Indian Arbitration Bill 2018: A Misadventure!

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21 Jan 2019 | 6 min read

The latest legislative reforms dealing with arbitration in India have met with controversy. Vyapak Desai, partner and head of international litigation and dispute resolution at Nishith Desai Associates, and Ashish Kabra, a senior member of the team, discuss areas of concern and give their views on the potential effects of the proposed changes.

The Minister of State in the Ministry of Law & Justice, while introducing the Arbitration & Conciliation (Amendment) Bill, 2018 in Lok Sabha said that '*it was visualised that India should also have a seat of arbitration*'. He highlighted that the Bill is based on the recommendations of the High-Level Committee, constituted under the chairmanship of Justice B.N. Srikrishna. However, a close analysis of the Bill shows that it crucially departs from the Committee recommendations and introduces a law, that would adversely impact arbitrations in India.

Arbitration Council of India

The Committee recommended constitution of an independent body, which will provide recommendations and guidelines for growth of institutional arbitration in India. The Minister also, while introducing the Bill, said that this body would be completely independent of the government. However, the Bill departs from both the recommendations of the Committee and the statement of the Minister.

The key concerns are:

- Not independent: The Arbitration Council of India ("ACI"), as proposed under the Bill, consists of only individuals nominated by the Central Government or ex-officio members. Government is the biggest litigator in India. With ACI, a body entirely comprising of individuals appointed by the government, grading arbitral institutions and reviewing grading of arbitrators, parties would be cautious in resorting to arbitration where government is the counter party.
- Power to frame regulations: Disregarding specific warning of the Committee, ACI has been introduced as a regulator. ACI has been given broad powers to frame regulations. This goes against the basic tenet of arbitration i.e. party autonomy.
- Broad powers and functions: The Bill provides certain additional functions for ACI i.e. review of grading of arbitrators & '*ensur(ing) satisfactory level of arbitration & conciliation'.* Ability to review arbitrator grading allows ACI to directly impact the arbitrators. Further, it is unclear what is the exact purport of ensuring satisfactory level of arbitration & conciliation and as such confers broad power on ACI.

Timeline

The Bill increases the time line for the duration of an arbitration provided in Section 29A of the Arbitration and Conciliation Act 1996 (as amended in 2015) from 12 to 18 months. The additional six months period available, based on parties' consent, stands as it is. This takes the total to 24 months. The first 18 months is split into two parts. There is a six-month period provided for completion of statement of claim and defence and thereafter a period of 12 months for completion of arbitration.

This six-month period for completion of pleadings will give rise to issues such as in circumstances where parties amend the pleadings or hold a jurisdictional hearing prior to completion of pleadings. Ideally, conduct of arbitral proceedings should be best left to parties' agreement or otherwise for determination by the arbitrator. A single time frame of 18 months from the date of appointment of the tribunal for the completion of the arbitration may be more suitable. The existing extension of 6 months, based on parties' consent, would stand as it is (total 24 months).

Further, the Bill excludes international commercial arbitrations ("ICAs") from the purview of the timeline. This would in fact act as a deterrent for foreign investors and other players from seating their arbitrations in India, as the assurance of a time bound arbitration is no longer available. In fact, the stated reasoning behind exclusion of ICAs also does not support such exclusion. It was noted by the Committee that arbitral institutions have their own machinery to ensure a timely adjudication. Following this reasoning, only institutional arbitrations (domestic or ICAs) should have been excluded from the timeline and not ICAs as such.

Confidentiality

The Bill introduces an express provision to protect confidentiality of arbitral proceedings. The only permitted exception to the confidentiality obligation in the Bill is implementation and enforcement of the award. However, there are several additional situations where disclosure is required, such as where a party approaches the court for interim relief or for appointment of arbitrator; or seeks third party funding; or seeks advice from other professional advisors; or is otherwise ordered or constrained to disclose in other proceedings.

In fact, the Committee had also recommended broader exceptions to the confidentiality obligation being (i) disclosure required as a matter of legal duty; and (ii) disclosure required for protecting or enforcing any legal right. The current provision in the Bill is likely to give rise to numerous issues over the course of time and requires a re-think of the permitted exceptions to confidentiality.

Arbitrator Qualification and Accreditation Norms:

The Bill also introduces minimum qualifications for a person to act as an arbitrator. The prescribed minimum qualifications are such that foreign legal professionals would no longer be able to act as arbitrators in India seated arbitrations. Further, general norms prescribed are highly unusual and vague.

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 high degree of restraint on the choice of parties. They are highly subjective, and consequently likely to give rise to further litigation.

Applicability of 2015 amendments

The Bill seeks to legislatively overrule the judgment of the Supreme Court of India in the case of *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd* (on stays of enforcement of awards). See News Analysis: India – Supreme Court sheds light on the applicability of the Arbitration Amendment Act. The Hon'ble Supreme Court had specifically requested that its judgment be placed before the Ministry of Law & Justice such that the Bill could be modified. However, no consideration has been given to the judgment of the Hon'ble Supreme Court. It is also likely to cause substantive issues, in all such cases, where enforcement process had started or interim protection had been granted based on the amended Section 36 of the Act and where the arbitration proceedings had commenced prior to October 23, 2015.

Conclusion

Whilst the Bill is aimed at improving the state of arbitration in India, it effectively is going to spoil India's growing image as an arbitration friendly jurisdiction. The Bill does not follow the recommendations of the Committee and is a piece of legislation which is likely to give rise to many issues.