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Promises and Pitfalls of the Draft Arbitration and Conciliation (Amendment) Bill, 2024

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The Department of Legal Affairs has proposed the Draft Arbitration and Conciliation (Amendment) Bill, 2024, with an aim to boost institutional arbitration, reduce court intervention, and ensure timely conclusion of arbitration proceedings. The proposed amendments reflect an objective to align India's arbitration rules and practices with prevailing international standards. Furthermore, the legislature has sought to codify major judicial rulings regarding the interpretation of the Act. The proposed Bill leaves room for addressing certain additional areas and includes some provisions that may increase complexity in the existing arbitration framework. This blog aims to address such provisions and the gaps in the Bill.

Restricting interim relief — An added complexity?

Section 9[1] of the Act provides for any party to seek interim relief from the court at any time before, during, or after the arbitral proceedings, but before the award is enforced. However, the Bill restricts the party's right to approach the court and seek interim relief during the arbitral proceedings. It states that a party may approach the court before the commencement of the arbitral proceedings, or only when an award has been passed. Though the objective behind this amendment seems to be reducing the court's intervention

in arbitral proceedings, it presents a major drawback in cases where interim relief from the court is a necessity. This happens in situations and areas where the Arbitral Tribunal is non-functional, or where it cannot exercise its jurisdiction. For instance, if the bank account of a party needs to be frozen during the continuation of the arbitration proceedings, it is not practical or effective for the arbitral panel to issue directions to the bank branch to freeze the bank account. However, the court's intervention in such situations would expedite the remedy, and the accounts could be frozen under the court's direction. Moreover, in a situation where an interim measure granted by a foreign tribunal, say from Singapore, is not enforceable in India, parties would be left with no recourse for interim protection by courts. Thus, barring the option of seeking interim relief from courts during the arbitration proceedings should be reconsidered.

This brings us to the introduction of Section 9-A to the Act, "emergency arbitrators." The enforcement of awards rendered by an emergency arbitrator is explicitly provided for in the New Zealand Arbitration Act, 1996[2], the Hong Kong Arbitration Ordinance (Cap. 609)[3], the Singapore International Arbitration Act, 1994[4], and the English Arbitration Act, 1996[5]. For instance, Section 22-B(1) under Part 3-A of the Hong Kong Arbitration Ordinance states, "Any emergency relief granted, *whether in or outside Hong Kong*, by an emergency arbitrator *under the relevant arbitration rules* is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court." The provision's unambiguous wording gives parties seeking emergency relief certainty as to the enforceability of an emergency award.

Given this international practice in favour of enforcing emergency awards, this is a much-welcomed move. However, this provision requires more clarity from the legislature. The Supreme Court in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.*[6] held that an award given by an emergency arbitrators in an Indian-seated arbitration under the Singapore International Arbitration Centre (SIAC) Rules is "awards" under Section 17(1)[7] and are enforceable under the provisions of Section 17(2). While the Court emphasised the need for legislative amendments to align with international practices that recognise and enforce emergency awards, it did not establish a precedent for enforcing such awards in international arbitrations not seated in India. This very question has been left unaddressed by the Bill — *What about the enforceability of emergency award from foreign-seated arbitration?* Since Section 17 of the Act does not explicitly apply to foreign-seated arbitration awards, more clarity needs to be provided by the Act, or an explicit mention of foreign-seated arbitration awards needs to be added to avoid unnecessary disputes and confusion.

No addressal of unilateral appointment of arbitrators

The amendment introduced to Section 11[8] for the appointment of arbitrators includes the mandate of disclosure with respect to the number and details of arbitra s pending between the parties and arbitral awards passed in respect of disputes arising between the parties from a common defined legal relationship, whether contractual or not. This disclosure is a positive step that increases the proceeding's transparency. Furthermore,

the proposal of a 60-day application filing period in the event that an arbitrator is not appointed is a welcome move. It will curtail the current three-year window for filing applications under Section 11 and ensure that the arbitrators are appointed promptly.

However, this section fails to give effect to the Supreme Court's judgment in *Central Organisation for Rly. Electrification* v. *ECI SPIC SMO MCML (JV)*[9], wherein, it was held that clauses allowing for the appointment of arbitrators by one party, especially in contracts involving public sector undertakings (PSUs), violate Article 14 of the Indian Constitution[10]. It must be noted that the appointment and composition of an Arbitral Tribunal are scrutinised only when challenged by one of the parties. Thus, unless a mandate against unilateral appointment of arbitrators is statutorily introduced, such practices remain unchecked, allowing parties to continue with such arrangements. The addition of a provision against unilateral appointment of arbitrators should be considered.

Furthermore, as per Section 11(3-A), the Supreme Court and High Courts may designate arbitral institutions that have been approved by the Council under Section 43-K on a periodic basis. This is complemented by Section 11(4), which stipulates that if the appointment procedure in sub-section (3) applies, the designated arbitral institution (designated by the Supreme Court for international commercial arbitration, or by the High Court for other arbitrations) will make the appointment upon a party's application. While the direct appointment of arbitrators through an application appears promising, there is a major practical problem — *parties lack access to information regarding the designated panel of arbitrators or arbitral institutions.* This brings them back to square one—approaching the court. This provision may be rendered ineffective if this designated list if not made publicly known on a website. Therefore, the Council or, in its absence, the courts should inform the public of this information.

Clarity between "seat", "venue", and "place" required

The Draft Bill proposes two options to amend Section 20[11], which addresses the place of arbitration. The proposed amendment enhances certainty and uniformity, which is a key objective shared by the UNCITRAL Model Law and the New York Convention[12]. Defining "place", "seat" and "venue" would further clarify the provision.

It is suggested that a mix of both options would be preferable and could be worded as follows:

"1. The parties are free to agree on the *seat* of arbitration.

2. Failing any agreement referred to in sub-section (1), in the 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 wh[illegible]f action has arisen.

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

ODR left unaddressed

The definitions provided in Section 2[13] of the Act have included the definitions of "*audio-video electronic means*" and "*emergency arbitrator*", however, they have failed to add the definitions of "online dispute resolution (ODR)" and "ODR for service provider/ODR Platform". Standard definition and recognition of ODR platforms are important to ensure that they are designed to fit into the infrastructure of arbitration organisations, rules, and practices. Moreover, a provision under Section 43-D(2) should have been added to impose a duty on the Council to maintain a list of ODR platforms and prescribe guidelines for them. The procedure followed by these ODR platforms and their privacy policies, etc., need to be updated with the Council.

Stamping of arbitral awards — A mandate

The Bill proposes an additional requirement for the arbitration award to be duly stamped under Section 31(1)[14]. It must be noted that such a stamping requirement has no basis in the New York Convention[15], or the UNCITRAL framework[16]; this is something that the Indian legislature has envisioned. Although the provision is well-thought, it should specifically address who is responsible for obtaining the necessary stamps for an arbitral award in both institutional and ad hoc arbitration situations.

Additionally, prevailing concerns regarding parties contesting awards on the grounds of insufficient stamp duty seem baseless in light of the Supreme Court's ruling in *N.N. Global Mercantile (P) Ltd.* v. *Indo Unique Flame Ltd.* [*N.N. Global III (2023)*][17], which allowed arbitration proceedings to continue despite unstamped agreements. Therefore, with the addition of clarity, this provision is a welcome move.

Is the inclusion of an Appellate Arbitral Tribunal necessary?

The newly introduced Section 34-A[18] proposes that an arbitral institution may provide for an Appellate Arbitral Tribunal to entertain applications made under Section 34 for setting aside an arbitral award. Since the validity of two-tier arbitration agreements has been upheld by the Supreme Court in *Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Ltd.*[19], the provision for the appointment of an Appellate Tribunal by arbitral institutions is not inherently flawed. However, it creates confusion with respect to the provision of such Appellate Tribunals in ad hoc arbitrations. Since it is settled that a two-tiered clause does not violate the fundamental principles or public policy of India, the provision for such an Appellate Tribunal seems redundant in the national legislation governing arbitration. It should rather be left to party autonomy to choose if they want to have th[illegible] Appellate Tribunal included. No leading arbitral institution in India, or worl[illegible] such mechanism to review awards. Moreover, the mandatory provision of an Appellate Tribunal in the institutional rules would only lead to additional costs for the parties, and

would not significantly help with lessening court burden, unless the parties themselves want such a mechanism. Thus, this proposal should be reconsidered.

Furthermore, the distinction between setting aside domestic and international commercial arbitration awards on the ground of patent illegality, has been removed by the proposed Section 34(2-A). It states that an award arising out of International Commercial Arbitration (ICA) can also be set aside if the award is vitiated by patent illegality apparent on the face of the award. However, this distinction was crucial to advance India as an arbitration-friendly jurisdiction. Judicial review of ICA awards must remain limited to universally recognised grounds in international arbitration, such as fraud, corruption, or violation of public policy. This amendment would also nullify the principles reiterated by courts in a series of cases, like *Patel Engg. Ltd.* v. *North-Eastern Electric Power Corpn. Ltd.*[20], *Ssangyong Engg. & Construction Co. Ltd.* v. *NHAI*[21], etc., where courts have emphasised that the grounds for setting aside an ICA award are limited to those that are in contravention of the fundamental policy of Indian law, conflict with the most basic notions of morality or justice, or are induced by fraud or corruption. Thus, the distinction should be maintained.

The Indian Arbitration Council — Awaiting formation

Section 11-A of the Draft Bill takes away the statutory fixation of Arbitration Council fees in the IVth Schedule and leaves it to be specified by the Council. While the underlying objective of this provision — to avoid a rigid statutory fee structure-is welcomed, the Draft Bill provides no guidance on how the Council is supposed to determine these fees. This omission is further complicated by the fact that the Indian Arbitration Council does not exist yet, casting significant uncertainty on the implementation of such provisions. A similar issue arises in the amended Section 19[22], which mandates that, in cases other than institutional arbitration, the Arbitral Tribunal shall duly consider carrying on the arbitration proceedings as per the model rules of procedures or guidelines to be issued by the Council from time to time. Once again, the absence of the Council creates serious ambiguity.

Furthermore, at least one expert member from ADR academia should have been included as a part of the Council in Section 43-C(1)[23]. Leading arbitral institutions including SIAC, ICC, and SCC, all have academic professors and ADR experts on their panels or Councils. It is high time for India to follow this international best practice and leverage the expertise and knowledge of ADR academia. Additionally, it is recommended that the Council maintain and publish a publicly accessible list of recognised arbitration courses on its website. Given the wide range of such courses, varying in cost and duration, it is essential to clarify which of these certifications would be officially recognised by the Council.

Conclusion

In 1985, the UNCITRAL Model Law on International Commercial Arbitration [illegible], forming the basis for India's Arbitration and Conciliation Act, 1996[24]. This Act sought to consolidate and amend the laws relating to domestic arbitration, international commercial arbitration, and the enforcement of foreign arbitral awards. However, at the time of its

enactment, a significant gap existed between India's arbitration framework and globally accepted practices. Since 2010, the legislature has taken a proactive stance, introducing key amendments in 2015[25], 2019[26], and 2021[27] to address challenges and align with international standards.

The Draft 2024 Bill demonstrates India's determination to take necessary strides forward and compete with Asian arbitration hubs like Singapore. For India's arbitration laws to truly meet the requirements of prestigious international organisations, there are still various significant gaps. For instance, the Bill should have specific clauses regarding the enforceability of emergency awards, prohibit unilateral appointments of arbitrators, and make it clear what seat, venue, and place of arbitration are. Additionally, a thorough list of approved arbitral institutions and appointed arbitrators should be published for improved accessibility by the Arbitration Council. Further, incorporating ADR specialists and scholars into the Council would also be consistent with global best practices.

Thus, while the Draft Bill introduces promising changes, there are still areas that remain untouched. Continuous updates to the Act and its procedures are imperative to attract foreign investors and enhance India's reputation as an arbitration-friendly jurisdiction. As a cost-competitive service provider, India must seize these opportunities. Despite the judiciary's pro-arbitration stance, it is ultimately the legislature that has to amend the law and drive necessary reforms. To truly enhance the ease of doing business and attract greater foreign investment, all arms of the State machinery must adopt a unified, pro-arbitration approach.

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1. Arbitration and Conciliation Act, 1996, S. 9.
2. Arbitration Act, 1996, S. 17-L (New Zealand).
3. Arbitration Ordinance (Cap. 609, Hong Kong), part. 3-A, S. 22-B(1).
4. International Arbitration Act, 1994, Ss. 12(6) and 19 (SG).
5. *See* Proposed Arbitration Act, 1996, S. 41-A, HL Bill 59 (as amended in Special Public Bill Committee), Arbitration Bill [House of Lords].
6. (2022) 1 SCC 209.
7. Arbitration and Conciliation Act, 1996, S. 17(1).
8. Arbitration and Conciliation Act, 1996, S. 11.
9. 2024 SCC OnLine SC 3219.

10. Constitution of India, Art. 4.
11. Arbitration and Conciliation Act, 1996, S. 20.
12. UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006), UN Doc. A/40/17, Annex I.
13. Arbitration and Conciliation Act, S. 2.
14. Arbitration and Conciliation Act, 1996, S. 31(1).
15. 330 UNTS 3.
16. Model Law on International Commercial Arbitration (1985, as amended 2006), UN Doc. A/40/17, Annex I.
17. (2023) 7 SCC 1.
18. Draft Arbitration and Conciliation Bill, S. 34-A.
19. (2020) 19 SCC 197.
20. (2020) 7 SCC 167.
21. (2019) 15 SCC 131.
22. Draft Bill, S.19.
23. Arbitration and Conciliation Act, 1996, S. 43-C(1).
24. Arbitration and Conciliation Act, 1996.
25. Arbitration and Conciliation (Amendment) Act, 2015.
26. Arbitration and Conciliation (Amendment) Act, 2019.
27. Arbitration and Conciliation (Amendment) Act, 2021.

Tags : Arbitration and Conciliation Act 1996 | Draft Arbitration and Conciliation (Amendment) Bill 2024 | English Arbitration Act | Hong Kong Arbitration Ordinance | New Zealand Arbitration Act | Singapore International Arbitration Act