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Comments on The Draft Arbitration and Conciliation (Amendment) Bill, 2024

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COMMENTS

DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024

THE PREAMBLE AND SECTION 1

The Potential Impact of the Proposed Amendments

1. Alignment to Strengthen Indian Arbitration

The amendment is aligned with the core purpose of the draft bill, which is to reduce ambiguity in the arbitration framework. Like Singapore, which has amended its Arbitration Act to focus exclusively on arbitration as a robust dispute resolution tool, this amendment may signal India's intent to make its arbitration framework more globally competitive.[1]

The amendment aligns with the Model Law's specific advocacy for arbitration in international commercial disputes by refining the focus on arbitration and not conciliation. This change brings India closer to international standards. It reflects the original goal of UNCITRAL, which emphasises the need for a uniform legal framework in arbitration rather than combining arbitration with conciliation.

Suggestions or Changes

1. Separate Act for Conciliation

Conciliation is vital in many commercial disputes, and maintaining business relationships is essential. Conciliation has solved 25-30% of the cases in the construction and infrastructure industry. Thus, a standalone Conciliation Act is proposed to address the removal of conciliation from the ambit of the Arbitration & Conciliation Act, 1996 (or the proposed 'Arbitration Act, 1996).

2. Separate enactments for domestic arbitration and International Arbitration

Research by the Queen Mary University of London found that 86% of corporate counsels,[2] view clarity in the arbitration framework as a critical factor when selecting arbitration venues. Considering the same, separate enactments for domestic and international arbitration are proposed. Singapore's decision to establish clear distinctions between domestic and international arbitration through the International Arbitration Act (IAA) and the Arbitration Act (AA) is a strong example of how clarity and separate regulatory frameworks enhance appeal.

[1] "International Arbitration (Amendment) Act 2020 – Singapore Statutes Online" https://sso.agc.gov.sg/ActsSupp/32-2020/Published/20201111170000?DocDate=20201111170000.
[2] "2008 Corporate Attitudes: Recognition and Enforcement of Foreign Awards – School of International Arbitration" https://www.qmul.ac.uk/arbitration/research/2008/.

Following Singapore's model, India could benefit from similarly clear legislative distinctions, thereby boosting its attractiveness to international entities.

SECTION 2- DEFINITIONS (THE DEFINITIONS OF 'ARBITRATION,' 'AUDIO-VISUAL ELECTRONIC MEANS,' 'ARBITRAL INSTITUTION,' 'COURT,' AND 'EMERGENCY ARBITRATION')

The Potential Impact of the Proposed Amendment

1. Section 2(1)(a) and 2(1)(aa): 'arbitration' and 'audio-visual means':

The amendment broadens the definition of "arbitration" to include proceedings conducted wholly or partly via audio-video electronic means. This is a significant shift towards accommodating modern technology in arbitration, especially in light of the global increase in remote work and digital communication.[3] There has been an increase in the use of audio-visual means for arbitration proceedings since the COVID-19 pandemic.[4] By formally recognizing electronic means in the definition, the amendment aligns with current practices and enhances the efficiency of arbitration. The amendment also aligns with the bill's aim to reduce the time and costs associated with arbitration.

Since the right to privacy is fundamental in India, private information disseminated during such proceedings must be handled with caution. However, there is a risk that the Council, under sub-section 5 of section 19, may set outdated or too rigid specifications, potentially stifling the flexibility that audio-video arbitration aims to introduce. The Council's specifications must promote accessibility for all parties, including those with limited technological resources.

It is suggested that the guidelines for conducting audio-visual electronic means are formulated referring to the EU General Data Protection Regulation ("GDPR") with the aim to limit processing, storage, transmission and erasure of information. Rules on express consent for processing information and record of said processing must be determined.

While simple contractual matters may easily be dealt with in virtual arbitrations, multi-party matters with multiple claims and voluminous evidence may render the process inaccessible. Considering the resolution of complex disputes, there appears to be a need to consider categories of cases which can be partly or entirely concluded 'online' without the physical

[3] Mittal Y and Law L, "Live Law" Live Law (January 15, 2024) https://www.livelaw.in/top-stories/use-of-audio-video-electronic-means-for-investigation-trial-according-to-bnss-246726#:~:text=The%20new%20law%20defines%20the%20%E2%80%9Caudio%2Dvisual%20electronic%20means%E2%80%9D,such%20other%20means%20as%20the.

[4] Dawn, "ICC Court Issues COVID-19 Guidance Note - ICC - International Chamber of Commerce" (ICC - International Chamber of Commerce, January 14, 2023) https://iccwbo.org/news-publications/news/icc-court-issues-covid-19-guidance-note-for-arbitral-proceedings/.

presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated. Hence, recognition of virtual arbitral proceedings must be supplemented by guidelines.

The minimum technical specifications for audio-video communication and protocols for securing confidential information must be specified. This would address potential issues with unequal access to reliable technology and ensure a standardized experience for the parties involved. Provisions must aim to minimise the 'digital divide' in arbitration.

2. Section 2(ea): 'emergency arbitration':

In jurisdictions like Singapore, including emergency arbitration provisions has led to an overall increase in applications for interim measures, showcasing its relevance in urgent situations. Thus, explicitly recognising emergency arbitrations can expedite resolving urgent matters, ensuring parties can obtain necessary interim measures promptly.[5] Thus, explicitly recognising emergency arbitrations can expedite resolving urgent matters, ensuring parties can obtain necessary interim measures promptly.

There are no detailed procedural guidelines on how emergency arbitrators are to be appointed, their powers, or the enforceability of interim orders they issue. This absence could lead to inconsistency in how different courts apply and recognise emergency arbitrator rulings. Thus, guidelines for arbitration institutions on determining rules related to emergency arbitrators' appointments, time limits, powers and types of reliefs can be defined. Suggestion: *"The rules governing the appointment of emergency arbitrators shall be established by the relevant arbitral institution, ensuring transparency and consistency in the process."*

Include clear guidelines on jurisdiction for arbitrations conducted solely via electronic means, specifying that the location of the "virtual seat" or other standardized criteria, such as the registered address of the administering institution, should determine the seat under Section 20.

3. Sections 2(1)(e) & 2A: 'court':

Minimisation of concurrent jurisdiction claims: Section 2A Subsection (1)(i) and (ii) specify jurisdiction based on the "seat of arbitration" and "subject matter of the suit" respectively. This amendment clarifies the jurisdiction of courts in arbitration proceedings, especially concerning the seat of arbitration. This proposed amendment will reduce ambiguity and enhance procedural predictability by establishing specific criteria that determine competent courts.

[5] "Emergency Arbitrators in Singapore" (Global Law Firm | Norton Rose Fulbright) https://www.nortonrosefulbright.com/en/knowledge/publications/0c310fce/emergency-arbitrators-in-singapore.

Potential Delays & Complexities: The provision allowing jurisdiction based on the "seat of arbitration" allows parties to choose venues at their discretion by arguing under Section 20 that a venue is more suitable than the other, leading to potential forum shopping. Thus, the risk of concurrent jurisdictional claims still needs to be eliminated, which might lead to legal complexities and delays.

Also, specific concurrent jurisdiction claims may arise in arbitration by audio-visual means because the law allows some rules based on physical arbitration changes as necessary. Judicial intervention in defining the law on this point will also be warranted.

SECTION 6- ADMINISTRATIVE ASSISTANCE

The Potential Impact of the Proposed Amendments

Clarity on the meaning of administrative assistance enhances efficiency in arbitration management. Administrative reforms have led to more cases being handled by the Singapore International Arbitration Centre (SIAC). In contrast, Indian arbitration institutions currently handle approximately 35-40% fewer cases, highlighting the potential for growth through enhanced administrative support. Administrative support leads to quicker resolution of cases which might come at the cost of increased expenses. The Supreme Court's observations in *Bharat Broadband Network Limited* v *United Telecoms Limited*[6] emphasised the critical need for professional, institutional support in arbitration, directly supporting the amendment's focus on institutional strengthening. This alignment extends to the reduction of judicial intervention, as demonstrated in the Swiss arbitration model, which reports a 92% satisfaction rate with administrative processes.[7] The Indian Supreme Court's progressive stance, particularly in *HRD Corporation v. GAIL (India) Limited*[8], emphasises the judiciary's recognition of the need for robust administrative mechanisms.

However, a potential impact may be an increased formality in arbitration by adding procedural layers, which may further affect the cost-effectiveness of the arbitration proceedings. Thus, it may complicate simple arbitration proceedings and may lead to over-bureaucratisation.

It is crucial to develop comprehensive qualification criteria for administrators, ensuring high standards of competency and professionalism in arbitration administration. Regular audits and

[6] Bharat Broadband Network Limited v. United Telecoms Limited (2019) 5 SCC 755.
[7] 'Evolution of Administrative Support in International Arbitration' (Kluwer Arbitration Blog, 2023) http://arbitrationblog.kluwerarbitration.com/2023/administrative-support-evolution/ (1 November 2024).
[8] HRD Corporation v. GAIL (India) Limited (2018) 12 SCC 471.

feedback systems may also be provided to ensure continuous improvement. The ICC model is helpful for training and standardisation.

Detailed cost guidelines should provide transparency and predictability in administrative expenses, helping parties better plan their arbitration budgets.

Standard operating procedures must be carefully crafted to provide clear guidance for routine operations while maintaining flexibility for unique situations. The Swiss Chambers' Arbitration Institution's success with standardised procedures suggests implementing detailed operational protocols focusing on digital infrastructure development.

SECTION 7- CHANGES TO THE MEANING OF 'ARBITRATION AGREEMENT'

This amendment addresses critical gaps identified in cases like *Trimex International FZE Ltd. v. Vedanta Aluminum Ltd.*[9], where the Supreme Court grappled with the validity of electronically concluded arbitration agreements. The New York Convention's interpretation of "agreement in writing" has evolved significantly, with 157 contracting states now recognizing various forms of electronic communications as valid for arbitration agreements. The proposed amendment significantly advances arbitration accessibility by removing procedural barriers and simplifying access mechanisms. The Supreme Court's observations in *Shakti Bhog Foods Ltd* v. *Kola Shipping Ltd.*[10] emphasized the need for Indian arbitration law to adapt to technological advancements.

Suggestions or Changes

For secure and efficient operations, implementing digital signature verification protocols should follow Singapore's Building and Construction Authority (BCA) model. This system has demonstrated remarkable reliability with a 99.9% success rate, offering a robust foundation for document authentication. The protocol would ensure seamless verification while maintaining the highest standards of security and authenticity in digital transactions.

The establishment of secure document repositories should be modelled after HKIAC's proven cybersecurity protocol, which maintains an impressive record of zero security breaches. This system would provide a fortress-like environment for sensitive arbitration documents while ensuring accessibility to authorised parties. The implementation would include multiple security layers and regular security audits to maintain this exemplary safety record.

[9] Trimex International FZE Ltd. v. Vedanta Aluminum Ltd. (2010) 3 SCC 1.
[10] (2013) 1 SCC 426.

The development of standardized electronic agreement templates should adopt ICC's comprehensive framework, which has achieved an impressive 85% adoption rate among users. These templates would streamline document preparation while ensuring consistency and compliance with legal requirements. The standardization would significantly reduce document preparation time and minimize errors in agreement formation.

Following SIAC's successful pilot program, the implementation of blockchain-based verification systems should be considered as it has demonstrated a vast improvement in verification efficiency. This cutting-edge technology would provide immutable records of all transactions and documents, ensuring transparency and trust in arbitration while significantly reducing verification times and administrative overhead.

SECTION 8- AN APPLICATION TO REFER PARTIES TO ARBITRATION– EXPEDITIOUS DISPOSAL (MAXIMUM TIME OF 60 DAYS)

The amendments should facilitate faster commencement of arbitration proceedings, eliminating traditional bottlenecks in the initiation phase. The proposed 60-day timeline aligns with international best practices such as those in SIAC and the International Law. The Supreme Court's observations in *Vidya Drolia* v *Durga Trading Corporation*[11] emphasized the need for quick referral mechanisms, directly supporting this amendment's approach.

However, several practical challenges may emerge during implementation. Court capacity issues could become apparent as the system adjusts to new timelines and procedures, potentially creating temporary bottlenecks. Resource allocation presents another significant challenge: courts and institutions must optimise their existing resources to meet new efficiency requirements. The establishment of effective compliance monitoring systems may initially strain administrative capabilities. Perhaps most crucially, maintaining the delicate balance between the quality of arbitration proceedings and the speed of resolution will require careful consideration and continuous assessment. This creates a nuanced challenge in practical application.[12] Parties to arbitration must adapt to compressed preparation timeframes, requiring more efficient case preparation strategies. Legal practitioners will face the challenge of adapting their strategies to align with expedited timelines while maintaining the quality of representation. Court administration systems will require significant restructuring to accommodate new procedural requirements and timeline management. Arbitration institutions

[11] Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1.
[12] 'Expedited Procedures in International Arbitration' (Singapore International Arbitration Blog, 2023) https://www.singaporelaw.sg/arbitration/blog/expedited-procedures (1 November 2024).

must revise their protocols and enhance technological infrastructure to align with the new procedural framework.

The amendment's effectiveness may face specific resource allocation issues that warrant careful consideration. Implementation challenges could arise from rapidly adapting existing systems and procedures to meet new timeline requirements. Additionally, systemic capacity constraints within the current arbitration framework may need to be addressed to ensure the amendment's objectives can be effectively realised.

Suggestions or Changes

For complex cases, it would be helpful to add flexible extension options based on SIAC's approach, which has provisions for extension. It is recommended that frequent monitoring systems be implemented, drawing inspiration from the ICC's supervision approach. For operational success, the framework should begin with implementing standardised referral forms based on the Stockholm Chamber's approach, which has achieved 92% user satisfaction. Timeline management might benefit from automation, such as incorporating components of SIAC's system, which maintains 95% accuracy in tracking case advancement.

SECTION 9- INTERIM MEASURES

The Potential Impact of the Proposed Amendment

This amendment removes the option to apply for interim measures during ongoing arbitral proceedings, restricting it to pre-commencement or post-award stages only. This change limits access to court intervention during arbitration proceedings. This amendment has the downside of preventing the intervention of courts during arbitration proceedings, which might be an essential requirement in some instances. Limiting court involvement during arbitration proceedings could streamline the process, but excluding the court's role entirely during this period may be premature.

Suggestions or Changes

1. **Alternative Approach**

Consider a limited exception allowing parties to seek court intervention for specific categories of interim measures that require judicial enforceability or when the tribunal is not yet constituted.

2. Additional Guidance

The amendment could benefit from clear guidelines on cases where parties still have recourse to courts for interim measures during proceedings, especially in urgent or exceptional situations.

SECTION 9A (ALONG WITH SECTION 17(DA))- EMERGENCY ARBITRATORS

Implementing emergency arbitrator provisions overcomes the shortcomings concerning the time for constituting the tribunal, thus allowing the arbitrator to influence the parties when their dispute arises, strengthening the arbitrator's position.

Emergency interim measures in court proceedings can be costly and time-consuming due to the need to translate foreign documents and local legal services. Courts often face case overload, causing delays in reviewing emergency interim measures requests. However, emergency arbitrators are typically quick and responsive to urgent requests, unlike court-imposed measures that may be costly and time-consuming. On the contrary, issues may arise due to emergency arbitrators needing the same powers in one country as in another. This may lead to disputes between parties to decide the seat and venue of the arbitration.

Since the aim and purpose behind the Draft Amendment Bill is to provide a further boost to institutional arbitration, reduce court intervention in arbitrations and ensure the timely conclusion of arbitration proceedings, there is a possibility that the introduction of such a section may act contrary to the aim, considering the lack of elucidation on the process of appointment of the emergency arbitrator. This may lead to challenges to the decisions of the emergency arbitrator, which, in turn, will increase court intervention in arbitration, and the continuation of litigation or arbitration proceedings will compensate against the time that would have been invested in constituting the tribunal.

Suggestions or Changes

i. Addition of a sub-section; emphasizing the procedure of appointment of an emergency arbitrator;
ii. Elaboration on whether parties can choose to opt out of emergency arbitration;
iii. Whether the emergency arbitrator can order an ex-parte award;
iv. Moreover, relief measures for the absolute power given to the arbitral tribunal over the decisions of the emergency arbitrator.

SECTION 11- APPOINTMENT OF ARBITRATORS

The Potential Impact of the Proposed Amendment

The amendment mandates that parties disclose the number and details of pending arbitration proceedings and arbitral awards related to disputes arising from a typical legal relationship. This disclosure requirement aims to enhance transparency and fairness. A new sub-section (6A) is introduced, setting a 60-day time limit for filing applications under sub-section (4), (5), and (6). This time limit ensures the timely initiation of arbitration. Since one of the several 'aims and purposes' behind the Draft Amendment Bill is to ensure the timely conclusion of arbitration proceedings, the provision above squarely aligns with the same.

SECTION 11A- FEES OF ARBITRATION INSTITUTIONS

The amendment seeks to regulate non-institutional arbitration and reduce inconsistencies in procedural rules. However, it may introduce a degree of rigidity, as the guidelines issued by the Council might not effectively address the specific needs of each case. This limitation on flexibility, essential to ad hoc arbitration, could hinder arbitrators from employing a dynamic approach to dispute resolution. Additionally, the phrase “occasionally” introduces ambiguity, lacking a specified timeline for introducing guidelines. Without such a timeline, any changes to the guidelines during an ongoing arbitration session would require parties to adhere to new procedural standards, potentially disrupting the arbitration process and increasing both time and costs.

The amendment may diverge from the bill’s overarching intent, as the lack of a defined procedure for fee determination could result in litigation and court intervention—outcomes that the bill seeks to minimise. Furthermore, the absence of oversight on the fees established by the Council undermines party autonomy and flexibility, which are essential principles of arbitration proceedings.

Despite some concerns, this amendment, with the necessary adjustments, is essential for establishing a clear framework for fee determination in the absence of governing agreements or rules. This amendment can potentially standardise costs and reduce unpredictability, ultimately encouraging the use of arbitration and furthering the objectives of the Act.

Suggestions or Changes

Several measures could be incorporated to enhance the amendment, drawing on an inter-jurisdictional approach as seen in the UNCITRAL Arbitration Rules, specifically Article 41(1), which addresses fee determination. The following adjustments could refine the amendment to ensure greater clarity and fairness:

1. **Establishing a clear criterion for fee determination**

Similar to the approach in UNCITRAL Rules, defining specific criteria based on case complexity and relevant factors would provide a structured framework. This would ensure that fees are proportionate to the demands of each case, thereby reducing the risk of arbitrary fee imposition.

2. **Mandating early disclosure of fees**

Requiring early fee disclosure, as outlined in Article 41(3)2 of UNCITRAL, would give all parties adequate time to review and, if necessary, contest the fees. Such transparency would foster trust and mitigate potential disputes before proceedings are underway.

3. **Ensuring uninterrupted arbitration proceedings**

Article 41(5) emphasises the importance of smooth arbitration even amid fee disputes. To create a comprehensive amendment, a clause ensuring that arbitration proceedings continue without delay in fee disagreement would help avoid interruptions and support timely award enforcement.

SECTION 16- COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

The amended portion of the existing provision, essentially sub-section (5), mandates that the arbitral tribunal must decide on the issue of jurisdiction as a preliminary issue within 30 days of the filing of the application. This time limit is subject to exceptions where the tribunal deems it necessary to defer the decision for reasons to be recorded in writing. The proposed amendment can effectively expedite the arbitration process and prevent unnecessary delays. Additionally, it can make arbitration in India more attractive to international parties.

The proposed amendment aims to abide by the primary aims of arbitration as a dispute resolution mechanism, that is, to ensure that arbitration is a 'fast-track' dispute resolution mechanism. The proposed amendment blends necessary flexibility by including the possibilities of delays wherein preliminary issues under sub-section (2) and (3) might not get resolved due to the complexity of the dispute or any other pertinent reason.

SECTION 18- SUBSTITUTION OF THE WORDS 'FULL' WITH 'FAIR AND REASONABLE'

The Potential Impact of the Proposed Amendment

The substitution of "full opportunity" with "fair and reasonable opportunity" introduces a degree of subjectivity and discretion into the arbitral process. While the intent may be to strike a balance between procedural efficiency and substantive justice, this change can potentially curtail the rights of parties to present their case effectively.

By limiting the opportunity to a "fair and reasonable" standard, the process may be subject to the biases and interpretations of the arbitrators. This could lead to situations where parties are denied the chance to fully present their case, potentially leading to unjust outcomes. In complex cases, particularly those involving multiple parties or intricate legal issues, a "full opportunity" is crucial to ensure a comprehensive and fair resolution.

A "full opportunity" guarantees that parties have the adequate time, resources, and procedural mechanisms to present their case effectively. It ensures that the arbitral process is transparent, impartial, and conducive to a just outcome. By contrast, a "fair and reasonable" opportunity may not provide the same level of assurance and could lead to procedural unfairness.

While the proposed amendment may or may not ensure a timely conclusion of arbitration proceedings, the reduction of court intervention in arbitration proceedings may not materialize, as the parties not being given the 'full' opportunity to be heard might lead them to challenge the actions or order of the arbitrator or arbitral tribunal, thus also adding to impending litigation. Such an amendment should not be included, as it poses a threat to the equality of the parties, as well as casts doubt on justice being ensured. There appears to be no apparent reason as to why the substitution is necessary.

SECTION 19(3)- DETERMINATION OF RULES OF PROCEDURE

The Potential Impact of the Proposed Amendment

The amendment aims to regulate non-institutional arbitration and reduce inconsistencies in rule followed between procedures. However, it might lead to possible rigidity, where the guidelines issues by the Counsel might not be best suited to the needs of the case. Flexibility, which remains central to ad hoc arbitration, may be limited due to such rules. Such prescriptive guidelines may hinder the arbitrators from adopting a dynamic approach to dispute resolution. The term 'time to time' leads to ambiguity, for there is no specified timeline for introducing the guidelines. Further, in absence of such a specified timeline, if the guidelines are changed during an ongoing session, parties will have to adhere to new procedural standards, thus, disrupting the process of arbitration and increasing time and costs. The amendment may conflict with the objective of promoting timely conclusions in arbitration proceedings. Unexpected changes in procedural rules could introduce delays, as arbitrators may require time to familiarize themselves with the updates. Moreover, if the parties do not agree on the new rules, seeking clarifications may result in additional delays in the process.

Including the amendment, with appropriate revisions, could be advantageous for ensuring an effective arbitration process. Clear procedural guidelines would provide arbitrators with a framework that facilitates a smoother and more efficient procedure.

Suggestions or Changes

To enhance the amendment, several measures could be incorporated, drawing on an interjurisdictional approach as seen in the UNCITRAL Model Law on International Commercial Arbitration, specifically Article 19[13], which determines rules of procedure. The following adjustments could refine the amendment to ensure greater clarity and fairness:

1. **Allowing scope for mutual agreement between the parties**

The provision can be revised to emphasize that the parties can retain the freedom to determine procedural rules and may opt out of the council's model guidelines if they mutually agree on an alternative procedure. This approach preserves party autonomy while providing a standardized procedural framework that can be followed in the absence of a mutual agreement, ensuring both flexibility and consistency in arbitration proceedings.

2. **Allowing scope for consultation with the parties**

Article 22[14] of the ICC Rules of Arbitration emphasizes the importance of collaboration between the tribunal and the parties. If this provision is included in the revised amendment, it may provide the tribunal the flexibility to implement measures that suit the specific circumstances of each case. By consulting the parties, the tribunal can ensure that procedural decisions are aligned with their needs, thus promoting efficiency and minimizing delays.

SECTION 20- SEAT OF ARBITRATION

Proposed: Option I

Seat of arbitration.—(1) The parties are free to agree on the seat of arbitration.

(2) Failing any agreement referred to in sub-section (1), the seat of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any venue it considers appropriate for consultation

[13] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2013), art 19.
[14] International Chamber of Commerce, ICC Rules of Arbitration (2021), art 22.

among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

The Potential Impact of the Proposed Amendment

Assessment of Change: The amendment replaces "place of arbitration" with "seat of arbitration," clarifying that "seat" denotes the legal jurisdiction governing the arbitration, as opposed to the "venue," which is the physical location where hearings may occur. This distinction aligns Indian arbitration law more closely with international arbitration terminology, particularly Article V of the New York Convention, 1958[15], reducing confusion and aligning the procedural approach with international best practices.

Expected Outcomes: This shift should provide clarity on jurisdictional matters, reducing the risk of legal challenges related to ambiguities in interpreting the place versus the seat of arbitration. It could help prevent jurisdictional conflicts by clearly establishing the governing law and supervisory court for arbitration proceedings. For instance, the law that governs arbitration agreements is generally defined by the Parties' agreement, and if there is no agreement, the law of the arbitration seat is applicable.[16]

Objective of the Amendment: The amendment appears intended to modernize arbitration practices in India and bring greater clarity to jurisdictional issues. This aligns with an overarching goal of making India a more favourable arbitration venue and reducing ambiguities that could lead to legal disputes.

Consistency Check: By distinguishing "seat" from "venue," the amendment aligns well with the bill's goals to enhance clarity and encourage international parties to arbitrate in India, reducing potential jurisdictional disputes.

Necessity of Inclusion

Reason for Inclusion: The amendment is necessary for achieving greater clarity and alignment with international arbitration standards. Recognizing "seat" as distinct from "venue" ensures that legal jurisdiction and the applicable arbitration law are clearly understood, which is particularly crucial for international parties unfamiliar with Indian arbitration terminology.

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) Article 5.
[16] ICC Case No. 6149.

Examples from Other Jurisdictions: Jurisdictions like the UK and Singapore[17] make a clear distinction between "seat" and "venue," with the "seat" defining the jurisdiction and legal framework applicable to the arbitration, while the "venue" is merely the physical location of hearings. Adopting this language brings India's approach closer to these established arbitration hubs.

Suggestions or Changes

1. **Additional Clarification**

It would be helpful to add an explanation in the Act or in the legislative notes distinguishing "seat" from "venue" for clarity, particularly for domestic parties who may not be familiar with this distinction.

2. **Guidance on Multi-jurisdictional Arbitrations**

For complex cases involving parties from multiple jurisdictions, further guidance on selecting a seat (when the tribunal determines it) could be valuable. For instance, a checklist or criteria for the tribunal's consideration when deciding on the seat could be useful to ensure consistency.

3. **Clarification of "Venue" Definition**

To avoid confusion, "venue" could be explicitly defined as the physical location where hearings may occur, distinct from the "seat" that determines the legal jurisdiction. This would prevent misinterpretation, especially by parties and practitioners unfamiliar with the proposed terminology shift.

Miscellaneous

Practicality of Enforcement: This amendment should be easily enforceable since it primarily clarifies terminology rather than changing procedural requirements. However, disseminating knowledge about the significance of "seat" versus "venue" may be necessary for seamless adoption.

Alignment with Global Arbitration Standards: This change places Indian arbitration practice in line with UNCITRAL and the standards in major arbitration hubs[18], which could improve India's standing as an arbitration-friendly jurisdiction for international contracts.

[17] FirstLink Investments Corporation Ltd v GT Payment Pte Ltd.
[18] The UNCITRAL Model Law on International Commercial Arbitration.

Proposed: Option II

(1) In case of domestic arbitration other than international commercial arbitration the seat of arbitration shall be the place where the contract/arbitration agreement is executed or where the cause of action has arisen.

(2) Notwithstanding sub-section (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any venue it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

The Potential Impact of the Proposed Amendment

Assessment of Change: Option II mandates that, in domestic arbitration (excluding international commercial arbitration), the "seat" of arbitration will be either the location where the contract/arbitration agreement is executed or where the cause of action arose. This removes party autonomy in choosing the seat, which could simplify some domestic arbitrations but also limit flexibility and potentially increase challenges for parties located elsewhere.

Expected Outcomes: This change might streamline the process by automatically setting the seat of arbitration in cases without international elements, potentially making domestic arbitrations faster and less disputed. However, it may lead to logistical inconveniences or increased costs if parties are required to arbitrate in a location dictated by the law, regardless of mutual convenience or preference.

Objective of the Amendment: The bill's likely purpose is to make arbitration more efficient and reduce jurisdictional disputes. While this amendment could reduce preliminary disputes about the seat, it limits party autonomy, a fundamental principle of arbitration, and could discourage parties from using arbitration in cases where location flexibility is critical.

Consistency Check: This amendment aligns with simplifying procedural issues in domestic arbitrations. However, it may contradict the principle of party autonomy, which is generally a core value in arbitration, especially if parties had valid reasons to agree on a different seat for practical reasons.

Necessity of Inclusion

Reason for Inclusion or Exclusion: While automatic seat assignment might reduce initial disputes in determining jurisdiction, this provision could lead to rigidity in cases where parties

would otherwise agree on a more suitable location. Given arbitration's emphasis on flexibility and party autonomy, this amendment might be restrictive.

Examples from Other Jurisdictions: Most arbitration-friendly jurisdictions, including Singapore, the UK, and Hong Kong, allow parties to select their seat and do not impose a mandatory seat based on the contract's execution or cause of action.[19] By comparison, this amendment could put India at odds with international standards that prioritize party autonomy.

Suggestions or Changes

1. **Alternative Approach**

Consider a flexible provision that allows parties to opt out of the mandated seat in sub-section (1) by mutual agreement. This would balance efficiency in cases where parties do not select a seat with the flexibility to choose a convenient location if both parties are in agreement.

2. **Clarification on Applicability**

Adding a note that this provision only applies when parties have not explicitly agreed on a different seat could help avoid potential misunderstandings. The amendment should clearly state that this default seat applies only in the absence of an express agreement between the parties.

3. **Option for Challenging the Seat**

Allowing parties to petition the tribunal or the court to alter the seat if it imposes an undue hardship could preserve flexibility while minimizing disputes.

Miscellaneous

Practical Challenges: For parties operating in multiple regions within India, a fixed seat based on the contract's location or cause of action may not be practical and could create avoidable challenges, especially if the designated location is far from the parties' business operations or legal resources.

Potential Impact on Arbitration's Popularity in India: Imposing a rigid rule for seat designation could make arbitration less attractive for domestic parties who may need flexibility based on specific circumstances.

[19] Anupam Mittal v. Westbridge II Investment Holdings [2022] SGCA 1; Sulamérica Cia Nacional de Seguros SA and others v. Enesa Engelharia SA and others [2013] 1 WLR 102; Enka v. Chubb, [2020] UKSC 38.

SECTION 29A- TIME LIMIT FOR AWARDS

The Potential Impact of the Proposed Amendment

The amendment seeks to expedite the process, which is the fundamental value of arbitration in contrast to court litigation, by revising the arbitral award's time limit. The question of which institution should be contacted, however, is unclear. Additionally, another matter that may give rise to disparities is the question of which court will have jurisdiction. The amendment is in conflict with the goal of fostering party autonomy because it is unclear which court must be approached for the extension. Additionally, the question of whether to approach the court or an arbitration institution detracts from the amendment's original intent.

Necessity of Inclusion

Including the amendment, with appropriate revisions, could be advantageous for ensuring an effective arbitration process. Clear guidelines as to which institution to approach can help in better implementation of the provision.

Suggestions or Changes

Section 29A specifies time limit for arbitral awards and also provides for extension which may be granted a court or an arbitral institution. However, the amendment fails to clearly indicate which entity will precedence over the other incase When a higher court appoints the arbitrator especially when the arbitration calls for a special treatment. A confusion is further spawned due to opposing judgements by various courts.

In *Nilesh Ramanbhai Patel v Bhanubhai Ramanbhai Patel,*[20] it was held by Gujarat HC that term court cannot be understood in context of Section 2(1)(e) of the Act. It held that if a court has initially appointed an arbitrator and the same should retain jurisdiction over the matter of extension. Such interpretation was also held in *Cabra Instalaciones Y Servicios, S.A. v Maharashtra State Electricity Distribution Company Limited*[21] which supported a narrow reading of the term ‘court’ to mean the appointing court, thereby limiting other courts' jurisdiction.

But in contrast, Kerala HC in the case of *M/s. URC Construction (Private) Ltd. v M/s. BEML Ltd.*[22] held the application under 29A should lie with the principal civil court per Section 2(1)(e) of the Act. Therefore, creating a more expansive interpretation of ’court,’ allowing for civil courts to potentially handle such requests if the High Court lacks original jurisdiction,

[20] Nilesh Ramanbhai Patel v Bhanubhai Ramanbhai Patel (2018) SCC OnLine Guj 5017.
[21] K.I.P.L. Vistacore Infra Projects J.V. v Municipal Corpn of the city of Ichalkarnji (2024) SCC OnLine Bom 327.
[22] M/s URC Construction (Private) Ltd v M/s BEML (2017) SCC OnLine Ker 20520.

potentially conflicting with the narrower interpretations of other courts. These cases altogether illustrate the prevailing confusion over jurisdiction overlaps of the courts. Therefore, focus needs to be laid upon this.

SECTION 30- AMENDMENT TO 'SETTLEMENT'

The Potential Impact of the Proposed Amendment

Since the Mediation Act, 2023 expands the scope and statutorily recognize pre-litigation mediation, online mediation, community mediation, and conciliation under the definition of 'mediation',[23] this would have the effect of dispensing with the concept of conciliation, in line with the international practice of using the terms 'mediation' and 'conciliation' interchangeably as done previously by the Supreme Court of India and as documented in the Singapore Convention.[24] In light of the same, removing 'conciliation and other measures' should not have as much of an impact if the amendment is implemented.

Unlike Section 16 of the Arbitration and Conciliation Act[25], which requires the award's scope to be limited to the disputes referred to arbitration under the arbitration agreement, the terms of the mediated settlement agreement may go beyond the scope of matters that have been referred to mediation. Therefore, this method recognizes that conflicts can be complex and linked, in contrast to the Arbitration and Conciliation Act, where the decision is limited to the issues that were formally referred to arbitration. Given that parties can negotiate on several facets of their relationship or disagreement, it might help to achieve a more thorough and long-lasting resolution. However, India became a signatory to the Singapore Convention on Mediation ("Singapore Convention") on 7 August 2019, it is yet to be ratified. As a result, the Mediation Act does not incorporate the Singapore Convention on Mediation, similar to how the Arbitration and Conciliation Act, 1996 ("A&C Act") adopted the "United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." A framework for the cross-border enforcement of settlement agreements reached through international mediation is contemplated and provided under the Singapore Convention.[26]

[23] The Mediation Act, 2023, Section 3(h).
[24] Rajya Sabha Department Related, Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, One hundred Seventeenth Report on the Mediation Bill 2021, Volume 1 2022.
[25] The Arbitration and Conciliation Act, 1996, Section 16.
[26] Rajya Sabha Department Related, Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, One hundred Seventeenth Report on the Mediation Bill 2021, Volume 1 2022.

Necessity of Inclusion

The amendment to Section 30(1) should be included. The amendment to Section 30(2) should not entail the substitution of the term but should provide an option between the two instead.

Suggestions or Changes

Section 30(2) should add 'a mediated settlement agreement' as an alternative, instead of completely replacing an arbitral award, for reasons that have been mentioned in the 'Potential impact' segment'. Section 30(3) and 30(4) should thus not be omitted and should be amended to provide for mediated settlement agreements as well.

SECTION 31- FORM AND CONTENTS OF ARBITRAL AWARD

The Potential Impact of the Proposed Amendment

The section aims at providing procedural safeguards, ensuring that proceedings remains fair and transparent. An essential inclusion includes the requirement for a "proper notice" to the parties, which aims to ensure transparency and procedural fairness by mandating that each party is informed about the arbitration proceedings, as well as the appointment of the arbitrator. The provision seeks to ensure that each party has the opportunity to introduce any changes and the proceedings move forward with mutual agreement. While this provision seems straightforward, it could introduce certain issues due to the ambiguity as to what would constitute a 'proper notice'. This ambiguity could lead to disputes, causing delays in their resolution and confusion due to varying interpretations of the term. The provision's intent to ensure "proper notice" aligns with the goal of promoting fairness and providing boost to institutional arbitration. However, the ambiguity around what constitutes "proper notice" risks increasing court intervention, as parties may challenge the validity of notice, leading to potential judicial review. This could also delay proceedings if arbitrators or courts need to address notice-related disputes, which ultimately undermines the aim of ensuring timely arbitration.

Necessity of Inclusion

Including the amendment is essential to ensure valid agreements, compliance with mutually agreed procedures and fair composition of the tribunal. Including such comprehensive conditions in the arbitral award promotes accountability and serves as a guarantee of fair proceedings consistent with the key principles of arbitration. However, resolving certain unclear terms in the amendment may improve its effectiveness and applicability.

Suggestions or Changes

To enhance the amendment, several measures could be incorporated, drawing on an interjurisdictional approach as seen in the Singapore International Arbitration Centre (SIAC) Rules, specifically Article 3, which determines requirements of notice of arbitration. The following adjustments could refine the amendment to ensure greater clarity and fairness:

1. Provide required elements of the notice

Referring to 3.1(b)[27], the provision could be refined to clearly define what constitutes proper notice by specifying the time frame within which parties may contest the appointment of an arbitrator and challenge the validity of the proceedings. Additionally, it should outline the necessary details regarding the arbitrator that must be included in the notice to adequately inform the other party. Furthermore, the provision should set a definitive response period for parties to acknowledge the notice.

2. Review by the Tribunal

An arbitral institution can play a pivotal role in ensuring that all procedural disputes, particularly those concerning proper notice, are addressed and resolved before arbitration proceedings commence. By implementing a structured preliminary review process, the institution can verify that notice requirements are fully met, including the time frame for contesting arbitrator appointments and the adequacy of information provided about the arbitrator. This preliminary review process, ideally set within a specific time frame, would involve a clear checklist of procedural criteria, such as notifying all parties of their right to contest appointments and stipulating a deadline for raising objections. Additionally, the institution can mandate a preliminary procedural hearing if any notice disputes arise, allowing both parties to present concerns at an early stage. By resolving such matters upfront, and ensuring a dedicated response period, the institution minimizes the risk of later procedural disruptions, preserving the flow of the arbitration process and bolstering the enforceability of the final award.

SECTION 31A(3)(C)- EFFECT OF FRIVOLOUS CLAIMS ON COST OF AWARDS

The Potential Impact of the Proposed Amendment

The Section deals with regime of costs and the sub-section with factors to be borne in mind by the Court or Arbitral Tribunal while determining the costs. The proposed amendment

[27] Singapore International Arbitration Centre Rules (2016), art 3.1(b).

significantly narrows down the applicability of the section, rendering delays caused during other parts of the dispute resolution an immaterial factor for the determination of costs. Any other unreasonable behaviour during other parts of the dispute resolution process shall have to be filed under other sub-sections of the Act, streamlining the ambit of this sub-section. However, the Court might face litigation on the topic of ascertaining precisely the point on which arbitral proceedings are said to be initiated. The proposed amendment does not promote institutional arbitration, but it does display potential to reduce court intervention, and thereby ensure timely conclusion of arbitration proceedings. As two out of three aims of the amendment are fulfilled, the amendment should be included in the Act.

SECTION 32- TERMINATION OF PROCEEDINGS

The Potential Impact of the Proposed Amendment

The amendment aims to streamline and improve the overall clarity on handling of arbitration records which until now did not find any mention in the law. While returning records to the institution helps in establishing confidentiality and in the case of ad-hoc arbitration is directs focus towards party autonomy by returning records to them. However, mandating record returns to institution could be rigid since there could be issues on retention period of the document, overall confidentiality and data protection of the data. The amendment may amendment may conflict with the objective of promoting party autonomy and confidentiality in arbitration proceedings. Parties should have the autonomy to choose where they want to provide and keep documents with the institution or not. Furthermore, if parties want to attack some timeline of fixed period to it also needs to be addressed.

Necessity of Inclusion

It might be beneficial to include the amendment with the necessary revisions to guarantee an effective arbitration procedure. This amendment is a step forward into streamlining the process of record handling in arbitration.

Suggestions or Changes

To enhance the amendment, several measures could be incorporated –

1. **Specify duration of record retention**

Introduction of a specific time period for which arbitration records can be retained by the institution, unless otherwise agreed by the parties. A clear time period for retention of documents can help in avoiding any future disputes in regards to the management of the records

and provides for confidentiality of documents. This goes in line with Article 30 of the LCIA Rules[28] which emphasizes on the confidentiality of the parties.

2. Reference of Confidentiality and Autonomy provisions

Article 34(5) of the UNCITRAL Arbitration Rules[29] emphasizes on the confidentiality aspect of the awards. Further, Article 19 of the UNCITRAL Model Law[30] allows parties to agree on the procedure. Based on this, firstly the language of the amendment should be modified in a manner that the returning of the records must comply with the existing confidentiality terms as set by the parties if any. The revised version shall add "any confidentiality obligations" to reinforce this idea. Secondly, if there exists any prior agreement to the management of documents the same should govern record handling post-proceedings. Therefore, there should be inclusion of "In accordance with any party agreement on confidentiality and retention of records."

SECTION 34- APPLICATION FOR SETTING ASIDE AN ARBITRAL AWARD

The Potential Benefits of the Proposed Amendment

Introduction of an Appellate Arbitral Tribunal- Allowing parties to approach an Appellate Arbitral Body reduces judicial interference within the arbitration regime thereby reducing judicial backlog and ensuring speedy resolution of disputes within a self-contained arbitral framework. This also aligns with various international arbitration standards which aim at minimizing the role of judicial courts within the arbitral process.

Mandatory Disclosure of Challenges/Proceedings- By requiring the parties to disclose pending or decided challenges in other related disputes, the amendment promotes transparent procedure of dispute resolution and consistency across cases. Moreover, such a measure reduces the chances of conflicting judgments and disputing awards in cases forming a part of common legal procedure.

Defining the Grounds for Set Aside- Outlining and defining specific grounds for setting aside ensures that only issues of procedural fairness, incapacity and public policy can vacate an award. While also providing direction to the adjudicating authority, it outlines the scope of appealable issues, limiting arbitrary or frivolous challenges that may prolong the resolution of a dispute.

[28] London Court of International Arbitration, LCIA Arbitration Rules (2020) art 30.
[29] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2021), art 34(5).
[30] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985), art 19.

Revisiting Merits of a Case- The Amendment also restricts the setting aside of an award on merits, fostering finality by preventing re-litigation on the grounds of merely legal errors or evidence re-evaluation. This practice aligns with the international standards where arbitral awards are respected and final unless substantial legal violations are apparent on the face of it.

Partial Set Aside and Continuation of Arbitration- After partial set aside, the original tribunal is to correct the specific issues without discarding the entire award. This not on conserves the resources of parties to the disputes but also prevents unnecessary delays by keeping much of the original adjudication intact.

The Potential Problems of the Proposed Amendment

Public Policy and Patent Illegality- While the proposed amendment delineates the factors constituting public policy, these terms can still be interpreted widely. This ambiguity might lead to inconsistent interpretations and subjective judgments.

Over-reliance on Appellate Tribunals- The new Appellate structure might complicate the arbitral process, introducing another layer leading to increased costs and delay in the arbitration procedure.

Disclosure Requirement- Disclosure of all proceedings involving numerous related transactions could potentially burden parties with extensive disclosure obligations and delays, especially in complex arbitrations. Moreover, the amendment does not specify if such obligation is mandatory or merely obligatory in nature, thus creating ambiguity.

Suggestions or Changes

1. **Refine the Scope of "Public Policy" and "Patent Illegality"**

Narrowing down the terms "public policy" and "patent illegality" by specifying criteria within each category will ensure objectivity. For instance, "*most basic notions of morality of justice*" could be clarified by reference to established legal doctrines or precedents. This will ensure more consistent rulings on these grounds, minimizing potential for subjective and overly expansive interpretations that lead to excessive challenges. Moreover, present jurisprudence[31] defines patent illegality as a part of the public policy exception to set aside an award. Given the delineation of the two as different grounds to set aside an award, definitional ambiguity remains.

[31] ONGC Ltd. v. Saw Pipes Ltd., AIR 2003 Supreme Court 2629.

2. Clarify Disclosure Requirements for Related Disputes

A threshold must be provided or a criterion for mandatory disclosure of other disputes in the same legal relationship. For instance, disclosures could be limited to cases where awards might directly influence the outcome of the current dispute, avoiding irrelevant and burdensome disclosures. Such refinement will ensure disclosure are meaningful and reduce administrative burden on both parties and the adjudicating authority.

3. Strengthen Procedural Safeguards for Appellate Tribunals

Specific procedural safeguards must be ensured to provide independence in operation, akin to judicial review standards for Appellate tribunals as well. For instance, setting fixed timelines for resolving appeals and limiting the scope of review to procedural issues unless otherwise warranted will ensure both effective and autonomous speedy resolution of disputes without compromising on fairness.

4. Clarify the Tribunal's Bound Obligation in Partial Set-Asides

The extent to which a Tribunal is bound by the findings of an original award must be defined when reconsidering the issues in a partial set-aside. Allowing flexibility in cases where new or additional evidence may reasonably affect the findings and allow tribunals to give due consideration to change without contradicting the finality of unchallenged award

SECTION 34A- APPELLATE ARBITRAL TRIBUNAL

The amendment adding Section 34A to the Arbitration and Conciliation Act, 1996 is a welcome move from the perspective of institutional arbitration. It allows arbitral institutions to entertain applications made under Section 34 by way of appellate arbitral tribunals. The procedure to be followed by this appellate tribunals is to be determine by the Indian Council for Arbitration.

The validity of appellate arbitral proceedings has earlier been upheld by the Supreme Court of India in *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*[32], where the election of an appellate arbitral mechanism was found to be a legal right which has come into existence by virtue of the parties' agreement. However, the current agreement envisages the replacement of Section 34 proceedings by an appellate arbitral tribunal, when the same has been provided by institutional rules chosen by the parties.

[32] Civil Appeal No. 2562 of 2006.

The Potential Impact of the Proposed Amendment

Promotion of Institutional Arbitration

The Act allows only arbitral institutions to provide for appellate proceedings. The same has not been provided for ad-hoc proceedings or otherwise. Institutions often adopt appellate proceedings, for example the ICC Rules. Thus, this move will promote the adoption of institutional rules, which will allow parties to avoid lengthy proceedings in Section 34 courts.

Trust building in Indian Institutional Arbitration

The checking of arbitral awards by appellate tribunals will add to the quality of institutional awards in India which lead to more reliance on Indian arbitration. A potential impact will be strengthening India's image as an arbitration friendly State and will add to the goal of developing India into a hub of arbitration.

The issue of consent

Questions like whether institutional rules providing for an appellate tribunal will apply retrospectively to the existing arbitration agreements providing for institutional arbitration and what can be the grounds for challenging the jurisdiction of the appellate tribunals.

Potential abuse of Section 37

Since proceedings under Section 37 will be the first instance of intervention of courts in case of arbitral awards, this may have the impact that section 37 proceedings are resorted to more frequently. It will be the responsibility of courts in this case that they restrict their intervention against orders of appellate arbitral tribunals in cases where their intervention is not required.

Suggestions or Changes

1. **Rules on Binding Nature of Rulings of Higher Judiciary on Appellate Arbitral Tribunals**

It is essential that the appellate tribunals follow the Indian jurisprudence on Section 34 challenges. Any deviations from the rulings of the Supreme Court on the powers of courts under this section must be avoided. Proper rules must be formulated by the Indian Council for Arbitration to ensure that the arbitrators of these potential appellate tribunals possess the necessary experience and talents so that these tribunals act within the powers of Sections 34 courts and possess the necessary experience and ta

2. **Check on the Powers of Section 37 Courts**

It is essential that the higher judiciary treats the decisions of appellate tribunals on the same scale as Section 34 orders and any tendency to act as an appellate body against these awards

must be avoided. This is essential especially considering the tendency of courts to act as appellate bodies against arbitral awards.

3. Restricting the powers of "Appellate" Arbitral Tribunals to Section 34

It is essential to remember that courts enquiring whether an award should be set aside on limited grounds are not appellate bodies. It is crucial that the legislature specifies the ambit of challenges in these "appellate" tribunals. This must be restricted to jurisdiction under the Section 34, and it must also be reconsidered whether to appropriate to name these bodies appellate bodies.

SECTION 37- APPEALABLE ORDER

The Potential Impact of the Proposed Amendment

The amendment adds a new ground for appeal: refusal to appoint an arbitrator under Section 11. This provides parties with an avenue to challenge decisions related to the appointment process. The expanded scope of appealable orders may increase the workload of courts, potentially leading to delays in the resolution of appeals. A new sub-section (1A) is introduced, setting a 60-day time limit for filing an appeal. This time limit aims to expedite the appellate process and prevent undue delays. The proposed amendment does not elucidate the standard of scrutiny to be employed by the Courts. This is a contentious point with conflicting rulings, some endorsing minimalist review in appeals to some undertaking a full-fledged review.[33] The amendment partly aligns with the aim and purpose. The bone of contention is the addition of one more ground to the already existing grounds of appealable orders.

Necessity of Inclusion

The proposed amendment should be included minus the additional ground for appeal. Moreover, the amendment should prescribe the standard of review for the judiciary to exercise.

Suggestions or Changes

Sub-section 1A of the provision can also include an explanation specifically elucidating that the Courts must exercise minimal intervention and should not undertake full-fledged review of the award in question unless required on the face of it.

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[33] Sharad Bansal, 'The Standard of Review of Interim Orders of an Arbitral Tribunal Seated in India: A Significant Step Towards Certainty' (Kluwer Arbitration Blog, 21 November 2018) https://arbitrationblog.kluwerarbitration.com/2018/11/21/the-standard-of-review-of-interim-orders-of-an-arbitral-tribunal-seated-in-india-a-significant-step-towards-certainty/ accessed 1 November 2024.

Removal of the additional ground for appeal i.e. refusal to appoint an arbitrator.

UK Jurisprudence: The refusal or failure to appoint an arbitrator under **Section 18** of the Arbitration Act, 1996 is not a ground for appeal. Instead, **Section 18** provides a **procedural remedy** that allows the court to intervene and appoint an arbitrator if there's a deadlock or refusal by one party, ensuring the arbitration process can continue without undue delay.

US Jurisprudence: The Federal Arbitration Act (FAA) under Section 5 allows courts to appoint an arbitrator if parties fail to agree or if an appointing mechanism fails. This provision has been upheld by U.S. courts, which interpret it as a way to uphold party autonomy while providing a judicial safeguard against delays. In *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.,* for instance, the court intervened to appoint arbitrators when the parties couldn't reach an agreement.

Further, the Arbitration and Conciliation Act of 1996 incorporates sufficient provisions to deal with the issue of appointment of arbitrators. Therefore, there exists no need for an additional ground for appeal to further elongate the process.

SECTION 43C

The Potential Impact of the Proposed Amendment

The proposed amendment restructures the composition of the Arbitration Council, broadening its member base to include individuals with varied expertise in arbitration, public administration, and finance. This diverse composition is likely to enhance the Council's capacity to oversee and implement effective arbitration standards in India. By including members with backgrounds in institutional arbitration, research, and teaching, the Council may benefit from a holistic approach to policy-making and dispute resolution management. Moreover, the addition of part-time and ex-officio members could improve decision-making efficiency, allowing the Council to draw on insights from commerce, industry, and finance. This structure aligns with best practices in international arbitration bodies, such as the Singapore International Arbitration Centre (SIAC), which includes diverse legal and administrative professionals.[34]

The draft amendment bill aims to strengthen India's arbitration framework and make it a preferred arbitration hub. The restructured Council composition aligns with this goal by ensuring that decision-makers are specialists in arbitration, public affairs, and financial oversight, reflecting the multi-faceted nature of modern arbitration. Additionally, the inclusion

[34] Rajoo S and Pillai S, Institutional Arbitration in Asia (LexisNexis 2021).

of stakeholders from government finance departments could support the financial sustainability of institutional arbitration. This inclusion aligns with the policy objectives stated in the Arbitration and Conciliation (Amendment) Bill, 2021, which seeks to build a resilient and globally competitive arbitration framework.[35]

Necessity of Inclusion

The inclusion of this amendment would likely be beneficial, as it builds a strong foundation for the Council by balancing representation from legal, commercial, and governmental backgrounds. Such a diverse composition reduces the risks of insularity and promotes a fairer, more comprehensive approach to arbitration policy. However, care must be taken to ensure that appointments are merit-based, transparent, and free from political influence. Introducing a representative from commerce and industry adds practical business insights that align with the commercial focus of arbitration, making this amendment highly relevant.[36]

Suggestions or Changes

One potential improvement to this amendment could be the addition of a clause allowing representation from civil society or academia, rotating periodically to bring diverse viewpoints. This could help ensure that the Council remains inclusive and responsive to new developments in arbitration theory and practice. Furthermore, requiring an annual report from each member, detailing contributions and decisions, could enhance accountability and transparency. Additionally, consulting with the Chief Justice of India in the appointment of key members, rather than solely the Central Government, could increase judicial oversight and mitigate potential conflicts of interest.

SECTION 43D

The Potential Impact of the Proposed Section

The proposed amendment enhances the scope and authority of the Council by introducing new responsibilities, including the ability to recognize and regulate arbitral institutions. It adds specific powers such as renewing, suspending, or cancelling the recognition of arbitral institutions and setting up a model code of conduct for arbitrators. This reform could elevate the quality of arbitration in India, offering a more structured system that promotes

[35] Krishnan S, 'India's Arbitration Reforms: Addressing Systemic Challenges' (2023) 30 Arbitration Law Review 99.
[36] Roebuck D, Arbitration and the Arbitration Law of India (2nd edn, Cambridge University Press 2019).

accountability and professionalism among arbitral institutions and arbitrators alike.[37] Moreover, by specifying criteria for institutional recognition and establishing a model arbitration agreement, the Council is positioned to set consistent standards, which are crucial for building confidence in India as an arbitration-friendly jurisdiction.

The amendment aligns well with the broader objectives of the draft amendment bill, which seeks to enhance the efficacy of arbitration in India by creating a predictable and transparent dispute resolution framework. By defining norms for arbitrator registration, model agreements, and the conduct of proceedings, the proposed amendments resonate with the bill's focus on improving institutional arbitration and establishing India as an international arbitration hub.[38] Furthermore, the specific provisions on recognizing institutions and setting conduct standards reinforce the policy objectives in the Arbitration and Conciliation (Amendment) Bill, 2021, which emphasizes robust, regulated institutions.[39]

Necessity of Inclusion

Including this amendment is advisable, as it introduces much-needed regulatory oversight that could increase transparency and credibility in India's arbitration ecosystem. The explicit recognition and criteria-setting functions vested in the Council could address the challenges posed by fragmented institutional standards across arbitral bodies in India. Notably, the amendment's provision for a model code of conduct for arbitrators addresses concerns about ethics and impartiality, which are pivotal for the integrity of the arbitral process.

Suggestions or Changes

A notable improvement to the amendment could be including a mandate for the periodic review of the Council's policies and procedures, ensuring they remain responsive to changes in arbitration practices. Additionally, the provision to "call for any information or record of arbitral institutions" (proposed subsection (2)(c)) might be clarified with a specification on how and when such records can be requested, especially for cases with confidentiality requirements. Furthermore, to strengthen India's appeal as an arbitration hub, it would be beneficial to include foreign arbitration institutions under the Council's recognition framework, with periodic assessments based on their performance in administering cross-border disputes.

[37] Krishnan G, 'Reforming India's Arbitration Ecosystem' (2022) 34 Asian Arbitration Journal 210.
[38] Bansal C, 'Standardizing Arbitration Practices in India: The Role of the Arbitration Council' (2023) 45 International Arbitration Review 56.
[39] Patel S, Arbitration Law in India: Evolving Frameworks and Emerging Issues (OUP 2021).

SECTION 43-I (1)

The Potential Impact of the Proposed Amendment

This section introduces the role of a Chief Executive Officer (CEO) to manage the Council's day-to-day operations, providing operational stability and continuous administrative oversight. By allowing a dedicated CEO to handle the Council's administration, the section ensures that strategic decisions can be effectively implemented without administrative delays.[40] The section aligns well with the bill's purpose by contributing to the efficient functioning of the Council, a central body in arbitration administration. Introducing a CEO reflects the bill's objective of enhancing India's arbitration infrastructure, mirroring international arbitration practices where such positions ensure sustained institutional governance. This amendment should be included as it facilitates the effective management of the Council by delineating administrative responsibilities to a CEO, thus allowing the Council to focus on policy-making and regulatory functions.

Suggestions or Changes

The amendment could benefit from further clarity regarding the CEO's tenure and evaluation criteria, which could foster accountability. Establishing fixed terms and a transparent performance review system would align this position with similar regulatory bodies.

SECTION 43J

The Potential Impact of the Proposed Section

The formation of a Secretariat strengthens the Council's capacity to fulfil its duties by introducing additional officers and employees. A dedicated Secretariat ensures that the Council has the administrative support necessary to carry out its regulatory responsibilities effectively.[41] This addition aligns with the bill's aim to create a robust arbitration ecosystem. A well-functioning Secretariat is essential for the smooth execution of Council functions, including policy formulation and stakeholder engagement. This section should be included, as an adequately staffed Secretariat can enhance operational efficiency, allowing the Council to undertake complex regulatory and accreditation tasks with greater efficacy.

[40] Bhatia P, 'Enhancing Administrative Efficiency in Arbitration Councils' (2023) 22 Asian Journal of International Arbitration 67.
[41] Ghosh D, Regulatory Powers in Arbitration (CUP 2022).

Suggestions or Changes

Including provisions for periodic review of Secretariat staffing levels would allow the Council to adjust its resources according to workload fluctuations, ensuring sustained efficiency.

SECTION 43-K

The Potential Impact of the Proposed Section

This section empowers the Council to recognize arbitral institutions, which is essential for establishing uniform standards and fostering trust in arbitral institutions. Recognizing institutions can also drive competition and encourage higher service quality among arbitral bodies in India.[42] The section aligns with the bill's vision to establish a reliable arbitration ecosystem, emphasizing transparency and accountability through regulated institutional standards. Including this section is recommended as it directly supports the bill's aim to create a reliable, high-quality arbitration infrastructure in India by accrediting institutions that meet specified standards.

Suggestions or Changes

Adding specific timelines for recognition processes could prevent potential delays, ensuring that institutions are accredited swiftly, supporting prompt arbitration proceedings.

SECTION 43-L

The Potential Impact of the Proposed Section

Establishing voluntary registration norms can create a standardized pool of arbitrators, enhancing the quality and credibility of arbitrators practicing in India. This can also provide parties with better insight into the arbitrators' qualifications and expertise. This section supports the bill's objective of professionalizing arbitration in India. Standardized registration fosters uniformity and professionalism among arbitrators. This section should be included, as it enhances transparency and improves the selection process for arbitration, thus reinforcing the Council's role as a quality assurance body.

Suggestions or Changes

Introducing a digital registry that displays registered arbitrators' qualifications and experience may make this initiative more accessible and practical for parties seeking arbitrators.

[42] Singh P, 'Financial Integrity in Arbitration Institutions' (2024) 19 Journal of Financial Regulation 89.

SECTION 43-M

The Potential Impact of the Proposed Section

A centralized depository could ensure the systematic tracking of arbitration cases, improving case management and allowing for data collection that can guide policy adjustments. It will also promote transparency and accountability in arbitration proceedings. The proposed section aligns well with the draft amendment's aim to modernize arbitration processes, making arbitration data accessible while preserving confidentiality. This section is advisable to include, as it supports an efficient, organized system for tracking arbitration cases, which can improve transparency and institutional oversight.

Suggestions or Changes

Data privacy concerns could be addressed by implementing strict access protocols for the depository, ensuring confidentiality while providing data-driven insight.

SECTION 43-N

The Potential Impact of the Proposed Section

Allowing grants from the Central Government can strengthen the Council's financial foundation, facilitating its administrative and regulatory responsibilities without financial constraints. The provision aligns with the bill's objective of creating a sustainable arbitration council by ensuring a steady funding source. The section should be included, as a consistent funding mechanism is essential for maintaining the Council's administrative efficiency.

Suggestions or Changes

Including provisions for independent audits of grant utilization may bolster accountability and public trust in the Council's financial management.

SECTION 43-O

The Potential Impact of the Proposed Section

Establishing a dedicated fund allows for the effective allocation of resources toward Council activities, ensuring that revenue from services and donations is properly managed. The section supports the bill's vision of a self-sustained Council by creating a structured funding mechanism.

Suggestions or Changes

Adding a stipulation for an external financial review could further enhance accountability in fund utilization

SECTION 43-P

The Potential Impact of the Proposed Section

Mandatory annual audits by the Comptroller and Auditor General of India can enhance transparency and accountability, instilling confidence in the Council's financial integrity. The audit requirement aligns with the bill's objectives of establishing transparency and good governance in arbitration. This section is essential to maintain high standards of financial accountability.

Suggestions or Changes

Including a public disclosure clause for audit results could foster additional transparency.

SECTION 43-Q

The Potential Impact of the Proposed Section

Granting the Council regulatory powers allows it to adapt to evolving arbitration needs by setting procedures and guidelines, thus improving the arbitration framework's flexibility. The section aligns with the bill's aim of creating a self-regulating, adaptable arbitration body. This section should be included as it grants the Council necessary autonomy to regulate evolving practices in arbitration.

Suggestions or Changes

Requiring periodic reviews of regulations, especially as arbitration practices evolve, could ensure the Council's regulations remain relevant and effective.

SECTION 84- POWER TO MAKE RULES

The Potential Impact of the Proposed Amendment

The amendment to Section 84 introduces a clear framework within which the Central Government may exercise its rule-making authority under the Arbitration and Conciliation Act, particularly by specifying areas where this authority can be applied. This precision could potentially enhance administrative efficiency, ensuring that essential operational and procedural guidelines—such as salary, allowances, and other terms of employment for key officers and employees—are clarified. By establishing this statutory basis for secondary legislation, the amendment may contribute to a more structured and predictable arbitration ecosystem in India, which could ultimately strengthen India's position as an arbitration-friendly jurisdiction. This structured approach aligns with international standards for arbitration institutions by providing a transparent governance framework.

The draft amendment bill, in aiming to strengthen India's arbitration framework, seeks to provide both operational clarity and regulatory oversight for the establishment and functioning of arbitration institutions. By specifying rule-making areas, the proposed amendment aligns with this purpose, supporting the Act's intention to promote arbitration and reinforce institutional autonomy (see Arbitration and Conciliation Act 1996, Preamble). Introducing clauses related to compensation, qualifications, and procedural clarity for officers and employees provides a regulatory foundation to facilitate effective dispute resolution, aligning with the broader goal of making arbitration more structured and reliable.[43]

Necessity of Inclusion

Including this amendment would likely be advantageous to the arbitration ecosystem in India. The delegation of power to regulate institutional roles and responsibilities ensures that the Central Government has a structured framework for governance, which could improve institutional accountability and transparency. Moreover, the provision's scope is limited to procedural matters, which respects the doctrine of separation of powers and limits executive influence on substantive legal matters, reducing potential risks of arbitrary exercise of authority.[44]

Suggestions or Changes

A potential improvement to the proposed amendment could involve adding an explanatory provision that clarifies the rationale behind each clause under sub-section (1A). For instance, explanations regarding the necessity for explicit qualifications and terms for the Chief Executive Officer and members of the arbitration council could reinforce the amendment's alignment with institutional reform objectives. Additionally, considering a regular review clause, allowing for the rules to be reviewed periodically by an independent committee, could enhance transparency and allow flexibility in response to evolving needs within the arbitration sector.[45]

[43] Narayan Shankar, 'The Indian Arbitration Act and Institutional Reforms' (2020) 18 Arbitration Journal 124.
[44] Krishnamurthy S, 'Judicial Review and Delegated Legislation in India' (2022) 15 Indian J Constitutional L 42.
[45] Bitter A, 'Comparative Analysis of Institutional Arbitration Rules' (2021) 12 Int'l Arbitration Rev 37.