A BILL TO KILL JUDICIAL INTERVENTION: FRESH ARBITRATION REFORMS IN INDIA

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The Department of Legal Affairs ("**Department**") is in the process of considering further amendments to the Arbitration and Conciliation Act 1996 ("**Act**") in India. Recently, the Department released the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ("**Draft**"), inviting comments/feedback for all stakeholders. The Draft Amendment Bill comes after the sixteen-member expert committee, chaired by Dr. T.K. Vishwanathan ("**Vishwanathan Committee**"), assessed the effectiveness of arbitration law and **proposed reforms** to the Act in February 2024.

While the Act has undergone significant amendments in the past (**2015**, **2019** and **2021**), the Draft Amendment Bill proposes unprecedented amendments in a bid to push India as an arbitration hub, strengthen institutional arbitration, and promote enforcement of contracts. The proposed amendments are far reaching and may need scrutiny to ensure absence of loose ends. This post engages critically with the key changes proposed in the Draft Amendment Bill.

COUNCIL TAKES CENTER STAGE WITHOUT BEING IN EXISTENCE

The Arbitration Council of India ("**Council**") was first envisaged by the Arbitration & Conciliation (Amendment) Act, 2019 ("**2019 Amendment**"). Initially devised to give boost to institutional arbitration and grade arbitral institutions, the Draft Amendment Bill appears to give a broader role to the Council. A cumulative reading of the Draft Amendment Bill indicates that the intention is to empower the Council to act as an overarching institution to regulate 'all things arbitration' in India. The faith shown on the Council may appear surprising to some given that it has not come into existence despite the 2019 Amendment.

There are many proposed amendments which appear to take the mandate of the Council beyond the realm of promoting institutional arbitrations. Proposed section 43(d) read with section 7(6) provides that the Council shall frame model arbitration agreements, which the parties may consider while agreeing to submit disputes to arbitration. This is a positive move since use of model clauses would ensure consistency in interpretation and enforcement of arbitration agreements.

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The proposed amendment to the proviso of section 19(3) provides that the Council shall issue model rules of procedures from time-to-time which ad-hoc tribunals shall duly consider for conducting the arbitration proceedings. The Draft Amendment Bill diverts from the Vishwanathan Committee to the extent that it uses the words 'shall duly consider' as opposed to 'may adopt' proposed by the Vishwanathan Committee. Proposed section 19(5) also mandates conducting proceedings through use of audio-video electronic means in a manner specified by the Council.

Council is effectively acting as a pseudo-arbitral institution even where parties may prefer to have their arbitration ad-hoc. While Council acting as a supportive body is welcomed, it is also imperative that arbitration proceedings do not become overly regulated and deprived of its basic characteristics, which are party autonomy and flexibility.

EMERGENCY ARBITRATOR GETS STATUTORY RECOGNITION

In a welcome move, the Draft Amendment Bill gives statutory recognition to the law laid down in *Amazon.com NV v FRL (2022) 1 SCC 209*. The proposed section 2(ea) read with proposed section 9A recognizes that arbitral institutions may, for the purpose of grant of interim measures referred in section 9, provide for appointment of emergency arbitrators prior to the constitution of the tribunal. Some aspects however warrant consideration.

Proposed section 9A (2) appears to be unnecessary. While acknowledging that emergency arbitration takes place under the aegis of arbitral institutions, the provision provides that the emergency arbitrator would conduct proceedings in a manner as may be specified by the Council. Arbitral institutions provide detailed rules for the conduct of emergency arbitration (see schedule 1, **SIAC Rules**), and interference of the Council and parallel regulation ought to be avoided.

Proposed section 9A (3) provides that an emergency award would be enforceable as if it is an order of a tribunal under section 17(2) of the Act. This creates a double legal fiction. Emergency awards are deemed to be orders under section 17(1), which in turn are deemed to be orders under section 9(1) for enforcement purposes. A double fiction may be principally avoided and proposed section 9A (3) may instead provide emergency awards to be enforceable in the same manner as if it were an order of the court. This is because emergency awards are an alternative to the relief under Section 9, and not under Section 17 of the Act. More importantly, while the proposed amendment to the proviso to section 2(2) suggests that section 9A (2) would apply to foreign seated

arbitrations, there is no such provision for section 9A (3). Consequently, foreign seated emergency awards continue to be treated unequally to domestic emergency awards, with there being no direct enforcement mechanism for the former. As I argued **here**, there is no basis for such distinction existing in the Act, and the Draft Amendment Bill fails to rectify this gap.

Proposed section 9A (4) is again unnecessary. While procedural guidance under the Act may be necessary for ad-hoc arbitrations, there is no need for such guidance when the process is wholly institutional. The power of the tribunal, and the manner of its exercise, to confirm, modify or vacate emergency arbitration is within the realm of institutional rules. A party may in principle be free to opt for an institution which does not envisage such a power for the tribunal, and proposed section 9A (4) should not be a hindrance to such party autonomy.

APPELLATE TRIBUNALS: THE WAY FORWARD

As a welcome step, the Draft Amendment Bill proposes the introduction of the option for appellate arbitral tribunals to decide section 34 petitions as opposed to domestic courts. In *Centrotrade v Hindustan* (discussed **here**), the Supreme Court had upheld the legal validity of appellate arbitration and the Draft Amendment Bill seek to statutorily recognize appellate tribunals in India. As on **September 1, 2023**, there were 2,106 petitions filed under section 34 of the Act, pending before the Delhi High Court. The disposal of section 34 petitions was on average taking 1,327 days or roughly more than 3.5 years. This amendment would bolster the Act as a complete code and provide an effective and expeditious alternative to section 34 proceedings before the court.

Having said that, it is unclear whether the appellate tribunals shall be limited to institutional arbitrations (see proposed section 34A), or parties would be free to agree to constitution of appellate tribunals in ad-hoc arbitrations. Further, as previously argued, in institutional arbitrations, the institution should be responsible for providing procedural framework for appellate tribunals rather than the Council as presently proposed in the Draft Amendment Bill (see proposed section 34A (2)).

SECTION 9(3) OMITTED?

Proposed amendment to section 9(1) suggests that the power of the court to grant interim relief during the pendency of arbitration has been totally done away with. Consequently, section 9(3), which would otherwise shield against section 9(1) applications during the arbitration, has also been

omitted. Section 9(3) provides that once the tribunal has been constituted, the court would only entertain a section 9(1) application when the relief under section 17 was either not available or not efficacious. It may be prudent to keep limited room open for such extraordinary circumstances rather than completing shutting the door to section 9(1) once the tribunal is constituted. Section 9(3), for instance, allows courts to grant interim relief when the tribunal cannot convene hearings for personal reasons, and relief is urgently required to safeguard the subject matter of the arbitration. Notably, the Vishwanathan Committee did not recommend deletion of section 9(3) but substitution of the word 'entertain' with 'proceed with'. The recommendation was made to ensure that the bar under section 9(3) operates not only against entertaining fresh applications under section 9(1) but also proceeding with pending applications, when efficacious remedy was available before the tribunal. On the flip side, the proposed amendment does settle the debate that the relief before the tribunal is always efficacious i.e. it can grant any relief which the court can grant under section 9 of the Act.

TIMES UP FOR CONCILIATION

Following the recommendations of the Vishwanathan Committee, the Draft Amendment Bill omits conciliation, and references to it, in the Act in toto. Accordingly, the title of the Act is proposed to be changed from *Arbitration and Conciliation Act, 1996* to *Arbitration Act, 1996*. This development coupled with the recent enactment of the Mediation Act in 2023 would indicate that mediation appears to have won the race between the two similar yet different alternate dispute resolution models in India. The preference accorded to mediation is also evident from the proposed amendment to section 30(2), which provides that a settlement reached by the parties during the arbitration would be a mediated settlement agreement enforceable in accordance with the provisions of the **Mediation Act, 2023**.

ODR IS HERE TO STAY AND SLAY

Proposed section 2(a) read with section 19(5) indicates that the Draft Amendment Bill promotes strongly embracing online dispute resolution ("**ODR**"), i.e., arbitration conducted wholly or partly, by use of audio-video electronic means. ODR promotes cost-time effective resolution of disputes and enforcement of contracts since parties with smaller claims and low appetite for elongated arbitrations can use ODR to realize their claims (see **SEBI ODR**). Many ODR platforms such as **CADRE** and **SAMA** are gaining traction in India, and ODR as a tool to promote arbitration culture in India must be widely utilized.

Other welcome developments

The long-standing statutory confusion between seat and venue, due to the word 'place' in section 20, appears to be put to rest. Proposed option 1 for section 20 should be the preferred option as parties ought to be free to decide the seat of arbitration. There is no gainsaying that party autonomy would allow a party to designate a seat, which is different to the place where the contract is executed or where the cause of action arises.

Section 42 has been correctly proposed to be deleted. This suggestion comes at an opportune time when the potential problems with its application were discussed by the Delhi High Court in ***CP Rama Rao v NHAI***. In this case, by way of a writ petition, an order of the lower court was impugned on the ground that it held that once a section 11 petition is moved before a high court, all subsequent applications, including under section 34, would lie only before the same high court. The Delhi High Court concluded that section 42 does not apply to applications under section 11 of the Act. Section 42, which promotes 'fastest finger first' culture, and allows a party to designate a seat by moving a court first, creates unnecessary confusion and has been rightly avoided.

Other welcome changes include the definition of court being streamlined with the introduction of proposed section 2A. Timelines of sixty days and thirty days being introduced for decision section 8 and section 16 applications respectively. The proposed amendments are specific to Part I of the Act and there is no suggestion for a similar timeline to apply to applications under section 45 of the Act. An order refusing to appoint an arbitrator under section 11 has been proposed to be made an appealable order under section 37(1)(aa). The legality of partial setting aside of award, which was recently upheld by Delhi High Court in ***NHAI v Trichy***, has also been rightly recognized in the proposed amendments to section 34. Following the recommendation of the Vishwanathan Committee, the debated Fourth Schedule has been omitted, and room has been left open for the central government to prescribe a legal framework and appropriate rules for fees of arbitrators.

CONCLUSION

The underlying objective of the Draft Amendment Bill appears to promote institutional arbitration and kill judicial intervention in arbitration, to the maximum extent possible, in the pre-constitution stage, pendent lite, and post award stage. The Draft Amendment Bill only partially follows the recommendations made by Vishwanathan Committee, and some important recommendations do not find mention. While several proposed amendments are welcomed, some may require closer scrutiny and deliberation. In particular, the Council has been given a wide-ranging role to shape

the future of arbitration in India. Its establishment (hopefully soon) and workings would need to be overseen to ensure that arbitration does not become an overly and strictly regulated process and does not lose its charm by translating from a party driven process to a Council driven process.