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Arbitration Bill 2018 – Regressive and Retrograde

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The Arbitration and Conciliation (Amendment) Bill, 2018 (the Bill) is scheduled to be moved in the Rajya Sabha for passing in the present session of the Rajya Sabha. The Bill has already been passed by the Lok Sabha without any discussion or debate.

The aim behind the bill is commendable, some very significant provisions are extremely troublesome and have the potential to undo the many years of development the arbitration landscape in India has

witnessed.

If the Bill is passed in its present form, it will set India back many decades in this space. It is for this reason that some practitioners have been actively resisting the passing of this Bill, including by starting a petition (which can be accessed here and has received over 85 signatures). Key concerns include:

Constitution of an Arbitration Council of India ("ACI")

The most troubling aspect of the Bill is the proposed constitution of the ACI to act as regulator of arbitration in India. The creation of a centralised body to promote arbitrations is laudable and was in fact recommended in the Sri Krishna Committee Report. However, the composition, power and the functions to be performed by the body are drastically different to what was proposed. Even ignoring this, the ACI as envisaged suffers from a number of shortcomings.

Significantly, a government body that regulates arbitrators and arbitrations is antithetical to the very concept of arbitration – and for that reason has no precedent in any arbitration friendly jurisdiction. Further, in a country where the Government is the biggest litigant, it cannot act as a supervisor over the very arbitrators who are hearing cases against the Government. There is a clear conflict of interest where an arbitrator is hearing a dispute involving the government if a body appointed by the government will also proceed to review grading of the arbitrator – as is envisaged in the Bill.

Relaxation from Time Limits set by the 2015 Amendments to the Act

The 2015 amendments to the Arbitration Act imposed a time limit of 12 months (extendable to 18 months with party consent) for completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. The Bill seeks to change the start date of this time limit to the date on which pleadings are complete, and exempt international commercial arbitration from the ambit of this time limit. Both aspects are problematic.

First, the date of completion of pleadings is not a clearly identifiable date in all circumstances (despite the Bill's attempt to relate it to the date of filing of the Statement of Defence). For instance, where there is need for a preliminary award on jurisdiction, or where proceedings are bifurcated for other reasons, or where there is a counterclaim filed, or where a party amends its pleadings – there is uncertainty as to the date on which pleadings are considered complete. If the intention was to extend time, then a cleaner way to do this would have been to extend increase the 12-month period.

Second, an exemption for international commercial arbitration is wholly unnecessary and counterproductive. The time limits have worked well in practice with arbitrators and counsel alike moving matters more quickly, and arbitrators refusing to take on new mandates where they feel unable to complete proceedings within time. This impact has been felt equally in both domestic and international arbitration. There is no sufficient justification to treat international commercial arbitration differently. There is a very significant degree of overlap both in the arbitrator and arbitration counsel pool across domestic and international arbitration. Therefore, if there is any justification for control domestically, there is no reason it should not apply to international arbitration seated in India. An exemption from time limits, may only be justified for institutional arbitration where there is an inbuilt safeguard, and institutions, instead of courts can extend time limits.

Imposition of a Blanket Confidentiality Regime

The Bill as proposed introduces a blanket confidentiality requirement in arbitration. The only exception is where the disclosure is necessary for the implementation and enforcement of the award. The current exception is inadequate as in various circumstances parties would be required to disclose facts which are in dispute before the arbitral tribunal. This could include, for instance, proceedings arising out of an

arbitration such as under Section 9, 11, 14, 27 and 34 of the Act; where one party wishes to initiate criminal proceedings, or file an anti-arbitration injunction or approach a regulatory authority; or where information is proposed to be shared with third party experts or with third party funder.

Arbitrator Qualification and Accreditation Norms:

The Bill also introduces minimum qualifications for a person to act as an arbitrator. The nature of minimum qualifications prescribed effectively implies that foreign legal professionals and certain other professionals will not be able to act as arbitrator in an India seated arbitration. Further general norms prescribed such as an arbitrator shall be conversant with the Constitution of India are highly unusual and are likely to cause more challenges against arbitrators.

The prescription of qualifications and norms for an arbitrator goes against the basic tenets of arbitration. One of the reasons for having limited grounds for setting aside of an award is that parties themselves choose a tribunal and thus are expected to live with the consequences of their choice. Parties ability to choose their arbitrator is sacrosanct subject to manifest issues such as conflict of interest. However, the qualifications and the norms impose a very degree of restraint on the choice of the parties.

Changing Goalposts

The Bill wishes to define the proceedings to which the amendments introduced on 23 October 2015 will apply. In doing so, the Bill seeks to overturn a recent decision of the Supreme Court in BCCI v Kochi which settled the issue after significant debate. The attempt to change the law on applicability of the 2015 amendments once again will only create chaos as thousands of proceedings across the country – several at a very advanced stage and following the Supreme Court ruling, will be set at naught. This does not augur well with the objective of certainty and predictability.

The Bill in its current shape is likely to do more harm than good to India's reputation as a seat of arbitration. It will particularly deter foreign players from seating their arbitrations in India. The only way to address these very serious shortcomings is to have a proper discussion on the Bill before it is passed. A number of changes require a thorough drafting overhaul. It is therefore imperative that the Bill be sent to a Standing Committee for a thorough review.

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