

The Amendments to the Indian Arbitration and Conciliation Act of 1996: A view from Abroad



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1. Introduction

The Indian Arbitration and Conciliation Act 1996 ('Indian Arbitration Act'), originally enacted in 1996 based on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), underwent a much-anticipated significant change in 2015. The Arbitration and Conciliation (Amendment) Ordinance, 2015 introduced a plethora of changes to the existing arbitration framework in India, which were enacted on 31 December 2015 by the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act'). The Amendment Act was deemed to have come into force on the date of the Ordinance, i.e. 23 October 2015.¹ Unless the parties agreed otherwise, the

amendments were not to apply to arbitral proceedings that had been initiated² before the commencement of the Amendment Act,³ but in relation to arbitral proceedings that had been initiated on or after the date of commencement of this Act. After years of uncertainty, the Supreme Court of India in March 2018 clarified that the amendments as a whole were prospective in nature.⁴ However, it also observed that the amended Section 36, which no longer provides for an automatic stay of the enforcement of an arbitral award during annulment proceedings, will nonetheless apply to all annulment applications under Section 34 of the Indian Arbitration Act that are pending on the date of commencement of the Amendment Act.⁵

**The contents of this article reflect the personal views of the author alone, and not of P&A Law Offices. The author reserves his right to depart from these views in the future.*

¹Amendment Act 2015, s 1(2).

²Indian Arbitration Act 1996, s 21.

³The term "commencement" is used here to mirror the language of Section 26 of the Amendment Act 2015, which pertains to the

prospective/ retrospective application of the amendments. While the Amendment Act was enacted on 31 December 2015, its date of commencement is 23 October 2015.

⁴Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and etc., Civil Appeal Nos. 2879 – 2880 of 2018, para. 54.

⁵Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and etc., Civil Appeal Nos. 2879 – 2880 of 2018, para. 42.



The Statement of Object and Reasons of The Arbitration and Conciliation (Amendment) Bill, 2015 reveals that these amendments were designed to make the arbitration process in India more user-friendly, cost effective and resulting in the expeditious disposal of cases, in line with India's commitment to improve its legal framework to obviate the delay in disposal of legal claims more generally.⁶

However, a more detailed analysis of the Amendment Act shows that consistent with the above broad objectives, these amendments are specifically intended to remove some of the hurdles created over time by the Indian judiciary through what was perceived as excessive intervention in the arbitral process.

While the impact of the changes introduced by the Amendment Act (hereinafter referred to as the "Amendments") can only be assessed once their judicial interpretation is ascertained, this paper seeks to assess how they are likely to be perceived by the international arbitration community and if they are in sync with their objective of remedying some of the vagaries of the Indian arbitration framework that render arbitrating in India less predictable and overall more complex than desired.

In the second part, we address the Amendments aimed at curtailing the opportunities for excessive judicial intervention by Indian courts in the arbitral process at the stage of the appointment of arbitrators. The third part addresses the Amendments motivated by an increasing judicial backlog in Indian courts, followed

by the fourth part, which addresses the Amendments intended to promote efficiency in the conduct of arbitral proceedings. In the fifth part, we analyse whether and to what extent promoting institutional arbitration could serve to address some of the problems currently hampering the Indian arbitration framework. The sixth part concludes.

2. Minimizing Judicial Intervention in the Appointment of Arbitrators

One of the key objectives of the Indian Arbitration Act is to minimize the extent of judicial intervention in the arbitral process. Section 5 confirms that "[n]otwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."⁷

The deliberate use of the word 'judicial authority', as opposed to 'court' in Article 5 of the UNCITRAL Model Law⁸, suggests that both courts and other quasi-judicial authorities in India, such as special tribunals, are expected to pay heed to this particular objective. The "purpose of Article 5 [of the Model Law] was to achieve certainty with respect to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the Law on international commercial arbitration all instances of court intervention."⁹

However, in the decade following the enactment of the Indian Arbitration Act, some Indian courts appeared not to have respected the text and spirit of Section 5. Through means of judicial interpretation, they expanded the scope of intervention at various stages of the arbitral process, particularly during the appointment of arbitrators. In many cases, this resulted in delay in the disposal of arbitration proceedings and in an increase in interference of the courts in arbitration matters, which defeated the object of the enactment.¹⁰

This being said, recent years have brought about a change in the attitude of Indian courts, which have adopted a cautious approach to not interfere in

⁶The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 7.

⁷Indian Arbitration Act 1996, s 5.

⁸Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (11 Dec. 1985), art 5 ('Model Law').

⁹Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 30.

¹⁰The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 2.

international arbitration proceedings. The High Court of Delhi's refusal in 2018 to grant a permanent injunction against Vodafone Group PLC UK, prohibiting it from pursuing arbitration proceedings against India under the India-UK Bilateral Investment Treaty, is a prime example of this tendency.¹¹ However, such instances are few in between, and therefore, continue to remain an exception rather than the norm.

As acknowledged by the Law Commission of India in its 246th report, "the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act."¹² Commentators have therefore suggested that the biggest problem may not be with the text of the Indian Arbitration Act, but with its "disjunctive interpretation by Indian courts [and the] abuse of the arbitral process by litigants and lawyers alike"¹³. In other words, wherever the Indian Arbitration Act "bolted the front door and limited judicial intervention to a few strictly defined instances, the Indian Courts found means to break down the back door"¹⁴. Undoubtedly, this has contributed to India's reputation as an arbitration-unfriendly jurisdiction¹⁵ and discouraged foreign parties from arbitrating in India.¹⁶

In this light, it is promising that the Amendments have sought to address some of the avenues for excessive judicial intervention by delineating the scope for intervention with the arbitral process at the initial stage of arbitral appointment.

Section 11 of the Indian Arbitration Act provides a framework for the appointment of arbitrators in case of any default by the parties. The provision originally empowered the Chief Justice, or any person designated by it, to appoint arbitrators under the circumstances specified therein. In the case of an international commercial arbitration¹⁷, this power was exercisable by

the Chief Justice of India, and in a domestic arbitration, by the Chief Justice of the High Court within whose local limits the court, as defined under Section 2(1)(e) of the Arbitration Act, was situated.

Yet, a seven-judge bench of the Supreme Court of India, by way of a majority judgment in *SBP & Co. v. Patel Engineering*¹⁸, had interpreted the un-amended Section 11 to hold that the power exercised by the Chief Justice of the High Court or the Chief Justice of India in the appointment of an arbitrator was a judicial and not an administrative power.¹⁹ As a result, even at the initial stage of the appointment of arbitrator(s), the Chief Justice had the right to decide on preliminary aspects such as "existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for exercise of his power and on the qualifications of the arbitrator or arbitrators."²⁰ These avenues were then crystallized in a three-prong hierarchy in 2008 by another two-judge bench of the Supreme Court of India in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*²¹, which was confirmed by its subsequent benches.²²

The Amendment Act has sought to address what was perceived as an overly broad interpretation of Section 11 by the judiciary, by adjusting the machinery for arbitral appointments under Section 11 in two principal ways:

- (i) The power to appoint arbitrators has been transferred from the Chief Justice of India or that of any High Court, as the case may be, to the Supreme Court of India and such High Court itself, or any person or institution designated by such Court.²³ In international commercial arbitration, "the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."²⁴

¹¹*Union of India v. Vodafone Group PLC United Kingdom & Anr*, CS (OS) 383/2017 & I.A. No. 9460/2017.

¹²*Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014)*, 15 et seq, para. 22.

¹³Sumit Rai and Naresh Thacker, 'India', GAR (18 May 2015).

¹⁴Pramod Nair, 'Surveying a decade of the New law of arbitration in India', (2007) *Arbitration International* 23, 738.

¹⁵B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 20.

¹⁶B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.

¹⁷*Indian Arbitration Act 1996*, s 2(1)(f).

¹⁸*SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618.

¹⁹*SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, para. 46(i).

²⁰*SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, para. 46(iv).

²¹*National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267.

²²*Chloro Controls India Pvt. Ltd. v. Seven Trent Water Purification Inc.*, (2013) 1 SCC 641; *Arasmeta Captive Power Co. Pvt. Ltd. v. Lafarge India Pvt. Ltd.*, AIR 2014 SC 525.

²³*Indian Arbitration Act 1996*, s 11(4), (5) and (6).

²⁴*Indian Arbitration Act 1996*, s 11(9).

- (ii) The newly introduced Section 11(6A) clarifies that the “Supreme Court or, as the case may be, the High Court, while considering any application [for arbitrator appointment] shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”²⁵

The fact that the Indian legislature has clarified that these amendments shall apply “notwithstanding any judgment, decree or order of any Court” shows an intent to expressly address and adjust the interpretation given by the Supreme Court of India in *Patel Engineering*.²⁶ Under the Amendment Act, the grounds which the Supreme Court or a High Court, as the case may be, can examine prior to appointing an arbitrator are now expressly listed and thus limited.

The said amendments are undoubtedly more in line with the understanding of the mechanism for arbitral appointments under the Model Law, on which the Indian Arbitration Act is based. Article 11 of the Model Law vests the power to appoint an arbitrator on a court, or ‘other authority specified in Article 6’ of the Model Law.²⁷ Article 6 then permits each country enacting the Model Law to specify the court(s), or another competent authority to appoint an arbitrator under Article 11.²⁸ The Court designated under Article 6 need not necessarily be a full court. “It may well be [...] the president of a court or the presiding judge of a chamber for those functions, which are of a more administrative nature, and where speed and finality are particularly desirable”²⁹ and “a state may entrust these administrative functions even to a body outside its court system.”³⁰ Thus, even under the Model Law, the function of appointing arbitrators was considered to be an administrative task, with minimal opportunity

for intervention by a designated authority. As a result of the changes introduced by the Amendment Act, the Indian arbitration law now appears to be in sync with its goal.

There is however still room for further clarification. Particularly, while the new Section 11(6B) of the Act limits the issues that can be reviewed at the stage of arbitral appointments, the Act does not set a standard of review to be applied at this stage. The Supreme Court’s finding in *Patel Engineering* that even at this stage, “[f]or the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded”³¹ gives rise to some concern. It may seem desirable that the Act be further amended to clarify that even while deciding the issue of the existence of an arbitration agreement, the Supreme Court or the High Court adopt a prima facie, and not full and final review.³² This was also the approach endorsed by Justice C K Thakker in his dissent in the *Patel Engineering* judgment, when he noted that:

“There is [...] no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters.”³³

Incidentally, Justice Thakker’s opinion resonates with the position under Swiss Law, where Article 179(3) of the Swiss Private International Law Act provides that “[i]f a judge has been designated as the authority for appointing an arbitrator, he shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties.”³⁴

²⁵Indian Arbitration Act 1996, s 11(6A).

²⁶Armaan Patkar, ‘Indian Arbitration Law: Legislating for Utopia’, (2015) 4(2) *Ind. J. Arb. L.* 28, 30 (‘The 2015 Act amends §11 to grant the power of appointment under §11 to the Supreme Court or the High Courts (or their designates) as the case may be, instead of their respective Chief Justices (or their designates). It has been clarified that designating a person or institution for the purposes of §11, is not a delegation of judicial power. This negates *SBP & Co.* where the Supreme Court inter alia held that the power under §11(6) is judicial.’)

²⁷Model Law, arts 11(3) and (4).

²⁸Model Law, art 6.

²⁹United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc.A/CN.9/264 20 (1985).

³⁰United Nations Commission on International Trade Law, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc.A/CN.9/264 20 (1985).

³¹*SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, para. 38.

³²See Pratyush Panjwani et al., ‘Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?’, (2013) 2(2) *Ind. J. Arb. L.* 24.

³³*SBP & Co. v. Patel Engineering Ltd. & Anr. (Dissenting Opinion of C K Thakker, J)*, (2005) 8 SCC 618, para. 13.

³⁴Swiss Federal Statute on Private International Law, art 179(3). See also, French New Code of Civil Procedure, art 1455.

The application of a prima facie review of the existence of an arbitration agreement in the context of the appointment of arbitrators is also squarely in line with amended Section 8 of the Indian Arbitration Act, which now mandates every judicial authority to refer a matter to arbitration in all circumstances “unless it finds that prima facie no valid arbitration agreement exists.”³⁵ This is consistent with the observations of the Law Commission of India, suggesting that where a “judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal.”³⁶

3. Arbitration as a Means to Reduce the Judicial Backlog in India

There exists an important co-relation between the efficient conduct of arbitration and judicial assistance in support of the same. The Indian Arbitration Act gives ample opportunities to courts to assist arbitral tribunals, and thus the arbitration process in general. These may, for example, be in the form of granting interim measures³⁷, court assistance in the taking of evidence³⁸, or assistance in case of contempt to the arbitral tribunal during the conduct of arbitral proceedings.³⁹ Obviously, any delay by the court in the exercise of these functions will translate into delay in the arbitration proceedings the court is intended to support.

The judicial backlog in Indian courts is well documented. The Arbitration and Conciliation (Amendment) Bill, 2015 acknowledged that since India was ranked 178th out of 189 nations in the world in contract enforcement, it was time that urgent steps be taken to reduce the pendency of cases in courts and accelerate

the process of dispute resolution through arbitration, so as to encourage investment and economic activity.⁴⁰ Similarly, the National Institution for Transforming India (‘NITI Ayog’), which is the policy think tank of the Government of India, highlights that at the end of 2015, “there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending before the subordinate judiciary [out of which] 26% of cases, more than 8.5 million, [were] more than 5 years old.”⁴¹ The Law Commission of India, in its 246th Report, also confirmed the general international perception that “in most Courts [in India], arbitration matters are kept pending for years altogether.” The high pendency of litigation before Indian courts means that arbitration-related proceedings take a long time to be disposed, and for arbitral awards to become final.⁴³

One of the factors that contributes to delay in addressing arbitration matters has been identified to be “the lack of dedicated benches looking at arbitration cases”⁴⁴, i.e. specialized benches for deciding the petitions or applications incidental to arbitration proceedings. To remedy this perception, various proposals have been made in the past few years. In its 246th Report, the Law Commission of India suggested that in “international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant “Court” which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court [rather than the the principal Civil Court of original jurisdiction in a district] even where such High Court does not exercise ordinary original jurisdiction.”⁴⁵ The Parliamentary Standing Committee in its Report on The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 further observed that “Government should establish

³⁵Indian Arbitration Act 1996, s 8(1).

³⁶Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 20, para. 33.

³⁷Indian Arbitration Act 1996, s 9(1).

³⁸Indian Arbitration Act 1996, s 27(1), (3).

³⁹Indian Arbitration Act 1996, s 27(5).

⁴⁰The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 4.

⁴¹Bibek Debroy and Suparna Jain, ‘Strengthening Arbitration and its Enforcement in India – Resolve in India’, NITI Ayog, 1. Similar observations were made at the end of 2006 as well; see Pramod Nair, ‘Surveying a Decade of the ‘New’ Law of Arbitration in India’, (2007) 23(4) Arbitration International 699, 700.

⁴²Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 16, para. 23.

⁴³B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.

⁴⁴Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 16, para. 23.

⁴⁵Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 17, para. 26.

Commercial Courts/ Divisions on a pilot basis in some States where commercial disputes are large in number and thereafter, it be replicated in remaining States.⁴⁶ With such infrastructure, any application or appeal relating to international commercial arbitration would be heard and disposed of by the Commercial Appellate Division of the High Court.⁴⁷

Following these recommendations, the Amendment Act altered the definition of 'court' in Section 2(1) (e) of the Indian Arbitration Act to reflect the Law Commission's suggestion. The amended Section 2(1)(e) (ii) now provides that the word "'Court' means in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."⁴⁸

Likewise, in Part II of the Indian Arbitration Act concerning the enforcement of New York Convention and Geneva Convention awards, two amendments are of significant import. The newly inserted Explanation to Section 47, dealing with New York Convention awards, clarifies that with respect to enforcement of a foreign award, the expression 'Court' "means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court."⁴⁹ An identical explanation is introduced in Section 56 with respect to Geneva Convention awards.⁵⁰

The aforementioned amendments are supplemented by the enactment of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, section 10(1) of which provides special treatment to matters relating to international commercial arbitration. It states that where the

subject-matter of an arbitration is a 'commercial dispute'⁵¹ of a specified value, and if such arbitration is an international commercial arbitration, then all the applications or appeals arising out of such arbitration under the provisions of the Indian Arbitration Act that have been filed in a High Court, "shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court."⁵²

These amendments have been well received by the international community. The elimination of jurisdiction of principal civil courts in matters of international commercial arbitration, as well as creation of a commercial division in the High Courts to deal with arbitration applications is expected to calm some of the age-old apprehensions concerning the Indian litigation system and reduce the time spent litigating before Indian courts. Yet, considering the sheer magnitude of the problem at hand, as is evident from the figures cited above, more ambitious reforms in this regard may be required.

One major step in this direction would be to vest the Supreme Court of India with exclusive jurisdiction to hear the main applications filed under the Indian Arbitration Act relating to international arbitrations.⁵³ The Supreme Court is already the default appointing authority for international arbitrations, and its decision in this regard is final.⁵⁴ The yet more relevant step would be to designate the Supreme Court as the sole forum for deciding petitions for the setting aside of awards rendered in international arbitrations⁵⁵ and the enforcement of foreign awards under Part II of the Indian Arbitration Act.⁵⁶ The efficiency of such an approach is well-known to arbitration practitioners in Switzerland, where Article 191 of the Private International Law Act provides for the Swiss Federal Supreme Court as the exclusive jurisdiction to hear applications to set aside arbitral awards.⁵⁷ The absence of an appellate remedy against the Federal Supreme Court's decision in this respect, together with the quality of the decisions rendered by judges familiar with international

⁴⁶Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 78th Report – The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 (2015), 15, para. 27.

⁴⁷Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 78th Report – The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 (2015), 10, para. 8.

⁴⁸Indian Arbitration Act 1996, s 2(1)(e)(ii).

⁴⁹Indian Arbitration Act 1996, s 47, Explanation.

⁵⁰Indian Arbitration Act 1996, s 56, Explanation.

⁵¹The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, s 2(1)(c).

⁵²The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, s 10(1).

⁵³Indian Arbitration Act 1996, s 11(9).

⁵⁴Indian Arbitration Act 1996, s 11(7).

⁵⁵Indian Arbitration Act 1996, s 2(1)(f).

⁵⁶Indian Arbitration Act 1996, s 48 and 57.

⁵⁷Federal Statute on Private International Law, art 191 (Switzerland).

arbitration ensures a particularly efficient approach. As a result, unless set aside, awards become final after some six months after being rendered. This guarantee has greatly contributed to Switzerland's popularity as a favoured seat of arbitration for international disputes.

Transposing the Swiss approach to India would of course present its very own challenges in light of the sheer size of the jurisdiction and the number of cases heard by the Indian Supreme Court. The proposal was nevertheless endorsed by Senior Advocate, Mr Fali S Nariman. In the first LCIA-India Arbitration Lecture in 2011, he discussed ten steps that ought to be adopted to salvage arbitration in India.⁵⁸ In his esteemed view, "the only way to inspire the confidence of the outside world in the Indian court system is to confer by law on the Supreme Court of India exclusive jurisdiction to decide all matters, with respect to foreign arbitrations and which pertain to enforcement of foreign awards."⁵⁹ And while Mr Nariman had lamented that no Chief Justice of India had taken his proposal seriously, the Indian Legislature may review this suggestion more carefully in the context of recent attempts at improving the Indian arbitration framework.

4. Repelling Guerrilla Tactics by Recalcitrant Parties

The above sections focussed on the interpretational discord and infrastructure limitations that contribute to delays in the arbitration process in India, and the amendments made to alleviate such concerns. However, this is not to suggest that these factors are the sole cause of delay. Indeed, arbitrations in India routinely take significant time to conclude even if there is minimum judicial intervention. "Delays on the part of the arbitrators and the counsel appearing in arbitrations"⁶⁰ are another common cause of delay. As acknowledged by the Law Commission of India in its 246th report, "[t]here is ingrained in the Indian system

a culture of frequent adjournments where arbitration is treated as secondary by the lawyers."⁶¹ And this is not a new concern.

Even in 2001, the Law Commission of India in its 176th report had noted:

"[I]n almost every arbitration in [India], at least one party is interested in delaying the conduct of arbitral proceedings and for that purpose, number of adjournments are sought at the stage of adducing evidence. It has been pointed out that parties and their counsel in India, still think that an arbitral tribunal is like court and raise all sorts of objections during the proceedings when oral evidence is being adduced."⁶²

This tendency is particularly notable in India due to a preference for ad-hoc arbitration over institutional arbitration. This was most recently noted by the B N Srikrishna High Level Committee in 2017 ('HLC Report'), noting that ad hoc arbitrations tend to be protracted and costly in the absence of monitoring, and costs and delays in ad hoc also mount in case of frequent adjournments.⁶³

The Amendment Act introduced two significant amendments to address these concerns; triggering contrasting reactions in the international community.

The Indian Arbitration Act already stated that unless otherwise agreed by the parties, it was for the arbitral tribunal to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or conduct the proceedings simply on the basis of documents.⁶⁴ Under the recent Amendments, the tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, i.e. the arbitral tribunal shall sit continuously for the purposes of recording evidence and for arguments, with no interruptions on account of any adjournments.⁶⁵ Further, the tribunal shall

⁵⁸Fali Nariman, 'Ten steps to salvage Arbitration in India: The First LCIA-India Arbitration Lecture', (2011) 7(2) *Arbitration International* 115.

⁵⁹Fali Nariman, 'Ten steps to salvage Arbitration in India: The First LCIA-India Arbitration Lecture', (2011) 7(2) *Arbitration International* 115, 119.

⁶⁰Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 67.

⁶¹Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 12, para. 15.

⁶²Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 110.

⁶³B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 16.

⁶⁴Indian Arbitration Act 1996, s 24(1).

⁶⁵Indian Arbitration Act 1996, s 24(1). See Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 13, para. 17 ('...the Commission has proposed addition of the second proviso to section 24 (1) to the Act, which is intended to discourage the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments.')

not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any such cause.⁶⁶ This is significant since, while a single, continuous hearing on the merits, usually ranging from one day to some two weeks in duration, is the norm in the practice of international arbitration, the tradition in India was for arbitral tribunals to hold hearings in a disjunct manner, with numerous adjournments in between, which inevitably resulted in the hearings being spread across several months or years.



In a more prominent change, the newly inserted Section 29A now provides a statutory time limit for rendering an arbitral award. It first stipulates that the "award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference";⁶⁷ wherein "an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment."⁶⁸ The parties may, however, by consent, extend the initial twelve-month period by a further period not exceeding six months.⁶⁹ Interestingly, Section 29(4) provides that such time period may be then further



extended by the concerned Court on the application of any of the parties for sufficient cause and on such terms and conditions as may be imposed by the Court.⁷⁰ In the absence of such extension by the Court, if the award is not made within the initial twelve month period, or eighteen month period where the parties mutually extend the same, the mandate of the arbitrator(s) shall terminate.⁷¹ Accordingly, beyond a permissible period of eighteen months, any further extension of the time period for rendering an award can only be granted by a Court.

The above provision is a throwback to the regime under The Arbitration Act, 1940 of India ('1940 Act'),⁷² which ordinarily required the arbitrators to make their award within four months after entering on the reference.⁷³ However, the concerned Court had the authority to extend this time period.⁷⁴ Thus, an award passed after four months of entering upon reference did not *ipso facto* become non-est.⁷⁵

Interestingly, no similar provision was included in the Indian Arbitration Act enacted in 1996, prior to the Amendment Act. This implied that Indian courts no longer had any power to extend the time for making an award, unlike under the old 1940 Act.⁷⁶ Consequently, "the condition precedent for enlargement of time would depend only on the consent of the parties, that

⁶⁶Indian Arbitration Act 1996, s 24(1).

⁶⁷Indian Arbitration Act 1996, s 29A(1).

⁶⁸Indian Arbitration Act 1996, s 29A(1), Explanation.

⁶⁹Indian Arbitration Act 1996, s 29A(3).

⁷⁰Indian Arbitration Act 1996, s 29A(5).

⁷¹Indian Arbitration Act 1996, s 29A(4).

⁷²Manini Brar, 'Implications of the new Section 29A of the amended Indian Arbitration and Conciliation Act, 1996', (2017) 5(2) Ind. J. Arb. L. 113, 118.

⁷³The 1940 Act, First Schedule, s 3.

⁷⁴The Arbitration Act, 1940, s 28(1).

⁷⁵See *Jatinder Nath v. M/s Chopra Land Developers Pvt. Ltd. & Anr.*, AIR 2007 SC 1401.

⁷⁶*N.B.C.C. Ltd vs J. G. Engineering Pvt. Ltd.*, 2010) 2 SCC 385.

is to say, that if the parties agree for enlargement of time.”⁷⁷ And “the consequence of the arbitrator not concluding the proceedings and rendering the award within the period [that may be [prescribed under the arbitration agreement [...] would uncliothe the arbitrator of his legal authority to continue with the proceedings...”⁷⁸ That is no longer the case after the introduction of Section 29A. In fact, while Section 28 of the 1940 Act was subject to the parties’ agreement to the contrary, and thus derogable⁷⁹, the present Section 29A is couched in mandatory terms.

The object behind Section 29A is clear, i.e. to avoid unnecessary delay in the completion of arbitral proceedings. Some perceive that such a provision could “do wonders for investor confidence.”⁸⁰ However, the imposition of such a rigid time limit has not been welcomed internationally with enthusiasm for a variety of reasons.

Firstly, the imposition of a stringent time limit overlooks that the time taken to conclude an arbitration proceeding and render an award is not merely a matter of procedural efficiency but is intrinsically linked with factors such as the complexity of the dispute, the volume of evidence adduced, as well as the number of parties to the arbitration entitled to advance their submissions and rebut the submissions of the other parties. This aspect was highlighted by the HLC Report by reference to the Arbitration Ordinance 2011 in Hong Kong, stating that the timeline of an arbitration very much depends on the complexity of the issues in dispute⁸¹, and hence, rigid timelines under Section 29A would not be practical.⁸² Accordingly, while the imposition of time limits is generally accepted in international arbitration practice, the same is predominantly left to the mutual agreement of the parties, in consultation with the

tribunal and any arbitral institution administering the arbitration.⁸³ While several institutional rules prescribe time limits, these are not absolute in nature, and extendable either by the institution, the arbitral tribunal, or by agreement of the parties.⁸⁴ After all, the purpose of arbitration, premised on the principle of party autonomy, is to allow the disputing parties flexibility to structure the procedure keeping in mind the nature and complexity of the dispute.⁸⁵

Secondly, the fact that extensions beyond an eighteen-month period can be granted only by a Court is a double-edged sword. While on the one hand, it deters an arbitral tribunal to unnecessarily prolong the arbitral proceedings, the fact that after the expiry of such period, a party is constrained to appear before a court – the very forum it sought to avoid by means of an arbitration agreement – could result in further delays in the conclusion of the arbitration. Therefore, for the Amendment Act to provide yet another avenue for judicial intervention is widely perceived with suspicion. Despite the safeguards intended to ensure continuity of arbitration,⁸⁶ one fears that the very possibility of another judicial intervention after eighteen months of arbitration will cause even further delays in the resolution of the dispute.⁸⁷

The fact that Section 29A(9) of the Indian Arbitration Act, which requires a Court to merely endeavour to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party⁸⁸, is not framed in mandatory terms fails to offer foreign parties and arbitration practitioners sufficient encouragement. Time and practice will tell how well the time limit in Section 29A(9) is respected by the courts, and how effective the rule really is.

⁷⁷*N.B.C.C. Ltd vs J. G. Engineering Pvt. Ltd, 2010) 2 SCC 385, para. 5; Bharat Oman Refineries Ltd. v. Mantech Consultants, 2012 SCC OnLineBom 669.*

⁷⁸*Shyam Telecom Ltd. v. Arm Ltd., 2004 (3) Arb LR 146 (Delhi), para. 15.*

⁷⁹*The Arbitration Act, 1940, s 3.*

⁸⁰*Armaan Patkar, Indian Arbitration Law: Legislating for Utopia, (2015) 4(2) Ind. J. Arb. L. 28, 50.*

⁸¹*B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.*

⁸²*B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 34.*

⁸³*B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 64.*

⁸⁴*Andrew McDougall et al., ‘Mandatory time limit for rendering awards under Indian Law: How good intentions can lead to bad outcomes’, (2017) 5(2) Ind. J. Arb. L. 188, 189.*

⁸⁵*Sanjeevi Seshadri, ‘S29A of the New Indian Arbitration Act: An attempt at slaying Hydra’, Kluwer Arbitration Blog (2 February 2016*

⁸⁶*Indian Arbitration Act 1996, s 29A(6)-(7).*

⁸⁷*Shreeja Sen, ‘Arbitration provision prescribing time limit draws flak at NITI Aayog conference’, Livemint (22 October 2016) (“The provision was also flagged by Alexis Mourre, President of the International Chamber of Commerce [...] for an added scope for judicial intervention.”)*

⁸⁸*Indian Arbitration Act 1996, s 29A(9).*

For the above reasons, it is important to pay heed to the recommendations of the HLC Report that Section 29A of the Indian Arbitration Act may still be amended in order to achieve effective incentives to carry out arbitration proceedings expeditiously, without the straight-jacket of an inflexible and somewhat unrealistic time limit.⁸⁹

Adopting the aforementioned recommendations would be consistent with the suggestion of Justice R. C. Lahoti, a former Chief Justice of India, that “Section 29A [...] is not going to work in India [since] six months are taken only in completing pleadings. The sensible provision would be to begin the limitation from the day the trial begins.”⁹⁰



It appears that the Indian legislature has already taken steps to give effect to the recommendations of the HLC Report. The Union Cabinet recently approved the Arbitration and Conciliation (Amendment) Bill, 2018 (‘Amendment Bill 2018’) for introduction in the Indian Parliament,⁹¹ which was passed by the Lok Sabha, i.e. the lower house of India’s bicameral Parliament, in August 2018.⁹² Amongst other things, the Bill proposes “to amend [Section 29A(1)] by excluding

⁸⁹B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 4.

⁹⁰Shreeja Sen, ‘Arbitration provision prescribing time limit draws flak at NITI Aayog conference’, *Livemint* (22 October 2016).

⁹¹Press Information Bureau, ‘Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018’, Government of India (7 March 2018).

⁹²Express News Service, ‘Lok Sabha passes Bill to help India become arbitration hub’, *The Indian Express* (11 August 2018).

⁹³Press Information Bureau, ‘Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018’, Government of India (7 March 2018); see *The Arbitration and Conciliation (Amendment) Bill, 2018*, s 6.



International Arbitration from the bounds of timeline and further to provide that the time limit for arbitral award in other [domestic] arbitrations shall be within 12 months from the completion of the pleadings of the parties.”⁹³ This proposed amendment, if passed by the upper house of the Indian Parliament as well, will certainly be welcomed, for it alleviates the aforementioned fears of the international arbitral community.

5. The Dearth of Institutional Arbitration in India

In addition to the various Amendments made in 2015, several of the above concerns may be addressed to a large extent through institutional arbitration.⁹⁴ It is widely accepted that the lack of growth of institutional arbitration in India stemmed largely from the fact that the un-amended Indian Arbitration Act was, to borrow words from the Law Commission, “institutional arbitration agnostic – meaning thereby, it neither promote[d] nor discourage[d] parties to consider institutional arbitration.”⁹⁵ The situation was aggravated by the additional hurdles posed by the Supreme Court of India that tended to prevent arbitration institutions from playing a prominent role in various stages of the arbitral process.

⁹⁴ Parliamentary Standing Committee Report on Personnel, Public Grievances, Law and Justice, 9th Report on The Arbitration and Conciliation (Amendment) Bill, 2003 (2005), in Ministry of Law and Justice, *Proposed Amendments to the Arbitration and Conciliation Act 1996 – A Consultation Paper*, 143, suggesting that institutionalised “arbitration in India can also ensure that parties to international arbitration opt for India as the [seat] for arbitration.”

⁹⁵ Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 9, para. 6.

For instance, the majority judgment in *Patel Engineering* concluded that since the original Section 11 of the Indian Arbitration Act dealing with the appointment of arbitrators entailed the exercise of a judicial function, this power in its entirety, could be delegated by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.⁹⁶ Accordingly, it dismissed the suggestion that the un-amended Section 11 had theoretically allowed the Chief Justice of India or a High Court to delegate the function of arbitral appointments to any “person or institution.”

Legislative measures were required to incentivise the use of institutional arbitration in India, some of which have already been implemented with the Amendment Act. The newly introduced Section 11(6B), for instance, clarifies that the “designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”⁹⁷ The intention was to sway the discussion about the appointment mechanism in India away from the administrative-judicial debate, and focus on the precise scope of the tasks to be performed by the appointing authority.⁹⁸

This has effectively paved the way for the Supreme Court or the High Court to appoint arbitration institutions as appointing authorities; something clearly envisaged by the text of the Indian Arbitration Act as well as the Model Law. This was also suggested by the Law Commission of India, when it noted in its 246th Report that:

“[D]elegation of the power of “appointment” [...] shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions.”⁹⁹

The initial effectiveness and success of the above amendment is confirmed by the fact that on 3 May 2017, the Supreme Court of India in Arbitration Case No. 33 of 2014, for the first time directed an arbitral institution, the Mumbai Centre for International Arbitration (MCIA), to appoint an arbitrator in a commercial dispute between Sun Pharmaceutical Industries Ltd. and Falma Organics Ltd. Nigeria.¹⁰⁰ This is certainly an encouraging sign from an international perspective as many Model Law jurisdictions stand by UNCITRAL’s characterization of the appointment function as an administrative one.¹⁰¹



Nonetheless, the dearth of institutional arbitration in India appears to be as much a cultural issue as it is a legal one. Positive experiences with reliable arbitral institutions, as well as possible further legislative changes will be necessary to change existing conceptions.

The recommendations of the HLC Report, ranging from the establishment of an autonomous Arbitration Promotion Council of India (‘APCI’) to grade arbitral institutions in India¹⁰² to designating private arbitral institutions as default appointing authorities for both international and domestic arbitration¹⁰³, provide an intriguing template for discussion. Notwithstanding the merits and demerits of some of the HLC recommendations, if the Indian Legislature reviews them with the same zeal and attention that it afforded the Law Commission of India’s 246th Report, then the future looks promising.

⁹⁶ *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, para. 46(ii).

⁹⁷ *Indian Arbitration Act 1996*, s 11(6B).

⁹⁸ *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014)*, 18, para. 29.

⁹⁹ *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014)*, 16, para. 24.

¹⁰⁰ *Ayushi Singhal, ‘Appointment of Arbitrators in India – Finally Courts Divest Some Power’, Kluwer Arbitration Blog (5 Sep. 2017); Khushboo Narayan, ‘SC tells MCIA to appoint arbitrator in global dispute’, The Indian Express (30 July 2017).*

¹⁰¹ *Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd.*, (1991) H.K.C.F.I. 190 (Hong Kong, 1991) (‘*Fung Sang*’); *Netherlands Code of Civil Procedure*, art 1027(4).

¹⁰² *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017)*, 4, para. 1.

¹⁰³ *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017)*, 6.



The Amendment Bill 2018 already provides a slight glimpse of this future. On the one hand, the Bill proposes to amend Section 11 such that “parties may directly approach arbitral institutions designated by the Supreme Court for International Commercial arbitration and in other cases the concerned High Courts” for appointment of arbitrators,¹⁰⁴ with the applications for appointment to be “disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party”.¹⁰⁵ On the other hand, it also seeks to create an independent body namely the Arbitration Council of India (ACI), which amongst other things “will grade arbitral institution and accredit arbitrators by laying down norms and take all such steps as may be necessary to promote and encourage arbitration.”¹⁰⁶

6. Concluding Remarks

After two decades since the enactment of the Indian Arbitration Act in 1996, based on the Model Law, the Amendment Act is perceived as a giant leap by Indian arbitration law in the right direction. One only hopes that it is the first of many. The approval of

the Amendment Bill 2018 and its passage by the Lok Sabha is another positive indicator, which will bring the Indian Arbitration Act in further conformity with internationally accepted best arbitration practices. At present, it is sufficient to conclusively infer that the evolutionary journey that the Indian arbitration law has embarked upon is far from over. And the rest of the arbitration world is keenly watching!

¹⁰⁴ Press Information Bureau, ‘Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018’, Government of India (7 March 2018); see *The Arbitration and Conciliation (Amendment) Bill, 2018*, s 3.

¹⁰⁵ *The Arbitration and Conciliation (Amendment) Bill, 2018*, s 3(13).

¹⁰⁶ Press Information Bureau, ‘Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018’, Government of India (7 March 2018); see *The Arbitration and Conciliation (Amendment) Bill, 2018*, s 10.