The 2018 Arbitration Bill-Hits, Misses and Missed Opportunities

G.V.Athvaidh
School of Excellence in law
The Tamil Nadu Dr.Ambedkar Law University
TamilNadu, India

ABSTRACT:

Alternative dispute resolution mechanisms have long been poorly implemented in India. The 2015 Amendment to the Arbitration and Conciliation Act left much to be desired. In order to redress the problems in the Indian arbitration culture and elevate India as a desirable hub for International commercial arbitration, the Parliament passed another amendment Bill in 2018. This Bill has its roots in the report of the Srikrishna Committee which was released in the preceding year. The Bill proposes key changes in the existing arbitration regime in relation to appointment of arbitrators, time period for arbitration and confidentiality of proceedings. It also suggests the creation of an independent body called the ACI to regulate the arbitration machinery in India. The Bill has so far elicited a mixed reaction from the arbitration fraternity. This is an article which analyses the various hits, misses and missed opportunities of the Bill and its potential impact on the arbitration culture in India.

I. INTRODUCTION

Religion When will mankind be convinced and agree to settle their difficulties by arbitration?[1]

On August 10, 2018, Lok Sabha passed The Arbitration and Conciliation (Amendment) Bill. This Bill aims at amending the existing Arbitration and Conciliation Act of 1996 and ushering in a new era in which India becomes the global hub for International commercial arbitration. The Bill features provisions for a time-bound settlement of disputes and for providing a proper framework for institutional arbitration. It also sets up an independent body called the Arbitration Council of India (ACI).

Arbitration in India has long been a well intentioned but poorly implemented endeavour. Just like the judicial system, it has also been plagued by extensive delays. The Arbitration and Conciliation Act was brought in 1996 modelled after the UNCITRAL rules. It aimed to limit the supervisory role of courts in the arbitral process and tackle the routine challenges to the arbitral awards leading to inordinate delays. The latest amendment of the Act was in 2015. However, even this Amendment proves to be inadequate in dealing with the unique problems in the Indian arbitration atmosphere.

The new Bill seeks to remedy these glaring flaws, in turn attracting various stakeholders towards arbitration in India and redressing the negative global perception of doing business here. The kindling for the Bill comes from the 'High Level Committee to Review the Institutionalization of Arbitration Mechanism in India[2]' led by

[1] Benjamin Franklin, https://www.brainyquote.com/quotes/benjamin_franklin_169230.
[2] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017), New Delhi.

Justice B.N.Srikrishna in 2017. This Committee was mandated to review and revamp the existing culture of ad hoc arbitration, with the aim of elevating India as a desirable international arbitration hub, harmonious with the international best practices.

The new Bill contains many provisions intended to revitalize both domestic and international arbitration and regulate conciliation proceedings.

II. FEATURES OF THE BILL

i. **Establishment of Arbitration Council of India**[3]**-** The Bill seeks to establish an independent body called the Arbitration Council of India. The proposed Council is to be presided over by a Judge of the Supreme Court or Chief Justice or Judge of any High Court or any other eminent person. The Council would frame policies for gradation of arbitral institutions. It would also make and promote uniform professional standards for arbitration and maintain a depository of all arbitral awards made in India and abroad.

ii. **Appointment of arbitrators:** Under the Bill, both the Supreme Court and High Courts may now refer the parties to arbitral institutions for the appointment of arbitrators- Supreme Court in the case of international commercial arbitration and the concerned High Court in the case of domestic arbitration. This Application for appointment of an arbitrator is to be disposed of within 30 days. The new Bill also proposes deletions of some clauses of Section 11 to enforce this amendment.

iii. **Deadline for written submissions**- Under the new Bill, the written claims and the defenses to such claims should be completed within six months from the date of the appointment of arbitrators.

iv. **Lifting time limit for International Arbitration**- The Bill excludes International Arbitration from the restricted timeline of making the arbitral award.

v. **Emphasizes confidentiality of proceedings-** The Bill proposes to insert a new Section 42A which essentially provides that all details of the arbitration proceedings be kept confidential. The arbitral award is to be disclosed only in pursuit of its enforcement.

vi. **Protection of Arbitrator's actions done in Good faith**- The Bill inserts a new Section 42B which aims to protect the Arbitrator from being dragged to Court by the parties for any action or omission done in good faith. This affords some ease to arbitrators in carrying out their duties.

vii. **Shifting the arbitration time window** – The 2015 Amendment Act introduced a time limit of 12 months for conclusion of arbitral proceedings, from the date when an arbitrator enters into reference.

[3] Ministry: Law and Justice, THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018 PRS (2018), http://www.prsindia.org/billtrack/arbitration-and-conciliation-amendment-bill-2018 (last accessed Feb 6, 2019).

This short time period was found to be insufficient as the completion of pleadings consumed a substantial portion of it. To remedy this impracticality, the 2018 Bill proposes an amendment in *Section 29A*. This Amendment shifts the 12 month window from the date of reference of Arbitrator to the date of completion of pleadings. This gives enough time for the arbitration proceedings and enables the arbitrator to record evidence and make his award competently.

viii. **Application of the Amendment Act of 2015**- In order to address this issue of applicability of the 2015 Act, The Bill proposed a new *Section 87* which specifies that unless the parties agree otherwise, the Amendment Act of 2015 shall neither apply to the arbitral proceedings that have commenced prior to the Act coming into force[4] nor to the court proceedings arising out of or in relation to such arbitral proceedings[5].

III. CRITICAL ANALYSIS OF THE BILL

i. Scope and powers of the Arbitration Council of India

It is absolutely crucial for the Bill to clearly define the scope of the role and powers of the ACI.

On one hand, having a regulatory body like the ACI will help to shape policy and guidelines for the establishment, operation and maintenance of uniform professional standards in arbitration. Further, it will also promote and encourage Alternative Dispute Resolution mechanisms. The Chairperson of the ACI being a retired member of the Judiciary or an eminent person will guarantee competence and expertise.

On the other hand, having a government regulated body governing arbitration, more or less defeats the purpose of arbitration.

The Srikrishna Committee emphasized that the autonomous body set up by the Government for Arbitration, should act not as a regulator, but rather as a facilitator of arbitration[6]. The Committee in its Report, suggested that the Chairperson of the Council was to be appointed by an independent governing body comprising only its members, completely divorced from the interference of the government. This was to ensure the integrity and independence of the body.

The Bill contradicts this recommendation by prescribing the appointment of the Chairperson of the ACI by the Central Government (in consultation with the Chief Justice of India). By doing so, the autonomy and self-

[4] i.e. prior to 23.10.2015.

[5] Vikas Goel, Abhishek Kumar & Arushi Gupta(Singhania & Partners LLP, Solicitors and Advocates), INDIA: HIGHLIGHTS: THE ARBITRATION & CONCILIATION (AMENDMENT) BILL, 2018 MONDAQ (2018), http://www.mondaq.com/india/x/712924/Arbitration Dispute Resolution/Highlights The Arbitration Conciliation Amendment Bill 2018 (last visited Feb 6, 2019). Last Updated: 22 June 2018.

[6] Parimal Kashyap & Kishan Gupta, HOW FAR DOES THE 2018 INDIAN ARBITRATION BILL GO IN REALIZING THE VISION OF SRIKRISHNA COMMITTEE? LAW AND OTHER THINGS (2018), https://lawandotherthings.com/2018/09/how-far-does-the-2018-indian-arbitration-bill-go-in-realizing-the-vision-of-srikrishna-committee/ (last visited Feb 6, 2019).

governance of the body is compromised. This is especially glaring considering that the Government is the biggest litigant in our country. There is a chance of conflict of interest where an arbitrator is hearing a dispute involving the government while the ACI (a body appointed by the Government) reviews the grading of the arbitrator– as is envisaged in the Bill[7].

ii. Changes to the Time Constraints set by the 2015Amendment

The 2015 Amendment to the Arbitration Act set a time limit of 12 months from the date of reference of arbitral tribunal for the completion of the proceedings. The 2018 Bill seeks to shift the starting date of this time limit to the date on which pleadings are completed. Pleadings are usually long, meandering and tend to eat up a lot of the time prescribed for arbitration. So, starting the 12 month hourglass at the end of the pleadings process will ensure that arbitrators are not pressurized by strict deadlines. It also enables them to hear different cases at different lengths depending upon the complexities of each case.

The only hiccup is that the date of completion of pleadings is not clearly identifiable in every case. In cases where a party amends its pleadings, files a counterclaim or in the case of bi-furcated proceedings, it is difficult to ascertain the true date on which the pleadings conclude. Instead, the cleaner way to provide more time for arbitration would have been to extend the 12 month period.

The Bill also exempts international commercial arbitration from the ambit of this time limit. In practice though, the time limits have helped move matters more quickly in international arbitration. There is no rhyme or reason to treat international commercial arbitration differently from domestic arbitration.

iii. Arbitrator Qualification norms

The Bill introduces minimum qualifications for a person to act as an arbitrator. The positive effect of such norms is the weeding out of persons who are not fit to be arbitrators. This ensures that the quality of arbitration isn't compromised.

However, by doing so, it excludes certain foreign legal professionals and other professionals from acting as an arbitrator in India. The prescription of norms and qualifications for an arbitrator by the Bill, goes against one of the basic tenets of arbitration- the free choice of arbitrators by the parties. The parties' ability to freely choose their own arbitrator is one of the defining features of arbitration. This is eroded upon by the Bill imposing a degree of restraint on their choice by prescribing exacting qualifications and norms.

iv. Changes made to the Appointment of Arbitrators

Under the new regime proposed by the Bill, The courts are authorized to designate arbitral institutions for the

[7] Vyapak Desai, Ashish Kabra & Vikas Mahendra, ARBITRATION BILL 2018 – REGRESSIVE AND RETROGRADE BAR & BENCH (2018), https://barandbench.com/arbitration-bill-2018-regressive-and-retrograde/ (last visited Feb 6, 2019).

appointment of arbitrators, based on the evaluation of the ACI. This reduces the burden of the courts as parties are no longer compelled to file a formal application in court, for the appointment of an arbitrator[8].

The only complication is the proposed deletion of Section 11(6) (A). This section required a court to seize and examine the arbitration agreement before allowing an application to be filed under Section 11. Removing this Section effectively means that courts will no longer review the validity of an arbitration agreement before an appointment. This creates an atmosphere of uncertainty as to who will perform this function instead. Problems may arise when one party contests the validity of the arbitration agreement when the other party files an application. There needs to be formulation of express rules in this regard when delegating the task of appointment of arbitrators to arbitral institutions.

v. Application of 2015 Amendment- Judiciary vs The Bill

The newly introduced Section 87 stands in conflict with a recent Supreme Court decision in *BCCI v Kochi Cricket Private Limited*[9]. *The ruling by the court observed that the 2015 Amendments would apply only to those court proceedings initiated after (and not before) its commencement.* The Supreme Court had directed the Centre to take this judgment into consideration while framing the Bill.

However, Section 87 as introduced in the Bill doesn't align with the principles laid down by the judges in the above mentioned case. This sudden attempt to change the law on applicability of the 2015 amendment will only stir up more confusion as thousands of proceedings across the country – several at a very advanced stage and following the Supreme Court ruling, will be nullified. The Bill which seeks to provide certainty and predictability in Arbitration proceedings falls short of these ideals in this regard.

Whether the Bill takes precedence over this judgment or gets modified to fall in line with it remains to be seen.

vi. The implementation of the Confidentiality provision

The proposed Section 42A, which deals with confidentiality of proceedings is a welcome addition to the arbitration regime. Confidentiality in Arbitration proceedings is highly cherished by parties who seek to protect their trade secrets. Hence, this express provision which spells out this important feature is likely to build India's image as a secure destination for arbitration.

However, it is unclear whether the vow of confidentiality persists even when the proceedings get taken before the Courts (under Section 34). The applicability of Section 42A when the Court requisitions the arbitral award is unclear.

[8] Rangon Choudhury, *Arbitration and Conciliation (Amendment) Bill, 2018*, IPLEADERS (2018), https://blog.ipleaders.in/arbitration-and-conciliation-amendment-bill-2018/ (last visited Feb 6, 2019).
[9] *BCCI v Kochi Cricket Private Limited* ,(2018) 6 SCC 287(India).

vii. Realisation of ideals of the Srikrishna Committee

The Bill has incorporated many of the key recommendations of the Srikrishna Committee such as the establishment of a body for grading arbitral institutions, accreditation of arbitrators and changes to the existing legislation. Nonetheless, it also omitted a few other salient recommendations of the Committee[10].

a) The Committee proposed a **specialized arbitration bar and bench**, just like we have for advocates in India. This institution has been proven to work well in other jurisdictions like Switzerland, France and the United Kingdom. Persons enrolled in these arbitration bars are enabled to appear only before arbitrators and not before courts. The idea behind such a specialized bar for arbitration is to nurture healthy arbitration culture among arbitrators and provide training to students pursuing a future in arbitration. The bill however, has skipped this recommendation in entirety.

b) The Committee also proposed a **permanent standing committee for arbitration** that can help the government in building strategies for promotion of arbitration regime in India. This standing committee was contemplated along the lines of Hong Kong's Advisory Committee on Promotion of Arbitration. The Bill has overlooked this recommendation.

c) The Committee had proposed provisions that would allow parties to opt for an **emergency arbitrator** to receive immediate interim relief even prior to constituting the tribunal. This concept is part and parcel of institutional arbitration and is present in many institutions like the SIAC, HKIAC and ICC. The Bill does not incorporate this feature of emergency arbitration and awards, which is considered a vital feature of arbitration in other jurisdictions like Singapore.

viii. Foreign seated Arbitrations

Two Indian parties, bound by Indian law may prefer to go for an arbitration seated outside India. The Bill doesn't clarify if such foreign seated arbitrations are recognised under the existing regime[11].

IV. CONCLUSION

The proposed Bill has attempted to fill some of the lacunae created by the 2015 Amendment but not all of the loopholes are plugged. While the Bill has faithfully incorporated some of the recommendations of the Srikrishna Committee, it also seems to have skipped others. If the aim of the Parliament is to flaunt India as an attractive destination for International commercial arbitration, it is imperative that this Bill addresses all the

[10] Parimal Kashyap & Kishan Gupta, HOW FAR DOES THE 2018 INDIAN ARBITRATION BILL GO IN REALIZING THE VISION OF SRIKRISHNA COMMITTEE? LAW AND OTHER THINGS (2018),https://lawandotherthings.com/2018/09/how-far-does-the-2018-indian-arbitration-bill-go-in-realizing-the-vision-of-srikrishna-committee/ (last visited Feb 6, 2019).

[11] Vikas Goel, Abhishek Kumar & Arushi Gupta, INDIA: HIGHLIGHTS: THE ARBITRATION & CONCILIATION (AMENDMENT) BILL, 2018 MONDAQ (2018), http://www.mondaq.com/india/x/712924/Arbitration Dispute Resolution/Highlights The Arbitration Conciliation Amendment Bill 2018 (last visited Feb 6, 2019).

practical difficulties and challenges faced by parties with regard to the current arbitration regime in our country. The aim behind the Bill is commendable and it is now doubt a progressive step towards realising that ideal. However, if the Parliament does not redress the shortcomings of the Bill, we'll be back to square one in a few years, in need of another Amendment.