COMMENTS AND SUGGESTIONS ON THE DRAFT ARBITRATION & CONCILIATION (AMENDMENT) BILL, 2024

Prepared by

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INTRODUCTION & ACKNOWLEDGMENT

The Centre for ADR at the National Law University Delhi would like to express our heartfelt gratitude for the Department of Legal Affairs, Ministry of Law & Justice, Government of India to seek our comments on the Draft Arbitration & Conciliation (Amendment) Bill, 2024.

The Centre for ADR hosted a Webinar – "*In Focus: The Draft Arbitration & Conciliation (Amendment) Bill, 2024*" on 28 October 2024. The Webinar focused on discussions around the conception of court and the seat-venue debate under sections 2A and 20 of the draft Bill, and jurisdiction under section 42 of the Bill. The panelists also discussed the impact of the omission of section 9(3) of the Act, the guerrilla tactics used by the parties and the overall scheme under section 34 to conclude that there has been an active effort to minimise the judiciary's role in the overall arbitration framework. We would like to thank the contribution of our panelists.

We have a few concerns with the current Bill which we are submitting for your perusal. In Part I, we submit a section-wise overview of our comments on the proposed amendments for the Department to consider and in Part II, we have provided a detailed analysis of the proposed amendments by considering the jurisprudence in India, prior Law Commission Reports, Expert Committee Reports, and International Best Practices.

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PART I

OVERVIEW OF COMMENTS

SECTION-WISE COMMENTS

i. **Section 2(1)(a)** – The Centre partially support the amended definition of "arbitration" with one suggestion that the term 'arbitral institution' be qualified by the term 'recognised'. Doing so would ensure that the arbitral institutions duly recognised by the Arbitration Council of India would fall under the said definition.

ii. **Section 2(1)(aa)** – The Centre support the inclusion, and thereby, the recognition of arbitration by audio-video electronic means. It reflects the modern realities and technological convenience, providing clarity on the use of communication devices during arbitration. However, this amendment can be effective only when there are clearer guidelines for ensuring the protection of sensitive data and maintenance of procedural fairness. An extremely important distinction required is: use of audio-video electronic means in *ad hoc* arbitration or conducting the whole arbitral proceedings through audio-video electronic means. The latter requires to be connected to Arbitral Institutions and would require clear guidelines.

iii. **Section 2(1)(ca)** – The Centre do not support this definition of the term "arbitral institution" as it allows any body or organization to fall under the definition. It is, instead, suggested that there be a mandatory requirement for an arbitral institution to be one that is so accredited by the Arbitration Council of India or those that are recognized by the Supreme Court or the High Courts as the case maybe.

iv. **Section 2(2)** – The Centre partially support this amendment with a few suggested changes. Firstly, it is suggested that the term "international commercial arbitration" needs to be retained. Awards recognizable under Part II are the awards arising out of International Commercial Arbitration in accordance with the New York Convention. Further, it is also suggested to remove the reference to Section 9A in the proviso since it contradicts with Section 9A and the intention behind it. Also, as it was suggested by the 246th Law Commission report too, there is a requirement to add the word "express" in the proviso. The proviso is to be read as, "subject to express agreement to the contrary".

v. **Section 2A** – This amendment gives statutory recognition to the concept of seat in domestic arbitration as well as India-seated international commercial arbitration. Two aspects are not supported.

- Introduction of the concept of seat in domestic arbitration as well as in arbitration conducted solely through audio needs reconsideration. Section 2(1)(e) and section 42

should be retained for domestic arbitration by adequately replacing the words, "principal courts of original civil jurisdiction" with "courts having territorial and pecuniary jurisdiction."

- Section 2A(2)(ii) is redundant to the extent of conceptualising an international commercial arbitration without a seat.

vi. **Section 7** – While the amendment to the effect of inclusion of the signatures is supported, the addition of sub clause (6), dealing with model arbitration clause is unnecessary for the purpose of this legislation and may be dealt better with rules of procedure or publications by the Council itself.

vii. **Section 9** – Omission of Section 9(3) is not supported as the same ignores the instances where a relief is required from the supervisory court in case of an inefficient arbitral tribunal, and the same may cause an impediment in obtaining an urgent relief. Further, such restriction of approaching the supervisory court while a tribunal has been constituted is also incompatible with UNCITRAL Model Law and other relevant international jurisprudence. Therefore, it is suggested that the original section must be retained while qualifying the right to approach the court. The legal position in this respect is fairly certain with the Supreme Court judgment in *Arcelor Mittal*.

viii. **Section 9A** – The inclusion of this section is supported as the same will lead to an increase in attraction of India as a seat for international commercial arbitration, provide more certainty around the domain of emergency arbitration, and strengthen the efficiency of arbitration as a method of dispute resolution.

ix. **Section 11** - The proposed amendments to Sections 11(3), 11(3A), 11(4), 11(5), 11(6) are welcome as the same leads to a promotion of institutional arbitration and are also focused on enhancing the independence and impartiality of the arbitral tribunal.

- While deletion of 11(6A) is required given the fact that appointments are to be made by the recognised arbitral institutions, this also leaves a gap as the Act will henceforth be silent about role of the courts at the time of designating an arbitral institution. It will be helpful to include a specific provision to that effect. Leaving it for the judiciary to clarify the same will generate another series of litigation.
- There is also a lack of clarity about the appointment of arbitrator in the case of *ad hoc* arbitrations. It appears from the proposed amendments that appointments are to be made by the designated arbitral institutions even in the case of *ad hoc* arbitrations. This lack of clarity is also an avenue for prolonged litigation if left for the judiciary to decide.
- Lastly, the deletion of the Fourth Schedule, in the absence of careful monitoring, may cause challenges in maintaining consistency across institutions and may affect access to arbitration due to excessive costs.

x. **Section 16** – The specification of a 30-day period for the tribunal to determine jurisdictional

questions is supported as the same shall limit pre-award litigation and will result in expeditious determination of jurisdictional issues, akin to an approach adopted by foreign arbitral institutions.

xi. **Section 17** - The amendment is supported with an important change, insofar as the power to confirm, modify or vacate an *ad interim* measure. The same is premised on the similarity of powers of the tribunal under Section 17 and that of the court under Section 9, which is also akin to the international practice. However, to increase its effectiveness, *the tribunal must also be provided the ability to exercise the aforesaid power at its own initiative subject to prior notice to the parties.*

xii. **Section 20** – Option I of the amendment is supported as the usage of the terms 'seat' and 'venue' as opposed to 'place' provides a much-required clarity to the dilemma of determining the seat of arbitration and adheres to the approach adopted by courts in India. However, Option II must categorically be rejected as the same ignores the basic principle of party autonomy in arbitration and opens avenues for 'forum shopping' and jurisdictional ambiguities and would cause significant delays in the determination of the seat of arbitration.

xiii. **Section 29A** – This amendment is partially supported as although integration of arbitral institutions in section 29A is needed to bring it in consonance with the larger scheme of the draft bill, which provides for a greater avenue for institutional arbitration, the proposed amendment does this mechanically and needs to provide more clarity with respect to the timelines of an *ad hoc* or institutional tribunal. In the absence of this, there may be a potential inconsistency between statutorily-mandated timeline and the timeline stipulated in the procedural rules of the institution. Further, there may also be uncertainty in relation to the extension of the tribunal's mandate.

xiv. **Section 31(1) –** The insertion of the phrase, "duly stamped" is supported since the amended provision would be in harmony with an already existing legal requirement. An award of an arbitrator is an instrument chargeable with duty as per s. 3 r/w Schedule I Entry 12 of the Indian Stamp Act, 1899. Further, as per s. 35 of the same Act, any award lacking proper stamping or with insufficient stamping is deemed inadmissible in evidence unless the deficiency is addressed, and the penalty is paid.

xv. **Section 34(1)** – The Centre partially support this amendment insofar as the introduction of a two-tierarbitration mechanism (appellate arbitral tribunals) is provided for. However, more consideration and clarity will be required before notifying this provision. Undoubtedly, this option will be available only for institutional arbitration. There is need for clarity on the composition and procedure for the constitution of these appellate tribunals. Moreover, an express agreement as envisaged in section 12(5) may be made mandatory for exercise of this option. The Centre believe that the taking away from the parties of the right to

approach the courts in case an appellate arbitral tribunal is opted in the agreement or by the arbitral institutions would possibly promote litigation as it might be seen in restraint of legal proceedings.

xvi. **Section 34(2A)** – The Centre do not support the amendment wherein the terms 'the Court finds that' have been replaced by 'if the party making the application establishes on the basis of the record of the arbitral tribunal that'. The Centre is of the opinion that this brings issues such as arbitrability and public policy on the same pedestal as those of absence of a proper notice or a party being under some incapacity. It is suggested that the original section shall be retained as the same strikes a distinction between certain objections which need to be raised by a challenging party and be established on the basis of the record of the arbitral tribunal while other concerns need to be identified by the court itself as part of its prerogative. Further, it is suggested that both 34(2) and 34(2A) should be similarly worded and partial setting aside must be allowed in both categories of issues.

xvii. **Section 42** – The omission of Section 42 is not supported as the same may lead to forum shopping. Section 42 guaranteed that once a court is approached in relation to an arbitration that court would subsequently have exclusive jurisdiction over all ensuing proceedings. However, in the absence of Section 42, and in the case where the seat of arbitration is undetermined, there will be uncertainty as to which court would have jurisdiction over the proceedings related to the arbitration.

xviii. **Section 43C** - This amendment is supported partially as the ACI may have representative from judiciary also who has sufficient experience in dealing with arbitration matters. Given the nature of functions to be performed by the Council under Section 43D, it is pertinent that there be a young judicial member in it.

PART II

DETAILED COMMENTS

SECTION 2

Existing Provision	Proposed Amendments
Section 2(1)(a): "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution.	**Section 2(1)(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.
New Proposed Section 2(1)(aa): N/A	**Section 2(1)(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.

CADR's Comment on the Proposed Amendment

This amendment is **partially supported.**

Reasoning:

1. **Definition of "Arbitration" (Section 2(1)(a))**: The amendment expands the scope of arbitration to include proceedings conducted via audio-video electronic means. This addition is a positive development in light of technological advancements and the need for flexibility in conducting arbitration, especially after the COVID-19 pandemic. It aligns with global trends, making arbitration more accessible and efficient by allowing for remote hearings, electronic filings, and recordings.

   CADR Recommendation: The definition should specify that arbitral institutions must be recognised under a regulation, ensuring accountability. The following redraft is suggested:

   - "Arbitration means any arbitration whether or not administered by a ***recognised*** arbitral institution and includes arbitration conducted, wholly or partly, by use of audio-video electronic means."

2. **Introduction of "Audio-video electronic means" (Section 2(1)(aa))**: This provision reflects the modern realities and technological convenience, providing clarity on the use of communication devices during arbitration.

CADR Recommendation: While supporting the inclusion of audio-video means, CADR recommends clearer guidelines for ensuring the protection of sensitive data and the maintenance of procedural fairness. Also, there is a need to mention clear distinction between use of audio-video means or arbitration solely by the audio-video electronic means. It is important that the latter is connected to an arbitral institution. A combination of *ad hoc* arbitration solely through audio-video electronic means will be highly problematic.

Consequences / Impact of the Proposed Amendment

i. **Impact of Audio-video Electronic Means**:
   - This amendment, while positive, may lead to possible conflicts about the adequacy of existing infrastructure and regulatory oversight. Challenges regarding data privacy, cyber-security, and technical failures may surface, potentially prolonging arbitrations if not addressed properly. Additionally, unequal access to reliable technology may disadvantage certain parties, affecting fairness.

ii. **International Arbitration Standards:**
   - In international commercial arbitrations, the reliance on virtual means is increasingly common.[1] However, if there are no clear guidelines on security and procedural fairness, India's arbitration framework may fall behind international best practices. Incorporating more coherent language on data protection and fairness will bring the Indian system in line with global standards.

Existing Provision	Proposed Amendments
Section 2(1)(ca): "Arbitral institution" means an arbitral institution designated by the Supreme Court or a High Court under this Act.	**Section 2(1)(ca)**: "Arbitral institution" means a body or organisation that provides for conduct of arbitration proceedings under its aegis, by an arbitral tribunal as per its own rules of procedure or as otherwise agreed by the parties.

CADR's Comment on the Proposed Amendment

This amendment is **not supported.**

Reasoning - **Definition of "Arbitral Institution" (Section 2(1)(ca))**: The proposed amendment broadens the

[1] Pursuant to Article 19.2 of the LCIA Arbitration Rules of 2020*:* : *The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, specifying that as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).*
The same is noticed in the updated Arbitration Rules of the ICC of 2021, which added the following sentence in its Article 26(1), as it stipulates: *The arbitral tribunal may decide, after consulting the parties, and on the basis of relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.*

definition of an arbitral institution, allowing any body or organisation that provides arbitration services under its own rules or as otherwise agreed by the parties. Whereas, the rest of the Act, especially in Section 11, mentions "recognised arbitral institutions" or those designated by the Supreme Court or the High Courts.

"Any body or any organisation" in not only incompatible with provisions in rest of the statute, it also removes judicial oversight in the designation of institutions, risks a dilution of standards, particularly in domestic arbitrations, where there may be lesser-known or informal organisations stepping in as arbitral institutions without adequate experience or governance. This could foster inconsistent arbitral awards and invite challenges based on procedural irregularities.

CADR Recommendation: The current provision that requires the Supreme Court or High Courts to designate arbitral institutions should be retained to ensure quality control, accountability, and oversight. If flexibility is sought, a middle ground could be introduced by mandating that institutions be accredited by a regulatory body under the Act. Suggested rewording:

- "Arbitral institution means a body or organisation accredited by a regulatory body under this Act, or designated by the Supreme Court or a High Court."

Consequences of the Proposed Amendment

i. **Promoting Litigation**:
   a. The removal of judicial oversight in designating arbitral institutions increases the risk of unregulated institutions conducting arbitrations. This could lead to procedural inconsistencies, triggering litigation over the validity of awards. Additionally, the introduction of the concept of seat without clear fallback provisions invites disputes over jurisdiction in both domestic and international arbitrations.

ii. **Affecting Finality of an Award:**
   a. The inclusion of unregulated arbitral institutions risks the enforceability of awards, as parties may challenge the legitimacy of the institution itself. Without proper oversight, the finality of awards could be compromised, leading to more frequent appeals.

Existing Provision - Section 2(2)	**Proposed Amendment**
(2) This Part shall apply where the place of arbitration is in India: Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the	(2) This Part shall apply where the place of arbitration is in India: 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,

place of arbitration is outside India, and an arbitral award made or to be made in such a place is enforceable and recognised under the provisions of Part II of this Act.	even if the seat of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

CADR's Comment on the Proposed Amendment

This amendment is **partially supported.** The proposed amendment brings improvements, especially with the inclusion of interim relief provided under section 9A. However, the broader application of Indian arbitration laws to arbitrations with a foreign seat, even without a direct focus on "international commercial arbitration," raises doubts about excessive intervention by Indian courts in cases that are seated abroad.

Also, the exclusion of Section 9 should be made subject to only "express" agreement to the contrary. This was also a recommendation made by the 246th Law Commission Report. Not mentioning the word "express" brings back the possibility of "implied exclusion" and associated litigation.

- **Recommendation**: The term "international commercial arbitration" should be retained to prevent overreach, ensuring that Indian courts only intervene when it concerns international commercial disputes. This will also be compatible with Part II and the India's stance towards the New York Convention which is applicable only to International Commercial Arbitration. The inclusion of section 9A for interim relief is a progressive step, but the clause should still preserve party autonomy in choosing their legal framework for arbitrations seated outside India. We propose the following redraft:

Suggested Redraft: "Provided that subject to an "express" agreement to the contrary, the provisions of section 9, section 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to ***international commercial 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."

Consequence of the Proposed Amendment

i. **Promoting Litigation**
   - By applying certain provisions of Part I to any arbitration seated outside India (not limited to international commercial arbitration), the amendment could lead to increased litigation. Retaining the term "international commercial arbitration" would help clarify when Indian courts can intervene, avoiding unnecessary litigation.

ii. **Affecting Party Autonomy**

iii. The broader application of Indian arbitration law to arbitrations outside India may undermine party autonomy. Parties to arbitrations with foreign seats often choose to exclude specific

national laws to avoid unnecessary intervention.

- Longer Arbitrations - The possibility of Indian courts providing interim relief (sections 9 and 9A) or engaging in procedural matters (section 27) for arbitrations seated abroad could lead to longer arbitrations. As parties seek court intervention during the arbitration process, delays may arise, increasing the length of time required to resolve disputes.

iv. **Impact on Finality of an Award**

SECTION 2A

Existing Provision	Proposed Amendment
Section 2(1)(e): "Court" means— (i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction...	2A. (1) In case of arbitration other than international commercial arbitration, (i) where 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. (2) In case of 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, Court means the High Court having territorial jurisdiction over the seat. (ii) in all other cases, Court means the High Court having territorial jurisdiction to decide disputes forming the subject matter of arbitration. (3) In arbitrations which are conducted solely through audio visual electronic means, the provisions of sub-section (1) or sub-section (2), as the case may be, shall mutatis mutandis apply.

CADR's Comment on the Proposed Amendment

The amendment is **partially supported**. Following is an **alternative drafting** that can be adopted:

(2) *2A. (1) In case of arbitration other than international commercial arbitration, the court means the court having pecuniary and territorial jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit(i) In case of international commercial arbitration, Court means the High Court having territorial jurisdiction over the seat.*
Provided that, in those cases, where an arbitration petition needs to be filed before determination of Seat the High Court having territorial jurisdiction to decide disputes forming the subject matter of arbitration.

(3) In arbitrations which are conducted solely through audio visual electronic means, the provisions of sub-section (1) or sub-section (2), as the case may be, shall mutatis mutandis apply.

Reinstate Section 42 with a slight modification for domestic arbitration to read as:

42. Jurisdiction.—Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, ***in cases other than international commercial arbitration****, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdictionover 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.*

Consequences / Impact of the Proposed Amendment

i. **Increased Pre-Arbitration Litigation** - The primary concern that lies within the amendment, insofar as sub-clause (1) is concerned, is the introduction of a new avenue for litigation through the venue v. seat distinction within domestic arbitration. Choice of seat within a country seems redundant,[2] considering one of the important elements of seat is choice of arbitration law of the chosen legal system. In any case, following the law in *Indus Mobile Distribution Pvt. Ltd. v Datawind Innovations Pvt. Ltd.*[3]*, Brahmani River Pellets Ltd v Kamachi Industries Ltd,*[4] and *Hindustan Construction Co. Ltd. v NHPC Ltd.,*[5] the choice of venue will have to be treated as a choice of jurisdiction of the territorial courts in domestic arbitration. While parties are allowed to hold this choice of venue in international arbitration, the conflating of it to seat seems counterproductive. This will lead to more pre-arbitration litigation.

ii. **Unenforceability of Award** - Insofar as sub-clause (2) in (ii) prescribes law for a situation where a seat does not exist within international commercial arbitration, is redundant. Even in a case where the seat is not determined in an arbitration agreement, such determination is within the ambit of the arbitral tribunal subject to review. But such arbitration cannot be conducted without a seat. Floating arbitration agreements[6] are not currently recognized in international arbitrations, considering concerns with unenforceability. Further, introduction of the principle of *mutatis mutandis* further only serves to bring confusion over the possibility of a seat-determined domestic arbitration, or a seat-absent international commercial arbitration.

Two options may be considered for remedying the concerns allied with the amendment.

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[2] Yogendra Adlak, Rashi Srivastava and Bhavya Shukla, 'Seat versus Venue: A Damsel Distressing Domestic Arbitrations' (*SCC Online*, 27 May 2024) <https://www.scconline.com/blog/post/2024/05/27/seat-versus-venue-a-damsel-distressing-domestic-arbitrations/#%3A~%3Atext%3DDetermination%20of%20seat%20in%20domestic%20arbitrations%26text%3DThe%20Court%20held%20that%20a%2Cthe%20purposes%20of%20arbitral%20proceedings> accessed on 27 October 2024.

[3] (2017) 7 SCC 678

[4] (2020) 5 SCC 462

[5] (2020) 4 SCC 310

[6] Morten Frank, 'Where to go: the floating arbitration agreement' *Arbitration International*, Volume 35, Issue 2, June 2019, Pages 171–194.

i. Clarification may be sought for when situations as under Section 2A(1)(ii), 2A(2)(ii) and 2A(3) may exist in the first place. Further, clarification must be sought for the purposes of Section 2A(1)(i), for the purpose behind introduction of the seat determination domestically.

ii. Section 42 must be reinstated (with necessary amendments as under the expert committee report), giving exclusive jurisdiction to the court where it was first invoked, for a situation where overlapping jurisdictions may be conceptualized.

SECTION 7

Existing Provision	Proposed Amendment
Arbitration agreement.— (1) In this Part, —arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.	Arbitration agreement.— (1) In this Part, —arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.	(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
(3) An arbitration agreement shall be in writing.	(3) An arbitration agreement shall be in writing.
(4) An arbitration agreement is in writing if it is contained in—	(4) An arbitration agreement is in writing if it is contained in—
(a) a document signed by the parties;	(a) a document signed by the parties including through digital signature;
(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or	(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.	(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.	(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.
	(6) The Council shall frame model arbitration agreements, which the parties may consider, while agreeing to submit disputes to arbitration.

CADR's Comment on the Proposed Amendment

The amendment to the effect of inclusion of digital signatures is **supported** by the CADR.

The amendment to the effect of addition of (6) is **not supported** by the CADR. This seems unrequired for the purposes of this legislation, and may be dealt better with, rules of procedure or publications by the Council itself.

Consequences / Impact of the Proposed Amendment

i. **Compatible for Borderless Transactions** - The amendment, insofar as it concerns the inclusion of digital signatures, is in line with the practice of allowing borderless transactions, reading together *Trimex International Fze Limited, Dubai v Vedanta Aluminum Ltd* and *Vidya Drolia v. Durga Trading Corpn*. This is resonated insofar as the 2016 Amendment's inclusion of electronic communications, and even the *New York Convention* allowing for such signatures under its Article II. While some concerns have been seen arising for the standard of proof required to establish a *bonafide* electronic signature, these may be dispensed with in practice instead of legislation, as was done in the USA.[7]

ii. The amendment, insofar as introduces a duty to frame model arbitration clauses, seems unnecessary to be placed within a legislation. While the factum of the existence of model clauses is seen through countries, these are not prescribed within the main legislation. Examples of this can be seen in the USA,[8] UK,[9] Switzerland,[10] etc. The relevance of this addition is unclear.

[7] Crystal Miller-O'Brien and Beatrice Nuñez-Bellamy, 'E-Signing Arbitration Agreements in a Remote World' (*Davis Wright Tremain LLP*, 17 June 2021) https://www.dwt.com/blogs/employment-labor-and-benefits/2021/06/e-signing-arbitration-agreements> accessed on 28 October 2024.

[8] 'AAA-ICDR Clause Drafting' (*American Arbitration Association*) <https://www.adr.org/Clauses> accessed on 28 October 2024.

[9] London Chamber of Arbitration and Mediation 'Model Contract Clauses' September 2022 <https://lcam.org.uk/wp-content/uploads/2022/07/LCAM-Model-Contract-Clauses_compressed.pdf> accessed on 28 October 2024.

[10] Swiss Rules of International Arbitration, 'Model Arbitration Clause' <Swiss-Rules-2021-Model-Arbitration-Clause-EN.pdf> accessed on 28 October 2024.

SECTION 9

Existing Provision	Proposed Provision
9) Interim measures, etc., by Court.— (1) A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—	9) Interim measures, etc., by Court.—(1)A party may, before the commencement of arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with the provisions of the Act, apply to a court—
(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or	(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relationto, any proceedings before it.	(ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relationto, any proceedings before it.
(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub- section (1), the arbitral proceedings shall be commenced within a period of ninety days from	(2) Where, before the commencement of the arbitral proceedings, a party files an application for any interim measure of protection under sub- section (1), the arbitral proceedings shall be commenced within a period of ninety days from

the date of such order or within such further time as the Court may determine.	the date of filing of such an application in the Court.
(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.	Omitted.

CADR's Comment on the Proposed Amendment

The amendment is **not supported** insofar as the proposed Section 9(1) limits interim relief to be granted only before the commencement of arbitral proceedings and removal of Section 9(3). Following is an **alternative drafting** that can be adopted -

Retaining the original Section, allowing access to courts, while qualifying such right after the arbitration proceedings have commenced.

> *"9. Interim measures, etc., by Court.—*
> *1 [(1)]A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—*
> *(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or*
> *(ii) for an interim measure of protection in respect of any of the following matters, namely:—*
> *(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;*
> *(b) securing the amount in dispute in the arbitration;*
> *(c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;*
> *(d) interim injunction or the appointment of a receiver;*
> *(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.*
>
> *2 [(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral*

proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.]"

Consequences / Impact of the Proposed Amendment

i. **Ignorance of inefficient Arbitral Tribunals** - Section 9(3) was added by the 2015 Amendment with the intention of reducing dependence on courts.[11] According to Section 9(3), courts have the authority to provide temporary relief in cases where Section 17 redress would be "inefficacious." In *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd*.,[12] the Supreme Court offered advice on this, stating that where the arbitral tribunal is unable to handle urgent concerns because of logistical limitations (such as illness, unavailability, or bias issues), courts may step in. Given that temporary remedy frequently necessitates prompt attention that tribunals may not be able to provide, this view indicates a policy-based approach. After reviewing the Act's provisions, the Supreme Court noted that Section 9(1) permits a party to an arbitration to request interim relief from the court before or during the arbitral proceedings, or at any point after the award has been made and published but before the final arbitral award is enforced under Section 36 of the Act. The intent and import of Section 9(3) was always to qualify the right available under Section 9(1).

ii. The Calcutta High Court used *Arcelor Mittal's* reasoning in *Jaya Industries v. Mother Dairy Calcutta*,[13] stressing that if a court has "entertained" a Section 9 motion, it should refrain from repeating the process before the arbitral tribunal to prevent duplicative litigation. Here, even though the tribunal was constituted while the interim relief was being considered, the court retained jurisdiction, underscoring the principle that intervention should avoid "rewinding the clock" on urgent applications. In *Bhubaneshwar Expressways Pvt. Ltd. v. NHAI*,[14] although a tribunal was present, the Delhi High Court granted a Section 9 application because an arbitrator's recusal prevented the panel from operating. This demonstrates the function of the court in situations where the relief provided by the tribunal is inadequate.

iii. **Impediment in obtaining Urgent Relief** - The Delhi High Court in *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India (P) Ltd*.[15] reinforced that Section 9(3) does not strip courts of their power to grant interim measures. Rather, it requires courts to assess whether the tribunal can promptly and effectively address the requested relief under Section 17.

[11] Arbitration and Conciliation (Amendment) Act 2015, Section 5.
[12] 2021 SCC OnLine SC 718.
[13] AP 85 of 2023.
[14] 2019 SCC OnLine Del 11390; see *Energo Engineering Projects Ltd. v. TRF Ltd.,* 2016 SCC OnLine Del 6560.
[15] 2017 SCC OnLine Del 7226.

These rulings affirm that courts maintain a supporting role in arbitration by ensuring that urgent relief is not impeded by procedural limitations. The avenue of seeking emergency arbitration nevertheless remains to seek interim relief if the tribunal is unavailable for any reason. In *Ashwin Minda & Anr v. U-Shin Ltd*.,[16] the Delhi High Court clarified that relief under Section 9 and emergency arbitrator's relief cannot be invoke simultaneously.

iv. **Incompatibility with UNCITRAL Model Law and International Jurisprudence** - Such a change is further incompatible with the UNCITRAL Model Law, the very law which has guided India's Arbitration and Conciliation Act.

> "*Article 9. Arbitration agreement and interim measures by court It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.*"

Similarly, even significant hubs of arbitration, including Singapore allow recourse to courts in case of both domestic and international arbitrations during the course of the arbitration proceedings.[17] Dependence on judicial authorities in exceptional circumstances is even acknowledged by Rule 30.3 of the SIAC Rules and Rule 25.3 of the LCIA Rules.

While reducing court intervention remains an important objective of arbitration law, but the past experience has shown that closing necessary statutory avenues for recourse to courts makes parties resort to invoking other methods like writ jurisdiction etc.

[16] (2020) 3 Arb LR 204

[17] Arbitration Act 2001, Section 31; International Arbitration Act, Chp 143A, Section 12A.

SECTION 9A

Existing Provision	Proposed Amendment
New Provision	New section- After section 9 of the principal Act, the following section shall be inserted, namely- —9A. 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 anarbitral tribunal. (2) The emergency arbitrator appointed under subsection (1) shall conduct proceedings in the manner as may be specified by the Council. (3) Any order passed by an emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under subsection (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

CADR's Comment on the Proposed Amendment

The amendment is **supported**.

Consequences / Impact of the Proposed Amendment

i. **Attraction for International Commercial Arbitration** - The presence of emergency arbitrators will make India a more appealing location for international commercial arbitration. It reflects India's commitment to being a pro-arbitration jurisdiction that offers an effective and efficient dispute resolution process. It will also serve to alleviate the pressure on courts by giving an alternative forum for getting interim relief.

ii. **Increased certainty around Emergency Arbitration** - Recognising emergency arbitration is a positive development. This inclusion seeks to clear up any uncertainty about the validity and implementation of orders issued by emergency arbitrators. Applying these principles universally and consistently will increase party confidence in the employment of arbitral institutions for interim relief applications.[18]

iii. **Increased efficiency of Arbitration as a method of dispute resolution** - The addition of emergency arbitration provision will allow parties to get immediate interim relief while increasing the efficiency of dispute settlement. However, to leverage these benefits,

[18] Pinsent Masons, 'India Launches Consultation on Further Changes to Arbitration Legislation' (Pinsent Masons, 24 October 2023) https://www.pinsentmasons.com/out-law/news/india-consultation-changes-arbitration-legislation accessed 30 October 2024.

successful implementation will require institutional preparation and stakeholder education.

However, unlike SIAC, LCIA and ICC, India currently lacks the set of rules that would guide the manner in which the emergency arbitration is conducted. Such an absence might give rise to ambiguity and uncertainty regarding the details of the procedure.

SECTION 11

Existing Provision	Proposed Provision
(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.	(3) Failing any agreement on a procedure for appointment of arbitrator or arbitrators referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
2019 amendment - yet to be enforced (3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.	 (3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been recognized by the Council under section 43K, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no recognized arbitral institutions are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified by the Council: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.
2019 amendment – yet to be enforced (4) If the appointment procedure in sub-section (3) applies and – (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their	 (4) If the appointment procedure in sub-section (3) applies and – (c) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (d) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

appointment, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.	the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be. Provided that the party in its application made under this subsection shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.
2019 amendment – yet to be enforced (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in subsection (4).	(5) Failing any agreement on a procedure for appointment of arbitrator or arbitrators referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4). Provided that the party in its application made under this subsection shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.
2019 amendment – yet to be enforced 6) Where, under an appointment procedure agreed upon by the parties,	2019 amendment – yet to be enforced 6) Where, under a procedure, for appointment of arbitrator or arbitrators, agreed upon by the parties,

(a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be, to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.	(a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be, to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. Provided that the party in its application made under this subsection shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.
(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement. **[Omitted in 2019]**	(6A) An application under sub-section (4) or sub-section (5) or sub-section (6) shall be filed within 60 days from the failure or refusal of appointment of arbitrator or arbitrators, as the case may be.
(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.	(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution designated under sub-section (3A) within a period of thirty days from the date of service of notice on the opposite party.

2019 Amendment – yet to be enforced (14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitration tribunal subject to the rates specified in the Fourth Schedule. Explanation – For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.	(14) The arbitral institution designated under sub-section (3A) shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitration tribunal as per its rules or in absence thereof, in the manner as specified by the Council under section 11A. Explanation—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.

CADR's Comment on the Proposed Amendment -

The amendments in Section 11(3) – insertion of "on a procedure for appointment of arbitrator or arbitrators", in Section 11(3A) – replacement of "graded" with "recognised" arbitral institutions, and in Sections 11(4), 11(5) and 11(6) – addition of mandatory disclosure requirements for pending arbitrations, are **supported** by CADR.

The amendment in Section 11(6A) – introduction of a 60-day time limit for filing applications, the change is **not supported** by CADR.

- CADR proposes to refrain from making the proposed change and retain Section 11(6A) to continue to read the following:

  (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall refrain from issues relating to jurisdiction of arbitral tribunal.

The amendment in Section 11(14) – removal of reference to the Fourth Schedule and introduction of institutional fee determination, the change is **partially supported** by CADR.

Consequences / Impact of the Proposed Amendment

i. **Promoting institutional arbitration** - The shift from *"graded"* to *"recognised"* arbitral institutions in Section 11(3A) reflects the Supreme Court's observations in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, where the Court emphasized the need for institutional arbitration to ensure

neutrality in appointments.[19] The proposed change aligns with this judicial thinking by creating a more flexible recognition system that can accommodate diverse institutions while maintaining quality standards. This also allows for specialization among institutions, as noted in the case of *BSNL v. Nortel Networks India Pvt. Ltd.*[20] It also aligns with recommendations in both the *246th Law Commission Report* and the *High-Level Committee Report* (Justice B.N. Srikrishna Committee, 2017). The Law Commission's 246th Report specifically noted that institutional arbitration would *"provide greater credibility to the arbitration process"*, while reducing the burden on courts. The SIAC v. CIETAC comparison demonstrates how recognition rather than grading has helped Singapore emerge as a preferred arbitration hub. The SIAC Annual Report 2020 showed increasing caseload demonstrating the success of their recognition-based approach. Applying the same to the Indian framework will foster a similar improvement.

ii. **Enhancing independence and impartiality** - The new disclosure requirements find their basis in the principles laid down by the Supreme Court in *HRD Corporation v. GAIL (India) Limited*, where the Court emphasized the importance of disclosures in maintaining arbitral integrity.[21] The amendments strengthen this by mandating disclosure of pending arbitrations between parties, requiring information about past awards in related disputes and creating a framework for identifying potential conflicts early in the process. Further, it also aligns with the Supreme Court's emphasis on arbitrator independence in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd*.[22]

iii. **Redundant and overlapping timeline** - The introduction of a 60-day timeline for applications must be viewed in light of *State of Arunachal Pradesh v. Subhash Projects*, where the Supreme Court emphasized the need for expeditious appointment procedures.[23] However, the rigid timeline presents concerns. It may conflict with principles of access to justice in complex cases, it could create particular challenges in international commercial arbitrations and therefore, required to be balanced. Therefore, balancing against the principle of party autonomy recognized in *Centrotrade Minerals v. Hindustan Copper*.[24]

iv. ***Affecting cost of arbitral proceedings*** - The removal of the Fourth Schedule reference represents a significant shift from the regulated fee structure discussed in *Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV*.[25] The new approach allows market forces to determine fees, potentially leading to more efficient pricing. It may however, create challenges in maintaining consistency across institutions. Therefore, it requires careful monitoring to prevent excessive costs affecting access to arbitration.

[19] (2019) SCC Online SC 1517
[20] (2021) 5 SCC 738
[21] (2018) 12 SCC 471
[22] (2017) 4 SCC 665
[23] (2006) 13 SCC 322
[24] (2017) 2 SCC 228
[25] (2022) SCC Online SC 1122

SECTION 16

Existing Provisions	Proposed Amendments
Competence of arbitral tribunal to rule on its jurisdiction. — (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —	**Competence of arbitral tribunal to rule on its jurisdiction. —** (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and	(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.	(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.	(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings	(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.	(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.	(5) The arbitral tribunal shall decide on a plea referred to in subsection (2) or sub-section (3) as a preliminary issue within thirty days of the filing of the application, unless for reasons to be recorded in writing, the arbitral tribunal deemsit fit to decide the plea later and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.	(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

CADR's Comment on the Proposed Amendment

The amendment is **supported**.

Consequences / Impact of the Proposed Amendment

i. **Preventing pre-award litigation:** The addition of phrase *"as a preliminary issue within thirty days of the filing of the application, unless for reasons to be recorded in writing, the arbitral tribunal deems it fit to decide the plea later"* to deal with plea dealing with jurisdictional issues, specifically with respect to tribunal exceeding its authority, proscribes a certain time limit. This makes the determination a time-bound process wherein at last jurisdictional issues are decided in an early stage. This however, is not an absolute provision and exceptional circumstances are provided herein to account for delays, e.g. where issues cannot be severed from each other. This can prove to be a provision that saves a whole series of pre-award litigation and jurisdictional issues, which inherently prove to be impeding the entirety off proceedings.

ii. **Expedition of Jurisdictional Determination** - The "Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit" recommended reforms to make proceedings on jurisdictional objections more efficient. It suggested that the tribunal must consider applications for determining its authority quickly, without a specific time limit. Section 16 of the Arbitration Act allows tribunals to determine their jurisdiction, which can be appealed under Section 37 or rejected, and can only be raised again in a later challenge to the final award under Section 34. The Committee suggested allowing an appeal under Section 37 for orders rejecting jurisdictional challenges under Section 16, aligning with the UNCITRAL Model Law. They also recommend amending Section 16 to expedite jurisdictional determinations and allowing parties to raise jurisdictional grounds under Section 34.

iii. The proposed amendments to Section 16 in the Arbitration and Conciliation (Amendment) Bill, 2024, are a progressive step towards creating an efficient arbitration framework by enabling expedited jurisdictional determinations and limited appeals for jurisdictional rejections. Instituting a prompt 30-day window for tribunals to resolve jurisdictional challenges encourages early clarification of jurisdictional authority, reducing uncertainties and ensuring that proceedings are not stalled by unresolved foundational questions. Multiple institutional rules provide for expeditious resolution of preliminary objections without such a time frame prescribed. SIAC Rule 28.3, LCIA Article 23.1, ICC Article 6, and ICSID Arbitration Rule 41(5) each allow for the tribunal to rule on its own jurisdiction promptly, ensuring that jurisdictional disputes are addressed early in the process, while also allowing for discretion with the tribunal to reserve them for later time in the proceedings. Additionally, the UNCITRAL Model Law under Article 16 endorses preliminary rulings on jurisdiction with a provision for immediate court review.

While the prescription of 30 days seems reasonable in the Indian context, the immediate court review of the same needs more consideration. It is therefore needed to look into corresponding appeals which may be preferred against the same along with a timeline for the same. In case of absence on the same, the purpose of timeline in section 16 seems frustrated.

SECTION 17

Existing Provision	Proposed Provision
Interim measures ordered by arbitral tribunal.— (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral	**Interim measures ordered by arbitral tribunal.—** (1) A party may, during the arbitral proceedings, apply to the arbitral tribunal— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (da) confirm, modify or vacate, as the case may be, the ad interim measures granted under section 9 or order made by an emergency arbitrator under Section 9A subject to such conditions, if any, as it may deem appropriate after hearing the affected parties; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and

tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.	convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.
(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.	(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.

CADR's Comment on the Proposed Amendment

The amendment is **partially supported**, insofar as the power to confirm, modify or vacate an ad interim measure. Following is an **alternative drafting** that can be adopted -

Retaining the amended Section, allowing the tribunal to confirm, modify or vacate the measure at its own initiative.

> *"17. Interim measures ordered by arbitral tribunal.—*
>
> *(da) confirm, modify or vacate, as the case may be, the ad interim measures granted under section 9 or order made by an emergency arbitrator under Section 9A subject to such conditions, if any, as it may deem appropriate after hearing the affected parties or, the tribunal may exercise the powers under this sub-section in exceptional circumstances and upon prior notice to the parties, on its own initiative. "*

Consequences / Impact of the Proposed Amendment

i. **Similarity of powers of the Court and the Tribunal** - Section 17(1)(ii)(da) was added to the proposed amendment due to serious of cases where courts held that tribunals hold the power of substantive review of its previous orders, and to vacate or modify them if the circumstances warrant so or causes undue hardships to the party seeking such modification.[26] The courts thus held that the tribunal's powers under section 17 are akin to

[26] *Airports Authority of India v. TDI International Limited*, 2024 SCC OnLine Del 4016; *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*, 2022 SCC OnLine Del 2112.

that of court under section 9 and therefore modifications by tribunals should be allowed.[27] This resulted in recommendation 3.16 of the Vishwanathan Committee Report.

ii. The UNCITRAL Working Group in its 2003 session deliberated upon the discretionary powers of the tribunal to modify or vacate interim measures.[28] The Working Group concluded that though the consensual nature of arbitration would require a tribunal to modify, suspend or terminate an interim measure only upon request of any of the parties, there may arise exceptional circumstances where the interim measures is granted on erroneous or fraudulent basis which would require the tribunal to act on its own discretion. However, such powers are limited to the prescribed circumstances. The extension of the powers of the tribunal to modify or terminate awards as per the proposed bill, can therefore be extended to accommodate such exceptional circumstances, where the tribunal may upon knowledge of such factors could act upon it.

iii. **Akin to International Practice** - The power of the tribunal to modify or terminate interim measures on its own initiative is even acknowledged by Article 17D of UNCITRAL Model Law, Rule 23.5 of HKIAC rules, Article 261 of Swiss Rules and Rule 15.2 and 1.6 of Appendix II of DIAC rules.

[27] *Augmont Gold (P) Ltd. v. One97 Communications Ltd*, 2021 SCC OnLIne Del 4484.

[28] December 2003 Working Group Report, A/CN.9/545, para. 36, p. 285; November 2002 Working Group Report, A/CN.9/523, paras. 51–52, p. 260

SECTION 20

Existing Provision	Proposed Amendment
Place of arbitration — (1) The parties are free to agree on the place of arbitration	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 place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.	(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 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.	(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.
	Option II 20 (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.

CADR's Comment on the Proposed Amendment

The **Option I** of the amendment is **supported**.

Consequences / Impact of the Proposed Amendment

i. **Affecting Party Autonomy** - The proposed use of Option II in domestic arbitration deviates significantly from traditional jurisprudence on the concept of a "seat" by designating the site based on where the contract was executed or where the cause of action arose, rather than the parties' consent. This approach violates the idea of party autonomy, a cornerstone of arbitration, by imposing a restrictive default rule that prevents parties from selecting a seat that meets their individual needs or procedural preferences. In arbitration, the choice of seat is critical to deciding supervisory jurisdiction and procedural legislation, giving parties the freedom to choose a neutral location that is advantageous to their arbitration goals. Option II's removal of this option may complicate arbitration, particularly in complicated commercial contracts where neutrality, convenience, and procedural efficiency are important considerations. Furthermore, this rigid norm may result in increased expenses and procedural complexity, inhibiting arbitration as a conflict resolution mechanism in domestic settings.

ii. **Forum Shopping and Delays in Determination** - Section 42 of the Arbitration Act prevents parties from filing applications in other courts, especially when the seat and venue are different. This restriction ensures the supervisory role of the court associated with the seat, preventing potential conflicts and ensuring all arbitration-related proceedings are heard by one court. Removing Section 42 could lead to forum shopping, inconsistent rulings, and increased delays, undermining the purpose of choosing a seat under Section 20. Therefore, Option I must be preferred over Option II. It isn't only narrower but also rigid in its application. If applied with a deletion of section 42, it would create a whole load of cases defeating the purpose of determination of seats and subsequent supervisory authority that comes to courts of seat.

iii. The Arbitration and Conciliation Act, 1996, needs to be specifically amended in order to resolve the ongoing ambiguity around "seat" and "venue" in arbitration. The "seat" of arbitration should be defined as the legal anchor that establishes the curial law and identifies the courts with supervisory jurisdiction. The "venue" should be defined as the actual physical location of the proceedings, with no bearing on jurisdiction. Guidelines that specify how to interpret these phrases should also be included in the revision, especially in situations when the arbitration agreement is vague. Unless the parties specifically state otherwise, there may be a presumption that the venue selected for proceedings will be regarded as the seat in the lack of a clear "seat" designation. Clarity would be achieved, court involvement would be curbed, and India's arbitration statute would be brought into compliance with international norms. In addition to increasing legal certainty, this action will establish India as a desirable location for international arbitration, promoting efficiency and confidence in the settlement of disputes for all parties involved.

SECTION 29A

Existing Provision	Proposed Amendment
Time limit for arbitral award.—(1) The award shall be made within a period of twelvemonths from the date the arbitral tribunal enters upon the reference. *Explanation.*—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.	**Time limit for arbitral award.—**(1) The award shall be made within a period of twelvemonths from the date the arbitral tribunal enters upon the reference. *Explanation.*—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.
(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.	(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding **six months.**	(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months or if there is no consent between the parties, then an application under sub- section (5) may be filed.
(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this subsection, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.	(4) If the award is not made within the period specified in subsection (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the arbitral institution under whose aegis arbitration is being conducted or Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this sub-section, if the arbitral institution under whose aegis arbitration is being conducted or Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of

	arbitrator(s) by not exceeding five per cent. for each month of such delay.
(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.	(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by an arbitral institution for arbitrations being conducted under its aegis and in all other cases, by the Court.
(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material	6) While extending the period referred to in sub-section (4), it shall be open to the arbitral institution or the Court, as the case may be, to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.
(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.	(7) **In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.**
(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.	(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.
(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.	(9) An application filed under sub-section (5) shall be disposed of by the arbitral institution or Court, as the case may be, as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

CADR's Comment on the Proposed Amendment

The amendment is **partially supported –** While integration of arbitral institutions in section 29A is needed to bring it in consonance of the larger scheme of the draft bill which provides for a greater avenue for institutional arbitration, the proposed amendment does this mechanically and needs to provide more clarity with respect to the timelines of an ad-hoc or institutional tribunal.

Consequences / Impact of the Proposed Amendment

i. **Potential Inconsistency between Statutorily-mandated timeline and the timeline stipulated in the Procedural Rules of the Institution –** It is unclear how the strict timeline framework such as the one-year period under subsection 1 or the six-months period upon extension under sub-section 3 can fit in the face of contrary procedural rules of arbitral institutions which provide for distinct set of timelines, and often provide the parties with the option to decide the period in which the arbitral tribunal may exercise its mandate. Furthermore, it is remains undetermined how the conflict between the statute and the procedural rules may be resolved, especially when the parties who have chosen an institution to administer their proceedings, have opted for a different timeline as the same is also likely to be violative of the entrenched principle of party autonomy. The provision must also take into consideration the distinct case management systems which are already in place in the context of the arbitral institution.

ii. **Uncertainty on extension of Tribunal's Mandate -** Recently the SC in *Rohan Builders Private Limited v. Berger Paints India Limited*[29] *(Rohan Builders II)* has finally determined that an application to extend the time for making an arbitral award in domestic arbitration proceedings beyond the statutory mandate is maintainable, even when the application is filed after the expiry of the tribunal's mandate. This clears the long history of conflicting jurisprudence emerging from several high courts. Prior to this decision, the Calcutta High in the *Rohan Builders (India) Pvt Ltd v Berger Paints India Limited*[30] (Rohan Builders I) had taken a contrary position, opting for a strict interpretation of the provision and disallowing the filing of such as application. However, in *Wadia Techno-Engineering Services Limited v. Director General of Married Accommodation Project*,[31] the Delhi High Court ruled that an arbitral tribunal's mandate can be extended either before or after the specified period has expired. The High Courts of Madhya Pradesh,[32] Bombay,[33] Kerala,[34] among others, have also preferred the position upheld by the Delhi High Court.

iii. While the recent SC decision brings in some clarity and consistency on the aforementioned

[29] 2024 INSC 686
[30] AP/328/2023
[31] 2023 SCC OnLine Del 2990
[32] *Rajesh Kaila V. Union Of India And Ors*, Misc. Civil Case No. 2855 of 2022
[33] *Nikhil H. Malkan v. Standard Chartered Investment and Loans (India) Ltd.* Arbitration Petition (Lodging) No. 28255 of 2023
[34] *Hiran Valiiyakkil Lal v Vineeth M.V.* 2023 SCC OnLine Ker 5151.

question, it does not answer if it is permissible for the parties to make such applications after a lapse of an excessively long period. It is does not emerge, either from the act or the decision if there a limitation period within which an application can be filed. This may be remedied by insertion of a proviso in sub-section 3 and 5, wherein under the legislature in its wisdom may provide for such a limitation period.

SECTION 34

[A] Proviso to Section 34(1) – On the Denial of the Right to move the Court

Existing Provision	Proposed Amendment
34. **Application for setting aside arbitral award—** (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)."	34. **Application for setting aside arbitral award—** (1) Recourse to a Court or an appellate arbitral tribunal, as the case may be, against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3) Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section, no application for setting aside an arbitral award shall lie before the Court.

CADR's Comment on the Proposed Amendment

The amendment is **partially supported** - The proposed alternative drafting ensures that the parties' right to approach the court stays intact and arbitration agreements which opt for an appellate or two-tier arbitration framework are not rendered void. Following is an **alternative drafting** that can be adopted -

34. Application for setting aside arbitral award—

(2) Recourse to a Court or an appellate arbitral tribunal, as the case may be, against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)

Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section, the same shall not affect the parties' right to further file an application for setting aside an arbitral award before the Court.

Consequences/Impact of the Proposed Amendment

i. **Makes Indian arbitral framework an unattractive choice**:

- The proviso to s. 34(1) envisages two-tier arbitration in a manner which is unknown to any other jurisdiction. A plain reading indicates that parties who have gone through one round of arbitration, can either take recourse to the appellate arbitral tribunal ("AAT") or the court. This raises the concern of promoting litigation since this amendment presents

the Indian arbitral framework as an unattractive choice.

- In *Centrotrade,*[35] the court held that appellate arbitration clauses are permissible under Indian law. The desirability and suitability of a two-tier arbitration system under the Indian legal framework is presumed for the purposes of this section since its merits will be dealt separately.

ii. Restraint of legal proceedings**:**

- It is our submission that the proposed proviso will be hit by s. 28 of the Indian Contract Act, 1872, which provides that agreements in restraint of legal proceedings are void. This is because opting for an AAT automatically extinguishes the parties' right to an appeal and such an arbitration agreement has been previously held to be void.[36] The exception I to s. 28 saves contracts where the right to move the court for appropriate remedy is restricted.[37] A lawful agreement to refer a matter to arbitration can be made a condition precedent before going to the courts, and the same is not violative of s. 28.[38]
- The interpretation of the provision as illustrated by Indian jurisprudence does not give even an iota of indication that the right to move the court can be done away with altogether. Even the various templates available for an appellate arbitration mechanism do not envisage a framework devoid of the role of courts.
- To illustrate, the American Arbitration Association Appellate Arbitration Rules, 2013 (or the "AAA Appeal Procedure") provides the following sample language for appellate review assuming a standard arbitration clause is already in place:
    - *"Notwithstanding any language to the contrary in the contract documents, the parties hereby agree: that the Underlying Award may be appealed pursuant to the AAA's Optional Appellate Arbitration Rules ("Appellate Rules"); that the Underlying Award rendered by the arbitrator(s) shall, at a minimum, be a reasoned award; and that the Underlying Award shall not be considered final until after the time for filing the notice of appeal pursuant to the Appellate Rules has expired. Appeals must be initiated within thirty (30) days of receipt of an Underlying Award, as defined by Rule A-3 of the Appellate Rules, by filing a Notice of Appeal with any AAA office. Following the appeal process the decision rendered by the appeal tribunal may be entered in any* ***court*** *having jurisdiction thereof."*

[35] *Centrotrade Minerals and Metal Inc. v Hindustan Copper Limited,* (2017) 2 SCC 228.
[36] *Shin Satellite Public Co. Ltd. v Jain Studios Ltd.,* (2006) 2 SCC 628.
[37] *World Sport Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd.,* (2014) 11 SCC 639.
[38] *Mulji Tejsing v Ransi Devraj,* (1909) 34 Bom 13; *Union Construction Co. Pvt. Ltd. v Chief Engineer Eastern Command,* AIR 1960 All 72.

[B] Section 34(2A) – On Arbitrability and Public Policy Concerns

Existing Provision	Proposed Amendment
34. **Application for setting aside arbitral award—** *(2)* (b) the Court finds that— *(i)* the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or *(ii)* the arbitral award is in conflict with the public policy of India. (2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on theface of the award…	34. **Application for setting aside arbitral award—** (2A) An arbitral award may be set aside in whole or in part by the Court or an appellate arbitral tribunal, as the case may be, only if the party making the application establishes on the basis of the record of the arbitral tribunal that— *(i)* the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or *(ii)* the arbitral award is in conflict with the public policy of India. *(iii)* the award is vitiated by patent illegality appearing on the face of the award…

CADR's Comment on the Proposed Amendment

The amendment is **not supported -** The proposed amendment places the concerns of arbitrability and public policy on the same pedestal as that of issues like party not having been given proper notice of arbitration or party being under some incapacity. Though this amendment is consistent with the overall scheme of the proposed changes wherein the role of the judiciary has been diminished to a great extent, after the introduction of arbitral institutions, there needs to be a category of concerns which need to be addressed regardless of being raised by the parties. In our opinion, arbitrability is one such concern.

Suggestion: The original drafting should be restored which strikes a distinction between certain objections which need to be raised by a challenging party and be established on the basis of the record of the arbitral tribunal while other concerns need to be identified by the court itself as part of its prerogative.

Consequences/Impact of the Proposed Amendment

i. **Public policy concerns must be based on a court's finding**:

- Whether or not a particular type of dispute is 'arbitrable' under a given law is essentially a matter of public policy for that law to determine. Public policy varies from one country to the next. States determine the contours of arbitrability in accordance with its own political, social, and economic policy.
- Consequently, issues involving public policy considerations must not be left at the behest of a challenging party making an application to that end.

[C] Section 34(2A) – On the Power to Modify an Arbitral Award

EXISTING PROVISION	PROPOSED AMENDMENT
34. **Application for setting aside arbitral award—** *(2)* An arbitral award may be set aside by the Court only if— *(a)* the party making the application establishes on the basis of the record of the arbitral tribunal that— *(i)* a party was under some incapacity, or *(ii)* the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or … (b) the Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or…	34. **Application for setting aside arbitral award—** (2) An arbitral award may be set aside in whole by the Court or an appellate tribunal… (2A) An arbitral award may be set aside in whole or in part by the Court or an appellate tribunal…

CADR's Comment on the Proposed Amendment

The amendment is **partially supported.** The amendment providing the court with the power to set aside an award *in whole* or *in part* is welcome since it is in line with the recommendation of the Vishwanathan Committee Report 2024. However, it is partially supported since the amendment creates a distinction between two categories of issues that may arise in reference to setting aside of an arbitral award. While in s. 34(2) the award can only be set aside in whole, in s. 34(2A) partial setting aside is allowed. There seems to be no rationale for this distinction.

Suggestion: Both 34(2) and 34(2A) should be similarly worded and partial setting aside must be allowed in both categories of issues as prescribed by the Vishwanathan Committee.[39]

Consequences/Impact of the Proposed Amendment

ii. Increased scope of judicial intervention:

- Before the advent of *NHAI v Hakeem*[40], there was no clarity with respect to the power of modifying an arbitral award. The apex court clearly pronounced that modification is not permitted and an award can only be set aside. Yet, in *Vedanta,* the court's observations suggested that courts could modify the rate of interest in s. 34 proceedings.
- Later, in *National Highways Authority of India v Trichy Thanjavur Expressway Limited,*[41] the Delhi HC remarked that the term "modify" used in *NHAI v Hakeem* referred to a variation or modulation of the ultimate relief that could be granted by a tribunal. However, partially setting aside an award does not mean modifying it, rather it would mean annulling a part(s) of an award provided that it is severable thereby saving the other components of it.
- To resolve all of the aforementioned, the Vishwanathan Committee suggested that the power to partially set aside an award be added alongside the scope for modification as well with the rider that it be done in "exceptional circumstances".
- This step increases the scope of judicial intervention since the court can now apply its mind to the award rendered to a greater extent.

[D] Section 34A - Comments on the issues with the introduction of a two-tier arbitration setup intothe Indian arbitration landscape – section 34A

1. The Hon'ble Supreme Court of India upheld the validity of appellate arbitration clauses in *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*. In *Centrotrade*, the arbitration clause between the parties provided for a two-tiered arbitration procedure i.e., institutional arbitration under the aegis of the Rules of Arbitration of the Indian Council of Arbitration (ICA Rules) and if either party disagreed as to the correctness of the award, the award may be appealed before an appellate tribunal constituted under the aegis of the ICC Rules, which was to be foreign seated. While appellate arbitration procedures are a step towards establishing a pro-arbitration regime, and reducing workload of courts several questions remain unanswered and need to be specified clearly before this amendment is notified
2. First, what will the position of the first arbitral award be during the appellate proceedings or an appellate arbitral tribunal is instituted – can it be enforced in the interregnum. Several institutions bar enforcement proceedings during the appellate process including Rule (c) of the JAMS Optional Arbitration Appeal Procedure, 2003, Rule 2.3 of the Arbitration Appeal Procedure of International Institute of Conflict Prevention and Resolution, 2007, Rule A-2(a) of the Optional

[39] Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit, p. 69.
[40] (2021) 9 SCC 1.
[41] 2023 SCC OnLine Del 5183.

Appellate Rules of American Arbitral Association, 2013.

3. Second, the when will the limitation period for enforcement operate – will it operate from the date when the first arbitral award is rendered or from the date when the appellate arbitral award is rendered? While the JAMS Appeal Procedure and the CPR Appeal Procedure provide for limitation to commence from the date when the appellate award is rendered, the Optional Appellate Rules of American Arbitral Association provide that "*the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal".*
4. Third, can the award be remanded back to the prior tribunal? The JAMS Appeal Procedure, CPR Appeal Procedure, and Optional Appellate Rules of American Arbitral Association explicitly bar this. Remand is beneficial since the prior tribunal is well-versed and seized with the matter, however, remand may prove loss of the opportunity to have the dispute re-examined by arbitrators with special qualifications.
5. Some other general questions which need answer are: composition of AATs, role of courts in relation to AATs, in other words, will courts be exercising supervisory jurisdiction over appellate tribunals in the same fashion as they do over first instance arbitral tribunal; powers of AAT to remand, modify or partially set aside awards
6. Also, Indian law does not allow a possibility to approach the courts when arbitral tribunal rejects jurisdictional challenge or challenge relating to independence and impartiality. If AAT is adopted, the aggrieved party's chance to approach the courts with the above issues will be inordinately deferred? In case of AATs should it not be made possible to approach courts when the above mentioned challenges are rejected?

[E] Interplay between Section 34 and Section 37 - Comments on the distinction between thejurisdiction and scope of review under the proposed regime

1. Several questions regarding the jurisdiction of the court remain unanswered since section 34 has now been transformed into a choice between an AAT or the court. This is because a catena of judgments – like *MMTC Ltd. v Vedanta Ltd.*[42] and *Konkon Railway Corporation Ltd. v Chenab Bridge Project*[43] – have clarified while exercising jurisdiction under s. 37, the court is concerned with the jurisdiction exercised by the court while hearing s. 34 application i.e., whether the award is perverse or manifestly arbitrary. There cannot be any reinterpretation of the contractual terms and substitution with an alternative view.
2. In case parties decide to take recourse to an AAT, then how does s. 37 appeal look like? There is no clarity neither as to the grounds to which the appeal shall be limited nor with respect to the coram of the bench before which such hearing has to take place.

[42] (2019) 4 SCC 16.
[43] (2023) 9 SCC 85.

SECTION 42

Existing Provision	Proposed Amendment
42. **Jurisdiction —** Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect 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.	Omitted

CADR's Comment on the Proposed Amendment

The amendment is **not supported.** Following is an **alternative drafting** that can be adopted:

> *"42 Jurisdiction — (1) Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect 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.*
>
> *(2) Notwithstanding anything contained in sub-section (1), wherein, seat of arbitration is determined by the parties or the arbitral tribunal in accordance with section 20 of this act, only the courts of the seat shall have jurisdiction over 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."*

Consequences / Impact of the Proposed Amendment

i. Section 42 established a "one-stop" jurisdictional anchor, guaranteeing that a court would maintain exclusive jurisdiction over all ensuing proceedings if any application pertaining to an arbitration agreement or arbitral proceedings was filed in that court. However, when parties have not decided on a seat of arbitration, it would be ambiguous as to which court would then have the jurisdiction to hear any application arising out of the arbitration agreement and the arbitral proceedings.

ii. In practice, the proposed omission of Section 42 can result in jurisdictional "forum shopping," in which parties may approach different courts at different stages during the arbitration process, causing delays in the process and conflicting decisions. Not vesting the exclusive jurisdiction in the court of the seat, or not vesting exclusive jurisdiction in one particular court in the absence of a pre-determined seat, as the case may be, could lead to a variety of interpretations and possibly put the onus of determining the proper jurisdiction on the courts. Therefore, Section 42 must be retained as it is or must be rephrased in the manner suggested above.

SECTION 43C

Existing Provision	Proposed Amendment
43C. Composition of Council. - (1) The Council shall consist of the following Members, namely:– (a) a person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India–Chairperson; (b) an eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government–Member; (c) an eminent academician having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson–Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary–Member, *ex officio*; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary–Member, *ex officio*; (f) one representative of a recognised body of commerce and industry, chosen on rotational basis by the Central Government–Part-time	**43C. Composition of Council. -** (1) The Council shall consist of the following Members, namely:— (a) a person of ability, integrity and standing having adequate knowledge and professional experience or shown capacity in dealing with problems relating to law, alternative dispute resolution preferably arbitration, public affairs or administration to be appointed by the Central Government—Chairperson; (b) a person having knowledge and experience in law related to arbitration or alternative dispute resolution mechanisms, to be appointed by the Central Government—Member; (c) an eminent person having experience in research or teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government—Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary—Member, ex officio; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary— Member, ex officio; (f) one representative of a recognised body of commerce and industry, chosen by the Central Government—Part-Time Member and (g) Chief Executive Officer—Member-

Member; and (g) Chief Executive Officer-Member-Secretary, *ex officio*. (2) The Chairperson and Members of the Council, other than *ex officio* Members, shall hold office as such, for a term of three years from the date on which they enter upon their office: Provided that no Chairperson or Member, other than *ex officio* Member, shall hold office as such after he has attained the age of seventy years in the case of Chairperson and sixty-seven years in the case of Member. (3) The salaries, allowances and other terms and conditions of the Chairperson and Members referred to in clauses (b) and (c) of sub-section (1) shall be such as may be prescribed by the Central Government. (4) The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.]	Secretary, ex officio. (2) The Members of the Council, other than ex officio members, shall hold office as such, for a term of four years from the date on which they enter upon their office and shall be eligible for reappointment: Provided that no Member other than ex officio Member shall hold office after he has attained the age of seventy years, in the case of Chairperson, and sixty-seven years, in the case of other Members: Provided further that if the Chairperson is appointed on Part-Time basis, then, at least one of the Members appointed under clauses (b) or (c) shall be a Full-Time Member. (3) The salaries, allowances and other terms and conditions of the Chairperson and Members referred to in clauses (b) and (c) of sub section (1) shall be such as maybe prescribed by the Central Government. (4) The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by the Central Government.

CADR's Comment on the Proposed Amendment

This amendment is **partially supported:** The ACI may include a young judicial officer also who has sufficient experience in matters related to arbitration.

Consequences / Impact of the Proposed Amendment

i. **Uncertain Competence of the Council** - The qualification requirement for the position of a member have also been diluted, raising doubts regarding the competence of the Council to be able to undertake the functions as laid down in Section 43D. Previously, one of the members had to be *"an eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international"*. However, this qualification has been reduced to *"a person having knowledge and experience in law related*

to arbitration or alternative dispute resolution mechanisms". Similarly, the requirement for the academic member have also been substantially diluted. While the actual effect of this change may not be seen soon, it surely does raise questions regarding the overall expertise and competence of the Council (whenever formed).

ii. **Compromising Independence and Autonomy of Arbitration** - These provisions are seen as compromising the independence and autonomy of arbitration, aligning less with the purpose of private dispute resolution and more with bureaucratic control, which risks being inconsistent with international arbitration standards. Such influence is a deviation from international norms, where independence is critical to ensuring impartial dispute resolution.

The composition of the ACI should be a mix of all stakeholders, like representatives from judiciary, Bar, academia, arbitral institutions, etc. Many successful arbitration frameworks, such as those in Singapore and the UK, limit government intervention.

A Council with reduced executive control and with members of higher qualification would go a long way in helping promote the arbitration regime of India worldwide. The framing of policies and regulatory standards for arbitral institutions requires certain experience and proven caliber in the field of arbitration.

Submitted by Centre for ADR



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