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Reforming Arbitration in India: A Critical Analysis of the Arbitration and Conciliation (Amendment) Bill, 2024

Institutionalisation, Judicial Restraint and the Problem of Legislative Design

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ABSTRACT

The paper looks at a comprehensive attempt to recalibrate the Arbitration and Conciliation Act, 1996 by the Department of Legal Affairs in the form of a consultation draft, the Arbitration and Conciliation (Amendment) Bill, 2024, dated 18 October 2024. It adopts a doctrinal approach by highlighting the thirty-seven operative clauses of the draft in comparison to the existing statute, the recommendations of the Viswanathan Expert Committee and the case law the draft hopes to recapture or supersede. It finds that the draft is based on three organising concepts that can be defended in principle, but that are hindered by drafting gaps, by giving too much room for delegation to an executive-dominated Council, and by provisions, on which it focuses in particular on the limited interpretation of section 9, the extension of patent illegality to international commercial arbitration, and the elimination of the consent award, the practical consequences of which would be contrary to the stated goals. The paper ends with specific recommendations prior to presentation to Parliament.

Keywords: *arbitration reform; Arbitration and Conciliation Act, 1996; seat of arbitration; emergency arbitrator; appellate arbitral tribunal; judicial intervention; Arbitration Council of India*

1. Introduction

The Arbitration and Conciliation Act of 1996 (the 1996 Act) was passed on the foundation of the UNCITRAL Model Law on International Commercial Arbitration 1985, which continues to be referenced in the Preamble to the 1996 Act. Parliament has subsequently amended the statute three times, in the Arbitration and Conciliation (Amendment) Act 2015 (Act 3 of 2016); in the Arbitration and Conciliation (Amendment) Act 2019 (Act 33 of 2019) and in the Arbitration and Conciliation (Amendment) Act 2021 (Act 3 of 2021). Different symptoms were addressed in each round. The 2015 amendments brought in a 12-month time limit for awards under section 29A and made some narrow changes to the public policy basis for challenge and added patent illegality as a challenge ground only for domestic awards. The amendments in 2019 introduced an Arbitration Council of India to grade institutions and accredit arbitrators and the amendments of 2021 changed the provisions relating to stay of awards under section 36. Some provisions of the 2019 are however, included in the tabular statement to the present Bill as "yet to be enforced".

The obvious weakness of Indian arbitration system has been its sluggish pace and the involvement of the court at various points during the proceedings and that the institutional arbitration has not superseded the ad hoc mode of arbitration. The consistent criticism of the reforms has been that Indian arbitration is slow; courts are involved at too many stages of the proceedings and institutional arbitration is not replacing the ad hoc process. The Department of Legal Affairs published the Arbitration and Conciliation (Amendment) Bill, 2024 for the public comment on 18 October 2024, accepting comments until 3 November 2024. The invitation is worded in three parts: 1) to promote the use of institutional arbitration; 2) to limit court involvement; and 3) to speed up the process. It is a thirty-seven-clause draft with a seventy-two-page tabular statement comparing existing provisions with proposed in the draft. It follows the report of the Expert Committee headed by Dr. T.K. Viswanathan, which was submitted on 7th February 2024. To the author's knowledge, the draft, as submitted at the time of writing (September 2026), has not been put before Parliament and all the propositions below are proposals and not acts of parliament.

There is a general lack of critical writing on the draft. This paper will try something more focused and ambitious: to really read the operative text carefully, and to examine each major

reform in the context of the objective it seeks to achieve; and to detect where the drafting is likely to lead to outcomes which are at odds with the objective. The inquiry is structured with 3 questions. Firstly, is the way the draft approach to institutionalisation is put forward credible and independent institutional framework, or is it simply a shift of judicial discretion to the Council, which is dominated by the executive? Second, do its time limits and restrictions on judicial recourse minimise delay while still ensuring that there are effective interim and appellate remedies available for the parties? Third, does the draft itself make internal sense in that its provisions are consistent with one another, with those of the 1996 Act that have been retained and with the recent decisions of the Supreme Court?

2. Scope, method and sources

The study is a doctrinal study. It consists mainly of the text of the Draft Bill, including the tabular statement, which is a reproduction of the existing statutory language, and allows clause by clause comparison. The judicial inputs of the draft are for decisions that it codifies or replaces: In Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., a draft set aside the NCLT ruling in favor of the petitioner, National Highways Traffic Safety Administration v. Blacktop, involving a contrary verdict, and in Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., a draft reversed a NCLT decision in favor of the petitioner. On the issue of modification of awards, the draft overturned the Constitution Bench decision in Gayatri Balasamy v. ISG Novasoft Technologies Ltd. The Expert Committee Report itself was not reviewed, only the published analysis by Bairagi, Sharma and Ayyub, to which the report is attributed in the analysis. Where there is a conflict between the analysis and the text of the Draft Bill, the text has been preferred, and the conflict has been noted. The list of authorities is deliberately short - see how many you can add. Provisions in the 1996 Act and any amending Acts are assumed to be the statutory starting point for analysis and not separate authorities and decisions referred to only in contexts in the secondary source are indicated in the footnotes.

3. Legislative background and architecture of the draft

The draft can be best interpreted as a continuation of the projects that were started in 2015 and 2019. From 2015 it carries over the concern with time from the previous Act, having an

additional six month extension for arbitration under section 29A (1) of the previous Act, but with the power to extend or reduce the fees for delay (maximum five per cent per day of delay) from the courts to an "arbitral institution under whose aegis arbitration is being conducted" with the courts retained for other cases. It will be carrying over the Council which, as a new section 43C, will also be transferred, as well as the concept of "recognised institutions", which has been moved to a new section 43K. The draft also incorporates two provisions outside the scope of the Act: the inclusion of the Mediation Act, 2023, to which it seeks to synchronize section 30, and the Supreme Court's ruling in Amazon.com, which it turns into a statutory provision regarding emergency arbitrators.

From a structural point of view, the draft can be divided into five categories: the institutional and regulatory structure (the Council, recognised institutions, fees, depository); the level of judicial action and time (sections 8, 9, 9A, 11, 16, 17, 29A and 37); the identification of the seat and competent court (sections 2, 2A, 20 and 42); the regime for awards (sections 30, 31, 31A, 34 and the new section 34A); and technology and settlement and nomenclature (sections 35, 36 and 38). Delegated legislation is discussed in a separate cross-cutting theme: a sixth theme.

4. Critical analysis

4.1 Institutionalisation and the regulatory architecture

The draft replaces the definition of "arbitral institution" in section 2(1) (ca). The current text refers to an institution "designated by the Supreme Court or a High Court" while the proposed text refers to a body or organisation that provides for the conduct of arbitration proceedings under its aegis, by an arbitral tribunal in accordance with its rules of procedure or otherwise agreed by the arbitrating parties. The change removes the need for judicial designation from the definition, which was a practical issue, but creates a two-tier vocabulary which the draft does not attempt to reconcile. There is no change in the broad definition of an institution to exercise the new powers under section 9A (emergency arbitrators) and section 29A (extension and substitution), and section 11(3A) retains its existing wording that only institutions "recognised by the Council under section 43K" may be so identified. The text does not mention whether unrecognised is able to exercise section 9A or 29A powers. The recognition

mechanism has no practical consequence if it may, or it should be stated in the drafting if it may not.

Another is the locus of judicial power within institutions to their own tribunals. The amended section 29A gives the institution discretion on extending the mandate of a tribunal, reducing the fee for delay by arbitrators and substituting arbitrators. The institution plays a role as administrator, supervisor and has a commercial interest in keeping cases and in the reputation of its panel. Although courts are not without issues, they are institutionally separate from the arbitral process. The draft does not provide for a review of institutional decisions under section 29A except to the extent of the general right to seek a court review and does not impose a requirement to provide reasons for an institutional decision.

The most basic question is raised by the Council itself. The proposed section 43C provides that the Council has seven members including the Chairperson and two members appointed by the Central Government, the Secretaries (or their nominees not below Joint Secretary) of the Departments of Legal Affairs and Expenditure as ex officio Members, one Member from a recognised body of commerce and industry, appointed by the Central Government, and the Chief Executive Officer as ex officio Member-Secretary. Each seat is thus held by, or elected by, the Central Government and the conditions and terms of the full-time members are determined by it. This is not all that unusual for a statutory regulator. It becomes significant due to what the Council is asked to do. The functions listed in the new section 43D (2), and the regulation-making power in section 43Q (2), include specifying the criteria for recognition of institutions, framing the procedure of emergency arbitrators and of appellate arbitral tribunals, specifying the manner of virtual hearings, fixing the fees of arbitral tribunals where no institutional rules apply, framing model agreements and model procedural rules, and maintaining a national depository of arbitration cases. This must be approved by the Central Government in advance and published in Parliament for a period of 30 days. The design thus becomes a body whose independence rests on the executive powers that directly impact the neutrality and binding effect of arbitral decisions. The question to be raised is, regardless of the intent, who is going to regulate the fees and procedure, and is it independent of the executive.

As evidenced by the treatment of arbitrator fees, the flexibility and the risk of this delegation. The draft also does not include the Fourth Schedule which provided for fees based on the sum

in dispute, and alters section 11A, so that, in the absence of party agreement and institutional fee rules, fees shall be "such as may be specified by the Council". The Expert Committee found that value of claim was an insufficient sole test and favoured a test taking into account knowledge, complexity, time and the need for oral evidence but such a test was not included in the draft, and the Expert Committee recommended that the Council should implement this. The criticisms of the Schedule were justified, but the alternative does not provide any statutory guidance. There is a possibility that Parliament could legitimately have laid out the factors for the Council to consider, and what kind of process there is for the Council to review, rather than reverting to a fixed table. The exclusion of international commercial arbitration, as well as arbitrations conducted under the institutional fee rules of the Council, from the Council's power to fix fees in section 11(14) is retained, but the impact is reduced for the sophisticated user by the provision in the explanation to section 11(14) that ad hoc domestic arbitration is the category in which the impact is to be borne.

Last, the new section 43M calls for each arbitral tribunal or arbitral institution to request a specific identifier from the Council for each arbitration. It has a good idea in it, as it would provide the first systematic information on arbitration in India and fits in with the disclosure requirements in sections 11(4), (5), (6) and 34(1A) of the draft, which require the applicant to inform the court of the number of pending proceedings and awards between the parties arising from a common defined legal relationship. The draft, however, has no content whatsoever, and it is Council regulation that will provide for the safeguarding of confidentiality. A register that documents the occurrence of proceedings without a specific statutory confidentiality regime can act as a disincentive for those commercial parties that institutional arbitration wishes to encourage.

4.2 Judicial restraint and temporal discipline

The draft introduces or modifies six time-related provisions, summarised in Table 1. The common assumption is that fixed statutory periods, unaccompanied by sanctions in most cases, will alter the behaviour of parties and of courts. The discussion below considers the provisions in ascending order of consequence.

Table 1: Statutory time limits under the Draft Bill

Provision	Existing position	Proposed position
s. 8(4)	No statutory period for deciding applications to refer parties to arbitration	60 days from filing, "expeditiously and in any event"
s. 9(2)	90 days to commence arbitration from the date of the court's interim order, or further time allowed by the court	90 days from the date of filing the application in court
s. 11(6A)	No specific period; Article 137, Limitation Act, 1963 (three years) applied (*BSNL v. Nortel*)	60 days from failure or refusal of appointment
s. 16(5)	No period for deciding jurisdictional pleas	30 days, as a preliminary issue, unless reasons are recorded for deciding later
s. 37(1A)	No period prescribed in s. 37 itself	60 days from receipt of the order appealed against, "but not thereafter"
s. 29A	12 months for award, extendable by 6 months by consent; extension otherwise by the court	Periods retained; extension where no consent by application to the institution (institutional cases) or the court

Source: Draft Bill, cll. 9, 10(ii), 12(viii), 14, 20, 27(iii) and tabular statement; Bairagi et al., Part II, para. 1.

Section 8(4) stipulates that the court must decide on an application to refer parties to arbitration "expeditiously and, in any event, within sixty days". The provision is a welcome one in principle but has two weaknesses of drafting. The new sub-section (4) uses the word "court" while the "judicial authority" referred to in section 8(1) is broader than "court" as defined under the new section 2A. The period of time may therefore be misplaced with regard to other judicial authorities other than the courts referred to in section 2A. The time period may not therefore be attached to other judicial authorities than the courts referred to in section 2A. Secondly, there is no penalty for failure to comply, and the existing directions given in the Act to Courts by time, such as the 'endeavour' directions in section 29A (9) indicate a direction but not a requirement. A limit that is not followed has no value.

The draft's premise is most susceptible to challenge in Section 9. The draft does away with the term "or during" in section 9(1) and also removes section 9(3), which would have allowed for the court to entertain an application after the constitution of the tribunal only if section 17 relief will not be sufficient. If relief is sought under interim orders, it would then be available only twice – before the commencement of arbitral proceedings and after the award. The proceedings begin under section 21 of the 1996 Act upon receipt of the request to refer the dispute to arbitration by the respondent (unless otherwise agreed). This time frame from that request to the time of the establishment of the tribunal can be when assets are at the greatest risk, and the establishment of the tribunal itself might require an application under section 11. A party was unable to approach the court then and would not be able to approach a tribunal that did not yet exist. An alternative is provided under the new section 9A, but will be available only if the institution's rules have made the appointment of an emergency arbitrator possible. This is not the case with ad hoc arbitration, where the parties continue to use this mechanism. The Bairagi analysis is, in order, correct that this is a vulnerability, especially in a foreign-seated arbitration where the interim orders of the foreign tribunal are not enforceable under the Act, and parties have found section 9 to be the basis for any relief that is enforceable in respect of assets in India. The amendment to the proviso to s. 2(2) of the draft itself reveals that the intention is to apply s. 9 and, to some extent, s. 9A to non-domestic arbitrations, and not, as the current proviso states, "international commercial arbitration". Accordingly, the scope of section 9's application is increased, while its time frame is decreased, a counterintuitive relationship.

The addition of section 9(2) compounds to the list further complicates the situation. The current provision stipulates that arbitral proceedings be initiated within ninety days after the court's interim order or as extended by the court. The draft will run for 90 days from the date the application is filed. As the secondary analysis explains, the aim is to avoid that a party obtaining relief should be able to stall the setting up of a tribunal. The argument seems correct but the result is the time spent waiting for the application that caused the period is the time spent on the period. Should the court take two months to make its determination, the applicant is then given one month in which to start proceedings and the draft removes the phrases "or such further time as the Court may allow". Where relief is denied, there is no need to run the period, but where relief is granted after the time, a just statute would give the period as of the date of the relief.

Emergency arbitration is statutorily recognized in the new section 9A. Arbitral institutions "may" appoint an emergency arbitrator before the constitution of the tribunal, and provide for granting the interim measures referred to in section 9, or the arbitrator may conduct proceedings as provided by the Council, or may confirm, modify or revoke the appointment, which is also duplicated in the new clause (da) of section 17(1) concerning the constitution of the tribunal. The provision is the clearest example of a judicial development that has been combined in the draft. The Supreme Court already had ruled on the enforceability of emergency orders in Amazon.com. Two reservations remain. The facility is limited to institutional arbitration and relies on the institution's selection of the facility. The enforcement provision is sub-section (3) and the proviso to section 2(2) extends "sub-section (2) of section 9A" to foreign-seated arbitrations, but sub-section (2) deals with the procedure that is prescribed by the Council. The reference is incorrect or the intent of the draft is not what it says.

That new section 11(6A) requires an application for an appointment to be made within 60 days of the "failure or refusal of appointment". It holds that by applying the provisions of Article 137 of the Limitation Act, 1963 to section 11 applications, a three-year period is added to the three-year period allowed for issuing the notice under section 21 and the total period for invoking arbitration could be extended to six years. The sharpest cut in limitation the draft offers are to reduce that window to sixty days, and it has three features missing. The trigger "Failure or refusal", is not defined, but will be challenged when the counter-party accepts or rejects a proposal. Unlike the thirty-day condonation of delay in the proviso to section 34(3), there is no such protection here under section 37(1A) which says "but not thereafter". Further, the link with the existing 30-day periods provided for in section 11(4) and (5) is not drawn out. The sixty-day period is not only a procedural remedy, but a substantive right as well; the dispute cannot be arbitrated without a tribunal. The severity demands either an express condonation power or a more extended time.

The rest of the requirements are not so bad. Section 16(5) provides that jurisdictional pleas shall be determined as a preliminary issue within 30 days of the application, with the proviso that the issue shall be decided later than that date "unless for reasons to be recorded in writing, the arbitral tribunal considers it appropriate to". This leaves almost complete discretion as to when it shall be decided. The new section 37(1)(aa) resolves the anomaly that was highlighted in Pravin Electricals (P) Ltd. v. Galaxy Infra and Engineering (P) Ltd., 2021 5 SCC 671, where

an order refusing to refer the parties to arbitration under section 8 was appealable while an order refusing to appoint an arbitrator under section 11 was not. The appeal period in the new section 37(1A) is sixty days "notwithstanding anything contained in any other law" thus eliminating uncertainty as to how the other law provisions might interact with the new sixty-day period but also eliminating condonation.

4.3 Seat, the competent court and the omission of section 42

The draft seeks to put an end to the "most persistent source of jurisdictional litigation in Indian arbitration" – the vagueness of the relationship between the "seat", the "place" and the "venue" of arbitration. Now the Constitution Bench in BALCO has taken the territorial approach to Part I of the 1996 Act and held that Part I will apply only to the situation where the seat is in India. In BGS SGS SOMA JV v. NHPC Ltd. the Supreme Court has held that where there are no contrary indicia, a designated venue is in substance the seat. However, contract drafters have persisted in using the two terms interchangeably, raising questions over which court would have supervisory jurisdiction. The draft tackles the issue in three ways: firstly, by substituting "seat" for "place" in sections 20, 28 and 31(4); secondly, by adding a new section 2A to the definition of Court, which refers to the seat; and thirdly by providing two alternative versions of section 20.

Under Option I, the seat of the tribunal is preserved as an autonomous choice of the parties: If they cannot agree on the seat, it is determined by said tribunal, and the tribunal's hearings are held at any "venue". In domestic arbitration (excluding international commercial arbitration), the seat of arbitration is designated in the contract/arbitration agreement as the location of the execution of the contract/arbitration agreement or the location of the cause of action, pursuant to Option II. As drafted it does not include the "unless otherwise agreed" qualification in its provisions, thus eliminating the parties' choice of seat in domestic arbitration which is built on the cornerstone of section 20 and of the Model Law that is the basis of the Act. It is also an ineffective certainty device. In effect, a contract could be made in one place and cause action in several and the imposition of the seat on the basis of these factors restores the multiplicity of connecting factors that the idea of the seat was meant to eradicate. The note on the draft itself states that the adoption of Option II would not require an amendment to the definition of

"Court", pointing to the fact that the options are structural and that the selection between the options does not have to await a later decision. It is certainly better to choose option I.

Additional Changes are made in Section 2A. In domestic arbitration the court shall have pecuniary and territorial jurisdiction over the seat, and, if there is no agreed or determined seat, the court which would have jurisdiction over such subject matter in the event of a suit. In international commercial arbitration, it is the High Court which has territorial jurisdiction over the seat. The latter goes beyond the previous definition which applies to a High Court "in exercise of its ordinary original civil jurisdiction". This means that in cities without the High Court's original civil jurisdiction, international commercial arbitration cases will be heard directly by the High Court, which will be loaded with work. A sensible answer to a question that would otherwise trigger litigation is provided by new section 2A (3), which applies to arbitrations that take place entirely in audio-video electronic format, and stipulates that sections 2A (1) and (2) apply mutatis mutandis, meaning the seat, not the location of parties, governs the competence of the court.

These reforms are preceded by the deletion of section 42 which gives the one court to which an initial application is made under Part I exclusive jurisdiction. The concept seems to be that if it's through seat then there's no need for an exclusivity rule. This is correct in unoccupied seats. However, both under the residual limb of section 2A(1)(ii) and under Option II, there could be more than one court with jurisdiction, and section 42 is the only provision which resolves competing first applications. If it is deleted, it should be linked specifically with the adoption of Option I and with the removal of the residual limb, or section 42 should be left. The draft is also not consistent with itself and needs to be corrected before it is introduced. While the proviso of section 2(2) and section 28 of the Tabular statement are about the seat, the proviso to section 2(2) and section 31(4) of the Tabular statement are about the place of arbitration. In Option I, both clauses (iii) and (iv) of the amending clause make reference to sub-section (2) of section 20, but, the tabular statement places the substitution of "venue" in sub-section (3).

4.4 The award: formalities, interest, costs and the reconstruction of section 34

There are a number of clauses that refer to the shape and material of the award. An award under section 31(1) would have to be "duly stamped". You might read this as a correlation with the Stamp Act, 1899, and a "shortening of enforcing time lag", but the wording of the clause only reads "duly stamped". The implementation of the draft brings up a number of practical issues that are not explored in the draft, such as who is responsible for the duty, how this duty is to be fulfilled and the differences in rates and procedures for stamp duty on awards between the States. New paragraph 31(2A) is to be satisfied by ensuring the following: absence of party incapacity, validation of the arbitration agreement, issuance of proper notices, compliance of the composition and procedure of the tribunal with the agreement, arbitrability and conformity of the award to the terms of the submission. The seven items follow up the reasons for setting aside in section 34. The provision can be used to guide the Tribunal's attention to threshold matters, but as a recital it does not impose any binding obligation on the court as it determines issues of grounds on the record and it can lead to formulaic recitals which may add length, but little assurance. There is no penalty for failing to do something stated in the draft.

Under the earlier provision of the amendment, the post-award interest was to be paid at a rate of interest which was two per cent more than the "current rate of interest", as defined under Interest Act, 1978; under the new provision the same is to be paid at "three per cent higher than the prevailing repo rate of the Reserve Bank of India prevalent on the date of award". According to the secondary analysis, the rationale behind the current rate is that banks have different rates, whereas the repo rate is published and transparent. It's a more rigid standard, but there are two points to note. It is not a floating rate that changes over time, it is fixed at the time of award and if it is fair at the time of the award, it will stay fair throughout the long period of time that it can take to enforce. Under section 31(7)(a), pre-award interest is still at the discretion of the tribunal and this is a much bigger issue of disagreement in practice. The change in section 31A(3)(c) to allow tribunals/courts to take account of the "frivolous claim/counterclaim" added to the cost's regime for the respondent's counterclaim and removes the previous requirement that the counterclaim caused delay in the disposal. The equalisation is principled, although the delay criterion has been dropped and there is no terminology of "frivolous" which expands discretion which tribunals have been reluctant to award costs.

Section 34 is described more fully than any other section, and a few features of it require comment.

First, the draft categorizes the grounds into two categories. The grounds on which an award may be set aside under new section 34(2) are: incapacity, invalidity of the arbitration agreement, improper notice, improper composition or procedure, and non-arbitrability. Award excess of jurisdiction, or conflict with public policy, or patent illegality on the face of the award may be set aside, in whole or in part, under the new section 34(2A). The bifurcation provides statutory support to the principle of partial setting aside which is in line with the recent judgement of the Delhi High Court in National Highways Authority of India v. Trichy Thanjavur Expressway Ltd, 2023 SCC OnLINE Del 5183, and also with the international practice of preserving the valid portions of an award. The effect of the structure is less known. The present section 34(2)(b) provides that the non-arbitrability and public policy are matters that the court shall "find," meaning that the court may raise the issue without the parties' pleading. Both new sub-sections are preceded by an "establishment", which is given as a requirement by the party applying for the introduction of the ground, "on the basis of the record of the arbitral tribunal". Non-arbitrability and public policy would thus become party driven grounds. If a dispute is not arbitrable due to rights in rem or a public interest not subject to waiver by the parties, that is a substantive narrowing of the court's supervisory jurisdiction and should be a conscious decision, if a decision at all.

Secondly, the limitation on the ground of patent illegality as contained in the existing section 34(2A) which applies to arbitrations “other than international commercial arbitrations” is dropped from the new section 34(2A) in sub-clause (iii) thereof. To the extent that an award is obtained with the proviso that the award was made in error and/or based on a misappreciation of the law or evidence, the proviso is not expressly prohibited by the 2015 amendments, which were specifically intended to remove such grounds of review for the international awards to promote foreign investment. The secondary analysis seems to suggest that the change is seen as a restriction on foreign parties considering India as a seat. The concern is fortified by the expanded scope of jurisdiction of section 9 over foreign-seated arbitration, mentioned above, and the draft also makes it possible for an international party to avail of interim relief from Indian courts and broadens the bases for an Indian court to intervene in an arbitration seated elsewhere. That the Bill does not explain anything as to why the international and domestic regimes should converge now is a notable absence at the consultation stage.

Thirdly, the new section 34(7) stipulates that if an award is set aside partly, then the court or appellate arbitral tribunal may order the arbitral tribunal to determine the issues on which the award is set aside, on the existing record unless it otherwise orders, and the finding of these issues by the arbitral tribunal shall be binding on the arbitral tribunal. The mechanism is sensible but doesn't mention or reconcile with the current section 34(4) which allows the court to adjourn the proceedings to allow the tribunal to give it further consideration or take any other steps to remove the grounds for setting aside. The draft also does not address, nor take reference to, the decision of the Constitution Bench, decided by a majority of four, on 30 April 2025 in Gayatri Balasamy v. ISG Nova soft Technologies Ltd. which held that the power of the court to modify an arbitral award under sections 34 and 37 is limited to correcting any clerical, computational or typographical error, or to vary the award with regards to the interest granted after the award, and not to rewrite the award on its merits. The Bill does not expressly acknowledge the power of modification and organizes partial relief on the basis of setting aside and remand. Prior to introduction, the legislature should determine whether to incorporate the Court's limited modification power into the legislation, to limit it, or to expressly limit partial setting aside and remand under section 34(7). It is easy to see why it would be unwise to leave the two regimes side by side and subject to litigation over their relationship.

Fourthly, new section 34(1B) requires the court or the appellate arbitral tribunal, in deciding an application, to "formulate specific grounds" and then to consider the application for determination on whether the specific grounds are made out; other grounds are still able to be considered subsequently, but this is after they have been set out in the court's or arbitral tribunal's minutes and with a proviso that the matter would otherwise be dealt with. The secondary analysis sees the provision as limiting the challenge and discouraging frivolous applications. But, to a large extent, this effect is neutralised by the proviso, as matters not expressed by the court could be considered on recorded reasons. The provision has merit as a case management tool, but as a restriction on challenges, it is probably going to have a relatively limited impact.

Lastly, the most innovative provision is the addition of section 34A which provides for an appellate arbitral tribunal to hear appeals from applications under section 34, the procedure to be established by the Council and the proviso to section 34(1) that prevents a court from hearing an application where the parties had agreed to have recourse to an appellate arbitral tribunal.

The analysis published omits two weaknesses: the draft fails to specify when a party will need to make the choice between the forums and it fails to include any discussion of the composition of the appellate tribunal which leaves the possibility for 'satellite litigation' and, in an institutional setting, for a 'confidence deficit' between the institution that appoints the appellate panel and the one that appoints the arbitrator. There are three more challenges in the text. The appellate tribunal has jurisdiction only to apply section 34 and only the limited grounds – it is not an appeal on the merits – and people who come expecting that are going to be disappointed. Section 37(1) is amended to add the words "or the appellate arbitral tribunal, as the case may be, after the words "passing the order", which implies that appeals against an appellate tribunal's order can be filed with a court and has an uneasy relationship with the proviso which bars the court from bringing an appeal. The draft doesn't specify whether the writ jurisdiction of the High Courts, or Article 136 of the Constitution can be exercised against the tribunal's decisions. Such a provision must be clear and precise on the extent of court involvement that is to be reduced.

4.5 Technology, settlement and nomenclature

The proposals on technology are the least controversial. Section 2(1)(a) is amended to cover arbitration by "audio-video electronic means", a new section 2(1) (aa) also defines what is meant by "audio-video electronic means", section 19(5) provides for such procedures in the way outlined by the Council, while section 7(4)(a) and section 31(5) acknowledge that awards and arbitration clauses may be signed by digital means. The word use used in the reference in clause 5(i)(B) refers to the use as defined by the Council, under sub-section 5 of section 19, a reference to the secondary analysis refers to the use as defined by the Council under sub-section (5) of section 2; the Bill's text is the authority, and the discrepancy is minor. The draft establishes a practice that has developed during the pandemic and provides it with a solid legal foundation. Whether the reform has substance or not will depend on what it leaves out, such as data security, admissibility of remotely recorded evidence and cross-border witness examination, in compliance with Council regulation.

There are more issues with the synchronisation with the Mediation Act, 2023. Section 30(1) is amended to remove the words "conciliation or other procedure", and the words "an award" in

sub-sections (3) and (4) are deleted from section 30(2), and the latter rewritten to read: "Where the parties agree during the arbitral proceedings to enter into a mediated settlement agreement, the arbitral proceedings are terminated and the settlement is duly recorded as such in the form of a mediated settlement agreement enforceable pursuant to Mediation Act, 2023". The published analysis takes this as a sign of the increasing significance of mediation. It also repeals the consent award. Two consequences follow. First, an award on agreed terms gets the enforcement as an award in India, and as an award across borders, in accordance with NY Convention; while an agreement reached through mediation can only be enforced in accordance with the Mediation Act. Secondly, it is not clear that a settlement agreement that the tribunal itself documents is a "mediated settlement agreement" that is contemplated by a statute where the mediation is conducted by a mediator and thus might not achieve the enforceability that the statute promises. It is advisable that the 'consent award' be kept as an alternative to the Mediation Act route in the draft.

The renaming of the statute as the "Arbitration Act, 1996" and the deletion of the word conciliation from the long title, preamble, section 1 and section 43D of the Act reflects this policy. Consequential amendments to Explanation 1 to section 34(2A), which removes a reference to breaches of section 75 and 81 of the Act. However, none of the thirty-seven clauses on the considered text repeals the provisions contained in Part III of the Act, which are the same provisions. It does not seem to make sense to re-name an Act to remove the conciliation provisions, but to not remove Part III. It does not seem sensible to re-name an Act and leave Part III and have no reason to keep it.

5. Cross-cutting concerns

Three aspects of the draft in general need to be commented on. The first is the amount of materials devoted to subordinate legislation. Even if only those rules described in the regulation-making entries in the new section 43Q(2) were included, the Council would list 11 different types of rules, and a number of substantive protections, including the procedures of the emergency arbitrators and the appellate tribunals, are described only in terms of those rules. This is a valid method for developing virtual hearings but less so to develop forums which determine substantive rights.

The second is related to transition. Under Clause 1(2) the Central Government may provide for the application of different provisions on different dates, but there is no saving or transitional provision in the draft for arbitrations commenced (or applications made) prior to commencement. The implementation of the 2015 amendments created a minefield of litigation and such provisions as the sixty-day limitation in section 11(6A) or the limitation in section 9 or the amended section 34 grounds are the type of provisions that will be challenged in relation to existing matters. Clear expression of language is a must.

The third is evidentiary. The purpose of the reform is described in the consultation paper, but not, as circulated, backed up with any empirical evidence for the length of the periods (60, 90 or 30 days) and no evaluation of the ability of courts and institutions to follow. Predictions are essentially time limits that are proposed without data on the time limits currently in place. A regulatory impact assessment and application of the depository proposed in the 43M for the data that may underlie future adjustments would enhance the reform.

6. Recommendations

The analysis underpins a series of targeted revisions, not a complete overhaul. Section 9 should be restored as it reads from the beginning of the constitution of the tribunal or section 9(3) should be included as it is now, so that there is no gap between the time an arbitration is invoked and the time section 17 relief becomes available; the ninety-day period specified in section 9(2) should be measured from the time the court makes its order. For section 20, it is recommended to adopt Option I; for the residual limb of section 2A(1)(ii), it is recommended that it be removed or retained in section 42; and the existing inconsistencies in the sections above should be addressed. Section 11(6A) should include a condonation power and a clear trigger and the time-limit provisions in Section 8(4) and 16(5) should contain consequences.

At the award stage patent illegality should be limited to domestic awards, unless a reasoned case for convergence is published; the non-arbitrability and public policy grounds should be retained as being capable of being raised by the court; section 34 should expressly make it clear whether the limited power of modification recognised in Gayatri Balasamy is retained or not with section 34(7); and the relationship between sections 34A, 37 and the constitutional jurisdiction of the High Courts should be made explicit, with a statutory rule for the stage at which the appellate option is taken. The consent award should be retained in section 30. The

Council shall consist of persons whose appointment is not subject to the executive, such as nominees of the judiciary or of recognised institutions, the principles of the decision to impose fees on the Council and the supervision of the institutions under section 29A shall be specified in the statute and a transitional provision shall be added.

7. Conclusion

Delay, curial intervention and institutional weakness are all recognised as factors which need to be addressed and several of its key provisions, including recognition of virtual hearings, of appeals against refusal to appoint in accordance with section 37(1) (aa), the seat-based definition of court and the partial setting aside of awards, codify and extend developments already made by the courts. The challenge is in the design of the "rest of the picture". The closing of section 9 without any replacement in the gap before constitution of the tribunal, the 60-day bar on applications for appointment, the overlapping grounds of international and domestic awards, the removal of the consent award, the executive nature of the Council and the virtual delegations of all institutional procedure will be likely to displace litigation on to other stages or to diminish the attractiveness of India as a seat. The draft is strong in the core and weak in the periphery, and the time for fixing the second is the time of the consult.

The analysis focuses on a reading of a consultation draft which may be materially different in the final draft before it is introduced. The proposals could be responsive to evidence from empirical work on the time for disposals in court, institutional caseloads and on the use of ad hoc arbitration and on intermediary relief and be informed by comparative study of appellate arbitral mechanisms and of the regime for emergency arbitrators in other jurisdictions. These are issues that need to be further investigated.

References

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