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Future of Arbitration in India: Decoding the Draft Arbitration and Conciliation (Amendment) Bill, 2024

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The Draft Arbitration and Conciliation (Amendment) Bill, 2024 (Draft Amendment) marks a significant step towards improving the arbitration framework in India by identifying and giving a legislative backing to practices, some of which had already been adopted by way of judicial precedents and widespread acceptance. This amendment trails the submission of a comprehensive Report by the Expert Committee[1] constituted by the Government of India to examine the working of the arbitration law in the country and recommend reforms to the Arbitration and Conciliation Act, 1996 (Act).

Some of the long-standing concerns which the proposed amendments aim to address are the scope of judicial intervention, procedural delays, seat/venue distinction amo[illegible]e Draft Amendment seeks to modernise arbitration processes through clearer rules, stricter timelines, and increased reliance on institutional arbitration.

This article provides a structured analysis of the Draft Amendment exploring its potential to reshape arbitration landscape in India. The article is divided into three sections for a comprehensive understanding of the key changes proposed. The first section delves into the practices and reforms that the Draft Amendment seeks to legislate upon. The second section assesses the proposed mechanisms for making arbitration practice more effective, with an emphasis on reducing court interference, establishing stricter timeframes, and giving an impetus to institutionalisation of arbitration. The final section offers a critical view of certain amendments that may or may not achieve their intended target in the current arbitral landscape.

Part I: Practices and suggestions legislated in the Draft Amendment

The Draft Amendment modernises arbitration in India by incorporating technology, codifying key legal principles, and clarifying procedural aspects to streamline dispute resolution and reduce ambiguities.

1. *Embracing technology in arbitration*

(*i*) Arbitration through audio-video electronic means

The Draft Amendment proposes an amendment to Section 2(1)(*a*) of the Act to broaden the definition of arbitration to explicitly include arbitration conducted through "audio-video electronic means". This amendment aims to give a legislative backing to the already widely accepted practice of virtual hearings.

The introduction of Section 2(1)(*aa*) to the Act defines "audio-video electronic means" as use of any communication device for videoconferencing, filing of pleadings, recording of evidence, transmission of electronic communication, for the purposes of conduct of arbitral proceedings and any other matter incidental thereto, in the manner as specified by the Council under sub-section (5) of Section 2 regarding the Recognition of Digitally Signed Arbitration Agreements.

The Draft Amendment also addresses the increasing use of digital platforms for commercial transactions by proposing an amendment to Section 7(4)(*a*) of the Act to recognise arbitration agreements executed via digital signatures. The existing legislation required arbitration agreements to be in writing, which had raised questions about the validity of agreements signed digitally.

2. *Codifying emergency arbitration in India*

The Draft Amendment also introduces a comprehensive legal framework [illegible] arbitration. The Supreme Court of India in *Amazon.com NV Investment Holdi[illegible]e Retail Ltd*.[2] had recognised the enforceability of emergency arbitrators' orders under Indian law. The proposed amendment seeks to codify this judicial recognition by formally introducing provisions that govern emergency arbitration.

(*i*) Definition of emergency arbitrator

The Draft Amendment introduces Section 2(1)(*ea*) to the Act, which provides a formal definition of an emergency arbitrator under the newly proposed Section 9-A.

(*ii*) Procedure for appointment and enforcement

According to Section 9-A(1) of the Act, an arbitral institution may appoint an emergency arbitrator before the constitution of the Arbitral Tribunal, specifically for the purpose of granting interim measures as provided under Section 9 of the Act. This provision grants parties the ability to seek urgent relief without waiting for the formation of the Arbitral Tribunal, providing them with an expedited process for securing interim measures, especially in cases requiring immediate intervention.

Section 9-A(3) further states that the orders passed by an emergency arbitrator shall be enforced in the same manner as an order passed by the Arbitral Tribunal under Section 17(2) of the Act. This provision strengthens the enforceability of emergency orders, giving them the same legal standing as orders issued by an Arbitral Tribunal.

Additionally, Section 9-A(4) provides that the Arbitral Tribunal, once constituted, may confirm, modify, or vacate the order passed by the emergency arbitrator. This is reflected in the proposed Section 17(*da*) of the Act, which gives the Arbitral Tribunal the power to review emergency orders.

3. *Recognition of seat of arbitration*

The Draft Amendment also seeks to address one of the most ambiguous and thus highly litigated issues in Indian arbitration landscape: the distinction between the “seat” and “venue” of arbitration.

To resolve this issue, the Draft Amendment proposes to replace the term “place” with “seat” throughout the Act, thereby clarifying that the seat of arbitration is the legal jurisdiction where arbitration proceedings are anchored as against “place” which is more indicative of a geographical location.

Despite this distinction being recognised by the Supreme Court in an array of judgments starting with the landmark judgment in *BALCO* v. *Kaiser Aluminium Technical Services Inc.*[3] to the more recent *BGS SGS Soma JV* v. *NHPC Ltd.*[4], parties often used these terms interchangeably in contracts. This led to jurisdictional conflicts and delays, as courts had to untangle the intent of the parties regarding the governing legal framework. The proposed amendment is consistent with this judicial interpretation, seeking to reduce confusion and align Indian law with international arbitration norms.

Section 2-A provides a detailed definition of the Court based on the seat of arbitration:

(*i*) Section 2-A(1) clarifies that in domestic arbitration, the Court will have jurisdiction based on the seat of arbitration as agreed by the parties or determined by the Tribunal. In case none of the above are possible, the Court would mean the Court that has pecuniary and territorial jurisdiction to decide the disputes forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, making it similar to the provisions of the Civil Procedure Code, 1908.

(*ii*) Section 2-A(2) provides that in international commercial arbitration, the High Court having territorial and pecuniary jurisdiction over the seat of arbitration will have jurisdiction.

Additionally, Section 20 has been amended to include two options for the seat of arbitration:

(*a*) Option 1 allows the parties to agree on a seat of arbitration, or for the Tribunal to determine the seat in case of no agreement between the parties.

(*b*) Option 2 provides that if no seat is agreed upon or determined, the seat will be the place where the contract was executed, or the cause of action arose.

This provision ensures that the parties retain autonomy in selecting a seat, while also offering clarity on how to determine the seat when the agreement is silent on the same. It is expected that this clarification will significantly reduce litigation surrounding jurisdictional disputes, expediting the arbitration process.

4. *Omission of the Fourth Schedule from the Act*

The Draft Amendment proposes the deletion of the Fourth Schedule, which deals with arbitrator fees. The Expert Committee, in its report, recommended this deletion, noting that the sole criterion under the Fourth Schedule — based on the value of claims or counterclaims — was not an ideal measure for determining fees. The Committee has advocated for a more nuanced approach that considers the complexity of the matter, the time required for its resolution, the necessity of leading oral evidence, and other relevant factors. However, no such mechanism has been introduced and instead it has been left for the Council.[5]

In line with the Committee's suggestions, the Draft Amendment introduces changes to Sections 11(14) and 11-A of the Act noting that in cases of institutional arbitration, arbitrator fees would continue to be determined by the respective institution's rules. Where no such rules exist, or in ad hoc arbitrations, the fees will be specified by the Council.

5. *Appeal against orders refusing to appoint arbitrators under Section 11 of th*

In response to the judicial recommendation in *Pravin Electricals (P) Ltd.* v. *Gala* *(P) Ltd.*[6], the Draft Amendment introduces a new appellate provision under Section 37(*aa*). The Supreme Court in the said judgment, had pointed out the anomaly between Sections 8 and 11 of the Act by stating that an appeal under Section 37 of the Act is allowed against orders

refusing to refer parties to arbitration under Section 8 of the Act, but no similar provision exists for orders refusing to appoint arbitrators under Section 11 of the Act.

By addressing this anomaly, the Draft Amendment intends to bring consistency in appellate provisions and ensure that parties have a right to appeal against orders refusing to appoint arbitrators.

Part II: Proposed changes to streamline arbitration, expedite proceedings, and reduce judicial interference

The Draft Amendment seeks to expedite arbitration, reduce judicial interference, and strengthen the institutional framework to address delays and improve dispute resolution.

1. *Expediting arbitration proceedings*

(*i*) Time-limit for applications under Section 8 of the Act

The Draft Amendment introduces sub-section (4) to Section 8 of the Act, which mandates a 60-day timeline for deciding applications under Section 8 of the Act. Previously, there was no statutory time-limit, often leading to delays. By introducing such timeline, the amendment ensures that the referral process is expedited.

(*ii*) Time-limit for constituting Arbitral Tribunals after applications under Section 9 of the Act

The proposed amendment to Section 9(2) of the Act provides for a more rigid timeline by starting the 90-day period for constituting an Arbitral Tribunal from the date of the application for interim relief under Section 9, rather than from the date of the court's order as is the case currently. This change addresses the current issue where parties, after securing interim relief, delay the formation of the Tribunal.

(*iii*) Limitation period for applications under Section 11 of the Act

A significant change is the introduction of Section 11(6-A), which imposes a 60-day limitation period from the date of failure or refusal of appointment of arbitrator or arbitrators by either party for making applications under Section 11. This addresses the problem identified by the Supreme Court in *BSNL* v. *Nortel Networks (India) (P) Ltd.*[7] where a 3-year limitation period was applied to application under Section 11 by taking recourse to Article 137 of the Limitation Act, 1963. The total period for invoking arbitration could stretch to 6 years — 3 years to issue a notice under Section 11 of the Act from the date of accrual of cause of action and another 3 years for the application under Section 11 seeking appointment of the arbitrator post the notice under Section 21 of the Act. The proposed 60-day limit will curtail the [illegible]s for filing application under Section 11 and ensure that arbitrators are appointe[illegible]

(*iv*) Time-limit for deciding jurisdictional challenges under Section 16

The Draft Amendment introduces a 30-day period to decide jurisdictional challenges under Section 16(5) of the Act by the Arbitral Tribunal, ensuring that objections to an Arbitral Tribunal's jurisdiction are resolved promptly.

(*v*) Time-limit for appeals under Section 37

The Draft Amendment introduces Section 37(1-A) to the Act, mandating a 60-day period for filing appeal under Section 37(1) of the Act ensuring minimal delays in appellate proceedings and allowing the parties to move forward efficiently.

2. *Model arbitration agreement*

The Draft Amendment introduces Section 7(6) which provides that the Council shall frame a model arbitration agreement which can be incorporated by the parties into their agreements. This provision, if implemented efficiently, could play a crucial role in reducing interpretational issues.

3. *Institutionalisation of arbitral proceedings*

Under the Draft Amendment, the definition of arbitral institution has been changed vide an amendment to Section 2(1)(*ca*) of the Act. In the existing Act, an arbitral institution has been defined as an institution designated by the Supreme Court or a High Court under this Act. In the Draft Amendment, it has been defined as a body or organisation that provides for conduct of arbitration proceedings under its aegis, by an Arbitral Tribunal as per its own rules of procedure or as otherwise agreed by the parties.

The Draft Amendment confers on arbitral institutions the powers previously vested in the courts under Section 29-A. This includes the authority to extend the mandate of the Arbitral Tribunal, reduce arbitrators' fees for delays, and substitute arbitrators when necessary. These powers, previously exercised by courts, would now be exercisable by arbitral institutions, enhancing the efficiency of arbitration and reducing the burden on the judiciary.

This change is particularly significant for the development of institutional arbitration in India, where recognised arbitral institutions will have a more direct role in managing the procedural and administrative aspects of arbitration. This move aligns with international practices and is expected to foster a more robust arbitration framework in India.

4. *Declaration by applicant under Section 11 of the Act*

The Draft Amendment introduces a new proviso to Sections 11(4), (5) and (6) of the Act, requiring the applicant to disclose the number of pending arbitration proceed[illegible]s passed in disputes between the parties.

By having a clear record of the parties' prior arbitration proceedings, may aid the Court with appointment of arbitrator/consolidation of proceedings.

5. *Stamping of arbitration awards*

The Draft Amendment to Section 31(1) of the Act introduces a requirement that an arbitration award must be duly stamped, aligning arbitration awards with the provisions of the Stamp Act, 1899.

Ensuring that awards are stamped at the time of issuance will mitigate the risk of delays during the enforcement stage, streamlining the post-award process and reducing the chances of procedural challenges based on stamping issues.

6. *Checklist for arbitration awards*

The Draft Amendment proposes to insert Section 31(2-A) to the Act, which outlines a procedural checklist for arbitral awards. This checklist requires arbitrators to confirm that essential elements — such as party capacity, validity of the arbitration agreement, and notice of arbitration — have been ensured in the award. The proposed provision also aligns with the grounds for challenging an award under Section 34 of the Act.

The introduction of a checklist is a prudent measure aimed at improving the procedural integrity of arbitral awards. By requiring arbitrators to confirm these key elements, the amendment ensures that awards are less vulnerable to challenge.

7. *Repo rate of interest*

The amendment to Section 31(7)(*b*) of the Act substitutes the current interest rate mechanism, which is based on the Interest Act, 1978 with the prevailing repo rate. Under the proposed provision, the interest rate would be calculated at 3% above the repo rate, replacing the existing mechanism of 2% above the general rate of interest.

The existing regime has faced criticism due to its reliance on the "current rate of interest", which varies significantly across banks, making it difficult for Arbitral Tribunals to determine a uniform rate. The repo rate, being published periodically by the Reserve Bank of India, provides a transparent and stable benchmark.

8. *Regime of costs: Accountability for both parties*

The proposed amendment to Section 31-A(3)(*c*) expands the Tribunal's discretion in awarding costs by considering whether any party, not just the respondent, has made a [illegible] counterclaim. Under the existing provision, only the respondent's counterclaim is scrutinised for frivolity.

This amendment introduces a more balanced approach by holding both the claimant and respondent equally accountable for making frivolous claims or counterclaims.

9. *Bifurcation of grounds for setting aside an award*

The Draft Amendment proposes a crucial bifurcation between the grounds for setting aside an award entirely and those for setting aside an award in part.

(*a*) Section 34(2) now specifies the grounds for setting aside an award in its entirety. These include issues such as party incapacity, invalidity of the arbitration agreement, lack of proper notice, improper composition of the Tribunal, or the non-arbitrability of the dispute.

(*b*) Section 34(2-A) on the other hand, deals with grounds where the award may be set aside either in whole or in part. These include arbitrators exceeding their jurisdiction, the award being contrary to public policy, or the presence of patent illegality in the award.

Additionally, the insertion of Section 34(7) provides that when an award is set aside in part, the Tribunal, on the direction of the Court or the Appellate Arbitral Tribunal, will only decide the issues on which the award was set aside, while the non-offending portions remain binding. It specifically clarifies that tribunal will decide the said issues based on the existing records of the original arbitral award, unless the Court or Appellate Arbitral Tribunal directs to the contrary.

The bifurcation of grounds for setting aside awards introduces much-needed clarity into the framework of arbitral award challenges. It distinguishes between issues that invalidate the entire award and those that only affect specific parts, thereby reinforcing the principle of partial set aside as recognised by the High Court of Delhi in its recent judgment in *NHAI* v. *Trichy Thanjavur Expressway Ltd*.[8]. This amendment aligns Indian arbitration law with international practices that favour preserving valid portions of an award to avoid the inefficiencies of a complete retrial. Additionally, Section 34(7) of the Act clarifies that subsequent tribunals are restricted to rehearing only the disputed portions, further streamlining the re-arbitration process.

10. *Formulation of grounds of challenge*

The Draft Amendment introduces Section 34(1-B) to the Act, which requires the Court or Appellate Arbitral Tribunal,[9] while hearing a challenge to an award, to formulate specific grounds for consideration. The Tribunal or Court must then determine whether these grounds are substantiated. Additionally, the proviso allows the Tribunal or Court to consider unformulated grounds, provided reasons are recorded.

This provision narrows the scope of challenges, ensuring that only specific, substantive issues are reviewed, promoting clarity and finality in arbitral awards. The requirement to identify

concrete grounds discourages baseless challenges, aligning with the legislative aim of minimising judicial interference in arbitration.

11. *Synchronisation of arbitration and mediation*

A notable aspect of the Draft Amendment is the effort to synchronise the Arbitration and Conciliation Act with the newly enacted Mediation Act, 2023.

Under the proposed changes to Section 30(2) of the Act, any settlement reached during arbitration will now be enforced under the Mediation Act, 2023. This change acknowledges the evolving role of mediation as a primary dispute resolution mechanism and provides a more structured process for enforcing settlement agreements.

Part III: Proposed amendments with potential challenges and uncertain implications

The Draft Amendment introduces several noteworthy changes to the existing arbitration framework in India. However, some of these changes may present practical challenges, the impact of which may be difficult to assess at this stage. Time and judicial interpretation are some of the factors which will determine the efficacy of these changes will function, if implemented.

1. *Introduction of an Appellate Arbitral Tribunal*

One of the most significant amendments is the introduction of an Appellate Arbitral Tribunal under Section 34 of the Act, which proposes establishment of two forums for adjudicating challenges to the arbitral award under this section i.e. the courts and the newly proposed Appellate Arbitral Tribunal. The proposed amendment contemplates party autonomy in choosing either of the forum. However, it stipulates that if the Appellate Arbitral Tribunal is chosen, recourse to the courts would be unavailable.

The intention behind establishing an Appellate Arbitral Tribunal appears to be reduction of judicial interference and alleviation of the burden on the judicial system. At this stage, the proposal raises question as to the stage of adoption of either forum which can become a contentious issue unto itself.

2. *Constitution of the Appellate Arbitral Tribunal*

The Draft Amendment does not elaborate on the procedure of constitution of the Appellate Arbitral Tribunals. Without such elaboration, the proposed amendment ra[illegible]f increased judicial intervention, as parties may resort to courts' intervention to [illegible]s regarding the formation of these tribunals.

In institutional arbitrations, the situation might be somewhat more straightforward, as institutions can appoint the Appellate Arbitral Tribunal directly. However, this could lead to a significant issue regarding party confidence. A party aggrieved by the arbitral award may feel less assured of receiving a fair hearing from an Appellate Tribunal appointed by the same institution. This could generate a deficit of confidence, potentially undermining the effectiveness of the arbitration process. Without clear guidelines on the constitution of Appellate Arbitral Tribunals, the proposed amendment may not achieve its intended goal of reducing judicial involvement and expediting dispute resolution.

3. *Blurring the distinction between domestic and international commercial arbitration*

Another contentious aspect of the proposed changes is the modification of Section 34(2-A) of the Act, which removes the distinction between domestic and international commercial arbitration regarding the ground of patent illegality. Under the existing framework, the ground of patent illegality does not apply to international commercial arbitrations, a provision introduced by the Arbitration and Conciliation (Amendment) Act, 2015 to encourage foreign investment in India.

The removal of this distinction increases the scope of challenge to an award in international commercial arbitration, potentially discouraging international investors and parties from engaging in arbitration in India.

4. *No recourse to Section 9 during pendency of arbitral proceedings â€• Ignorance of inefficacious remedy principles*

The Draft Amendment to Section 9(1) of the Act introduces a significant limitation on the recourse available to parties for interim measures. As of now, Section 9 of the Act allows the court to entertain an application for interim relief post the constitution of the Arbitral Tribunal and during the pendency of arbitration proceedings, when the remedy under Section 17 of the Act is deemed ineffective. The proposed amendment now restricts parties from filing an application under Section 9 of the Act once arbitration proceedings have commenced.

In cases where a tribunal is seated outside India (foreign tribunal), any interim relief granted by such a tribunal regarding assets located within India, does not have direct enforceability under the Act.[10] In such a case, a party has an option to approach the Court under Section 9 of the Act to seek an enforceable interim measure. The proposed amendment may lead to a scenario where the interim measures granted by a foreign tribunal may not be enforceable, leaving parties vulnerable and without immediate recourse to Indian courts for interim protection.[11]

Thus, while the intention behind the proposed changes is to streamline and harmonise the interim relief mechanisms available before tribunals and courts under Sections 9 and 17 respectively, the practical implications of these proposed amendments may create unintended hurdles. Without introduction of a simultaneous mechanism for direct enforceability of interim

orders by foreign tribunal, especially when the assets are located in India, the parties may find themselves unable to effectively safeguard their interests.

Conclusion

In conclusion, while the Draft Amendment offers promising avenues for reform, careful consideration is warranted to address the challenges that arise from these changes. Stakeholders, including legal practitioners, arbitration institutions, and policymakers, must engage in constructive dialogue to refine the proposed amendments, ensuring that they achieve their intended goals without compromising the principles of confidence and fairness that underpin effective arbitration. The successful implementation of these reforms will be crucial in positioning India as a leading hub for arbitration in the global arena. Only time will determine the real impact of these changes, but proactive measures and collaborative efforts will be essential for fostering a robust, efficient, and trustworthy arbitration system that serves the needs of all parties involved.

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1. T.K. Viswanathan, Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act, 1996 to make it alternative in the letter and spirit, (7-2-2024).)
2. 2021 SCC OnLine SC 557.
3. (2012) 9 SCC 552.
4. (2020) 4 SCC 234.
5. To be constituted by the Government under S. 43-C of the Act.
6. (2021) 5 SCC 671.
7. 2021 SCC OnLine SC 207.
8. 2023 SCC OnLine Del 5183.
9. *See* S. 43-C of the Act.
10. *Big Charter (P) Ltd.* v. *Ezen Aviation Pty. Ltd.*, 2020 SCC OnLine Del 1713; *Shanghai Electric Group Co. Ltd.* v. *Reliance Infrastructure Ltd.*, 2024 SCC OnLine Del 1606.
11. *Raffles Design International India (P) Ltd.* v. *Educomp Professional Education Ltd.*, [illegible] OnLine Del 5521.

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