# Kluwer Arbitration Blog

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

Pranav Rai · Saturday, November 24th, 2018 · YIAG

The **proposed amendments** ("Bill") to the Indian arbitration law may soon get the force of law. The Bill is based on the **report** ("Report") of a High Level Committee and suggests several changes which may have far-reaching negative effect.

In my **earlier post**, it was argued that the Report and the Bill have some fundamental policy flaws. It was accordingly suggested that the Bill be reconsidered by the legislature. This post endeavors to point out the major legislative flaws in the Bill, which, as a concept, have been proposed to be introduced for the first time in the Indian arbitration law. These new concepts, discussed below, relate to designation of arbitral institutions ("AI"), confidentiality obligations, and qualifications, experience and general norms for arbitrators.

**Designation of Arbitral Institutions**

As a result of the Report's focus on developing institutional arbitration in India, the Bill now makes a provision for the designation of AI by the Supreme Court (for international commercial arbitration) and the High Courts (for domestic arbitration). The Bill then provides that, in the absence of an agreed arbitration procedure between the parties, the AI (and not the appropriate court as per the current law) will be the appointing authority for arbitrator/s.

Although inspired from Singapore's **International Arbitration Act** ("IAA") and Hong Kong's **Arbitration Ordinance** ("HKO"), this provision misses an important aspect which is present in both IAA and HKO. Only one AI is designated as the appointing authority under both IAA and HKO – Singapore International Arbitration Centre and Hong Kong International Arbitration Centre, respectively. Consequently, it also fails to construe an important reason for limiting such AI to only one – Quality.

In an ideal scenario, this number should have been one or possibly two – one for international commercial arbitration and another for domestic arbitration. The least which could have been done here is to put a cap on the number of such IA which can be so designated by the courts. The Bill does neither, but leaves it open for the courts (1 Supreme Court plus 24 High Courts) to start the designation process for an (infinite) number of AI.

Further, to be designated as such, the courts are only required to see if the AI has been "graded" by the Arbitration Promotion Council of India. There is no clarity (yet) on what grades will be considered good for this purpose.

So, on the whole, this provision leaves the designation aspect at the wisdom of the courts. This is however fraught with danger. There have been several instances in the past where the Indian courts have taken positions contrary to the legislative intent of the arbitration law (see **here** for an example). We can only imagine what can happen if even the legislative intent is not clear, as in the present case. Not to mention the plight of the parties negotiating the arbitration agreement, who will now have "too many" AI to choose from and agree to, even in domestic arbitration.

**Confidentiality**

The Report suggested a provision for explicit obligation of confidentiality in arbitral proceedings. The Bill incorporates this suggestion, with some deviations, and provides for confidentiality obligations upon the parties, the arbitrator and the AI. But, as we shall see, this provision raises some concerns.

First, although the Report correctly suggests that there is a divergence of views on this subject, it did not make any effort to find out the reasons for these divergent views. After a short (ten line) discussion on the position in Hong Kong (explicit confidentially obligations) on the one hand, and Singapore and UK (implied duty of confidentiality on parties through case law) on the other, it simply concluded that that an express confidentiality provision for arbitral proceedings is required. Also, during this process, the Report did not look into the **nuances linked to this obligation** or study other jurisdictions which have maintained position similar to India. One such jurisdiction clearly missed out is Australia, which had for long maintained a **contrarian position on this issue** (similar to India's current position) and has only recently applied confidentiality provisions on an "opt-out" basis. Only if this aspect could have been studied holistically, with an effort to appreciate the reasoning adopted by these jurisdictions for the approach chosen, it would have served the cause better and could have provided concrete options to work with.

Secondly, the Report found inspiration for the explicit confidentiality provision from the HKO

model, but surprisingly failed to capture or discuss the various aspects of the confidentiality dealt even by the HKO. The HKO does this very differently from what the Bill proposes, for it also: a) provides for confidentiality in court proceedings related to the arbitral proceedings; b) makes confidentiality obligations of the parties' subject to the principle of party autonomy; and c) has several other nuances, for example, the various exceptions to confidentiality obligations (see Articles 16-18 of HKO).

Thirdly, the Report did not consider that such matters with respect to confidentiality could have also been taken care of by the AI and that there was at least a case for not providing for this explicitly in the legislation but leaving it at the judgement of the AI. This approach, if considered and adopted, would have been in sync with what most prominent AI do globally (for example, see Rule 39 – Confidentiality of **SIAC Rules** and Rule 30 – Confidentiality of **LCIA Rules**).

As a result, the Bill ends up providing for an express confidentiality provision applicable as a blanket obligation upon the parties, arbitrator and even the AI. It is devoid of the party autonomy principle and does not capture the various nuances which should be present if the legislation provides for this expressly. This is compounded by the inept drafting of even this binary form of confidentiality obligation which makes it impractical to be observed. To illustrate, there is no exception provided for non-disclosure of any "arbitral proceedings", except for the arbitral awards. Even for the arbitral awards, the only exception provided is "where its disclosure is necessary for the purpose of implementation and enforcement of award." There is no mention of other standard exceptions, such as, for challenging the award or when a disclosure is required to protect or pursue a legal right, although this was pointed out by the Report.

This is not to suggest that confidentiality obligations in arbitration should be rejected outright. But instead, this is to propose that any provision which is new to the arbitration law in India should be incorporated with more thought and study than has been done in the present instance. Particularly when such a provision also affects one of the important principles of arbitration – Party Autonomy.

**Qualifications, experience and general norms for arbitrator**

The Bill adds a new schedule. The first part of this schedule classifies certain professions and provides that persons outside of this list shall not be qualified to be arbitrators. The second part provides for certain general norms applicable to arbitrators. The legislative intent here appears to be to apply these only to the arbitrators on the panel of AI and not to ad hoc arbitration. However, due to ambiguity in drafting, even this cannot be said with certainty.

In the first part, regarding qualifications and experience for arbitrators, an exclusive list of

professionals has been provided for and only they can be arbitrators. For example, an India qualified chartered accountant, having ten years of experience, is regarded as qualified for this purpose, but there is no mention of an architect or a company secretary or a cost accountant who may all do a perfectly fine job as an arbitrator in their respective spheres. No good reasoning for such classification can be found in the Bill or the Report.

Even within this exclusive list of professions, there is an unreasonable classification. So, while there is no experience requirement for certain persons (such as officers of Indian Legal Service), an experience of ten years is required for others (such as Advocates and Chartered Accountants). Undefined terms like "officer of the Indian Legal Service", "senior managerial position" and "senior legal experience" make this even more difficult to decode.

The second part of this schedule, providing for the general norms applicable to arbitrator, is inordinately wide and eludes objectivity on almost all occasions. For example, it expects the arbitrator (for domestic or international commercial arbitration) to: be "conversant with labour laws", have a "robust understanding of international legal system on arbitration" and not be involved in "any legal proceeding." Here again, no effort has been made by the legislation to explain the reasoning of applying such widely worded norms upon arbitrators.

If this schedule becomes a part of the legislation then it would be a unique case. There are of course standards for admission to arbitration panels in almost all prominent AI, but making it a part of law in such wide and vague terms is unheard of. A prescription on these matters should have been best left to the wisdom of the AI, as it would have been in their own interest to self-regulate on matters such as these and they would have likely been more moderate and specific in their expectations.

**Conclusion**

An incoherent government policy on arbitration (discussed in the **earlier post**) was a problem in itself. There is then, on arbitration law and policy, a history of divergence in the views of the Indian judiciary on the one hand and legislative intent on the other. In such an environment, introduction of new legislative elements devoid of any reasonable justification and without even conducting a holistic study of the international arbitration environment (which the Report claims to rely upon) is fraught with complexities and pitfalls.

"Justice hurried is justice buried," is a phrase often heard in the context of Indian judiciary. If the Bill, in its current form, becomes a law, a new phrase would need to be coined to reflect this realty – "legislation hurried is legislation buried."

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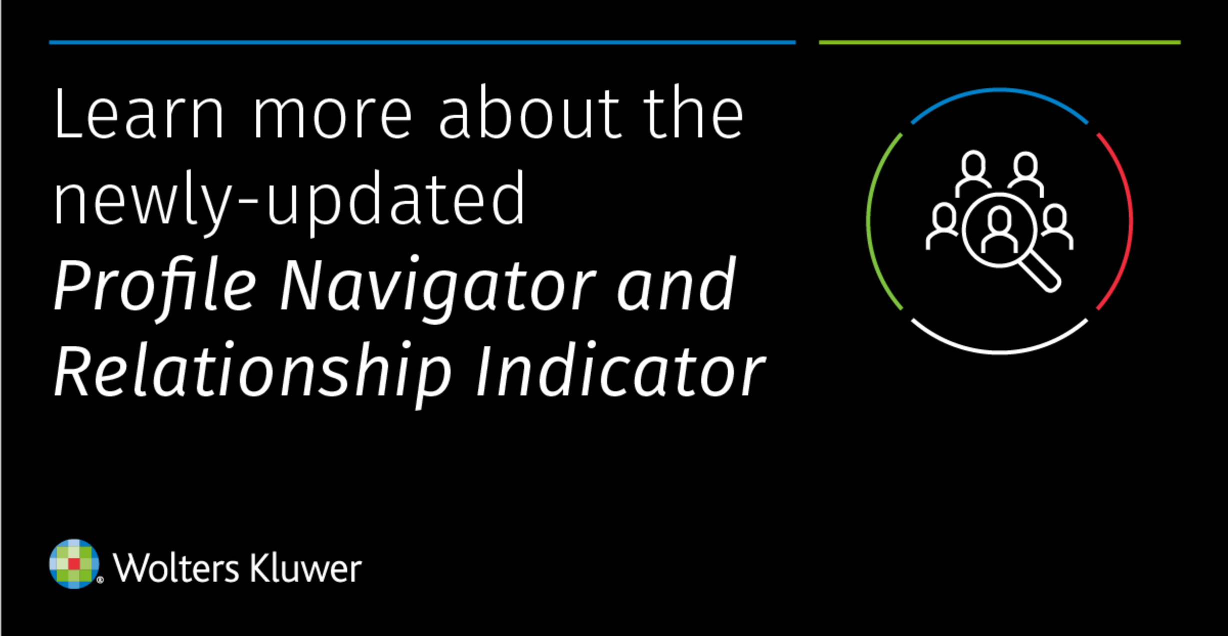


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