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THE GLASS HALF EMPTY

ANALYSING THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

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SOLICITORS AND ADVOCATES

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1. Introduction

The Central Government on March 11, 2021 has notified the Arbitration and Conciliation (Amendment) Act, 2021 ("**Amendment Act**"), to repeal the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**Ordinance**") dated November 4, 2020. The Amendment Act, however, seeks to provide validity to anything done or any action taken under the Ordinance.[1]

In the first part of this series (available here), we had critically evaluated the practical implications of the amendment of Section 36(3) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act, 1996**") *vide* Section 2 of the Ordinance.[2] In this part, we propose to examine the scope of Section 3 (*substitution of new section for section 43J*)[3] and Section 4 (*omission of Eight Schedule*)[4] of the Amendment Act.

Section 43J of the Arbitration Act, 1996, as it stood before the amendment, detailed the qualifications, experience, and norms for accreditation of arbitrators by placing reliance on the Eighth Schedule to the Arbitration Act, 1996. The unamended Section 43J also provided that the Central Government 'may', after consultation with the Arbitration Council of India[5] ("**Council**") comprising the Chief Justice of India as its Chairperson,[6] through a notification in the Official Gazette, amend the Eighth Schedule.

Now, *vide* Section 3 of the Amendment Act, the Central Government has substituted Section 43J of the Arbitration Act, 1996 which now reads, "*The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.*" Further, by virtue of Section 4 of the Amendment Act, the Eighth Schedule to the Arbitration Act, 1996 has been altogether omitted.

2. Section 3 and Section 4 of the Amendment Act

Before delving into the scope and effect of Section 3 and 4 of the Amendment Act, it may be relevant to take note of the report of the High-Level Committee ("**Committee**") which was propounded under the Chairmanship of Justice B.N. Srikrishna, Retired Judge, Supreme Court of India to review the institutionalization of arbitration mechanism in India ("**Report**").[7]

The Committee in its Report had noted that accreditation of arbitrators is one of the significant reforms necessary to improve the situation of institutional arbitration in India. The rationale behind this was owed to the fact that stakeholders were progressively losing faith in the process of domestic arbitration as domestic arbitrators purportedly lacked both quality and professionalism. Stakeholders also expressed concerns about how Indian arbitral institutions need to be on par with international institutions, with respect to the services and facilities offered and the way in which they conducted proceedings. The Committee felt since accreditations are provided by professional institutes which are independent bodies unaffiliated to any industry and their grading was based on a combination of stringent criteria; litigating parties would have a reliable standard of assessment of arbitrators they were looking to appoint.[8] This, in turn, would reestablish faith in the system.

[1] Section 5 of the Amendment Act.
[2] Section 2 of the Amendment Act.
[3] Section 3 of the Ordinance.
[4] Section 4 of the Ordinance.
[5] Section 43B of the Arbitration Act, 1996.
[6] Section 43C(1) of the Arbitration Act, 1996.
[7] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (July 30, 2017), available at: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.
[8] The Committee in its Report also acknowledged the two types of accreditation which are available:

Hence, the Committee in its Report recommended that arbitrators must be encouraged to seek accreditation from such bodies established in India such as the Chartered Institute of Arbitrators ("**CIArb**"). The Committee, in the process, also clarified that establishment of another professional body is not necessary so long as an autonomous body styled the Arbitration Promotion Council of India ("**APCI**") and having representation from various stakeholders is set up by amendment to the Act for grading arbitral institutions in India.

The Committee summarized its recommendations pertaining to accreditation of arbitrators by stating the following:

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1. *The APCI, an autonomous body, may be set up to recognise professional institutes providing for accreditation of arbitrators on the basis of criteria such as method of accreditation, training provided before and after the accreditation of arbitrators, review of accreditation, membership, etc.*
2. *The accreditation of arbitrators by any such recognised professional institute may be preferable for: (a) international commercial arbitrations seated in India; and (b) other arbitrations seated in India where the value of the claim is equal to or exceeds INR 5,00,00,000 (INR 5 crores).*
3. *The Central Government and various state governments may stipulate in arbitration clauses/ agreements in government contracts that only arbitrators accredited by any such recognised professional institute may be appointed as arbitrators under such arbitration clauses/ agreements.*"[9]

In view of the Report by the Committee, the Central Government *vide* the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment**"), established the Council[10] by introducing Part IA to the Arbitration Act, 1996 and also stipulated, recognition of professional institutes providing accreditation of arbitrators, *inter-alia*, as an essential duty and function of the Council.[11] Further, *vide* the 2019 Amendment, the Central Government had also introduced the Eighth Schedule to the Arbitration Act, 1996 under Part IA, prescribing an exhaustive list of requisite qualifications and experience for being appointed as arbitrators.

The Eighth Schedule, since its introduction, has drawn criticism for its restrictive approach, significantly limiting India's potential as an arbitration friendly nation. Specifically, the fact that the Eighth Schedule debarred a foreign national from being appointed as an arbitrator in an India seated arbitration, has been condemned by jurists. In fact, even the Supreme Court has observed that there is no absolute bar in foreign lawyers conducting international commercial arbitrations in India subject to the applicable rules of the concerned arbitral institution.[12] Additionally, the mandate of Eighth Schedule permitting only an advocate within the meaning of the Advocates Act, 1961 having ten years of practice to be eligible to be appointed as an arbitrator[13]militated against the established principles of party autonomy which the Arbitration Act, 1996 embodies.[14] Further, the exhaustive list of requisite qualifications and experience for being appointed as an arbitrator prescribed by the Eighth Schedule was not only arbitrary but also exhibited an obvious bias in favour of Indian professionals purporting to make India an unpopular destination as a 'seat' in a foreign arbitration.

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a. accreditation by a professional body of arbitrators; and
b. membership on a panel/ list of arbitrators maintained by an arbitral institution.

[9] *Supra* note 7 at page 57.

[10] *Supra* note 5.

[11] Section 43D (2)(b) of the Arbitration Act, 1996.

[12] *Bar Council of India* v. *A.K. Balaji*, AIR 2018 SC 1382.

[13] Entry (i), Eighth Schedule to the Arbitration Act, 1996.

[14] Section 11(1) of the Arbitration Act, 1996; Section 11(9) of the Arbitration Act, 1996 permits appointment of an arbitrator of any nationality in an international commercial arbitration.

However, even before, the provisions under Part IA as introduced by the 2019 Amendment are notified,[15]the President promulgated Section 3 of the Ordinance,[16] permitting the qualifications, experience, and norms for accreditation of arbitrators to be specified by regulations made by the Council in consultation with the Central Government[17] and in effect abrogated the Eighth Schedule to the Arbitration Act, 1996 *vide* Section 4 of the Ordinance.[18]

3. Parting Thoughts

The omission of the Eighth Schedule is perceived as a welcome move which shall aid in effectively augmenting the arbitration landscape in India. There is, however, an obscurity in respect of framing the norms of accreditation for the arbitrators as the Council (although established by virtue of Part IA as introduced by the 2019 Amendment), practically does not exist as on date as the Part IA has not yet been notified[19]. As accreditation of arbitrators will enhance faith in the system, it is imperative that the Council is set up promptly and norms for accreditation are framed taking into consideration the best practices of arbitral accreditation institutions around the world including the Singapore Institute of Arbitrators ("**SiArb**") [20], the Resolution Institute, the British Columbia Arbitration and Mediation Institute ("**BCAMI**") [21] as recognised by the Committee in its Report.[22] Notably, these institutions adopt a pragmatic approach determining the norms for accreditation of arbitrators, laying significant emphasis on experience in conducting arbitral proceedings, specialized knowledge in the arbitration and evidence of published writings in ADR journals or legal periodicals.

The Regulations with respect to qualification and experience for being appointed as an arbitrator should be framed with a more holistic approach without being restricted to affiliation with government posts/entities to determine eligibility.

Therefore, it is absolutely essential that provisions of Part IA are notified at the earliest by the Central Government and the regulations contemplated by the Amendment Act are framed by the Council in consultation with the Central Government to give effect to the Amendment Act, in its true letter and spirit.

This paper has been written by Pooja Chakrabarti (Partner) and Kunal Dey (Associate).

[15] Ministry of Law and Justice notification dated August 30, 2019, available here.
[16] Section 3 of the Amendment Act.
[17] Section 43L of the Arbitration Act, 1996.
[18] Section 4 of the Amendment Act.
[19] *Supra* note 15.
[20] SiArb, Admission Criteria for Panel, available here.
[21] Principles, Criteria, Protocol and Competencies required for the designation of Chartered Arbitrator, available here
[22] *Supra* note 7 at page 53.

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