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## UNDERSTANDING THE INDIAN ARBITRATION AND CONCILIATION ACT

~ *Yash Sharma*

ADR mechanisms have always provided expeditious means of dealing with disputes outside the standard legal realms. Arbitration is an effective ADR method in India due to the flexibility of procedure, party control and quick delivery of outcome. The main legislation regulating arbitral process in India, the Arbitration and Conciliation Act, 1996<sup>1</sup> (“the Act”) was enacted to harmonize and update the domestic and international commercial arbitration, as well as to criminalize the enforcement of awards made outside India.

The Arbitration and Conciliation Act of 1996 came as a response to the need for a new arbitration that was aligned with the global trend in respect to arbitration. The Act replaced the dated Arbitration Act 1940 and it was based on UNCITRAL Model Law on International Commercial Arbitration, 1985<sup>2</sup>, and UNCITRAL Conciliation Rules, 1980<sup>3</sup>. The general objectives of the Act are to avoid judicial control over arbitration, to endorse party autonomy, maintain fairness, and impartiality in proceedings, and provide for the recognition and enforcement of arbitral awards.

The Act comprises of four distinct parts. Part I deals with both domestic and international commercial arbitration, Part II is concerned with enforcement of foreign awards under the New York and Geneva Conventions, Part III is considering conciliation, while final part contains supplementary provisions. These are parts that work in concert to create an all encompassing system that can quickly settle disputes involving minimal involvement of the judiciary.

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<sup>1</sup> The Arbitration and Conciliation Act, 1996 (No. 26 of 1996).

<sup>2</sup> UNCITRAL Model Law on International Commercial Arbitration, 1985 UN Doc A/40/17, Annex I.

<sup>3</sup> UNCITRAL Conciliation Rules, 1980, UN Doc A/35/17 (1980).

The Act characterizes “arbitration” in Section 2(1)(a)<sup>4</sup> so as to be inclusive of all forms of arbitration, voluntarily organized or organized under a permanent arbitral institution. Rather, the scope of Part I in terms of arbitrations seated in India was fresh watered up by the Supreme Court in its decision *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*<sup>5</sup> In where the concept of territory was underscored. The Court was categorical that Indian courts have no jurisdiction to intervene in arbitrations that happen beyond India.

Section 7<sup>6</sup> of the act states that arbitration agreement refers to the written contract among the parties by which they agree to resolve disputes through arbitration. In *K.K. Modi v. K.N. Modi*<sup>7</sup>, the Supreme Court held that the arbitration agreement has to convey an image of definite intent to resolve disputes through legally binding process outside courts.

The rules governing the appointment of the arbitrators as stipulated in the Act are given in section 11<sup>8</sup> of the Act. Parties can use their own way of appointing arbitrators. If the parties are not in agreement, the High Court (in cases of domestic arbitration) or the Supreme Court (in international commercial arbitration) steps up and takes the lead in the selection of the arbitrator. The Supreme Court judgment in *TRF Ltd. v. Energo Engineering Projects Ltd.*<sup>9</sup>, held that an disqualified person cannot appoint another arbitrator, irrespective of the clauses laid down in the contract.

Interim measures are vital parts of the legal system in arbitration. Parties can approach the court for interim relief under Section 9<sup>10</sup> both before and during arbitration. From Section 17, the arbitration tribunal is allowed to give interim measures while the arbitration is in process. A major development took place in 2015 when the Arbitration and Conciliation (Amendment) Act was made, which declared that interim measures that the tribunal could order under Section 17<sup>11</sup> to be enforceable as court orders. In *Essar House Pvt. Ltd. v. Arcelor Mittal Nippon Steel India Ltd.*<sup>12</sup>, it was confirmed that judgment delivered under Section 17 is having binding authority.

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<sup>4</sup> The Arbitration and Conciliation Act, 1996, § 2(1)(a), No. 26, Acts of Parliament, 1996 (India).

<sup>5</sup> *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

<sup>6</sup> *Id.* § 7.

<sup>7</sup> *K.K. Modi v. K.N. Modi*, (1998) 3 SCC 573.

<sup>8</sup> *Id.* § 11.

<sup>9</sup> *TRF Ltd. v. Energo Engineering Projects Ltd.*, (2017) 8 SCC 377.

<sup>10</sup> *Id.* § 9.

<sup>11</sup> *Id.* § 17.

<sup>12</sup> *Essar House Pvt. Ltd. v. Arcelor Mittal Nippon Steel India Ltd.*, (2022) SC 625.

The rules for arbitration proceedings are spelled out in Sections 18-27<sup>13</sup>. The Act provides parties with significant room to make their own rules on procedure. If parties fail to agree on procedural rules, the arbitral tribunal becomes entitled to indicate the proper procedures to be followed. Parties are required to be treated on par in accordance with Section 18<sup>14</sup> and this advances compliance to natural justice.

Section 31<sup>15</sup> outlines the structure and must have elements of an award of arbitration. Under section 34<sup>16</sup> only a specific ground of contest may be available to a party to an arbitral award: incapability, failure to afford proper notice or violation of public policy. Judgment in *ONGC Ltd. v. Saw Pipes Ltd.*<sup>17</sup>, broadened the scope of 'public policy' to situate the 'patent illegality' scenario. Although the Supreme Court clarified this concept in *Associate Builders vs. DDA*<sup>18</sup> by warning against constant intervention of judiciary which should only be interfered in dire circumstances.

After expiration of the right to challenge an award under Section 34 or petition rejected, arbitral awards may be enforced as a court decree under section 36<sup>19</sup>. In 2015, a controversial amendment removed an automatic injunction on award enforcement, when Section 34 challenge is filed, which makes the enforcement quicker and more certain.

Other than arbitration, the Act recognizes conciliation as a form of ADR under Part III. Conciliation varies from arbitration in that it is not adjudicatory, a neutral conciliator who helps parties attain a mutually acceptable settlement. The agreement reached in a conciliation process has equal legal standing as arbitral award on agreed terms (Section 74<sup>20</sup>).

Over the history of the Act it has undergone several changes, most significant at the time of the amendments in 2015<sup>21</sup>, 2019<sup>22</sup> and 2021<sup>23</sup>. The revision in 2019 however instituted the Arbitration Council of India, which had mandated to oversee arbitral bodies and maintain consistent procedures in arbitration. Moreover, it established benchmarks of qualification of the arbitrator and encouraged effective processing of arbitration processes. In year 2015,

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<sup>13</sup> Id. §§ 18–27.

<sup>14</sup> Id. § 18.

<sup>15</sup> Id. § 31.

<sup>16</sup> Id. § 34.

<sup>17</sup> *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.

<sup>18</sup> *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49.

<sup>19</sup> Id. § 36.

<sup>20</sup> Id. § 74.

<sup>21</sup> The Arbitration and Conciliation (Amendment) Act, 2015; No. 3 of 2016.

<sup>22</sup> The Arbitration and Conciliation (Amendment) Act, 2019 No 33 of 2019

<sup>23</sup> The Arbitration and Conciliation (Amendment) Act, 2021 No. 3 of 2021.

Section 29A was enacted and it requires that arbitral awards shall be pronounced within a period of 12 months escalation of this period is by way of mutual assent or through court direction.

Although reform efforts have improved, many obstacles remain in place. There is not much institutional arbitration in India since most cases are ad hoc arbitrations. Consequently, it often causes long and ineffective procedures. Although rights given by Sections 9 and 34 of the Act to the courts in the aspect of arbitration are properly warranted, the same are also abused, leading to too much judicial interference. Also, settling the issue of enforcement of awards is a hurdle in elaborate commercial cases.

Attaining arbitration primacy in India requires upholding institutional arbitration as well as developing technology-driven dispute resolution schemes and rendering the arbitral decisions predictable for enforcement. For arbitration to be considered a reliable alternative for dispute settlement, judicial discretion needs to be regulated and a viable legal context has to be created.

After all, the Arbitration and Conciliation Act, 1996, signifies a turnbag towards participant-based and efficient mechanisms of dispute settlement in India. In keeping with strong legal provisions, persistent judicial backing, and political reforms, the Act can make India a favourable ground for both local and international arbitration.