

Proposed Arbitration Reforms 2024 in India: Analysis

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Abstract:

At present, when writing, India's Arbitration Law is undergoing yet another transformation. The Ministry of Law and Justice, Government of India, on 18th October 2024, came out with a draft amendment (DA) called 'Arbitration and Conciliation (Amendment) Bill, 2024' (draft amendments) and invited comments from the public as part of the public consultation exercise on the draft amendments. The last date to submit the same was 03rd November 2024. This draft amendment has been proposed to promote "ease of doing business" and "enforce contracts" as posted on the official website. It has three primary objectives: first, "to provide a further boost to institutional arbitration"; second, "to reduce court intervention in arbitrations"; and third, "to ensure the timely conclusion of arbitration proceedings". This legislative proposal follows the "Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996" (the Report), led by former law secretary Dr. T. K. Viswanathan, aimed at enhancing the efficiency and effectiveness of India's arbitration landscape. The draft amendments introduce several amendments; some are incremental, while others contemplate key changes to the arbitration regime. This article discusses a few key amendments and values them based on challenges encountered by the Indian judiciary in interpreting and accommodating them to bring India on par with international arbitration in practice.

Keywords: Arbitration, Proposed amendments, Reforms.

Background and Evolution of Draft Amendments:

The Arbitration and Conciliation Act of 1996 ('the Act') was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration ('ICA') under Part I of the Act, enforcement of foreign arbitral awards under Part II of the Act and also to define the law relating to conciliation under part III of the Act. This Act was enacted by taking into account the United Nations Commission on International Trade Law Model Law, 1985.¹ The existing Act results from several amendments made previously by the legislature from time to time. For instance, the Arbitration and Conciliation (Amendment) Act of 2015 was enacted pursuant to the 246th report of the Law Commission. Similarly, pursuant to the recommendations in the Srikrishna Committee Report, the Arbitration and Conciliation (Amendment) Act 2019 was enacted. In 2021, the Act was again amended to promote India as a hub of ICA by attracting eminent arbitrators to the country. In 2023, the Mediation Act 2023 was enacted, which contained self-contained provisions for mediation, repealing the provisions relating to Conciliation in the Arbitration and Conciliation Act 1996. The draft amendments suggest some key

¹ The preamble of the Arbitration and Conciliation Act, 1996

changes that need to be incorporated. For instance, interim measures & protection by the court, insertion of the new provision for emergency arbitration, changing the term “place” to “seat” of arbitration, allowing for partial setting aside of an arbitral award, legitimizing appellate arbitration tribunals (AAT), etc.²

Proposed Title of the Act:

Since the Mediation Act 2023 has comprehensively provided for mediation, which was earlier a part of the Arbitration and Conciliation Act 1996, it has been proposed to be omitted, and hence, this draft amendment may be called the “Arbitration Act, 1996”.³

Techno-friendly Mechanism

DA has focused on developing and using various technological services via digital platforms for arbitral proceedings to facilitate a cost-effective and time-bound completion of the proceedings in need of an hour. There is an emerging class of techno-legal service providers specializing in this arena. There are many advantages to adopting the latest technological advancements in arbitrations. For instance, document automation translates to a reduction of costs, etc. By giving importance to techno legal utilities, i.e., virtual or online arbitration, changes have been offered in the definition of “arbitration” S. 2 (1) (a)⁴ & (aa)⁵ and “recognize arbitration conducted, wholly or partly, by use of audio-video electronic means.” The techno-legal utilities will facilitate the swift of *ad-hoc* arbitrations to institutional arbitrations in the long run, which is one of the objectives.

Emergency Arbitration (EA)

The draft amendments propose the insertion of a new Section 2 (ea)⁶-“emergency arbitrator” and, says, ‘an arbitrator appointed under Section 9A’⁷. To give correspondence effect, a new section 9A has been introduced. It says that arbitral institutions may provide for the appointment of an emergency arbitrator prior to the constitution of an arbitral tribunal. Further, it clarifies that any order passed by an emergency arbitrator “shall be enforced in the same manner as if it is an order of an arbitral tribunal under section 17(2)⁸ of the Act”. Earlier, in the case of *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. & Ors.*, (2022) 1 SCC 209, wherein the Court held that “an emergency arbitrator’s award will be

² Ahan Gadkari, Unpacking India’s Draft Arbitration and Conciliation Amendment Bill, 2024 (Part II), National Law School, Business Law Review, Nov 16.

³ The draft arbitration and conciliation (amendment) bill, 2024, section 1, p. 23

⁴ (a) —arbitration means any arbitration whether or not administered by an arbitral institution and includes arbitration conducted, wholly or partly, by use of audio-video electronic means.

⁵ (aa) —audio-video electronic means shall include use of any communication device for video conferencing, filing of pleadings, recording of evidence, transmission of electronic communication, for the purposes of conduct of arbitral proceedings and any other matter incidental thereto, in the manner as specified by the Council under sub-section 5 of section 19;

⁶ (ea) —emergency arbitrator means an arbitrator appointed under Section 9A.

⁷ Emergency arbitrators – (1) Arbitral institutions may, for the purpose of grant of interim measures referred to in section 9, provide for appointment of emergency arbitrator prior to the constitution of an arbitral tribunal.

(2) The emergency arbitrator appointed under sub-section (1) shall conduct proceedings in the manner as may be specified by the Council.

(3) Any order passed by an emergency arbitrator under subsection (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under sub-section (2) of section 17 of the Act.

(4) An order of the emergency arbitrator may be confirmed, modified, or vacated, in whole or in part, by an order or arbitral award made by the arbitral tribunal.

⁸ (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

considered as an order enforceable under section 17(1)⁹ of the Act.” Consequently, legal recognition to an emergency arbitrator’s award was provided. When parties often approach the courts for “interim relief” in a situation where the constitution of the arbitral tribunal under section 9 remains pending, the courts are unable to grant urgent interim reliefs due to the heavy workload.¹⁰ To address this difficulty, many Institutional Arbitration Rules provide for the appointment of “emergency arbitrators”.¹¹ The draft amendment also suggests granting the power to confirm, modify, or vacate any past interim orders passed under S. 9 and 9A by an order or arbitral award under section 17. The appointment of emergency arbitrators was required due to the demand by the party for arbitration for immediate interim relief in commercial proceedings. A party that needs urgent interim measures and cannot await the constitution of an arbitral tribunal may apply for emergency relief by seeking the appointment of an emergency arbitrator.¹² If there is a requirement for an appointment of emergency arbitrators, the rules of various arbitral institutions in India provide for the appointment of an emergency arbitrator. However, such appointments do not have explicit legislative sanction under the existing Act 1996. There is a demand from the stakeholders to ensure statutory recognition of orders passed by emergency arbitrators. It can be confirmed by reading the survey report published by the “Queen Mary University of London and White & Case”. According to this report, 39% of the participants replied that they were willing to choose a “seat” where arbitral tribunals may be able to enforce decisions under the provision of “emergency arbitration”.¹³ Foreign-seated emergency arbitrators’ orders are not directly enforceable in India except by applying to the Court under section 9 of the Act.¹⁴ In the case of *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. (2016)*, one of the issues before the court was “Whether the petitioner could approach the Delhi High Court for interim reliefs, considering it has already obtained an “emergency award” from the arbitral tribunal?” “The Court held that a party is not precluded from seeking interim measures from a court merely because it obtained a similar order from an arbitral tribunal.” It further held that “the court, in considering a petition under section 9, should not be influenced by the arbitral tribunal’s orders”. In this context, the Court also observed that “the Act does not contain any provisions for enforcement of an emergency/ interim award issued in a foreign-seated arbitration, and therefore, an emergency award was unenforceable in India. Therefore, an application under section 9 is probably the only recourse left for the parties to seek interim measures of protection in India for foreign-seated arbitrations.” The judgment highlights the lacuna in Indian arbitration law for the enforcement of emergency awards (both domestic and foreign) and interim awards in foreign-seated arbitrations. This issue was not addressed in the Amendment Act of 2015. An interim measure of protection given by an emergency arbitrator that needs to be executed in India; hence, it requires changes in Section 9.¹⁵

⁹ Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings, apply to the arbitral tribunal

¹⁰ The draft arbitration and conciliation (amendment) bill, 2024, section 1, p. 57

¹¹ Ibid.

¹² Ibid.

¹³ 2021 International Arbitration Survey, Mary University of London and White & Case

¹⁴ The draft arbitration and conciliation (amendment) bill, 2024, section 1, p. 60, See also: *Raffles Design International India Private Limited & Anr. v. Educomp Professional Education Limited & Ors.*, 2016 SCC OnLine Del 5521, *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, 2022 SCC OnLine Del 2112, *Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd.*, 2023 SCC OnLine Cal 2442.

¹⁵ Manupatrafast.com

Jurisdiction of “Court” and Scope of “Seat”, “Venue”, and “Place” of Arbitration

The draft amendments suggest substituting the present definition of ‘court’ by adding Section 2-A¹⁶. As per the new definition, domestic arbitrations in India would mean a court having “pecuniary and territorial jurisdiction” over the “seat” of arbitration. Further, if no “seat” has been designated, the Court has pecuniary and territorial jurisdiction over the subject matter. Whereas, in International Commercial Arbitrations (ICA) where the “place of arbitration” is in India, it would mean the High Court having “territorial jurisdiction” over the “seat”, and if no “seat” has been designated, the High Court having “territorial jurisdiction” over the “subject matter of the dispute” would exercise “supervisory jurisdiction”.¹⁷ And, since the above provision clarified the jurisdiction of the court and related issues, provision section 42¹⁸ has become redundant and has been suggested for omission in draft amendments. In an attempt to end the timeless debate about the “seat”, “place”, and “venue” of arbitration, the draft amendments have suggested two options to amend Section 20.

The Act in its current form under sections 2(2), 20 (1), 20(2), 20(3)¹⁹, 28 and 31(4)²⁰ refers to the “place” of arbitration. Section 2(2) of the Act stipulates that Part I of the Act would apply where the place of arbitration is in India. The proviso, which was inserted by the 2015 Amendments,²¹ Further extends the application of sections 9, 27 and sections 37(1) (b) and (3) to ICA, even though the “place of arbitration” is outside India.²²

The presence and interpretation of multiple terms, viz. “seat”, “place”, and “venue”, has created ambiguity and uncertainty. Therefore, the Bill proposes to delete the term ‘place’, wherever it occurs in sub-section (2) of section 2 of the Act and replace it with the term ‘seat’. Similar amendments are suggested in sections 20(1), 20(2), 28 and 31(4) of the Act, 1996. Further, it has been suggested that “place” is to be replaced with the word ‘venue’ in section 20(3).²³

The difference between “seat” and “venue” has been the subject matter of judicial pronouncements many a time. In the case of *BBR (India) Private Limited v. Singla Constructions private Limited*, (2023) 1 SCC

¹⁶ 2A. (1) In case of arbitration other than international commercial arbitration, (i) where the seat of arbitration has been agreed by the parties or determined by the arbitral tribunal as per Section 20, the court means the court having pecuniary and territorial jurisdiction over the seat of arbitration.

(ii) in all other cases, the court means the court having pecuniary and territorial jurisdiction to decide the disputes forming the subject-matter of the arbitration if the same had been the subject-matter of a suit.

¹⁷ Yogendra Aldak, Pranav Mundra and Rashi Srivastava, Arbitration and Conciliation (Amendment) Bill, 2024 — Small Leaps to Align the Law with Practicality, published on 30/11/2024.

¹⁸ Jurisdiction.— Notwithstanding anything contained elsewhere in this Part or in any other law for the time being being in force, where to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

¹⁹ Place of arbitration.—(1) The parties are free to agree on the place of arbitration.(2) Failing any agreement referred to in sub-section (1), the place 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 place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property.

²⁰ (4) The arbitral award shall state its date and the place of arbitration as determined per section 20 and the award shall be deemed to have been made at that place.

²¹ S. 2 (2) —Provided that subject to an agreement to the contrary, the provisions of section 9, sub-section

(2) of section 9A, section 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to an arbitration, even if the seat of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.

²² Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996, 07 February, 2024.

²³ Ibid.

693, the Supreme Court held that the “seat”, once fixed by the arbitral tribunal under section 20(2) of the Act remains static and fixed unless changed by express mutual consent of the parties, whereas the “venue” of the arbitration can change and move from the “seat” to a new location. Jurisdiction comes from “seat” and not “venue”.²⁴

The Supreme Court, in the case of *BALCO v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, has held that the word ‘place’ mentioned in sections 20(1) and 20(2) refers to the seat of arbitration, and in section 20(3) refers to the ‘venue’ of the arbitration. The proposed amendment draft is also consistent with the international usage concerning the ‘seat of arbitration’ as opposed to ‘place of arbitration’. In fact, the concept of a “judicial seat” is established in the international sphere while deciding which country will have jurisdiction. It has also acquired importance in the context of India's seated domestic arbitrations given the law propounded by the Supreme Court from time to time.²⁵ It says to replace the word “place of arbitration” with either “seat” or “venue” as appropriate. Further, is to designate the “place” where the contract is executed or where the cause of action has arisen as the seat of domestic arbitrations seated in India. *In other words*, In Option I, the expression “place of arbitration” in Section 20 is replaced with “seat” in sub-sections (1) and (2) and “venue” in sub-section (3). This is a welcome change that resolves the ambiguity in the statute. Option II, on the other hand, wholly recasts Section 20 and mandates that in domestic arbitration (other than international commercial arbitrations), the “seat” of arbitration shall be the “place” where the contract/arbitration agreement is executed or where the cause of action has arisen. Issues arise when parties may choose a “seat” different from the “jurisdiction” where the contract was executed or the cause of action arose. This option also takes away the autonomy of two Indian companies/parties to choose a “foreign seat”, which they may prefer due to factors such as risks of delay and/ or broader intervention by Indian courts.²⁶ This reverses the Supreme Court decision in *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*, AIR 2021 SC 2517, wherein “the Court permitted Indian parties to choose foreign seats, even if the subject matter of their contracts and counterparties is entirely situated within India”.²⁷

Speedy Arbitration Procedure

Under the existing Act of 1996, the parties are spending a lot of time on procedural applications, which should not take as long as they do for all practical purposes. This also happens because the Act does not prescribe timelines for various applications. However, in order to overcome this, the draft amendments suggest various timelines. The draft amendments suggest that the Section 8 application must be disposed of within 60 days from the date of filing. Further, it suggests that the Section 16 application must be decided as a preliminary issue within 30 days of filing. However, it also allows the Arbitral Tribunal to decide the issue later for reasons to be recorded in writing. Further, the draft amendments suggest changing the same to 90 days from the application filing date before the court under Section 9. The draft amendments suggest that all Section 37²⁸ applications must be filed within 60 days from the date of receipt of the order appealed against, irrespective of the kind of order.

²⁴ Ibid,

²⁵ Ibid.

²⁶ Anjali Anchayil, Aiman Singh Kler, Proposed Amendments to the (Indian) Arbitration and Conciliation Act – if it ain't broke, don't fix it? - Part I, view point on Bar & Bench, 7/11/2024.

²⁷ Ibid.

²⁸ (1A) Notwithstanding anything contained in any other law, an appeal under sub-section (1) shall be made within 60 days from the date of receipt of the Order appealed against, but not thereafter.

Appellate Arbitral Tribunal, Arbitral Award and Appeal

In section 34 of the principal Act, draft amendments have suggested some changes. The Act of 1996 does not create an embargo on forming an ‘Appellate Arbitral Tribunal’ (AAT). The Supreme Court in *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd. (2006) 11 SCC 245* allowed the parties to approach an Appellate Arbitral Tribunal for the resolution of disputes subject to a statutory challenge.²⁹ The draft amendment empowers arbitral institutions to establish an AAT, which would have the authority to entertain Section 34 applications for setting aside arbitral awards. As per the proposed amendment, “where parties have agreed to take recourse to an appellate arbitral tribunal”, no application for setting aside an arbitral award can be filed before the court. The introduction of appeals adds to the time and cost of arbitration. However, for ad hoc arbitrations or cases where a party has not approached the AAT, the authority to adjudicate Section 34 applications will continue to reside with the court.³⁰ The rationale for limiting appellate arbitral tribunals only to institutional arbitration while excluding ad hoc arbitration is not clear.

However, the draft amendment does not define the scope of the powers of an AAT. One could pose a question of whether it would have a wider scope of interference than that present with the courts under Section 34 if the parties consented to such a mechanism in their contract. In other words, whether an Appellate Arbitral Tribunal would be allowed to sit in appeal over an award and decide the appeal on merits if the parties agree to the same. Additionally, the inclusion of an appellate tribunal will also be an added cost point for the parties since the cost of filing an appeal before the court is substantially less.³¹ Here, to noted that the proposed amendment provides an option to challenge the award either before the Court or AAT.³² This may, in practice, lead to another appeal stage and delay the end process. As a result of ATT, the interim relief before the court under s. 34 and s. 37 may be reduced.³³

Further, the draft amendments suggest under section 34(7) that when an award is partially set aside under Section 34, the court/Appellate Arbitral Tribunal may send it back to the original Arbitral Tribunal to decide limited issues afresh. However, this overlooks the fact that once the award is passed, the Arbitral Tribunal becomes *functus officio*. The Act shows that once an award is passed, the Arbitral Tribunal may only modify it to a limited extent under Sections 33 and 34(4).

The 1996 Act does not allow the parties to challenge an order rejecting a Section 11 petition. This makes the issue softer at the first stage, allowing parties to approach the civil courts to obtain relief. However, the draft amendments under Section 37 (1) (aa)³⁴ suggest that an order rejecting the appointment of the arbitrator under Section 11 can also be challenged under Section 37 of the Act.

²⁹ Yogendra Aldak, Pranav Mundra and Rashi Srivastava, Arbitration and Conciliation (Amendment) Bill, 2024 — Small Leaps to Align the Law with Practicality, published on 30/11/2024.

³⁰ Payal Chawla, Navigating Commercial Disputes: The Draft Arbitration and Conciliation (Amendment) Bill, 2024 - An Analysis, Bar & Bench.com

³¹ Chirag Gupta, Principal Associate, Alpha Partners. Read more at: <https://legal.economictimes.indiatimes.com/news/law-policy/experts-see-potential-benefits-but-highlight-risks-of-complexity-and-costs-in-draft-arbitration-bill-2024/114476969>

³² Shreni Shetty, Head - Dispute Resolution, ANB Legal, Read more at: <https://legal.economictimes.indiatimes.com/news/law-policy/experts-see-potential-benefits-but-highlight-risks-of-complexity-and-costs-in-draft-arbitration-bill-2024/114476969>

³³ Apeksha Lodha, Partner, Singhania & Co. Read more at: <https://legal.economictimes.indiatimes.com/news/law-policy/experts-see-potential-benefits-but-highlight-risks-of-complexity-and-costs-in-draft-arbitration-bill-2024/114476969>

³⁴ (aa) refusing to appoint an arbitrator under Section 11;

Conclusion

The above changes clarify several practical solutions and align the Act with the recent judicial pronouncements. However, there is little scope to improve in making India a preferred seat of arbitration, especially with international parties. Since recommendations are being collected from the stakeholders, we hope for the best.