



MR NARESH THACKER

Reflecting on the Arbitration & Conciliation (Amendment) Bill, 2018

INTRODUCTION

In a significant step towards ameliorating the Indian arbitration landscape, the Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”) was introduced, which had brought about noteworthy changes to the Arbitration and Conciliation Act, 1996 (“**the Act**”) (the Act, as amended by the Amendment Act, will be referred to as the “**Amended Act**”). The Amendment Act reinforced India’s efforts to align itself with globally recognised arbitration practices and endeavored to bolster India’s image as an arbitration friendly jurisdiction in the international arena while simultaneously filling the lacunae in the Act. The Supreme Court of India and the various High Courts have played a remarkable role in implementing the Amended Act and elevating arbitration as the preferred mode of dispute resolution through the catena of pro-arbitration judgments passed in recent times.

To address the difficulties which arose in the implementation of the Amended Act and to usher in a prominent role for institutional arbitration in India, a High-Level Committee was constituted under the chairmanship of Hon’ble Justice B.N. Srikrishna (Retd.) (“**Committee**”) and the findings of the Committee were published in a Report dated 30 July 2017 (“**Report**”). On 7 March 2018, the Arbitration and Conciliation (Amendment) Bill, 2018 (“**Bill**”), which proposes to

amend the Amended Act received the approval of the Union Cabinet, and on 10 August 2018, the Bill was approved by the Lok Sabha. The Bill is presently pending before the Rajya Sabha for consideration.

The Bill touches upon several aspects including, but not limited to the constitution of the tribunal, powers of the tribunal to grant interim measures, time limit for making an award, application to set aside an award, confidentiality of proceedings, protection of arbitrators, qualifications of arbitrators, and proposes the establishment of an Arbitration Council of India (“**Council**”). In this backdrop, we have delved into few of the amendments proposed in the Bill, particularly - the constitution of the arbitral tribunal, time limits for making an award, confidentiality of proceedings, and the viability of the proposed Council.

CONSTITUTION OF THE ARBITRAL TRIBUNAL *Courts to designate Arbitral Institutions to constitute the Arbitral Tribunal*

To seek the court’s assistance in constituting the arbitral tribunal, a party can request the Supreme Court (in an international commercial arbitration) or the High Court (in a domestic arbitration) to appoint an arbitrator under Section 11 of the Amended Act. In its effort to minimise the role of the court in the constitution of the arbitral tribunal, the Bill proposes to amend Section 11 of the Amended Act to empower designated arbitral institutions to appoint arbitrator(s). The Bill proposes that when a party seeks assistance of the court for the constitution of the tribunal, the Supreme Court or the High Courts (as the case may be) shall designate arbitral institutions, which have been graded by the Council for appointing arbitrators. Further, the Bill proposes that in the absence of a graded arbitral institute, the Chief Justice of the High Court shall maintain a panel of arbitrators for discharging

such functions of an arbitral institute.

Pertinently, the Report recommended that arbitral institutions should not be privately owned and instead should be incorporated as companies under Section 8 of the Companies Act, 2013, or as societies under the Societies Registration Act, 1860 / the applicable state legislation. However, in the Bill, the proposed definition of an 'arbitral institution' is 'an arbitral institution designated by the Supreme Court or a High Court under this Act'. Therefore, the Bill does not clarify whether arbitral institutions will be privately owned, or incorporated as companies, or as societies, or exist as an entity of any other kind.

Scope of the Arbitral Institutions and Courts

In the Amended Act, the Legislature had clarified that while considering an application for appointment of an arbitrator, the Supreme Court or High Court (as the case may be) shall confine itself to 'the examination of the existence of an arbitration agreement'. The Bill proposes the omission of this provision i.e. Section 11 (6-A) of the Amended Act. If the Bill is notified, since Section 11(6-A) of the Amended Act may cease to exist, when an arbitrator is to be appointed pursuant to Section 11 of the Amended Act it remains to be seen whether the appointing authority will examine the existence of an arbitration agreement before constituting the tribunal.

Given the absence of reasoning for the omission in the Bill, a party seeking to constitute the tribunal may even oppose examination of the arbitration agreement by contending that - the action of first inserting Section 11 (6-A) in the Amended Act and then omitting the same through the Bill clearly shows the intent of the legislature is to do away with any examination of an arbitration agreement at the early stage of constituting the tribunal. Nonetheless, it remains to be seen whether the intent of the legislature will surface through once the Bill is notified and the issues arise for determination before the courts.

The Bill also proposes the omission of Section 11 (7) of the Amended Act which provides that no appeal including letters patent appeal shall lie against an order passed by the Supreme Court or High Court (as the case may be) or institution designated by such court under

Section 11 of the Amended Act and such decision is final. The Report noted that while the default procedure for constituting the arbitral tribunal in other jurisdictions does not require involvement of the courts, the Amended Act did not limit court interference entirely. Although the Bill has not expressly clarified or indicated the rationale for the omission of Section 11 (6-A) and Section 11 (7) of the Amended Act, seemingly the proposed amendment could be in furtherance of the legislature's intent to remove provisions which relate to the function of the court in the constitution of the tribunal since the courts will no longer appoint arbitrators (except in the absence of arbitral institutions). In any event, we hope that the Legislature's intent will come through once this amendment is interpreted by the judiciary. An issue which remains un-addressed in the Bill is whether the appointment of arbitrators is a judicial function or an administrative function, given that the omissions of Sections 11(6-A) and 11 (7) of the Amended Act indicates that we are headed towards the appointment of tribunals being an administrative and non-judicial function.

TIME LIMIT

Completion of Pleadings within 6 months

Section 23 (1) of the Amended Act provides that the statement of claim and defence shall be filed within the time period agreed upon by the parties or determined by the arbitral tribunal. Expressly restricting the time period for completion of pleadings, the Bill now proposes the insertion of sub-section (4) in Section 23 of the Amended Act which will provide that the pleadings under Section 23 shall be completed within a period of 6 months from the date the arbitrator(s) receives notice in writing of its appointment. This amendment will provide an impetus to completion of the pleadings and therefore compliment Section 29-A of the Amended Act which provides the time limit for making an award. Considering that the Bill has neither omitted nor aligned the existing Section 23(1) of the Amended Act with the proposed insertion of Section 23 (4), an initial conflict between the existing Section 23(1) and the proposed Section 23(4) is likely to be an issue for determination before the courts.

Imposition of time limits in the Amended Act

To address the prolonged delay in completing arbitrations in India, the legislature had introduced Section 29-A of the Amended Act, which provides a time limit of 12

months for making of an award, whereby the time-period of 12 months for completion of arbitral proceedings begins from the date on which the arbitral tribunal entered upon reference and can be extended by a further period of 6 months with the consent of both parties. However, if the award is not rendered within the said 12 months or within the additional 6 months thereafter, the mandate of the arbitrator(s) shall terminate unless the time period is extended by the court, on an application by either party, only for sufficient cause and on such terms and conditions as may be imposed by the court – prior to or after the expiry of the period so specified.

The imposition of a statutory time limit for completing an arbitration was initially criticised as being opposed to party autonomy, along with a perception that it will overburden the existing diaries of the court. However, in practice, it has been noticed that arbitral tribunals are now conscious of the time limit and in fact drive parties to complete proceedings in a time bound manner- if not within the statutory time frame of 12 months, then within the further 6-month extension as provided under the Amended Act. Practical experience also shows that in those rare circumstances when the award has not been made within the time frame of 12 months or within the further 6 month extension under section 29-A of the Amended Act and parties have had to approach the court for a further extension, the courts have been wary while granting such further extension. Thus, the imposition of a time frame has proved beneficial for arbitrations in India.

Change to the time limit under section 29-A

Since most arbitrations have been spilling over the 12-month period in view of various factors including the administrative snags which affect an arbitration, the Bill has proposed to amend the time limit under section 29-A of the Amended Act such that the 12-month period will begin to run from the date of completion of pleadings in terms of the newly proposed Section 23(4) (i.e. pleadings shall be completed within 6 months from the date the tribunal enters upon reference). Therefore, if the Bill is notified, the time limit will no longer run from the date the tribunal enters upon reference but will start running only from the date of completion of pleadings under the newly proposed Section 23 (4). As a result, the time limit

for making of an award will be enlarged by a further period depending on the date of completion of pleadings. However, since Section 29-A of the Amended Act has been effective in its implementation, the Legislature's proposal to enlarge the time period to the extent provided in the Bill appears premature.

International Commercial Arbitrations excluded from time limits to make an award

The Report elucidated that the strict timelines imposed by the Amended Act attracted criticism from arbitral institutions in the international diaspora as arbitral institutions often prescribe their own guidelines for the tribunal to set out the procedural time table or the rules itself may set timelines for the arbitration proceedings. Thus, the non-derogable nature of Section 29-A of the Amended Act encroached upon the power of arbitral institutions to govern the conduct of arbitrations, thereby projecting India as a less favorable seat of arbitration. To address this concern, the Bill proposes to exclude 'international commercial arbitrations' from the ambit of Section 29-A of the Amended Act. The proposed exclusion of 'international commercial arbitrations' from the ambit of Section 29-A of the Act will not just result in the exclusion of institutional arbitrations but also the exclusion of ad-hoc 'international commercial arbitrations' seated in India. While the Committee's intent was limited to excluding institutional arbitrations from statutory time limits since they already run on a tight schedule, the legislature has proposed to exclude ad-hoc international commercial arbitrations as well, thereby discriminating between ad-hoc domestic arbitrations (which will continue to be bound by the statutory time limit) and ad-hoc international commercial arbitrations.

Mandate of the arbitrator to continue pending disposal of an application for extension of time before the Court

The Bill proposes that pending disposal of an application before the court for an extension of time to make an award under Section 29-A (5) of the Amended Act, the arbitrator's mandate will continue and not terminate automatically, until the application is disposed of. The language of the proposed amendment clarifies that the arbitrator can continue with the arbitration during the pendency of the application before the court. This amendment will further the objective of saving time and

ensure that delays in disposal of the application before the court does not have a knock-on effect on the timeline of the arbitration proceedings.

CONFIDENTIALITY OF ARBITRATION PROCEEDINGS

Stemming from the findings in the Report vis-à-vis the confidentiality in arbitrations, the Bill proposes that the arbitrator, the arbitral institution, and the parties to the arbitration agreement shall keep confidentiality of all the arbitral proceedings, except the award which can be disclosed for the purpose of implementation and enforcement of the award. While the Report proposed an exclusion to the confidentiality obligations if disclosure of the arbitration proceedings is mandated by a legal duty or to protect or enforce a legal right, this exclusion has not been imported in the Bill. To ensure the confidentiality obligations are watertight, the provision of 'Confidentiality of Information' commences with the words "*Notwithstanding anything contained in any other law for the time being in force*". In the circumstances, assuming the disclosure/production of the arbitral award or even the arbitration record is mandated under another statute, the question which will arise for consideration before the courts will be whether such statute over-rides the provision for confidentiality contained in the Act.

The language of the proposed provision does not clarify whether the duty of confidentiality is limited to arbitration proceedings only or whether it also extends to arbitration related court proceedings prior to the making of the award. There seems to be a disconnect in the Bill vis-à-vis the proposed provision for confidentiality and the proposed amendment to Section 34 of the Amended Act which provides for an application for setting aside an arbitral award. The provision for confidentiality is restrictive and it allows an award to be disclosed for the purpose of implementation and enforcement of the award. At the same time, a change has been proposed in Section 34 of the Amended Act which will provide that the 'record of the arbitral tribunal' can be utilised in court for the purposes of establishing a party's case under Section 34 of the Amended Act. Therefore, clearly the provisions of the Bill seem to be at cross purposes. If the provisions as proposed in the Bill are to be literally interpreted, it would lead to anomalous situation i.e.

while a party is granted the right to challenge an award, it will be deprived of the benefit of relying upon the records of the tribunal to substantiate its case on account of the restrictive provision on confidentiality.

However, when holistically read, one would have to agree that the clause on confidentiality cannot over-ride a statutory right granted to challenge the award. Therefore, it seems that bearing the foregoing in mind the legislature has consciously proposed the usage of the words 'record of the arbitral tribunal' in Section 34 of the Amended Act for the purposes of establishing the limited grounds of Section 34.

ARBITRATION COUNCIL OF INDIA

Recommendations in the Report

With the aim of promoting arbitral institutions in India and elevating India as preferred seat of arbitration, the Report recommended the constitution of an autonomous body styled as the 'Arbitration Promotion Council of India'. Broadly, the Report suggested the establishment of the Council inter alia to (i) accredit and grade arbitral institutions, and review such grading on a periodic basis; (ii) incentivise arbitral institutions to perform; (iii) recommend legislative changes to the government for promoting institutional arbitration in India; and (iv) to do anything which is necessary or The Bill proposes that the Council should frame policy to establish uniform professional standards in respect of all matters relating to arbitration for the purpose of promoting arbitration, mediation, conciliation or other ADR mechanisms; and amongst other things, the Council should be responsible for grading arbitral institutions, and for reviewing the grading of arbitral institutions and arbitrators. We hope that once the Bill becomes an Act, the legislature and/or the Council will introduce checks and balances in the grading of arbitral institutions, given the pivotal role that the institutions will have in the constitution of tribunal.

Eighth Schedule – Qualifications of an arbitrator

The Bill proposes the insertion of the Eighth Schedule ("**Schedule**") in the Amended Act which will provide the prerequisites to qualify as an arbitrator i.e. 'Qualifications and Experience of an arbitrator' and 'General Norms applicable to Arbitrator'. Once the Council is formed, it is likely that it will publish guidelines for grading the arbitrators in consonance with the requirements



envisaged in the Schedule. The Schedule is ambiguous and anomalous in nature - For instance, an advocate can only qualify an arbitrator for the purposes of the Amended Act if he is registered under the Advocates Act, 1961. Pertinently, the Advocates Act, 1961 permits only an Indian citizen to register as an advocate. While the intent seems to be to preclude international legal practitioners from being arbitrators, it is yet possible that such practitioners may qualify under the other sub-provisions in the schedule. Amongst other norms, the Schedule provides that an arbitrator shall be familiar with the statutes listed therein including constitution of India, labour laws, and customary laws. However, while a person may qualify as an arbitrator under the Schedule in view of his/her expertise in a scientific or technical stream, such a person may not be familiar with the specified statutes. Therefore, it appears that the provisions within the Schedule are self-defeating. Further, while the Schedule chalks out the prerequisites to qualify as an arbitrator, it does so in a restrictive approach. For example, industrial and technical experts from streams which have not been enlisted in the Schedule may be ousted from being arbitrators.

Electronic Depository of Awards

With the objective of creating a depository of arbitral awards and records related thereto, the legislature has mandated that the Council shall maintain an 'electronic depository of all arbitral awards made in India and such other records related thereto in such manner as may be specified by the regulations'. Recognising the difficulty faced by courts in obtaining an authentic copy of an arbitral award made in ad-hoc arbitration during enforcement proceedings, the Report proposed the creation of a depository of arbitral awards, however, the Bill itself does not highlight the purpose for storing awards in the depository. Since the Bill is abstruse vis-à-vis the depository, we hope that the Council lends clarity to characteristics of the depository including (i) the purpose for storing awards in the depository; (ii) whether the storage of 'other records related thereto' in the depository encompasses the record of the arbitrator or the records of the entire arbitration proceeding; (iii) the circumstances under which the arbitral award and

records filed in the depository can be accessed; and (iv) the measures taken to preserve the security of the electronic depository to reduce the risks of theft and data privacy breach.

CONCLUSION

While the perception within the arbitration community - both in the country and outside, was that the Amendment Act would address the sore points in the Act, some lacuna yet remains in the Amended Act. The Report intended the Bill to further the cause of arbitration by ironing out the creases in the Amended Act and with a view to make India a global hub of arbitration. However, we believe that the Bill misses the mark. As opined in this article, the Bill has more negatives than positives. Particularly, the creation of a regulatory body for the purpose of monitoring arbitral institutions, arbitrators, parties, and arbitration in general is a retrograde step.

The Bill is bare - some of the proposed amendments are ambiguous, anomalous, and devoid of relevant details, with too much being left open to the discretion of the Council. In this background, the powers and role of the Council will be vast, and as a regulatory body it is likely to yield tremendous power over arbitral institutions, arbitrators, parties, and the conduct of arbitration in India. The fear of the powers of the Council completely over-shadowing party autonomy, which is the hallmark and starting point of the law on arbitration, is real.

Party autonomy is the foundation of arbitration, and once the Bill is notified as an Act, arbitration law as it is understood in the international context will be completely overturned. While some of the amendments may be open to question, the development of law is a constant process, and nevertheless, for the first time, the legislature has given an impetus to arbitral institutions, provided for confidentiality of arbitral proceedings, and protection of arbitrators for actions taken in good faith.

Any change in law comes with its set of challenges, and if the Bill is notified, in the months immediately following the Bill, the interpretation of the Bill and the intent of its provisions may be put to test before the courts.