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Experts wary of govt influence over proposed Arbitration Council of India

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Aashish Aryan December 16, 2018 Last Updated at 20:41 IST



Illustration by Binay Saha

In August, when the Lok Sabha passed the Arbitration and Conciliation Bill (Amendment) Bill, 2018, many experts termed it retrograde and detrimental for the purposes of arbitration and conciliation. The Bill is likely to be introduced in the Rajya Sabha during the ongoing winter session. Experts are again apprehensive of what they call gaping holes in the Bill and have called for certain amendments before it becomes a law.

Among other provisions, the Bill seeks to establish an independent body called the Arbitration Council of India. Though envisaged as an independent body, the council will only have individuals

nominated by the Centre, and secretaries from the department of legal affairs and the department of expenditure as ex-officio members. Such an overarching presence of the government in the council is undesirable and uncalled for, experts said.

“The Arbitration Council of India as currently envisaged is akin to a regulator. This is unnecessary and undesirable. There is not a single other arbitration-friendly jurisdiction in the world that has a similar setup,” noted Vikas Mahendra, partner at Keystone Partners. A high-level committee set up to review the institutionalisation of arbitration mechanism, headed by Justice B N Srikrishna, suggested that the council should consist of individuals nominated by the Chief Justice of India, the Centre, and a reputed overseas practitioner.

The government, however, took a completely different stand, which is not a prevalent practice, said Ajay Thomas, vice-chairman of the ICC India Arbitration Group. “Ideally, the government should have the same influence on the Arbitration Council of India as the other stakeholders such as the end-users, the bar and the Bench,” Thomas said.

Experts pointed out that the government is the biggest litigant. “Any licensing of arbitration institutions or arbitrators by the government gives the appearance of bias and hits at the very root of independence and impartiality — the cornerstones of arbitration,” said Mahendra.

Apart from the structure of the arbitration council, the confidentiality clause during the arbitral proceedings is a bone of contention among experts. The Bill proposes maintaining confidentiality during arbitral proceedings. This applies to arbitration proceedings, the arbitrator, arbitral institution and all the parties involved.

Experts said a blanket order of confidentiality would force parties to choose between violating the Arbitration Act and regulatory requirements. The Bill also steers clear of the much wider exceptions recommended by the Justice Srikrishna Committee.

“Typically, such exceptions should be expanded to allow disclosure where it is necessary for protecting or enforcing legal rights of a party, where a party is ordered to disclose details by a competent authority or where a party requires advice from its professional or other advisors,” noted Ashish Kabra, senior expert, international litigation and dispute resolution at Nishith Desai Associates.

The 12-month deadline suggested by the government in the Bill is perhaps the only silver lining and step towards making India a global arbitration hub, experts said. The Bill seeks to introduce Section 29 (A), which prescribes a 12-month deadline from the date on which the tribunal receives a notice of appointment for making the award. The Bill provides for a further extension of six months of the deadline, after a mutual agreement between the parties, or otherwise through a court order.

“Statistics emanating from leading international arbitral institutions reveal that it takes around 12-18 months for the completion of arbitration. If there were to be complex issues of fact and law necessitating lengthy evidence, a slightly longer timeline would be in order,” Thomas said.

Though the timelines have largely ensured that arbitrations were completed in an efficient and time-bound manner, removing international commercial arbitrations from deadline limitations could prove counterproductive, Kabra said. “Foreign investors and other foreign players would have to be conscious before keeping their arbitrations in India, as they would no longer have an assurance that the arbitration would be completed within a time frame,” he said.