

## Proposal to redefine the arbitration landscape in India: A review of the Arbitration and Conciliation (Amendment) Bill, 2024

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Late last year, the Indian government released a draft of the proposed Arbitration and Conciliation (Amendment) Bill, 2024 (the “**Draft Amendment Bill**”). The Draft Amendment Bill proposes to amend the Arbitration & Conciliation Act, 1996 (the “**Arbitration Act**”) and aims to promote the ease of doing business in India by providing a boost to institutional arbitration, reducing judicial intervention and ensuring timely conclusion of arbitral proceedings. In this update, we discuss the proposed amendments in the Draft Amendment Bill and their implications.

### Key changes

The Draft Amendment Bill has proposed amendments such as a new definition of “court” for domestic arbitration and statutory recognition to emergency arbitrators. Further, existing provisions, such as those dealing with interim measures and appointment of arbitrators, have been amended by the Draft Amendment Bill. The key proposals are as follows:

- (i) Definition of “court”: At present, the Arbitration Act confers jurisdiction to courts solely on the basis of the jurisdiction for the subject matter of the arbitration. That said, judicial precedents have time and again conferred jurisdiction to courts having jurisdiction over the seat of the arbitration. In its report of February 2024, the expert committee formed by the Indian government to examine the Arbitration Act (the “**Expert Committee**”) recommended the need for giving statutory recognition to the seat of the arbitration for conferring jurisdiction in line with judicial precedents. While the Draft Amendment Bill does not incorporate all recommendations of the Expert Committee, it proposes to bifurcate the definition of “court” into two (2) different definitions for domestic and international commercial arbitrations. For domestic arbitrations, where the seat of arbitration is designated, “court” will mean the court having pecuniary and territorial jurisdiction over the seat of arbitration. In all other cases, “court” will mean the court having pecuniary and territorial jurisdiction over the subject-matter of arbitration. For international commercial arbitrations, where the seat of arbitration is designated, “court” will mean a High Court having territorial jurisdiction over the seat of arbitration. In all other cases, the “court” will mean the High Court having territorial jurisdiction over the subject-matter of arbitration. In our view, this proposed amendment provides clarity on procedural ambiguities and can contribute to reducing delays as it specifically outlines the criteria for determining the competent court.
- (ii) Interim measures: In a number of cases, parties routinely file applications seeking interim relief under Section 9 of the Arbitration Act. These applications, while often crucial to protect parties’ interests, also significantly increase court workloads. Interestingly, Section 9 currently permits parties to approach the courts for interim

reliefs even during the arbitral proceedings. However, courts are only permitted to entertain such applications in extraordinary circumstances. The Draft Amendment Bill proposes to restrict the parties' rights to approach the court for interim relief once the arbitration proceedings have commenced to encourage parties to seek interim reliefs from the arbitral tribunal under Section 17 of the Arbitration Act. However, parties will be entitled to approach the courts before the arbitration proceedings commence or after an award is made but is yet to be enforced. Further, while Section 9 currently requires arbitration proceedings to commence within ninety (90) days of a court passing an order on the interim relief application, the Draft Amendment Bill proposes to link the foregoing timeline to the date of filing of the application instead. The proposed amendment may limit parties' rights in certain cases, especially in relation to seeking interim measures against third parties that are not involved in the arbitration. That said, the change aims to limit judicial intervention and encourage reliance on the arbitral tribunal. The proposal to link the time for initiation of arbitration proceedings to date of filing of the application is also likely to curb instances where parties approach the court to unduly delay the commencement of arbitration proceedings.

- (iii) Emergency arbitrators: Many arbitration institutions, including the Singapore International Arbitration Centre, London Court of International Arbitration and International Chamber of Commerce, provide for detailed procedures to conduct emergency arbitrations prior to the constitution of the arbitral tribunal. However, the Arbitration Act does not currently include any provisions to enforce such emergency awards. While courts in India have relied on their inherent powers and provisions of the Specific Relief Act, 1963 to enforce these awards (albeit only in domestic arbitrations), there was a need to provide for recognition of such awards in the Arbitration Act. The Draft Amendment Bill proposes to introduce statutory recognition for emergency arbitrations. As per the Draft Amendment Bill, parties may appoint emergency arbitrators in instances where parties require urgent interim relief before the constitution of the arbitral tribunal and the emergency arbitration procedure is contemplated in the institutional rules. The Draft Amendment Bill also proposes to provide for enforcement of the orders of an emergency arbitrator in a manner similar to the order of the arbitral tribunal. The Draft Amendment Bill attempts to bring the arbitration framework in India in line with international best practices. However, the Draft Amendment Bill does not include detailed provisions on, *inter alia*, the procedure for appointment of emergency arbitrators and timelines for passing an interim order, especially for *ad hoc* arbitrations. While statutory recognition for emergency arbitrations is a welcome change, *ad hoc* arbitrations remain a common practice in India and more clarity is required on the procedures to be followed in such arbitrations.
- (iv) Reducing delays: The Draft Amendment Bill proposes amendments to key provisions by introducing strict timelines for speedy disposal of applications and appeals. The Draft Amendment Bill proposes a timeline of sixty (60) days for courts to issue orders on applications seeking initiation of arbitration. Further, the Draft Amendment Bill also proposes a timeline of thirty (30) days for an arbitral tribunal to decide on any

challenge to its jurisdiction or the scope of its authority. Lastly, it proposes a timeline of sixty (60) days for filing of appeals against an arbitral award. The Draft Amendment Bill has identified and addressed the need for speedy disposal mechanisms to prevent delays. However, a delicate balance needs to be struck to attain the objective of this proposed amendment. While justice delayed may be justice denied, justice rushed may not be justice at all. Similar to the approach adopted by international institutions, the possibility of seeking extensions in case of delays due to genuine reasons should be introduced. That said, judicial precedents must also shape and strictly define the instances where the timelines can be extended to mitigate any abuse of such relief.

- (v) Determination of arbitration fees: The Draft Amendment Bill proposes deletion of the model schedule of fees (Schedule IV) and related provisions of the Arbitration Act. In doing so, it proposes to vest the power to determine the fees for *ad hoc* arbitrations, where parties have not agreed on the fees, with the Arbitration Council of India (“**Council**”), which is yet to be set up. Drawing inspiration from United Nations Commission on International Trade Law arbitration rules, the Draft Amendment Bill could have sought to identify the criteria and factors to be relied on for determining arbitration fees to ensure fair determination. However, the lack of guidance in the Draft Amendment Bill and the pending constitution of the Council is likely to lead to a lack of clarity on this issue in the near term if the Bill is implemented in its proposed form.
- (vi) Place of arbitration: The Draft Amendment Bill proposes two (2) options for the amendment of provisions related to the place of arbitration. The first option merely proposes replacing the phrase “place of arbitration” with “seat” or “venue”, as applicable, thereby clarifying the law and reducing ambiguities relating to the interpretation of “place”. Therefore, parties will be able to expressly agree on the seat of arbitration and meet at any convenient venue. The second option proposes to designate the seat in a domestic arbitration to be either the place where the contract is executed or where the cause of action arises. In our view, the adopting the first option would align India’s approach with international best practices. Incorporating the terms “seat” and “venue” in arbitration agreements will improve contract enforceability by providing clarity and reducing ambiguities associated with the term “place”. This amendment, if implemented effectively, could make India a more preferred jurisdiction for international arbitrations. On the other hand, the second option is likely to simplify procedural issues and make arbitration more efficient. However, it is also likely to curtail party autonomy in choosing a seat, and therefore, a procedural law of their own choice. Further, the second option is also silent on the determination of the seat in international commercial arbitrations. Given this, in our view, the first option is preferable.
- (vii) Appellate arbitral tribunal: The Draft Amendment Bill proposes to introduce the concept of an appellate arbitral tribunal as an alternative forum to courts for setting aside an arbitral award. The appellate arbitral tribunal or the court will only be entitled to set aside an earlier arbitral award on the grounds specified in the Draft

Amendment Bill. Further, the appellate arbitral tribunal or the court will also be empowered to partially set aside an award. Lastly, patent illegality has now been added as a ground to challenge an award in case of international commercial arbitrations also. This proposal is well intentioned as it can mitigate the need for parties to approach courts for setting aside an award, and therefore, significantly reduce the burden on courts. That said, it is currently unclear if parties will be sufficiently incentivized to approach appellate arbitral tribunals. In our view, in the absence of clear incentives, parties may continue to approach courts for setting aside of arbitral awards, which will largely limit the purpose sought to be achieved by this change.

- (viii) Post-award interest rate: The proposed changes define the post amount interest rate as 3% above the repo rate specified by the Reserve Bank of India, diverging from the existing rate of 2% above the current rate of interest. This proposal effectively addresses the ambiguities surrounding the interpretation of “current rate of interest”. By proposing a clear and established standard of repo rate, the Draft Amendment Bill brings much-needed clarity to the enforcement of arbitral awards.

## Conclusion

A robust framework for alternative dispute resolution is crucial to India’s economic growth, increasing ease of doing business in India, reducing litigation timelines, and attracting foreign investment. The Draft Amendment Bill is a significant step at establishing India as a preferred seat especially for international arbitrations. The proposed amendments which provide clarity on uncertain aspects and fix timelines for arbitration proceedings, are a commendable development. Moreover, the shift from court intervention to empowering arbitral tribunals will further strengthen the arbitration framework in India. The statutory recognition of emergency arbitrators in the Draft Amendment Bill will also help India’s approach with international best practices.

That said, some proposals are counterintuitive to the stated objectives of the Draft Amendment Bill. For instance, the Draft Amendment Bill will have the effect of weakening party autonomy, which forms the foundation of arbitration, by restricting parties’ right to choose a seat. The Draft Amendment Bill’s proposal to vest certain powers with the Council, which has not been constituted despite being introduced in the Arbitration Act in 2019, also opens the door to uncertainty and creates significant gaps.

It is pertinent to note that the Draft Amendment Bill is undergoing consultation, and the public has provided their comments. We hope that industry comments on the Draft Amendment Bill will help bring it further in line with international best practices and improve the ease of doing business in India.