

## ARTICLES

# Proposed Amendments to the Arbitration Regime in India

By Naresh Thacker and Ria Dalwani – May 15, 2019

The elevation of arbitration as the preferred mode of dispute resolution in emerging markets, including India, has been aided significantly by the development of arbitration jurisprudence and the reinforcing role played by arbitral institutions. To promote arbitration in India, a committee constituted under the chairmanship of Honorable Justice B.N. Srikrishna published its findings in a [report](#) dated July 30, 2017.

Pursuant to the report, the legislature introduced the [Arbitration and Conciliation \(Amendment\) Bill, 2018](#) to align itself with widely recognized arbitration practices and carve out a foothold for institutional arbitration, while also addressing the gaps in India's Arbitration and Conciliation Act, 1996. This bill—which was approved by the 16th Lok Sabha in August 2018 and was pending before the Rajya Sabha for consideration—lapsed when the Lok Sabha was dissolved due to upcoming general elections in India.

While the fate of the bill is now uncertain, we have reflected upon several striking features of it that may be of interest to stakeholders of an international commercial arbitration seated in India.

### Qualification of Arbitrators

The bill proposes to insert a [schedule](#) in the act which will provide the “qualifications” and “[g]eneral norms applicable to Arbitrator.” The schedule, amongst other requirements, stipulates that an advocate can qualify as an arbitrator for the purposes of the act only if registered under the [Advocates Act, 1961](#). It is noteworthy that under the Advocates Act, 1961, only a citizen of India may register as an advocate. Further, the schedule provides that an arbitrator shall be familiar with statutes listed therein, including the constitution of India, Indian labor laws, Indian customary laws, and others.

These qualification requirements are muddled somewhat by other provisions in the bill. As an example, an international legal practitioner will be precluded from acting as an arbitrator since she is not registered under the Advocates Act, 1961; however, she may qualify under other provisions in the schedule, such as “technical” expert.

Similarly, lack of study of the various Indian laws, including the constitution of India, may preclude international legal practitioners from acting as an arbitrator under the Arbitration and Conciliation Act, 1996. This may be equally true for experts from scientific or technical streams who might be appointed to serve as arbitrators.

### “International Commercial Arbitration” Excluded from Time Limits

In [2015](#), to bolster the speedy resolution of disputes, the legislature had introduced Section 29-A into the Arbitration and Conciliation Act, 1996, which provides that an arbitration must be completed and the award must be issued within 12 months from the date on which the arbitral tribunal receives notice of its appointment in writing. If necessary, this time limit can be extended in accordance with the procedure prescribed under the act.

The report found that international arbitral institutions were critical of section 29-A of the act, as monitoring the conduct of proceedings ought to be left to the institution. Therefore, the bill proposes to exclude “international commercial arbitrations” (ICAs) (as defined under section 2(1) (f) of the act) from the ambit of section 29-A.

While the committee’s intent was to exclude institutional ICAs from statutory time limits, the bill in its present form also excludes ad-hoc ICAs seated in India. As a result, while ad-hoc ICAs will fall within the exclusion, ad-hoc arbitrations other than ICA’s will continue to be bound by statutory time limits.

### **Arbitration Council of India**

The bill seeks to constitute an Arbitration Council of India on which the central government will have representation and the power to regulate its composition. Considering that public sector undertakings and body corporates under the central government may also be litigants, issues of conflict of interest are likely to arise.

The functions of the council, amongst others, includes grading arbitral institutes, grading arbitrators, and policy-making. The bill proposes to vest the council with the power to make “regulations” for discharge of its functions in consultation with the central government and in consonance with the act. Given its attributes as a regulatory body, the council may wield excessive power over arbitrators, parties, arbitral institutions, and the conduct of arbitrations in India.

Pertinently, the report had clarified that the body shall be autonomous and “would not act as a regulator set up by the government.” Negating the spirit of the report, seemingly the establishment of the council would be a retrograde step and would jeopardise party autonomy.

### **Conclusion**

Although the report was expected to set the course for the bill, divergence between the two is now apparent. Instead of ironing out the remaining creases in the act, when read in its entirety the bill falls short of expectation. If enacted, the bill will certainly be tested on various counts in the courts. This would set to negate the legislature’s original intent (i.e., minimal court intervention). Nonetheless, while any change in law comes with its set of challenges, the bill has drawn attention to institutional arbitration in India, provided for confidentiality of information, and provided protection to arbitrators for actions taken in good faith, which will help strengthen the arbitration framework in the country.

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