

Dispute Resolution Hotline

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ARBITRATION COUNCIL: THE BIRTH OF A NEW REGULATOR?

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MADE TO ORDER

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Regulation is usually antithetical to growth. Over the past decade, we have witnessed the growth of arbitration in India. The Supreme Court passed judgments overruling its previous positions, and the government made changes to the law, bringing in much-needed air of freshness in an otherwise stale and abused law. Arbitration in India has finally taken off. However, this flight may be short lived.

The Cabinet recently approved the Arbitration and Conciliation (Amendment) Bill, 2018, which would make several changes to the arbitration laws. These amendments are based on the report of the High-Level Committee constituted under the chairmanship of Justice BN Srikrishna. The aim is strengthening institutional arbitration, which, consequently, would improve dispute resolution in the country.

A key recommendation made under the report is the constitution of a council that would grade arbitral institutions in India and set benchmarks. In addition, the council has other functions such as recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps for creating India as a centre of domestic and international arbitrations. While recommending the constitution of such a council, the committee strongly cautioned against the council acting as a regulator. However, the government appears to have not seriously heeded to this warning.

The committee recommended that the council would provide benchmarks and guidelines. While adopting this recommendation, the Bill gives power to the council of making regulations, which would have force of law. Thereby completely changing the nature of the body from the one contemplated under the report.

Contrary to the recommendations of the committee, the governing body of the Arbitration Council of India would only consist of people nominated by the government and members of ministries. This raises serious issues of conflict of interest. Arbitral institutions perform crucial functions requiring a high degree of independence and impartiality such as the appointment of arbitrator, extension of timelines, scrutiny of awards, etc. The government is the largest litigator and, by virtue of council, has the ability to grade arbitral institutions and set benchmarks for them.

The committee recommended the appointment of an eminent overseas practitioner nominated by the Attorney General of India on the governing body of the council. The overseas practitioner would have helped introduce international best practices, and, importantly, allow the council to be viewed favourably by foreign counterparts, considering that the government wishes to promote international arbitration in the country. However, this suggestion has been dropped.

Further, the report only spoke of the council recognising professional institutes that provide accreditation to arbitrators such as the Chartered Institute of Arbitrators.

However, the Bill allows the council to review the grading of arbitrators. This creates a concern, i.e. whether the council could also directly look at arbitrator accreditation? If so, it again creates a huge issue of conflict of interest.

The list of issues doesn't end here. There are several concerns with the amendments proposed in the Bill, grammatical and typographical errors included. The government, while taking the broad recommendations under the report, has critically altered the suggested constitution of the body and given it much wider powers. Therefore, though it may be claimed that the Arbitration Council of India is not a regulator but a promoter of arbitration, the Bill surely allows it to act like one if it chose to do so.

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