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# NEED FOR A REGULATORY BODY IN THE FIELD OF ARBITRATION

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## Introduction

Alternate Dispute Resolution has emerged as one of the popular modes of dispute resolution among parties apart from the conventional route of Court litigation. This mechanism mostly involves three major divisions to choose, that is, mediation, conciliation and arbitration. In recent times, arbitration has evolved as an efficient and swift means of dispute resolution due to its flexibility which accords party autonomy as well as the legal force of a binding judgement of the arbitral tribunal on the parties. Though the Indian context related to arbitration is more or less settled due to the well-settled precedents set by the Court and the statutory provisions of Arbitration and Conciliation Act, 1996 (as amended in 2019), it still involves some unresolved aspects due to uniformity in procedure and regulatory framework for swift dispute resolution.

## What is a regulatory body and legal edifice for establishing the same?

Regulatory bodies are basically independent government bodies who are mostly responsible for the implementation of laws and setting up a Standard of Procedure for all parties operating in that field for uniformity and consistency. The major functions of a regulatory body are:

1. Regulations and guides
2. Review and assessment
3. Licensing
4. Inspection
5. Corrective actions
6. Enforcement.

The Constitution of India (Article-246) provides for the distribution of subject matters on which the law-making power resides either upon the Parliament, or the Legislature of States,

or both (the Concurrent List)<sup>1</sup>. The legislature, then, under the power vested upon it by item 13 of List - III (Concurrent List) of the Constitution, make a law which deals with the aspect of the establishment of regulatory bodies which form a part of the Indian executive inappropriate implementation of the law and thereby bring about order among all the members of the society. Thus, a regulatory body is created for the sole purpose of filling the gaps of legislative actions and thus creation of a regulatory body for the sole purpose of bringing about uniformity among all arbitral institutions suggests that there are implementation difficulties. As government is the litigator in many arbitration proceedings, creating a regulatory body to influence the arbitral panel is violative of principles of natural justice and also makes the non discriminatory arbitration panel biased towards the government, making the State as all mighty and powerful which hampers the dispensation of justice. This act of the legislature depicts the State as a bully in the eyes of the law and biased towards the weaker party.

### **Need for a regulatory body- Present role of Arbitration Council of India**

The regulatory body which may presumably be called as a regulatory body is the Arbitration Council of India which has been brought into existence in the 2019 amendment in the Arbitration and Conciliation Act, 1996 incorporating the recommendation given by Justice B N Srikrishna Committee<sup>2</sup>. The functions of this Council are enshrined as follows:-

1. Grading of arbitral institutions in India
2. Setting benchmark for these institutions
3. Recognition of professional institutes for giving accreditation to arbitrators
4. Issuing guidelines and recommendations to arbitral institutions
5. Incorporate international best practices for promoting India as a hub for international commercial arbitration<sup>3</sup>.

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<sup>1</sup> <http://legislative.gov.in/sites/default/files/COI-updated.pdf>

<sup>2</sup> <http://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>

<sup>3</sup> <https://www.drishtias.com/daily-updates/daily-news-editorials/regulatory-bodies-1>  
<https://www.mondaq.com/india/arbitration-dispute-resolution/689482/arbitration-council-the-birth-of-a-new-regulator>

These functions depicts that, the role of the Council is not merely regulatory in nature, but also directory and the Act also gives power to the Council to frame regulations and rules as it deems fit for proper functioning of the arbitral institutions. This clearly violates the impartiality and independence of arbitration procedure from the set norms and procedures of the judiciary and the executive.

The regulatory interference as enshrined in the Act snatches away the rights from the people to develop their own suitable procedure and an uniform standard of procedure will lead to difficulty in compliance of all the requirements, thus leading to a time consuming process which will be no different than a normal Court litigation and thereby the purpose of arbitration will be defeated.

### **Regulatory body to hamper the principle of party autonomy?**

A regulatory body, for eg: regulation of Securities and Banking Regulations by SEBI<sup>4</sup>. The regulatory bodies provide a structure to all the parties involved in the process and thereby prevents duplicity. The body is formed to promote an uniform procedure and operating manual for all the involved parties in the system significantly reduces autonomous approach among the involved parties and thereby reduces confusion among the stakeholders.

This approach is not viable in an arbitration process, as the primary Cornerstone of arbitration proceedings is party autonomy. This unique nature gives flexibility among the parties to choose any appropriate laws, procedures, panel or expertise for dispute resolution and a strict or uniform establishment of processes among all arbitral institutions will diminish party autonomy and arbitral institutions will be no different than a tribunal.

Furthermore, in most of the arbitration proceedings, the government is the primary litigator, and the establishment of a regulatory body by the State will be violative of the basic principle of independence of the adjudicatory body and the other organs of the State. No matter how evolved a legal system is, it cannot overrule the basic common law principle that "*No person shall be a judge in his own case*". Therefore, a government-appointed and constituted regulatory body such as the Arbitration Council of India is evidently violating the cardinal rule of the principle of natural justice, the Rule of Bias.

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<sup>4</sup> <https://www.sebi.gov.in/>

Thus, a regulatory body which can set the operating procedure of arbitral institutions would be violative in nature and it would threaten the very existence of the arbitral institutions which provide customised, ordered and swift means of dispute resolution through arbitration.

### **Can establishment of a regulatory body promote skill development for lawyers to pursue arbitration as a prospective career option?**

One of the major functions of the Arbitration Council of India is to provide accreditation to institutions for appointing arbitrators. If we are considering this function to be a means for skill development, then the regulatory body would only serve as a certifying body.

Arbitration is primarily a process wherein inherent expertise in dispute resolution is required as a skill set rather than legal prowess in domestic and international law. Before the commencement of any arbitration proceeding, a notice of arbitration is sent by one party to another party which leads to efficient negotiations and adoption of a variety of dispute resolution mechanisms such as mediation or conciliation. This requires a wholesome training and practical schedule for aspiring arbitrators who want to pursue this field as a permanent career option.

Therefore, a mere accreditation mechanism adopted by the Council will not suffice this requirement, rather a more strategic approach must be adopted by the State to encourage arbitral institutions to adopt training courses, internships and contractual employment for aspiring arbitrators to train them to adopt flexibility of procedure rather than sticking to a set procedure as enshrined in conventional legal practices.

### **Do Courts already function as a regulatory body as per Arbitration and Conciliation Act,1996?**

The Courts, under the power conferred upon them by Arbitration and Conciliation Act, 1996<sup>5</sup> do act to regulate Arbitration processes to a certain extent. For example, the Honourable Supreme Court of India in the landmark judgement of *Booz Allen and Hamilton Inc V. SBI Home Finance Ltd*<sup>6</sup>. has provided for disputes which are not arbitrable and fall outside the categories of arbitrable disputes (Section 2(3)). Further, the Court also has the power to refer

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<sup>5</sup> <https://indiacode.nic.in/bitstream/123456789/1978/1/199626.pdf>

<sup>6</sup> <https://main.sci.gov.in/judgment/judis/37919.pdf>

the parties to arbitration (Section 8), take interim measures (Section 9), appoint arbitrators (Section 11), termination of the mandate (Section 14), the substitution of the arbitrator (Section 15), providing assistance in taking evidence (Section 27), extending the time limit for arbitrator to make an award (Section 29A), determination of costs (Section 31A), determining jurisdiction over arbitral proceedings (Section 42) and the power to make rules (Section 82). Hence, the functional aspects to be performed by the regulatory body are covered under the power of the Courts by the Act.

## **Conclusion**

The requirement of the regulatory body is more in respect of the functioning of market players, which does not always entail dispute resolution. The state while regulating is not in conflict with the other party owing to its own interest as a party but as an authority. However, in the matter of dispute resolution, where there is a clear need of an impartial decision making authority, introducing a state prescribed regulatory body to govern such arbitral proceedings in a country where the state itself is a major litigator would not be either efficient or just as it would inflict a twofold damage, i.e., it would reduce party autonomy on one hand while creating a feeling of inherent bias in the minds of the parties upon the functioning of the arbitration proceedings which must not be allowed. Further, the Acts, as well as the Court, have put in place a reasonable amount of checks and balances so that the objective of such mechanisms, i.e, quicker resolution of disputes, is already being achieved. Hence, introducing a separate regulatory body would not serve an better purpose, but would just increase the disputes in respect to the functioning of such a regulatory body.