

## 2019 AMENDMENTS

### INTRODUCTION

The ACA was first amended by the 2015 Amendments with the objective to make the arbitration process cost-effective, speedy and having a minimum judicial intervention. The 2015 Amendments did not specifically provide for institutional arbitration. To review the institutionalization of the arbitration mechanism in India and suggest reforms, the Central Government<sup>1</sup> set up a high-level committee (“Committee”) under the Chairmanship of Justice (Retd.) B.N. Srikrishna, former Judge, Supreme Court of India. Based on the report<sup>2</sup> submitted by the Committee, the Arbitration and Conciliation (Amendment) Bill, 2018, was introduced, which was passed by both the Houses of Parliament. On 9 August 2019, the Arbitration and Conciliation (Amendment) Act, 2019 (“2019 Amendments”), received the assent of the President.

The main features of the 2019 Amendments are:

#### **(A) ARBITRAL COUNCIL OF INDIA: PART 1A**

- (i) Part 1A has been inserted, which is titled ‘Arbitration Council of India’ (Sections 43A to 43M). A national-level-body called the ‘Arbitration Council of India’ (“Council”) will be established and incorporated by the Central Government for performing duties and functions under the

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<sup>1</sup> Set up by the Ministry of Law and Justice, Government of India by an office order dated 13 January 2017.

<sup>2</sup> ‘Report of the High-Level Committee To Review the Institutionalization of Arbitration Mechanism in India’ dated 30 July 2017.

Act.<sup>3</sup> The Council shall be a body corporate with its head office at Delhi.<sup>4</sup>

(ii) **Composition of the Council**<sup>5</sup>

<b>Chairperson</b>	Retired Judge of the Supreme Court/ High Court; or Retired Chief Justice of a High Court ; or An eminent person having special knowledge and experience in the conduct or administration of the arbitration.
<b>Members (2)</b>	An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration (both domestic and international); and An eminent academician having experience in research and teaching of arbitration and alternative dispute resolution laws.
<b><i>Ex officio</i> members (2)</b>	Secretary, Department of Legal Affairs, Ministry of Law and Justice; Secretary, Department of Expenditure, Ministry of Finance; and Chief Executive Officer- Member-Secretary
<b>Part-time member (1)</b>	Representative of recognized body of commerce and industry

The term of the Chairperson and Members of the Council shall be three years.

(iii) **Duties and functions of the Council**<sup>6</sup>: The Council will promote and encourage alternative dispute resolution mechanism and perform vari-

<sup>3</sup> Section 43B (1) inserted in ACA by Section 10 of the 2019 Amendments.

<sup>4</sup> Section 43B (3) inserted in ACA by Section 10 of the 2019 Amendments.

<sup>5</sup> Section 43C inserted in ACA by Section 10 of the 2019 Amendments.

ous duties and functions including framing policies governing grading of arbitral institutions, providing accreditation of arbitrators,<sup>7</sup> conducting training, workshops, and courses related to arbitration, establishing and maintaining depository of arbitral awards,<sup>8</sup> and promoting institutional arbitration.

- (iv) **Grading of arbitral institutions and arbitrators<sup>9</sup>:** The Council will grade arbitral institutions based on criteria relating to infrastructure, quality, and caliber of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations in the manner specified by the regulations.
- (v) The Council is also empowered to make regulations and rules, in consultation with the Central Government, for discharging its functions and duties under the Act.<sup>10</sup>

**(B) APPOINTMENT OF ARBITRATORS: SECTION 11 (THE AMENDMENT TO SECTION 11 HAS NOT BEEN BROUGHT INTO FORCE AS ON 20 FEBRUARY 2020)**

- (i) The appointment of arbitrator(s), under the default procedure, shall be done exclusively by the ‘arbitral institutions’ designated by the Supreme Court (in case of international commercial arbitration) and the High Court (in case of all other arbitrations).
- (ii) The Supreme Court and the High Court are empowered to designate arbitral institutions from time to time, which have been graded by the Council<sup>11</sup>, and such designation will not be regarded as delegation of judicial power.<sup>12</sup>

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<sup>6</sup> Section 43D inserted in ACA by Section 10 of the 2019 Amendments.

<sup>7</sup> Section 43J inserted in ACA by Section 10 of the 2019 Amendments.

<sup>8</sup> Section 43K inserted in ACA by Section 10 of the 2019 Amendments.

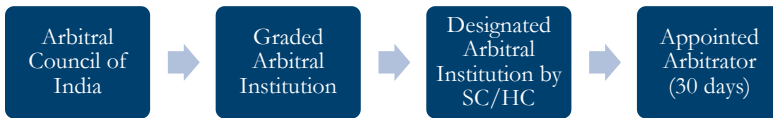
<sup>9</sup> Section 43-I inserted in ACA by Section 10 of the 2019 Amendments.

<sup>10</sup> Section 43L inserted in ACA by Section 10 of the 2019 Amendments.

<sup>11</sup> Section 11(3A) inserted in ACA by Section 3 of the 2019 Amendments.

<sup>12</sup> Section 11(6B) omitted in ACA by Section 3 of the 2019 Amendments.

- (iii) An application for appointment of arbitrator(s) will be filed before an ‘arbitral institution,’ and such application has to be disposed of by the arbitral institution within thirty (30) days from the date of service of notice on the opposite party.<sup>13</sup>
- (iv) In case where graded arbitration institutions are unavailable, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions.
- (v) The fees of the arbitral tribunal and the manner of its payment shall be determined by the arbitral institution as per the rates specified in the Fourth Schedule.



### **(C) INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNAL: SECTION 17**

- (i) Section 17 (1) has been amended to provide that an application for interim measure can be filed by a party only during the arbitral proceedings as the words “or at any time after the making of the arbitral award but before it is enforced in accordance with section 36” have been omitted.<sup>14</sup>

### **(D) TIME PERIOD FOR FILING OF STATEMENT OF CLAIM AND DEFENSE: SECTION 23**

- (i) Section 23 (4) has been added which requires the parties to complete the statement of claim and defense within six months from the date the

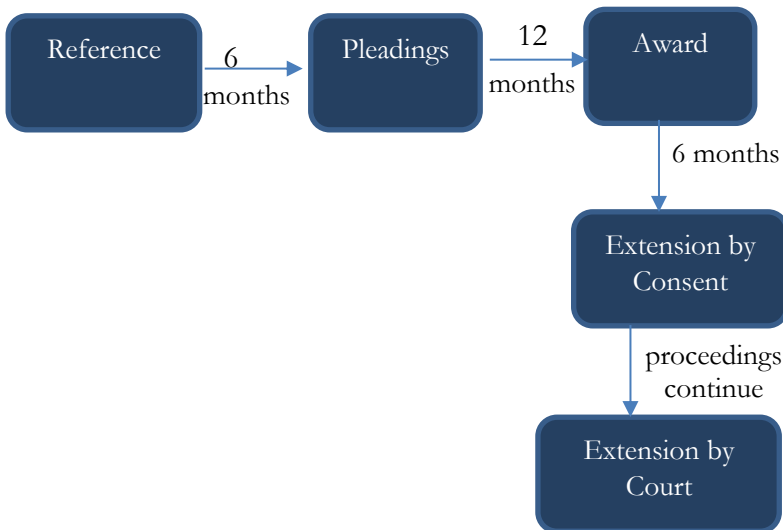
<sup>13</sup> Section 11(13) substituted in ACA by Section 3 of the 2019 Amendments.

<sup>14</sup> Please note that as per Section 32 of the ACA, the office of arbitral tribunal becomes *functus officio* after the making of award. Thus, an application for interim measure “at any time after the making of the award but before enforcement under section 36” could not lie before the arbitral tribunal.

arbitrator or all the arbitrators (as the case may be) receive notice, in writing, of their appointment.

**(E) TIME LIMITS FOR ARBITRAL AWARD: SECTION 29A**

- (i) The time limit for the passing of the arbitral award has been modified in domestic arbitrations. Section 29A (1) provides that the arbitral tribunal shall pass an award within twelve months from the date of completion of pleadings under Section 23(4).
- (ii) The proviso to Section 29A (1) states that in international commercial arbitrations, an award may be passed expeditiously, and an endeavor has to be made to adhere to the time limit as provided for the matter in domestic arbitrations.
- (iii) Second proviso to Section 29A (4) has been inserted which states that if an application for extension of the period is filed before a Court under Section 29A (5), the mandate of the arbitrator shall continue till the application is disposed of.
- (iv) The arbitrator shall be given an opportunity of being heard before an order of reduction in the fees of the arbitrator is passed by the Court under Section 29(4).



**6 months + 12 months + 6 months = 18 months**

**(F) APPLICATION FOR SETTING ASIDE ARBITRAL AWARD: SECTION 34**

- (i) Section 34 (2) (a) has been amended, to clarify that a party applying to the Court for setting aside of arbitral award has to rely only on the record of the arbitral tribunal, by substituting the words “furnishes proof that” with “established on the basis of the record of the arbitral tribunal”.

**(G) APPEALABLE ORDERS: SECTION 37**

- (i) In sub-section (1) of section 37 of the ACA, the words “Notwithstanding anything contained in any other law” has been added before the words “An appeal shall lie”.

**(H) CONFIDENTIALITY OF INFORMATION: SECTION 42A**

- (i) An express provision i.e. Section 42A has been inserted providing for confidentiality of arbitral proceedings. It casts an obligation upon the arbitrator, the arbitral institution and the parties to the arbitration agreement to maintain the confidentiality of all arbitral proceedings with the exception that award can be disclosed for the purposes of enforcement and implementation.

**(I) PROTECTION OF ACTION TAKEN IN GOOD FAITH: SECTION 42B**

- (i) Section 42B has been added which grants immunity to arbitrators. It states that a suit or any other legal proceedings shall not lie against the arbitrator for anything which is done or intended to be done by him or her in good faith in course of arbitration proceedings.

**(J) POWER OF JUDICIAL AUTHORITY TO REFER PARTIES TO ARBITRATION: SECTION 45**

- (i) In Section 45 the words “unless it finds” have been substituted with the words “unless it *prima facie* finds” to clarify that the Court shall refer the parties to arbitration on the basis of only *prima facie* conclusion that the

arbitration agreement is not null and void, inoperative or incapable of being performed<sup>15</sup>.

**(K) APPLICABILITY OF 2015 AMENDMENTS: SECTION 87**

- (i) Section 87 has been inserted to clarify the applicability of the 2015 Amendments. It states that unless the parties otherwise agree, the 2015 amendments are not applicable to
  - a) the arbitral proceedings which commenced before 23 October 2015<sup>16</sup>; and
  - b) to court proceedings that arise out of or in relation to such arbitration proceedings.
- (ii) Thus, the 2015 amendments have been made prospective in nature and applicable to the arbitral proceedings and related court proceedings which commenced on or after 23 October 2015.
- (iii) However, the Supreme Court of India in *Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors.* 2019 SCC OnLine SC 1520, has struck down Section 87 reviving the *BCCI v. Kochi Cricket Pvt. Ltd.*, (2018) 6 SCC 287 ruling.

**(L) QUALIFICATIONS AND EXPERIENCE OF THE ARBITRATOR: EIGHT SCHEDULE (THIS AMENDMENT HAS NOT BEEN BROUGHT INTO FORCE AS ON 16 FEBRUARY 2020)**

- (i) Eight Schedule has been inserted which provides for qualifications required for a person to be appointed as an Arbitrator. A person shall not be qualified to be an arbitrator unless he is or has been:
  - a. an advocate under the Advocates Act, 1961 having ten years of practice experience;

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<sup>15</sup> Section 45 of the Act corresponds with section 8 of the Act (applicable to arbitrations seated in India) which provides that a judicial authority can only make a *prima facie* finding on whether a valid arbitration agreement exists.

<sup>16</sup> 23<sup>rd</sup> October 2015 is the commencement date of the Arbitration and Conciliation (Amendment) Act, 2015

- b. a chartered accountant under Chartered Accountant Act, 1949 having ten years of practice experience;
  - c. a cost accountant under Cost and Works Accountants Act, 1959 having ten years of practice experience;
  - d. a company secretary under the Company Secretaries Act 1980 having ten years of practice experience;
  - e. an officer of Indian Legal Service;
  - f. an officer with law degree having ten years of experience in the legal matters in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in the private sector;
  - g. an officer with engineering degree having ten years of experience as an engineer in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in the private sector or self-employed;
  - h. an officer having senior-level experience of administration in the Central Government or State Government or having experience of senior-level management of a public sector undertaking or a Government company or a private company of repute; or
  - i. a person having educational qualification at degree level with ten years of experience in a scientific or technical stream in the fields of telecom, information technology, intellectual property rights or other specialized areas in the Government, autonomous body, public sector undertaking or a senior-level managerial position in a private sector, as the case may be.
- (ii) The Eight Schedule also prescribes the 'General norms applicable to Arbitrator' which includes the following:
- a. The arbitrator must have a general reputation of fairness, integrity and must be capable of applying objectivity in arriving at a settlement of disputes;



- b. The arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;
- c. The arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, the law of torts, making and enforcing the arbitral awards;
- d. The arbitrator should be capable of suggesting, recommending, or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

