

# BAR & BENCH

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The Arbitration and Conciliation (Amendment) Bill, 2018 (“2018 Bill”) was passed by the Lok Sabha without any debate or discussion. However, it remained pending in the Rajya Sabha and eventually lapsed with the dissolution of the last Lok Sabha. On Monday, the same Bill (albeit with minor changes) was introduced in the Rajya Sabha as the Arbitration and Conciliation (Amendment) Bill, 2019 (“2019 Bill”). We had previously [highlighted various issues in the 2018 Bill](#), which continue to exist in the 2019 version.

As has been the case with multiple legislations in the past, the 2019 Bill if passed in its current form, would require the intervention of courts to remove the ambiguities which currently exist. Some of these are the conflict between the proposed Section 43J in Clause 10 and the proposed Eight Schedule in Clause 14 of the 2019 Bill, lack of adequate exceptions to the proposed confidentiality obligation and the extent of the ability to rely upon documents beyond the tribunal’s record in a petition for setting aside an award. These issues are likely to cause foreign parties to seat their arbitration’s outside India, particularly till such time that clarity is given on whether a foreign legal professional can act as an arbitrator in an India seated arbitration.

However, what is startling is the inclination to exercise a degree of control over the arbitral institutes and the arbitrators by creating a body called Arbitration Council of India (“ACI”). It would not be easy to find examples where the creation of a government body to regulate or exercise oversight has led to improvement. In fact, in India, we were witnessing a growth of new institutions such as the Nani Palkhiwala Arbitration Centre and the Mumbai Centre for International Arbitration. However, ignoring these recent developments, an ACI with wide powers is now proposed. It would be critical for such a body to consist of genuine proactive experts in the field and not suffer from the typical government lethargy.

2019 Bill also impinges upon the flexibility that arbitration provided. Fixation of an overall time frame for completion of arbitration through the amendment in 2015 was an understandable move, considering that arbitrations, particularly ad-hoc, would take unusually long to complete. However, the 2019 Bill is going a step further. It now seeks to impose a 6-month time limit for completion of a statement of claim and defense.

This is pursuant to a demand from the arbitrators that parties take unusually long to complete the pleadings, which leaves them with little time for the rest of the arbitration. However, resolving this due process paranoia issue with a statutory amendment is akin to killing a fly with a cannonball. Arbitrations are often split into various parts where certain issues whether jurisdictional, liability related or preliminary issues are heard separately from other issues. This proposed amendment is affecting this flexibility. Further, the amendment creates various issues such as whether the claim or defense can be amended post this six-month time frame, or if a counter-claim is filed, whether the reply thereof should also be filed within these six-months. It would be simpler to extend the overall timeline to eighteen months while leaving the flexibility with the arbitrator to determine appropriate timelines for the arbitration.

The objective of the setting up of the High Powered Committee was to institutionalize arbitration in India. While the intention is laudable, but the 2019 Bill does not address, the actions required to achieve such an objective. The 2019 Bill exempts international commercial arbitration from the prescribed timeline. However, it would be prudent that such exemption is instead be given for institutional arbitration. This is due to various reasons such as good institutions can ensure timely completion of arbitration and ad-hoc arbitrations are the one which the intervention. Large disputes, where a statutory timeline may not be suitable, can be then resolved through institutional arbitration which would still ensure that such disputes are subject to institutional oversight.

Lastly, the 2019 Bill disregards Justice Nariman's observations in *BCCI v. Kochi Cricket* and creates a legal quandary for parties who were taking steps to enforce their arbitral awards. The 2019 Bill if passed would practically mean that courts and parties across the country have wasted their time and resources for the past four years.

With such ill-thought legislation being introduced, Indian arbitration law is becoming unnecessarily complex with an increasing number of determinative factors such as whether the agreement is dated prior to September 6, 2012, whether proceedings commenced prior to October 23, 2015, and now another dependent on how the 2019 Bill would apply. It is imperative that the 2019 Bill be referred to a committee such that all issues are discussed and resolved at the legislative stage in a comprehensive manner and piecemeal legislations are not introduced every couple of years. The alternative for these issues not being resolved is being before the courts for a long time, which is likely to impact India's image as an arbitration-friendly jurisdiction.

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