Proposed 2018 Amendments to Indian Arbitration Law: A Historic Moment or Policy Blunder?

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The lower house of the Indian Parliament recently passed the Arbitration and Conciliation (Amendment) Bill 2018 ("Bill") to amend the arbitration law. If also passed by the upper house of Parliament, and upon receiving the President's assent, this will become a law. It will then come into force when the Government so notifies.

The Law Minister termed this Bill as a historic moment. It is largely based on the report ("Report") of a High Level Committee ("Committee"), which was given a mandate to identify the roadblocks to institutional arbitration ("IA"), examine issues which affect the arbitration landscape, and prepare a roadmap for making India a robust center for international and domestic arbitration.

This post argues that the Report has taken a myopic view of the problems and has made some suggestions which do not have a sound basis in policy. To be fair to the Committee, it was given a flawed mandate by the government – to implement rhetoric, disguised as an objective. The Report, however, instead of correcting this flawed objective, had a one-dimensional focus of improving IA. In this process it ignored the more importunate issues which plague Indian arbitration landscape. Below is an analysis of some important policy flaws in the Report which have crept into the Bill.

Making India a global arbitration hub – a wrong premise to start with

For some time now, statements made by the government on the issue of arbitration have contained more rhetoric than substance. One such rhetoric has been to make India a global arbitration hub ("Hub"). It is important to point out that, due to similarity of terms there is a scope of confusion over the meaning of the term Hub, especially at the government level. However, a reading of government statements, here and here, and an earlier Law Commission report suggests that the intent has indeed been to make India a Hub i.e. making India a globally preferred seat when both parties are foreign.

Consequent to such an objective, one of the aims of the Committee was to formulate a roadmap to achieve this. This, in my view, was an opportunity for the Committee to set the record straight by pointing out the impossibility of this objective (at least in the near future) and instead suggest a more modest objective with a clear roadmap and timelines. It however ended up presenting an ambiguous picture of this objective coupled with an equally ambiguous roadmap.

These are some fundamental flaws with the objectives which the Report fails to properly address.

a) All of the existing Hubs are cities or city states. It would be nothing short of a miracle if a country of India's size becomes a Hub. As a proposition, this is a non-starter and the Committee should have advised the government accordingly. If the other flaws with such objective (explained below) could be resolved, the Report should have first suggested that some cities should be identified for this purpose. Priority should have been given to new smart cities such as GIFT City which would have complemented the larger plans of the government in the financial space. A model suitable in the Indian context should have then been applied to such cities, differently if necessary. But since neither of this was done, it is still not clear what will be the government's objective going forward.

b) This idea of a Hub seems to have been developed by the government without a clear understanding of its rationale. The Report suggests that improving the arbitration landscape in India and making India a Hub will help in improving the ease of doing business and will also promote India as an investor-friendly country. While an improved arbitration landscape should help in the ease of doing business and should also promote India as an investor-friendly country, these are not plausible reasons to endeavor to become a Hub. Generally, it is the other way around – ease of doing business and being investor friendly are more like a pre-requisite to be a Hub. The case of Singapore and Hong Kong are good examples here. There are on the other hand several reasons for not aiming so high. Substantial costs for considerable period of time is one such reason. It would have been helpful if the Report could have included a cost-benefit analysis and financial feasibility study of this objective before even attempting to provide a solution.

c) None of the existing Hubs have directly become a Hub. A possible process which could have been followed here is – first improve upon the international arbitration landscape and identify the cities and arbitral institutions which need to be developed. Care should be taken so that the arbitral institutions are evenly spread across the cities and do not exceed beyond a point. An opportunity to be a regional or global player can only arise later once the arbitration system is well developed. The Report however did not provide any roadmap or timelines here, except for suggesting that an Arbitration Promotion Council should be set up to grade arbitral institutes and that as of now one arbitral institution has been identified for this purpose. With the aims so high the Report's roadmap should have been more robust than this.

More immediate problems overlooked

The ambiguity surrounding the objectives of the Committee has also resulted in the more immediate problems being overlooked. For example, the Law Commission's earlier report (see above) noted that the shortcomings in the arbitration law resulted in even the Indian parties preferring arbitration seat abroad. The judiciary has also been unable to resolve this issue and has instead given contradictory signals. This should have set the alarm bells ringing and, in my view, calls for a legislative fix. This was an achievable goal and should have been the first priority for the Report. But instead, the Report seems to suggest that IA is a general medicine which will cure all problems. These could have been resolved if the Committee would not have mixed all problems together and could have clearly prioritized its objectives.

One-dimensional focus on institutional arbitration

The Report and the Bill clearly favour IA at the cost of ad hoc arbitration ("ad hoc"). This is an important arbitration policy deviation because until now the arbitration law has been IA agnostic. Being an important deviation, the Report should have at least provided plausible reasons for favoring IA over ad hoc. But all it seems to suggest is that ad hoc should be discarded gradually as they are costly and cause delay. There was, however, one favourable change suggested in the Report – to provide model arbitration rules. Although this was not intended to directly benefit ad hoc, this could have been beneficial for ad hoc. These model rules, however, do not form part of the Bill.

The problem of ad hoc was not only with respect to cost and delay, as has been pointed out by the Report, but also of independence and impartiality along with the unique problem of unilateral clauses. However, all of these have to a large extent been resolved by the 2015 amendment, but the Report discounts this fact. This amendment *inter alia* made provisions for: a) reduction in arbitrators' fee on account of delay; b) model fee; and c) adoption of a modified version of IBA Guidelines on Conflicts of Interest in International Arbitration. These problems are thus not inherent in the system and a cure is possible. Also, most of the problems are common to both IA and ad hoc, so if the Report suggests a resolution of the problems for IA then it is difficult to comprehend why cannot the same be done for ad hoc.

While the Committee was constantly looking at other models for inspiration, it could have also studied India's history and culture of alternative dispute resolution. This culture continues even today and is also one possible reason why majority of Indian parties prefer ad hoc over IA. Some versions of *Ramayana*, for example, cite attempts by deities to settle the dispute between Rama and his twin sons, which is akin to modern day alternative dispute resolution. Informal arbitration proceedings have been conducted by the *panchayats* (village councils) since ancient times and there is some evidence to suggest that it is still preferred over litigation. This not only shows that ad hoc has been functioning reasonably well since ages, but this could have also been used as a model even today, with some modifications to suit the current day requirements. The Report completely ignored these indigenous sociocultural aspects of ad hoc.

In view of the above, rather than out rightly rejecting ad hoc, there was at least a case to improve the existing ad hoc systems and provide it an equal playing field in the domestic arbitration sphere.

Conclusion

The above analyses show that there are some vital flaws in the Report and consequently in the Bill. The legislature should thus reconsider this Bill. In its eagerness to make India a robust center for arbitration, the government is perhaps missing the point that all successful models of arbitration have their own uniqueness. Hence, instead of blindly following a foreign model, India should first weigh in all options to see which model suits best from an Indian context and how best to utilize India's rich history and experience in this sphere.