V. ACCREDITATION OF ARBITRATORS: A SYNONYM FOR QUALITY IN INDIA?

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ABSTRACT

With the boom of global trade and commerce, arbitration as a dispute resolution mechanism witnessed immense growth and development, which in turn then benefitted the economies of several countries. The symbiotic relationship between international commerce and arbitration can be likened to a closed circle, each constantly gratifying and benefiting the other. India, slow to recognise this cause and effect relationship, has been playing catch up ever since by making attempts to improve the arbitration blueprint of the country. Recognised as a problem area by state leaders as well, the government set out to improve the domestic institutional arbitration ecosystem in order to facilitate India's arbitration journey. Despite recommendations by an illustrious committee, the government embarked on a series of unfortunate amendments to the Arbitration Act in the past year. This article attempts to address one of these many problematic steps taken by the legislature – considering accreditation and eligibility synonymous. The article recognises the importance of quality adjudicators for the success of any adjudication mechanism and therefore, analyses the pivotal question the legislature failed to ask when blindly embarking with the 2019 Amendment Act – whether accreditation can actually improve the quality of arbitrators. The author traces the journey up to this point, and highlights the context surrounding the discussion on accreditation within India. Thereafter, it aims to provides a clear distinction between the concepts of eligibility and accreditation and presents key takeaways for the government to explore in order to conclusively resolve the issue of poor quality of arbitrators.

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I. INTRODUCTION

The legislature's recent amendments to the Arbitration & Conciliation Act, 1996 ("Arbitration Act") can only be characterised as misadventures. The havoc wreaked by the introduction of Section 43J of Amendment Act of 2019 was rectified in November 2020 by the promulgation of an Ordinance before the aforementioned section could be even notified.[1] Much to the legal community's pleasure, the Arbitration and Conciliation (Amendment) Ordinance 2020 substituted Section 43J and did away with the heavily condemned corresponding Eighth Schedule of the Act.[2] The unamended Section 43J provided that the qualifications, experience and norms for accreditation of arbitrators will be as specified in the Eighth Schedule of the 2019 Amendment.[3] The Eight Schedule, as it stood before the recent amendment, prescribed an exhaustive list of qualifications which an individual would need to possess in order to "qualify as an arbitrator" in India. These qualifications were of an advocate, a chartered accountant, a cost accountant, a company secretary, a government officer possessing either a law degree, or an engineering degree, or having administrative experience, or any individual with educational qualification at degree level with ten years of experience in scientific or technical streams.[4] Thereafter, the substituted version of Section 43J, introduced in the 2020 Ordinance, simply stated that forthcoming regulations shall govern the qualifications, experience, and norms required for accreditation of

[1] Ministry of Law & Justice, F.No. H-11018/2/2017-Admn.-III(LA) (Notified on August 30, 2019).
[2] The Arbitration and Conciliation (Amendment) Ordinance, 2020, § 4 (November 4, 2020).
[3] The Arbitration and Conciliation (Amendment) Act, 2019, § 43J.
[4] *Id*. Eighth Schedule.

arbitrators.[5] The last notch on the unpleasantness that was the debate of accreditation and eligibility of arbitrators in India was by way of the Arbitration and Conciliation (Amendment) Act, 2021. It gained parliamentary assent a few months back in March 2021, and was deemed to come into force in November 2020 itself.[6] It reinforced the steps taken by the 2020 Ordinance, omitting Schedule VIII, and reiterating the substitution of Section 43J.[7]

Although, one can seemingly assume that the vigorous discussion on accreditation that arose in the past two years has been packed away neatly, this could not be further from the truth. Section 43J in its current form is far too vague and bestows unfettered discretion on the Arbitration Council of India ("ACI"), the designated governing body under the Act, for the creation of accreditation standards for arbitrators to practice in India. While the Indian populace might be far too accustomed to broad and unclear legislations, the consequences nonetheless tend to be devastating and must be prevented whenever possible. When given an opportunity, the legislature in the erstwhile Schedule VIII incorporated a set of nine orthodox and conservative standards of measuring the eligibility of arbitrators for accreditation. These standards imposed heavy reliance on age, government service, and domestic professional degrees, equating them to the quality of an arbitrator. The legislature had also seemingly barred recognition of foreign arbitrators violating perceived notions of neutrality, under both, the

[5] Arbitration and Conciliation Ordinance 2020, § 3.
[6] The Arbitration and Conciliation (Amendment) Act, 2021, § 1(2).
[7] *Id*.§ 3.

Arbitration Act and the principles of international arbitration.[8] Hence, while this was met with widespread criticism both domestically and beyond,[9] an important question was lost in the mix – whether accreditation can actually improve the quality of arbitrators? Before the government engages any further on this topic through the aforementioned regulations, it is crucial for it to answer this question, understand the accompanying nuances and thereafter, chart the path ahead.

This article with the aim of resolving this question, has been split into two halves. Part I of the paper attempts to set the context in which accreditation became a topic of discussion in India and the misnomers committed in equating two mutually exclusive concepts of accreditation and eligibility of arbitrators. Part II of the paper focuses on whether and how accreditation can in fact resolve the quality issue that plagues India's arbitration institutions, and presents key takeaways for the legislature to implement in the forthcoming regulations.

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[8] Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, *in* SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23, 24 (C. Reymond & E. Bucher eds. 1984); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1868 - 1875 (Kluwer Law International 3d ed.2021).

[9] Ajar Rab, *Accreditation of Arbitrators in India: A New License Requirement?* KLUWER ARBITRATION BLOG (Oct. 11, 2018) http://arbitrationblog.kluwerarbitration.com/2018/10/11/accreditation-of-arbitrators-in-india-a-new-license-requirement/; Subhiksh Vasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?* KLUWER ARBITRATION BLOG (Aug. 25, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/.

PART I

II. THE CONUNDRUM OF ACCREDITATION AND ELIGIBILITY

In order to comprehensively capture the importance of accreditation of arbitrators, the underlying intentions of the High Level Committee ("Srikrishna Committee") formulated to review and improve institutional arbitration within India must be realised. The Srikrishna Committee conducted an extensive survey with the required stakeholders in order to appropriately fulfil its mandate.[10] Respondents reported largely similar reasons for why institutional arbitration in India had stagnated, at the crux of which lied the issue of quality of arbitrators. The survey participants provided a host of reasons for their preference of international arbitration institution over the domestic ones, most of which revolved around the poor quality of arbitrators and the visible lack of technical and contemporary knowledge they possessed.[11] It was noted that most of the institutions exercised a special bias towards retired judges ignoring the need for younger and more adept individuals.[12] This is not unfounded. In the recurring annual survey conducted by Queen Mary University, School of Arbitration in collaboration with White & Case LLP in 2015, the international arbitration community reiterated the importance the quality of panelled arbitrators has in the choice of an institution.[13] The perceived neutrality and expertise an

[10] Press Release, Press Information Bureau, Comments invited on the working paper of the High LevelCommittee to review the Institutionalisation of Arbitration Mechanism in India by 7 April 2017 (March 16, 2017), http://pib.nic.in/newsite/PrintRelease.aspx?relid=159370.
[11] MINISTRY OF LAW & JUSTICE, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017) 32[hereinafter Srikrishna Committee Report].
[12] *Id*.at 32, 53.
[13] Queen Mary University of London and White & Case LLP *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration'* (2015), 22,

arbitrator exhibits have been considered key instigators in the choice of an arbitration institution.[14] Further, in the case of *Reliance Industries Ltd. & Ors. v. Union of India,*[15] the Supreme Court of India discussed the relationship of neutrality vis-a-vis nationality, placing reliance on the writings by several eminent scholars and practitioners of international arbitration. It espoused the importance of a neutral appearance in order to guarantee independence and impartiality of the tribunal, despite the legal position not explicitly requiring the same. Several luminaries of arbitration have touched upon the requirement of neutrality to ensure the international image of arbitration and its value as an efficient adjudication mechanism is upheld.[16]

It was the aftermath of these survey responses which led to the Srikrishna Committee identifying accreditation of arbitrators as a key recommendation under the report. The Committee recognised that accreditation was possible in two ways, by a professional body of arbitrators or account of membership on a panel / list of arbitrators of an arbitral institution. This understanding of accreditation is one of the vital pointers of the fact that the Committee was functioning under the overarching context of institutional arbitration. Accreditation is any process by which any arbitrator acquires education qualification, or expertise, and thereby recognition for its

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https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf [hereinafter QMUL White & Case 2015 Survey].

[14] Elvira Gadelshina, *What plays the key role in the success of an arbitration institution?*FINANCIER WORLDWIDE (2013), https://www.financierworldwide.com/what-plays-the-key-role-in-the-success-of-an-arbitration-institution#.YLpfcagzZPY.

[15] Reliance Industries Ltd. &Ors. v. Union of India (2014) 7 SCC 603.

[16] LALIVE, *supra* note 8 at 23, 24.

skill as an adjudicator.[17] Therefore, it cannot be qualified by any set process and comprises a continuous system of learning and development.[18] By its very nature, accreditation cannot amount to a mandatory process, because it is not akin to eligibility of an arbitrator. Failure to understand this, was the reason the legislature embarked on the long-winded goose chase the Arbitration Act witnessed in the past year.

The possibility of imposing licensing and regulatory requirements has been long explored in the arbitration community in a domestic and global context, to always be rejected.[19] The rejection being based on the fact that such restrictive criteria would run afoul of the fundamental cornerstone of arbitration, party autonomy. Arbitration as a dispute resolution mechanism owes its success to the deeply rooted theme of flexibility and free will, which if taken away would render it no better than the ill ridden judicial system. It would especially allow countries to impose invisible barriers of entry, creating a favourable environment for the monopoly of national arbitrators stifling growth and development.[20] India attempted to commit this very error with the introduction of Schedule VIII in the 2019 Amendment. By misaligning accreditation and eligibility, it violated the basic principles of arbitration and turned back the clock on the development of 'India as a seat of global arbitration'. National regulators do indeed have the power to impose certain eligibility requirements, however, these must only be limited to the contractual power of the individuals, that is, of sanity and age of

[17] Loukas A. Mistelis, *Chapter 7: ADR in England and Wales: A Successful Case of Public Private Partnership, in*,GLOBAL TRENDS IN MEDIATION (SECOND EDITION), 173(Nadja Alexander ed., 2006).
[18] Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*,22 ARB. INT'L, 275,287 (2006).
[19] BORN, *supra* note 8 at 2105 - 2204.

majority.[21] References for this can be established by analysing domestic arbitration laws of other countries, such as Saudi Arabia and Vietnam.[22] Both countries have prescribed eligibility requirements for arbitrators to practice within their country.[23] However, these requirements are simply of legal competence and basic education qualifications, not limited to any specific profession. Therefore, standards for eligibility of arbitrators must be the bare minimum, thereby rendering them essential.

On the other hand, standards for accreditation are not essential but rather recommendatory, for although it improves the overall experience of arbitration; the parties have the power to choose otherwise. A mandatory requirement of accreditation does not substantially improve the status quo of institutional arbitration but adversely harms the condition of ad hoc arbitrations. This effect would have been completely contrary to the goals of the Indian leaders to establish and develop 'an arbitration ecosystem.' Instead of improving progress towards the positive reconstruction of institutional arbitration within India, the 2019 Amendment Act would have led to the creation an unfriendly and restrictive arbitration environment.

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[20] *Id*.
[21] The Indian Contracts Act, 1872, § 11.
[22] Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD), Article 14 (Saudi Arabia); THE LAW ON COMMERCIAL ARBITRATION NO. 54/2010/QH12, Article 20 (Vietnam).
[23] *Id*.

PART II

III. IS ACCREDITATION THE ANSWER TO INDIA'S QUALITY ISSUE?

To answer the question posed throughout this paper, it is resoundingly in the affirmative. However, it cannot be achieved in the manner the government currently envisages it. There are three key takeaways the government must acquaint itself with before releasing the accreditation regulations under Section 43J of the Act.

Firstly, the legislature or the ACI must not dictate the qualifications or standards for accreditation of arbitrators. This is simply because both cannot be considered a neutral body. The Srikrishna Committee Report clearly mentioned the requirement of establishing a neutral non-governmental multiple stakeholder body for the governance of institutional arbitration within India.[24] The body that was manifested within Part IA of the 2019 Amendment Act is a far shot from this, and has been subjected to its own share of criticism.[25] The composition of the council as mentioned within Section 43C does not paint a picture of neutrality and unbiased perspective. Outside of government officials, the section seemingly limits the membership to individuals possessing legal faculties.[26] The composition, coupled with the fact that the legislature in the past resorted to deeply conservative notions of seniority and service in order to determine qualifications, further diminishes the faith of acquiring a well-suited

[24] Srikrishna Committee Report, *supra* note11, at 49.
[25] Chahat Chawla, *Legislation Update: India*, 14 ASIAN INT'L. ARB. JOURNAL,215, 220 (2018).
[26] AmendmentAct, 2019, § 43C.

unbiased list of standards. Therefore, either the legislature or the ACI, is not adequately equipped to comprehend the needs of all sectors, especially complex, technical, and commercial ones. All arbitration institutions are not full service, rather some limit the provision of their resources to certain areas of trade or industry.[27] Only practitioners from that particular field of expertise will be able to appropriately gauge their needs and requirements, which then can translate to a tailored set of accreditation standards. A blanket set of standards by a disengaged body shall do more harm than good for it will deprive the parties of an arbitrator with specific experience and qualifications.

Secondly, the regulations should pay heed to the foremost recommendation made by the Srikrishna Committee in its report. The report states distinctly that the governing body should simply recognise the professional institutions and bodies providing accreditation to arbitrators.[28] While this has been incorporated within Section 43D(2)(b) as one of the duties and functions of the ACI, its power within the forthcoming accreditation regulations should also be limited to the same. The reasoning for this is that internationally, only few independent organisations have evolved and received recognition for developing standards for the certification of qualified, well-trained arbitrators. Their standards have been elevated to become synonymous with international best practice norms for training and selecting arbitrators. The Srikrishna Committee paid heed to a few of these institutions and the stringent yet diverse criteria they had

[27] CONSTRUCTION INDUSTRY ARBITRATION COUNCIL (CIAC), http://www.ciac.in/ (last visited June 4, 2021); INDIAN INSTITUTION OF TECHNICAL ARBITRATORS, http://www.iitarb.org/about-us.html (last visited June 4, 2021).
[28] Srikrishna Committee Report, *supra* note11 at 56-57.

adopted for certifying their members. These criteria reflected a holistic understanding of arbitration proceedings and included professional education, attendance of arbitration hearings, qualifying examinations, peer interviews / assessments by a panel of approved arbitrators, and Continuous Professional Development ("CPD") requirements.[29]

In order to expound further upon the specialised expertise of these organisations to decide accreditation of arbitrators, one can take a look at the standards followed by globally renowned institutions such as the Chartered Institute of Arbitrators ("CIArb"), the Singapore Institute of Arbitrators ("SIArb"), or the Resolution Institute ("RI"). Their membership consists of arbitrators, mediators, and other professionals from specialist fields. The CIArb has been hailed with establishing the gold standard of certifying arbitrators in its panel on account of its rigorous training and development programs.[30] These aforementioned organisations have several ascending categories of memberships, taking into consideration the member's experience, qualifications and exposure. In order to procure any membership level, individuals are required to attend hours of specialised training courses covering a variety of subjects, attempt examinations, and demonstrate proof of their experience and/or qualifications.[31] The level of scrutiny is so rigorous, that for example at CIArb, more than half of the applications tend to fail the first around.[32] Despite having achieved the membership status,

[29] Srikrishna Committee Report, *supra* note11 at55-56.
[30] JONES, *supra* note18, at 286.
[31] SIARB, http://siarb.org.sg/index.php/membership/categories (last visited June 4, 2021); *Policy for the Registration of Practising Arbitrators*, RESOLUTION INSTITUTEhttps://www.resolution.institute/documents/item/2306 (last visited June 4, 2021); CIARB, https://www.ciarb.org/membership/routes-to-membership/ (last visited June 4, 2021).
[32] JONES, *supra* note18, at287.

most of these institutions impose mandatory CPD requirements upon the arbitrators in order to improve, update and keep them in touch with contemporary and global developments.[33] Hence, it is beguiling that the legislature and a new-born governing body would assume its prowess to establish norms over these well-established institutions. If ACI, in line with the recommendations, simply engages its power to recognise these accreditation institutions, it would serve the same purpose and rather prove more beneficial to domestic arbitration institutions.

Furthermore, when these international requirements are juxtaposed with that of a domestic institution like Indian Institute of Arbitration & Mediation ("IIAM"), the underlying problems which have led to the current quality issue can be witnessed. For accreditation by IIAM, an individual is required to endure barely twenty four hours of training, a stark contrast from the aforementioned stringent standards.[34] Furthermore, the levels of accreditation at IIAM have not been fleshed out. Hence, instead of taking matter of setting accreditation standards into their own hands, the ACI should concentrate on reviewing and improving the policies of such domestic institutions.

Thirdly, instead of establishing norms of accreditation, the ACI through its functions under Section 43D(2) and the forthcoming regulations must review, recommend and reform the standards applied by domestic arbitration institutions in the empanelment of its arbitrators. The ACI under the Amendment Act, 2019, in line with the recommendations of the

[33] *Supra* note31.
[34] *IIAM Accreditation System for Neutrals & Professionals & Qualifying Assessment Programs*, IIAM https://www.arbitrationindia.com/pdf/iiam_qap.pdf (last visited June 4, 2021).

Committee, has the power to grade arbitral institutions based on a number of yardsticks. Within these, if the standards employed for empanelment are included it could positively reflect on the quality of arbitrators engaged and a consequential reform in institutional arbitration. Without an internal change in the policies of these institutions, it will not be possible to overhaul the institutional arbitration set up in India. For example, let us consider the two most well recognised arbitration institutions within India, the Mumbai Centre for International Arbitration ("MCIA") and Delhi International Arbitration Centre ("DCIA").

The MCIA, on one hand, does not maintain a panel of arbitrators rather withholds the discretion to choose arbitrators based on the facts and circumstances of the case.[35] While such a format has its own merits, for parties do seem to appreciate the flexibility in the appointment of arbitrators,[36] it can also portray to potential clients a lack of standardisation and transparency. This method of appointment is followed by both International Chamber of Commerce ("ICC") and London Centre of International Arbitration ("LCIA"), generally acknowledged as two of the most successful arbitration institutions of the world. However, the format followed is not as simple as leaving it to the institution's discretion. When opportunity arises for the ICC Court to make appointments, it is based upon the proposal by a National Committee or Group, previously selected by the Court.[37] As for the LCIA, the Secretariat makes a recommendation to the

[35] *MCIAFAQ*, https://mcia.org.in/faq/ (last visited June 4, 2021).
[36] QMUL White & Case 2015 Survey, *supra* note13, at 20-22.
[37] Belinda McRae, *Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?* 18 ICCA CONGRESS SERIES 667, 709(2015).

LCIA Court post perusal of its database of arbitrators.[38] Despite adopting a flexible model, both institutions recognise the significance of transparency in the appointment of arbitrators.[39] Accordingly, the methods followed by the institutions are generally available in their publications, training programs and other materials,[40] something that visibly lacks on behalf of the MCIA. Hence, if domestic institutions adopt such a flexible method of appointment, the ACI must nonetheless ensure sufficient transparency.

On the other hand, although the DCIA chooses to maintain a panel of arbitrators, the standards it employs are borrowed word to word from the erstwhile Schedule VIII of the Amendment Act, 2019 and have despite its omission, not yet been amended.[41] The DCIA witnessed more than an approximate of five thousand hearings in 2018 itself, a number which grows steadily. These grounds for empanelment, similar to its original document, lead to either biased or unsuited appointment of arbitrators, disgruntling parties, and thereby defeat the process of comprehensive adjudication. The parties in turn choose not to designate these institutions as the governing bodies of their arbitration proceedings, and rather opt for ad hoc arbitrators which allows for procedural flexibility. The ACI can remedy this situation by taking a chapter from the books of premier arbitration institutions that

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[38] *Id.*

[39] *Id.*, at 711 – 712.

[40] *LCIA Notes for Parties*, LCIA, §8https://www.lcia.org/adr-services/lcia-notes-for-parties.aspx#8.%20APPOINTMENT%20OF%20ARBITRATORS(last visited June 4, 2021); *Note to Parties and Arbitral Tribunals on The Conduct Of The Arbitration Under The ICC Rules Of Arbitration* (2021), ICChttps://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf(last visited June 4, 2021).

[41] *DIAC EMPANELMENT RULES, 2020*, DIAC, Rule 1http://dacdelhi.org/DataFiles/CMS/file/Public%20Notice-Empanelment%20of%20Arbitrators%20with%20annexure.pdf(last visited June 4, 2021).

maintain panels, such as the Singapore International Arbitration Centre ("SIAC"). SIAC requires its panelled arbitrators to possess tertiary educational qualifications, experience as an arbitrator and membership from recognised accreditation institutions like CIArb. It is to be noted that Indian parties are the topmost foreign contributors to SIAC's caseload with the number being as high as 485 parties in 2019.[42] Therefore, there is something to be said regarding what domestic arbitration institutions can take away from SIAC's methods. The ACI by leveraging its power of grading these institutions can adopt a process of continuous checks and balances on the standards adopted by these domestic arbitral institutions. This approach shall, while allowing the cornerstone of flexibility to be retained, improve quality of arbitrators available within these institutions.

IV. CONCLUSION

Accreditation cannot be employed as a one stop solution for the deeply imbibed availability and quality issues in India's arbitration blueprint. The process of accreditation only when coupled with continuous training, development and exposure of arbitrators, can eventually improve the quality of arbitrators available within our domestic borders. The issues that have contributed to the present stagnation of institutional arbitration within India cannot be simply charted up to poor governance, misunderstandings, and lack of resources and infrastructure. There exists an ingrained animosity and distrust towards arbitration institutions within India on account of the anti-arbitration stance frequently adopted by judicial and governmental bodies. It

[42] SIAC,SIAC ANNUAL REPORT (2019) https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf.

can only be resolved with mutual co-operation and respect between the government and the various stakeholders involved in the arbitration process. For governmental bodies, this entails respecting the core principles of arbitration and providing flexibility and autonomy within the process. On the other hand, for institutions and organisations, it entails shredding age-old notions of experience and qualifications and imbuing new blood into the field. The goal of relegating India as a seat of arbitration requires active steps of community engagement, improvement within domestic laws, arbitration-friendly structures and mechanisms, and transparency. Only this will allow India to produce the all-rounded quality arbitrators for which it is looking.