

## Arbitration and Conciliation (Amendment) Act, 2021: Why the Eighth Schedule is a Good Riddance?

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### Abstract

The Indian arbitration regime has had a long journey since the Arbitration Act of 1899 under the British crown rule. At present, the Arbitration and Conciliation Act, 1996 is the primary legislation regulating the rules and procedures of arbitration in the country. Arbitration and Conciliation (Amendment) Act, 2021 was the third attempt in less than five years to simplify and correct the loopholes in the arbitration rules and procedures in the country. The 2021 amendment made two significant changes to the existing arbitration law: (a) it ruled out the provision for automatic stay on awards; and (b) it substituted s43J and omitted the Eighth Schedule both of which were added in previous amendment in 2019. Section 43J stated qualifications, eligibility and norms for accreditation of arbitrators, and referred to the Eighth Schedule which provided an exhaustive list of qualifications for accreditation. This article argues that the schedule is a good riddance since it had created two problems. Firstly, the qualification norms were too focused on seniority of candidates rather their experience and understanding of the arbitration law, rules and procedures. Secondly, it also barred foreign national arbitrators from arbitrating international commercial arbitrations seated in India.

**Keywords:** Arbitration, international commercial arbitration, the eighth schedule, general norms for arbitration, 2019 amendment, 2021 amendment

### Introduction

As of 13<sup>th</sup> October, 2021, there are 31,042,467 pending cases (active cases that are more than a year old) across various courts in India.<sup>2</sup> Out of these cases, more than 8.2 million cases are civil in nature. With criminal trials, a delayed pronouncement on top of a poor conviction rate results in ineffective punishment and which fails to deter future crimes.<sup>3</sup> With civil cases, particularly those related to trade and business, a long trial hurts the economy. There are various factors behind this

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<sup>2</sup>National Judicial Data Grid Statistics

<sup>3</sup>“Justice delayed is justice denied” is a popular legal maxim which is the basis for a person’s right to speedy trial. Source: [https://en.wikipedia.org/wiki/Justice\\_delayed\\_is\\_justice\\_denied](https://en.wikipedia.org/wiki/Justice_delayed_is_justice_denied); Lucia argues that delayed convictions in criminal cases had less deterrence effect for future crimes. Source: Dalla Pellegrina, Lucia. "Court delays and crime deterrence." *European Journal of Law and Economics* 26, no. 3 (2008): 267-290.

pendency. Our courts operate with fewer judges for every million people as compared to more developed nations.<sup>4</sup> These fewer judges also have to handle more cases today than before. A traditional court also must follow due process. It is the ultimate door for justice and the consequences of a poor judgement could be irreversible. This is truer in the case of a criminal trial where any conviction of an innocent is beyond acceptance.

Commercial disputes are of different nature, though. They are often more of a difference between two “partner” business entities than a dispute of an adversarial nature.<sup>5</sup> As such, any commercial dispute resolution should offer room for collaboration which in the case of traditional courts is not permitted. Court trials are adversarial in nature.<sup>6</sup> Alternative dispute resolution (ADR) mechanisms such as arbitration are extra-judicial methods wherein two parties can get their dispute resolved with the help of a neutral third person outside the courtrooms. These mechanisms offer a cheaper, faster, and more flexible approach for business entities to resolve their disputes with collaboration and mutual understanding.

Alternative dispute resolution (ADR) systems are not new. Systems similar to mediation and arbitration are found in historical scripts throughout different periods in history. For instance, there are records of prophet Muhammad mediating business disputes in Makkah before he was called upon by angel Gabriel to spread the message of God.<sup>7</sup> In its modern form, ADRs have been in existence at least since the late 19<sup>th</sup> century when the US federal government passed the Arbitration Act of 1888<sup>8</sup> to legislate labour disputes in railways. The first legislation in modern India came during the British Crown regime in 1899. The Arbitration Act, 1899 was based on the English legislation of the same name.<sup>9</sup> In 1908, Schedule II of the Code of Civil Procedure extended the arbitration provisions to other parts of British India.<sup>10</sup>

Between 1937 to 1961, three legislations were passed in India each of which dealt with arbitration in a different context – the Indian Arbitration Act, 1940<sup>11</sup> dealt with domestic arbitrations while the Arbitration (Protocol and Convention) Act, 1937<sup>12</sup> and the Foreign Awards (Recognition and Enforcement) Act, 1961<sup>13</sup> both dealt with matters related to the recognition and enforcement of foreign arbitration awards under the Geneva Protocol and Convention and the New York Convention, respectively. The subsequent Arbitration and Conciliation Act, 1996 was a landmark legislation in the development of an arbitration-friendly regime in India. The law was modelled on the UNCITRAL Model

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<sup>4</sup>In 2019, there were only 20 judges for every million people in India. Source: Livemint. “There are 20 judges per 10 lakh people in India: Govt.” *Livemint* (6 Feb 2019). URL: <https://www.livemint.com/politics/news/there-are-20-judges-per-10-lakh-people-in-india-govt-1549457164121.html>

<sup>5</sup>Kartuzov, Mikhail. "Advantages and Disadvantages of International Commercial Arbitration in comparison to Litigation and other means of dispute resolution." *Evropský politický a právní diskurz* 3 (2015): 64-68.

<sup>6</sup>Ibid.

<sup>7</sup>Hazleton, Lesley. “The First Muslim: The Story of Muhammad” (2013).

<sup>8</sup> US Congress, Arbitration Act, 1888.

<sup>9</sup>UK Parliament, Arbitration Act, 1899.

<sup>10</sup>British India, Code of Civil Procedure, Schedule II.

<sup>11</sup>Indian Arbitration Act, 1940.

<sup>12</sup>Arbitration (Protocol and Convention) Act, 1937

<sup>13</sup>Foreign Awards (Recognition and Enforcement) Act, 1961

Law on International Commercial Arbitration<sup>14</sup> and was passed during the '90s economic liberation intended to attract foreign investors by providing for an effective and efficient commercial dispute resolution. It repealed the previous three legislations and codified arbitration rules into one simple law. The Act acknowledges appointment process abilities while doing away with an outdated umpire system and giving arbitrators more discretion in decision-making. It further holds arbitrators liable for damages, whether contractual, tortious, or both.

The Act had its shortcomings which the Indian Parliament attempted to solve with multiple amendments. The first amendment came in 2005<sup>15</sup> but was subsequently repealed in 2015. The next three major amendments in 2015<sup>16</sup>, 2019<sup>17</sup> and 2021<sup>18</sup> have all been significant.

The present article is a critical review of the Eight Schedule<sup>19</sup>. The Eight Schedule was introduced in the 2019 amendment and it specified qualification and experience norms for a person to qualify as an arbitrator in India. One of the main criticisms was that it also barred foreign arbitrators from practice in India. Besides, practicing arbitrators who did not meet the criteria also criticised the need for such qualification norms. Because of these controversies, the Eighth Schedule was omitted in the very next amendment in 2021.<sup>20</sup> This article attempts to declutter the norms for accreditation of arbitrators as laid down in the Eighth Schedule and it presents a critique of the qualification norms. Since institutional arbitration is quickly becoming the norm, we also look at the eligibility criteria to qualify as an arbitrator at some leading arbitral institutions in India. It is indeed found that arbitral institutes have their own criteria for the empanelment of arbitrators into the institute.

## Background

### Arbitration – Introduction

Arbitration, mediation, and conciliation are the three most important ADR tools. Arbitration is perhaps the most popular of the three. Christopher and Naimark<sup>21</sup> found that 90% of international contracts included an arbitration clause. All three ADR mechanisms involve a neutral third person or a tribunal who facilitate the resolution between the parties. The third person facilitating an arbitration is referred to as the "arbitrator" and the final pronouncement of the arbitrator is called the arbitration award. Parties require an arbitration clause in the contract or a separate agreement wherein they mutually declare their preference for arbitration in case of disputes. Both parties are then bound by the arbitration agreement and in case one party approaches the court with a fresh dispute, the other party can object to it.

The arbitral tribunal's judgement is referred to as the "arbitral award" and it is enforceable in a court of law. The party in whose favour is the award is called the award creditor while the other party is

<sup>14</sup>UNCITRAL Model on International Commercial Arbitration

<sup>15</sup>The Arbitration and Conciliation (Amendment) Act, 2005.

<sup>16</sup>The Arbitration and Conciliation (Amendment) Act, 2015.

<sup>17</sup>The Arbitration and Conciliation (Amendment) Act, 2019.

<sup>18</sup>The Arbitration and Conciliation (Amendment) Act, 2021.

<sup>19</sup>The Arbitration and Conciliation (Amendment) Act, 2019, Schedule VIII.

<sup>20</sup>The Arbitration and Conciliation (Amendment) Act, 2021, s4.

<sup>21</sup>Christopher and Naimark 2005

known as the award debtor. The award debtor is required to pay the award as well as the compensation for arbitration proceedings to the award creditor. The award debtor can though approach the court within a stipulated time to challenge the award. Following the 2015 amendment, the litigating party is required to file a separate litigation for an interim stay on the award. However, prior to the amendment, any challenge to the award under section 34 of the principle Act also put an automatic stay on the arbitral award as well.<sup>22</sup> It resulted in loss for the award creditor and made arbitration as slow and ineffective as a litigation could get.

The court evaluates different aspects of an arbitral award. As per the principle Act, an award is considered invalid when a party is proven incapable of representing their interest, when the arbitration clause or the agreement is found invalid, in cases where the award is found out of scope of reference, at times when the other party isn't given a proper notice, when the court finds evidence of fraud or corruption in arbitral proceedings or in the composition of the arbitral tribunal, or when the award is in conflict with the larger public interest.<sup>23</sup>

A mediation is facilitated by a neutral and impartial third person called "mediator" and that third person in the case of a conciliation is called a "conciliator". Both arbitration and conciliation are subject to provisions of the Arbitration and Conciliation Act, 1996. On the other hand, a mediation is not subject to any legislation and so is the jurisdiction of a mediator limited on various fronts. The role of a mediator is to facilitate a conducive conversation between the parties. The mediator is allowed to use any technique he or she deems fit to facilitate a settlement but it must be arrived at the mutual consensus of the parties involved. That is, unlike in the arbitration, a mediator is not a judge. A mediator cannot pass a judgement and a settlement thus arrived is not enforceable in a court of law. In other words, mediation is more of a voluntary exercise facilitated by a third person. With conciliation and mediation, unlike in the case of arbitration, parties again don't need a prior agreement or a conciliation clause in order to use conciliation for dispute resolution. Unlike mediation, though, conciliation is regulated as per provisions of the Arbitration and Conciliation Act, 1996. The settlement reached via a conciliation is also, as with mediation, not enforceable in a court of law.

Arbitral proceedings are also not subject to provisions of the Code of Civil Procedure or the Indian Evidence Act.<sup>24</sup> This gives more room for the arbitrator and the parties to settle their dispute in whatsoever manner possible unlike in a traditional court procedure where the court must adhere to tedious procedures and rules of the abovementioned laws.

### **Commercial Arbitration v. Court Litigation**

Christopher and Naimark<sup>25</sup> found that 90% of international business contracts included an arbitration clause, which is indicative of its popularity in the commercial world. We have argued that arbitration offers a cost-effective, time-efficient, and a collaborative way of commercial dispute

<sup>22</sup>Christopher R. Drahoszal and Richard W. Naimark, Towards A Science Of International Arbitration: Collected Empirical Research, International Arbitration Law Library Series Set, Kluwer law International (2005): 59.

<sup>23</sup>Arbitration and Conciliation Act, 1996, s34(2)(a)(v).

<sup>24</sup>Ibid, s19.

<sup>25</sup>Christopher and Naimark. Towards a Science of International Arbitration (2005).

resolution. This is in respect of the place of arbitration, the flexibility with respect to the rules and procedure of the arbitral proceedings, international recognition of award, appointment of the arbitral tribunal on mutual consent of the dispute parties, and the confidentiality arbitral proceedings provide to the parties.

On the other hand, a court litigation is bound by a tedious process, is subject to the Code of Civil Procedures and Evidence Act, has a lengthy waiting period and an increasingly huge pile of pending cases, puts the parties against each other, and is costly. These disadvantages make court litigations an unfavourable option for commercial dispute resolution. Zekos points out that courts have also encouraged parties to use alternative systems of dispute resolution and have recognised and enforced the decisions from those proceedings.<sup>26</sup> Courts too support arbitral proceedings such as by referring parties to an arbitral institute, enforcing arbitral awards, recommending arbitrator/s when parties fail to appoint one, and by objectively hearing litigations that challenged arbitral awards. In fact, long before the principle Act came into existence in 1996, the Supreme Court had made the following remark in a 1989 hearing with respect to the Indian Arbitration Act, 1940<sup>27</sup> –

*"We should make the Arbitration law simple, less technical and more responsive to the realities of the situations but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating sense that justice appears to have been done."*

### **Ad hoc v. Institutional Arbitration**

Disputing parties can either opt for an ad hoc or institutional arbitration. Although ad hoc arbitral proceedings are cheaper, need little time, offer greater flexibility, and are tailored to the parties' needs, it has drawbacks due to the absence of a well-defined procedural and administrative framework. Building an ad hoc arbitral procedure system from scratch has the risk of containing inoperable clauses and/or an invalid procedure that could result in an arbitral award that isn't recognized. To be effective, ad hoc arbitration also requires two additional conditions: (a) that the parties cooperate fully until the very end of the arbitration, (b) and that a favourable legal system exists where arbitration will take place.

Ad hoc arbitrations are the norm in India.<sup>28</sup> Although institutional arbitration is making inroads within India's arbitration system, it is yet to make a significant effect. Due to the requirement that the parties must agree to the proceedings in ad hoc arbitration and because this can never be guaranteed until the very end, disputing parties are likely better off with institutional arbitration over ad hoc arbitration. Arbitral institutes also have well-established procedures, a panel of experienced arbitrators, and transparent fees. Ad hoc arbitration is also hampered by a lack of support of infrastructure. It is possible for parties to choose their own arbitrators in institutional arbitration and the arbitral

<sup>26</sup>Zekos. Georgios I, The role of courts and ADR in the rule of law (2001).

<sup>27</sup>AIR 1981 as reported in Gupta, Dr. Pankaj Kumar and Sunil Mittal. Commercial Arbitration in India. 2010 International Conference on Economics, Business and Management (IPEDR), v.2 (2011): 186-191.

<sup>28</sup>Gupta and Sunil Mittal. Commercial Arbitration in India.

institutions keep a list of all their arbitrators and their profiles. Specialized arbitrators are also available through these arbitral institutes.

There are 35 arbitral institutes in India. Some of these institutes include the International Chamber of Commerce (ICC), the Indian Council of Arbitration (ICA), the Delhi International Arbitration Centre (DIAC), and the Construction Industry Arbitration Council (CIAC).

One of the most significant disadvantages with ad hoc arbitration is the inability to predict the form of a future conflict, the most appropriate procedure, and the parties' willingness to cooperate at that point in time. As a result, rather than crafting a lengthy and expensive arbitration agreement that covers every imaginable element, it is preferable to leave all of these things to an expert institution. The second major benefit of institutional arbitration is that the prestige of the organisation lends to the credibility of the judgement, making voluntary compliance and enforcement easier.

It is difficult to say if institutional arbitration is superior to ad hoc arbitration, or vice versa. A fair evaluation depends on dispute-to-dispute, yet, in recent years, authorities have attempted to promote institutional arbitration for its convenience and credibility. The 2019 amendment made a significant landmark in this direction. It introduced the Arbitration Council of India (ACI) which is an independent statutory body with a wide range of responsibilities and authority. The ACI is the nodal agency for regulating, training and recognizing arbitral institutes operating in India. It also grades these arbitral institutes based on their infrastructure and the expertise and experience of their arbitrators. Besides, the ACI is also responsible for making depositories of arbitral awards since previous awards and judgements are crucial in related disputes in future. Prior to the ACI, no such depository existed and the burden of bringing and proving the authenticity of previous award rested upon the party concerned.<sup>29</sup>

The ACI is based upon the recommendation of the High-Level Committee headed by Justice Srikrishna. It submitted its report on 3<sup>rd</sup> of August 2017 in which it recommended for the government to take steps to improve the quality of institutional arbitrations. It recommended the setup of an independent body responsible for the promotion of and regulation of arbitral institutes. The committee called it the Arbitration Promotion Council of India (APCI). The APCI had more or less similar responsibilities to what now rests with the ACI.

### **Jurisdiction of Indian Courts in Foreign Seated Arbitrations**

The case of *Bhatia International v. Bulk Trading*<sup>30</sup> brought the interventionist nature of the Indian judiciary into the limelight. In the said case, the arbitration agreement included a clause wherein the parties had agreed to arbitration as per the rules of the International Chamber of Commerce (ICC). The ICC thereafter appointed a sole arbitrator as asked by *Bulk Trading* and the parties settled for Paris as their place of arbitration. The respondent thereafter filed an appeal under s9 of the Arbitration and Conciliation Act 1996 with the Indore District Court. On the other hand, the appellant posed that the appeal was invalid on the ground that Part 1 of the Act (that included s9) did not apply to arbitrations

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<sup>29</sup>Arbitration and Conciliation (Amendment) Act, 2019.

<sup>30</sup>Bhatia International v. Bulk Trading, Appeal (civil) 6527 of 2001.

held outside India. The district court however admitted the appeal and ruled that Part 1 of the Act applied to arbitrations held outside India. The appellant filed another appeal with the Supreme Court opposing the judgement of the district court while the Supreme Court ruled in favour of the judgement.

The detail of the judgement is outside the scope of this discussion, yet it helps to understand the consequence of this judgement. Sharma<sup>31</sup> believes that the inability of Indian courts to grasp the actual significance of this decision has resulted in legal confusion around the legitimacy and implementation of judgements made in international commercial arbitrations held outside of India. Sharma points at the fallacy in the reasoning of the court when arriving at the judgement. He argues that it would have helped to interpret the Arbitration and Conciliation Act in the context of the UNCITRAL Model on International Commercial Arbitration, which, he points out, provides for applicability of extra-territorial jurisdiction only in the case of Articles 8 and 9. Sharma further argued that it did not make sense to apply the entire Part 1 of the Act to international commercial arbitrations seated outside India.

Sharma further points out that where legislatures meant to attract foreign investors by providing for an effective and efficient resolution of disputes, they could not have meant for courts to intervene in international arbitrations which also compromised the confidence of foreign investors in the Indian market. The case of *Bhatia International v. Bulk Trading* proved to be a landmark piece of judgement, though in poor taste. Further judgements often cited and sometimes misinterpreted the reasoning behind the judgement in the *Bhatia v. Bulk* case. The Calcutta High Court admitted an appeal to put a stay on the enforcement of an award resulting from an international arbitration seated in London because the parties had entered into an agreement as per the rules of the India law on arbitration.<sup>32</sup>

On the other hand, there have been instances when court rulings have put a question on the *Bhatia* case itself. A two-judge bench once ruled that a foreign award could not be challenged under s34 of the Act.<sup>33</sup> In another case where the parties had entered into a contract with an arbitration clause as per the rules of the England and Wales, the CJI ruled that the arbitral proceedings were subject to the jurisdiction of the England and Wales only but admitted the appeal on the basis of the judgement in the *Bhatia v. Bulk Trading* case did not exclude the applicability of the provisions of Part 1 expressly or by implication in the present case.

As such, the case of *Bhatia International v. Bulk Trading* began a mayhem within the Indian judicial system as to whether or not to entertain stay motion plea on arbitration awards held outside India. In the years following the said case, Indian courts attracted a name for intervening in foreign arbitration awards which made an embarrassment out of a country which wanted to minimize judicial interventions in arbitrations to attract foreign investors.

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<sup>31</sup>Sharma, Raghav. "Bhatia International v. Bulk Trading SA: Ambushing International Commercial Arbitration Outside India?." *Journal of International Arbitration* 26, no. 3 (2009).

<sup>32</sup>Hindustan Copper Ltd. V. Centrotrade Metals and Minerals Inc., AIR 2005 Cal 133.

<sup>33</sup>Venture Global Engineering v. Satyam Computer Services Ltd., AIR 2008 SC 1061.

### Automatic Stay on Arbitral Awards and the 2015 Amendment

Prior to the 2015 amendment, a challenge to the award in the court under section 34 of the principle Act provided for an automatic stay upon the enforcement of the award. So, unless and until the litigation was dismissed or resolved, the award remained dormant. This was a controversial provision and yet managed to stick around for a long time. The 2015 amendment ruled out the automatic stay and required that the party files a separate petition to enforce a stay on the award which the court now grants upon considerations of various evidence. The 2021 amendment quietly but judiciously inserts the provision for automatic stay back into the principle Act given the court is *prima facie* satisfied that either (a) the agreement is invalid, or (b) the making of the award is induced by fraud and/or corruption.<sup>34</sup> As per the provisions of the principle Act, an award can be considered invalid on the following grounds.<sup>35</sup>

- when a party is proven incapable of representing their interest, in which case the party may file to appeal with the arbitral tribunal or the court which may, upon finding the appeal true, put an interim stay on the award or overrule the award;
- if the agreement is deemed invalid, which could be because the agreement referred to a subject that is outside the scope of arbitration;
- when the award is beyond the scope of reference, for instance, the parties could have appealed for resolution on one matter while the award ruled in another;
- when a party is not given proper notice, in which case the party can challenge the award before, first, the arbitral tribunal, and if unresolved, later, the court;
- when there is illegality in the composition of the arbitral tribunal and/or the arbitration proceedings; and
- When the award is in conflict with the larger public interest.

According to section 36 of the principle Act, an arbitration award can be enforced only after the due date for challenging the award under section 34 had expired or the petition filed thereafter dismissed.<sup>36</sup> Prior to the 2015 amendment, when an award debtor challenged an award with the court under section 36 of the parent Act, it put an automatic stay on the enforcement of the award until the court arrived at a conclusion. The 2015 amendment ruled out automatic stay on awards and required a separate petition for that. Section 26 of the amended Act read as follows:

*"Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*<sup>37</sup>

Given the above provision, one would think there cannot be any doubt with regard to the applicability of the amendment. On the contrary, the 2015 amendment led to even more litigations.

<sup>34</sup>Arbitration and Conciliation (Amendment) Act, 2021, s2.

<sup>35</sup>Arbitration and Conciliation Act, 1996, s34(2)(a)(v).

<sup>36</sup>Ibid., s34.

<sup>37</sup>Ibid., s26.

Interestingly, there has been opposing court judgements and instances of overruling in this regard as well. In *Ardee Infrastructure v. Anuradha Bhatia*<sup>38</sup>, a single judge bench at the Delhi High Court interpreted section 26 of the 2015 amendment to mean that the amendment only applied to petitions and court proceedings where the arbitration proceedings were initiated before the commencement of the amendment on 23 October 2015. It further held that section 36 which provided for conditional stay following the 2015 amendment could not be applied retrospectively to a petition challenging an award unless the award itself was passed in an arbitral proceeding which had commenced before 23 October 2015.

In *BCCI v. Kochi Cricket Pvt. Ltd.*<sup>39</sup>, the Supreme Court had a different point of view in respect to the application of section 36. In this case, the appellant had challenged the award and appealed before the Bombay High Court for an automatic stay under section 36 of the unamended Act. The High Court, however, refused to grant an automatic stay and argued that the amended section 36 would apply in this matter. Further, on request of the Bombay High Court, the Supreme Court laid to rest the issue of applicability of the 2015 amendment. The court ruled that, except for section 36, the 2015 amendment applied prospectively. This means that the amendment applied to only the cases where the arbitral proceedings had begun before the commencement of the amendment on 23 October 2015. However, with respect to the applicability of section 36, the amendment applied retrospectively if the challenge is filed after the commencement of the amendment, e.g., post 23 October 2015.

While the Supreme Court did partially resolve on the matter of applicability of the 2015 amendment, some clarity from the Executive realm was nonetheless expected. The 2019 amendment further clarified on this issue and introduced a whole range of significant changes to the Indian arbitration regime. Section 36(3) was again replaced in the 2021 amendment which provided for *prima facie* stay on the arbitral award if the court is satisfied of the conditions noted earlier.<sup>40</sup> Besides, the 2019 amendment also introduced the very controversial Eighth Schedule which listed who could and could not become an arbitrator. We briefly touch upon other major changes brought about by the 2019 amendment and then present a detailed critique of the Eighth Schedule and why it is a good riddance in 2021.

### **Norms for Accreditation of Arbitrators – the Eighth Schedule**

#### **Appointment of Arbitrators**

Before we discuss the Eighth Schedule, it helps to understand the procedures related to the appointment of arbitrators under the Indian regime. The principle Act intends to give full autonomy and freedom in this respect to the disputing parties.

**Number of arbitrators<sup>41</sup>:** The Act provides that parties are free to determine on any odd number of arbitrators. The purpose is to avoid a situation where there is equal number of arbitrators in favour

<sup>38</sup>Ardee Infrastructure v. Anuradha Bhatia, FAO (OS) No. 221/2016.

<sup>39</sup>Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. &Ors. Appeal (civil) Nos. 2879-2880 of 2018.

<sup>40</sup>Arbitration and Conciliation Act, 1996, s36(3).

<sup>41</sup>Ibid., Chapter III, s10.

and opposing an arbitral award. In case the disputing parties fail to have a consensus on the number of arbitrators, the tribunal shall comprise of a sole arbitrator. In case one of the disputing parties does not exercise their right to determine or challenge the number of arbitrators within a stipulated time period, they would have deemed to have waived their right to do so in which case the number of arbitrators could be solely determined by the other party. Arbitral tribunals could rule on their own jurisdiction unless objected by either of the parties no later than when a statement of defence is submitted, even in case when the party has participated in the or appointed the arbitrator themselves.

**Qualification of arbitrators<sup>42</sup>:** The Act further provides the parties the right to mutually determine the qualification requirements and the procedure when appointing the arbitral tribunal. An important consideration is that these criteria must be provided for within the arbitration clause or the agreement. As such, one party could object to the appointment of an arbitrator on grounds that the person or the tribunal does not meet the criteria agreed upon in the arbitration agreement. However, the latter party must challenge such an appointment within 15 days after becoming aware of the constitution of the arbitral tribunal. Furthermore, in case where the parties fail to mutually appoint the arbitral tribunal and seek the help of the Chief Justice or the institution referred to them by the Chief Justice, section 11(8)(a) provides that the person duly authorised to appoint the tribunal must do so in consideration of any qualifications required so of the arbitrator by the agreement of the parties.

**Nationality of the arbitrators<sup>43</sup>:** Parties may also mutually decide on the nationality of the arbitrator within the agreement. It is not necessary that the arbitrator should be of a specific nationality, but the Act gives parties the freedom to do so.

**Named person or authority as arbitrators<sup>44</sup>:** The parties may also decide to refer their future disputes to a specific person or an arbitral institute within their arbitration clause. In case the clause names an arbitral institute, arbitral proceedings will of course have to adhere to the procedures as specified by the institute. In the case of a specific person/s, the agreement may refer a specific person or a designation. For example, the clause may state that any arbitral proceedings will be referred to the Chief Engineer of the department. Such an agreement is considerable inoperable only when the referred person refuses or fails to act. It may happen that to whom the arbitration had to be referred is sick or has died, in which case the parties would have to mutually appoint another arbitrator.

In the case where one party wants to appoint someone other than the named person or the authority. The Act allows the parties to do so only if the other party does not object to such an appointment within a stipulated time. The argument that the appointment of a single-bench tribunal by a party violates the equitable principle is not permissible if the party has agreed to the agreement containing the clause that appointed the specific tribunal. A similar judgement was made in *Nandan Biomatrix Ltd. v. D1 Oils Ltd.*<sup>45</sup> in which the petitioner had claimed that the appointment of the arbitrator as specified in the arbitration clause violated the equitable principle. The court dismissed the

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<sup>42</sup>Ibid., Chapter III, s11.

<sup>43</sup>Ibid.

<sup>44</sup>Ibid.

<sup>45</sup>M/S Nandan Biomatrix Limited v. D1 Oils Limited, Arbitration Petition No. 6 of 2007.

plead arguing that the petitioner had agreed to the terms of the clause and could not now renege on accepting the contracts terms and conditions.

**Notice and Commencement of Arbitration<sup>46</sup>:** An arbitral action might start as soon as a notice to name an arbitrator was served, as provided in the Act. The respondent must receive and acknowledge receipt of the notice from the claimant indicating that arbitration is sought. Unless the respondent confirms receipt or denies receipt, it is the duty of the person making the request to prove that the respondent received it. If the request is submitted via registered mail and the acknowledgement includes the respondent's signature, it is also evidence. An implied request for the appointment of an arbitrator may suffice. A reasonable recipient would have no reasonable doubt that communications were meant to serve as a call for the appointment of an arbitrator if they were clear and unambiguous in their context.

There are other important provisions about the appointment of arbitrators in the principle Act but they are inconsequential to our discussion in this article. The purpose to discuss the appointment provisions is to understand the extent of authority and freedom the Act gives to the parties in the appointment of the arbitrators. It is only in the case the parties fail to appoint an arbitrator is when the matter is referred to the court. Then too, the referred institute must consider the qualifications requirement of the agreement when appointing the arbitrator. It is in this context that the next critique of the Eighth Schedule has been discussed. This paper argues that the Eighth Schedule robbed the freedom of the parties to appoint an arbitrator of their choice. The Eighth Schedule also barred most foreign arbitrators from practicing in arbitrations seated in India. This paper also critiques this aspect of the Eighth Schedule.

### The Eighth Schedule

Prior to the 2019 amendment, the Indian arbitration regime did not have any qualification norms for accreditation of arbitrators. That meant that anyone could arbitrate a dispute if the parties felt the person met their needs. Parties could also enter some eligibility criteria within their arbitration agreement. Besides, the Act did talk about qualities of an arbitrator one of which is impartiality. So, what changed with the 2019 amendment?

The Arbitration and Conciliation (Amendment) Act, 2019 inserted section 43J and the Eighth Schedule in the original Act. Section 43J discussed the qualifications, experience and other general norms for accreditation of arbitrators and referred to the Eighth Schedule for an exhaustive list of qualification criteria an arbitrator needed to possess as per s43J. Before we discuss these norms set forth by the 2019 amendment, one should note that it was not received well and the Eighth Schedule was soon deleted by the next amendment in 2021.

One of the main contentions against the Eighth Schedule was that foreign registered lawyers and retired foreign officers did not qualify as arbitrators in India. The question of practice by foreign lawyers in India was also posed before the court in the case of *Lawyers Collective v. Bar Council of*

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<sup>46</sup>Arbitration and Conciliation Act, 1996, s11(13).

*India*<sup>47</sup>. It was pointed out that only those advocates who were registered with the Bar Council of India could practice law in India as per the Advocates Act, 1961. The petition was filed before the Bombay High Court opposing the foreign law firms who had set up liaison offices in India with the permission of the Reserve Bank of India. Therefore, the practice of law by foreign lawyers has been a controversy since a long time. It was finally put to rest by the Supreme Court in *BCI v. A.K. Balaji*<sup>48</sup> where the court ruled that foreign firms/ lawyers could not practice the profession of law but were allowed to advise on matters of foreign laws and arbitrate international commercial arbitrations seated in India. For a country which aimed to project a business and arbitration-friendly jurisdiction at the global stage, the judgement and the subsequent addition of the Eighth Schedule in 2019.

For reference, the Eighth Schedule specified a set of criteria for a person to qualify as an arbitrator. One should note that a person only needed to qualify for one of the following criteria to qualify for an arbitrator's position. Ineligibility disqualified any person to arbitrate a dispute for the duration of the period the Eighth Schedule was in rule. As per the Eighth Schedule, the following groups of people qualified to become an arbitrator.

- an advocate, chartered account (CA), cost accountant, or company secretary as defined by the respective law of the Indian Parliament and with at least ten years of practice experience; or
- a current or former officer with the Indian Legal Service; or
- an officer with the central or state government; or
- a person with a law degree and ten years of senior-level management experience with a public sector undertaking or a reputed private company; or
- a person with a degree in any stream and ten years of scientific or technical experience in a specialised stream such as telecom, information technology (IT), intellectual property (IP) rights, etc.; or
- a person with any degree and ten years of senior-level managerial experience with a reputed private company.

The Eighth Schedule also introduced a set of general norms it recommends an arbitrator to adhere to. The general norms state that an arbitrator should:

- be a person with a known reputation for fairness and integrity and capable of applying objectivity in dispute resolutions;
- avoid any financial or otherwise relationship or conflict that might affect his/her objectivity in a dispute to be arbitrated by him/her;
- not have any past conviction in a case involving morality or economic offence; and
- be familiar with the Indian Constitution, principles of natural justice, equity, common and customary law, corporate law, and arbitral law and procedures.

**Ad hoc arbitration:** Before we discuss the implications of the Eighth Schedule, it is important to note that the provisions excluded ad hoc arbitrations from its purview. That is, parties were free to appoint any arbitrator as long as they opted for ad hoc arbitration. It is pertinent to emphasise again that

<sup>47</sup>Lawyers Collective v. Bar Council of India, Bombay High Court 2009.

<sup>48</sup>Bar Council of India v. A.K. Balaji. Civil Appeal Nos. 7875-7879 of 2015.

even in the case of institutional arbitration, institutes are required to consider the qualification requirements and/or preference of the parties when appointing an arbitral tribunal in a proceeding. Since arbitral institutions are graded by the ACI and the ACI is a statutory body under the Arbitration and Conciliation Act 1996, the Eighth Schedule determined who could these institutes appoint in their arbitration panels. This also meant that disputing parties may not be able to effectively command their choice in the appointment of their arbitral tribunal because of norms put forth in the Eighth Schedule, which (a) automatically disqualifies most foreign arbitrators (discussed in a later section), and (b) may render practicing arbitrators out of practice. This affects the autonomy of the disputing parties in the appointment of arbitrators which has been a cornerstone in promoting arbitration.

**Archaic method of qualification judgement:** It is important to note that under the Eighth Schedule criteria, there is no place for any manner of evaluating an arbitrator's quality, expertise, or professional qualifications. Since only seniority and an entry-level professional degree or work in a government service are considered in the Eighth Schedule, it displays the government's conservative and outmoded mindset. A person's knowledge of arbitration law or ability to successfully fulfil an arbitrator's duties and role will not be demonstrated by any of these.

The existing list in the Eighth Schedule presupposes that a person is supposed to have received expertise in the field of arbitration and can discharge the job of an arbitrator that is judicial in character by simply practising as an attorney or chartered accountant for 10 years. The list favours seniority in managerial positions, government services, and government enterprises, but does not specify the extent of that seniority. It's a fallacy to believe that simply because someone is older or has worked in government or the business sector, they know about arbitration and the fundamentals of justice.

Many well-known arbitrators around the world will attest to the fact that age, seniority, or previous government employment do not in any way qualify someone to serve as an arbitrator. For even the most experienced Indian lawyer, there is no guarantee that he or she has dealt with arbitration cases in those ten years. As a result, if the Eighth Schedule becomes law, all of the people listed in the Schedule will be able to become accredited arbitrators because there are no other criteria to evaluate their knowledge and understanding of arbitration. The worst-case scenario would be the appointment of arbitrators who have no background in arbitration law or practise.

The Srikrishna Committee report specifically noted that no new body was to be formed for accreditation of arbitrators. Instead, the ACI was supposed to recognize international bodies and professional institutes that accredited arbitrators such as the Chartered Institute of Arbitrators, the Singapore Institute of Arbitrators, the Resolution Institute, the British Columbia Arbitration or Mediation Institute, etc. The idea was that these institute have an existence and robust system in place to recognise qualified personnel. On the contrary, setting up of a new body required a substantial financial commitment from the government and was not a guarantee of success either. Section 43D(2)(b) of the 2019 amendment reflects this intent and gives ACI the responsibility and the authority to recognise such international bodies and professional institutes. Yet, the 2019 Amendment Act has managed to do just that.

The amendment also failed those who, despite being accredited and acknowledged as arbitrators on an international scale, failed to qualify the norms listed in the Eighth Schedule. The Eighth Schedule stipulates an age/seniority threshold that runs opposite to the goal of promoting arbitration, while most bodies/professional institutes like the CIArb, SIArb etc. urge candidates to enrol and get accredited as arbitrators.

By contrast, several arbitral institutes have their own set of qualification norms for empanelment of arbitrators which require candidates to have prior exposure to arbitration. We discuss the eligibility norms of some of the leading institutes here to provide better context for our discussion and to argue why the Eighth Schedule was an archaic method of judging a candidate's qualification for arbitration cases.

The Indian Council of Arbitration (ICA) does not have any minimum bar but does provide some loose categories of qualifications and experience for candidates applying for a place in the ICA panel of arbitrators. "These broad criteria are as follows:<sup>49</sup>

- Retired judge of the Supreme Court or any of the High Courts with a prior judgement in an arbitration case.
- Advocates with a minimum of 15 years of practice with the Supreme Court or any of the High Courts and knowledge of corporate laws, particularly arbitration law and procedures.
- Retired Chief Engineer in the CPWD or with any state of central government department; or Chartered Engineers with a minimum of 15 years of experience in a specific field and five years of experience in arbitration cases, law and procedures.
- Chartered Accountants and Chartered Secretaries with a minimum of 15 years in practice and five years in conduct of arbitration cases, law and procedures.
- Company secretaries and senior legal and commercial executive with at least 15 years of experience with a state or the central government department, public sector units, or a private entity of reputation and five years of experience in legal matters.
- Anyone with at least five years of experience of shipping laws practices and procedures in international matters at a senior-level in a company or institution.
- Company directors and other persons with outstanding reputation and experience in domestic or international trade for at least 10 years and five years in arbitration laws and procedures.
- Foreign nationals with a minimum of 15 years of experience in commercial and arbitration procedures.
- Specialists with 15 years of experience in a specific field and five years in arbitration law and procedures."

Other institutes such as the Delhi International Arbitration Centre (DIAC)<sup>50</sup>, the Construction Industry Arbitration Council (CIAC)<sup>51</sup>, the Indian Road Congress (IRC)<sup>52</sup> and the Bharat Heavy Electrical

<sup>49</sup>[https://www.icaindia.co.in/icanel/membership/new-membership-form/ApplicationForm\\_PanelMembership.pdf](https://www.icaindia.co.in/icanel/membership/new-membership-form/ApplicationForm_PanelMembership.pdf)

<sup>50</sup><http://dacdelhi.org/DataFiles/CMS/file/Public%20Notice-Empanelment%20of%20Arbitrators%20with%20annexure.pdf>

<sup>51</sup>[http://www.ciac.in/Empanelment\\_of\\_Arbitrators.html](http://www.ciac.in/Empanelment_of_Arbitrators.html)

Limited (BHEL)<sup>53</sup> have similar criteria for empanelment of arbitrators. All these arbitral institutes require between 10-15 years of professional experience in addition to knowledge and/or experience in the conduct of arbitration law, rules and procedures. In addition to similar requirements, the IRC also requires candidates to possess at least a bachelor's degree in civil engineering or its equivalent.

In the case of each of the abovementioned arbitral institutes, the eligibility norms emphasize on the candidate's experience in arbitration laws, rules and procedures. Besides, the institutes admit candidates on a competitive basis which implies that not all candidates who may be eligible as per the norms will be admitted to the panel of arbitrators at the institute. CIAC also considers applicants who may have conducted fewer arbitrations cases than required in the eligibility norms but fulfil other criteria. This implies that the eligibility criteria are not only broad but also do not guarantee a candidate admission into the panel.

On the other hand, the Eighth Schedule emphasized only on seniority and did not consider a candidate's knowledge and/or experience with arbitration cases. It also had implication for the ACI. Did the Eighth Schedule intend for the ACI to provide accreditations to arbitrators based on the eligibility norms? The title clearly said so, at least – “norms for ‘accreditation’ of arbitrators”. The term ‘accreditation’ could have wide implications when and if it had been brought before the court. Fortunately, the Eighth Schedule was soon omitted by the very next ordinance in 2020 that informed into the 2021 amendment later.

**Bar on foreign arbitrators:** In the previous section, we noted that the principle Act allowed parties to appoint an arbitrator of any nationality. The parties were even free to write a nationality criterion within their arbitration clause or the agreement. This is provided for under section 11(1) of the principle Act.<sup>54</sup> Section 11(9) of the Act further provides that “in the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court of 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.”<sup>55</sup>

On the contrary, the 2019 amendment restricted most foreign national arbitrators from arbitrating international commercial arbitrations seated in India. For example, according to the Eighth Schedule, an advocate with at least ten years in practice qualifies to be accredited as an arbitrator where the term “advocate” is defined as per the Advocates Act, 1961. The Advocates Act clearly specifies that to be an advocate, the person must be an Indian citizen.<sup>56</sup> So, a non-Indian citizen advocate regardless of the experience and expertise in arbitration could not qualify to be accredited as an arbitrator under the Eighth Schedule. Similarly, another criterion required that the candidate must have worked with a state or the central government department in which case candidates with experience

<sup>52</sup><http://www.irc.nic.in/writereaddata/links/guidelines%20for%20arbitratord41944b4-a306-4237-90d9-b7878166c8c2.pdf>

<sup>53</sup>[https://www.bhel.com/sites/default/files/5c1dd706c3addCriteria\\_and\\_Conditions\\_for\\_empanelment\\_of\\_arbitrators\\_in\\_BHEL.pdf](https://www.bhel.com/sites/default/files/5c1dd706c3addCriteria_and_Conditions_for_empanelment_of_arbitrators_in_BHEL.pdf)

<sup>54</sup>Arbitration and Conciliation Act, 1996, s11(1).

<sup>55</sup>Ibid., s11(9).

<sup>56</sup>Advocates Act, 1961.

with a state government department of a foreign jurisdiction could not qualify while his/her Indian counterpart qualified under the rule.

Blanket ban on foreign advocates practicing in India has been a contentious issue for some time. In *Bar Council of India v. A.K. Balaji and Ors.*, a two-judge SC bench in 2018 was posed with the same question: whether foreign law firms/lawyers were allowed to practice in India. The BCI had appealed before the Supreme Court against foreign firms who had obtained permission from the Reserve Bank of India to open liaison offices in India. The BCI argued that one needed to be (a) an Indian citizen with a law degree from a recognized University in India, and (b) registered with the Bar Council of India in order to practice as an advocate in the Indian jurisdiction as per the provision under section 29 of the Advocates Act, 1961. The BCI noted that exceptions were provided within the Advocates Act for foreign national advocates when the country of the advocate also allowed Indian advocates to start practice in India.

On the other hand, foreign law firms pointed out that "(a) there was no bar to a company carrying out consultancy/support in the field of protection and management of intellectual, business and industry proprietary rights, carrying out market service and market research, publication of reports, journals, etc.; and (b) Indian national advocates are allowed to practice law in the United States and that Indian lawyers frequently travel to the US on temporary basis for consultation on Indian law issues."<sup>57</sup>

In their judgement, the two-judge bench ruled part in favour of the BCI and restricted foreign law firms and lawyers from setting up their offices in India. However, the bench also allowed foreign lawyers to advise on foreign legal matters and arbitrate in international commercial arbitrations on a "fly in and fly out" basis. The intent was to restrict a proliferation of BPO law firms. The Supreme Court thereby restricted foreign firms and lawyers from practicing the profession of law in India either at the litigation or non-litigation end. At the same time, the court made an exception for foreign firms and lawyers to advise on issues of foreign law and on diverse international legal issues on a "fly in and fly out" basis, implying that they could not establish a permanent liaison office in India for advisory purposes only.

On the matter of arbitration, the judgement allows foreign lawyers and arbitrators to arbitrate international commercial disputes that are seated in India. Note that it's a judgement from a 2018 case and the very next year, an amendment to the Arbitration Act places a bar on foreign advocates, as they do not qualify to become an advocate under the Advocates Act of 1961, from arbitrating in Indian-seated disputes.

## Conclusion

The Indian arbitration regime has had a long journey since the first legislation of late-19<sup>th</sup> century under the British crown rule. At present, the Arbitration and Conciliation Act, 1996 is the primary legislation regulating the rules and procedures of arbitration in the country. The Act has had its own journey of evolution – for good and for bad. The first attempt to correct some of the misplaced

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<sup>57</sup>Bar Council of India v. A.K. Balaji & Ors.

logics and logical fallacies came in 2005. The 2005 amendment was repealed soon after. Since then, the Act has had three major amendments in 2015, 2019 and 2021. The present article discussed a specific provision which was introduced in the 2019 amendment and repealed soon by the 2020 ordinance, and later, the 2021 amendment. The change under question is the Eighth Schedule and s43J of the 2019 amendment.

Section 43J was inserted by the 2019 amendment and it stated the qualifications, eligibility and norms for accreditation of arbitrators, and referred to the Eighth Schedule, also added by the 2019 amendment, for an exhaustive list of qualifications for accreditation of arbitrators. In summary, an advocate, chartered accountant, cost accountant, and chartered secretariat as defined by Indian legislations and with ten or more years of practice were eligible for accreditation as arbitrators under the Eighth Schedule. In addition to those, a senior-rank officer with a state or the central govt. department, PSU, or a private company of repute were also eligible. The last category included those with veteran experience in a specific field.

A simple read out of the Eighth Schedule implied that advocates, CA and CS of foreign nationals were ineligible. Since as per the Advocates Act, 1961, advocates needed to be an Indian citizen to practice in India. This criterion to practice law in India was also pointed out by the Supreme Court in a 2018 judgement in the case of *BCI v. A.K. Balaji*. However, the Supreme Court also allowed foreign nationals to advice on foreign legal matters and in international commercial arbitrations on a “fly in and fly out” basis. The Eighth Schedule, on the other hand, put a blanket ban on foreign advocates from commercial arbitrations. Other than the qualification and experience norms, the Eighth Schedule also listed some general norms that applied to an arbitrator. These norms included general principles of arbitration such as neutrality, impartiality, fairness, and integrity.

In the previous section, we discussed that the accreditation norms put forth by the 2019 amendment led to two major problems. Firstly, the norms were based on an archaic principle of seniority in terms of years of experience and official rank. It made any retired judge, a veteran advocate and senior professionals eligible for the position of an arbitrator without checking for their understanding of arbitration itself. Arbitration is a separate discipline and it requires the knowledge of arbitration law and procedures as well as that of the industry about which a dispute may be. That is why arbitral institutes such as the IRC and CIAC requires candidates to possess a relevant degree and/or experience of the concern industry.

Secondly, most foreign arbitrators such as foreign national advocates, CA, CS, officials with a non-Indian state govt. did not qualify the norms under the Eighth Schedule. This was contrary to a landmark judgement delivered only a year ago in the case *BCI v. A.K. Balaji*, wherein the Supreme Court had ruled that though foreign lawyers could not practice the profession of law in India, they could play advisory roles in foreign legal matters and arbitrate international commercial disputes on a “fly in and fly out” basis. It is, however, unlikely that the Indian Parliament, who is otherwise desperate to make India an arbitration-friendly regime, did this on purpose. The Eighth Schedule was more likely to be introduced with good intentions and when it failed, the good intention reflects in the quick omission of the schedule.

So, what did the 2021 amendment change? The 2021 amendment made two changes in respect to the accreditation norms. Firstly, it substituted s43J and omitted the Eighth Schedule both introduced in the previous amendment of 2019. The amended section 43J states that qualifications norms would be based on the “regulations” which, when read with section 2(1)(j), effectively places the responsibility with the ACI. However, as of October 2021, the ACI is yet to release these norms.

The swift at which the Indian government acted on criticisms of the Eighth Schedule is a reflection of their desperation to project India as an arbitration-, business- and investors-friendly country. The BJP-led government has also made other attempts like the introduction of the Insolvency and Bankruptcy Code (IBC) 2016 to encourage entrepreneurship at home and attract foreign investments into the country. The 2021 amendment was the third attempt in less than five years to simplify and correct the loopholes in the arbitration rules.

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