



DOWNLOAD PDF

India aims to be a jurisdiction that is arbitration-friendly and the introduction of the Arbitration and Conciliation (Amendment) Bill, 2019 in the Rajya Sabha has proven to be a step towards achieving that goal. The Bill was initially known as the Arbitration and Conciliation (Amendment) Bill, 2018, was passed by the Lok Sabha but was pending before the Rajya Sabha. Subsequently, as the Lok Sabha was dissolved, the bill could not see the light of the day.

On 15.07.2019, Mr. Ravi Shankar, Minister for Law and Justice introduced the Arbitration and Conciliation (Amendment) Bill, 2018 with minor changes as the Arbitration and Conciliation (Amendment) Bill, 2019 (hereinafter referred to as "The Bill") which was passed by Rajya Sabha on 18.07.2019. The Bill is the fruit of the recommendations of the High-Level Committee chaired by Justice. B. N. Srikrishna (hereinafter referred to as "The Committee").

The key feature of the Bill is to provide a suitable framework for all the arbitration on or after 23.10.2015 which is appropriate for both domestic and international arbitration. The Bill aims to outline a proper timeline and procedure so that India could emerge as an arbitration-friendly jurisdiction. India has set sights on becoming a hub for international jurisdiction just as Singapore, wherein appointment of arbitrators is designated as per the Singapore International Arbitration Centre (SIAC) and Hong Kong, wherein appointment of arbitrators is in accordance with the Hong Kong International Arbitration Centre (HKIAC) respectively.

Likewise in India, the Bill has proposed to constitute an Independent Government body called Arbitration Council of India (hereinafter referred to as "ACI"). The body will be responsible for the promotion of arbitration, conciliation, mediation and other alternative dispute redressal mechanisms (ADR).

The main reason for proposing ACI to be a government body is due to the fact that the Government of India is the largest litigator in India, and ACI will have to make serious attempts to overcome the shortcomings of the Arbitration and Conciliation Act (Act).

According to the Bill, the main functions of the ACI would be as follows;

- Framing policies for grading arbitral institutions and accrediting arbitrators.
- Making policies for the establishment, operation and maintenance of uniform professional standards for all alternate dispute redressal matters.
- Maintaining a depository of arbitral awards (judgments) made in India and abroad.

The Arbitration and Conciliation (Amendment) Bill, 2019 is majorly based on

the recommendations of the Committee, but a few modifications have been made in the Committee Report of Justice B. N. Srikrishna, while finalizing the Bill. The Bill proposes that the Chairperson who will be heading the ACI would be either Chief justice of a High Court or a Judge from Supreme Court or High Court or an eminent person with expert knowledge in conduct of the arbitration. Furthermore, the council will include eminent practitioners, academician, and government appointees with experience in arbitration. The Secretary to the Government of India in the Legal Affairs, Ministry of Law and Justice or a representative, another member from the Government of India in the Department of Expenditure, Ministry of Finance or a representative could also be considered for being the members of the council. There would also be one representative from the Commerce and Industry on a rotational basis and finally, a Chief Executive Officer or a Secretary ex officio could also be a member of the council.

The Committee had recommended that the retired Judge of the Supreme Court or High Court who would be nominated by the Chief Justice of India will be heading ACI. The other members in the council are envisaged to be eminent practitioners, academicians, and the Central Government will appoint government appointees with experience in arbitration. Finally, the Committee recommended that there should also be the presence of one overseas practitioner who has substantial knowledge and experience in the field of arbitration.

The amendments were made to facilitate and achieve the goal of improving institutional arbitration by establishing an independent body to lay down standards that are international in nature. The aim was to make the arbitration process more user-friendly, cost-effective and to also ensure timely disposal of cases. However, on the other hand, the ambiguity still prevails as the parties are free to choose and appoint an arbitrator as per the Act, 1996 in the Bill. The next major question is whether or not a foreign legal professional will be able to act as an arbitrator given the fact that the Eight Schedule of the Bill, as the qualification of the arbitrator is as per the Advocates Act, 1961. The Hon'ble Supreme Court of India consisting of Justice A.K. Goel and Justice U.U. Lalit recently passed a crucial verdict in the matter titled Bar Council of India vs. A.K. Balaji and Ors. declaring that foreign lawyers/firms are not entitled to practice law in India either on the litigation or non-litigation side unless they fulfil the requirements of the Advocates Act, 1961, and the Bar Council of India Rules.

Although, the committee believed that Section 11 of the Act, 1996 should be amended by providing powers to the Supreme Court and the High Court to designate arbitrators and arbitration which have been accredited by the ACI, and the Bill has implemented the recommendations in Paragraph 3.

The Bill has not changed the timeline that was introduced in the 2015 Amendment. It maintains the timeline of a total time frame of 18 months (12+6 months) to complete the arbitral proceedings and to pass an award. If the arbitral award is not passed by the arbitrator within the time frame of 18 months, the provision stipulates that the mandate of the arbitrators shall be terminated, unless a court of competent jurisdiction grants a further extension.

The Bill fails to provide clarification regarding the fact that whether or not the parties can mutually decide, at their will, to extend the time limit

beyond 18 months or if they mandatorily have to approach the court for seeking an extension. This is quite contradictory to the pith and substance of the Act, more so since arbitration is deemed to be something consensual. Furthermore, in case, the parties are forced to approach the court then it is very likely that judicial intervention will cause more delay, thus retarding the concept of having a timeline. Although the Amendment Act, 2015 provides a 60 days period for the courts to dispose of the dispute but the feasibility is questionable given the fact that the Indian Judiciary is overburdened and the timeline is far from being achievable.

However, the timeline for filing written claim was provided in order to maintain a proper balance of the timeline, a period of 6 months is prescribed for framing and completion of a statement of claim and defence is incorporated in the Bill. Although the biggest challenge is to determine the stage at which the filing of the statement has to be made, as arbitral proceedings do not strictly follow the well-established procedural law completely.

The Bill has exempted the international commercial arbitration by providing a non-binding proviso, although, on the other hand ensuring that the international commercial arbitration is made as expeditiously as possible and aim to resolve the dispute well within the 12 months' timeline. One of the striking features of the Bill, 2019 is that they have provided with clear cut guidelines and exceptions with regards to confidentiality. Although, the Bill has departed from the recommendations provided by the committee which was to insert a specific provision for confidentiality. It stated that unless the disclosure is utmost necessary to protect or to enforce legal rights or is required to be disclosed under a legal duty or to enforce or challenge any award, the confidentiality will be overlooked. In the Bill, however, the disclosure is allowed only for the purpose of implementation and enforcement of the award.

Another feature of the 2019 Bill is that in it, it is proposed that the arbitrator will be provided with immunity for anything done bona fide and/or done in accordance with the Act. There is also insertion of a provision prescribing the qualification of the arbitrator although whether or not the foreign professional can be an accredited arbitrator or not is still ambiguous. If the foreign professionals are not allowed to become an arbitrator in international arbitration, then it will act detrimental to the future of international commercial arbitration. The foreigners would not find it user-friendly and hence, the aim to become the hub of international arbitration might be a little too optimistic to be achieved.

In a nutshell, the Bill seeks to provide for a robust mechanism to deal with institutional disputes, but there exist many lacunas that still need to be looked at. The arbitration is undoubtedly becoming more complex with every passing amendment. Although, the implementation of the Bill is yet to be evaluated, the legislature should look out for a comprehensive amendment covering all the grounds instead of implementing a piecemeal in short interval of time which will create a mistrust in the international judicial system as it may reflect as an amateur in the company of the other international arbitration jurisdiction.

:

Contributed By - Deiya Goswami
Designation - Associate