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Salient features of Arbitration and Conciliation (Amendment) Bill 2018

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ABSTRACT

Arbitration is popular in India as an ad-hoc rather than an institutional setup, wherein parties regulate the arbitration proceedings themselves. Institutional arbitration involves the regulation of arbitration proceedings by an institution, which applies its rules of procedure. Due to a lack of adequate emphasis on institutional arbitration, Indian parties have preferred to conduct ad hoc arbitrations. However, as arbitration continues to grow between Indian parties, policymakers and courts of law have taken note of its importance but the challenge now is to substantially increase awareness about institutional arbitration in India so that efforts being taken to reform institutional arbitration are supported by an increase in usage. Arbitral institutions must themselves take the lead by increasing awareness about their services and benefits. In addition, they must adopt the best practices from around the world which will encourage parties to use their services over foreign arbitral institutions.

Keywords — ICADR International Centre for Alternative Dispute Resolution, HLC High Level Committee, ADR Alternative Dispute Resolution, BIT Bilateral Investment Treaty, APCI Arbitration Promotion Council of India, ACA Arbitration and Conciliation Act, UNCITRAL United Nations Commission on International Trade Law 1985

1. INTRODUCTION

Arbitration is popular in India as an ad-hoc rather than an institutional setup, wherein parties regulate the arbitration proceedings themselves. Institutional arbitration involves the regulation of arbitration proceedings by an institution, which applies its rules of procedure. Due to a lack of adequate emphasis on institutional arbitration, Indian parties have preferred to conduct ad hoc arbitrations. However, as arbitration continues to grow between Indian parties, policymakers and courts of law have taken note of its importance but the challenge now is to substantially increase awareness about institutional arbitration in India so that efforts being taken to reform institutional arbitration are supported by an increase in usage. Arbitral institutions must themselves take the lead by increasing awareness about their services and benefits. In addition, they must adopt the best practices from around the world which will encourage parties to use their services over foreign arbitral institutions. **Barack Obama the 44th U.S. President** said “we believe that big nations should not bully smaller nations, and that the sovereignty of nations must be respected and we have long urged that disputes be resolved peacefully, including through mechanisms like international arbitration. The Union Cabinet chaired by the **Hon’ble Prime Minister Shri. Narendra Modi** has approved the Arbitration and Conciliation (Amendment) Bill, 2018 for introduction in the Parliament. It is a part of the efforts of the Government to encourage institutional arbitration for the settlement of disputes and make India a Centre of robust Alternative Dispute Resolution (ADR) mechanism. The Amendments will facilitate achieving the goal of improving institutional arbitration by establishing an independent body to lay down standards, make arbitration process more party friendly, cost-effective and ensure timely disposal of arbitration cases. On 7th March 2018, the Union Cabinet approved the introduction of the Arbitration and Conciliation (Amendment) Bill, 2018 for discussion in the Parliament.

2. HISTORY OF ARBITRATION IN INDIA

Under the British rule, the Bengal Resolution Act of 1772 and Bengal Regulation Act of 1781 were formed with respect to arbitration. It was replaced by the Code of Civil Procedure in 1859. In 1862, this was extended to the Presidency towns of Calcutta, Bombay, and Madras. The British Arbitration Act, 1889, the Indian Arbitration Act, 1899 and later, the Arbitration (Protocol and Convention) Act, 1937 followed. The Arbitration Act of 1940 made provisions for pending arbitration and arbitration with and without court intervention. Since the Act was only developed on a domestic level, it proved to be frustratingly ineffective in disputes arising from foreign trade. With respect to international conventions, India had given its assent to the Geneva Protocol on Arbitration Clauses, 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 and

the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. The Arbitration and Conciliation Act of 1996 was passed. It covered both international and domestic commercial arbitration and aimed to promote arbitration as a speedy means to settle commercial disputes. It also stated that the Arbitral Tribunal would not be subject to the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872. This was done following the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law (UNCITRAL), 1985. The Indian government brought the 1996 Act into effect using an ordinance, before being passed by the government. Thereafter Arbitration and Conciliation (Amendment) Act 2015 was come in to force. The government of India felt it necessary to review Institutionalization of Arbitration Mechanism in India and accordingly the High-Level Committee was appointed

3. INSTITUTIONAL ARBITRATION IN INDIA

Despite the existence of numerous arbitral institutions in India, parties in India prefer ad hoc arbitration and approach the courts for the appointment of an arbitrator. The **Hon'ble Mr. Justice Amitabha Roy, Chief Justice, Rajasthan High Court** in a Seminar held at Jaipur in 2013 "Institutional Arbitration in India" advocating for institutional arbitration. He wanted the arbitral institution in the country should be oriented with good arbitral services so as to motivate the parties for the adoption of institutional arbitration. He suggested that arbitral institutions should be continuously devoted to motivating the masses to accept this dispute resolution mechanism. In the same conference, **Mr. Justice Bhandari** Judge of Rajasthan High Court felt that with the help of institutional arbitration the overburdened court cannot be relieved. He thought that for the establishment of a successful arbitration regime, the judicial intervention should be curtailed and accordingly judicial officers in lower court should be educated and instructed to dispose of objection against the arbitration quickly.

Institutional arbitration is a specialized institution with permanent character and assumes the function of aiding and administering the arbitral process as provided by the rules of Institutions. The institution facilitates and the panel of an arbitrator who arbitrates the dispute as per the rules of the institution.

4. NEED TO REVIEW THE INSTITUTIONALIZATION OF ARBITRATION MECHANISM

Thou The Arbitration and Conciliation Act, 1996, was amended by the Arbitration and Conciliation (Amendment) Act, 2015 in order to make arbitration process user-friendly, cost-effective and ensure speedy disposal and neutrality of arbitrators. However, to give a boost to institutional, arbitration vis-a-vis *ad hoc* arbitration and to remove some practical difficulties inapplicability of the Arbitration and Conciliation (Amendment) Act, 2015, to examine the effectiveness of existing arbitration mechanism by studying the functioning and performance of Arbitral Institutions in India; There were discussions on the proposed Arbitration Amendment Bill to incorporate necessary changes in the existing Arbitration and Conciliation Act 1996 along with the Arbitration and Conciliation (Amendment) Act, 2015. Placing into consideration the need for incorporating certain changes in the existing law relating to Arbitration and other related ADR mechanisms with reference to enhancing and promoting institutional, arbitration vis-a-vis *ad hoc* arbitration and to remove some practical difficulties in the applicability of the Arbitration and Conciliation (Amendment) Act, 2015. HCL was set up to identify the roadblock to the development of institutional arbitration, and to prepare a roadmap for making India "a robust Centre for international and domestic arbitration"

5. TERMS OF REFERENCE FOR THE HIGH-LEVEL COMMITTEE

The High-Level Committee (hereinafter for the purpose of brevity called as HLC) was set up by the Ministry of Law and Justice, Government of India by an office order dated 13 January 2017 to review the institutionalization of arbitration mechanism in India and submit a report on suggested reforms. The committee functioned under the chairmanship of Justice (Retd.) B.N. Shrikrishna (former judge of Supreme Court of India). The reference was made on the following points:

- (a) To analyze and review the effectiveness of the present arbitration mechanism.
- (b) To review the facilities, resources, funding, and manpower of existing ADR institutions.
- (c) To review the working of the institutions funded by the Government of India for arbitration purposes.
- (d) To assess skill gaps in ADR and allied institutions for both national and international arbitration.
- (e) To evaluate information outreach and efficacy of the existing legal framework for arbitration.
- (f) Based on the foregoing, to:
 - Suggest measures for the institutionalization of arbitration mechanism, national and international, in India so as to make the country a hub of international commercial arbitration.
 - Identify amendments to other laws that are needed to encourage International Commercial Arbitration (ICA).
 - Devise an action plan for implementation of the law to ensure speedier arbitrations.
 - Recommend revision of institutional rules and regulations and funding support thereof.
 - Advice empanelment of national and international arbitrators for time-bound arbitral proceedings.
 - Suggest a roadmap for further strengthening of research and development impacting the domain.
 - Enlist requisites steps for augmenting skill sets and professional manpower buildup for the sector.
 - Recommend measure to make arbitration more widely available in curricula and study materials.
 - Focus on the role of arbitrations in matters involving the Union of India, including bilateral investment treaties (BIT) arbitrations and make recommendations where necessary.
 - Evolving an efficient arbitration ecosystem for expeditious resolution of international and domestic commercial disputes.

6. OBJECTIVE OF HIGH-LEVEL COMMITTEE

The objective of formation of the committee was to facilitate the quick and effective resolution of commercial disputes through arbitration, the effective conduct of international and domestic arbitration and to formulate a roadmap for making India a hub for international and domestic arbitrations. The committee was asked to examine the effectiveness of existing arbitration mechanism, studying the functioning and performance of the arbitral institution in India and to identify the gaps in terms of manpower, skill,

infrastructure and funding in such institution. The Committee had extensive deliberations, meetings with stakeholder so also with academics and practitioners and prepared the report which consists of three parts. The Committee has submitted a report in three parts.

Part I contain the committee's findings Institutional arbitration in India and explore some of the reasons behind the lukewarm attitude towards institutional arbitration and its recommendation.

Part II contains a study of the working and performance of Indian arbitral institutions and the committee's recommendations for its reforms.

Part III deals with the role of arbitrations in BIT disputes involving the union of India and suggested suitable reforms with respect to dispute management by the government when an investor files arbitration claims and dispute resolutions under BIT's and dispute prevention etc.

7. KEY RECOMMENDATIONS OF THE HLC COMMITTEE

The HLC submitted its Report on 30th July 2017 and recommended that:

1. **Arbitration Promotion Council of India**– An autonomous body styled the Arbitration Promotion Council of India (“APCT”) and having representation from various stakeholders may be set up by amendment to the ACA for grading arbitral institutions in India.
2. **Accreditation of arbitrators**– The APCI may recognize professional institutes providing for accreditation of arbitrators. Accreditation may be made a condition of acting as an arbitrator in disputes arising out of commercial contracts entered into by the government and its agencies.
3. **Creation of a Specialist arbitration bar**– Measures may be taken to facilitate the creation of an arbitration bar by providing for admission of advocates on the rolls of the APCI as arbitration lawyers, encouraging the establishment of for an of young arbitration practitioners, and providing course in arbitration law and practice in law schools and universities in India.
4. **Creation of a Specialist arbitration bench**– Judges hearing arbitration matters should be provided with a periodic refresher course in arbitration law and practice. These courses could be conducted by the National Judicial Academy and the respective state judicial academies.

8. IMPORTANT AMENDMENTS SUGGESTED IN THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL 2018

In view of detail report of the Committee and observation on several issue and to facilitate the speedy appointment of arbitrators through designated arbitral institutions by the Supreme Court or the High Court, without having any requirement to approach the court in this regard. It is envisaged that parties may directly approach arbitral institutions designated by the Supreme Court for International Commercial arbitration and in other cases, the concerned High Courts following major amendments were proposed a thorough bill.

Section 2 following definitions are added.

(CA) “**Arbitration institution**” means an Arbitral institution designated by the Supreme Court or High Court under this Act.

(I) “**Prescribed**” means prescribed by rules made under this Act

(J) “**Regulations**” means the regulations made by the council under the Act.

In **Section 11** of the Principal Act following important aspects are suggested.

The Supreme Court and High Court shall have the power to designate arbitral institutions from time to time which has been graded by the council under section 43F for the purposes of the Act.

Provided that in respect of those High Court jurisdiction where no graded institution are available then CJI of concerned High Court may maintain panel of Arbitrators for discharging the functions and duties of arbitral institutions and any reference to the arbitrator shall be deemed to be an arbitral institutions for the purposes of this Section and the arbitrator appointed by a party shall be entitled to such fees as prescribed under Forth Schedule.

Provided that Chief Justice of concerned High Court may from time to time review the panel of arbitrators.

The appointment shall be made on an application of the party by the arbitral institution designated by the Supreme Court in case of international commercial arbitration or by High Court in case of arbitrations other than international commercial arbitration, as the case may be.

It is further clarified that an application under this Section for the appointment of the arbitrator shall be disposed of by the arbitration institution within a period of 30 days from the date of service of notice on the opposite party. The arbitral institutions shall determine the fees of arbitral tribunal and manner of its payment subject to the rate specified in schedule 4.

Section 17 The portion hereinafter “Or at any time after making of arbitral award but before it is enforced in accordance with Section 36” is omitted.

Section 23 proposes that “the statement of claim and the defense under this Section shall be completed within a period of 6 months from the date the arbitrator or the arbitrators, as the case may be, received notice, in writing, of their appointment.

After Part 1 of the Principal Act, Part 1A is newly added

Section 43A following definitions were inserted

- (a) “**Chairperson**” means the Chairperson of the Arbitration Council of India appointed under clause (a) of sub-section (1) of Section 43C.
- (b) “**Council**” means the Arbitration Council of India established under Section 43B.
- (c) “**Member**” means a Member of the Council and includes the Chairperson.

Section 43B Establishment and incorporation of the arbitration council of India.

It states that the central government shall by notification in the official gazette establish arbitration council of India to perform duties and discharge the function under the Act. It will be a body corporate having perpetual succession and a common seal with power subject to the provisions of Act and it acquires, hold and dispose of property and enter into a contract and shall be sue or be sued in its name. The head office shall be at Delhi and the council may with the prior approval of the Center government establishes the offices at other places of India.

Section 43C Composition of Council it consists of:

- (a) The chairperson will be a person who has been the judge of Supreme Court or CJI of High Court or a Judge of High Court or an eminent person having special knowledge and experience in the conduct or administration of arbitration and will be appointed by the central government in consultation with CJI.
- (b) One member nominated by the central government, who is an eminent arbitration practitioner having substantial knowledge and experience in domestic and international institutional arbitration.
- (c) One member appointed by the central government in consultation with Chair Person who is an eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws.
- (d) One ex-officio member who is secretary to the government of India in the department of legal affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary.
- (e) One ex-officio member, who is secretary to the government of India in the department of expenditure, the ministry of finance of his representative not below the rank of Joint Secretary.
- (f) One part-time member who is representative of the recognized body of commerce and industry, chosen on a rotational basis by the central government.
- (g) One member Secretary that is chief executive officer.

The chairperson and members of the council other than the ex-officio members shall hold office for terms of 3 years from the date on which they entered their office. The Chairperson other than ex-officio members shall not hold office after he attends the age of 70 years and in case of Member 67 years. The chairpersons and the members shall be entitled to salary, allowances and other terms and conditions, as prescribed by the Central Government. The part-time member shall be entitled to traveling and other allowances as prescribed by the Central Government.

Section 43D Duties and functions of Council

The council shall take all measures which are necessary for promotion and for encouraging arbitration, mediation, conciliation or other alternative dispute resolution mechanism and for that purpose to frame police and guidelines and discharge following functions:

- (a) frame policies governing the grading of arbitral institutions;
- (b) recognize professional institutes providing accreditation of arbitrators;
- (c) review the grading of arbitral institutions and arbitrators;
- (d) Hold training, workshops, and courses in the area of arbitration in collaboration with law firms, Law universities and arbitral institutes;
- (e) set up, review and update norms and ensure a satisfactory level of arbitration and conciliation;
- (f) act as a forum for the exchange of reviews and techniques to be adopted for creating a platform to make India a robust Centre for domestic and international arbitration and conciliation;
- (g) make recommendations to the Central Government on various measures to be adopted to make provisions for each resolution of commercial disputes;
- (h) promote institutional arbitration by strengthening arbitral institutions;
- (i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof;
- (j) establish and maintain a depository of arbitral awards made both in India and overseas;
- (k) Make recommendations regarding personnel, training, and infrastructure of arbitral institutions; and such other function as may be decided by the Central Government.

Section 43E Appointment of Experts and Constitution of Committees thereof as specified by the regulation by the council.

Section 43F General norms for grading of the arbitral institution. The council shall grade arbitral institutions on the basis of infrastructure quality and caliber of arbitrators, performance, and compliance of time limit for disposal of domestic or international commercial arbitration.

Section 43G Norm for accreditation: The qualification, experience, and norms for accreditation of arbitrators are specified.

Section 43H: The Council shall maintain in the electronic depository of all arbitral awards made in India and such other records in a manner specified in the regulation.

Section 43-I: The council may in consultation with central government make regulations consistent with the provisions of Act and the rules made thereunder.

Section 43-J: The Chief Executive officer of the council shall be responsible for day to day administration of the council. The qualification appointment and other terms of services of CEO will be prescribed by Central Government.

Section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to:

- (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act of 2015
- (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

9. CONCLUSION AND SUGGESTIONS

From the year 2012-15, the Supreme Court of India assumed a pro-arbitration stance, by delivering various judgments that favored arbitration. It said that the Indian arbitration law should be seat-centric. This means that the Indian judiciary has no say in arbitrations that take place abroad. In institutional arbitration, the parties pre-decide an established and specialized institution for dispute resolution. It is this institution that conducts the arbitration process. Here, only the rules of the institution apply. It is the arbitrators themselves who arbitrate and decide the dispute as per the terms of agreement and as per the procedure fixed by the Arbitration Institutions. According to Author following are some of the loopholes, still left for debate in Courts:

- (a) To clearly define the scope of the ACI's role and its powers.
- (b) Designation of the institution by Supreme Court and the High Court for securing the speedy appointment of the arbitrators then Section 11 of the Act becomes redundant.
- (c) It is necessary to make a provision where a party is objecting to the validity of the arbitration agreement itself, what is the course of action to be adopted in such circumstances.
- (d) With regards to the section containing confidentiality, it is not clear whether the confidentiality remains even when the proceedings have progressed to the Court under Section 34 of the Act and the Court requisitions the arbitral record. It is suggested that:
 - There are several arbitration institutions in India however they are at developing stage. Therefore targeted reforms and action needs to be taken by every stakeholder i. e Parties, Advocates, and Judiciary and Legislature to improve the working of institutional arbitration in India.
 - The government to provide financial assistance for improving the existing functioning and development of Institutional arbitration.
 - There is great need to develop institutional arbitration at the district level as a large number of the pendency of dispute is in lower courts.
 - In Case of Domestic Arbitration, there is every need to give the power to prepare a panel of Arbitrator to Principal District Judge of every District where there are no Institutions.
 - The arbitration institution needs to be equipped with their own website, to facilitate the litigant with e-filing, e signature, e-payments etc. According to Author Institutional arbitration will open a new era in India by proposed arbitration Bill 2018.

10. REFERENCES

- [1] O.P. Malhotra, Indu Malhotra, the Law and Practice of Arbitration and Conciliation.
- [2] Article published in ICA Arbitration Quarterly vol. No. 178 July- September 2013. Seminar on " Institutional Arbitration in India: Opportunities and Challenges"
- [3] Annexure I Report of the HLC to Review the Institutionalization of Arbitration Mechanism in India page 115
- [4] Chapter VI Section A of Report of the HLC to Review the Institutionalization of Arbitration Mechanism in India
- [5] Chapter VI Section B of Report of the HLC to Review the Institutionalization of Arbitration Mechanism in India
- [6] Chapter VI Section C of Report of the HLC to Review the Institutionalization of Arbitration Mechanism in India
- [7] Chapter VI Section D of Report of the HLC to Review the Institutionalization of Arbitration Mechanism in India
- [8] Bill No. 100 of 2018 Introduced in Lok Sabha.
- [9] Section 11(3A) of the proposed amendment.
- [10] See New Eighth Schedule is added

APPENDIX

ICADR	International Centre for Alternative Dispute Resolution
HLC	High Level Committee
ADR	Alternative Dispute Resolution
BIT	Bilateral investment treaty,
APCI	Arbitration Promotion Council of India
ACA	Arbitration and Conciliation Act
UNCITRAL	United Nations Commission on International Trade Law 1985