral proceedings, i.e., 12 months plus an extension period of 6 months after that 5% deduction in the Arbitrator fees.
- Arbitral Tribunals have been given the power to pass interim measures u/s 17 as any other court.
- The provision for setting aside the award on the grounds of public policy has been modified to include: A. In contravention with the entire system of Indian Law B. In conflict with the nations of mortality or justice in addition to other grounds.

FEATURES OF 2019 AMENDMENTS

- Institution of an independent body called the Arbitration Council of India (ACI) to encourage Arbitration, Mediation, Conciliation, and other ADR mechanisms.
- The Arbitration Council of India would consist of a Chairperson who is either: (i) a Judge of the Supreme Court; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in the conduct of Arbitration. Other members will include a distinguished arbitration practitioner, an academician with experience in Arbitration, and government appointees.
- The Supreme Court and High Courts may now assign arbitral institutions, which parties can approach for arbitrators' appointment. For international commercial Arbitration (ICA), appointments would be made by the institution chosen by the Supreme Court. For domestic Arbitration, appointments will be made by the institution selected by the concerned High Court. In case there are no arbitral institutions available, the Chief Justice of the concerned High Court may create a panel of arbitrators to conduct the functions of the arbitral institutions. An application for the appointment of an arbitrator is required to be disposed of within 30 days.
- Removal of the time barrier for international commercial arbitrations. It says that tribunals must endeavor to dispose of international arbitration matters within 12 months.
- The written claim and the defense to the request in an arbitration proceeding should be completed within six months of the arbitrators' appointment.
- All details of arbitration proceedings will be kept confidential except for the details of the arbitral award in certain circumstances. Disclosure of the arbitral award will only be made where it is necessary for implementing or enforcing the award.

COMPARATIVE ANALYSIS (2019 VS 2015 AMENDMENT)

The Arbitration and Conciliation (Amendment) Bill, 2019 has been introduced with the objective of promoting Institutional Arbitration in India and eliminating some of the issues being faced as an impact of the 2015 Amendment Act. The 2015 Amendment Act was initially introduced to make India grow as an arbitration friendly country on an international level, however, it was not very successful and now the 2019 Amendment act is a step ahead towards achieving the objective of establishing India as an arbitration hub.

The 2019 Amendment act aims to lessen the collective role of courts in arbitration proceedings and make the whole procedure a swift one. According to this recent amendment both the Supreme Court as well as the High Court can designate an arbitral institution, whereas, according to the 2015 Amendment Act, only the High Court had the power to designate an arbitral tribunal. The 2019 Amendment Act lays down that parties can approach the Supreme Court for the designation of an arbitral institution in cases of international commercial arbitration and the High Court in cases relating to domestic arbitration. The 2015 Amendment Act on the other hand, only had the High Court covered under the definition of court in the act and the High Court was solely responsible for delegating an arbitral tribunal for both international commercial arbitrations as well as domestic arbitrations. This addition to the act will not only bifurcate and simplify responsibilities of courts but will also speed up and increase the accuracy of the process of allotment of arbitral tribunals and promote growth of arbitral institutions. Further, the 2019 Amendment Act also eliminates Section 11(6A) from the act, which was first inserted in the act via the 2015 Amendment Act. By way of inserting Section 11(6A) to the act, the 2015 Amendment Act, imposed a restriction over the power of courts as under this section, the scope of courts was to limited to examination of the arbitration agreement already existing between parties and they could not consider if the claims were otherwise referable to arbitration without a pre-existing agreement. According to Section 11(6A), the courts only had the power to appoint an arbitral tribunal for parties with a pre-existing arbitration agreement. This situation was however completely modified by the 2019 Amendment Act, as it made amendments to Section 11 of the act and removed Section 11(6A) completely. According to the latest amendment, the requirement of Section 11(6A) stands nullified as the Supreme Court and the High Court are no longer responsible for the appointment of arbitral tribunals, instead, they are only responsible for designation of arbitral institutions to the parties, which in turn will appoint an arbitral tribunal for the parties. This particular change in the act plays an important role in establishing India as a global

arbitration hub and attracting international business because it is an efficient way of promoting and supporting the growth of institutional arbitration, which is preferred by the international community over ad-hoc arbitration.

The time limit initiated for completion of arbitration proceedings by the 2015 Amendment Act was 12 months from the date the arbitral tribunal was first referred to. However, it was further extendable to a time period of 18 months from the date of reference of the arbitral tribunal with the consent of both parties. In comparison to the 2015 amendment, the latest amendment provides relaxation in terms of time limit by changing the starting date of the time limit to the date on which both parties complete their statements of claim and defense. Further, in order to promote and ease international arbitration, the latest amendment provides a relaxation over the compulsory time limit of one year to pass the final award.

CASE LAWS

In the year 2019, after the much-needed amendment of the Act, there have been some crucial legislative and case law growths in arbitration law in India. The year was concluded with the following landmark judgments by the Apex Court:

Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.[1]

A person who has a concern in the proceedings' decision must not have the power to appoint a sole arbitrator.

Hindustan Construction Company Ltd. v. Union of India[2]

Section 87 of the Arbitration Act struck down as being noticeably arbitrary.

Bgs Sgs Soma Jv vs. Nhpc Ltd.[3]

The title of a seat holds sole jurisdiction on the courts of the said seat. Arbitration, irrespective of its designation as a seat, venue, or location, is the juridical seat of Arbitration unless there is a sign to the contrary. SC stated the judgment in Hardy Exploration and Production (India) as incorrect.

SSIPL Lifestyle Pvt. Ltd. v. Vama Apparels (India) Private Limited & Anr.[4]

It was held by the Court that arbitration use can be could've party under two circumstances- one by either filing a statement of defense or to jurisdiction and secondly, by unduly postponing the filing of the application under Section 8 of the

[1] Arbitration Application No.32 of 2019
[2] 2019 SCC OnLine SC 1520
[3] Civil Appeal No. 9307 of 2019
[4] *2020 in CS (COMM) 735/2018*

Act by not filing the same till the date by which the statement of defenced been filed. In the background of the amendments in the CPC, which includes the recent modifications in the context of Commercial Courts Act, 2015 and the amendments in the Arbitration Act, the Court decided that the amendment to Section 8 is a deliberate step towards setting a limitation period for filing the Section 8 application. Thus, the limitation period for filing of written statement as given in the CPC, 1908, and the Commercial Courts Act, 2015, would be valid for applying Section 8.

The state of Gujarat… v. Amber Builders[5]

The Court held that a joint reading of the Acts together, it is clear that the powers conferred in the Tribunal in terms of Section 17 of the Arbitration and Conciliation Act are concerned; Arbitral Tribunal can employ such capabilities constituted under the Gujarat Act because there is no discrepancy in these two Acts as far as the grant of interim relief is concerned. The Court orated that the judgment decreed in Gangotri Enterprises Limited v Union of India is *per incuriam* as it depends upon Raman Iron Foundry, which has been explicitly overruled by three judges bench in the case of H.M. Kamaluddin Ansari.

Dr. Bina Modi v. Lalit Modi & Ors.[6]

The Court held that the principle of freedom of parties governs the Arbitration Act. Section 19 specifically says that the parties are free to agree on the procedure to be followed by the Arbitral Tribunal in performing the proceedings. The Court perceived that considering the status of the parties, who belong to a business family and are well aware of litigations and arbitrations of all kinds, it could not be said that they were not mindful of the procedure to ICC. Therefore, the ground of haste makes waste, cannot be used. Further, It was r held that the amendment to section 8 does not amend the bar to the Court's jurisdiction in section 5 of the Act.

Additionally, no window has been opened to permit a judicial authority to step in. It finds no existing valid arbitration agreement to order Arbitration. Only when a fundamental action is brought before the Court, and a plea of Section 8 is taken, the Legislature has permitted the Court to question the actuality of a valid arbitration agreement before referring the parties to Arbitration. It was elucidated that principles relating to anti-suit injunction suits are not enticed to anti-arbitration injunction suits

[5] *Civil Appeal No. 8307 of 2019*
[6] *CS (OS) 84/2020*

because the Arbitration Act is a comprehensive code in itself. The 1996 Act authorizes the Arbitral Tribunal to rule on its jurisdiction.

Sona Corporation India Private Limited v. Ingram Micro India Private Limited[7]

It was held by the Court that there was no bar in law for an arbitral tribunal to pass an order in an ensuing application filed before it under Section 17 of the Arbitration Act, in the distinction of an order given in the original Section 17 application, if it could be established that successive material developments had happened in the interval.

MBL Infrastructures Ltd. v. Rites Limited [8]

The Court held that it is clear from bare scrutiny of the Arbitration & Conciliation (Amendment) Act, 2019, which was notified on 30.08.2019 that it does not have a backdated effect, amended. Section 29(A) would not apply to pending arbitrations as on the amendment's date.

M/s Morgan Securities & Credits Pvt. Ltd. v. Videocon Industries Ltd.[9]

The Court held that it should be expected that the Arbitrator has granted the post-award interest only on the principal sum with full intent and while doing so, was mindful of the individual claims of the parties, the pertinent merits/demerits of the please taken before him, the equities required to be equalized between the parties and all other relevant factors for yielding the rate of interest as awarded. Further, The Court held that the Arbitrator's view for conceding the claim could not be treated as deliberately illegal or obstinate to go to the matter's root.

CONCLUSION

The Arbitration and Conciliation (Amendment) Act, 2019, gives the impression that if implemented judiciously, it would be successful in transforming India into a global arbitration hub. This amendment along with other fresh ideas, introduced the idea of establishment of the Arbitral Council of India(ACI) which might turn out to be really effective in turning India into an arbitration friendly country, hence bringing plenty of foreign business into the country. The ACI has been assigned the essential roles of promoting institutional arbitration along with other methods of dispute resolution in India and maintaining global professional standards in all matters relating to alternative dispute resolution. Institutional arbitration is highly regarded and resorted to in the international

[7] *ARB. A. (COMM.) 4/2019*
[8] *OMP (Misc) (Comm.) 56/2020*
[9] *FAO(OS) (COMM) 9/2020*

community, therefore, promotion and establishment of institutional arbitration in India will provide other countries the ease of doing business in the country. The improved stance of institutional arbitration in India will also attract more Foreign Direct Investment as investors in the international community seek and rely on institutional arbitration as an efficient method of dispute resolution.

The current global crisis of COVID-19 has frightfully affected the economy and has given rise to several disputes in almost all sectors of trade and business across borders. As a consequence of this, India was in dire need of a globally acceptable, less expensive, speedy and a more uniform sort of method of alternative dispute resolution and the 2019 Amendment Act was introduced as just the right time to cater to these needs. Availability of institutional arbitration as against just Ad-hoc arbitration in the country will not only attract domestic arbitrations but also be an effective method of international dispute resolution during this difficult time when disputes are on a rise. The setting up institutional arbitration shall increase domestic and international arbitration, as a result of which, employment will increase as a spillover effect, resulting in the overall betterment of the country's economy.

The 2019 Amendment Act is an appreciable attempt at overcoming certain issues being faced prior to this. New provisions including providing separate time to parties for completion of framing of pleadings, making proceedings cost effective and the whole procedure of arbitration less expensive, availability of institutional arbitration over ad-hoc arbitration, will be a great motivation for people to choose arbitration over litigation as a method of dispute resolution. Further, the latest amendment has drastically decreased the court's involvement in arbitration proceedings, as now the High Court and the Supreme Court are only bound to designate to the parties an arbitration institution as they see fit. Since the appointment of arbitral tribunal is no longer under the purview of the courts, the whole process of initiation arbitration becomes free of delays and hindrance. Moreover, the respective court is only given 30 days within which it has to delegate a domestic or an international arbitration to an arbitral institution, this leaves no further room for impediment.

Another major change brought about by this amendment is the confidentiality clause, according to which, all essential details of the arbitration proceedings are required to be kept confidential, except in certain circumstances the details of arbitral awards may be disclosed. However, such disclosure of the arbitral award will only be made in a situation

wherein it is necessary to enforce an arbitral award. Maintaining such strict standards of confidentiality in proceedings being conducted in the country will not just attract more domestic arbitrations but also provide an arbitration friendly jurisdiction to the international community.

Despite trying its best on a conceptual level, the amendment still leaves scope for ambiguity when it comes to the practical implementation of certain provisions. One such example is the time period of six months that has been allotted to parties for filing statements of claim and defense. In this case the parties will have to submit their claims and defense for both jurisdictional and substantive issues, whereas, usually the parties have an option of dividing the proceedings into two stages, wherein the first is for jurisdictional issues and the second stage is for substantive issues. This provision's practical applicability somewhat lacks flexibility and may result in the escalation of costs for both parties.

The 2019 Amendment Act has its strengths and its flaws but all in all it passes as a convincing enough change that could help in the transformation of India into a global arbitration hub, with the right implementation.