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REIMAGINING ARBITRATION IN INDIA: EVALUATING THE STRUCTURAL CHALLENGES AND REFORM POTENTIAL OF THE DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024

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ABSTRACT

India has been making continuous efforts to develop its arbitration framework in order to meet the requirements of being a preferred location for dispute resolution. The Arbitration and Conciliation Act, 1996 has been amended multiple times in the years 2015, 2019, and 2021 so as to reduce judiciary's intervention and increase efficiency, as well as to promote institutional arbitration. However, arbitration in India continues to face certain obstacles such as high level of judicial intervention, delays, uncertainty in law, and prevalence of ad-hoc arbitration.

The Draft Arbitration and Conciliation (Amendment) Bill, 2024 represents the latest attempt to address these concerns. It introduces several important reforms such as greater reliance on arbitral institutions, statutory recognition of emergency arbitration, an appellate arbitral tribunal, stricter timelines, and changes relating to the seat of arbitration and post-award remedies. At the same time, several proposed amendments raise concerns regarding their practical implementation, institutional readiness, and compatibility with internationally accepted arbitration principles.

This paper critically evaluates whether the Draft Bill is capable of addressing India's long-standing arbitration challenges. Rather than merely examining the proposed amendments, it evaluates their likely implementation, identifies unresolved structural weaknesses, and analyses whether the reforms strike an appropriate balance between judicial oversight and arbitral autonomy. The paper argues that although the Draft Bill introduces several progressive reforms, many proposals require further refinement to ensure that India develops a reliable, efficient, and internationally competitive arbitration system.

KEYWORDS: Arbitration, Draft Arbitration and Conciliation (Amendment) Bill, 2024, Institutional Arbitration, Emergency Arbitration, Party Autonomy, Appellate Arbitral Tribunal, Judicial Intervention, India.

INTRODUCTION

The evolution of arbitration in India represents an ongoing effort to balance the freedom of parties to resolve their disputes privately with the need for effective court supervision. Using the mediation process to resolve disagreements, it provides several benefits like privacy, pliability, methodological effectiveness, celebration liberty as well as the irrevocability of arbitration judgments.

India subsequently enacted the Arbitration and Conciliation Deal, 1996, mainly in perspective of UNCITRAL's Product Law, aiming in building an arbitration-friendly approach using fewer courtroom interruptions than within prior years. The arbitration plan of India was however beleaguered by way of substantial court docket intercession, domination involving ad- hoc arbitrations, methodological delays plus the variation associated with statutory arrangement interpretations. In addition to these types of numerous problems, the Parliament incorporated remarkable revisions from the Agreement in 2015, 2019 and 2021 to minimize courtroom intercession, advertise institutional arbitrations, boost procedure productivity together with secure recognition concerning arbitrary judgments. Despite those adjustments, many underlying systemic difficulties & their implementation issues persevering with hampering.

In order to deal with them, in 2023 June, the Govt of The Indian subcontinent appointed an extra Higher Level Skilled Panel with Chairman Dr. T.K. Vishwanathan to overview the whole arbitration arrangement. [1]According to their own pointers the Draft Arbitration and Conciliation (Amendment) bill, 2024 offers implemented very many radical changes: the bolstering of institutional arbitration, providing recognition so that you can arbitration urgencies, instituting an Arbitration Council, developing an appellate arbitral body, restructuring Arbitration Seat related terms, setting- forth standard procedures and many others.

[1] **Report of the Expert Committee on Arbitration Law** (Dr. T.K. Viswanathan Chairperson, 2024).report-of-the-expert-committee-members-on-arbitration-law-2-526205.pdf

This post presents an endeavour with their vital research and an analysis of proposed modifications versus the historical impediments, whether they present sensible steps regarding to fixing structural shortcomings coupled with whether The Indian subcontinent may finally turn into truly Arbitration-friendly.

RESEARCH QUESTIONS

This paper aims to explore the following research questions:

What are the existing challenges and issues confronting arbitration in India?
How do the recommendations of the Draft Arbitration and Conciliation (Amendment) Bill, 2024 seek to address these challenges?
Are the proposed measures practical in implementation and will they boost India's positioning as an international business destination for dispute resolution?
What additional steps are necessary to foster a conducive arbitration regime in India?

RESEARCH METHODOLOGY

This is a doctrinal research paper, and the primary methodology will be based on extensive review and analysis of statutes and case laws. The paper will analyse the provisions of the draft Arbitration and Conciliation (Amendment) Bill 2024 and contrast these with the extant Arbitration and Conciliation Act 1996. Also, pertinent case laws will be reviewed to provide a contextual understanding of the evolution of arbitration laws and practices in India. Relevant contemporary literature, articles and reports will be examined for highlighting key challenges facing Indian arbitration and the effectiveness of existing legal frameworks. The paper will also review the arbitral practices adopted in other arbitration-friendly jurisdictions in the world for drawing comparisons and to assess the compatibility of the proposed changes with global best practices. Finally, the policy framework and relevant legal documents governing arbitration in India will be examined to determine the current status quo and the practical consequences of implementing the proposed changes in the draft bill.

THE PUSH FOR INSTITUTIONAL ARBITRATION: STRUCTURAL REALITIES AND CHALLENGES?

One of the proposals of the draft Arbitration and Conciliation (Amendment) Bill 2024 seeks to empower arbitral institutions by giving them powers to extend the tenure of arbitral tribunals or remove arbitrators, among other things. It is expected that this amendment would promote institutional arbitration in India and de-escalate the prevalence of ad hoc arbitration. Arbitration has been mostly ad hoc in India, and there were only a few arbitral institutions which had any real power to influence arbitration proceedings.

In ad hoc arbitration, due to the absence of a formal framework and the lack of administrative and secretarial support to the arbitral tribunal, arbitration tends to get dragged out due to disagreements on matters pertaining to appointment, fees, and seat of the arbitrators, etc

However, this amendment in the Arbitration and Conciliation Act, 2024, by giving more powers to arbitral institutions and broadening the definition of "arbitral institution", will overcome such obstacles by giving the institutions administrative control over the arbitration proceedings thereby making arbitration faster and more efficient. This amendment is a step towards globalization as, in other countries, as well arbitral institutions such as SIAC, LCIA, ICC, etc. play an important role in facilitating arbitration by providing administrative support and exercising control over various aspects related to arbitration. However, this amendment is built on an unrealistic assumption that arbitral institutions in India would be able to carry out their functions efficiently, because at present, arbitration is primarily conducted as ad hoc arbitration by retired judges.

Therefore, any significant impact of this reform hinges on the maturation of institutional arbitration. Another significant omission from the proposed amendment is the lack of a mechanism for managing arbitration fees. The amendment proposes to abolish the Fourth Schedule, which lists remuneration guidelines for arbitrators, leaving fee determination to arbitral institutions or the to-be-established Arbitration Council. While this offers much-needed flexibility in fixing arbitral fees, the absence of an operational Arbitration Council raises concerns, particularly for ad hoc arbitration. [2]

Additionally, the absence of transitional provisions for ad hoc arbitrations makes the implementation of this reform problematic. There is also a problem that the draft bill fails to provide transition mechanisms for ad-hoc arbitration, which makes ad-hoc arbitration useless. The draft bill allows arbitration institutions to develop rules for arbitration and enhances their capacity in arbitration. However, it fails to introduce transition mechanisms which allow ad-hoc arbitration to transform into institutional arbitration. The reform fails to realize that small

[2] *Arbitration and Conciliation Act, 1996*, Part IA (Sections 43A to 43M), inserted by the *Arbitration and Conciliation (Amendment) Act, 2019* (Act 33 of 2019).

businesses lack the capacity to move into institutional arbitration owing to the high costs of institutional arbitration.[3]

Therefore, while the reform recognizes the necessity of bolstering institutional arbitration, it still seems premature for reasons like the lack of transition mechanisms for ad-hoc arbitration, weak regulatory capacity and the incapacity of arbitration institutions to manage arbitration well.

SEAT AND VENUE CONUNDRUM: PROTECTING PARTY AUTONOMY

The problem of the distinction between the “place” of arbitration and “seat” is a grave concern in arbitration and conciliation act, 1996.[4] Because of the vague distinction, there were a multitude of disputes concerning which court has the jurisdiction over arbitration proceeding.

The proposed draft bill suggests either one of the following two options: One option states that the arbitration agreement explicitly contains a provision stating that determines the seat of arbitration and that the arbitration venue may be different from the seat of arbitration; on the other hand, an alternative option advocates that the arbitration act should allow the parties to determine the seat as one of either the place where the arbitration agreement was entered into or the place where the cause of action arose.[5]

The first option is more reasonable because it prioritizes party autonomy and comports well with international arbitration practice. Parties in commercial disputes are entitled to choose the venue and the seat of arbitration separately and independently. The venue could be stipulated by the parties and the seat, of arbitration, determines the supervisory jurisdiction of a court over arbitration proceeding.

The second option defeats the purpose of arbitration because it undermines the element of party autonomy which makes arbitration a popular and preferred choice for many businesses when opting to settle their commercial dispute through arbitration. The second option denudes parties of the freedom to decide the seat of arbitration and assumes that the seat of arbitration shall be only either the place of the cause of action or the place of performing the arbitration agreement.

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[3] **Law Comm'n of India, 46th Report on the Code of Civil Procedure, 1908 (1971).** ***also finds mention in Union of India v. Singh Builders Syndicate, (2009) 4*** SCC 523 (India)
[4] **Section 20 of the Arbitration and Conciliation Act, 1996,**
[5] Arbitration and Conciliation Act, No. 26 of 1996, § 20 (India).

However, in practice, businesses usually choose an arbitration venue that can be apart from the place where the commercial dispute occurred. Businesses would prefer places with a developed institutional arbitration framework and a proper legal framework to facilitate arbitration processes.

The second option ignores how the arbitration process is essentially a privilege which makes businesses free to choose a seat apart from one of the parties' seats, therefore being neutral. The first option is therefore, more acceptable because it embodies the notion of party autonomy and is an internationally accepted procedure.

EMERGENCY ARBITRATION: A DESIRABLE BUT ELABORATE REFORM

The draft arbitration and conciliation bill, 2024 has introduced another significant reform by providing a new section 9A that allows arbitral institutions to set forth rules concerning the appointment of an emergency arbitrator. It further declares that the arbitration awards made by emergency arbitrators will be as valid as awards made by the arbitral tribunal under section 17 of the Arbitration and Conciliation Act, 1996.

Previously, there were no provisions about emergency arbitration in the arbitration and conciliation act, 1996. Though numerous leading institutions such as SIAC, ICC Arbitration rules, LCIA had rules that permitted emergency arbitration.

The reform is desirable because it bridges a gap in the Arbitration and Conciliation Act, 1996 and minimizes judicial intervention in arbitration process. Previously, section 9 of the arbitration and conciliation act, 1996 mandated courts to pass interim measures by allowing immediate and urgent applications. The proposed reform allows parties to bypass court proceedings and go directly to emergency arbitrators which significantly cut down the judicial interventions.

Moreover, this reform reinforces the growth of institutional arbitration and provides an incentive for party members to opt for Institutional Arbitration Rules to speed up dispute resolution process. Also, this reform is aligned with international arbitration standards as several institutions offer rules related to emergency arbitration. There, however, exists some difficulties associated with this reform. [6]Firstly, the reform will apply only in Institutional

[6] Amazon.com NV Inv. Holdings LLC v. Future Retail Ltd., (2022) 1 S.C.C. 209 (India).

Arbitration. This section of Arbitration and Conciliation Act, 1996 does not provide for Emergency Arbitration in ad-hoc arbitration, as ad-hoc arbitration still largely governs commercial arbitration in India and small businesses are unable to comply with the high costs imposed for institutional arbitration. Secondly, the reform does not extend to foreign-seated arbitrations. The reform is implicit for Domestic Arbitration proceedings and does not have rules for those domestic arbitration proceedings that are instituted with a seat in a foreign country. Therefore, in this situation, Emergency Arbitration would be determined by the law that governs the foreign seat of arbitration.

Thus, the reform should have provided for foreign-seated arbitration as the unavailability of Emergency Arbitration in such proceedings will continue to attract judicial intervention in this aspect. [7]Therefore, it must be explicitly stated in the new section 9A that Emergency arbitration rules shall also apply to foreign-seated arbitration proceedings, otherwise the reform fails to achieve the objective of minimizing judicial interventions in arbitration and it will be ineffective as for Foreign Investors there would remain no reason to invest in a country where the arbitral institutions have not attained much capacity to conduct Emergency Arbitration well enough and where judicial intervention will be permitted for Emergency Arbitration.

STRENGTHENING INSTITUTIONAL ARBITRATION: REFORM OR PREMATURE TRANSITION?

One of the core policy goals of the Draft Bill is to wean Indian arbitration away from reliance on ad hoc methods in favour of institutional arbitration. Arbitration in India has historically gravitated towards an ad hoc approach where parties freely determine procedural rules and nominate arbitrators without institutional supervision. This method offers flexibility but can also lead to inconsistencies in practice, delays in appointing arbitrators, controversies around their fees, and prolonged dispute resolution.

To circumvent these issues, the Draft Bill seeks to bolster the role of arbitral institutions. A broader definition of “arbitral institution” now covers organisations managing arbitration proceedings under their own rules, in addition to those under the Arbitration and Conciliation Act, 1996. Crucially, several judicial functions such as the extension of an arbitrator’s mandate

[7] Shreya Jain, Mrinali Komandur & Shweta Kabra, 2024 Year in Review: Arbitration in India—Reset or Rewind? (2025).

and the substitution of an arbitrator where appropriate, are proposed to be taken over by authorised arbitral institutions.[8]

From an international perspective, Major global arbitration bodies like the Singapore International Arbitration Centre (SIAC), the London Court of International Arbitration (LCIA), and the International Chamber of Commerce (ICC) play an active administrative role by minimising court interference and expediting proceedings through the use of their standard institutional rules and procedures. The advantages of institutionalised arbitrations include speedy appointments of arbitrators, use of consistent procedures, administrative support, and transparency regarding fees.

The key issue for the Draft Bill's effectiveness is whether India's institutional infrastructure is ready for this shift. The assumption underpinning the transfer of judicial powers to institutions is that arbitral institutions in India possess the administrative wherewithal to take on these additional roles. In reality, most institutional arbitration in India is relatively nascent with several commercial disputes proceeding as ad hoc matters involving retired judges acting as arbitrators without the involvement of any arbitral institution. Simply transferring power without strengthening arbitral infrastructure is unlikely to bring immediate efficiencies.

A serious concern raised regarding the Arbitration Council of India's proposed role is that one of the suggested changes involves deleting Fourth Schedule which contains a model of fees for arbitrators. Instead, it will be left to either arbitral institutions or the Arbitration Council of India to prescribe those fees.

As much as it is good that the rates of compensation for arbitrators can be flexible, this particular suggestion brings more confusion than anything else right now since the Arbitration Council is not ready to take on any real form yet. In fact, the removal of the Fourth Schedule seems almost pointless since in the current environment most ad hoc arbitrations that take place within India will essentially have no arbitration fees guidelines until a more comprehensive set of regulations is introduced by the Arbitration Council.

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[8] **Arbitration and Conciliation Act, No. 26 of 1996, § 29A(3)–(6) (India).**

Another serious concern is that while the proposed change promotes institutional arbitrations, it does not offer enough to entice either ad hoc parties or even the ad hoc institutions to transition.

Small domestic businesses may prefer ad hoc arbitration due to the costs of institutional ones or simply due to the ability to tap into a bigger pool of resources that may be spread out more across the country rather than concentrated within a few big cities. If institutional arbitration is not boosted to higher standards, domestic arbitration will continue to be mostly ad hoc with only a subset of cases taking place within institutions.

Hence, although the spirit of shifting to institutional arbitration is laudable and is indeed the direction for India's arbitration, the reform could be perceived as being somewhat premature. Empowering arbitral institutions would need to be coupled with robust capacity-building initiatives, quality standards for arbitration institutions, financial support for operationalising and enhancing arbitration institutions nationwide, and phased measures for transition from ad hoc arbitration; otherwise, the mere transfer of powers from courts to these institutions may only shift burdens without much amelioration of the existing challenges.

Settlement of the Seat and Venue Confusion and the Protection of party autonomy

The Arbitration and Conciliation Act, 1996 remains somewhat unclear on what an arbitrary seat/venue is as it often refers to only as the 'place of arbitration' without define "seat", therefore have led to varied interpretation as per judicial interpretations and led to constant disputes in jurisdictions in regard to whose jurisdiction an arbitrator will fall in under? To address this, the Draft Arbitration and Conciliation (Amendment) Bill, 2024 suggest two optional ways to resolve the dispute:

Option I: Clearly separates 'place of arbitration' as the venue and 'seat of arbitration' allowing arbitration in any location independent of where the contract had been executed or for whichever reason a cause of action has arisen. This is in line with best practice norms regarding international arbitration and is supportive of party autonym as well.

Option II: which suggests to limit the 'place of arbitration' when such arbitration is of domestic concern only to the place the arbitration has occurred or cause of action for arising for dispute; that whilst may seem like an efficiency, dramatically limits party autonomy a key feature of arbitration which gives it its status; allowing parties to choose its venue regardless of its physical location and its law which governs proceedings. It also disincentives any business from choosing the arbitration route as opposed to courts; a trend which is supported by the establishment and development of arbitration hub such as Mumbai, Delhi, Hyderabad and GIFT City.

Therefore, it can be argued that option I is most effective, it not only defines seat and venue in clearest of terms so as to assist judges in reducing dispute on jurisdictions, which in terms of international arbitrations is critical to India's credibility as a viable Arbitration friendly jurisdiction it will also remove undue interference.

Emergency Arbitration And Interim Relief: A Welcome Reform With Practical Limitations

The Draft Arbitration and Conciliation (Amendment) Bill, 2024 introduces statutory recognition of emergency arbitration through the proposed Section 9A, enabling parties to obtain urgent interim relief before the constitution of the arbitral tribunal. Such relief is often necessary to preserve assets, protect confidential information, or prevent the destruction of evidence. Under the existing framework, parties must approach courts under Section 9, increasing judicial intervention at the preliminary stage. By recognising emergency arbitrators appointed under institutional rules and making their orders enforceable in the same manner as interim measures under Section 17, the Bill aligns Indian arbitration with international practice.

However, the reform has important limitations. It applies only to institutional arbitration, excluding the large number of ad hoc arbitrations in India, whose parties will continue to rely on courts for urgent relief. The Bill also does not clarify the enforceability of emergency awards in foreign-seated arbitrations, while the effectiveness of the framework ultimately depends on the capacity of Indian arbitral institutions, many of which continue to face infrastructural and administrative constraints.

The Bill also proposes deleting **Section 9(3)** to further reduce judicial intervention after the constitution of the arbitral tribunal. Although this reinforces arbitration as the primary forum for interim relief, a complete withdrawal of judicial oversight may create practical difficulties where the tribunal is unable to function due to resignation, death, or challenges to an arbitrator's appointment.[9] A more balanced approach would preserve limited court intervention in exceptional circumstances to ensure that parties are not left without an effective remedy.[10]

DELETION OF DELETION AND INTRODUCTION OF AN APPELLATE ARBITRAL TRIBUNAL:

"Most disputed issue on amendment bill"- A move towards more efficient and faster arbitration or an added layer of judicialization? Arbitration disputes under section 34 of AC Act. The Draft Bill provides for an option to parties to apply to an Appellate Arbitral Tribunal for the review of arbitration award with the rules prescribed by the administrating arbitration institution as would be the law.

The intention is to reduce burden of civil courts, speed up adjudication process and to maintain impartiality. While on the face it looks as an attractive solution, it brings along with it its own structural concerns and challenges. To begin with, an issue with the appointment of the adjudicating bodies: As proposed the appellate arbitral tribunal would be constituted by an arbitral institution that has administered the original proceeding. The institution would be the administering institution itself and as institutional bias is the norm in domestic institutional settings it would create another layer which has inherent bias. As explained earlier that arbitral institutions often look to protect their reputation so would certainly not overrule a decision delivered by an arbitrator serving its institution.

Thirdly, since no procedures, timelines for admission / disposal of appeal, appointment standards of members, code of ethics for Appellate arbitrary tribunal, have been provided. A complete delegation has been made for a sector where in most of the arbitral institution are immature and may not have enough resources or capability to act as appellate tribunal or to implement the proposed appellate procedure. [11]Lastly, as international arbitral are intended to finalize arbitration as soon as the award is pronounced and the purpose for less judicial intervention as with lesser enforcement procedure is not be defeated, however in India as many arbitrations are administered ad hoc, this provision too would primarily be applicable to limited institutions.

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[9] ***Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.* (2022) 1 SCC 712**

[10] Department of Legal Affairs, Ministry of Law and Justice, Notice inviting comments on the *Draft Arbitration and Conciliation (Amendment) Bill, 2024*, 18 October 2024.

[11] Hong Kong Int'l Arbitration Ctr., Code of Ethical Conduct (2017), Int'l Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (2021), London Court of Int'l Arbitration, Notes for Arbitrators (2017), Singapore Int'l Arbitration Ctr., Code of Ethics for an Arbitrator (2015).

Hence as far as the proposed appellate arbitrary tribunal as formulated in the present Draft bill is concerned it would lead to added layers in the arbitration proceedings resulting in undue delays and cost as also the spirit of international practice where award is considered final is defeated with unnecessary layer of appellate judicialization in domestic sphere.

FASTER TIMESCALES AND CASE MANAGEMENT: INTENT VS. CAPACITY

Responding to the concern of delays, the Draft Arbitration and Conciliation (Amendment) Bill, 2024 prescribes prescriptive time-lines for certain crucial procedures. The application under Section 8 and 11 have been capped at 60 days, [12]jurisdiction challenges in an arbitral tribunal under Section 16 is to be decided in 30 days, and the application under Section 37 to challenge awards to be presented within 60 days. Such deadlines intend to foster promptitude, giving greater certainty and confidence to commercial parties.

Despite this, it is doubtful whether merely imposing time-frames could be the solution, given that a significant part of the delays may spring from deep structural roots: such as scarcity of judicial and other manpower resources, the pile-up of case files, inadequacy of institutional support and technology and insufficient infrastructural facilities. [13]Absent these, statutory timeframes could only prove to be idealistic. Moreover, since the Draft Bill does not entail penalties for failing the prescribed time-frame, rigid compliance might potentially be an impossibility.

Further, hard-coding time-frames could prove detrimental in genuine circumstances and lead to hurried conclusions in complex matters.

Only concurrent institutional reforms-namely introduction of arbitration specialized divisions benches, strengthening of arbitral institutions and infrastructure along with technology adoption-can offer enhanced efficiency.

POST-AWARD REVIEW: EXPANDING PATENT ILLEGALITY TO INTERNATIONAL ARBITRATION

The finality of arbitral awards is a defining feature of arbitration and a key reason why commercial parties prefer it over litigation. Excessive judicial review undermines efficiency, increases costs, and weakens confidence in arbitration as an effective dispute resolution

[12] Arbitration and Conciliation Act, No. 26 of 1996, § 11(4)–(6) (India).
[13] Bharat Sanchar Nigam Ltd. v. Nortel Networks (India) (P) Ltd., (2021) 5 S.C.C. 738 (India).

mechanism. International arbitration regimes therefore limit court intervention to exceptional circumstances, preserving the enforceability and certainty of arbitral awards.

Against this background, the Draft Arbitration and Conciliation (Amendment) Bill, 2024 seeks to extend the ground for "patent illegality" under Section 34 to awards of International Commercial Arbitration. This is a worrying proposition as the doctrine of patent illegality has been inconsistently interpreted by Indian Courts and is, at best, a nebulous concept. By introducing this amendment, the Draft Bill, in the view of the author, would incentivize litigants to question the awards of commercial arbitrations on their merits as "patently illegal" and lead to post award judicial interference with awards on their merits. This is undesirable as Indian courts have generally been reluctant to interfere with awards on their merits and this amendment will make India less attractive as a seat of arbitration.

By contrast, the introduction of the **partial setting aside** of awards under Section 34(7) is a welcome change. Instead of setting aside the entire award, as is the case currently, or leaving the entire award intact as the other view appears to be, the court or the proposed Appellate Arbitral Tribunal can set aside the offending part of the award and remit the matter back to the arbitral tribunal with directions to recompute the award on the same evidence. This will have the effect of preserving the valid part of the award, avoiding the need to go through the arbitral process again and save time and costs to the parties. This amendment strikes a good balance between allowing limited judicial interference with awards and preserving the integrity of the arbitral process and is, in fact, one of the most attractive features of the Draft Bill.

THE PUBLIC PROCUREMENT PARADOX: CONTRADICTORY GOVERNMENT POLICY

An assessment of the Draft Bill cannot be confined to a consideration of its provisions. It is necessary to review India's arbitration policy as reflected in the general approach of the government. One of the major obstacles to reforming arbitration in India is that the executive policy is contradictory.

While the Draft Bill explicitly aims to promote arbitration by decreasing judicial intervention[14], bolstering institutional mechanisms, and expediting dispute resolution, a June 2024 Office Memorandum from the Ministry of Finance, titled "**Guidelines for Arbitration and**

[14] Delhi Metro Rail Corp. Ltd. v. Delhi Airport Metro Express (P) Ltd., (2022) 1 S.C.C. 131 (India).

Mediation in Contracts of Domestic Public Procurement," advises government departments, Public Sector Undertakings (PSU), Public Sector Banks (PSU Banks), and other governmental agencies from resorting to arbitration for domestic procurement disputes that are worth over Rs.10 crore. [15]For those disputes of equivalent value in domestic procurement not falling under the clause of 10 crore, and over the said monetary threshold, the parties are persuaded to attempt mediation, which if failed then the dispute is expected to go before ordinary civil courts.

Such a move presents a stark dichotomy in policy- while the Government is trying to strengthen arbitration through legislation, it is actively discouraging the use of arbitration in some of the nation's largest commercial contracts. Disputes arising out of domestic public procurements are often large-scale infrastructural disputes, including highways, railways, ports, defence, energy sectors, and public-private partnerships (PPP) that make up a large proportion of high value commercial disputes in India.

Their exclusion will inherently reduce demand for institutional arbitration services and harm confidence in the entire arbitration ecosystem. Practical issues also arise as a result of the above policy: Mediation, while a useful dispute resolution mechanism where both parties are inclined to negotiate, tends to falter where infrastructure disputes involving technical claims, contractual interpretation, delayed performance damages, and large financial liabilities call for an authoritative determination of the disputes, rather than mere facilitation of a settlement.

However, once mediation fails (which is a common occurrence in large value commercial disputes), parties will again turn to already heavily burdened civil courts. This seems to work against the objectives of judicial decongestion that are largely touted as the reasons behind these reforms. This ambiguity might also harm investor confidence-domestic and international businesses will weigh statutory reforms alongside executive action; if government entities themselves refrain from arbitration in major commercial contracts, private parties will begin to question the perceived robustness of India's arbitration framework. A coherent arbitration policy in India therefore requires the Government to align its legislative ambitions with its executive actions to build a strong and dependable arbitration system.

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[15] Dep't of Expenditure, Ministry of Fin., Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement (India, 2024

LINGERING STRUCTURAL GAPS: INSOLVENCY AND THIRD-PARTY FUNDING

While the Draft Bill has succeeded in addressing a few long-standing issues, there are many others where the present amendment is silent yet requires legislative intervention that is growing with the evolution of modern commercial arbitration.

Arbitration and Insolvency

The most complex interaction between existing laws and arbitration pertains to the arbitration process and the workings of the Insolvency and Bankruptcy Code, 2016 (IBC). An arbitrary moratorium against continuation of any proceedings against the corporate debtor is applicable upon the commencement of insolvency proceedings against the corporate debtor under Section 14 of the IBC. This application has led to significant questions on the intersection of arbitrations and IBC including, for example, the enforceability of an arbitration award obtained pre-insolvency against the corporate debtor and continuation of arbitral proceedings during insolvency resolution. None of these have been addressed by the Draft Bill. The absence of statutory mandate will leave a multitude of questions regarding interpretation entirely up to judicial determination. Creditors and businesses engaged in arbitral proceedings need predictable and coherent rules concerning the synergy between Indian arbitration law and Indian insolvency law.

Third-Party Funding

Third-Party Funding, yet another significant arena not addressed by the Draft Bill, has gained traction globally. Third-Party funding refers to a business arrangement wherein an external provider funds all or a portion of the costs of arbitration in exchange for an interest in the eventual outcome of the dispute. Such an arrangement permits financially restricted parties from pursuing meritorious but costly arbitration claims. International arbitration institutions worldwide readily recognize third-party funding arrangements whilst including conditions for disclosure by any party so that arbitrators can judge potential conflicts arising from the third-party's interest; institutional bodies like the Singapore International Arbitration Centre, therefore, provide for disclosure and transparency rules for any funding by third parties. The Draft Bill is silent on any mention, discussion or provision relating to third-party funding. This leaves questions of mandatory disclosure, resultant conflicts of interest, confidentiality obligations of the third party, recovery of funds in the event of adverse award, the ethical considerations involved, and many other unresolved disputes as commercial arbitration proliferates across borders. A robust framework to cover third-party funding will therefore be prudent and will assist accessibility to justice while ensuring transparency.

RECOMMENDATIONS

Despite several progressive reforms proposed in the Draft Arbitration and Conciliation (Amendment) Bill, 2024, a few significant amendments will go a long way in making the arbitration framework of India more efficient.

1. It will be prudent to phase in a transition toward institutional arbitration. Prior to vesting more powers in these institutions, it is necessary for a robust arbitration ecosystem to be built upon adequate infrastructure, trained and professional workforces, appropriate arbitration standards for institutional governance and territorial reach all over India.
2. The preference to only have the 'seat' of arbitration should be upheld as indicated in Option I, allowing party autonomy, an essential factor for attraction of both Indian and international commercial parties.
3. The provisions relating to emergency arbitration should not be restricted to the scope of institutional arbitration; but also clarify the recognition and enforcement of emergency awards from foreign seated arbitrations.
4. Outright deletion of Section 9(3) might not be beneficial; rather retention of limited court jurisdiction to provide interim relief when remedies administered by arbitrators are impractical and ineffective.
5. The proposed Appellate Arbitral Tribunal must have strong safeguards and measures in place, ensuring its institutional independence, appointment of its members, adherence to strict timelines for dispensing justice, and separation of ethics of appointment and administration from the appointing institution.
6. Patent illegality must remain as an excluded ground for setting aside in international commercial arbitration to ensure finality and strengthen India's status as a favoured destination for international arbitration.
7. Timely disposition mandated by the Act needs to be coupled with practical structural reforms such as specialist arbitration benches, digital cas management, increase in judicial appointments and improvement in administrative infrastructure.

8. Later reforms must be implemented to address hitherto pending issues of insolvency, third-party funding, confidentiality, and enforcement of foreign emergency arbitral awards.

CONCLUSION

The Arbitration and Conciliation (Amendment) Bill, 2024 has attempted some of the boldest steps at reforming the arbitration regime of India since the 1996 Act and it continues the Government's long-term push to make arbitration an attractive choice of dispute resolution by diluting court intervention, bolstering arbitral institutions, contemporising the law, and promoting India as a destination for international arbitration. Many of these proposals, such as allowing emergency arbitration statutory recognition, granting expanded powers to arbitration institutions and introducing a partial setting aside of an arbitral award, are welcome measures to increase the efficiency and efficacy of the framework.

At the same time, several problems arise in relation to the proposed amendment. First of all, the competence and jurisdiction of the Appellate Arbitral Tribunal raise questions about the separation of powers. Second, extending the list of patent infringements to international commercial arbitration is a step towards increased judicial oversight and loss of investment confidence. Third, the Bill cannot ensure the rapid resolution of disputes if it does not provide the necessary infrastructure for their effective implementation. Fourth, reliance on underdeveloped arbitration courts in the short term will damage the effectiveness of the adopted law. Finally, the most critical factor is the issue outside the limits of this project – government policy prohibiting arbitration of government contracts, which significantly undermines the confidence of economic subjects in the new system. In other words, for arbitration to develop, India will need more than just this Bill, and if the new government does not support the idea, time spent considering the draft will be wasted.

Overall, the draft Arbitration Bill is a step in the right direction, making India more attractive for business, but by itself, without corresponding changes, it will not bring the expected results. Thus, the Bill, if properly supported and supplemented by other documents, will allow India to take a step forward in the development of its arbitration practice.