



# Blockchain and Arbitration Council of India

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## INTRODUCTION

The Arbitration and Conciliation Bill, 2019 was recently passed by both the houses of parliament and has now become an Act (hereafter referred to as the “**Act**”). Under Part I A of the Act, the formation of Arbitration Council of India (**ACI**) has been proposed. This has been done to make India a global hub for arbitration, however, the exact nature and intention for the creation of the ACI still stands unclear.

## STORING AWARDS ON BLOCKCHAIN

The functions of the ACI have been mentioned under Section 43D (2) of the Act. One of the functions of the ACI under Section 43D (2) (j) reads: “*establish and maintain a depository of arbitral awards made in India*”. The bare reading of the provision suggests that the ACI will be maintaining a record of all arbitral awards in India. Blockchain can be a great tool which can come to the rescue of the ACI in performing this particular function. Blockchain, the technology behind bitcoin, is a publicly accessible decentralised ledger where all the records are kept and cannot be tampered with. The blockchain can help store all arbitral awards and such data would be accessible without having any external alterations made. Considering the confidential and sensitive nature of awards passed, the blockchain can be made either a permissioned blockchain or a private blockchain. This will depend on the purpose of recording the awards. A permissioned blockchain is where people can add blocks and access the chain after their role and identity is established. A private blockchain is where the chain is controlled by the internal nodes of the organisation. If the purpose of the awards is to create a jurisprudence, a permissioned blockchain can be a way forward because the access will be allowed to only those people who are involved in an arbitration proceeding. However, if the ACI intends to not allow the awards to be viewed by anyone, it can be stored on a private blockchain. Every award that would be stored on the blockchain would be a proof that the award exists and the parties would not have to bear any extra costs to prove the existence or authenticity of an award at the stage of execution. In order to eliminate the possibility of adding frivolous awards, the awards can be submitted to the ACI first and after their approval, the same can be recorded on the blockchain. While adding a block to the blockchain, there should be a simple majority. This would further enhance the process of recording the awards. Tampering with the blockchain is close to impossible. Therefore, it will ensure ‘transparency’ for the confidential awards added on the private blockchain as the tampering is not possible. Confidentiality has been discussed further below in the next section of the article.

One major concern is what kinds of awards would be recorded by the ACI. The confusion is whether only those awards would be recorded which have their seat of arbitration in India or those awards where the venue of arbitration is India. The words “in India” in the verbatim of the provision mentioned above suggests that when the venue of arbitration is India, the award would be recorded by the ACI. The seat of an arbitration essentially means jurisdiction and the venue means the territorial boundaries. Further, the question remains, what happens when Indian awards are provided in a foreign state. Blockchain can assist in performing certain other functions of the ACI. A few of which are: –

- (i) Frame policies governing the grading of arbitral institutions; [Section 45D(2)(a)]

- (ii) Recognise professional institutes providing accreditation of arbitrators; [Section 45D(2)(b)]
- (iii) Review the grading of arbitral institutions and arbitrators; [Section 45D(2)(c)]

The information regarding the institutes from every arbitral proceeding which provide accreditation of arbitrators may be stored on a private blockchain. Such information may be further used to observe a pattern of accreditation of arbitrators.

## USING BLOCKCHAIN TO GRADE ARBITRATORS

While choosing an arbitrator, parties consider the previous records and the expertise that the arbitrator holds in the particular sector. For instance, if the matter that goes for redressal in arbitration is an energy dispute, the parties would want an arbitrator who has significant expertise in the matters of energy disputes and has been unbiased while passing an award. Selection of an arbitrator is a time-consuming process which can be made efficient through blockchain. According to Section 45D(2)(c), the function of the ACI is to review the grading of the arbitral institution and the arbitrators. Parties to an arbitration may give their opinion or testimony on the arbitrators and the same can be stored on the blockchain. In order to maintain anonymity, the only information on the blockchain would be the testimony itself and whether the party was a claimant or a defendant. However, there is a possibility that the losing party may not give testimony or worse, an unbiased testimony. In such cases, an agreement to give testimony at the end of the proceeding shall be entered into. Further, in order to ensure a fair system in place, the testimonies could be sent to the arbitral institute itself, which appointed the arbitrators and the testimony will be recorded on the blockchain only after it has been approved by the institutes. It must not be forgotten that the data can be added to the blocks only after at least a simple majority has been achieved. Therefore, the ACI may utilise such information to review and grade arbitrators and institutions in a swift manner and such information would also be helpful to parties which are in the process of choosing an arbitrator.

## CHALLENGES

In order to carry out the process swiftly, certain clarifications are required and a few of them are as follows:

### Confidentiality

According to Section 42A of the Act which reads as follows: *“Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.”*, it is to be noted that firstly, only the ‘arbitral award’, and not the proceedings can be made public. Secondly, the arbitral award shall also be made public only when the disclosure is necessary for the implementation or execution of the award. However, our opinion is that the words *“shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation*

*and enforcement of award*” mean that all arbitral awards shall be recorded on the depository but not necessarily disclosed. However, since the intention of making a depository is not clear, whether the parties will have an option to opt-out or is it mandatory to record. Further, if the parties must contribute to the depository, will the names of the parties be removed before recording the award? Blockchain can be used as an unbiased depository to create data of all such awards. Further, a jurisprudence can be created when such awards are recorded and are accessible by the public. Parties looking to arbitrate may use the data as a reference.

### Challenging an arbitral award

A dispute that arises, with respect to recording awards, is when such an award is challenged before a court. The question is whether the original award would then have to be recorded on the blockchain when the award is passed or when such an award has been ruled upon by the court. The court can either uphold or modify or set aside the order. Should the award be recorded only after the award has been upheld by the court? What needs to be clarified is at what event shall the award be recorded. Further, if the court sets aside the award, should the award still be recorded? It shall also be noted that every block on the blockchain has a timestamp. Therefore, if the identities of the parties are excluded from the depository, the final and the correct awards will be difficult to locate. Thus, if the purpose of depository is to create jurisprudence and the awards which are set aside by the court, are also recorded, the purpose of recording the awards in the first place would be futile.

Today, data has become an important commodity in itself and blockchain is an essential technology that can help accumulate such data. Through the commission of ACI, India has taken a leap forward to becoming a global arbitration hub. However, there are certain aspects of the Act which still needs to be furthered upon. Utilising blockchain in arbitration awards will reduce human error and make arbitration a time-efficient process. Storing the data inside the blockchain with regards to all awards that are granted would make the process of verifying such awards and even creating a jurisprudence for the same much easier for the authorities. However, some key questions regarding storing such data still remain unanswered. We, through this article, have been able to highlight some of them. Confidentiality is a major concern and the Act has not been able to clarify aspects regarding the same.