LETTER TO THE MINISTER OF LAW AND JUSTICE

New Delhi
07 February, 2024

Dear Arjun Ram Meghwal *ji*,

We have the privilege and honour to present the report of the Expert Committee on Arbitration Law, set up on 12 June 2023, to examine the working of the Arbitration Law in the country and recommend reforms to the Arbitration & Conciliation Act, 1996. The Committee has considered the various recommendations in detail, besides undertaking further research, and examining the prevalent best practises, both nationally and internationally. This report sets out our final conclusions and recommendations. It also includes a draft Bill to implement our recommendations and an Explanatory Memorandum explaining the provisions of the Bill in simple language and also the amended version of the sections as proposed in the Bill to facilitate ease of understanding the proposed changes.

Many of the amendments proposed are necessitated due to conflicting judgements of courts. Since appeals and reviews may take time hence, it would be necessary we implement the recommendations by requisite legislative intervention as early as possible. It is not advisable to wait for courts to reconsider and self-correct. However, it is for the Government to decide whether or not to implement our recommendations, in whole or in part. We have not listed every proposal or reason given by various stakeholders but have considered them all.

The Committee has not released the Report in the public domain as the mandate of the Committee was to prepare a draft of the proposed amendments and make other recommendations to the Government. However, in view of the expectations from all stakeholders who are awaiting the response of the Government on the hurdles in making the Act an alternative dispute resolution in letter and spirit, the Report ought to be made available to the public.

India is one of the fastest growing economies. It is currently ranked as the world's fifth largest economy with a GDP of $ 3.73 trillion and the world's third largest Economy when the GDP is compared on the basis of Purchasing Power Parity (PPP) at $ 10.51 trillion. A vision to increase the size of the Indian economy to $ 5 trillion was envisaged in a report by a group of the Commerce & Industry Ministry. The report suggested that by taking short and long term measures like the development of infrastructure, providing ease of living, creating Digital India, ease of doing business and tackling the problem of pollution etc, India's potential to become a $ 5 trillion economy by 2024-25 is within the realm of possibility.

The Committee sincerely believes that the reforms proposed in the present Report, if implemented in their true spirit, will play a crucial role in making India a global player in the arbitration sector, make India a favourable destination for international commercial arbitration and contribute to the realisation of the vision of $ 5 trillion economy by creating a legal environment that is favourable for economic investment.

We thank you for providing us an opportunity to present our views on the issues arising from the implementation of the Act and related matters.

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.

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Former Secretary, Ministry of Law & Justice, Government of India
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Secretary, Ministry of Railways
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Secretary,
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Secretary, Department of Public Enterprises/ CPSEs
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Secretary,
Ministry of Housing & Urban Affairs/ DG, CPWD
(Member)

THE REPORT

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PART I

1. EXECUTIVE SUMMARY

1.1 PREFACE

1.1.1 The Arbitration and Conciliation Act, 1996 ("**Act**"), was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration ("**ICA**") and enforcement of foreign arbitral awards and also to define the law relating to conciliation. This Act was enacted by specifically taking into account, the United Nations Commission on International Trade Law Model Law, 1985. ("**UNCITRAL Model Law**")

1.1.2 The Act replaced the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937, and the Foreign Award (Recognition and Enforcement) Act, 1961. Since its enactment in 1996, the working of the Act has been examined by the Law Commission in its 176th, 222nd, and 246th Report. Separately, a High Powered Committee was also constituted in 2017 to examine specific aspects of the 1996 Act.

1.1.3 The first attempt to address the difficulties encountered in the working of the Act was made in 2001 when the Law Commission undertook a comprehensive review of the provisions of the Act and made recommendations in its 176th Report in 2001.

1.1.4 The Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha in 2003 to give effect to recommendations of the 176th Report of the Law Commission. The Bill was examined by the Parliamentary Committee which recommended that the provisions of the Bill were open to more court interventions. Consequently, the Bill was not enacted into law.

1.1.5 The second major attempt to address the shortcomings of the 1996 Act was made by the Law Commission in its 246th Report in 2014. The 246th Report suggested major reforms to the then existing arbitral regime.

1.1.6 The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendments**") which was enacted pursuant to the 246th Report of the Law Commission was aimed at addressing the criticism of the working of the Act.

1.1.7 A third major attempt was made to address further concerns arising out of the working of the arbitration regime, when the Ministry of Law constituted on 13 January 2017, a High- Level Committee under the Chairmanship of Hon'ble Justice B. N. Srikrishna, Former Judge of the Hon'ble Supreme Court of India ("**Supreme Court**"), to review the institutionalisation of arbitration mechanisms in India ("**Srikrishna Committee**"). On 30 July 2017, the Srikrishna Committee submitted its Report, suggesting various measures to, *inter alia*, strengthen institutional arbitration in India ("**HLC Report**").

1.1.8 Pursuant to the recommendations in the Srikrishna Committee Report, the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendments**"), was enacted.

1.1.9 In 2021, the Act was again amended to address the issue of corrupt practices in securing contracts or arbitral awards and to promote India as a hub of ICA by attracting eminent arbitrators to the country.

1.1.10 In 2023, the Mediation Act 2023 was enacted which contained self-contained provisions for mediation, repealing the provisions relating to Conciliation in the Arbitration and Conciliation Act 1996.

1.1.11 It is against this background that on 14 June 2023, the Ministry of Law & Justice, Government of India ("**Government**") vide its notification dated 14 June 2023 constituted this Expert Committee ("**Committee**") to examine the working of arbitration law in India and recommend reforms to the Act.

1.1.12 The Committee functioned under the Chairpersonship of Dr. T.K. Viswanathan, former Law Secretary and Secretary General of the 15th Lok Sabha, to examine the working of arbitration law in India and to recommend reforms to the Act.

1.1.13 The Committee comprised of various other eminent members including Mr. N. Venkatraman (Senior Advocate & Additional Solicitor General of India), Mr. Gourab Banerji (Senior Advocate), Mr. A.K. Ganguli (Senior Advocate), Mr. Shardul S. Shroff (Executive Chairman, Shardul Amarchand Mangaldas & Co), Mr. Bahram Vakil (Co-Founder, AZB & Partners), Mr. Saurav Agarwal (Advocate), Mr. Tejas Karia (Partner and Head – Arbitration, Shardul Amarchand Mangaldas) for Confederation of Indian Industries, Mr. Shreyas Jayasimha (Advocate and co-Founder - Aarna Law, India and Simha Law, Singapore), Mr. Vyom Shah (Advocate), representative of NITI Aayog, representative of Public Enterprises/CPSES, representative of Department of Confederation of Public Indian Industries, representative of National Highways Authority of India/Ministry of Road Transport and Highways, representative of Ministry of Railways, representative of Department of Economic Affairs, representative of Ministry of Housing & Urban Affairs / Central Public Works Department, representative of Legislative Department and Dr. Rajiv Mani, Additional Secretary, Department of Legal Affairs.

1.2 TERMS OF REFERENCE AND PREFATORY REMARKS

1.2.1 The Committee's prefatory remarks in relation to the Terms of Reference notified by the Government for the Committee ("**Terms of Reference**") have been detailed below.

1.2.2 Having undertaken extensive consultation with various stakeholders, the Committee has identified several issues in the present arbitration regime.

The issues identified against each Term of Reference, and the broad outline of solutions proposed, have been briefly addressed below.

1.2.3 ***Evaluate and analyse the operation of the extant arbitration ecosystem in the country, including the working of the Act, highlighting its strengths, weaknesses and challenges vis-à-vis other important foreign jurisdictions:***

(i) The Committee encountered the general perception among stakeholders that the Arbitration and Conciliation Act,1996 has not been able to realise its stated objectives. The present arbitration regime is not widely perceived as being a fair, efficient, inexpensive and competent mechanism to meet the evolving needs of business and commerce;

(ii) The arbitral process is often delayed right from the pre-arbitral stage itself. This includes the delays encountered during the appointment stage, which often require the intervention of court. Further, even after commencement of the arbitral process, strict timelines are not maintained, leading to further delays ;

(iii) It has also been noted that there is an overwhelming prevalence of ad-hoc arbitrations as compared to institutional arbitrations. This had been noted by the Justice Srikrishna Committee in 2017. While remedial measures had suggested, such measures are yet to take full effect;

(iv) The cost of participating in the arbitral process has shot up. This has led to instances of an unexpected financial burden on the parties. This has also led to several disputes concerning fees and costs of arbitral tribunals, which further contributes to delay in the arbitral process;

(v) Arbitral proceedings are further delayed due to dilatory tactics adopted by certain parties, which include frivolous challenges to the competence, jurisdiction and constitution of an arbitral tribunal. Such avoidable challenges are often raised on grounds of bias, or apparent conflict of interest ;

(vi) There is also a perception that the Indian arbitration regime must be tailored to accommodate the specific requirements of small and medium value arbitrations;

(vii) The Committee has also noted the need for the Indian arbitration regime to account for the overwhelming preference for ad-hoc arbitrations in India. This is in contrast to the experience in other UNCITRAL Model Law jurisdictions, where the arbitral process is mostly institutionalized;

(viii) In certain jurisdictions, there is a significant backlog of arbitration matters pending before the courts;

(ix) Finally, the reluctance to adopt technology in arbitrations is a major stumbling block in the goal of making India a hub of International commercial arbitration.

1.2.4 ***Recommend a framework of model arbitration system, which is efficient, effective, economical and caters to the requirements of the users:***

(i) In many instances, the arbitral tribunal insists on strict rules of procedure and evidence, which can lead to delays. It also defeats the purpose of arbitral proceedings being distinct and unshackled from the rigours of regular court proceedings;

(ii) Party autonomy requires the parties to have the final say in the choice of procedure to be adopted by the arbitral tribunal. However, in practice, most parties leave matters of procedure to the discretion of the arbitral tribunal;

(iii) The prevalent practice is contrary to the intent of Section 19 of the Act, which states that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. Further, Section 19 specifically provides that the arbitral tribunal is not bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 ;

(iv) Different arbitrators adopt different rules of procedure which is not surprising while considering that arbitrators come from different backgrounds and training. While rules of arbitral institutions normally lay down the procedure that guide the proceedings, there is no such guidance in case of *ad hoc* arbitrations;

(v) The Committee has also noted the absence of uniform model rules of procedure for ad-hoc arbitral tribunals and the resultant wide variance in rules of procedure adopted by such arbitral tribunals;

(vi) In this regard, the Committee has recommended a model procedure that can be used by the arbitral tribunals as a guide. This model procedure has been prepared considering the prevalent best practices. This is also to ensure some certainty and uniformity in matters of procedural steps to be taken, the approximate time that would be consumed and the rules. Nonetheless, any such procedure should also have due regard to party autonomy.

(vii) Besides procedural aspects, since it is entirely within the domain of the Arbitrators "to determine the admissibility,

relevance, materiality and weight of any evidence", the Tribunal has to ensure that this duty is discharged having due regard to the rules of natural justice, fair play and the established rules on admissibility, relevance, materiality and weight of evidence.

(viii) There is a need to devise a strategy to develop a competitive environment in the arbitration services market for domestic and international parties. This is likely to sub-serve the interests of the users, particularly in building a regime of efficient and cost-effective arbitration;

(ix) There is also a need to integrate professionals from various professional spheres, including business and commerce, into the arbitration regime ;

(x) Parties must be encouraged to work out the estimated costs of arbitral proceedings while entering into an arbitration agreement. Such estimated costs should specifically mention the cap for arbitrator fees and other expenses, which, in turn, should be reflected in the arbitration agreement.

1.2.5 ***Propose measures to fast track enforcement of award by suggesting modifications to existing provisions relating to setting aside of award and appeal so as to lend finality to arbitral award, expeditiously:***

(i) Arbitration disputes can be fast-tracked by creating a separate Arbitration Division in every High Court;

(ii) In any event, execution proceedings must be heard and decided expeditiously;

(iii) Unless there is a stay on enforcement, the enforcing Court should endeavour to dispose of an enforcement petition within 9 months from its institution. Further, adjournments in such proceedings must be granted sparingly, and for exceptional reasons only.

1.2.6 Recommend statutory means to minimise recourse to judicial authorities/Courts in arbitration centric dispute resolution mechanisms:

(i) While oversight by a court is essential to the legitimacy and integrity of the arbitral process, its role must be limited to overall supervision, and a second-look at the post-award stage. A second-look by courts must also be within the parameters provided in Section 34 of the Act;

(ii) There is an urgent need to institutionalize the process of appointment of arbitrators, and minimize court intervention at the very first stage;

(iii) In any event, the Supreme Court and the High Courts must endeavour to dispose of applications for appointment of arbitrators expeditiously, and without any delay.

1.2.7 Suggest administrative mechanism/SOP for minimising routine challenge to arbitral awards by the Government in disputes involving them:

(i) Challenging an arbitral award, which has little scope for success in most cases, exposes the party challenging the award to an additional interest- burden, until the challenge is finally decided. Post award, the interest is normally calculated on the principal amount and may also include *pendente lite* interest;

(ii) Any decision to challenge an arbitral award must be based on an honest assessment about the prospects of success, as weighed against the estimated costs of litigation (including interest). Routine challenge to arbitral awards must be avoided, and *bona-fide* administrative suggestions to not challenge an arbitral award must be given finality. In most cases, an independent review of arbitral awards by persons not connected to the arbitral process would be useful;

(iii) The legal personnel involved in the arbitral process must identify the grounds of challenge, and make a realistic and reasonable assessment of the prospect of success. This may be supervised by a senior law officer. Periodic reviews (quarterly or semi-annually) of the outcome of challenges to arbitral awards must be carried out;

(iv) Simultaneously, the Government may consider initiating discussions with the successful party, to explore the possibility of a settlement. More often than not, the successful party may be willing to give up some of the awarded amount to avoid the risks of uncertainty arising out of pendency of the challenge to the award; and

(v) Further, as an alternative, a standing committee of officers may be appointed to immediately examine an award after it is delivered, to decide whether to challenge it, or attempt to settle it. Fortnightly reviews of all arbitral awards must be undertaken to ensure that the timeline for challenging an award does not expire.

1.2.8 ***Recommend principles for determination of costs of arbitration:***

(i) The principles for determination of costs of arbitration have already been laid down in detail in section 31A of the Act and require no further elaboration;

(ii) While the power to award costs rests with the tribunal, arbitrator's fees and related costs of conducting and participating in arbitration proceedings should generally be awarded to the party determined by the tribunal under Section 31-A(2);

(iii) Insofar as other costs are concerned, the tribunals should normally award costs to the successful party, unless there are reasons to not grant the same;

(iv) The Court entertaining a challenge to an award should generally direct the party challenging the award to pay the costs awarded within the time so directed, subject to the final outcome of the challenge to the award;

(v) In this regard, suitable amendments have been suggested to Section 31A of the Act.

1.2.9 ***Recommend principles reducing the costs of arbitration and for determination of fees of arbitrators:***

(i) Party autonomy enables parties to have the final say in the choice of procedure to be adopted by the arbitral tribunal. Thus, parties can specifically provide for a regime of costs (including arbitrators' fees) in the arbitration agreement itself. This will reduce uncertainty regarding costs once a dispute arises, and enable organizations to optimally allocate and plan resources towards each dispute;

(ii) The 246th Law Commission noted that arbitrators' fees was a key area of concern, especially in *ad-hoc* arbitrations. The Law Commission recommended a model schedule of fees. This formed Section 11-A and Fourth Schedule to the Act, as inserted by the 2015 Amendment Act;

(iii) However, the fees fixed under the Fourth Schedule have been met with reluctance. The Schedule was fixed way back in 2015, and has not been revised periodically. The Committee has received requests from arbitrators for revision and amendment to the Schedule to make it dynamic;

(iv) In this view, the Committee has recommended that the Fourth Schedule be shifted to the Rules so that the Government is in a position to prescribe Alternate Fee Arrangements which are in vogue in many other jurisdictions and to provide different fee structures for different class of arbitrations such as small and medium value claims and also periodically revise the rates as well as make provisions / suitable alterations in future to meet the needs of changing times without the need to amend the Act.

1.2.10 ***Recommend a charter of duties for guidance of arbitral tribunal, parties and arbitral institutions:***

(i) The distinction between an arbitration and a Court system is the liberty of having a chosen judge, but that has its own problems. The most important duty that all the stake holders have is to ensure the independence and impartiality of the arbitrators and arbitral institutions, otherwise the system would fail;

(ii) Arbitrators, lawyers, experts, parties and arbitral institution are all stakeholders, and they have to work together to make the system efficient and successful. For this purpose, the requirement of disclosure has to be seriously and honestly met;

(iii) The Arbitration Council should specify, by regulation, a Charter of Duties for arbitral institutions;

(iv) Every Arbitral Institution should prescribe a Charter of Duties for its Arbitrators;

(v) In this regard, the Guidelines on Conduct of Arbitrators, published by the Indian Arbitration Forum, would be useful.

1.2.11 ***Examine the feasibility of enacting separate laws for domestic arbitration and international arbitration and for enforcement of certain foreign awards:***

(i) This aspect was considered when the 1996 Act was enacted. Many stakeholders and senior lawyers strongly supported the idea of two different legal frameworks when the UNCITRAL Model Law was adopted in 1996, as followed in certain jurisdictions such as South Africa and the U.K;

(ii) One of the major criticisms levelled against the Act, right from its inception, was that the UNCITRAL Model Law was adopted without significant modifications to suit India's local conditions. In other jurisdictions, some countries adopted certain provisions of the Model Law, but considered that they could extend, simplify or liberalise the Model Law. Examples include the Netherlands in 1986 and Switzerland in 1987. Italy and England decided not to follow the Model Law closely;

(iii) The Model Law was mainly intended to enable various countries to have a common model for 'international commercial arbitration'. However, the 1996 Act applies to purely domestic arbitrations as well;

(iv) However, at that time, the suggestion for a separate law for domestic arbitrations was not agreed to and it was decided to

have a single law governing both international commercial arbitrations as well as for domestic arbitrations repealing the 1940 Act;

(v) Having enacted a single Act for both international and domestic arbitrations, the 1996 Act has been sufficiently fine-tuned by judicial pronouncements and legislative amendments. The present Act has been accepted by the international as well as domestic users. As such, the Act can continue to be the legal framework for international commercial arbitration. If the amendments proposed in this Report are implemented, the Committee is confident that India will emerge as a hub of international commercial arbitration;

(vi) The current Act has stood the test of time for international commercial arbitrations. The present Act can be further amended to incorporate further changes in the UNCITRAL Model Law introduced in 2006, if necessary;

(vii) It is widely accepted that domestic arbitrations do require greater supervision than international arbitrations;

(viii) The Committee is of the opinion that a separate law for domestic arbitration is desirable for the reasons stated below –

(a) The UNCITRAL Model Law is based mainly on the experience of western countries where arbitrations are mostly conducted under the auspices of arbitral institutions;

(b) Informed consent of parties in respect of arbitral costs, including arbitrator's fees, is necessitated. Parties should have the final word on the choice and fees of the arbitrators, the expenses likely to be borne by the parties and procedure followed by the arbitral tribunal. Parties should have the choice for opting for a fixed cost arbitration where arbitrators' fees are capped;

(c) A separate domestic law will be necessary to address India specific concerns. which can be finalised by the Government after holding consultations with the Bar Council and Advocates' Associations and trade associations or make a reference to the Law Commission to undertake this exercise.

(ix) However, at this stage, it is not feasible for this Committee to immediately draft and suggest a separate law for domestic arbitration. This will require a longer consultative process with all stakeholders, further deliberations and policy inputs. Nevertheless, the Committee suggests that separate legislation

ought to be considered at an appropriate time so as to tailor the distinct arbitration legislations to the requirements of domestic and international commercial arbitration, as the case may be;

(x) Insofar as enforcement of foreign awards is concerned, the existing statutory scheme does not require any changes. However, delay in enforcement of awards, irrespective of whether it is a domestic or a foreign award, requires to be addressed at the earliest.

1.2.12 ***Recommend templates for model arbitration agreement for adoption by parties and model award for guidance of arbitrators:***

(i) The arbitration agreement is the cornerstone of arbitration. Parties should exercise due diligence while concluding any agreement. Amongst other things parties should examine whether to stipulate in the arbitration clause the following:

1. the law governing the contract;
2. the seat of arbitration and venue of proceedings;
3. the language of the arbitration;
4. the law governing the arbitration agreement;
5. the composition of the arbitral tribunal: whether sole arbitrator or three;
6. the procedure governing the conduct of arbitral proceedings;
7. mode of the conduct of arbitral proceedings namely virtual /hybrid or physical;
8. fees of arbitrators whether capped or per sittings or value based.

(ii) Certain standard clauses can be modified to take account of the requirements of national laws and any other special requirements. This can be best addressed by arbitral institutions by prescribing model arbitration agreements and model awards for guidance of parties and arbitrators;

(iii) The Arbitration Council is suited to, and must periodically publish, guidelines on model awards and model templates.

1.2.13 ***Design and develop a handbook for Arbitrators to standardise their functions; and***

(a) The Committee has recommended a model procedure for arbitrators. In addition, the Arbitration Council can be tasked with the responsibility of periodically publishing best practices to be followed by arbitrators and arbitral tribunals to standardise their functions;

(b) Moreover, arbitral institutions should conduct periodic familiarisation courses and workshops at the grass-root level in local languages in consultation with local Advocates'

Associations. This is to ensure familiarisation of prospective arbitrators and other stakeholders with the arbitration process at the district level;

(c) The Arbitration Council could periodically circulate publications of UNCITRAL like the UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS. This will ensure all stakeholders are updated and familiar with the latest developments and guidelines issued by UNCITRAL;

(d) The Indian Arbitration Forum periodically publishes a Handbook on Arbitration which serves as a valuable guide to arbitrators regarding procedural rules required in the conduct of arbitral proceedings;

(e) The Arbitration Council should also regularly publicise international practices in arbitration which provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings (for instance, the IBA Rules on the Taking of Evidence in International Arbitration). These Rules form a useful guide, to be used in conjunction with, and adopted together with institutional, *ad -hoc*, or other rules or procedures governing international arbitrations.

1.2.14 ***Suggest any other measures including the need for a new legislation on arbitration in simple language***.

(i) One of the major criticisms levelled against the Act, was that the UNCITRAL Model was adopted without substantial modifications. This was in contrast to the law in other countries, where the Model Law was amended to suit domestic needs. Some countries adopted certain provisions of the Model Law, but considered that they could extend, simplify or liberalise the Model Law. Examples include the Netherlands in 1986 and Switzerland in 1987. Italy and England decided not to follow the Model Law closely;

(ii) The Model Law was mainly intended to enable various countries to have a common model for 'international commercial arbitration.' The 1996 Act has been made applicable to purely domestic arbitrations as well. This has given rise to some concerns;

(iii) However, several judicial pronouncements and legislative interventions have taken place since the 1996 Act was initially introduced. Drastic changes to the provisions of the Act may result in further litigation, and unsettling the jurisprudence which has otherwise crystallised, and is widely accepted;

(iv) Nevertheless the Committee feels a separate domestic law is necessary to address these India specific concerns, which can be finalised by the Government after holding consultations with all the Bar Councils, Advocates' Associations, trade associations, or consider making a reference to the Law Commission to undertake this exercise.

1.2.15 *RE: PLAIN LANGUAGE DRAFTING*

(i) The need to draft legislation in plain language is widely recognized. Plain drafting means a person who reads the document must be able to find and understand the information easily. In cases where legislation itself cannot be simplified further, one can rely on extraneous material along with the Act to simplify the text;

(ii) The importance of plain drafting was noted as far back as 2005, by the Department Related Standing Committee on Personnel, Public Grievances, Law & Justice;

(iii) In 2005, the Legislative Department made presentations on the developments in other commonwealth jurisdictions, and suggested two important techniques. The techniques suggested included an Explanatory Memorandum, and a Schedule containing the sections which will appear after amendment which could serve as external aids to understanding of the provisions of the Act;

(iv) The practice of Explanatory Memoranda being annexed to the Bill, followed in certain Commonwealth countries, is instructive. The purpose of such Explanatory Memoranda is to act as a summary and guide to the provisions of the Bill. It further provides information, particularly for members of the Legislature. In several cases, the courts in the U.K have also found Explanatory Memoranda useful in conjunction with other extraneous material;

(v) This Explanatory Memoranda is drafted in parallel with the drafting of the Bill. When the Bills change and develop in the course of the drafting process, supplementary Explanatory Memoranda are also moved for amendment;

(vi) Explanatory Memoranda do not form part of the Bill and do not claim to be authoritative. They do not receive the Parliament's approval. This means that there is freedom to use techniques which cannot generally be used in the Bill. The notes can explain the background to the measures; summarize its principal provisions; give worked examples; and explain difficult concepts by setting them out in different ways;

(vii) The Explanatory Memoranda are designed to help the reader navigate the legislation. The current practice of annexing Notes to clauses for Bills with several clauses is not adequate to facilitate Members of Parliament to easily understand the contents of the Bill. Moreover, Notes on clauses are discarded once the Bill is passed by one House of Parliament and are not transmitted along with the Bill as passed by the House. Also Notes on clauses are not amended to tally with the amendments made to the Bill during the passage in the House and do not present a permanent record;

(viii) Hence, instead of the current practice of annexing Notes on Clauses, the Committee has annexed Explanatory Notes in plain language;

(ix) The Department Related Standing Committee on Personnel, Public Grievances, Law & Justice in its 6th Report on Demands for Grants 2005-06 of the Ministry of Law & Justice emphasized on the need for simplification of laws so that the common man can easily understand them and observed at para 7.41 as follows:

> *"The Committee notes that the process of simplification of laws is the need of the day. Common law countries like England has started simplifying its laws. The Committee observes that legislative language is often quite technical, intricate and incomprehensible for common man for whom laws are made. It feels that laws should be drafted in national or regional languages to convey the purpose and intent of framing laws and all Central laws are translated into Hindi making the provisions known to the masses. The Committee, therefore, recommends that the Government should explore the ways and means to simplify laws so as to be understood even by people having no specialized knowledge of legal formulations. In other words, Legislative Department should act as a catalyst for launching a movement for plain language drafting of laws and instruments of subsidiary legislation."*

(x) Recently, the Ministry of Environment, Forest and Climate Change has taken significant initiatives towards plain language drafting. It has adopted the practice of circulating Explanatory Memoranda and Schedule of amended provisions, with descriptions explaining the provisions. The Ministry circulated, along with the Forest (Conservation) Amendment Bill 2023, an Explanatory Memorandum explaining the provisions of the

Forest (Conservation) Amendment Bill 2023 and a simplified version explaining the provisions of the Act as proposed to be amended along with a description to each section. This greatly facilitated the understanding of the proposed amendments;

(xi) In view of the above, the Committee has annexed an Explanatory Memoranda explaining the provisions of the proposed amendments to the Arbitration Act 1996 in simple language, and also an amended version of the sections for easy understanding by the readers;

(xii) It is further recommended that the 1996 Act, and other accompanying materials like the Explanatory Memoranda, should be translated in all official languages.

1.3 THE OBJECTS OF THE COMMITTEE

1.3.1 In view of the above mandate, the Committee undertook this exercise to

(i) identify the fault-lines and issues which require clarity in the Indian arbitration regime;

(ii) update the Act to reflect the changes in commerce and industry since its enactment;

(iii) ensure greater adherence to the principle of party autonomy and consent;

(iv) recommend simplified procedures to make arbitral proceedings time bound and cost effective;

(v) minimise intervention of courts in arbitral proceedings;

(vi) develop a professional environment in arbitration services;

(vii) facilitate the use of technology in arbitrations to attain greater productivity and outcomes;

(viii) suggest measures to establish India as a hub of international arbitration;

(ix) recommend measures to enhance the ease of doing business and ease of living;

(x) provide external aids to understand the provisions of the Act which will enable all the stakeholders including those who are not proficient in legal language to understand the effect of the provisions of the Act.

(xi) provide a special procedure for small and medium value claims

arbitrations;

(xii) revitalize the Arbitration Act as an effective ADR mechanism for dispute settlement;

(xiii) suggest measures to make the provisions of the Act user friendly for all the stakeholders by reducing the delays, costs, and time.

1.3.2 The Committee undertook an evaluation and analysis of the operation of the extant arbitration ecosystem in the country, including the working of the Act. It has attempted to highlight the strengths, weaknesses and challenges vis-à- vis other important foreign jurisdictions and judicial pronouncements. Accordingly, it has suggested amendments to the Act to-

(i) make it efficient, effective, and economical, and to better cater to the requirements of business and commerce;

(ii) leverage the latest innovations in technology for the efficient conduct of judicial and arbitral proceedings, reducing costs and avoiding inordinate delays;

(iii) facilitate arbitrations to migrate to virtual mode and adopt technology, to help India emerge as a global player and favoured seat in international commercial arbitration;

(iv) facilitate the Ease of Doing Business to attract Foreign investment;

(v) enable greater participation of arbitrators with rich domain knowledge and judicial experience in arbitrations ;

1.4 WORKING PROCESS OF THE COMMITTEE

1.4.1 By the Government's notices dated 22 June 2023 and 4 July 2023, the Committee had invited concise written comments and suggestions from all stakeholders on various aspects of the working of the Act in line with the Committee's Terms of Reference. The Committee had received an enthusiastic response, evidenced by the numerous suggestions it received from a wide range of sources including industry bodies, advocates, law firms, private sector entities, etc.

1.4.2 The Committee has conducted 6 (six) meetings till date (along with two additional meetings held with specific stakeholders), and the Committee has received a total of 124 (one hundred and twenty-four) comments/suggestions from various stakeholders. A list of all the meetings and summary is at Appendix V.

1.5 THE REPORT

1.5.1 The Committee has considered the various recommendations in detail, besides undertaking further research, and examining the prevalent best practises, both nationally and internationally. This report sets out our final conclusions and recommendations. It also includes a draft Bill to implement our recommendations. The Committee has considered all the proposals received by it, even if it may not find mention in the Report.

1.5.2 This Report is the culmination of the Committee's deliberations after carefully considering the wide-ranging views expressed by various stakeholders, for which the Committee is grateful.

1.5.3 A summary of the proposed amendments and conclusions and way forward is at Appendix III.

1.6 STRUCTURE OF THE REPORT

1.6.1 PART I - Executive Summary

1.6.2 PART II – Brief History of Arbitration in India

1.6.3 PART III – Key Recommendations for amendment of the Act

1.6.4 PART IV – Conclusions and Way Forward

1.6.5 Appendices

(a) Appendix 1 contains a summary of the recommendations made by the Committee;

(b) Appendix 2 contains the draft Bill, which sets out the proposed amendments to the Arbitration and Conciliation Act 1996 to give effect to the recommendations;

(c) Appendix 3 contains Explanatory Notes to accompany the draft Bill, which explain in detail and in plain language each clause in the Bill;

(d) Appendix 4 contains sections of the Arbitration Act as they would appear after the textual amendments to facilitate ease of understanding the sections after amendment;

(e) Appendix 5 contains the summary of the various meetings held by the Committee;

PART II

2. BRIEF HISTORY OF ARBITRATION IN INDIA

2.1 EVOLUTION OF ARBITRATION PRIOR TO THE 1940 ACT

2.1.1 Arbitration has a long and rich tradition in India. Even before the advent of the British, the final and conclusive settlement of differences by tribunals chosen by the parties themselves, was common amongst Hindus in ancient India. In fact, the *Puga* (assemblies), *Sreni* (corporations / guilds) and *Kula* (village councils) courts of ancient India have been described as 'arbitration courts' as they were private tribunals not constituted by a royal authority and resembled modern-day arbitrators. However, they could only decide disputes which related to matters within their special knowledge, for example, trade disputes.[1]

2.1.2 After the advent of British rule, the Regulations introduced in Bengal,[2] Madras[3] and Bombay[4] provided for reference to arbitration. It also provided for setting aside of arbitral awards, arbitral awards having the force of decrees, etc. Thereafter, the Act 8 of 1859, which codified the procedure of Civil Courts, provided for arbitration in the course of suits.[5]

2.1.3 The enactment of the Indian Arbitration Act, 1899 ("**1899 Act**") marked a key development in India's arbitration history. The 1899 Act applied to cases where, if the subject-matter submitted to arbitration were the subject of a suit, such suit could have been instituted in a Presidency town.

2.1.4 The application of the 1899 Act was initially limited to Presidency towns. It was extended to all places to which it did not apply then by the Second Schedule to the Code of Civil Procedure, 1908 ("**CPC**"). Section 89 of the CPC and the Second Schedule to the CPC also introduced more extensive provisions on arbitration.

2.2. BRIEF HISTORY OF THE 1940 ACT

2.2.1 In the 1920s, the Civil Justice Committee was appointed to report on the machinery of civil justice. The Civil Justice Committee's Report made various suggestions regarding modification of the law relating to arbitration. Pursuant to the enactment of the (English) Arbitration Act of 1934, in 1938, the Government of India appointed Shri Ratan Mohan Chatterjee as a special officer for revision of the law of arbitration. Eventually, the Arbitration Act, 1940 ("**1940 Act**"), was enacted.

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[1] Dr. Priyanath Sen's Tagore Law Lectures, 1909 on "*The General Principles of Hindu Jurisprudence*", cited by Dr. P.B. Gajendragadkar in his address to the Fifth International Arbitration Congress.

[2] Bengal Regulations of 1772, 1780, 1781, 1787, 1793, 1803 and 1813. The extension of the Bengal Regulations to Banaras and the ceded Provinces meant that these Regulations covered a large portion of Northern and Eastern India.

[3] Madras Regulations of 1816.

[4] Bombay Regulations of 1827.

[5] sections 312 to 325 of Act 8 of 1859

2.2.2 After the passing of the 1940 Act, the law on arbitration in India, which was thus far contained in two separate enactments, i.e., the 1899 Act and the Second Schedule to the CPC, was consolidated in one statute. The 1940 Act drew from the provisions of the (English) Arbitration Act of 1934 and was intended to be a complete code on arbitration law.

2.2.3 The scheme of the 1940 Act dealt with: **(i)** arbitration without intervention of Court (Chapter II); **(ii)** arbitration with intervention of Court where there is no suit pending (Chapter III); **(iii)** arbitration in suits (Chapter IV); and **(iv)** provisions which are common to all the three kinds of arbitration (Chapters V to VII and the Schedules). Under the 1940 Act, an award could not be enforced without approval of the Court, and by securing a judgment in terms of the award. Further, the Court had the power to modify, remit, or set aside the award.

2.2.4 The 1940 Act did not deal with enforcement of foreign awards. For this purpose, the Legislature enacted the Arbitration (Protocol and Convention) Act, 1937 for Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 for New York Convention Awards.

2.2.5 The 76th Report published by the Law Commission of India on the 1940 Act *inter alia* noted that while the scheme of the 1940 Act was by and large sound, some provisions caused difficulties in practice, and resulted in delays and needless expenses. In the 76th Report, the Law Commission attempted to improve the provisions regarding resolution of disputes under the 1940 Act by recommending certain amendments. This included a recommendation to add a proviso to section 28 of the Act, forbidding an extension beyond one year for making the award, except for special and adequate reasons to be recorded.

2.2.6 Recognizing the need for competent arbitrators and an arbitration bar, the 76th Report also noted in its ultimate analysis that there is much truth in the saying that "*an arbitration is as good as an arbitrator*".

2.2.7 The challenges, arising out of the working of the 1940 Act, were succinctly described by the Supreme Court in ***Guru Nanak Foundation v. Rattan Singh***,[6] where the Court noted as follows:

> "*Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep.*"

[6] (1981) 4 SCC 634.

2.3 BRIEF HISTORY OF THE 1996 ACT

2.3.1 The liberalisation of the economy in 1991 acted as a catalyst to usher in further steps to promote foreign investment, create a comfortable business environment and promote investor confidence in the Indian dispute resolution mechanism.

2.3.2 A need was felt to bring uniformity in the law, by aligning it with the United Nations Commission on International Trade Law ("**UNCITRAL**") Model on Commercial International Arbitration, 1985. This led to the enactment of the Arbitration and Conciliation Act, 1996. The 1996 Act was a self-contained Code, and enacted to attain the objectives of consolidating and amending existing laws relating to domestic arbitration. It also aimed at defining conciliation, and creating a unified legal framework for fair and effective settlement of disputes. Based on the Model Law, the 1996 Act replaced the 1940 Act.

2.3.3 The Act was aimed at curbing delays in the conduct of arbitration. It further consolidated the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Speedy arbitrations and minimal judicial intervention were its key objectives.

2.4 176TH REPORT OF THE LAW COMMISSION

2.4.1 In its 176th Report, published on 12 September 2001 ("**176th Report**"), the Law Commission undertook a comprehensive review of the 1996 Act, and recommended several amendments.

2.4.2 The Law Commission observed that while minimum judicial interference in setting aside an award would be a guiding principle for international arbitral awards, it could not be wholly applied to domestic arbitrations.

2.4.3 In that view, it recommended insertion of two additional grounds of challenge to a domestic award at the Section 34 stage, viz. substantial error of law apparent on the face of the award, and where no reasons have been provided in the arbitral award.

2.4.4 The 176th Report also contained a draft Arbitration and Conciliation (Amendment) Bill, 2001. The Government, after inviting comments of the State Governments and certain commercial organisations, decided to accept almost all the recommendations. In addition, some suggestions made by the leading senior lawyers, jurists and representatives of commercial organisations in a special seminar organized by the Law Ministry were also accepted.

2.5 ARBITRATION AND CONCILIATION AMENDMENT BILL, 2003

2.5.1 The Arbitration and Conciliation Amendment Bill, 2003 ("**2003 Bill**")

was introduced in the Rajya Sabha in December 2003.

2.5.2 The amendments were stated to have been suggested for the following reasons:

(i) To resolve the conflict between some judgments of the High Court under the Act;
(ii) To bring it in conformity with the Model Law in certain respects; and
(iii) To improve upon the Model Law for speeding up of arbitral and Court proceedings in India.

2.5.3 The Statement of Objects and Reasons highlighted the following important features of the Bill as follows:

(a) to enable the judicial authority to decide jurisdictional issues, subject to strict rules, where an application is made before it by a party raising any jurisdictional question;

(b) to empower the Courts to make reference to arbitration in case all the parties to a legal proceeding enter into an arbitration agreement to resolve their disputes during the pendency of such proceeding before it;

(c) to provide for the appointment of arbitrators by the Chief Justice of the Supreme Court or the High Court or his nominees to be an appointment made on the judicial side, with a view to prevent writ petitions being filed on the basis that it is an administrative order of the Chief Justice;

(d) to provide that where the place of arbitration under Part I of the existing Act is in India, whether in regard to arbitration between Indian parties or an international arbitration in India and arbitration between Indian parties, Indian law will apply;

(e) to provide for completion of arbitrations under the existing Act within one year from commencement of arbitration proceedings. However, at the end of one year the Court will fix up a time schedule for completion of the proceedings until the award is passed;

(f) to empower the arbitral tribunal to pass peremptory orders for implementation of interlocutory orders of the arbitral tribunal and in case they are not implemented, to enable the Court to order costs or pass other orders in default;

(g) to provide for the Arbitration Division in the High Courts and for its jurisdiction and special procedure under Chapter IXA for the speedy enforcement of awards made under the Arbitration

Act, 1940, the existing Act including awards made outside India;

(h) to provide provisions for speeding up and completing all arbitrations under the existing Act, including those arbitrations pending under the repealed Arbitration Act, 1940 within a stipulated time;

(i) to introduce a new Chapter XI relating to single member fast track arbitral tribunal wherein the filing of pleadings and evidence will be on fast-track basis and award will have to be pronounced within six months and to specify procedure therefor in a new Schedule.

2.6 JUSTICE SARAF COMMITTEE

2.6.1 The Ministry of Law & Justice, Government of India, constituted the Justice Saraf Committee to examine the implications of the recommendations of the 176th Report and the amendments proposed by the 2003 Bill.

2.6.2 The Justice Saraf Committee recommended various modifications and opined that the proposed Bill would in fact, lead to greater interference by Courts. It apprehended that courts would sit in appeal over arbitral awards, contrary to international best practices.

2.6.3 The Justice Saraf Committee was of the view that the Government should instead bring in a fresh, and comprehensive legislation on the subject.

2.6.4 The 2003 Bill was thereafter extensively discussed in the Parliamentary Standing Committee and was withdrawn.

2.7 194TH REPORT OF THE LAW COMMISSION

2.7.1 In 2005 the Law Commission undertook a *suo-moto* exercise to analyse the Division Bench judgment of the Madras High Court in **The Commissioner Corporation of Chennai v. K. Ramdass & Co.**[7]. The judgment concerned stamping and registration of arbitral awards.

2.7.2 In the judgment, the High Court had suggested that the Law Commission consider a legislative exercise to ensure requisite stamping and registration.

2.7.3 The Law Commission's review of the legal position culminated in the 194th Report of the Law Commission. The Commission suggested suitable amendments to the 1996 Act, which *inter alia* included an amendment requiring the award to be duly stamped and registered, if required.

[7] (O.P.D. No. 27597/02) dated 17 December 2003 (modified on 30 January 2004).

2.7.4 However, these amendments were not ultimately carried out.

2.8 THE 246TH REPORT OF THE LAW COMMISSION, AND THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

2.8.1 In 2014, the Law Commission was entrusted with the task of reviewing the 1996 Act. In its 246th Report, the Law Commission analysed the arbitration law in India in some detail, and recommended several key amendments.

2.8.2 This was shortly followed by the Arbitration and Conciliation (Amendment) Act, 2015. Some salient features of the 2015 Amendment were as follows:

(i) Sections 9, 27, 37(1)(a) and 37(3) were made applicable to international commercial arbitrations even if the place of arbitration was outside India, or the arbitral award was enforceable under Part II of the Act;[8]

(ii) Interim orders of arbitral tribunals were made enforceable in the same manner as if were a decree of a court;[9]

(iii) It was made obligatory for arbitrators to disclose circumstances concerning their independence, impartibility and availability;[10]

(iv) Specific timeframes were introduced for conclusion of arbitral proceedings; [11]

(v) An optional fast-tracked procedure was introduced under Section 29-B; [12]

(vi) A comprehensive costs regime was introduced; [13]

(vii) Explanations were added to Sections 34 and 48 of the Act, to clarify and narrow challenges to awards on the grounds related to 'public policy';

(viii) 'patent illegality' was statutorily recognized as a ground to set aside a domestic award under Section 34;

(ix) Courts were obligated to dispose of challenges to arbitral awards within one year;[14] and

(x) it was clarified that there would be no automatic stay of awards merely upon challenging the award, and a separate application would have to be filed seeking stay of the arbitral award.[15]

2.8.3 In ***Hindustan Construction Co. Ltd. v. Union of India***,[16] the Supreme Court observed that "*salutary provisions …were made to correct defects that were found in the working of the Arbitration Act, 1996…which was strengthened by the 2015 Amendment Act*" (emphasised). The 2015

[8] Proviso to section 2(2) of the Act
[9] sections 9 and 17 of the Act.
[10] section 12 read with the Fifth and Seventh Schedules of the Act.
[11] section 29A of the Act
[12] section 29B of the Act.
[13] sections 31A of the Act.
[14] section 34(6) of the Act.
[15] section 36(2) of the Act.
[16] (2020) 17 SCC 324, Paragraphs 50 & 60

Amendments played a pivotal role in streamlining various arbitral and judicial processes under the Act, which has resulted in enhancing the attractiveness of India as a seat for arbitrations.

2.9 JUSTICE SRIKRISHNA COMMITTEE REPORT (HLC) 2017

2.9.1 In 2016, a High-Level Committee to 'Review Institutionalization of Arbitration Mechanism in India' was set up under the chairmanship of Justice B.N. Srikrishna. The key recommendations made by the High Level Committee were as follows:

(a) Constitution of an Arbitration Promotion Council of India (APCI): An autonomous body, with representation from various stakeholders was recommended to be set up for grading arbitral institutions in India;

(b) Accreditation of arbitrators: It was suggested that the APCI could recognise professional institutes providing for accreditation of arbitrators. Accreditation could be made a condition for acting as an arbitrator in disputes arising out of commercial contracts entered into by the government and its agencies;

(c) Creation of a specialist arbitration bar: Measures were recommended to be taken to facilitate the creation of an arbitration bar, by providing for admission of advocates on the rolls of the APCI as arbitration lawyers, encouraging the establishment of fora of young arbitration practitioners, and providing courses in arbitration law and practice in law schools and universities in India;

(d) Creation of a specialist arbitration bench: It was also recommended that judges hearing arbitration matters should be provided with periodic refresher courses in arbitration law and practice.

2.9.2 The High Level Committee also suggested various Amendments to the Arbitration and Conciliation Act 1996.

2.9.3. Bilateral investment arbitrations involving the Union of India: Various recommendations were issued for effective dispute management and resolution and dispute prevention, including:

(a) appointment of the Department of Economic Affairs as the Designated Representative of the Government in existing BITs;
(b) creation of the post of an International Law Adviser, to advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations, particularly disputes arising out of BITs;
(c) establishment of a five-member permanent Inter-Ministerial Committee in order to ensure effective management of disputes arising

out of BITs entered into by the Government; and

(d) tasking the Department of Economic Affairs with the preparation and implementation of dispute prevention strategies in order to prevent disputes from arising or escalating to formal dispute resolution proceedings.

2.10 THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019

2.10.1 The HLC Report was followed by the Arbitration and Conciliation (Amendment) Act, 2019. The amendments, carried out with a view to boost institutional arbitrations, *inter alia* provided for:

(i) appointment of arbitrators by designated arbitral institutions;[17] **(ii)** changes to time limits for appointment of arbitrators,[18] completion of pleadings[19] and making of awards;[20] **(iii)** applications for setting aside of awards to be based on the arbitral record;[21] **(iv)** confidentiality obligations on arbitrators, arbitral institutions and parties;[22] **(v)** protection of arbitrators for actions taken in good faith;[23] and **(vi)** establishment of the Arbitration Council of India.[24]

2.10.2 However, Section 87 the 2019 Amendment Act restored the earlier position of automatic stay of arbitral awards merely upon the filing a challenge, for all arbitral proceedings which had commenced before 23 October 2015. This appears to have been necessitated by the Supreme Court's judgment in **BCCI v. Kochi Cricket (P) Ltd.**[25]

2.10.3 Section 87 of the 2019 Amendment Act was struck down by the Supreme Court in ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors.***,[26] as being manifestly arbitrary and contrary to the object sought to be achieved by the 2015 Amendments.

2.10.4 While some of the amendments in the 2019 Amendments are yet to be notified, the positive steps to promote institutional arbitration in India are commendable. The 2019 Amendments, if and when notified, would ultimately prove to be a strong boost for institutional arbitration in India.

2.11 THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

2.11.1 In 2021, the Act was amended yet again. The amendment *inter alia*

[17] section 11(3A) of the Act (not in force as on date).
[18] section 11(13) of the Act (not in force as on date).
[19] section 23(4) of the Act.
[20] section 29A(1) of the Act.
[21] section 34(2) of the Act.
[22] section 42A of the Act.
[23] section 42B of the Act.
[24] sections 43A-43N of the Act (not in force as on date).
[25] BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287
[26] 2019 SCC OnLine SC 1520.

deleted the Eighth Schedule (introduced by the 2019 Amendments), which had provided the qualifications for appointment as an arbitrator. The Eighth Schedule had invited heavy criticism for being restrictive and unclear, especially in respect of appointment of foreign arbitrators in India-seated arbitrations. The deletion of the Eighth Schedule has been widely perceived as another welcome step towards promoting arbitrations in India. This has been widely perceived as another welcome step towards promoting arbitrations in India.

PART III

3. KEY RECOMMENDATIONS FOR AMENDMENT OF THE ACT

3.1. AMENDMENT TO THE PREAMBLE AND THE SHORT TITLE OF THE ARBITRATION AND CONCILIATION ACT 1996

3.1.1 The Mediation Act 2023 has comprehensively provided for mediation, which was earlier part of the Arbitration and Conciliation Act 1996. Since the provisions relating to conciliation in the Arbitration Act 1996 have been omitted by the Mediation Act, 2023 it became necessary to omit the references to conciliation in the Arbitration Act.

3.1.2 Though section 61 of the Mediation Act made consequential amendments to the Arbitration and Conciliation Act 1996 through the Sixth Schedule, the references to conciliation in the Preamble and the Short Title references remained. Consequently, it is necessary to amend the Preamble to the Act, the Long Title and the Short Title to omit references to conciliation.

3.1.3 The Committee recommends amendment to the Preamble to the Act and to the short title to omit references to the word Conciliation.

Recommendation

Amendment

(i) of the Long Title and Short Title
(ii) in the Preamble

(iii) in subsection (1) of section 1

to omit the words “and conciliation”.

3.2 REPLACEMENT OF "PLACE" WITH "SEAT" OR "VENUE" IN THE ACT.

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

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

3.2.3 The difference between "seat" and "venue" has been the subject matter of judicial pronouncements. In ***BBR (India) Private Limited v. Singla Constructions private Limited***, (2023) 1 SCC 693, the Supreme Court held that the 'seat', once fixed by the arbitral tribunal under section 20(2) of the Act remains static and fixed unless changed by express mutual consent of the parties, whereas the 'venue' of the arbitration can change and move from the 'seat' to a new location. Jurisdiction comes from "seat" and not "venue".

3.2.4 The Supreme Court, in ***BALCO v. Kaiser Aluminium Technical Services Inc***., (2012) 9 SCC 552 and subsequent judgments, has held that the word "place" mentioned in section 20(1) and 20(2) refers to the seat of arbitration, and in section 20(3) refers to the venue of the arbitration. The proposed amendment is also consistent with the international usage concerning the 'seat of arbitration' as opposed to 'place of arbitration'.[27] Even the 246th Law Commission Report had suggested that the replacement of the word "place" with "seat" and/or "venue" as may be applicable. This Committee endorses the same.

3.2.5 The substitution of "seat" for "place" in sections 20(1) and 20(2) of the Act also gives the parties the right to choose the "seat" of arbitration, which in turn resolves the issue of jurisdiction. While the concept of a judicial seat established in the international sphere while deciding which country will have jurisdiction, it has also acquired importance in the context of India-seated domestic arbitrations, in view of the law propounded by the Supreme Court from time to time.

3.2.6 Therefore, it is proposed to delete the term "place", wherever it occurs

[27] For instance, please refer to Article 21.1 of the Arbitration Rules of the Singapore International Arbitration Centre, 2016 ("**SIAC Rules**"); Article 14 of the 2018 Hong Kong International Arbitration Centre Administered Arbitration Rules, 2018 ("**HKIAC Rules**"); Article 16 of the Arbitration Rules of the London Court of International Arbitration, 2020 ("**LCIA Rules**").

in various sections of the Act and replace it with the term "seat". The proposed amendment is consistent with the international usage of 'seat of arbitration' as opposed to 'place of arbitration'.

3.2.7 The substitution of the term "seat" and "venue" instead of "place" will bring the Act in consonance with internationally accepted practices and the law declared by the Hon'ble Supreme Court. Accordingly, the Committee recommends the following amendments:

Recommendation

Amendment of section 20(3) by substituting the word "place" with the word "*venue*";

Amendment of sections 2(2), 20(1), 20(2), 28(1) and **31(4)** by substituting the word "place" with the word "*seat*".

3.3 AMENDMENT TO THE DEFINITION OF 'COURT' HAVING REGARD TO THE AMENDMENT RELATING TO THE SEAT OF THE ARBITRATION

3.3.1 The current definition of Court is similar to the definition of Court in the 1940 Act. As presently contained in section 2(1)(e) of the Act, it is solely based on the jurisdiction of the subject matter of arbitration. Also relevant is section 42 which provides that a Court once approached would be the Court having jurisdiction to hear further applications under Part 1 of the Act.

3.3.2 However, the Supreme Court has held in ***BALCO v. Kaiser Aluminium Technical Services Inc***., (2012) 9 SCC 552, ***Indus Mobile Distribution Pvt Ltd v Datawind Innovations Pvt Ltd & Ors.*** (2017) 7 SCC 678 and more recently in ***BGS SGS SOMA JV v. NHPC***, (2020) 4 SCC 234, that all applications must be made to the Court having original jurisdiction over the seat of the arbitration, including for domestic arbitrations. The concept of "seat" has been recognised by the Supreme Court even in the context of purely domestic arbitrations. It should therefore be given statutory recognition.

3.3.3 There may be instances where parties choose a neutral "seat" which would otherwise not grant the court jurisdiction over the dispute under Indian law. Similarly, there may also be instances where parties have later agreed to a "seat" under section 20(1), after approaching an earlier court. In such instances, it is imperative that the law provide for jurisdiction of the court of the "seat" of the arbitration. In that view, it is proposed to amend the definition of "Court" to mean the court, first and foremost, having jurisdiction over the seat of the arbitration, and only if such seat is not determined, then the court having jurisdiction over the subject matter of the arbitration. Section 42 will also have to be appropriately amended.

3.3.4 The definition of 'Court' was amended in 2015 to ensure that for international commercial arbitrations, jurisdiction is exercised by the High Court, even if such High Court does not exercise ordinary original civil jurisdiction. However, with an increase in institutional arbitrations and variation in the quantum of claim amounts, it was felt that the current definition is not sufficient.

3.3.5 Therefore, the proposed amendment seeks to further provide clarity on the court of first instance for both international commercial arbitrations and domestic arbitrations, depending on whether it is institutional or *ad-hoc* arbitration, while also considering the value of the subject matter of the arbitration. To further incentivise institutional arbitration, it is suggested that for institutional arbitrations having a Specified Value of Rs. 50 crores or higher, the Court will be the jurisdictional High Court, having original jurisdiction or jurisdiction to hear appeals from subordinate Courts over the seat of the arbitration and if no seat has been determined, then the Court having jurisdiction over the subject matter of arbitration. A similar provision is already in force for international commercial arbitrations.

3.3.6 To carry out these amendments to Court, Committee recommends that a new section 2A be incorporated to clearly define the term Court to reflect the above recommendation.

Recommendation

Insertion of new section 2A to provide a definition of Court in the following terms-:

(i) Courts means the Court first and foremost having jurisdiction over the seat of the arbitration and only if such seat is not determined then having jurisdiction over the subject matter of the arbitration;

(ii) To make a consequential amendment to section 42;

(iii) to further incentivise institutional arbitration, it is proposed that for arbitrations having a Specified Value of Rs. 50 crores or higher, the Court under section 2(1)(e) will be the jurisdictional High Court, having original jurisdiction or jurisdiction to hear appeals from subordinate Courts over the seat of the arbitration and if no seat has been determined, then the Court having jurisdiction over the subject matter of arbitration;

(iv) it is proposed to provide in the definition that the Specified Value will be calculated on the basis of principles specified in section 12 of the Commercial Courts Act, 2015.

3.4 ADMINISTRATIVE ASSISTANCE BY TECHNO-LEGAL UTILITIES

3.4.1 Section 6 provides for arbitral tribunals availing administrative assistance provided by suitable persons or institution to conduct arbitration proceedings. It is proposed to amend section 6 by introducing techno-legal utilities as one of the functionaries, in addition to "suitable institution or person" to facilitate the conduct of arbitral proceedings. This will facilitate proceedings before arbitral tribunals, especially *ad hoc* tribunals. Availing technology services will reduce expenses in the conduct of proceedings currently carried out in the physical mode.

3.4.2 The Law Commission in its 176th Report had observed at as follows:

> *"The above section was drafted on the model of Art. 8 of the UNCITRAL Report on Adoption of Conciliation Rules (prepared by the United Nations Commission on International Trade Law), which was, more or less, in the same language. In fact, in that Report it was suggested that if the conciliators arrange for administrative assistance, they must not merely consult the parties but must also obtain their consent. In practice, however, at any rate in India, it is becoming increasingly common for arbitration proceedings being conducted at expensive venues. On several occasions, even when the proceedings last for a very short duration, the parties have to pay for a whole day. If the venue is a five-star hotel, the expense will be heavier. Parties feel embarrassed if they have to reject request for an expensive venue"*

3.4.3 The problem of expensive venues and travel costs associated with arbitrations can be effectively addressed by arbitral proceedings migrating to virtual or hybrid mode. For this purpose, the Committee has proposed to introduce certain provisions for the involvement of techno-legal utilities in arbitral proceedings.

3.4.4 Virtual dispute resolution mechanisms, and the growing use and role of technology in the efficient conduct of arbitral proceedings, will enable parties to avail the services of such utilities to facilitate arbitration proceedings in a more efficacious manner.

3.4.5 Apart from reducing the cost of expensive venues and travel costs, there are many other advantages in adopting technology in arbitration. For instance, lawyers spend much of their time ploughing through documents. Document automation can be used in arbitral proceedings to reduce charges for examination of documents and material evidence by legal experts time because it enables documents to be generated in minutes whereas in the past they would have taken many hours to craft.[28] More recently, a new set of techniques have been adopted, drawing from disciplines of machine learning, big data and predictive analytics. These emerging systems can play a crucial

[28] Richard Susskind -Tomorrows Lawyers-An Introduction to Your Future (OUP) Kindle 3rd Edition p 65;

role in analysing document sets or summarizing or extracting key provisions of contracts. Blockchain technology enables data and documents to be shared in a way that makes it all but impossible to change or falsify such documents and it permits sharing securely among users with no single person or authority in control.[29]

3.4.6 These utilities provide a wide variety of services based on digital platforms. The proposed amendment merely provides an indicative list of techno-legal services, for instance, providing the necessary technological infrastructure, secure online platforms for efficient document sharing, management and collaboration for the conduct of arbitration proceedings; technology support for transcription/recordings and for virtual court rooms; communication tools; depository of records; cybersecurity, etc.

3.4.7 The proposed amendment further seeks to expand the scope of techno-legal utilities, and enable virtual and remote participation in arbitral proceedings.

3.4.8 For the effective utilisation of technology in dispute resolution, it is necessary to statutorily recognise and enable the parties to submit *inter alia* documents electronically; conduct virtual hearings; provide systems for recording of evidence of witnesses, depository of documents in digital form, authentication of records etc. The proposed amendment confers adequate discretion upon the Central Government to make Rules in this regard.

3.4.9 Providing statutory recognition to Techno Legal utilities will facilitate the migration of *ad hoc* arbitrations, which currently lack the backend support in the form of secretarial and technological services, to more efficient and technologically savvy environment. It is hoped that this will catalyse India's emergence as a hub of international commercial arbitration.

3.4.10 In this background, the Committee recommends amendments to section 6 and the insertion of new sections 6A and 6B:

[29] Susskind ibid p 72;

Recommendation

(a) amendment to section 6 to include Techno Legal Utilities as a suitable institution to provide administrative assistance;

(b) Insertion of new Section 6A –to provide for 'Techno-Legal Utilities', which provide techno-legal services to *ad hoc* as well as to institutional arbitrations. Techno-Legal services include, but are not limited to, secure online platforms for efficient document sharing, technological support for transcription, recordings and virtual hearings and cybersecurity measures.

(c) Insertion of new section 6B for regulating the functioning of the Techno-Legal Utility and providing for such Techno-Legal Utilities to be serviced by a registry with properly delineated functions.

3.5 VALIDATION OF INSUFFICIENTLY STAMPED OR NOT DULY STAMPED ARBITRATION AGREEMENT

3.5.1 The issue arising out of the requirement of an adequately stamped arbitration agreement has been the subject matter of various judicial pronouncements by the Supreme Court of India.

3.5.2 A Division bench of the Supreme Court of India in ***SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.***, (2011) 14 SCC 66 ("**SMS Tea Estate**"), having regard to section 35 of the Stamp Act, held that the Courts cannot act upon arbitration agreements/ arbitration clauses contained in insufficiently stamped or unstamped instruments unless the stamp duty and penalty due on such instruments was paid.

The Supreme Court had occasion to reconsider this aspect, after the introduction of Section 11(6A) by the 2015 Amendment, in ***Garware Wall Ropes Ltd v. Coastal Marine Constructions & Engg. Ltd.***, (2019) 9 SCC 209 ("**Garware**"). The Supreme Court re-iterated the law laid down in **SMS Tea Estate**. It held that an arbitration agreement contained in unstamped instruments or insufficiently stamped instruments could only be acted upon/ become enforceable in law after they were duly stamped. The judgment in *Garware* was cited with approval by a three-judge bench of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation***, (2021) 2 SCC 1 ("**Vidya Drolia**"), albeit in a different context.

3.5.3 Subsequently, in ***N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.***, (2021) 4 SCC 379, another three Judge Bench of the Supreme Court of India took a contrary view that there was no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. The decision, relying on the doctrine of severability, held that an arbitration agreement was distinct, separate, and independent from the underlying commercial contract. As such, non-payment of stamp duty would not invalidate the arbitration clause contained in the agreement, or render it unenforceable. However, since the earlier co-ordinate Bench in *Vidya Drolia* had expressed a contrary view, the matter was referred to a larger bench expressing doubts over the correctness of the view taken by the co-ordinate Bench in *Vidya Drolia* and *Garware*.

3.5.4 The reference culminated in the judgment of a five-judge Constitution bench of the Supreme Court of India in ***NN Global-II***. The decision, rendered on 25 April 2023, ruled that an unstamped instrument, on which stamp duty is payable, containing an arbitration clause "*cannot be said to be a contract, which is enforceable in law within the meaning of section 2(h) of the [Indian] Contract Act and is not enforceable under section 2(g) of the [Indian] Contract Act.*" It thus held that the arbitration clause contained in an unstamped or insufficiently stamped instrument could not be acted upon unless deficit stamp duty is paid and a certificate to that effect is issued by the concerned authorities.

3.5.5 *NN Global-II* raised concerns in the arbitration community regarding

the enforceability of arbitration agreements which were entered into prior to the judgement, as well as the potential delays in deciding applications: **(i)** for interim measures under section 9; and **(ii)** to appoint arbitrators under section 11.

3.5.6 By creating a legal hurdle of stamping before appointment of arbitrators or grant of interim relief, the Supreme Court took away the power of the arbitral tribunal to decide its own jurisdiction and also the existence of the arbitration agreement. At the stage of appointment of arbitrators or granting interim relief prior to constitution of the arbitration tribunal, there are no substantive proceedings before the Court. Such proceedings are only supportive in nature, to aid an early constitution of the arbitral tribunal or to protect the subject-matter of the dispute in the ultimate arbitration proceedings.

3.5.7 By prescribing a mini-trial at this stage, for impounding and adjudication of the stamp duty, the decision created a procedural difficulty in speedy constitution of the tribunal and the urgent need to protect the subject-matter of the dispute.

3.5.8 Default in the payment of stamp duty, or its insufficiency, is a curable defect as per the proviso to section 35 of the Stamp Act and most of the state legislations relating to stamping.

3.5.9 In ***Bhaskar Raju and Brothers v. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram***[30], another five-judge bench of the Supreme Court doubted the view taken in *NN Global-II*. Therefore, it referred the issue to a seven-judge bench.

3.5.10 This resulted in the judgment of the seven-judge Constitution bench dated 13 December, 2023, in ***In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899***, 2023 INSC 1066.

3.5.11 The seven-judge bench in ***In Re: Interplay between Arbitration Agreements***, overruled *NN Global-II* and *SMS Tea Estate.* It held that an unstamped agreement is not rendered void or void ab initio or unenforceable, and that an objection as to stamping does not fall for determination under Sections 8 or 11 of the Arbitration Act.

3.5.12 It was specifically held in ***In Re: Interplay between Arbitration Agreements*** that any objections in relation to the stamping of the agreement fall within the ambit of the arbitral tribunal. However, the judgment did not elaborate upon the stage of examination, or the procedure to be followed by the arbitral tribunal in deciding such objections.

3.5.12 In view of the above, the Committee has recommended the insertion

[30] Curative Petition (C) No. 44 of 2023 in Review Petition (C) No.704 of 2021 in Civil Appeal No. 1599 of 2020

of Section 7-A to the 1996 Act. Besides giving statutory recognition to the judgment in ***In Re: Interplay between Arbitration Agreements***, the provision aims at bringing certainty and uniformity in the approach of arbitral tribunals on this aspect.

3.5.13 It is proposed to allow the admission of an insufficiently stamped or unstamped arbitration agreement into evidence, and for the same to be acted upon by a Court, an arbitral tribunal, or any other judicial fora for the purposes of the Act. The proposed provision begins with a non-obstante clause to legislatively overrule the effect of any judgment, decree or order of any Court, anything contained in the Indian Stamp Act, 1899 ("**Stamp Act**") or any other law for the time being in force to enable Courts, arbitral tribunals, and judicial authorities to act on unstamped or insufficiently stamped arbitration agreements. Further, the Bill seeks to give retrospective effect to the proposed section 7A from 22 August 1996 in order to ensure that technical pleas of non-stamping or insufficient stamping do not delay the commencement of arbitration proceedings between the parties.

3.5.14 The proposed provision also contains a proviso which empowers the judicial authority, Court, or arbitral tribunal to direct parties to pay stamp duty on the arbitration agreement so as to cure any defect in case of insufficiently stamped arbitration agreements. The said stamp duty will be payable in accordance with the provisions of the Stamp Act or any other law for the time being in force. This ensures that the interest of the revenue is protected, while not unduly delaying the arbitral process.

3.5.15 The proposed amendment therefore seeks to legislatively settle the issue by allowing Courts, tribunals and other judicial authorities to act upon an unstamped or inadequately stamped arbitration agreement until the arbitral tribunal directs the parties to cure the defect in payment of stamp duty "*at a stage it considers appropriate*". Further, the proposed amendment re-affirms the principle of the arbitral tribunal's competence to rule on issues concerning its own jurisdiction, minimizes judicial intervention and facilitates expeditious constitution of arbitral tribunal.

3.5.16 Additionally, the proposed amendment seeks to be made effective with retrospective effect from 22 August 1996 in order to **(i)** ensure that technical pleas of non-stamping or insufficient stamping do not delay the commencement of arbitration proceedings between the parties; and **(ii)** exclude any challenge to the appointment of arbitrators, the conduct of arbitral proceedings or any other consequent actions on the ground of non-payment of stamp duty or insufficient stamp duty.

3.5.17 Accordingly, the Committee recommends that the legal position should be legislatively settled through a suitable validation clause.

Recommendation

To insert a new section 7A to provide that notwithstanding any judgment, decree or order of any Court or anything contained in the Indian Stamp Act, 1899, or any other law in force, an arbitration agreement not duly stamped or insufficiently stamped shall be admitted in evidence and shall be acted upon by any Court, an arbitral tribunal, or any other judicial authority for the purposes of the Act and the arbitral tribunal shall direct a party to pay the requisite stamp duty at an appropriate stage.

To provide in section 9 of the Amending Act a validation clause to provide that section 7A in the principal Act shall be deemed always to have been in force at all material times with effect from 22nd August 1996 and accordingly no suit or other proceedings shall be initiated, maintained or continued in any Court, tribunal or other authority challenging the appointment of arbitrators or the conduct of proceedings or any action taken thereof on the ground that the arbitration agreement was not duly stamped or insufficiently stamped in accordance with the relevant provisions of the Indian Stamp Act 1899 or any other law for the time being in force

3.6 TIMELINE FOR DISPOSAL OF APPLICATIONS UNDER SECTION 8

3.6.1 Section 8 of the Act was introduced to promote and uphold the principles of party autonomy and the use of arbitration as an alternative dispute resolution mechanism. It aims to minimize judicial intervention and interference in arbitration matters and allows for parties to resolve their disputes by mutual agreement.

3.6.2 Very often, parties institute a suit or other legal proceeding before a judicial authority despite being bound by an arbitration agreement. Under Section 8, the judicial authority is bound to refer the matter to arbitration, if it is covered by an arbitration agreement. Section 8 ensures the effectiveness of arbitration as a dispute resolution mechanism in India, and prevents unscrupulous parties from circumventing it.

3.6.3 Section 8 was also amended by the 2015 Amendments to ensure that parties did not subvert the arbitration agreement. However, in practice, such applications take a long time to get decided in view of the delays in Courts. Arbitration is also rarely commenced during the pendency of the application. This negates the purpose and intent behind section 8(3). To expedite disposal of such applications, it is proposed that a timeline of 60 days be introduced for deciding an application under section 8.

3.6.4 In keeping with the overall objective of reducing the timelines for arbitration proceedings, the Bill seeks to add sub-section (4) under section 8 of the Act to include a directory timeline of 60 days to ensure that applications filed under this provision are disposed of by the Court as expeditiously as possible.

Recommendation

It is proposed to amend section 8 to provide that an application filed under sub-section (1) 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 the application.

3.7 APPLICATIONS TO COURT FOR INTERIM MEASURE OF PROTECTION UNDER SECTION 9

3.7.1 Applications for interim protection under Section 9 are routinely filed by parties, which clogs the court's dockets. In some instances, parties obtain an ad-interim order under section 9 but the application itself remains to be finally heard and disposed of. The Committee is of the opinion that applications under section 9 must be disposed of expeditiously. In instances where an arbitral tribunal has been constituted, such an application ought to be relegated to the arbitral tribunal. This was also the objective behind insertion of section 9(3) of the 1996 Act, which states that once the arbitral tribunal has been constituted, the Court shall not entertain an application under section 9(1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

3.7.2 Further, the Act currently provides that a party is required to commence arbitrations within 90 days from receipt of an order under section 9. In the spirit of discouraging parties to routinely resort to section 9, it is further proposed to expedite the timeline for commencing arbitrations, by requiring a party to commence arbitrations within 30 days of making a section 9 application to the Court. This amendment is expected to incentivise parties to view section 9 as a stop-gap arrangement only, prior to the constitution of the arbitral tribunal. The arbitral tribunal, once constituted, can vary the orders passed under section 9 or by the emergency arbitrator if it deems appropriate, in exercise of powers under section 17. In view thereof, enabling amendments are also proposed to section 17.

3.7.3 The further amendment to section 9 provides that once an arbitral tribunal is constituted, the parties may approach the tribunal for interim reliefs under section 17 and not proceed with the application under section 9, unless deemed necessary by the Court. This is expected to significantly reduce the backlog before the Courts, and also promote urgent interim filings before an emergency arbitrator, or an arbitral tribunal, as may be necessary. To further incentivise approaching the arbitral tribunal for obtaining interim measures of protection, the Court may direct that if the arbitration is not commenced within the stipulated time period, the order shall stand vacated. As on date, the Act does not provide a consequence to not commencing arbitration proceedings within the stipulated time-frame. The Committee is of the opinion that some legislative certainty in this regard is desirable.

3.7.4 However, these amendments, to bring out an effective solution, would still require that the Court not entertain applications filed under section 9 once a tribunal is constituted. Very often, parties may obtain an urgent ad-interim order under section 9 but the application itself remains to be finally heard and disposed of. As per the law settled in ***Arcelor Mittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.***, (2022) 1 SCC 712, the expression "*entertain*" under section 9(3) of the Act, means to consider the issues raised by application of mind. It was held that the bar of Section 9(3) would not operate, once an application has been entertained and taken up for consideration. In that case, the bar under Section 9(3) was held to not operate, as the hearing was concluded and judgment was reserved.

Virtually all matters are heard for ad-interim relief and consequently, these matters would be said to have been 'entertained' by the Court. In view of the law laid down in *Arcelor Mittal*, such matters would continue to be heard and decided by the Court. This not only perpetuates the pendency of section 9 applications in Court, but it also renders the arbitral tribunal incapable of hearing and granting interim measures of protection on the issues that are subject matter of the section 9 application.

3.7.5 It is thus felt that under section 9(3) of the Act, a Court must be precluded from not only applying its mind to the matter, i.e., "*entertaining*" an application under section (9), but also from proceeding with the matter altogether, unless it finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

3.7.6 Therefore, the Bill seeks to substitute the word 'entertain' in sub-section (3) of section 9 with 'proceed with'. The Bill further proposes to reduce the time period for commencement of arbitral proceedings to 30 days from the date of making an application under section 9. The Bill also seeks to add a provision that permits the Court to direct that the order under section 9 is to enable the party to approach the arbitral tribunal under section 17 and if arbitration proceedings are not commenced within the stipulated time, the order shall stand vacated.

Recommendation

It is proposed to amend section 9-

(i) to substitute subsection (2) to provide that where, before the commencement of the arbitral proceedings, a party applies to a Court for any interim measure of protection under sub-section (1), it shall also commence the arbitral proceedings within 30 days from the date of making such application to the Court;

(ii) to insert a new subsection (2A) to provide that where, before the commencement of the arbitral proceedings, a party applies to a Court for any interim measure of protection under sub-section (1), the Court, for the purposes of enabling the parties to approach the arbitral tribunal for adequate interim measures under section 17, may grant relief under sub-section (1) and shall further direct that if the arbitral proceedings are not commenced by the party within the period specified in sub-section (2), the interim measure granted under the said sub-section shall stand vacated on the expiry of the said period;

3.8 APPOINTMENT OF ARBITRATORS-AMENDMENTS TO SECTION 11:

3.8.1 Section 11 of the Act outlines the procedure for appointment of arbitrators where parties are unable to mutually agree on the appointment of an arbitrator. Despite the 2015 and 2019 Amendments making significant inroads in ensuring neutrality of arbitral tribunals, two issues have persisted with regard to the constitution of arbitral tribunals.

3.8.2 Firstly, entities with greater bargaining power insist on arbitration clauses providing for unilateral power to constitute/ appoint arbitral tribunals. This issue has been largely resolved by pronouncements of the Supreme Court. In ***TRF Ltd. v. Energo Engg.***, (2017) 8 SCC 377 ("TRF"), the Supreme Court held that a person ineligible to act as arbitrator under section 12(5) of the Act is also ineligible to nominate a person to act as arbitrator. Extrapolating this principle, the Supreme Court in ***Perkins Eastman v. HSCC (India) Limited***, (2020) 20 SCC 760 ("Perkins"), held that a party or an official or an authority interested in the dispute would be disentitled to make appointment of an arbitrator.

3.8.3 Thus, after Perkins (supra), it is abundantly clear that one party cannot unilaterally appoint arbitrators to adjudicate the dispute, notwithstanding any agreement to the contrary. The proposed Bill codifies the law declared by the Supreme Court in Perkins (supra). However, the proposed Bill also gives a

right to the parties to continue with the procedure of unilateral appointment of arbitrators by a party if there is an express agreement executed between them subsequent to disputes having arisen between them.

3.8.4 Second, several public sector undertakings and governmental bodies provide for panel- based appointment of arbitrators. In other words, one party is constrained to nominate an arbitrator from the panel furnished by the other party. Usually, the panel of arbitrators comprises of retired employees or consultants of the party nominating the panel. The Supreme Court in ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd***., (2017) 4 SCC 665 ("Voestalpine") and ***Central Organisation for Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV)***, 2019 SCC OnLine SC 1635 ("CORE"), has upheld the right of one party to compel the other party to appoint person(s) to act as arbitrator from a panel of arbitrators furnished by it. In order to ensure neutrality of arbitrators, it was felt that such a procedure for appointment of arbitrators should only be permitted if there is an express agreement between the parties subsequent to disputes having arisen between them.

3.8.5 To deal with the legal issues which arise as a result of the aforesaid judgements, it is proposed to mandate the appointment of arbitrators to be strictly through consent of both parties. This is notwithstanding an agreement to the contrary between the parties regarding the appointment of an arbitrator. However, the parties have been given the option to waive the applicability of this provision by an express agreement executed subsequent to disputes having arisen between the parties.

3.8.6 It is thus proposed to amend section 11 to make the three significant changes in appointment of arbitrators by inserting three new subsections (2A),(2B) and (2C) in section 11. This aims to address the observations of the Supreme Court in its recent judgements with regard to unilateral appointment of arbitrators, as also appointments from a panel unilaterally constituted by one party. It reinforces the principle of equality enshrined in section 18 which provides that parties shall be treated with equality. As a corollary, it follows that if an arbitration agreement provides one party with the sole right to determine the composition of the arbitral tribunal, it places the other party at a disadvantage. Such an arrangement is bad in law.

3.8.7 To address the problem of arbitration clauses providing for unilateral power to constitute/ appoint arbitral tribunals it is proposed to provide in the proposed new sub section (2A) that the procedure for appointment of arbitrators shall offer equal right to parties to choose the arbitrators or presiding arbitrator, as the case may be, and no party shall have the exclusive right to appoint a sole arbitrator or a presiding arbitrator. Where the appointment procedure agreed upon by the parties provides for the unilateral appointment of a sole arbitrator or a presiding arbitrator at the option of one party, then the appointment of the sole arbitrator or the presiding arbitrator shall, notwithstanding anything to the contrary specified in the appointment procedure contained in the agreement, be made in accordance with the provisions of sub-section (6).Parties may, subsequent to disputes having

arisen between them, waive the applicability of this sub- section by an express agreement in writing.

3.8.8 To address arbitration clauses providing for panel-based appointment of arbitrators it is proposed to insert a new sub-section (2B) to the effect, that the procedure for appointment of arbitrators shall offer equal right to parties to choose from a panel of arbitrators or presiding arbitrators, as the case may be, and no party shall have the exclusive right to insist that the other party appoint arbitrators from a panel offered by it for the appointment of an arbitrator or presiding arbitrator. Where the appointment procedure agreed upon by the parties provides for the appointment of arbitrators from a panel selected by any party, then the appointment of the arbitrators shall, notwithstanding anything to the contrary specified in the appointment procedure contained in the agreement, be made in accordance with the provisions of sub-section (6).Parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

3.9 RETIRED EMPLOYEES AS ARBITRATORS

3.9.1 The Fifth and Seventh Schedules suggest that only serving employees of one of the parties are disqualified by the statute. There is no reference to disqualification of a retired employees of one of the parties. However, the entry relating to past business relationships with a party has given rise to doubts as to whether retired employees can be appointed as arbitrators. The issue attains great significance when the panel of arbitrators, offered by one party to the other to choose the arbitrator from, is comprised only of retired employees.

3.9.2 In the judgment of ***Government of Haryana PWD Haryana(B&R) Branch v. G.F. Toll Road (P) Ltd***., (2019) 3 SCC 505, the Supreme Court accepted the appointment of a retired officer of the Government. However, at the time of such appointment, the provisions of the 2015 Amendments had not come into force. Therefore, the said judgment cannot be considered as a precedent on the issue of eligibility of retired employees as arbitrators.

3.9.3 In ***Voestalpine***, the 31 retired officers on the panel of arbitrators did not include former employees of the employer. In the facts of the case, the Supreme Court pointed out that the said retired officers of the Government or PSUs were not disqualified under the Fifth and Seventh Schedules as they were not serving employees of Delhi Metro Rail Corporation.

3.9.4 It was thus implied in *Voestalpine* that a retired employee of one of the parties cannot be appointed, though retired employees of other organisations could be appointed as arbitrators. It was also implied that retired officers of one of the parties are not likely to be independent and unbiased.

3.9.5 In this context, the Committee is of the opinion that instead of imposing a blanket disqualification on all retired employees from being appointed as an arbitrator by their erstwhile employers, it would be prudent to prescribe a

cooling-off period after retirement. This is akin to a cooling-off period prescribed for a government servant before accepting employment after retirement.

3.9.6 It is desirable that experienced persons and experts with domain knowledge are available for appointment as arbitrators. A blanket ban on retired employees may restrict the pool which is not desirable. Modern business corporations are not monolithic in structure and deal with a variety of areas of operation. An employee working in one department may have no connection with the other departments. Moreover, such a blanket ban on retired employees will effectively rule out all retired Government employees from acting as arbitrators in Government contracts. Government contracts involve public money, and it is necessary to have people with integrity and honesty to act as arbitrators. The expertise, integrity and honesty of retired officers are easily subject to verification. Hence, subject to the completion of the cooling period after retirement, the Committee recommends that retired employees should not be ineligible to act as arbitrators.

3.9.7 It is therefore proposed to add in the new subsection (2C) that an arbitrator who is an employee, consultant, advisor or has any other past or present business relationship with either of the parties cannot be appointed as an arbitrator to adjudicate the dispute, unless the cooling-off period of two years is fulfilled.

3.9.8 It is proposed to provide in new subsection (2C) that no person referred to in serial number 1 of the Seventh Schedule shall be appointed as arbitrator unless he has completed a mandatory cooling period of two years from the date of cessation of such relationship. Parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

3.9.9 To expedite appointment of arbitrators, it is proposed to amend subsection (4)(a) to substitute the words "within thirty days" with "expeditiously but not later than fifteen days". It is further proposed to substitute the words "thirty days" in sub-section (4)(b) with "expeditiously but not later than fifteen days". Both these amendments are necessary to cut down the delays which are currently experienced in the time taken for appointment of arbitrators.

3.9.10 To give primacy to sub-sections (2A), (2B) and (2C), it is proposed to amend subsection (6) to substitute the words "unless the agreement on the appointment procedure provides other means for securing the appointment" with the words "notwithstanding that anything contained in the agreement on the appointment procedure provides other means for securing the appointment".

3.9.11 This amendment is necessary in cases where the court or arbitral institution has to intervene to appoint an arbitrator where the parties have failed to reach an agreement.

3.9.12 It is also proposed to add sub-section (16) to include a time-frame of 30 days to ensure that applications filed under this provision are disposed of by the Court as expeditiously as possible.

Recommendation

To amend section 11 to

(a) insert a new subsection (2A) to provide that the procedure for appointment of arbitrators shall offer an equal right to parties to choose the arbitrators or presiding arbitrator, as the case may be, and no party shall have the exclusive right to appoint a sole arbitrator or a presiding arbitrator and where the appointment procedure agreed upon by the parties provides for the unilateral appointment of a sole arbitrator or a presiding arbitrator at the option of one party, then the appointment of the sole arbitrator or the presiding arbitrator shall, notwithstanding anything to the contrary specified in the appointment procedure contained in the agreement, be made in accordance with the provisions of sub-section (6);

(b) to insert a new subsection (2B) to provide that, the procedure for appointment of arbitrators shall offer an equal right to parties to choose arbitrators or presiding arbitrators, as the case may be, and no party shall have the exclusive right to insist that the other party appoint arbitrators from a panel offered by it for the appointment of an arbitrator or presiding arbitrator, and where the appointment procedure agreed upon by the parties provides for the appointment of arbitrators from a panel selected by any party, then the appointment of the arbitrators shall, notwithstanding anything to the contrary specified in the appointment procedure contained in the agreement, be made in accordance with the provisions of sub-section (6);

(c) to insert a new subsection (2C) to provide that no person referred to in serial number 1 of the Seventh Schedule shall be appointed as arbitrator unless he has completed a mandatory cooling-off period of two years from the date of cessation of such relationship;

(d) to insert a proviso to all the three sub sections that parties may, subsequent to disputes having arisen between them, waive the applicability of the said sub-sections by an express agreement in writing;

(e) in sub section (4) to substitute in clauses (a) and (b) the words "within thirty days" with the words "expeditiously but not later than fifteen days";

(f) in sub-section (6) to substitute for the words, "unless the agreement on the appointment procedure provides other means for securing the appointment" the following words "notwithstanding anything contained in the agreement or the appointment procedure provides other means for securing the appointment.";

(g) in sub-section (14) to substitute for the words "subject to the rates specified in the Fourth Schedule" the words "as may be prescribed considering the quantum of the claim and counterclaim, requirement of leading oral evidence, time spent on the arbitration proceedings and other similar factors that may be considered";

(h) to insert new sub-section 15 to provide that subject to the provisions of sub- section (14), the fees of each of the arbitrators in the arbitral tribunal shall be fixed by written agreement between the parties, failing which fees shall be payable to each arbitrator as may

be prescribed considering the quantum of the claim and counterclaim, requirement of leading oral evidence, time spent on the arbitration proceedings and other similar factors that may be considered;

(i) to insert new sub-section 16 to provide that (16) an application filed under this section shall be disposed of as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of thirty days from the date of the application.

3.10. ARBITRATORS FEES – OMISSION OF SECTION 11A & FOURTH SCHEDULE

3.10.1 It is widely perceived that the costs of arbitration have shot up. In some instances, it exceeds the amount in dispute. It is thus necessary to evolve a mechanism to curtail costs in arbitration proceedings to make arbitration an effective alternative dispute mechanism. In its 246th Report, the Law Commission examined the issue relating to fees charged by arbitrators. The Report noted that fees of arbitrators was one of the main complaints against arbitration in India, especially in *ad hoc* arbitration. The high costs associated with the arbitrations included the arbitrary, unilateral and disproportionate fixation of fees by several arbitrators.

3.10.2 The Law Commission also observed that in *ad hoc* arbitrations, fees are often charged on a "per sitting" basis (with sometimes two/three sittings in a day in the same dispute and between the same parties), dates are usually spread out over a long period of time, and proceedings continue for years - which result in increasing costs, and denial of justice.

3.10.3 Calculation of arbitrators' fees on an hourly or per sitting basis may require a relook. It is felt that such an approach encourages inefficiency, as it rewards lawyers and arbitrators who take longer to complete the proceedings. It further penalises those who operate efficiently.

3.10.4 The 246th Law Commission Report took note of this aspect, which also finds mention in ***Union of India v. Singh Builders Syndicate,*** (2009) 4 SCC 523. In that case, the Court observed as follows:

> *"[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges… There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who*

is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."

3.10.5 The Law Commission observed that the fee structure for arbitrators must be rationalised. In order to provide a workable solution to this problem, the 246th Report recommended a model schedule of fees. It also recommended that High Courts be empowered to frame appropriate rules for the fixation of arbitrators' fees by taking the model schedule into account. These recommendations were implemented resulting in the enactment of section 11A and the Fourth Schedule by the 2015 Amendment Act.

3.10.6 Although section 11A and the Fourth Schedule were incorporated to provide a framework for determining the fees of arbitrators, its execution was riddled with several issues. The Supreme Court, in ***ONGC v. Afcons Gunanusa JV***, 2022 SCC OnLine SC 1122, observed that the Fourth Schedule was to serve as a guide for different High Courts to frame rules for determining the fees of arbitrators. However, the High Courts had been slow in framing these rules for the purpose of determination of fees and the manner of payment to the arbitral tribunal. Apart from the High Courts of Rajasthan, Kerala and Bombay, other High Courts had not framed rules under section 11(14) of the Act for the determination of fees. Further, the rules framed by High Courts of Bombay and Rajasthan only governed arbitrators appointed by the Courts. Thus, the purpose of section 11(14) for regulating fees in ad-hoc arbitrations remained unrealised.

3.10.7 The Supreme Court further held that the failure of many High Courts to notify the rules had led to a situation where the purpose of introducing the Fourth Schedule and sub-section (14) to section 11 had been rendered nugatory, and the Court-appointed arbitrator(s) continued to impose unilateral and arbitrary fees on parties. Further, such unilateral fixation of fees violated the principle of party autonomy, which was central to the resolution of disputes through arbitration.

3.10.8 The Committee received many recommendations highlighting several problems with the Fourth Schedule of the Act. It was further highlighted that *ad hoc* tribunals did not always follow the prescribed fees under Fourth Schedule of the Act.

3.10.9 The ceiling on arbitrators' fees was fixed way back in 2015. Necessarily, the ceiling requires a relook, and must be periodically reviewed and revised.

3.10.10 The Schedule should adequately compensate an arbitrator for adjudicating complex disputes, which require significant devotion of time and resources. The current system of fee calculation is based entirely on the quantum of the claim. It is felt that the quantum of the claim may not be the

most appropriate yardstick to determine arbitrators' fees. The additional parameter to determine arbitrators' fees could include providing an additional percentage of fee if the parties decide to lead oral or expert evidence. This is in contrast to arbitrations where the dispute is narrow and/or is being adjudicated on basis of documents.

3.10.11 It is further recommended that a mechanism to determine the fees, in cases where a dispute is settled and the tribunal's mandate is terminated, be devised. Such a mechanism may also consider instances where the tribunal is reconstituted.

3.10.12 Globally, Alternative Fee Arrangements (AFA) are being increasingly resorted to, in order to cut down cost of arbitral services.[31] Such an arrangement may be considered in respect of arbitrators' fees as well. Under this model, fees are charged on a fixed cost basis, with an agreed upper ceiling. This is known as Value Billing, which involves consideration of a variety of factors while charging for the value of work undertaken, rather than the time expended. Under this mechanism, charges are based on both the time and cost saved.

3.10.13 Considering the issues faced by various stakeholders, the Committee has proposed the omission of section 11-A and the Fourth Schedule from the Act. Further, it is recommended that the Central Government be empowered to prescribe the legal framework for fees of arbitrators by framing appropriate rules. This will enable the Government to dynamically adapt the fee structure for different categories of arbitrations, and consider Alternative Fee Arrangements. It is expected that this will ensure that costs of arbitral proceedings can be rationalised and moderated.

3.10.14 The Committee has recommended amendments to amend subsections (14) and (15) of section 11 to empower the Central Government by rules to regulate fees, which will give flexibility to deal with different type of cases and also avoid the need to amend the Fourth Schedule. Further, the amendments suggested provide that the fees shall consider the quantum of the claim and counterclaim, requirement of leading oral evidence, time spent on the arbitration proceedings and other similar factors that may be considered. Accordingly, the Committee recommends omission of section 11-A and consequently the Fourth Schedule from the Act.

Recommendation

It is proposed to omit section 11A.

3.11 DISCLOSURE REQUIREMENTS OF ARBITRATORS UNDER SECTION 12, AND THE FIFTH AND SEVENTH SCHEDULES

[31] Susskind .p 35 infra

3.11.1 As observed by the Law Commission in its 246th Report, arbitral proceedings must be conducted in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process. In the Act, the test for neutrality is set out in section 12(3) which provides – "An arbitrator may be challenged only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality…"

3.11.2 The Commission noted that the Act did not lay down any other conditions to identify the "circumstances" which gives rise to "justifiable doubts". This has led to ambiguity and uncertainty.

3.11.3 To deal with such a situation, the Law Commission, in its 246th Report, suggested the requirement of specific disclosures by the arbitrators, at the stage of appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts as to his impartiality. This was supplemented by recommending incorporation of the Fifth and Seventh Schedules, which were drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration. This provided a 'guide' and a frame of reference as to whether circumstances exist to give rise to justifiable doubts as to neutrality and impartiality of arbitrators.

3.11.4 The Law Commission, however, felt that party autonomy must be respected and parties should be allowed to waive an arbitrator's ineligibility. The recommendation was accepted, and the 2015 Amendment Act incorporated two schedules, namely the Fifth and Seventh Schedules in the Act. Though the insertion of the two Schedules has made the disclosure requirements clear and precise, yet, in practice, certain difficulties have arisen.

3.11.5 To further strengthen the disclosure norms the Committee is of the opinion that Section 12 should be amended, and a more detailed format for disclosure must be incorporated in the Sixth Schedule. This will preclude parties challenging an arbitrator's appointment belatedly, on the ground that the circumstances leading to the challenge were not known to them earlier. This is likely to further reduce frivolous and meritless challenges to the arbitral tribunal's composition, on grounds of bias and impartiality. Such challenges often cause undue embarrassment to the arbitrators, besides delaying the proceedings.

3.11.6 It is further proposed to amend section 12 and clarify the procedure to be followed by an arbitrator upon his appointment.

3.11.7 The ambit of disclosure under section 12(1) of the Act is required to include past and present relationships not only of the potential arbitrator, but also his close family member(s). Explanation 1 to the Fifth and Seventh Schedules states that the term "close family member" refers to a spouse, sibling, child, parent, or life partner.

3.11.8 Further, such disclosure should also include details of: (i) counsel (s) representing or advising any of the parties; and (ii) other arbitrators. The amendment seeks to add four new explanations to section 12 of the Act.

3.11.9 The Sixth Schedule, introduced by the 2015 Amendment, requires arbitrators to the parties and co-arbitrators, to disclose the number of ongoing arbitrations, and disclose circumstances which are likely to affect his/her ability to devote sufficient time to the arbitration. In particular, it refers to his/her ability to complete the entire arbitration within 12 months.

3.11.10 In many instances, arbitrators who have a heavy docket are unable to devote enough time to an arbitration. In such cases, the parties are often faced with long delays and extended schedules, despite no fault of theirs.

3.11.11 Such practice is also contrary to the spirit of the proviso to Section 24 (1) which provides "the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out…".

3.11.12 It has also been noted by the Committee that several arbitrators do not disclose the number of ongoing arbitrations pending with them.

3.11.13 Arbitration as a mode of dispute resolution is preferred since it is perceived as a faster and more efficacious remedy than courts. Faster disposal of cases involving commercial disputes is in the interest of the economy. It is also essential to building an efficient infrastructure in the country.

3.11.14 Accordingly, it is necessary to ensure that an arbitrator's docket is not unduly heavy. Therefore, it is proposed to introduce a new sub-section (6) to prevent arbitrators from accepting fresh arbitrations in excess of 15 on-going arbitrations, after the commencement of the Arbitration and Conciliation (Amendment) Act, 2023.

3.11.15 However, with a view to preserve party autonomy, it is further recommended to confer the discretion to waive the applicability of such a restriction on the parties. However, such a waiver must be given after disputes having arisen between them, through an express written agreement.

3.11.16 The disclosure as per the proposed Sixth Schedule is sought to be made mandatory even in respect of arbitrations pending at the time of commencement of the Arbitration and Conciliation (Amendment) Act, 2023. Such disclosure should be made by the arbitrators within fifteen days of such commencement, and a copy forwarded to the Court or arbitral institution appointing them, as the case may be.

3.11.17 In this background, the Committee recommends amendments to section 12 to provide for stricter disclosure norms in Sixth Schedule, and to impose a limit to the maximum number of ongoing arbitrations per arbitrator at a given point in time.

Recommendation:- Amendment of section 12

(a) subsection (1) to provide that when any person is approached in connection with his possible appointment as arbitrator he shall forthwith truly and fully disclose in the Form specified in the Sixth Schedule-

> **(i)** any circumstances or matters of his or his close family members, past or present relationship with or any interest in any of the parties, or the counsel representing or advising any of the parties, or with other arbitrators or in relation to the subject matter in dispute, whether personal, financial, business, professional or any other kind;
>
> **(ii)** a declaration that there are no past or present matters or circumstances which exist which is likely to give rise to justifiable doubts as to his independence or impartiality or conflict of interest having regard to the grounds stated in the Fifth Schedule;
>
> **(iii)** a declaration that he has the ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within the initial period of 12 months, after completion of pleadings under section 23(4) of the Act.

(b) in sub-section (2) to substitute for the words "shall, without delay, disclose to the parties" with the words "shall, contemporaneously and promptly and without delay, disclose to the parties".

(c) to insert a new subsection (6) to provide that no person, after the commencement of the Arbitration and Conciliation (Amendment) Act, 2023 shall accept any fresh arbitration in excess of fifteen on-going arbitrations at any given point of time. However, the parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

(d) to insert a new subsection (7) to provide that every arbitrator in arbitrations pending at the commencement of the Arbitration and Conciliation (Amendment) Act, 2023 shall, within fifteen days from the date of such commencement, file a disclosure in the Form specified in the Sixth Schedule to the Court or the arbitral tribunal appointing him and in other cases, to the parties.

3.12 ENSURING INDEPENDENCE AND IMPARTIALITY OF ARBITRAL INSTITUTIONS: RECOMMENDED ADDITION

OF SECTION 12A

3.12.1 To supplement the proposed amendments to section 12 of the Act, it is proposed that a new section 12A be added. Section 12A is to impose the duty of independence and impartiality upon arbitral institutions as well. Since arbitral institutions play a significant role in the appointment of arbitrators, case management and conduct of proceedings, it is necessary to ensure independence and impartiality in their functioning as well.

3.12.2 Section 12A seeks to make it mandatory for arbitral institutions to periodically disclose and publish information concerning their ownership and management, in such form as may be prescribed. Further, the Bill casts a duty upon arbitral institutions to ensure fairness in appointment of arbitrators. This includes ensuring that all eligible arbitrators are fairly considered for appointment by an institution. No arbitrator should be unduly favoured, and all matters should be evenly distributed amongst the empanelled arbitrators, as far as practicable.

3.12.3 Arbitral institutions would be required to maintain a database of arbitrators, containing details regarding their professional expertise, number of ongoing arbitrations, calendar of dates and other details to facilitate the parties in planning their schedule. The creation and maintenance of a database of arbitrators will further promote transparency, improve case management, and ensure expeditious conduct of proceedings. It would ensure transparency regarding the availability of arbitrators and their expertise vis-à-vis the subject matter of the dispute, etc. It will also oblige arbitral institutions to monitor the timelines of proceedings to ensure their conclusion without delay.

3.12.4 The proposed amendment also requires arbitral institutions to publish a code of ethics for arbitrators. Leading arbitral institutions already have a code of ethics for arbitrators. Some examples are the HKIAC, Code of Ethical Conduct, 2017; ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, 2021; LCIA Notes for Arbitrators, 2017; and SIAC Code of Ethics for an Arbitrator, 2015; etc.

3.12.5 Since arbitrators are engaged in providing specialised expert services, it is necessary to have a written code of their duties and obligations. A code of ethics would guide the arbitrators as to their role in the conduct of arbitral proceedings. Such a code may also be accompanied with consequences on account of non-compliances with the obligations contained therein. The Committee therefore recommends that arbitral institutions be required to draft a code of ethics for arbitral proceedings to be conducted under their aegis. Such a code would be binding.

3.12.6 Accordingly, the Committee recommends the insertion of a new section 12A to provide for duties and responsibilities of arbitral institutions to ensure their independence and impartiality.

Recommendation

It is proposed to insert new section 12A to provide:

(1) Arbitral institutions shall be independent and impartial and shall maintain highest standards of professional excellence and their ownership and management shall be disclosed and published periodically from time to time in such form as may be prescribed.

(2) Arbitral institutions, while appointing arbitrators, shall ensure that the appointments are as far as possible evenly distributed and no undue favours are shown to any arbitrator.

(3) Arbitral institutions shall for the purposes of appointment of arbitrators, maintain a data base of arbitrators with details about their professional expertise, number of ongoing arbitrations, calendar of available dates and such other details to facilitate the parties to plan their schedule.

(4) Arbitral institutions shall monitor the timelines of the arbitrations to ensure they are concluded without undue delay.

(5) Arbitral institutions shall publish a Code of Ethics for Arbitrators;

3.13 EMERGENCY ARBITRATION NEW SECTION 12B

3.13.2 Very often, parties approach the courts for interim relief pending the constitution of the arbitral tribunal under section 9. However, in many instances courts are unable to grant urgent interim reliefs due to the heavy workload. To address this difficulty, many Institutional Arbitration Rules provide for the appointment of emergency arbitrators.

3.13.1 The need for appointment of emergency arbitrators was necessitated due to the demand by some claimants for swift interim relief in commercial proceedings. A party that needs urgent interim or conservatory measures and cannot await the constitution of an arbitral tribunal may apply for emergency relief by seeking appointment of an emergency arbitrator.

3.13.3 A party that needs urgent interim or conservatory measures, may apply for emergency relief in accordance with the emergency arbitrator provisions under the rules of the respective arbitral institutions. The application can be submitted at the same time, before or after the "Request for Arbitration", but no emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal.

3.13.4 Insofar as appointment of emergency arbitrators is concerned, the rules of various arbitral institutions in India provide for the appointment of an

emergency arbitrator. Such appointments however, do not have explicit legislative sanction under the Act. Absence of express legal sanction to emergency arbitrator's awards may result in significant hindrances to their enforcement. The issue of enforceability or an emergency arbitrator's award fell for consideration before the Supreme Court of India in ***Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. & Ors.***, (2022) 1 SCC 209, wherein the Court held that an emergency arbitrator's award will be considered as an order enforceable under section 17(1) of the Act. Consequently, legal recognition to an emergency arbitrator's award was provided.

3.13.5 In this context, the 246th Report of the Law Commission of India had recommended to recognise the concept of emergency arbitrator by widening the definition of "arbitral tribunal" under section 2(1)(d) of the Act to mean and include an emergency arbitrator. However, this recommendation was not incorporated in the 2015 Amendment to the Act.

3.13.6 In 2019, the Srikrishna Committee Report also made recommendations to include emergency arbitration in the Act. However, neither the 2019 Amendments nor the 2021 Amendments have ultimately incorporated any provisions for emergency arbitration in the Act.

3.13.7 According to the 246th Report of the Law Commission, it is necessary to provide statutory recognition to emergency arbitrators to ensure that orders passed by emergency arbitrators appointed under institutional rules such as the SIAC Arbitration Rules, are given statutory recognition in India. It was further stated that unless the emergency arbitrator is recognized, his orders on urgent interim measures cannot be enforced in the courts in India, which will ultimately defeat the very rationale for the appointment of emergency arbitrators.

3.13.8 Under the Rules of the International Chamber of Commerce ("ICC"), one of the key changes effected in 2012 was the creation of an emergency arbitration procedure to provide interim and conservatory relief prior to the constitution of the arbitral tribunal. Article 29 and Appendix V of the 2012 Rules provide for the appointment of an emergency arbitrator who can issue orders concerning interim or conservatory measures "that cannot await the constitution of an arbitral tribunal".

3.13.9 The London Court of International Arbitration ("LCIA") amended its Rules in 2014, incorporating Article 9B to provide for appointment of an emergency arbitrator who can grant emergency relief. The LCIA Court will strive to appoint the emergency arbitrator (who will always be a sole arbitrator) within three days of an application, and s/he shall decide the claim for emergency relief as soon as possible, but no later than 14 days following his/her appointment. No hearing is necessary for the emergency arbitrator to reach a decision. Once a tribunal is formed, it may confirm, vary, discharge, or revoke any order made by the emergency arbitrator. In addition to the emergency arbitrator option set out above, the 2014 LCIA Rules retain the option provided under the 1998 Rules which allows parties to apply for the

expedited formation of the tribunal in cases of "exceptional urgency".

3.13.10 The arbitral institutions in India conducting institutional arbitrations will have to take note of the international trend in view of the international best practices and the recommendations of the 246th Report of the Law Commission and would be required to make suitable revision to their Rules on a priority basis.

3.13.11 The Committee is of the considered view that it is important to introduce statutory provisions on emergency arbitration in the Act to avoid confusion regarding the validity of the emergency arbitration procedure and enforcement of orders passed by emergency arbitrators. The provisions regarding emergency arbitration when applied in a uniform and consistent manner will reduce the filing of applications under Section 9 to the Courts and also incentivise the use of arbitral institutions to conduct arbitration proceedings. Emergency arbitrators would be equipped, as per the rules of the institution, to pass orders within a very short frame of time ranging from a few days, but not exceeding 30 days. This would ensure adequate protection of the parties' interest by achieving the twin objectives of obviating unnecessary recourse to Courts under section 9 and promotion of institutional arbitration.

3.13.12 Pertinently, according to the Mumbai Centre for International Arbitration's ("**MCIA**") Annual Report of 2022, two applications were received for the appointment of emergency arbitrator under the MCIA Rules. In both these applications, the MCIA appointed an arbitrator within 24 hours, and both awards were delivered within the 14-day timeline as mandated under the MCIA Rules.

3.13.13 Incorporating provisions regarding emergency arbitration would also make India a prominent seat of arbitration. According to the 2021 survey report published by the Queen Mary University of London and White & Case ("2021 International Arbitration Survey"), when asked about the adaptations that would make other seats more attractive to the users, 39% of the participants replied highlighting the "ability to enforce decisions of emergency arbitrators or interim measures by arbitral tribunals". Hence, there is a demand from the stakeholders to ensure statutory recognition to orders passed by emergency arbitrators.

3.13.14 The statutory regime in India currently lacks provisions supporting the enforcement of emergency arbitrator awards, as opposed to the position in developed arbitration jurisdictions such as Singapore and Hong Kong, which have recognised the enforceability of orders given by an emergency arbitrator. It is suggested that the law may be suitably amended to recognize an emergency arbitrator's order passed in India seated arbitrations, which shall be enforced in the same manner as if it is an order of the arbitral tribunal enforced under section 17(2).

3.13.15 Foreign-seated emergency arbitrators' orders are not directly enforceable in India except by applying to Court under section 9 of the Act

[***Raffles Design International India Private Limited & Anr. v. Educomp Professional Education Limited & Ors.***, 2016 SCC OnLine Del 5521, ***Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd***., 2022 SCC OnLine Del 2112, ***Uphealth Holdings INC. v. Glocal Healthcare Systems (P) Ltd***., 2023 SCC OnLine Cal 2442]. The Committee is of the opinion that the present position be retained and enforcement of orders from foreign-seated emergency arbitrators be implemented by way of a section 9 Application before the Courts.

3.13.16 The Committee does not suggest an expansion of the definition of "arbitral tribunal" under section 2(1)(d) of the Act to include an emergency arbitrator as that would render the orders passed in an emergency arbitration amenable to the appellate mechanism prescribed under Section 37 of the Act. The Committee is of the opinion that remedy by way of appeal under Section 37 of the Act is unnecessary for orders passed by an emergency arbitrator as independent recourses against such orders are available under the Rules of the relevant arbitral institutions appointed by the parties to adjudicate the dispute and in any event such orders are subject to review by the arbitral tribunal.

3.13.17 The question of whether the expression "emergency award" as recommended by the Law Commission in their 246th Report fits within the definition of "award" under the Act was also discussed. It was felt that there is a qualitative difference in the nature of an emergency order passed by an emergency arbitrator as against that of an award passed by an arbitral tribunal. Both cannot be treated on an equal footing under the Act. The provisions relating to challenge of an award under the Act should not be made applicable to orders of the emergency arbitrator as they are amenable to challenge and/or modification by the arbitral institution and the arbitral tribunal.

3.13.18 It is also proposed to impose a duty on emergency arbitrators to pass orders or awards of interim relief without any delay. Currently, various arbitral institutions around the world provide expedited timelines for orders/awards by emergency arbitrators[32]. An upper limit of 30 days has been stipulated from the date of the emergency arbitrator's appointment for passing of the order. One of the objects underlying the appointment of an emergency arbitrator is for expeditious relief where circumstances demand the same. Statutory introduction of a timeline for passing an order or award of interim relief by an emergency arbitrator is in furtherance of this objective.

3.13.19 The Committee recommends insertion of new section 12B to explicitly recognise emergency arbitration and orders passed pursuant thereto. Arbitral institutions may, for the purpose of this Act, enact rules for the appointment of emergency arbitrators and regulate the conduct of emergency arbitral proceedings. Consequently, an amendment to define

[32] ICC Rules, 2021 – Within 15 days from date of file transmission; SIAC Rules, 2016 – Within 14 days from date of appointment;. LCIA Rules, 2020 – Within 14 days from date of appointment;. MCIA Rules, 2017 – Within 14 days from date of appointment; Delhi International Arbitration Centre ("DIAC") Rules, 2023 - Within 14 days from date of appointment; etc.

'emergency arbitrator' in clause section 2(1) (ea) of the Act as the emergency arbitrator appointed under section 12B, is recommended;

Recommendation

(1) It is proposed to insert new section 12B to provide the following: -

(i) Arbitral institutions may, for the purposes of this Act, provide for the appointment of emergency arbitrators and the conduct of emergency arbitral proceedings under their rules.

(ii) An emergency arbitrator appointed under this section shall enter upon the reference without delay and pass his order or award of interim relief as expeditiously as possible and in any event not exceeding 30 days from the date on which s/he was appointed;

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

(2) It is proposed to amend section 2(1) to insert a new clause (ea) defining emergency arbitrator as the emergency arbitrator appointed under section 12B.

3.14 CHALLENGE TO AN ARBITRATOR -SECTION 13

3.14.1 Currently, a challenge to the arbitrator, when a party has justifiable doubts as per section 12(1) of the Act, is to be made to the arbitral tribunal itself under section 13 of the Act and if such challenge fails, then the arbitration continues, and the grounds can be taken up while challenging the final award under section 34. This not only makes, to some extent, the arbitrator a judge in his own cause when deciding an application under section 13, but also forces an unwilling party to continue with the arbitration without timely recourse against the order passed by the arbitrator under section 13.

3.14.2 Rejection of an application under section 13 would in most circumstances result in an application under section 34 by the aggrieved party wherein the same grounds taken in the Section 13 application are reagitated along with the merits of the award. This would result in increased burden on the Court's docket as well as delay in the proceedings. In some instances, a recalcitrant party may resort to filing of writ petitions and even suits on the strength of peculiar facts to warrant judicial interference, ultimately leading to the mandate of minimal judicial interference under section 5 of the Act being vitiated, despite the Court's attempt to uphold the said mandate.

3.14.3 The question that arises for consideration is whether it is desirable to provide for an immediate appeal to the Court under Section 37 against the

decision of an arbitral tribunal rejecting an application under Section 13 challenging the arbitrator or whether such a challenge can be made only after the award is passed. The 176th Report of the Law Commission dealt with this question in its Report.

3.14.4 The176th Report of the Law Commission traced the position in other jurisdictions and also the UNCITRAL debates and the Model Law. According to the Report, the English Act, 1996 did not contain any provision for challenging an arbitral tribunal before the same tribunal and a subsequent challenge to the tribunal's decision thereon. On the other hand, Section 24 of the English Act, 1996 prescribes a challenge procedure before the Court.

3.14.5 The Model Law in Art. 13 provides for an immediate appeal against an interlocutory order of the arbitral tribunal rejecting a plea of bias or disqualification. However, the said remedy is omitted in the Indian Arbitration and Conciliation Act in Section 13 as well as in sub section (2) of sec. 37.

3.14.6 Art.13(3) of the Model Law provides for an immediate right of appeal and challenge to the arbitrator's decision on bias before the Court within 30 days. Further, it makes the Court's decision on such a challenge non-appealable. While such a challenge before the Court is pending, the Model Law contemplates that the arbitral proceedings 'may' continue and the arbitrator may make an award as well. Several countries which have adopted the Model Law have retained the text of Art. 13(3) (See sec. 1037(3) of German Arbitration Act, 1998, sec. 13(2) of Schedule to the Australian Act, Art. 13(3) of the Canadian Act, 1985, Art. 13(3) of the Schedule to the Ireland Act, 1998, Art. 1393 of the first schedule of the New Zealand Act, 1999).

3.14.7 The 176th Report also notes 1985 Report of the UN Commission on the adoption of the Model Law which considered this question elaborately (see paras 121 to 134) and finally came to the conclusion that if the plea of bias is rejected, there must be an immediate appeal. It considered different alternatives. It considered (in para 122) the plea that if Art. 13(3) is deleted, it would 'reduce the risk of dilatory tactics'. It also considered that pleas that, at any rate, Art. 13(3) may be restricted to cases of a single arbitrator or a majority against whom a plea of bias was raised. Another suggestion was that it should be left to the tribunal whether to permit immediate Court intervention or not, when a plea of bias was refused. On the other hand, there were suggestions (para 123) that pending court decision, the arbitral tribunal should not be allowed to go ahead since such 'continuation would cause unnecessary waste of time and costs if the court later sustained the challenge or that it should not go forward if the court granted a stay'. After considering all these suggestions, the UN Commission observed that the 'prevailing view, however, was to retain the system adopted in Art. 13 of the Model Law since it would strike an apparent balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding waste of time and money.'

3.14.8 The 176th Report, after elaborately discussing the pros and cons as

discussed above, decided against providing an appeal against an order of the arbitral tribunal refusing the challenge under Section 13.

3.14.9 However, the Committee is of the considered opinion, with due respect to the view taken in the 176th report, that it is necessary to provide a provision for appeal against the order rejecting an application under section 13 because in the Indian context, a Judge deciding his/her own case has not been well received by parties. In almost all cases where a sole arbitrator presides, challenge has to be made before the same person and parties who failed to succeed resort to dilatory tactics in order to subvert the proceedings.

3.14.10 It is therefore suggested that an appeal mechanism under section 37 be provided, which permits an appeal to the Court against the order of an arbitrator rejecting an application under section 13. Since the Court will have the benefit of a reasoned order of the arbitral tribunal and the arbitration is still at an interim stage, the appeal should not unnecessarily detain the Courts, unless the facts already on record merit interference.

3.14.11 Further, since an appeal is recommended to be provided against the order of an arbitrator rejecting an application under section 13, parties cannot be permitted to raise the same grounds in an application under section 34 which have been taken in a section 13 application. In the event the parties do not challenge the arbitrator's order, the arbitrator's order shall attain finality on this aspect and the parties cannot challenge the same in an application under section 34.

3.14.12 The Committee therefore proposes to omit subsection 13 (5) which provides for appeal under section 34 where the challenge is rejected. Suitable amendments have been suggested to section 37 to provide for appeal from rejection of the application under section 13.

Recommendation

It is proposed to omit subsection (5) of section 13 which provides for an appeal under section 34 and instead provide an appeal under section 37 against any order passed under Section 13 of the Act.

3.15 ARBITRAL TRIBUNAL DECIDING AN APPLICATION UNDER SECTION 16

3.15.1 Section 16 enshrines the competence of the arbitral tribunal to rule on its jurisdiction. Currently, if a challenge to the jurisdiction of the arbitrator under section 16 is accepted, such order is appealable under section 37. However, if the application under section 16 is rejected, then the arbitration continues, and the grounds objecting to the arbitrator's jurisdiction that were taken in a section 16 application can be taken up while challenging the final award under section 34. A party therefore has no option but to continue with the arbitration if its challenge to the jurisdiction of the tribunal, validity or

existence of the arbitration agreement are rejected.

3.15.2 The Committee notes that absence of a provision for an appeal against the order rejecting a Section 16 application prompts the parties to raise their objections to the jurisdiction, existence and/or validity at the very outset, such as in the application under Section 11 for appointment of arbitrator or sometimes by resorting to the extra ordinary remedy of writ jurisdiction. This invariably results in delays at the pre-reference stage and widens the scope of inquiry. Further, absence of a provision for appeal against an order rejecting a Section 16 Application condemns the parties including a reluctant one to participate in an arbitration without timely recourse, resulting in significant costs.

3.15.3 The consequence of the lack of provision for appeal against an order rejecting a section 16 application can also be felt at the stage of setting aside of the award under section 34, wherein the same grounds agitated in the section 16 application are reagitated in a section 34 application before the courts along with a challenge on the other aspects of the award, thereby increasing the burden on courts and causing significant delay in the proceedings. The Committee therefore suggests a mechanism under section 37 of the Act which permits an appeal against the order of an arbitrator rejecting an application under section 16. The Committee notes that the said position is reflected in the UNCITRAL Model Law, and is of the opinion that the Court entertaining the appeal under section 37 would benefit from a reasoned order passed by the arbitrator while rejecting an application under section 16.

3.15.4 This question of appeal was also discussed in the 176th Report of the Law Commission at para of their Report which is reproduced below:

> *"2.12.1 Section 16 - Request for a right of appeal in section 37(2) against an interlocutory order of the arbitral tribunal rejecting the pleas under sub-sections (2) and (3) of section 16 – rejected:*
> *The Law Commission noted that section 16 of the 1996 Act is based on Art.16 of the Model Law but certain aspects of Art.16 of the Model Law have been omitted in the 1996 Act. The commission elaborately discussed the question of inclusion of those aspects in section 16 so as to bring the section into conformity with Art.16 of the Model Law. The Model law contained a further sub-clause (3) which reads as follows and which was absent in section 16 of the Indian Act of 1996. Clause (3) of Article 16 of the Model law reads as follows:-*
> *"16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."*
> *In view of the possibility of the abuse, if a right of appeal is provided*

against interlocutory orders, the Commission has decided not to give importance to the weighty arguments in favour of a right of appeal set out above."

3.15.5 The Law Commission in its 176th Report rejected the proposed amendment to Section 16. However, with due respect to the Commission's views, the Committee is of the opinion that an appeal should be provided on the lines suggested by the Model Law as the lack of an appeal provision under section 37 for rejecting the plea referred to in subsections (2) or (3) of section 16 is one of the major factors for parties not accepting the finality of the award. The Committee is not inclined to agree with the recommendation of the 176th Report for not providing an appeal for rejection of plea under the said subsections (2) and (3) of section 16.

3.15.6 The arbitral tribunal may, in certain circumstances, decide an application under section 16 immediately or postpone it to a later stage, maybe even at the stage of final hearing, depending on the questions involved. An order merely postponing the decision of a section 16 application may not require an immediate appeal. Hence, it would not be appropriate to provide for a blanket prohibition against reiterating section 16 grounds in an application under section 34. The proposed amendment therefore provides that the party will be permitted to again raise the grounds in an application to set aside the arbitral award under section 34, subject to the outcome of the appeal preferred against an order passed by the arbitral tribunal rejecting the application under section 16.

3.15.7 The Committee feels that tribunals should efficiently adjudicate on the question of their own jurisdiction under section 16 as expeditiously as possible. This will ensure that parties are clear as to the jurisdiction of the tribunal at the earliest stage. In the event the application concerns factual questions which require evidence to be led, such application should be heard as expeditiously as possible.

3.15.8 The Committee recommends the inclusion of those aspects in section 16 so as to bring the section into conformity with Art.16 of the Model Law and recommends the proposed amendments to section 16 and corresponding amendments to section 37 of the Act.

Recommendation

It is proposed to amend section 16-

(a) sub-section (5) to provide that the arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) as expeditiously as possible;

(b) sub-section (6) to provide that subject to the outcome of any appeal under

section 37 preferred against the order passed by the arbitral tribunal under sub-section

(5) a party aggrieved by an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

3.16 SECTION 17 APPEALS FROM SECTION 9 AND 12B

3.16.1 Section 17 of the Act provides for interim measures which can be ordered by an arbitral tribunal. In view of the insertion of new section 12B which provides for the appointment of emergency arbitrators and amendment to Section 9, it is proposed to empower arbitral tribunals to confirm, modify or vacate the ad interim measures granted under section 9 or an order made by an emergency arbitrator under section 12B.

3.16.2 Accordingly, the Committee recommends an amendment to subsection (1) of section 17 to add a new clause to empower the arbitral tribunal to confirm, modify or vacate as the case may be ad interim measures granted under section 9 or an order made by an emergency arbitrator under section 12B subject to such conditions, if any, as it may deem fit, after hearing the affected parties.

Recommendation

It is proposed to amend section 17 of the Act to add a new clause (da) in sub-section

(1) as follows

"(da) confirm, modify or vacate as the case may be, ad interim measures granted under section 9 or an order made by an emergency arbitrator under section 12B, subject to such conditions, if any, as it may deem fit, after hearing the affected parties."**.**

3.17 THIRD-PARTY FUNDING: REQUIREMENT OF DISCLOSURE UNDER THE PROPOSED SECTION 18A

3.17.1 Third-party funding ("**TPF**"), also known as Litigation Funding Arrangement (LFA), involves a third-party funder providing financial

support to enable individuals or commercial entities to pursue or defend themselves, either in Court or in arbitration proceedings. It is steadily gaining traction with Indian parties.

3.17.2 Historically, funding of litigation by unconnected third parties was prohibited in common law jurisdictions as falling foul of the doctrines of maintenance and champerty. However, with the global rise of TPF, various jurisdictions such as England & Wales, Australia, Singapore and Hong Kong have narrowed or abolished maintenance and champerty and have permitted TPF. Singapore has also passed amendments to its Civil Law Act legalising TPF for arbitration and associated proceedings. Similarly, Hong Kong recently legalised TPF for arbitrations and mediations. The Paris Bar Council has also indicated its support for TPF.

3.17.3 While TPF is popular in other jurisdictions, India does not have a well-developed TPF regime. This is because even though TPF is not expressly prohibited, India does not have any legislation seeking to regulate TPF.

3.17.4 However, there have been some interesting developments in India in the form of judicial pronouncements recognising of TPF. In ***Bar Council of India v. AK Balaji***,[33] the Hon'ble Supreme Court had observed that there is no restriction on third parties funding litigation and getting repaid subject to the outcome of the litigation. In ***Tomorrow Sales Pvt. Ltd. v. SBS Holdings Inc. & Ors***.[34], the Hon'ble High Court of Delhi recently held that TPF is essential to ensure access to justice and that in the absence of TPF, a person having a valid claim would be unable to pursue the same for recovery of amounts that may be legitimately due to it. It was observed that it is essential for third-party funders to be fully aware of their exposure. The Hon'ble Court held that third-party funders cannot be mulcted with liability, which they have neither undertaken nor are aware of, as this would dissuade third-party funders from funding litigation.

3.17.5 Given that Indian Courts have taken the view that TPF is not prohibited and is in fact, essential for accessing justice, there is likely to be an increase in TPF in future. In this regard, the Committee has recommended substituting Explanation 2 in the Fifth Schedule of the Act to provide that "the term "affiliate" encompasses all companies in one group of companies, including the parent company and would include any person bearing the cost of arbitration under a funding arrangement with one of the parties". This would aid in ensuring that, in the process of declaring that there are no past or present matters which are likely to give rise to justifiable doubts as to an arbitrators' independence or impartiality or conflict of interest, arbitrators are mindful of their relationships with third-party funders involved in an arbitration where their appointment is sought.

3.17.6 Third Party Funding agreements give rise to concerns when third-party funders are permitted to interfere with lawsuits in which they have no

[33] (2018) 5 SCC 379
[34] 2023 SCC Online Del 3191

legitimate interest. The Committee is not aware of the extent to which this practice is prevalent under our legal system and especially in the area of arbitration.

3.17.7 Under the new ICC Arbitration Rules which entered into force on 1 January 2021, parties must now disclose the existence of any third-party funding together with the funder's identity (Article 11(7)). This is designed to assist arbitrators with their disclosure duty, which is ongoing throughout the case.

3.17.8 Further and in any event, the Committee is of the opinion that in order to have more transparency in arbitral proceedings, it is necessary to impose a duty on the party which is the beneficiary of such funding from a third party to disclose the identity of such third party to the arbitral tribunal and the Committee thus recommends insertion of a new section 18A.

3.17.9 The Committee is also of the opinion that the larger question of regulating third party funding should be referred to the Law Commission for their examination and Report.

Recommendation

It is proposed to insert a new section:

18A. Where a party receives funding for arbitration from any non-party, it shall disclose the identity of such non-party to the arbitral tribunal.

3.18 PROPOSED INTRODUCTION OF MODEL RULES OF PROCEDURE UNDER SECTION 19

3.18.1 Section 19 of the Act provides that failing any agreement between the parties, the Arbitrator may "conduct the proceedings in the manner it considers appropriate". The provision in its present form gives a wide latitude to the arbitrators in *ad hoc* arbitrations in the matters of procedure, which sometimes results in strict application of the Code of Civil Procedure and the Evidence Act as if it were a civil suit, or complete non-application of even the basic principles of procedure and evidence.

3.18.2 The 246th Report of the Law Commission also observed that proceedings in arbitrations are becoming a replica of court proceedings, despite specific provisions in Chapter V of the Act which provide adequate powers to the arbitral tribunal.

3.18.3 Different arbitrators adopt different procedures, considering that arbitrators come from different backgrounds and training. While rules of arbitral institutions normally lay down the procedure that guides the proceedings, there is no such guidance in case of *ad hoc* arbitrations. Uniformization of such standards may be considered, particularly due to the overwhelming prevalence of *ad hoc* arbitrations in India. It is important that the arbitrators lay down at least the important procedural steps along with timelines at the start of the proceedings and some basic rules that should be observed.

3.18.4 While section 19(4) of the Act empowers the arbitral tribunal to determine admissibility, relevance, materiality and weight of any evidence, it is silent on the manner in which the same has to be done. There exists no uniform standard or regime at present which governs the grant or non-grant of *ex-parte* or preliminary orders, and the specific procedure adopted in each case is often dependent upon the arbitral tribunal itself, in view of the flexibility afforded by section 19 of the Act.

3.18.5 Though the provisions of the Code of Civil Procedure and Evidence Act do not strictly apply to arbitral proceedings under the Act, arbitrators nevertheless tend to follow them in conducting proceedings, thus rendering the arbitral proceedings as a replica of a civil suit and not a mode of dispute resolution under the ADR framework. It was further observed that the absence of a proper procedure for guidance under the Act compels arbitrators in an *ad-hoc* arbitration to often resort to the provisions under the Code of Civil Procedure and the Evidence Act, leading to delayed proceedings, complications and giving rise to the tendency referred to as the ***Due Process Paranoia*** (Discussed in detail at para 4.5 of the Report).

3.18.6 Further, the introduction of Model Rules of Procedure shall benefit specialist arbitrators who are domain experts and not necessarily from a legal background. Apart from providing assistance to arbitrators, such Model Rules can curb procedural irregularities which are often agitated by a losing party as grounds for setting aside the arbitral award.

3.18.7 In this regard, the Committee proposes Model Rules of Procedure that can be used by arbitral tribunals as a guide. This Model Procedure has been prepared considering the prevalent best practices on procedure. The Model Procedure also aids the arbitrators and parties to ensure effective case management, practice directions and to estimate the approximate time required for the hearings. The application of such Model Procedure is subject to party autonomy. However, the proposed Model Procedure is also for the benefit of the arbitral tribunals in order to lay down the procedure to be followed at the very outset of the arbitral proceedings in the interest of certainty, for which reference may be made to the best practices.

3.18.8 The object of the Arbitration Act is to facilitate conduct of the arbitration proceedings effectively and, in a time bound manner. It has been seen that while the users in other jurisdictions seem to prefer institutional arbitration, India is still an exception to this rule. Till institutional arbitration gains momentum, it is necessary to make the *ad hoc* arbitration regime more robust and more structured.

3.18.9 The Justice Srikrishna Committee Report also recommended that Model Rules for *ad hoc* arbitrations should be prescribed in the Act as a Schedule. It had observed:

> *"that the flexibility that ad hoc arbitrations offer, particularly the flexibility to set rules of procedure and timelines, has been its curse as well. Arbitral tribunals in ad hoc arbitrations do not usually lay down clear rules of procedure or timelines for the completion of arbitral proceedings at the start of an arbitration. This often results in parties having to address procedural issues during the conduct of the proceedings or approach courts for deciding procedural issues, wasting substantial time in the process. Providing for a default procedure in the ACA will be beneficial for parties and / or the arbitral tribunal as they have a pre-determined procedure that they can follow with modifications. Further, it may also promote institutional arbitration in an indirect manner — if parties find the default procedure too strict and detailed to administer, they may have an incentive to opt for an arbitral institution which can administer the arbitration."*

3.18.10 The Committee is of the opinion that prescribing a Model Rules of Procedure has many advantages, especially in *ad hoc* arbitrations and arbitrations which are conducted in areas outside the metropolitan cities. This will go a long way in speeding up arbitral proceedings and would cut costs and delay. Therefore, the Committee recommends substitution of section 19(3) of the Act and introduction of new sub sections 19(3A), (3B) and (3C) to be read with the Eighth Schedule specifying Model Rules of Procedure.

Recommendation

It is proposed to amend section 19 by -

(a) substituting sub-section (3) to provide that in the case of arbitrations not conducted by arbitral institutions, the arbitral tribunal for more efficient conduct and timely completion of proceedings may adopt the model Rules of Procedure specified in the Eighth Schedule with such modifications as it may deem fit and failing any agreement on the procedure to be followed the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate;

(b) inserting subsection (3A) to provide that the Model Rules of Procedure shall be, as far as possible, in plain language and avoid strict rules of evidence and procedure which are applicable to the trial of civil suits;

(c) inserting subsection (3B) to confer power on the Central Government by notification in the Official Gazette, to amend the Eighth Schedule and thereupon the Eight Schedule shall be deemed to have been amended accordingly.

(d) inserting new subsection(3C) to provide that a copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament subject to modification.

3.19. ARBITRATIONS IN VIRTUAL MODE: PROPOSED ADDITION OF SECTION 19A & AMENDMENT OF SECTION 24

3.19.1 The proposed Bill seeks to provide for a framework to recognise and regulate functionaries who can provide techno-legal services to arbitration users. The amendment seeks to leverage technology to make the conduct of arbitration proceedings more transparent, efficient, secure, and neutral.

3.19.2 In practice, it has become increasingly common for arbitration proceedings to be conducted at expensive venues. In some cases, even when the proceedings last for a very short duration, the parties end up bearing costs for the entire day. Expensive venues compound such costs. If the venue is a five-star hotel, the expense will be heavier. Parties feel embarrassed objecting when an expensive venue is proposed.

3.19.3 The Committee notes that several cheaper alternatives are available such as conference rooms of public institutions, as also inexpensive private venues at reasonable rates. The cost for arrangement of venues results in significant expenses for parties. This proves particularly burdensome for parties who do not have enough resources.

3.19.4 The CoVID-19 pandemic led to parties, arbitrators, counsel, and institutions turning to virtual hearings and video conferencing for the

conduct of arbitral proceedings. While the pandemic has receded, some arbitrators and parties continue to prefer virtual hearings. Parties, too, expect higher administrative/logistical support for virtual hearings.

3.19.5 In the 2021 International Arbitration Survey, conducted by Queen Mary University of London, 73% of the participants were found to sometimes, frequently, or always use virtual hearing rooms, while 63% participants were found to frequently or always utilise video conferencing in arbitration. The participants chose the 'potential for greater availability of dates for hearings' (65%), 'greater efficiency through use of technology' (58%) and 'greater procedural and logistical flexibility' (55%) as the greatest benefits arising out of virtual hearings. This highlights the need to provide legal recognition to hearings conducted in virtual or hybrid mode. The 2021 Survey concluded that participants would prefer a 'mix of in-person and virtual' formats for almost all types of interactions, including meetings and conferences. Wholly virtual formats are narrowly preferred for procedural hearings, but participants would keep the option of in-person hearings open for substantive hearings, rather than purely remote participation. This need to adapt in response to changing circumstances was further underlined by the fact that there was also a demand for rules to include a 'provision for arbitrators to order both virtual and in-person hearings' (23%).

3.19.6 The 2021 International Arbitration Survey reported that if a hearing could no longer be held in person, 79% of respondents would choose to 'proceed at the scheduled time as a virtual hearing'. Only 16% would 'postpone the hearing until it could be held in person', while 4% would 'proceed with a documents-only award'. Strikingly, a quarter of the respondents (25%) stated that they would be prepared to forego 'in-person hearings' to make arbitrations cheaper and faster. This reflects the increased level of comfort users have acquired with virtual hearings in recent times.

3.19.7 Further, according to the 2021 International Survey, greater support for arbitration by local courts and judiciary (56%), and ability of local courts to deal remotely with arbitration related matters (28%) were identified as key adaptations that would make any arbitral seat more attractive. The participants chose administrative/ logistical support for virtual hearings (38%) and secure electronic filing and document- sharing platforms (23%) as their top choices for adaptations that would make any arbitration rules or arbitral institutions more attractive for them.

3.19.8 Interestingly, a 2022 report by the International Council for Commercial Arbitration ("**ICCA**") on 'parties' right to a physical hearing in international arbitration' found that none of the 78 jurisdictions examined (including India) expressly guarantee a physical hearing, and that Courts are unlikely to set aside awards solely based on proceedings having been conducted virtually.

3.19.9 In order to minimise challenges and complexities faced by users on account of wholly physical hearings, high logistical costs, scheduling conflicts etc., it is necessary to adapt to emerging technology. This is to

ensure a better, more accessible, cost effective, timely and efficient arbitration ecosystem. By way of virtual hearings, electronic filing of pleadings and documents, various limitations of physical hearings can be eliminated.

3.19.10 Virtual arbitration proceedings will help address logistical challenges and issues arising from physical hearings, while also reducing costs involved in travel and hospitality arrangements. These costs add to the overall costs of the arbitration. Introducing tools for document management and transcription will benefit all stakeholders, augmenting the ease in conduct of proceedings.

3.19.11 The Committee is of the opinion that the infrastructure for seamlessly carrying out virtual hearings in a cost effective, secure, and efficient manner is still not freely available in the market. Once such techno-legal utilities are widely available, necessary and cost-effective services will become more accessible.

3.19.12 The Committee further notes that courts are equipped to accept electronic pleadings and conducting virtual hearings. Several courts have also permitted filing of evidence virtually, subject to appropriate safeguards. The Digital India plan of the Government of India has been a tremendous success, resulting in a digitally empowered society. These services will also improve the ease of doing business. In this context, it is even more relevant and important for arbitrations to migrate to virtual platforms.

3.19.13 The shift towards promotion of virtual hearings can also be noticed in the rules adopted by major arbitral institutions including:

(a) International Chamber of Commerce Arbitration Rules, 2021 ("ICC Rules"): It explicitly permits the use of "video conference, telephone or similar means of communication" for case management conferences [Article 24(4)], hearings [Article 26(1)] and emergency arbitration [Appendix V, Article 4(2)];

(b) ICC Rules [Articles 22(2), 26(3)]: The Rules mandate that the tribunal "shall be in full charge of the hearings" and permits the tribunal to "adopt such procedural measures as it considers appropriate" so long as they are not contrary to the parties' agreement;

(c) LCIA Rules: The Rules allows for any type of hearing to proceed "virtually by conference call, video conference or using other communications technology with participants in one or more geographical places (or in a combined form)" [Article 19.2];

(d) SIAC Rules (Consultation Draft, 7th Edition): These Rules provide for the conduct of hearings "in-person, in hybrid form, or by video conference, teleconference or other form of electronic communication." [Article 39.2];

(e) Prominent Indian arbitral institutions also permit arbitral tribunals to specify the mode of hearings, i.e., physical, virtual or hybrid mode(s), including the International Arbitration and Mediation Centre, Hyderabad, Arbitration Rules ("**IAMC Rules**") (Article 28.3), MCIA Rules (Article 14.5 for emergency arbitrations), etc.;

(f) Some arbitral institutions and professional bodies have adopted the best practices for planning and conducting videoconferences in international arbitration;

(g) Korean Commercial Arbitration Board's 2018 Seoul Protocol on Video Conference in International Arbitration: The protocol addresses the use of video conference in arbitral proceedings; discusses best practices for organizing, testing, and performing video conferencing; and provides practical guidance for users of international arbitration to consider;

(h) Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration, 2019: These guidelines provide for witnesses to depose via video conferencing;

(i) ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, April 2020: The note details the procedural tools available to parties, counsel, and tribunals to mitigate the delays generated by the Covid-19 pandemic through greater efficiency; and provides guidance concerning the organisation of conferences and hearings in light of Covid-19 considerations;

(j) HKIAC Virtual Hearing Guides: HKIAC has released guides for the efficient conduct of virtual hearings and to assist arbitrators and parties, such as a Virtual Hearing Guide for Arbitrators and Parties;

(k) SIAC Maxwell Virtual ADR Services: SIAC has laid emphasis on the usage of 'Maxwell Virtual ADR Services', which provides world class infrastructure for virtual hearings and video conferencing. SIAC has also issued guides on conducting arbitrations remotely.

3.19.14 Therefore, it is proposed to insert section 19A, to provide for the procedure for conduct of proceedings in a virtual or hybrid manner, and empower the Arbitration Council to specify by regulations Model Rules of Procedure for Virtual Mode. The procedure may be adopted by arbitral tribunals and they may make use of techno-legal utilities.

3.19.15 It is also proposed to make consequential amendments to section 24, to add a proviso to permit oral hearings, and presentation of evidence to be conducted virtually. The insertion of the proviso after the second proviso to section 24(1) of the Act is aimed at incorporating the evolving technological standards, and to bring the Act at par with international standards. The amendment proposed to section 24 grants the arbitral tribunal the power to choose between physical hearing and virtual hearing. The tribunal can decide to conduct oral hearings for presentation of evidence ,or for oral arguments.

Recommendation

It is proposed to insert new section 19A:

(a) to provide for the procedure for conduct of proceedings in a virtual or hybrid manner and empower the Arbitration Council, to specify by-regulations, Model Rules of Procedure for Virtual Mode to be adopted by arbitral tribunals and also to make use of techno Legal utilities;

(b) empower the Arbitration Council of India to specify, by regulations, Model Rules of Procedure for Virtual Mode for adoption by arbitral tribunals.

It is also proposed to make consequential changes to section 24 to add a proviso to permit oral hearings and presentation of evidence to be conducted virtually.

3.20 PERIOD FOR COMPLETING THE FILING OF PLEADINGS IN ARBITRATION-SECTION 23(4)

3.20.1 Section 23(4) of the Act was inserted by 2019 Amendment Act and provided a fixed timeline for completion of pleadings. Section 23(4) of the Act provides that statement of claim and defence shall be completed within 6 months from the date the arbitrator(s) receive notice of their appointment in writing.

3.20.2 However in practice there appears to be a great deal of uncertainty regarding the operation of timeline of 6 months. This is because the 6 month timeline has been assumed by some as the minimum time prescribed to file pleadings.

3.20.3 Therefore, the Committee recommends that theprovision needs to be substituted to clearly provide 6 months as the maximum timeline under section 23(4).

Recommendation

It is proposed to substitute sub-section (4) of section 23 to provide that the pleadings under this section shall be completed expeditiously and, in any event, not later than a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment."

3.21 TIME LIMIT FOR ARBITRAL AWARD - SECTION 29A

3.21.1 Section 29A of the Act was inserted through the 2015 Amendment Act to introduce a time limit for delivering the award, in matters other than international commercial arbitration. The said section 29A (1) fixes a time limit of 12 months from the date of completion of pleadings for the arbitral tribunal to make the award in matters other than international commercial arbitration.

3.21.2 The Committee recommends exclusion of any time spent in the reconstitution of an arbitral tribunal from the aforementioned time limit of 12 months.

3.21.3 Further, where there is no consensus between the parties under section 29A (3) to approach the Court seeking for an extension in the said time limit, it is proposed to allow one of the parties to approach the Court through an application under section 29A (5).

3.21.4 It is further proposed to allow the parties to make an application for extension of time under section 29A even after the expiry of the specified time limit, or any extended period thereafter. However, in such an event, the application shall be filed without undue delay and with sufficient cause.

3.21.5 Consequently, the proposed amendment to section 29A seeks to introduce the concept of revival of an arbitrator's mandate while extending the time period for delivering the award. This is being proposed to cater to cases where an application was filed after the expiry of the time limit in the manner specified above.

3.21.6 The Committee recommends amendment of subsections (1), (2) and (4) of section 29A suitably to give effect to the above proposals.

Recommendation

It is proposed to amend section 29A –

(a) to insert a second proviso in sub section (1) to provide that any time spent in reconstitution of the Tribunal shall be excluded for computing the time limit for making of the award.

(b) to amend sub section (3) to provide if there is no consent between the parties within six months then an application under sub-section (5) can be made to the Court.

(c) to amend sub-section (4) to provide for revival of the mandate of the Tribunal while extending the period for the purposes of termination of the mandate of the arbitrator.

(d) to insert fourth proviso in sub-section (4) to provide that an application can be filed even after the period specified in sub-section (1) or the extended period specified under sub-section (3), subject to the condition that it has been filed without undue delay and with sufficient cause.

3.22 SPECIAL PROCEDURE FOR SMALL AND MEDIUM VALUE CLAIMS ADJUDICATION

3.22.1 The 1996 Act was enacted to implement the UNCITRAL Model Law. It mainly focused on fine-tuning the Indian legal framework to suit the demands of international trade and commerce. The UNCITRAL Model law was formulated for international commercial arbitrations which often involve high value claims.

3.22.2 By way of background, the 76th Report of the Law Commission, concerning the 1940 Act, *inter alia* noted that while the scheme of the 1940 Act was by and large sound, some provisions required a relook. The Law Commission recommended certain amendments, including a proviso to be inserted in section 28 of the 1940 Act. The proposed amendment forbade any extension to deliver an award beyond one year, except for special and adequate reasons. Such reasons were to be recorded in writing.

3.22.3 Some stakeholders have opined that separate legislations for domestic and international commercial arbitrations would have been ideal.

3.22.4 The UNCITRAL Model Law is based mainly on the experience of western countries where arbitrations are mostly conducted under the auspices of arbitral institutions. It cannot be disputed that adequate modifications are desirable to suit India's domestic needs.

3.22.5 In order to address the needs of smaller and medium value claims, it is proposed to include a special procedure, being Chapters VIA and VIB. This is aimed at enabling arbitral institutions to set up Adjudicating Authorities to

decide proceedings relating to small and medium value arbitrations. This will enhance the efficacy of the arbitral process, particularly in respect of small value claims. It circumvents the elaborate procedure under the Act, reducing the cost of arbitration. The determination as to whether an arbitration deals with small and medium value claims will be on the basis of the value of the claim, to be prescribed by the Central Government. However, the threshold value of the claim shall not be higher than Rs. 10 crores.

3.22.6 It is also proposed to specify that Chapter VIA shall apply to all small and medium value claims arbitration, institutional or otherwise. Parties shall make their applications under sections 9, 14, 29A or 34 of this Act to any recognised Adjudicating Authority in accordance with the provisions of this Chapter and Chapter VIB. However, parties may, subsequent to disputes having arisen between them, waive the applicability of this Chapter and Chapter VIB by an express agreement in writing.

3.22.7 It is further provided that arbitral tribunals shall conduct proceedings under this chapter by following the Fast Track Procedure prescribed under section 29B, unless the parties agree otherwise. Further, the arbitral tribunal shall conduct proceedings under this chapter virtually, unless the parties agree otherwise.

3.22.8 Chapter VIB provides for setting up of Adjudicating Authorities. Arbitral institutions may, by rules, provide for the establishment of one or more Adjudicating Authorities for disposal of applications made in accordance with Chapters VIA and VIB. The Adjudicating Authorities shall be subject to the recognition by the Arbitration Council of India.

3.22.9 Adjudicating Authorities are aimed as an alternative to courts, which are presently burdened with various proceedings under the Act. These include applications under sections 9,14,29A and/or 34 of the 1996 Act. Under the proposed amendments, eligible parties shall make applications under section 9, 14, 29A and/or 34 to the Adjudicating Authority, provided such an authority is recognised by the Arbitration Council of India. Parties may, however, agree to waive the applicability of these Chapters subsequent to disputes having arisen between them.

3.22.10 The Adjudicating Authority shall comprise of three members, who are either retired judges of the Supreme Court, High Courts or a Commercial Court. It shall meet at such place and follow such procedure as it deems fit. Sitting fees and other terms and conditions of the members of the Adjudicating Authority, along with costs for making applications to the Adjudicating Authority, shall be specified by the relevant arbitral institution.

3.22.11 The jurisdiction of the Adjudicating Authority will be determined on similar parameters as that of a "Court" as defined under the Act. In the event there is no recognised Adjudicating Authority available within the jurisdiction as defined, the relevant provisions for making reference to an Adjudicating Authority shall not be applicable to such arbitrations.

3.22.12 The orders passed by the Adjudicating Authority shall be enforceable in the same manner as if it were an order of the Court.

3.22.13 The Committee feels that these special provisions for small value claims will address the long standing demand of trade and commerce for an effective ADR framework involving low value claims and relieve substantial burden on the court dockets.

3.22.14 The Committee recommends insertion of new Chapter VIA and VIB:

Recommendation

It is proposed to insert Chapter VIA sections 29C to 29 G as follows –

(i) Section 29C to provide that Chapter VIA and Chapter VIB shall apply to small and medium value claims arbitration and for the purposes of Chapter VI A and Chapter VIB "small and medium value claims" in relation to an arbitration shall mean claims having Specified Value not exceeding such amount as may be notified by the Central Government and no amount exceeding ten crores shall be notified as Specified Value by the Central Government;

(ii) Section 29D to provide that the parties to a small and medium value claims arbitration, institutional or otherwise, shall make their applications under sections 9, 14, 29A or 34 of this Act to any recognised Adjudicating Authority in accordance with the provisions of this Chapter and Chapter VIB. However, the parties may, subsequent to disputes having arisen between them, waive the applicability of this Chapter and Chapter VIB by an express agreement in writing;

(iii) Section 29E to provide that the arbitral tribunal shall conduct the proceedings under this chapter by following the Fast Track Procedure prescribed under section 29B unless the parties otherwise agree;

(iv) Section 29F to provide that the arbitral tribunal shall conduct proceedings under this chapter in the virtual mode unless the parties otherwise agree;

(v) Section 29G to provide that save as otherwise provided in this Chapter or in Chapter VIB other provisions of this Act shall apply to small and medium value claims arbitration.

Recommendation

It is proposed to insert Chapter VIB sections 29H to 29O as follows –

(i) Section 29H to provide that Arbitral institutions may by rules provide for the establishment of one or more Adjudicating Authorities for disposal of applications made in accordance with this Chapter. Each Adjudicating Authority will be subject to recognition by the Arbitration Council of India;

(ii) Section 29I to provide that the Adjudicating Authority shall consist of a Chairperson and two other members who shall be retired judges of the Supreme Court; or the High Court; or a Commercial Court;

(iii) Section 29J to provide that the Adjudicating Authority shall be independent and impartial in carrying out its functions and the Arbitration Council of India shall specify by regulations such criteria as it may deem appropriate for recognition, independence and impartiality of the Adjudicating Authority;

(iv) Section 29K to provide that the Adjudicating Authority shall have the same power for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it;

(v) Section 29L to provide that any order made by the Adjudicating Authority under this chapter 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;

(vi) Section 29M to provide that for the purposes of applications made under section 29D and notwithstanding anything contained in section 2A, Court shall mean a recognised Adjudicating Authority located in the district of the seat of arbitration as determined under sub-section (1) or (2) of section 20 and in the event no seat has been determined, Court shall mean a recognised Adjudicating Authority located in the district of the subject-matter of the arbitration if the same had been the subject- matter of a suit;

(vii) Section 29N to provide that where with respect to a small and medium value claims arbitration any application under section 29D has been made in a recognised Adjudicating Authority, that Adjudicating Authority alone shall have jurisdiction, and all subsequent applications under section 29D shall be made in that Adjudicating Authority and in no other Adjudicating Authority;

(viii) Section 29O to provide that section 29D and this Chapter VIB shall not apply to small and medium value claims arbitration, institutional or otherwise, if there is no recognized Adjudicating Authority available within the district of the seat of arbitration as determined under sub-section (1) or (2) of section 20 and in the event no seat has been determined, if

there is no recognized Adjudicating Authority available within the district of the subject-matter of the arbitration if the same had been the subject-matter of a suit."

3.23 FORM OF AWARD AND POST AWARD INTEREST RATE- SECTION 31

3.23.1 Sub-section (1) of section 31 provides that an arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. There is no requirement as to stamping.

3.23.2 The Law Commission in the 194th Report on Verification of Stamp Duties and Registration of Arbitral Awards, examined certain difficulties referred to in a judgement of the Madras High Court.

3.23.3 According to the Report, section 31(5) states that the arbitral tribunal shall communicate a 'signed' copy of the arbitral award to the parties. Thereafter, the parties are entitled to file applications for setting aside the award under section 34(1) or for enforcement of the award under section 36, as the case may be, by annexing the copy of the arbitral award communicated to them. If only a copy of the award is to be filed along with the said applications under the Act, the Court will not be in a position to know whether the original award is duly stamped or, where it requires compulsory registration, whether it is duly registered.

3.23.4 The Report noted that after an award is passed by the arbitral tribunal, the question which arises is whether the original arbitral award passed by the arbitral tribunal under the Arbitration and Conciliation Act, 1996 has been duly stamped or duly registered. The reason why the question has arisen is because the 1996 Act does not require the original award to be filed in Court. Section 31(5) of the Act merely states that the arbitral tribunal shall communicate a 'signed copy' of the original arbitral award to the parties. The 'signed copy' of the award does not reveal whether or not the original arbitral award is duly stamped or registered.

3.23.5 To get over this difficulty, the Law Commission recommended the amendment of sub section (1) of section 31 to provide that an arbitral award shall be made in writing, duly stamped, and signed by the members of the arbitral tribunal.

3.23.6 The Committee is in agreement with the view expressed and solution proposed by the Law Commission. It is therefore proposed to substitute subsection (1) of section 31 to provide that an arbitral award shall be made in writing, duly stamped, and signed by the members of the arbitral tribunal.

3.23.7 Sub-section (6) of section 31 provides that the arbitral tribunal may pass an interim order at any time during the proceedings with respect to any matter regarding which it may make a final award.

3.23.8 Interim awards under section 31(6) of the Act can be challenged separately and independently under section 34 of the Act. This aspect was considered by the Supreme Court in ***IFFCO Ltd. v. Bhadra Products*** where it held that piecemeal awards lead to "*unnecessary delay and additional expenses*" and interim awards shall be consolidated with the final award to avoid challenges in piecemeal. Therefore, the Supreme Court recommended that *"we are of the view that Parliament may consider amending section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under section 34 can be made after delivery of the final arbitral award"*.

3.23.9 It is therefore proposed to amend section 31 to insert a proviso to sub-section (6) to clarify that the arbitral tribunal, either with consent of the parties or by giving reasons, may make an interim arbitral award at any time during the arbitral proceedings. The interim award cannot be challenged independently and the same shall be challenged along with the challenge to the final award.

3.23.10 Section 31(7) clause (b) provides that a sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate which is two per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. *Explanation*. —The expression "current rate of interest" shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978.

3.23.11 With reference to the said clause (b) of section 7 the Committee is also of the view that it would be appropriate to have interest linked to the repo rate of the Reserve Bank of India so that the interest adequately compensates a party for not receiving the money due to him in the interim period. Therefore, the Committee feels that the post award interest rate be amended to simple interest at the rate of three percent higher than the repo rate of the Reserve Bank of India prevalent on the date of award, payable till the period of full payment of interest. This will ensure that default interest rate is neither excessive nor insufficient.

3.23.12 The Committee recommends substitution of clause (b) of subsection (7) of section 31 to provide that the post award interest rate be amended to simple interest at the rate of three percent higher than the repo rate of the Reserve Bank of India prevalent on the date of award, payable till the period of full payment of interest.

3.23.13 Several arbitrators in *ad hoc* arbitrations, including retired Judges of the Supreme Court and the High Courts, have raised the question as to -

(a) how long they should keep the original award with them, particularly, if no party files an application under section 34 or section 36?

(b) How long they should keep the records of the arbitration proceedings, the pleading, evidence, etc., with them? and

(c) As to the point of time at which they could return the documents to the respective parties who had filed them. After all, the parties may require the original title deeds and documents for various purposes – e.g. raising loan on security or for mortgage of the property or sale thereof.

3.23.14 These questions were examined by the 176th Report of the Law Commission and it was recommended that Act should be amended to say that the original award will be filed by the arbitrators in a Court of law.

3.23.15 However, the Committee is of the view that this will result in undue burden being cast upon the Courts and the award will be difficult for interested parties to retrieve when required. With an Arbitration Council in position, the Committee is of the view that the awards could be filed with the depositories maintained or recognised by it.

3.23.16 It is therefore proposed to insert a new subsection (9) to provide that a copy of the award shall be authenticated and filed in the depository maintained by the Arbitration Council of India.

3.23.17 It is proposed to make amendments to section 31 as follows:

(i) to provide that an arbitral award shall be made in writing, duly stamped, and signed by the members of the arbitral tribunal;

(ii) to clarify that the arbitral tribunal, either with consent of the parties or by giving reasons, may make an interim arbitral award at any time during the arbitral proceedings and also the interim award cannot be challenged independently and that the same can be challenged along with the challenge of the final award;

(iii) to provide that the post award interest rate be amended to simple interest at the rate of three percent higher than the repo rate of the Reserve Bank of India prevalent on the date of award, payable till the period of full payment of interest;

(iv) to provide that a copy of the award shall be authenticated and filed in the depository maintained by the Arbitration Council of India;

Recommendation

It is proposed in section 31

(i) to substitute sub section (1) to provide that an arbitral award shall be made in writing, duly stamped, and signed by the members of the arbitral tribunal;

(ii) to insert a proviso to sub-section (6) to clarify that the arbitral tribunal, either with consent of the parties or by giving reasons, may make an interim arbitral award at any time during the arbitral proceedings and also the interim award cannot be challenged independently and that the same can be challenged along with the challenge of the final award;

(iii) substitute clause (b) of subsection (7) to provide that the post award interest rate be amended to simple interest at the rate of three percent higher than the repo rate of the Reserve Bank of India prevalent on the date of award, payable till the period of full payment of interest;

(iv) to insert a new subsection (9) to provide that a copy of the award shall be authenticated and filed in the depository maintained by the Arbitral Council of India.

3.24 REGIME FOR COSTS - SECTION 31A

3.24.1 Section 31A of the Act presently confers discretion to the Court or the arbitral tribunal, as the case may be, to determine certain questions concerning the costs involved in an arbitration. These include whether the costs are payable by one party to another, the amount of such costs and when such costs are to be paid. It is proposed to make it mandatory for the concerned Court or arbitral tribunal to determine the said aspects.

3.24.2 Where an arbitral tribunal denies costs to the successful party, it is also proposed to make it mandatory for reasons to be provided for such denial. The Bill further prescribes certain modalities for the award of costs. This includes the submission of details as to costs incurred by the parties, or by any person authorised by the party, to the tribunal.

3.24.3 Where such details have not been submitted by the parties, it is proposed to empower the tribunal to determine the costs as per its best judgement and having regard to the circumstances under section 31A(3).

3.24.4 It is also sought to clarify that the arbitral tribunal may determine the costs as part of the arbitral award on merits or pass a separate award on costs as it may consider appropriate and where the award for costs is a separate award, the time for making an application under section 34 to set aside the award for costs shall be calculated from the date of such award for costs.

3.24.5 The Committee recommends amendment of section 31A –

(i) to omit the word ***discretion*** in subsection (1);

(ii) to provide that in all cases, the arbitral tribunal shall award the share of the fees and expenses of the arbitrators and share of administrative fees of the institution supervising the arbitration paid by the successful party having regard to the circumstances under sub-section (3) in sub section (6);

(iii) to provide that the arbitral tribunal shall give reasons for denying other costs to a successful party in new sub section (7);

(iv) to provide that unless otherwise agreed between the parties or directed by the arbitral tribunal, the parties shall before passing of the award submit the costs incurred, either by the party itself or by any person authorized by the party and where the party has not submitted the details of the costs incurred, the arbitral tribunal shall determine the same as per its best judgement having regard to the circumstances specified under sub-section (3) in new subsection (8);

(v) to provide that the arbitral tribunal may determine the costs as part of the arbitral award on merits or pass a separate award on costs as it may consider appropriate and where the award for costs is a separate award, the time for making an application under section 34 to set aside the award for costs shall be calculated from the date of such award for costs in new sub section (9).

Recommendation

It is proposed to amend section 31A –

(a) In sub-section (1) to omit the word "discretion";

(b) to insert new sub-section (6) to provide that in all cases, the arbitral tribunal shall award the share of the fees and expenses of the arbitrators and share of administrative fees of the institution supervising the arbitration paid by the successful party having regard to the circumstances under sub-section (3);

(c) to insert sub-section (7) to provide that the arbitral tribunal shall give reasons for denying other costs to a successful party;

(d) to insert sub-section (8) to provide that unless otherwise agreed between the parties or directed by the arbitral tribunal, the parties shall before passing of the award submit the costs incurred, either by the party itself or by any person authorized by the party and where the party has not submitted the details of the costs incurred, the arbitral tribunal shall determine the same as per its best judgement having regard to the circumstances specified under sub-section (3);

(e) to insert sub-section (9) to provide that the arbitral tribunal may determine the costs as part of the arbitral award on merits or pass a separate award on costs as it may consider appropriate and where the award for costs is a separate award, the time for making an application under section 34 to set aside the award for costs shall be calculated from the date of such award for costs."

3.25 SETTING ASIDE AND/OR VARYING OF AWARDS UNDER SECTION 34

3.25.1 Section 34 of the Act deals with applications for setting aside an arbitral award. One of the long-standing issues on this aspect concerns the power of courts to modify an award in a section 34 proceedings.

3.25.2 Prior to the judgment of the Supreme Court in ***NHAI v. Hakeem***, (2021) 9 SCC 1, there was divergence of judicial opinion on this aspect. The Karnataka, Bombay and Delhi High Courts had held that the Courts can only set aside arbitral awards. On the other hand, Madras, Telangana and Andhra Pradesh High Courts had held that courts could set aside an arbitral award or modify it by varying the findings in the arbitral award. In *M. Hakeem* (supra), the Supreme Court set the controversy to rest, and held that courts under section 34 of the Act cannot modify an arbitral award by varying the findings. It could only set aside awards.

3.25.3 Thus, under the present regime, once an arbitral award is set aside, parties have to commence fresh arbitration proceedings to resolve their disputes.

3.25.4 However, in ***Vedanta Limited v. Shenzhen Shandong Nuclear Power***[35], certain observations made by the Supreme Court appeared to suggest that in section 34 proceedings, courts could modify the rate of interest in the arbitral award. In that matter, the Court was not concerned with the power of a section 34 Court to modify an arbitral award. Since the law on this aspect was also not discussed, it could be argued that the Court's observations were merely *obiter*.

3.25.5 Further, courts continue to have the power to "partially" set aside arbitral awards under section 34 of the Act. The law in this regard had been succinctly summarized by the Bombay High Court in ***R S Jiwani v. Ircon International Limited***, 2009 SCC Online Bom 2021.

3.25.6 Recently, a Ld. Single Judge of the Delhi High Court, in ***National Highways Authority of India v. Trichy Thanjavur Expressway Limited***,[36] extensively considered the law on this aspect. It was observed that if an award is comprised of separate components, each standing separately and independent of the other, there was no hurdle in adopting the doctrine of severability to partly set aside an award. The power so wielded would continue to remain confined to "*setting aside*", and would thus constitute a valid exercise of jurisdiction under section 34 of the Act.

3.25.7 While discussing the judgment in ***N. Hakeem*** (*supra*), the Delhi High Court held that the term 'modify' used in ***N. Hakeem*** (*supra*) meant a variation or modulation of the ultimate relief that could be accorded by an arbitral tribunal. However, when a section 34 Court exercised its power to partially set aside an award, it did not amount to a modification or variation of the award. Such setting aside is confined to the offending and unsustainable part of the award coming to be annulled and set aside. It is this distinction between a modification of an award and its partial setting aside that must be borne in mind. Therefore, the expression "*setting aside*" as employed in section 34 of the Act includes the power to annul a part of an award, provided it is severable and does not impact or eclipse other components of the award.

3.25.8 The Committee has examined the proposal to permit courts to modify or vary an award, while setting aside such an award in exercise of its section 34 jurisdiction. This is proposed to be achieved by amending sub-section (2) and sub-section (2A) of section 34.

3.25.9 Such orders must, however, be made only in exceptional circumstances to meet the ends of justice. This will enable a section 34 Court to provide a quietus to the matter, so as to avoid further litigation. It is proposed to substitute the words "set aside by the Court" with the words "set aside in whole or in part by the Court" and add a proviso for partly varying the award in exceptional circumstances.

[35] (2019) 11 SCC 465;
[36] 2023 SCC OnLine Del 5183;

3.25.10 The Committee feels that the proposed amendment will provide relief to parties in situations where the findings in the arbitral award can be varied, having regard to the arbitral records. Needless to state, any such modification to the arbitral award can only be ordered by the Court if the strict parameters for setting aside the arbitral award under section 34 of the Act are made out, and there is no need to adduce fresh evidence.

3.25.11 An express provision incorporated in the Act is likely to streamline the process, saving time, effort, and resources for all the parties involved. Thus, granting the Courts the authority to modify awards within well-defined limits would help strike a balance between preserving finality of the arbitral process and ensuring fairness.

3.25.12 The Committee recommends amendment to sub-sections (2) and (2A) of section 34 to substitute the words "set aside by the Court", with the words "set aside in whole or in part by the Court" and to add the following proviso, namely "Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice.".

Recommendation

It is proposed to amend section 34-

(i) to insert a new sub section(1A) to provide that an application for setting aside an award under sub-section (1) shall be accompanied by the original award and where the parties have not been given the original award, they may file a copy of the award signed by the arbitrators;

(ii) in sub-section (2) -

(a) for the words "An arbitral award may be set aside by the Court", the words "An arbitral award may be set aside in whole or in part by the Court" be substituted;

(b) after clause (b) and before Explanation 1 the following proviso shall be inserted, namely:-

Provided that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice"

(iii)in sub-section (2-A)-

(a) for the words "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court", the words "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside in whole or in part by the Court" shall be substituted.

(b) after the proviso the following proviso shall be

inserted namely: -

"Provided further that in cases where the Court sets aside the arbitral award in whole or in part, the Court may make consequential orders varying the award only in exceptional circumstances to meet the ends of justice"

3.26 ENFORCEMENT OF AWARDS UNDER SECTION 36

3.26.1 Section 36 of the Act deals with enforcement of awards. By the 2015 Amendment, a proviso to section 36(3) was added. The proviso stated that "the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908."

3.26.2 In this regard, courts have been guided by the principles enumerated in Order XLI Rule 5 of CPC. However, no strict parameters have been enumerated in Order XLI Rule 5 of CPC for furnishing of security. Accordingly, Courts have been constrained to exercise their discretion while passing orders for security under section 36(3) of the Act. In the absence of any guidelines, there is significant variance in the orders passed by different courts.

3.26.3 Withdrawal of amounts deposited under this provision, and the requirement of security by the successful party to withdraw such amount, has been a matter of some debate. Further, some judgments have stated that once a deposit is made, interest ceases to run on the deposited amount. In the opinion of the Committee, once a deposit is made, interest on the deposited amount should cease to run only if the successful party is permitted to withdraw the deposited amount unconditionally, as only that will amount to effective compliance of the award.

3.26.4 As an awardholder, the successful party is immediately entitled to the proceeds of the award. However, it rarely gets its dues in a timely manner. The status of an award holder continues to be one of an unsecured creditor, till a deposit is made by the award debtor. The Committee notes that an award creditor does not have any security as a matter of course during the arbitration proceedings and prior to the award. Further, by requiring a security for withdrawal, the award creditor is constrained to incur further costs which are generally not recoverable by it.

3.26.5 By permitting only a conditional withdrawal upon the award creditor providing some security, the award debtor is secured as a matter of course, during the pendency of the section 34 proceedings. This is not appropriate, since by this time, an award has already been rendered in the arbitration proceedings which should mutually be final and binding and the award debtor has lost the arbitration.

3.26.6 Besides affecting the award holder's legitimate rights, such orders create further complications in instances where insolvency proceedings are

initiated against either the award holder or the award debtor.

3.26.7 The Committee is of the opinion that a mere deposit of monies into Court, and further a condition permitting withdrawal of the monies by the successful party only upon providing some security, would not amount to compliance with an arbitral award. In such an event, interest on the deposited amount should continue to run. Only in those instances where the award holder is permitted to unconditionally withdraw the deposited amount, should interest cease to run.

3.26.8 The Committee further notes that the award debtor is not left remediless. In the event the award debtor succeeds in the section 34 proceedings and the award is set aside, the award holder must be directed to refund the monies with appropriate interest. Such a course will adequately compensate the award debtor who succeeds in section 34 proceedings. Further, if the award debtor seeks to be secured in the facts of a particular case, appropriate applications may be made to the Court in that behalf.

3.26.9 In order to bring uniformity to pre-conditions for stay of an arbitral award, the Committee recommends the following amendment to section 36(3). It is proposed to amend section 36 subsection (3) to insert two provisos, before the second proviso, as follows, "Provided further that the Court may grant stay of the arbitral award upon deposit of 50% of the principal amount awarded and the furnishing of security for the remaining sum awarded, with interest accrued up to the date of furnishing security" and "provided also that in the event of deposit being made of such amount as directed by the Court, or in the event of such higher amount at the option of the party making the deposit, further interest on the amount so deposited shall cease only in the event of unconditional withdrawal of the deposited amount by the other party.

Recommendation

It is proposed to amend sub section (3) of section 36 to insert two provisos before the second proviso to provide:-

(i) that the Court may grant stay of the arbitral award upon deposit of 50% of the principal amount awarded and the furnishing of security for the remaining sum awarded, with interest accrued up to the date of furnishing security.

(ii) that in the event of deposit being made of such amount as directed by the Court, or in the event of such higher amount at the option of the party making the deposit, further interest on the amount so deposited shall cease only in the event of unconditional withdrawal of the deposited amount by the other party."

3.27 MODIFICATIONS TO PROVISIONS REGARDING APPEALS UNDER SECTION 37

3.27.1 Section 37 of the Act provides for appealable orders. Under subsection (1) of section 37, which provides for appealable orders, no time limit has

been prescribed. The Committee is of the opinion that there is a need for standardisation of the time period for filing an appeal under section 37(1). This has become necessary because of section 13A of the Commercial Courts Act, 2015, which states that

> *"any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:*
>
> *Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996)."*

3.27.2 In ***Government of Maharashtra v. Borse Brothers Engineers & Contractors Pvt. Ltd.***[37] the Supreme Court held that the limitation to prefer an appeal under section 37 would differ in the case of appeals covered under the Commercial Courts Act, and other appeals. If the specified value of the subject matter is Rs. 3,00,000 or more, then an appeal under section 37 of the Act must be filed within 60 days from the date of the order as per section 13(1A) of the CCA. However, in those cases when the specified value is for a sum less than Rs. 3,00,000 then the appeal under section 37 would be governed by Articles 116 (which provides for 90 days for inter-Court appeal) and 117 (which provides for 30 days for intra-Court appeal) of the Limitation Act, 1963, as the case may be.

3.27.3 In order to standardise the time period for filing an appeal under section 37(1), it is proposed to amend section 37 to insert new sub-section (1A) which provides that an appeal under section 37(1) should be filed within 60 days from the date of receipt of the order appealed against, but not thereafter. The proposed insertion would prohibit the Courts from admitting a section 37 appeal filed after the period of 60 days has lapsed. The time period of 60 days is in keeping with the provisions of the Commercial Courts Act.

3.27.4 Further, the time taken to file an appeal should not be extended because this incentivises delays. The proposed insertion would prohibit the Courts from admitting appeals under section 37(1) filed after the period of 60 days has lapsed.

3.27.5 Thus, the Committee recommends addition of a new sub section (1A) to section 37 to provide "**(1A)** Notwithstanding anything contained in any other law, an appeal under sub-section (1) shall be made within 60 days from the date of receipt of the order appealed against, but not thereafter."

[37] 2021 SCC OnLine SC 233;

3.27.6 Adopting a similar rationale, it is proposed to add sub section (2A) to section 37, prohibiting appeals under section 37(2), against orders of an arbitral tribunal, beyond a period of 30 days, and not permitting appeals to be filed thereafter. This is also to keep delays in check. A shorter period of 30 days has been provided since these are appeals against an order of arbitral tribunals when arbitration proceedings are still in progress. Hence, any such appeal must be promptly filed.

3.27.7 The Committee recommends addition of new subsection (2A) to section 37 to provide that notwithstanding anything contained in any other law, an appeal under sub-section (2) shall be made within 30 days, but not thereafter, from the date of receipt of the order appealed against."

3.27.8 Subsection (2) of section 37 provides that an appeal shall also lie to a court from an order of the arbitral tribunal--(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or (b) granting or refusing to grant an interim measure under section 17.

3.27.9 In addition to the above, the Committee suggests providing an appeal against rejection of an application by the arbitral tribunal under section 13(4), and the rejection of an application under section 16(5). Section 37(2) will have to be amended accordingly.

3.27.10 In this background, the Committee further proposes substitution of section 37(2), to enable appeals against rejection of an application by the arbitral tribunal under section 13(4), and the rejection of an application under section 16(5). This will ensure that in instances where an order under section 13(4) or 16(5) is patently incorrect, and deserves to be set aside, parties are not forced to undergo the entire arbitral process.

3.27.11 It is therefore proposed to substitute sub section (2) of section 37 to provide that an appeal shall also lie to a Court from an order of the arbitral tribunal –

(a) Rejecting the plea referred to in sub-section (4) of section 13;

(b) Accepting or rejecting the plea referred to in sub-section (2) or sub-section (3) of section 16; and

(c) Granting or refusing to granting an interim measure under section 17.

3.27.12 This Amendment is also in consonance with Article 16(3) of the Model Law.

3.27.13 Accordingly, it is proposed to amend section 37 to insert subsections (1A) and (2A) and also substitute subsection (2) to provide for appeals from sections 13(4), 16(3) and section 17.

Recommendation

It is proposed to amend section 37 –

(i) to insert new sub section (1A) to provide that notwithstanding anything contained in any other law, an appeal under sub-section (1) shall be made within 60 days from the date of receipt of the order appealed against, but not thereafter;

(ii) to substitute sub section (2) to provide that an appeal shall also lie to a Court from an order of the arbitral tribunal –

(a) rejecting the challenge referred to in subsection (4) of section 13;

(b) accepting or rejecting the plea referred to in sub-section (2) or subsection (3) of section 16;

(c) granting or refusing to granting an interim measure under section 17;

(iii) to insert new sub section (1A) to provide that notwithstanding anything contained in any other law, an appeal under sub-section (2) shall be made within 30 days, but not thereafter, from the date of receipt of the order appealed against.

3.28 MISCELLANEOUS AND CONSEQUENTIAL AMENDMENTS

3.28.1 Amendment of section 42 to provide that when any application under Part I has been made in a Court and the seat of the arbitration has not been determined under sub-section (1) or sub-section (2) of section 20, then 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.

3.28.2 AMENDMENT TO SECTION 43-D

3.28.3 Section 43D provides for the duties and functions of the Arbitration Council. Under clauses (a) and (c) of subsection (2) the Council may frame policies governing the grading of arbitral institutions and review the grading of arbitrations and arbitrators.

3.28.4 The legal sector has witnessed exponential growth, both in India and abroad. Arbitrators with extensive experience, skill and knowledge have carved out a name for themselves. A subjective scrutiny of such persons may not be accurate, if not misplaced. The skill and competence of an arbitrator is best decided by the market.

3.28.5 Indeed, in the absence of any objective standards, any grading exercise

may lead to needless controversy and litigation.

3.28.6 This was a suggestion received by the Committee from various stakeholders. Hence it is proposed to omit the clauses (a) and (c) of sub section (2) which confer the Arbitration Council of India with the powers to frame policies governing the grading of arbitral institutions, and to review the grading of arbitral institutions and arbitrators respectively.

Recommendation

It is proposed to omit clauses (a) and (c) in sub section (2) of section 43-D.

3.28.7 REVISION OF SECTION 43-I & ADDITION OF SECTION 43-IA

The Arbitration Council of India shall specify by regulations, criteria relating to infrastructure, quality and calibre of arbitrators, performance, and compliance of time limits for disposal of domestic or international commercial arbitrations and other matters which arbitral institutions shall satisfy for accreditation with the Council.

Recommendation

It is proposed to insert a new section 43-I to provide that the Council shall specify by regulations criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations and such other matters which arbitral institutions shall satisfy for accreditation with the Council.

3.28.8 Arbitral institutions shall apply to the Council in such Form as specified in the regulations for accreditation.

Recommendation

It is proposed to insert new section 43-IA to enable the Arbitral institutions seeking accreditation to apply to the Council in such Form specified in the regulations

3.28.9 OMISSION OF FOURTH SCHEDULE

3.28.10 Although section 11A and the Fourth Schedule were incorporated to provide a framework for determining the fees of arbitrators, its execution was riddled with several issues. The Supreme Court, in ***ONGC v. Afcons***

Gunanusa JV, 2022 SCC OnLine SC 1122, observed that the Fourth Schedule was to serve as a guide for different High Courts to frame rules for determining the fees of arbitrators. However, the High Courts had been slow in framing these rules for the purpose of determination of fees and the manner of payment to the arbitral tribunal. Apart from the High Courts of Rajasthan, Kerala and Bombay, other High Courts had not framed rules under section 11(14) of the Act for the determination of fees. Further, the rules framed by High Courts of Bombay and Rajasthan only governed arbitrators appointed by the Courts. Thus, the purpose of section 11(14) for regulating fees in ad-hoc arbitrations remained unrealised.

3.28.11 The Committee received many recommendations highlighting several problems with the Fourth Schedule of the Act. It was further highlighted that *ad hoc* tribunals did not always follow the prescribed fees under Fourth Schedule of the Act.

3.28.12 The ceiling on arbitrators' fees was fixed way back in 2015. Necessarily, the ceiling requires a relook, and must be periodically reviewed and revised.

3.28.13 The Schedule should adequately compensate an arbitrator for adjudicating complex disputes, which require significant devotion of time and resources. The current system of fee calculation is based entirely on the quantum of the claim. It is felt that the quantum of the claim may not be the most appropriate yardstick to determine arbitrators' fees. The additional parameter to determine arbitrators' fees could include providing an additional percentage of fee if the parties decide to lead oral or expert evidence. This is in contrast to arbitrations where the dispute is narrow and/or is being adjudicated on basis of documents.

It is further recommended that a mechanism to determine the fees, in cases where a dispute is settled and the tribunal's mandate is terminated, be devised. Such a mechanism may also consider instances where the tribunal is reconstituted.

3.28.14 Considering the issues faced by various stakeholders, the Committee has proposed the omission of section 11-A and the Fourth Schedule from the Act. Further, it is recommended that the Central Government be empowered to prescribe the legal framework for fees of arbitrators by framing appropriate rules by rules.

Recommendation

It is proposed to omit the Fourth Schedule from the Act.

3.28.15 DELETIONS OF ENTRIES IN THE FIFTH SCHEDULE

3.28.16 The Fifth Schedule specifies the grounds which give rise to justifiable

doubts as to the independence or impartiality of arbitrators and contains 34 entries under seven categories namely, **(a)** Arbitrator's relationship with the parties or the counsel; **(b)** Relationship of the Arbitrator to the dispute; **(c)** Arbitrator's direct or indirect interest in the dispute; **(d)** Previous services for one of the parties or other involvement in the case; **(e)** Relationship between an arbitrator and another arbitrator or counsel; **(f)** Relationship between arbitrator and party and others involved in the arbitration.

3.28.17 A cursory reading of entries in the Fifth Schedule and Seventh Schedule reveals that the entries 1 to 19 find place in both the Schedules. This has caused confusion. The Supreme Court in ***HRD Corpn. v. GAIL (India) Ltd.***, (2018) 12 SCC 471, held that items 1 to 19 of the Fifth Schedule are identical with the aforesaid items in the Seventh Schedule. The only reason that these items appear in the Fifth Schedule is for purpose of disclosure by the arbitrator, as parties are unaware as to the arbitrator's involvement, if any, as regards any of the six categories of the Fifth Schedule aforementioned, until the arbitrator provides his disclosure in writing as the factum of such involvement since this is often within the arbitrator's personal knowledge.

3.28.18 Since it is proposed to amend the Sixth Schedule to make it more comprehensive and detailed by *inter alia* enumerating the said items 1 to 19, there is no requirement to separately retain items 1 to 19 in the Fifth Schedule.

3.28.19 Explanation 2 in the Fifth Schedule defines the term "affiliate" which encompasses all companies in one group of companies including the parent company. The said definition does not include any person bearing the cost of arbitration under a funding agreement with one of the parties. Hence, it is proposed to widen the ambit by adding the requisite language in Explanation. 2.

3.28.20 It is accordingly proposed to substitute Explanation 2 with the following, "*Explanation 2 – The term "affiliate" encompasses all companies in one group of companies including the parent company and would include any person bearing the cost of arbitration under a funding agreement with one of the parties;".*

3.28.21 It is proposed to substitute Explanation 3 with the following, "*Explanation 3 – The grounds stated in the Fifth Schedule are illustrative of the circumstances that give rise to justifiable doubts as to the independence or impartiality of an arbitrator.".*

Recommendation

It is proposed to amend the Fifth Schedule

(i) by omitting item nos 1 to 19 and entries relating thereto;

(ii) to substitute Explanation 2 to include any person bearing the cost of arbitration under a funding agreement with one of the parties;"

(iii) to substitute Explanation 3 to clarify that the grounds stated in the Fifth Schedule are illustrative of the circumstances that give rise to justifiable doubts as to the independence or impartiality of an arbitrator.".

3.28.22 SUBSTITUTION OF THE SIXTH SCHEDULE

3.28.23 Section 12 is proposed to be amended to provide for stricter disclosure norms specified in the Sixth Schedule. This amendment is proposed to clarify the procedure that the proposed arbitrator must follow upon appointment.

3.28.24 It is necessary to substitute the Sixth Schedule which would specify the necessary disclosures to be provided under the form, including the appointee arbitrator's statement, acceptance, availability, impartiality, and independence to ensure immediate steps are taken without delay to constitute the arbitral tribunal.

3.28.25 The Committee recommends substitution of the Sixth Schedule.

Recommendation

It is proposed to substitute the Sixth Schedule to provide for stricter disclosure requirements

3.28.26 AMENDMENT OF THE SEVENTH SCHEDULE

3.28.27 In entry 1 of Seventh Schedule, a person who "*has any other past business relationship with the party*" is not eligible to act as an arbitrator. However, this restriction is very wide in its ambit and places a blanket restriction on a person from acting as an arbitrator if he had any past business relationship with a party. The Committee is of the view that if the arbitrator has had a past business relationship with the party over two years ago, would make any allegation of bias untenable.

3.28.28 Accordingly, it is proposed to add the phrase "*who has not completed the mandatory cooling period of two years from the date of cessation of such relationship.*" in entry 1

Recommendation

It is proposed to amend entry 1 of the Seventh Schedule to add the words "who has not completed the mandatory cooling period of two years from the date of cessation of such relationship."

3.28.29 INSERTION OF THE EIGHT SCHEDULE MODEL RULES OF PROCEDURE

3.28.30 It is important that the arbitrators lay down at least the important procedural steps with timelines at the start of the proceedings and some procedural rules that would be observed during the arbitral proceedings. For that purpose it is proposed to amend section 19(3), *inter alia*, to provide that for more efficient conduct of proceedings, the arbitral tribunal may adopt the Model Rules of Procedure specified in the Eighth Schedule with such modifications as it may deem fit.

3.28.31 This will discourage arbitrators from following the strict procedural requirements provided under the Code of Civil Procedure and the Evidence Act for trial of civil suits.

Recommendation

It is proposed to insert a new Eight Schedule containing a Model Code of Procedure

3.29 Clause 41 of the Bill clarifies the applicability of the amendments to pending arbitral and court proceedings.

PART IV

4. CONCLUSIONS AND THE WAY FORWARD

4.1 SUGGESTIONS FOR BUILDING AN ECOSYSTEM FOR INDIA TO EMERGE AS A HUB OF INTERNATIONAL COMMERCIAL ARBITRATION

4.1.1 Trade, industry, commerce and investment can only thrive in a conducive business environment. This includes a robust dispute resolution mechanism This Report has proposed several statutory amendments to the current arbitration regime in India. The 1996 Act has already been amended on several occasions, in 2015, 2019 and 2021, to keep pace with global and current developments in arbitration. The proposed amendments are further aimed at promoting institutional arbitration, and updating the law to reflect best global practices. They further aim to resolve ambiguities and establish an arbitration ecosystem where arbitral institutions can flourish. They attempt to trigger a paradigm shift for ensuring timely conclusion of arbitration proceedings, minimize judicial intervention in the arbitral process, and enforcement of arbitral awards.

4.1.2 The Committee has considered the amendments made to the UNCITRAL Model Law in 2006 and, in particular, the amendment to Article 7 and various amendments made to Aticle 17. The Committee recommends that the Government may consider appropriate amendments to the Act in the light of the 2006 amednments.

4.1.3 However, statutory amendments to the Act alone will not suffice in meeting these goals. Legal reform is a never ending process, and requires active co-operation of all stakeholders. Specific steps and actions, catering to the needs of various stakeholders are required for a holistic evolution of the arbitration landscape in India. In particular, there is a need for more reliable arbitral institutions and adoption of technology. These steps are expected to reduce the cost and time required to conclude arbitrations.

4.1.4 In this regard, a multipronged approach must be adopted, including: (i) implementation of the existing and proposed amendments to the Act; (ii) continuous monitoring by the Ministry of Law and the Arbitration Council of the working of the Arbitration Act, (iii) collection of data which will enable the Government to study the effectiveness of the amendments to the Act and (iv) attitudinal changes by all stakeholders.

4.1.5 With these objectives the Committee suggests the following measures as the way forward for making arbitration an effective means of ADR to solve disputes and also to make India as a hub of international commercial arbitration.

4.2 REVITALISING PARTY AUTONOMY

4.2.1 The Indian judiciary has consistently upheld the principle of party autonomy, which is integral for arbitration to succeed in India. The Hon'ble Supreme Court has referred to party autonomy as "the backbone", "grundnorm", and "the brooding and guiding spirit" of arbitrations.

4.2.2 Party autonomy comes into play when parties to an arbitration agreement invoke the agreement. The parties have the right to choose (a) the arbitrators, (b) their fees (c) venue (d) and procedure to be followed by the arbitral tribunal. However, in reality, in many instances the parties are left with little to no choice in choosing the arbitrator or the procedure or the fees or the venue.

4.2.3 Companies and firms routinely insert arbitration clauses into their contracts with customers. Such clauses may appear to be innocuous, or even beneficial to customers, but in practice, they often cause unprecedented hardship to unwary customers, specifically in cases where the sum in dispute is of small value. The manner and mode of obtaining the consent of the customer requires closer introspection. In most cases, consent is obtained in a routine manner where the parties agree to contracts containing arbitration clauses without fully understanding the consequence of such acceptance. The problem is exacerbated in a digital marketplace where consent is often obtained at the click of a button. Prevailing practices of contracting in the context of digital platforms often denude consent of its meaning, rendering it as an empty construct. Such practices are not only normatively futile, but also positively harmful. The intervention of the courts and regulators is limited to voluntariness and disclosure requirements. Such a narrow view fails to account for the context and the systemically unjust background conditions in which individual acts of consent take place. [38]

4.2.4 Party Autonomy must thus begin even before the parties sign the arbitration agreement, by enforcing the requirement of informed consent, where parties are aware of the approximate expenses, costs and timelines that are likely to be involved in

[38] Consent as a Free Pass: Platform Power and the Limits of the Consent as a Free Pass: Platform Power and the Limits of the Informational Turn - Elettra Bietti, 40 Pace L. Rev. 310 (2020) DOI: https://doi.org/10.58948/2331-3528.2013;

an arbitration. Also, there is a need to be provided with an opt-out mechanism and an option to choose other modes of resolution such as mediation or other means of settlement.

4.2.5 Informed consent assumes greater significance in cases of arbitrations involving Governments and PSUs because their budget is publicly funded and is subject to advance financial budget allocation and legislative scrutiny.

4.2.6 Arbitration agreements should clearly spell out the likely expenditure, arbitrator fees, venue, process and timelines etc., and parties should give their informed consent. This will give an opportunity to parties to weigh other less expensive modes of dispute settlements like mediation, etc.

4.3 INSTITUTIONAL ARBITRATION AS A PREFERRED MODEL FOR HIGH VALUE CLAIMS

4.3.1 When compared to ad hoc arbitration, institutional arbitration offers several benefits without compromising on party autonomy. These include: **(i)** clarity of procedure and time periods; **(ii)** model arbitration clauses; **(iii)** administrative and infrastructural support; **(iv)** specialised panels of arbitrators and streamlined procedures for appointment; **(v)** a framework for challenging arbitrators; **(vi)** a demarcated and well-established costs regime and cost calculators; **(vii)** procedural mechanisms such as joinder, consolidation, emergency arbitration, expedited procedure, early dismissal; and **(viii)** scrutiny of awards, etc.

4.3.2 As arbitral institutions in India grow increasingly sophisticated and myths surrounding institutional arbitration[39] are steadily dispelled, parties and counsel must seek to resolve their disputes through institutional mechanisms. Doing so will not only improve the quality of arbitration but also ensure awards that are more likely to be enforced on account of institutional oversight.

4.3.3 Arbitral institutions should invest in technology and infrastructure facilities, like acoustically treated hearing rooms, seamless high-definition video connectivity, virtual hearing managers, evidence presentation operators, e-bundling support, e-hearing suite for remote connection, exclusive state-of-the-art waiting lounges for arbitrators and fully updated digital libraries, etc.

4.3.4 Arbitral institutions should periodically take cognizance of

[39] Myths surrounding institutional arbitration include high costs, rigid internal processes, lack of party autonomy, etc.

the best practices in arbitration by publishing pamphlets and also update their websites like leading arbitral institutions like ICC etc. In this context, it is worth referring to the ICC Commission on Arbitration document entitled "Techniques for Controlling Time and Cost in Arbitration"[40], The IBA Rules on the Taking of Evidence in International Arbitration[41] and the Indian Arbitration Forum Guidelines for conduct of Arbitrations Version 2.0 February 2020.

4.3.5 Other features of arbitral institutions which will greatly help the arbitral ecosystem have also been captured by the High-Power Committee Report headed by Justice Srikrishna. Transparency in the administrative process and decisions of these arbitral institutions would instil considerable confidence in the parties to the arbitration. Extensive case management provisions will also assist in expediting the effective disposal of arbitral proceedings. In addition to the conduct of arbitration proceedings physically, virtually as well as in hybrid mode when necessary, it would also be necessary for such institutions to have adequate technology for inter alia recording evidence and hearing matters. Adequate technology necessarily encompasses sufficient technology to ensure data protection and cyber security.

4.3.6 The Government should provide incentives for creation of arbitral institutions of excellence, which can rival forigen institutions currently occupying the international arbitration market. Law firms, trade associations and the Bar should encourage and contribute to creation of such arbitral institutions. There must be a concentrated endeavour to ensure easy access to these institutions by users in any part of India including non-urban towns. In its 246th Report, the Law Commission also recommended that in order to further encourage and establish the culture of institutional arbitration in India, it is important for trade bodies and commerce chambers to start new arbitration centres with their own rules. These centres, it suggested, could be modelled on the rules of the more established centres.

4.3.7 With excellent information technology infrastructure and competent human resources available arbitral institutions can make a foray into the global markets to service international commercial arbitration for developing countries.

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[40] ICC Commission on Arbitration, Techniques for Controlling Time and Costs in Arbitration (ICC2007) ;https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-commission- report-on-techniques-for-controlling-time-and-costs-in-arbitration/

[41] Adopted by a resolution of the IBA Council 17 December 2020; https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b

4.4 TECHNO LEGAL UTILITIES AS DRIVERS OF CHANGE

4.4.1 The emergence and use of various technological services via digital platforms for arbitral proceedings facilitates in a cost-effective and time bound completion of the proceedings. As a result, there is an emerging class of techno-legal service providers specializing in this arena.

The proposed amendment to section 6A provides an indicative list of techno-legal services that provide the necessary technological infrastructure such as secure online platforms for efficient document sharing, management and collaboration for the conduct of arbitration proceedings; technology support for transcription/recordings and for virtual court rooms; communication tools; depository of records; cybersecurity, etc.

4.4.2 There are many advantages in adopting the latest technological advancements in arbitrations. By way of an example, the time taken by lawyers for manual search and referencing to documents and material evidence during hearings can be cut down to a large extent by utilizing the facility of document automation. The time saved translates to reduction of costs, since manually locating and referencing a document consumes a lot of time, which is factored into the cost of engaging legal experts. [42] The techniques of machine learning, big data and predictive analytics are steadily making inroads into the discipline of law. Some have argued that the legal profession historically has been reluctant to embrace new technologies because the hours reduced on account of automation implies reduction in billing revenue. [43]

4.4.3 The emergence oftechnological advancements can play a crucial role in analysing document sets and summarization or extraction of key provisions of documents. Further, the use of Blockchain technology for document sharing renders it virtually impossible to change or falsify a document as no single person or authority is in control of the document. [44]

4.4.4 A spillover effect of the development of techno-legal utilities can be observed in the emergence of start-up companies providing such techno-legal services. As the adoption of these utilities for arbitral proceedings increases, the sector will attract considerable investments. According to the London

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[42] Richard Susskind -Tomorrows Lawyers-An Introduction to Your Future (OUP) Kindle 3rd Edition p 65;

[43] See, e.g., William G. Ross, The Ethics of Hourly Billing by Attorneys, 44 RUTGERS L. REV. 1, 30 (1991)

[44] Susskind ibid p 72;

Financial Times report, Law-Tech companies have tapped billions of dollars in venture capital investment and the sector is poised for fast growth.[45] Governments across the globe are taking up active interest in law-technology start-ups. For example, "the Law Technology UK" is a government-funded initiative by the Government of the United Kingdom that promotes greater intake of technology in legal process. Similarly, the Future Law Innovation Program "**FLIP**" is an initiative by the Singapore Government for incubation and acceleration of law-tech start-ups.

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4.4.5 A proactive policy approach towards the growth of law-tech startups will ensure that arbitral institutions and ad hoc arbitrations can avail such services with relative ease from service providers at competitive prices, as opposed to investing into such utilities from the institution's own financial resources.

4.4.6 Techno legal utilities will facilitate migration of ad hoc arbitrations to the institutional arbitrations in the long run.

4.5 ARBITRATORS AND DUE PROCESS PARANOIA

4.5.1 Though the provisions of the Code of Civil Procedure and Evidence Act do not apply to arbitral proceedings under the Arbitration Act, arbitrators often tend to follow them in conducting the proceedings. This results in arbitral proceedings becoming a replica of a civil suit and not a mode of alternative dispute resolution. Arbitrators prefer to err on the side of caution by adopting due process requirements due to the abuse of due process rights by parties which resort to dilatory or guerilla tactics. The methods by which such abuse takes place involve advancing of numerous or late procedural applications or raising due process objections which threaten the arbitral tribunal with a likely annulment of its award in the event of non-compliance. Such tactics force the arbitrators to adopt the formal procedure followed in the trial of suits to ensure due process, leading to significant delays and costs that follow from prolonged proceedings and interlocutory interventions.

4.5.2 This phenomenon is increasingly attracting attention.[46] In the 2015 Queen Mary International Arbitration Survey"[47] one of the many interesting findings was the apparent growing

[45] Susskind ibid p123;

[46] K P Berger, J O Jensen, Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators, Arbitration International, Volume 32, Issue 3, September 2016, Pages 415–435.

[47] https://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/ Due Process Paranoia - Remy Gerbay (Hughes Hubbard LLP)/June 6, 2016 /]

concern of some users of arbitration with what can be termed "due process paranoia" which has been defined as -*"a perceived reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully".*

4.5.3 However, Courts have always shown deference to the arbitrator's discretion in arbitral proceedings. Recently the Supreme Court of Singapore has clearly explained the legal position regarding the arbitrator's dilemma in following strict procedural rules in the case of ***China Machine New Energy Corporation v Jaguar Energy Guatemala LLC and another.***[48] The Singapore Court of Appeal expressed concern at the cynical misuse of due process and natural justice complaints in the context of arbitration proceedings. In order to address this issue and to reduce the opportunity for abuse, the Court of Appeal provided guidance on the balance to be struck between genuine due process concerns and the tribunal's legitimate duty to ensure a prompt and efficient resolution of the dispute at hand.[49] It worth recalling the observations of the Court.

4.5.4 The Court at para 104 observed as follows:

"104 The foregoing discussion of the applicable principles may be summarised as follows:

(a) *The parties' right to be heard in arbitral proceedings finds expression in Art 18 of the Model Law, which provides that each party shall have a "full opportunity" of presenting its case. An award obtained in proceedings conducted in breach of Art 18 is susceptible to annulment under Art 34(2)(a)(ii) of the Model Law and/or s 24(b) of the IAA.*

(b) *The Art 18 right to a "full opportunity" of presenting one's case is not an unlimited one. It is impliedly limited by considerations of reasonableness and fairness.*

(c) *What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.*

(d) *In undertaking this exercise, the court must put itself in the shoes of the tribunal. This means that: (i) the tribunal's*

[48] [2020] SGCA 12; Civil Appeal No 94 of 2018 28 February 2020;

[49] https://www.globalarbitrationnews.com/2020/06/18/due-process-paranoia-in-international-arbitration- singapore-court-of-appeal-provides-useful-guidance-to-tribunals/

decisions can only be assessed by reference to what was known to the tribunal at the time, and it follows from this that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time; and (ii) the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently."[50]

4.5.5 The Malaysian High Court has also endorsed arbitrator discretion when writing reasons in arbitration awards. In ***Allianz General Insurance Company Malaysia Berhad v Virginia Surety Company Labuan Branch***, (Originating Summons No. WA-24NCC(ARB)-13-03/2018), the Court dismissed an application to set aside a majority arbitration award under Section 37 of the Malaysian Arbitration Act 2005 (**MAA**) for alleged breaches of natural justice predicated on the drafting of the arbitrators' reasoning.[51]

4.5.6 To deal with this problem of arbitrators resorting to Code of Civil Procedure and the Evidence Act formalities, Justice Srikrishna Committee Report recommended that a Model Rules of Procedure should be inserted in the Arbitration Act as a Schedule which parties can adapt with modifications. This suggestion has been given effect in the present Amendment Bill which incorporates a Model Riles of Procedure as Eighth Schedule to the Act.

4.5.7 Adoption of the Model Rules of Procedure by arbitral tribunals will go a long way in speeding up the arbitral proceedings and cut costs and delay.

4.6 SPECIALISED ARBITRATION DIVISION AND BAR

4.6.1 There is a need for specialised arbitration benches as the Indian judiciary is burdened with mounting arrears of cases and exploding dockets. According to the data from the National Judicial Data Grid, as on 17 June 2023, there were 60,88,579 cases pending before the High Courts and 4,38,46,440 cases pending before the District and Taluka Courts of India. Support from a specialised judiciary has been instrumental in the growth of arbitration and arbitral institutions in jurisdictions such as Singapore, Hong Kong and the UK. In these jurisdictions, it has been observed that the judiciary is mindful of the independence of the arbitral process while, at the same time providing support for the arbitral process where required.

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[50] Supra para 104;

[51] https://arbitrationblog.kluwerarbitration.com/2020/06/16/judicial-support-against-due-process-paranoia-in- international-arbitration/?output=pdf;

4.6.2 Dedicated benches exclusively for hearing arbitration matters must be set up in Courts across India and must consistently abide by the Act's goal of minimal judicial interference. Further, arbitration would also have to be supported by a dedicated bar comprising professionals competent to conduct such arbitration.

4.6.3 In this context it is worth recalling that the Arbitration and Conciliation (Amendment) Bill 2003 introduced in Rajya Sabha on December 2003 contained a separate Chapter on setting up of Arbitration Divisions in the High Courts. The said "CHAPTER IX A contained new sections 37A to 37E, which provided for the creation of arbitration division, jurisdiction and special procedure in the High Courts. Section 37A of the said Bill *inter alia* provided as follows :

"37A. (1) Every High Court shall, as soon as may be after the commencement of the Arbitration and Conciliation (Amendment) Act, 2003, constitute an Arbitration Division within the High Court.

(2) The Judges of the Arbitration Division shall be such of the Judges of the High Court as the Chief Justice of that High Court may, from time to time, nominate.

Explanation.—For the purposes of this sub-section, "Judges" shall include Judges appointed under article 224A of the Constitution.

(3) Without prejudice to the provisions of section 37F, the Arbitration Division shall consist of one or more Division Benches of the High Court, as may be constituted by the Chief Justice of the High Court and such Bench or Benches shall dispose of every application, appeal or proceeding allocated to it."

4.6.4 However, the said Bill was not enacted into law so the proposal was not given effect. Establishment of separate Arbitration Division in every High Court may be difficult due to financial constraints. Though section 10 of the Commercial Courts Act, 2015 confers limited jurisdiction in respect of arbitration matters it is not an exclusive court and arbitration cases are clubbed with other commercial cases and do not get any priority in disposal.

4.6.5 In view thereof it would ideal if a separate Arbitration Division is created if not in every High Court or at least in select High Courts and the Government may earmark separate funds for creation of a exclusive Arbitration Division in select High Courts having heavy pendency of arbitration cases. Judges could periodically be appointed under article 224A to

clear the backlogs on priority basis. It may be worth revisiting the documentedproposals for speedy disposal of arbitration cases. This will address the problem of delay in arbitration cases.

4.6.6 In this context the Committee feels the Government should consider utilising the services of retired Judges of the High Court who are willing to work till health permits solely to man these Arbitration Divisions.

4.7 EMPIRICAL RESEARCH AND A VIABLE ECOSYSTEM - PRELUDE TO LAW REFORM

4.7.1 Attempts to reform Arbitration Act are handicapped by lack of empirical data on the functioning of the Act and impact analysis upon the users. Two pre- requisites for effective law reform are: (a) study of the impact and effectiveness of the Acts of legislatures in operation and the study of empirical data on the impact of judicial decisions;[52] and (b) a rich ecosystem accompanying the legislation. The first requisite necessitates law-in-action studies and empirical research for collection of data, whereas the second requisite necessitates a machinery to monitor the progress of law. However, the need for studying the effectiveness of Acts of legislatures is yet to be realised.

4.7.2 Advances in digital technology make the collection of data easy. This is due to the availability of computer resources, data storage, applications through cloud and mobile technology etc., which have led to tremendous growth in digital data. Through internet-searches, social networking platforms, various other channels and methods, raw data is, in most instances, freely available or is purchasable from data aggregators, intermediaries or from selected operators either in consideration for money or in consideration for some type of service.

4.7.3 Big data invites lawyers to make a fundamental change in their approach to law itself by looking to statistical patterns, predictors, and correlations, in addition to the legal rules that purportedly control outcomes – case law, statutory law, procedural rules, and administrative regulations.[53] New

[52] Professor Upendra Baxi, "Who Bothers About the Supreme Court-The Problem of Impact 24 Journal Of the Indian Law Institute p 854;

[53] Dru Stevenson and Nicholas J. Wagoner- Bargaining in the Shadow of Big Data, 67 Fla. L. Rev. 1337 (2016) p 19; http://scholarship.law.ufl.edu/flr/vol67/iss4?utm_source=scholarship.law.ufl.edu%2Fflr%2Fvol67%2Fiss4%2F 1&utm_medium=PDF&utm_campaign=PDFCoverPages

techniques combined with traditional statistics and computer science make it increasingly feasible to test and analyse large sets of data. These techniques and algorithms developed by statisticians and computer scientists have the potential to provide a wealth of useful information if we can develop ways to extract it.[54] In this context datafication can provide Big Data to Government to measure the impact and shortcomings of the working of Acts of Parliaments instead of depending on anecdotal evidence and on that basis undertake law reform.

4.7.4 Datafication refers to transforming words into data, and it not merely the digitisation of information from analog to digital medium. Datafication of a phenomenon is to put it in a quantified format so that it may be tabulated and analysed.[55] To capture quantifiable information, we need to know how to measure and how to record what we measure. This requires the right set of tools and also necessitates a desire to quantify and to record. There exists a large amount of legal literature available on methods of data collection, scaling techniques in socio-legal research, analysis of aggregate data and interpretation of data which facilitates measuring the impact of law and legislation.[56]

As is the case with medical statistics, judicial statistics[57] by use of data analytics is emerging as a separate discipline, bolstered by advances in information processing tools, which can provide great impetus to law reform. For example, data analytics can be used to determine the costs, risks, and ultimate outcome of arbitration proceedings.[58]

4.7.5 This will give rise to the need for a new breed of legal data experts since with the growing significance in law of *machine*

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[54] Dru Stevenson and Nicholas J. Wagoner, ibid p 20;.

[55] Mayer-Schönberger, Viktor; Cukier, Kenneth. Big Data: A Revolution That Will Transform How We Live, Work, and Think (p. 78). Houghton Mifflin Harcourt. Kindle Edition.

[56] Gangrade, K. D. "Methods of Data Collection: Questionnaire and Schedule." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 713–722. JSTOR, www.jstor.org/stable/43950835. Accessed 20 June 2021.; Ghosh, B.N. "Scaling Techniques in Socio-legal Research." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 739–750. JSTOR, www.jstor.org/stable/43950838. Accessed 20 June 2021; Shukla, K. S. "Analysis of Aggregate Data." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 756–762. JSTOR, www.jstor.org/stable/43950840. Accessed 20 June 2021; Raj, Hans. "Interpretation of Data." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 763–771. JSTOR, www.jstor.org/stable/43950841. Accessed 20 June 2021; Agrawala, Rajkumari. "Experiments of a Law Teacher in Empirical Research." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 863–874. JSTOR, www.jstor.org/stable/43950846. Accessed 20 June 2021; Ghosh, B. N. "Collection and Analysis of Data." Journal of the Indian Law Institute, vol. 24, no. 4, 1982, pp. 785– 836. JSTOR, www.jstor.org/stable/43950843. Accessed 20 June 2021.

[57] Thiel, Orin S. "Judicial Statistics." *The Annals of the American Academy of Political and Social Science*, vol. 328, 1960, pp. 94–104. *JSTOR*, www.jstor.org/stable/1032725. Accessed 20 June 2021.

[58] Benjamin Davies, *Arbitral Analytics: How Moneyball Based Litigation/Judicial Analytics Can Be Used to Predict Arbitration Claims and Outcomes*, 22 Pepp. Disp. Resol. L.J. 321 (2022) p 7; Available at: https://digitalcommons.pepperdine.edu/drlj/vol22/iss2/2; Kevin D. Ashley, *Artificial Intelligence and Legal Analytics- New Tools for Law Practice in the Digital Age*,, Cambridge University Press);

*learning and predictive analytic*s, there will be a corresponding need for data experts who are masters of tools and techniques that are required to capture, analyse and manipulate great quantities of information. The legal data scientists will seek to identify and correlate trends, patterns and insights both in legal areas and in non-legal materials.[59]

4.7.6 The Insolvency and Bankruptcy Code, 2016 ("**IBC**") has shown the way by providing for a rich ecosystem which facilitates the measuring of IBC's effectiveness on a real-time basis by all stakeholders.

4.7.7 Until the 2019 amendment, the Arbitration Act, lacked such an ecosystem. The Arbitration Council entrusted with statutory functions to supplement the working of the to the Arbitration Act has been established. The Arbitration Council should take a proactive role in collecting data about pending arbitrations, timelines taken for conclusion, delays in enforcement of awards etc., so as to enable the Government to receive feedback and respond appropriately.

4.7.8 The Committee also recommends that there be a periodic and institutionalised, data- driven review of the Arbitration and Conciliation Act, 1996 and its amendments (including the amendments suggested along with this report). Ad hoc or multiple revisions of this important statute are to be avoided. Yet, it is imperative to recognise that a responsive and dynamic approach to law making is critical to build and maintain an internationally acclaimed arbitral ecosystem.

4.8 STAMP ACT AND UNIFORM E-STAMPING PROCESS

4.8.1 In India, there is a dearth of uniformity and standardisation for e-stamping processes. At present, 30 States/Union Territories have adopted the Stamp Act while the remaining 6 States/ Union Territories have their own Stamp Acts. Recently, in *Splendor Landbase Ltd v. Aparna Ashram Society & Anr.*,[60] the Hon'ble High Court of Delhi provided an elaborate procedure and modalities for dealing with an unstamped agreement in arbitral proceedings. Further, relying on the Hon'ble Supreme Court's judgment in *New Central Jute Mills Co. Ltd. v. State of W.B.*,[61] the Hon'ble High Court held that an agreement needs to be stamped in accordance with the laws of the state in which it is executed.

4.8.2 The Committee feels that E-stamping is the need of the hour. There is a need for uniformity in the process of e-

[59] Susskund ibid p197;
[60] SCC OnLine Del 5148.
[61] AIR 1963 SC 1307.

stamping and improving technology to ensure that e-stamping can be done with a few clicks. Although several states and union territories have implemented the digital e-stamping process by either amending the applicable Stamp Acts/rules, or by issuing necessary orders, there is no uniformity in the same, thus creating issues of compliance in dispute resolution processes.

4.8.3 While the Committee has suggested amendments to the Act to ensure that concerns regarding stamping of agreements do not create obstacles to the arbitration process, such amendments alone will not solve the problem. A holistic approach of bringing about amendments to the Stamp Act is crucial to further facilitate EODB in India.

4.8.4 Recently, the Government in its cabinet note circulated to various ministries reportedly[62] stated that "*in order to enable digital e-Stamping, it is desirable to clearly provide in the Act for e-Stamps, for a digital process for payment and acquisition of e-Stamp and for its affixation on a digital instrument*". Further, it was stated that "… *to ensure a more robust basis for digital e-stamping in the country, the Indian Stamp Act, 1899, is required to be amended by introducing necessary amendments to certain definitions in the Act*".

4.8.5 The Government is already deliberating on bringing about the requisite amendments in the Stamp Act. However, to elevate EODB in India, it is imperative that the Government takes prompt steps to expedite the process of effecting these amendments. These amendments will bring in uniformity in the process of e stamping and have a direct impact on dispute resolution processes including arbitration.

4.8.6 Therefore, while the necessary statutory amendments to resolve stamping issues in the arbitration landscape have already been recommended in the present Bill, holistically, a proper resolution of the issue demands that the proposed amendments to the Stamp Act are brought to fruition.

4.9 NEED FOR A SEPARATE ACT FOR DOMESTIC ARBITRATION AND INTERNATIONAL COMMERCIAL ARBITRATION

4.9.1 Apparently when the UNCITRAL Model Law was adopted in 1996 the option of having two different legal framework for purely domestic and international commercial arbitrations

[62] 'India proposes changes to Indian Stamp Act to include options relating to e-Stamping' by The Hindu Businessline, accessible at https://www.thehindubusinessline.com/news/india-proposes-changes-to-indian- stamp-act-to-include-options-relating-to-e-stamping/article67053714.ece

was considered, as was followed in certain jurisdictions such as South Africa and the U.K. However, at the time, it was decided to have a single law governing both international commercial arbitrations as well as for domestic arbitrations.

4.9.2 While it would have been ideal to have adopted the UNCITRAL Model Law specifically for international commercial arbitrations and leave the domestic arbitrations to be governed by a separate legislation based on the experience derived from the Arbitration & Conciliation Act, 1940 which was in force at the time, amendments were made to the 1996 Act to make the provisions of the new Arbitration Act suitable for domestic arbitrations as well.

4.9.3 However, as per the suggestions and recommendations received from stakeholders, it is understood that stakeholders think it would be advisable that India has a distinct law for international commercial arbitration which could be a mere adoption of the UNCITRAL Model Law without much modification. Should this be followed through, then arbitral institutions should also adopt the UNCITRAL Rules of Arbitration.

4.9.4 Reasons –

(i) First, an international arbitration law based on the UNCITRAL Model Law 1985, as modified by subsequent changes introduced in 2006, would cater to the request of the international business community at large, leading to increase in the level of confidence that would encourage them to arbitrate in India.

(ii) Second, there are many features associated with international arbitrations that are quite distinct and different from purely domestic arbitrations.

4.9.5 However, the Committee is of the opinion that at present it is not necessary to enact a separate law for international commercial arbitrations and the present 1996 Act can be further amended to incorporate the changes in the UNCITRAL Model Law introduced in 2006, as suggested by Shri A.K Ganguly, Sr Advocate after due consultation with all the stakeholders.

4.9.6 The Committee is nevertheless of the opinion that in the longer term a separate law for domestic arbitration is necessary which can be finalised after consultation with all stakeholders.

4.9.7 Reasons for separate Arbitration Act for domestic users –

- The UNCITRAL Model Law is based mainly on the

experience of western countries where arbitrations are conducted under the auspices of arbitral institutions. Thus, doctrines of competence-competence which empower arbitrators to decide allegations against themselves are based on the western practice where an internal review system is in place to deal with bias of individual arbitrators in India. When the 1996 Arbitration Act was introduced, we did not have arbitral institutions to suggest the new dispensation. Sole Arbitrators deciding allegations of bias against themselves has not been well received and has led to endless litigations, clogging the Court dockets.

- Further, "party autonomy" in purely domestic arbitrations is often compromised in practice actual practice comes into play. An unwary party who has signed a contract containing an arbitration clause is told the bear the cost of arbitration, including arbitrator's fees. In this regard, it is necessary to mandate by law, a standard form contract in appropriate cases that should seek informed consent from the parties for accepting the arbitration clause. The parties should be aware of the costs and timeline involved before signing the contract and should also have the option to opt for mediation rather than arbitration.

4.9.8 Also, given the varied forms of domestic arbitrations and awards, as a matter of policy greater supervision by the Courts is required.

4.9.9 A separate domestic law will be necessary to address India specific concerns.

4.10 A SEPARATE LEGAL FRAMEWORK FOR INVESTOR STATE DISPUTE SETTLEMENT

4.10.1 The Delhi High Court has repeatedly held that arbitral awards arising from Bilateral Investment Treaties ("BIT") are not "commercial" within the meaning of section 44 of the Arbitration Act, thereby negating the applicability of the Arbitration Act to the enforcement of BIT arbitral awards. India not being a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), parties cannot directly enforce a BIT arbitral award in India. Hence, BIT arbitrations require a special legal framework to strike a balance between investor protection and national interests.

4.10.2 Principles which govern commercial arbitration may not fit into BIT legal framework and therefore requires to be addressed through a special enactment. In particular, the

question of ***Third Party Funding (TPF) /Litigation Funding Arrangement (LFA)*** in BIT arbitrations raises important questions affecting national interests.

4.10.3 Another important feature of Investor-state arbitration is need for transparency. In recent years, the trend is to respond to the demand for transparency. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [63] provides inter alia that at the commencement of arbitral proceeding, publication of the following documents which shall be made available to the public namely, the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and above all hearings for the presentation of evidence or for oral argument shall be public.

4.10.4 However, where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private such part of the hearing that which requires confidentiality. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate.)

4.10.5 In 2022, ICSID amended its arbitration rules and introduced a chapter dedicated to transparency. The key change, Rule 62, now provides that 'awards, supplementary decisions on an award, and rectification, interpretation, and revision of an award, and decisions on annulment' are to be published automatically unless a party objects in writing within 60 days. This is the opposite of the previous position, which required all parties to give consent for the publication of awards and decisions. In addition, Rules 63 and 64 provide for default publication of procedural orders, party submissions and supporting documents. New Rule 65 also includes a presumption that hearings will be open to the public, unless a party objects.[64]

4.10.6 The Arbitration Act was amended in 2021 to deal with awards procured by corrupt means. Viewed in this context, if TPF/LFA in BIT arbitrations is recognised under the present law, it may facilitate the assignment of awards won by corrupt means by the successful party to the third-party

[63] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf

[64] https://www.freshfields.com/493257/globalassets/noindex/international-arbitration-top-trends-2023.pdf

funders. This will result in successful parties walking away with their ill-gotten gains, leaving the [65] government to engage in litigation against third-party funders.

4.10.7 Another important factor which requires the attention of the Government is that in most BIT arbitrations, the pool arbitrators are drawn from developed countries and advised by foreign law firms controlling what has been referred to as the "Invisible College" of the global international arbitration community. The lack of diversity undermines the legitimacy of the ISDS regime. As observed by UNCITRAL Working Group III on (Investor-State Dispute Settlement Reform) appropriate diversity, such as geographical, gender and linguistic diversity as well as equitable representation of the different legal systems and cultures would be of essence in the ISDS system which is currently lacking in the present ISDS set up.[66]

4.10.8 ICSID, which has jurisdiction over cases arising under certain commercial contracts, national investment law, and investment treaties, publishes a biannual summary of ICSID tribunals and ad hoc committees. By the end of 2013, there were 459 registered cases. ICSID provides information by region and country. ICSID arbitrators, conciliators, and ad hoc committee members came from seventy-seven different states; forty-nine percent were European nationals, twenty-two percent were from North America, thirteen percent were from Central or South America, ten percent were from Asia or the Pacific, and six percent were from Africa or the Middle East.25 The most frequently appointed nationalities were the United States (163 appointments), France (155), the United Kingdom (133), Canada (97), Switzerland (93), Spain (52), and Australia (50).26 Waibel and Wu also identified the dominance of developed country arbitrators at ICSID. Specifically, for the 341 ICSID arbitrators sitting between 1978 and 2011, they identified sixty-six percent of ICSID arbitrators as nationals of OECD states.[67]

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[65] *International Law as a Profession* , J. D'Aspremont, T. Gazzini, A. Nollkaemper, & W. Werner (Eds.) Chapter 12 .Professionals of International justice -From the Shadow of State Diplomacy to the Pull of the Market For Commercial Arbitration; Cambridge University Press (2017);

[66] Susan D. Franck et al., International Arbitration: Demographics, Precision and Justice, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA Congress Series No. 18, at 33–122; Susan D. Franck, et al The Diversity Challenge: Exploring the "Invisible College" of International Arbitration, 53 Colum. J. Transnat'l L. 429 (2015).

[67] ibid

4.10.9 In investment treaty arbitration (ITA), scholars have begun identifying arbitrator demographics. A study of 102 ITA arbitration awards rendered before 2007 identified a pool of 145 ITA arbitrators: of that group, 75% were from OECD states and 3.5% percent were women. Expanded research from 252 ITA awards rendered by January 2012 identified a pool of 247 different arbitrators wherein 80.6% were from OECD states and 3.6% were women. Given repeated appointments of certain female arbitrators, at least one woman was present in 18.3% of the ITA awards. Tribunals exclusively containing men constituted the majority (81.7%) of awards. Other research replicates the general lack of female arbitrators in ITA, 3and Rubins and Sinclair suggested in 2006 that, "data supports the view that ICSID belongs primarily to gentlemen.[68]

4.10.10 Despite having a good pool of arbitrators in our country, none of these names appear to figure as arbitrators in BIT arbitrations. Foreign law firms aggressively lobby for a select few arbitrators drawn mainly from developed countries who dominate the investment arbitration sector. As a result, India is heavily dependent on foreign law firms to contest BIT arbitrations, which is a huge cost on the country. These deficiencies need to be addressed urgently and the Government should take steps to promote our arbitrators and law firms in foreign seated arbitrations.

4.10.11 BITs were popular during the 90s when nations signed a multitude of BIT with varying provisions giving effect to what has been termed as the "Noodle Bowl effect" with different countries to attract foreign investment. However, after a massive wave of investor claims raised in the late 1990s, the climate changed. Certain major criticisms levelled against in investment treaty arbitration are as follows:[69]

(a) The closed nature of the world of investment treaty arbitrations – excessive specialisation that creates a narrow field which is removed both from commercial arbitration and from public international law;

(b) An alleged lack of democratic accountability and lack of sensitivity to allegations of corruption;

(c) Lack of diversity, e.g. the dominance of male arbitrators from developed countries and the lack of

[68] Ibid

[69] Why Europe Should Reconsider its Anti-arbitration Policy in Investment Disputes- Alan Uzelac Prof. Dr., Full Professor of Law, Head of Department for Civil Procedure, Faculty of Law, University of Zagreb;https://ajee-journal.com/upload/attaches/att_1551341965.pdf;

female arbitrators;

(d) Insufficient space for balancing the regulatory policies of the state against the interests of the private investors;

(e) Built-in bias in favour of investors, often connected with problems regarding the impartiality of arbitrators who appear in the role of counsel in other arbitrations (double-hatting) or other forms of conflicts of interest;

(f) Absence of transparency and appeal options; no uniform case law;

(g) Lack of symmetry in procedure, forum shopping and possible parallel proceedings;

4.10.12 The anti-ISDS wave has resulted from a backlash against investment arbitration in western jurisdictions particularly in the EU and US. It became a controversial issue during the beginning of negotiations in the EU-US trade agreement in the TTIP negotiations, which started in July 2013 when many European politicians and NGOs moved against inclusion of ISDS in the treaty and in the next stage of negotiations, the draft text of the TTIP proposed by the EU excluded ISDS provisions and included provisions on a special, hybrid body for investor-state dispute resolution – a standing investment tribunal that would be established under the treaty once it came into effect.

4.10.13 Similarly in the EU trade agreement with Canada, CETA (Comprehensive Economic and Trade Agreement), the policy of moving away from arbitration materialised in its dispute resolution provisions, which are based on a new investment court system. This system, according to official announcements, enshrines the right of governments to regulate in the public interest, but also introduces a system which is public, professional, and transparent.

4.10.14 In its Concept Paper of 5 May 2015 on 'Investment in TTIP – the path beyond[70], the Commission also indicated that work should start on setting up a multilateral system for resolving international investment disputes. This work would be carried out in parallel to the reform process undertaken in bilateral EU negotiations.

[70] https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en

4.10.15 The salient features of the Multilateral Investment Court are as follows. The Court would:

(i) have a first instance tribunal;
(ii) have an appeal tribunal;
(iii) have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards, and a dedicated secretariat;
(iv) be a permanent body;
(v) work transparently;
(vi) rule on disputes arising under future and existing investment treaties;
(vii) only apply where an investment treaty already explicitly allows an investor to bring a dispute against a state;
(viii) would not create new possibilities for an investor to bring a dispute against a state;
(ix) prevent disputing parties from choosing which judges rule on their case;
(x) provide for effective enforcement of its decisions; and
(xi) be open to all interested countries to join.

4.10.16 In the EU, the overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes. It would build on the EU's groundbreaking approach to its bilateral FTAs and be a major departure from the system of investor-to-state dispute settlement (ISDS) based on ad hoc commercial arbitration. For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreement.

4.10.17 In the American continent the rejection of ISDS has already been confirmed in the agreement that will replace NAFTA and its Chapter 11 ISDS mechanism. Under the USMCA28 the US investors in Canada and Canadian investors in the United States will only find recourse in national courts.

4.10.18 Apart from the developments in treaty negotiations the decision of the Court of Justice of the European Union (CJEU) issued on 6th March 2018, in a case initiated by the highest German court, the Federal Court of Justice (BGH), which had submitted a request for a preliminary ruling in proceedings between the Slovak Republic and the Dutch company Achmea BV[71] had added momentum to this anti ISDS wave. The CJEU overruled its Advocate General and found that the arbitral provision from the Dutch-Slovak BIT (Art 8) has an adverse effect on the autonomy of EU law since the only bodies authorised to interpret EU law are

[71] https://curia.europa.eu/juris/document/document.jsf;jsessionid=A02C4F06951C7BD8D1A91D968AD65635?text=&docid=194583&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2791563;

EU bodies (and the Luxembourg Court itself) and that the arbitral clauses contained in the 'intra-EU BITs' (bilateral treaties for protection of investments concluded between two EU Member States) are 'not applicable' (unanwendbar), thereby leading to the same consequences as if the arbitral agreement was inexistent or invalid.

4.10.19 This judgment addressed the compatibility of the bilateral investment treaty concluded between the Netherlands and the Slovak Republic with European Union (EU) law. The ECJ ultimately held that the treaty's dispute settlement provisions infringe EU law. Although the ECJ only addressed this particular bilateral investment treaty, the judgment is widely considered to be a landmark decision with far-reaching implications.[72]

4.10.20 The decision sparked a debate amongst scholars, politicians and practitioners as to the impact of the judgment, focussing in particular on whether Achmea puts an End to (intra-EU) Investor-state dispute settlement (ISDS) as a whole.

4.10.21 Currently UNCITRAL Working Group III on (Investor-State Dispute Settlement Reform) is deliberating on the possible reform of investor-State dispute settlement (ISDS) and pertinent elements of selected permanent international courts and tribunals.[73] Working Group III of UNCITRAL at its thirty-sixth session, the concluded that the development of reforms was desirable to address concerns related to the lack or apparent lack of independence and impartiality of decision makers in ISDS (A/CN.9/964, para. 83); the question of the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules (A/CN.9/964, para. 90); the lack of appropriate diversity among decision makers in ISDS (A/CN.9/964, para. 98); and the mechanisms for constituting ISDS tribunals (A/CN.9/964, para. 108).

4.10.22 Recent trends indicate that countries are inclined to shift away from the ISDS system currently followed for settling investment disputes which provide for the appointment of arbitrators on a case-by-case basis by the investor and the State involved in the dispute towards a Multilateral Investment Court system in which, on the

[72] Janssen, Andre & Wahnschaffe, Christian. (2020). For Whom the Bell Tolls: Any Hope Left for Investment Arbitration After Achmea?. 10.1007/978-3-030-42974-4_12; See Pinna, Andrea. (2018). The Incompatibility of Intra-EU BITs with European Union Law, Annotation Following ECJ, 6 March 2018, Case 284/16, Slovak Republic v Achmea BV, Paris Journal of International Arbitration, Cahiers de l'arbitrage, 2018(1) pp. 73-95;

[73] https://uncitral.un.org/en/multilateralpermanentinvestmentcourt

contrary, the courts' members (subject to strict independence and impartiality requirements) would be appointed in advance by a joint committee of the States party to the treaty. The decisions of such court would be subject to appeal before an appellate body.[74]

4.10.23 While drafting a separate law for BIT Arbitrations the Committee feels that the Government may explore the possibility of setting up an Investment Court to settle investment disputes which is gaining currency in international practice. With GIFT city holding the promise of becoming a hub of international commercial arbitration, setting up an International Investment Court in GIFT city could be a big leap forward in making India a hub of International arbitration.

4.10.24 The Committee also feels that it is necessary to take note of the current wave of anti-BIT sentiment against incorporating arbitration clauses in trade treaty negotiations which has come to the fore in the recent past in the EU and US and opting for a permanent standing body viz an Investment Court.

4.10.25 These matters require further examination, and the Committee recommends that a decision on the new law on investor state disputes may be taken after deliberations at the highest level in Government.

4.11 ARBITRATION IN SEZs / GIFT CITIES

4.11.1 A new form of arbitration has developed in Special Economic Zones in other countries known as "free-zone arbitration". [75] Free-zone arbitration, being managed by zone-specific institutions, is distinct from onshore arbitration.[76] It also follows zone-specific arbitration rules. The formation of foreign arbitral institutions in the zones and the variety of ways to arbitrate in the zones are the two characteristics that make free-zone arbitration unique.[77]

4.11.2 Special Economic Zones ("**SEZs**") are areas with special privileges established by a particular country to attract

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[74] https://jusmundi.com/en/document/publication/en-investment-court-system

[75] Gordon Blanke, 'Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM: (Part I)', 35 Journal of International Arbitration 541 (2018).

[76] Jie (Jeanne) Huang, 'Recent Developments of Institutional Arbitration in China: Specialization, Digitalization and Internationalization', in Julien Chaisse and Jiaxiang Hu (eds), International Economic Law and the Challenges of the Free Zones (Kluwer, 2019).

[77] Georgios Dimitropoulos, International Commercial Courts in the 'Modern Law of Nature': Adjudicatory Unilateralism in Special Economic Zones, *Journal of International Economic Law*, Volume 24, Issue 2, June 2021, Pages 361–379, accessible at: https://doi.org/10.1093/jiel/jgab017

foreign investment into the country and boost trade.[78] SEZs form separate jurisdictions within the countries in which they are present. SEZs themselves have investor-friendly policies that invite cross-border trade. Traditionally, these zones have separate rules for dispute resolution within the zone.

Viewed in this context, and with a view to promote India as a hub of international arbitration, the Special Economic Zones Act 2005 may be suitability examined.

4.11.3 To understand the position under Indian law, it is necessary to examine the provisions of the Special Economic Zones Act 2005. A Special Economic Zone (SEZ) is a specifically delineated duty-free enclave and is deemed to be foreign territory for the purposes of trade operations and duties and tariffs. In order words, SEZ is a geographical region that has economic laws different from a country's typical economic laws. Usually the goal is to increase foreign investments. The Act provides for setting up of international financial Service centers in SEZ Zones which are regulated by a separate legal regime. The following provisions of the Special Economic Zones Act, 2005, which provide for setting up of International Financial Centers in SEZ are worth recalling.

4.11.4 Section 18 of the SEZ Act provides for setting up of an International Financial Centre in each SEZ which satisfies the conditions prescribed by the Central Government. The section provides as follows:

> ***"Setting up of International Financial Services Centre***
>
> *18.(1) The Central Government may approve the setting up of an International Financial Services Centre in a Special Economic Zone and prescribe the requirements for setting up and operation of such Centre :*
>
> *Provided that the Central Government shall approve only one International Financial Services Centre in a Special Economic Zone.*
>
> *(2) The Central Government may, subject to such guidelines as may be framed by the Reserve Bank, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority and such other concerned authorities, as it deems fit, prescribe the requirements for setting up and the*

[78] P. Pakdeenurit, N. Suthikarnnarunai, and W. Rattanawong, 'Special Economic Zone: Facts, Roles, and Opportunities of Investment'. Proceedings of the International MultiConference of Engineers and Computer Scienctists, 2014 Vol II, IMECS.

terms and conditions of the operation of Units in an International Financial Services Centre."

4.11.5 Section 49 of the SEZ Act empowers the Central Government by notification,

a) to modify provisions of the Special Economic Zones Act 2005;

b) or other enactments in relation to Special Economic Zones to the effect that such enactment s shall not apply or apply subject to such modifications as may be specified in the said notification.

4.11.6 Section 53 of the SEZ Act provides that a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations. Subsection (2) of the said section provides that a Special Economic Zone shall, with effect from such date as the Central Government may notify, be deemed to be a port, airport, inland container depot, land station and land customs stations, as the case may be, under Section 7 of the Customs Act, 1962.

4.11.7 Section 56 of the SEZ Act amends the Banking Regulation Act, 1949 the Insurance Act, 1938 to exempt the off shore banking companies and Insurance companies operating in SEZ area from the provisions of the said Acts.

4.11.8 Limiting the applicability of other enactments in SEZ areas, and introducing a special arbitration regime in such areas could be explored. Designatedarbitral institutions could be the seat of the arbitration unless specified otherwise by the parties. This seat would be distinct from an Indian seat, which in turn is governed by the provisions of the prevailing Arbitration and Conciliation Act, 1996. The Government could also consider having specialized arbitration courts designated under the SEZ Act, which will have limited supervisory jurisdiction over arbitrations conducted by the arbitral institutions in the SEZ areas, and to execute orders and awards rendered by them.

4.11.9 With sufficient financial incentives to arbitral institutions, it will also be a good idea to promote such arbitral institutions as a neutral seat for foreign arbitrations, where neither party is Indian. This would benefit Indian lawyers and arbitrators, and also provide employment, in addition to benefiting the arbitral institutions. Further, international arbitrators and lawyers can also fly in and fly out, as permitted under law.

4.11.10 Provisions of robust arbitral institutions that cater to disputes in the SEZ area, would also greatly improve the confidence of foreign investors and this would in turn promote business. Further, a package of incentives to set up a state- of-the-art arbitral institution in an SEZ area will also facilitate the institution's functioning itself. This will not only reduce the institutional fees but also be consistent with administrative assistance in terms of Section 6 of the Arbitration and Conciliation Act, 1996.

4.11.11 The Dubai International Financial Centre ("**DIFC**"), an SEZ in the Gulf region has an extensive arbitration ecosystem. Parties may choose the DIFC as their seat of arbitration which will be governed by the DIFC Arbitration Law.[79] Further, the Arbitration Institute has been given a separate legal identity, making it functionally and financially independent from the DIFC Courts and the DIFC.[80]

4.11.12 In India, the Gujarat International Finance Tec ("**GIFT**") City was set up in 2008, with a vision of creating a world class finance zone to provide services globally.

4.11.13 It would therefore be beneficial in promoting the setting up of arbitral institutions and resolving dispute through arbitration in GIFT City. The Hon'ble Finance Minister, while presenting the 2022-2023 Union Budget, announced the setting up of an International Arbitration Centre in GIFT City.[81] Its creation would ensure swift case resolution and prevent frivilous appeals.

4.11.14 For such arbitrations, it is also necessary for foreign arbitrators to receive visas and reference letters from the concerned arbitral institutions promptly. Foreign lawyers hesitate to come to India to participate in arbitration as the process of issuance of visas is time-consuming. [82] Singapore, to expedite the arbitration process, does not impose visa requirements for non-resident arbitrators. It is sufficient for them to have a short-term Visit Pass, issued at the immigration checkpoint and valid for a maximum duration of 60 days.[83] The provision of arbitration and mediation services is designated as a Work Pass Exempt

[79] DIFC Law No. 1 of 2008 (Arbitration Law)
[80] Article 8 (Third: Arbitration Institute) (2) and (3) of Dubai Law No. (9) of 2004.
[81] 'International Arbitration Centre to be set-up in GIFT city', SCC Blog, (April 5, 2022) https://www.scconline.com/blog/post/2022/04/05/international-arbitration-centre-to-be-set-up-in-gift-city/
[82] Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), accessible at: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf
[83] *Id.*

Activity.[84] Additionally, Singapore also offers tax breaks and incentives on increased revenue from legal services, as well as tax exemptions for non-resident arbitrators.

4.11.15 Therefore, to ensure that international lawyers and arbitrators have easy access to the country, the government may take into consideration a speedy visa facilitation system and/or a specific category of multiple-entry visas. This, coupled with the creation of an arbitration ecosystem in SEZs such as the GIFT City, will further contribute to improving the arbitration infrastructure in India.

4.11.16 To capitalise on the advantages under the SEZ Act, the Committee recommends arbitral institutions should set up facilities in SEZs to cater to global markets.

4.12 ODR SERVICE PROVIDERS

4.12.1 The Digital Revolution has given birth to e-commerce, and is also challenging the traditional methods of resolving disputes through intervention of courts or arbitrations conducted in-person. Arbitrations and judicial hearings are also gradually adapting themselves to conduct proceedings virtually.

4.12.2 The emerging global electronic marketplace, where producers, intermediaries and consumers interact electronically, and enter into legal relations, ~~the resultant internet economy~~ presents substantial challenges as well as opportunities for speedy dispute resolution settlement.

4.12.3 As e-commerce progresses and more businesses migrate to the cyberspace, disputes are bound to occur. However, since cyberspace is an environment characterised by inter-connection and dematerialisation, it is only logical that such disputes should be resolved virtually. ~~such as online arbitration~~.

4.12.4 These developments have led to the emergence of a new breed of service providers, who provide Online Dispute Resolution (ODR) in the market, giving rise to demand for statutory recognition for ODR Services.

4.12.5 For instance, in the United Kingdom, low value civil claims can be resolved through online dispute resolution. While ODR has been recognised in the United Kingdom and other

[84] 'Eligible activities for a work pass exemption', Ministry of Manpower, Singapore Government, available at accessible at: http://www.mom.gov.sg/passes-and-permits/work-pass-exempt-activities/eligible-activities.

jurisdictions, the Committee is of the view that we should at present wait for and evaluate the effect of migration of arbitrations to virtual mode. One must also learn from the experience of Online Mediation which has been granted statutory recognition under the recently enacted Mediation Act, 2023. This is necessary to provide a separate legal frame work to address the legal issues involved in the ODR process.

4.13 USE OF ARTIFICIAL INTELLIGENCE IN ARBITRATIONS

4.13.1 Artificial Intelligence (AI) technologies, especially machine learning and natural language processing, are already impacting and gaining traction within the legal sector. With the development of technology in recent years, AI is changing the way lawyers think, conduct business, and interact with clients.[85]

4.13.2 While the international arbitration community has been open to adopting technological innovations, the adoption of artificial intelligence ("**AI**") continues to lag behind other technological tools in arbitration. As noted in the 2021 International Arbitration Survey, 35% of the respondent groups stated that they had 'never' used AI, while 24% stated that they had used AI rarely. Only 15% declared that they used AI 'frequently' or 'always'.[86]

4.13.3 AI`s utility lies in its ability to streamline administrative tasks, while freeing up arbitrators and lawyers to focus on the parts of the process that require the greatest amounts of human judgment: assessing the facts, constructing arguments and deliberating to determine outcomes.[87] AI in arbitration can help in the management of massive amounts of documentation due to an ever-growing demand for speed and efficiency. AI can make the arbitral process swifter and more efficient and could be increasingly used for handling and reviewing documents, especially during discovery,. Another field where AI's use is highly recommended is speech recognition, where AI can successfully identify different accents and languages, and voices of particular individuals with precision. This may help in: (i) transcription – AI would record the hearing via

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85 http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession

86 2021 International Arbitration Survey at Pg. 21, accessible at https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey- 2021_19_WEB.pdf.

87 The Future of International Arbitration May Not Be AI Megan Turchi; https://thinksetmag.com/insights/ia-future-ai

microphones and provide a real-time transcript with speaker identification; (ii) translation - AI can translate thousands of documents in seconds with very high accuracy, including scanned, hand-written or annotated documents; and (iii) interpretation – parties may need to present witnesses, requiring assistance of interpreters.

4.13.4 Use of AI in law, especially in judicial and arbitral proceedings, has generated a lot of academic literature on the subject. Scholars have not been able to come to any agreement on its potentially substituting it for human intelligence,[88] or replace human arbitrators.[89] AI can also be deployed in the appointment of arbitrators by analysing arbitrators' views in similar disputes and issues in the past, their manner of conducting arbitral proceedings, their emotive capabilities, behavioural patterns and general likes and dislikes in the arbitral process.

4.13.5 Some US judges have issued standing orders while trying to grapple with this problem, requiring disclosure if AI has been used in drafting pleadings and certification that their accuracy has been verified (see orders issued in and by Texas and Pennsylvanian courts). Other US courts have issued requiring disclosure of the tool and manner of use of AI in legal research and in drafting any documents for filing. Canadian courts have also issued general practice directions requiring disclosure of the use of AI, and the manner of its use in any drafting or legal research.

4.13.6 In US and Canadian courts, case management powers have so far been sufficient to regulate and sanction lawyers' use of AI. However, such regulation does not seem to have affected arbitration practice yet. There is no soft law on the use of AI, and the one is not aware of any procedural orders dealing with AI. The US/Canadian court orders and practice directions are very wide, requiring disclosure of all uses of AI in research or court filing.[90]

4.13.7 It is certain that in the future, AI will create highly supportive systems which will remove bottlenecks in the dispute resolution frameworks. However, over-reliance on AI systems would be detrimental, as it may adversely affect

[88] Daniel Ben-Ari, Yael Frish, Adam Lazovski, Uriel Eldan, & Dov Greenbaum, "Danger, Will Robinson"? Artificial Intelligence in the Practice of Law: An Analysis and Proof of Concept Experiment, 23 Rich. J.L. & Tech. 3 (2017), http://jolt.richmond.edu/index.php/volume23_issue2_greenbaum/

[89] Gizem Kasap, Can Artificial Intelligence ("AI") Replace Human Arbitrators? Technological Concerns and Legal Implications, 2021 J. DISP. RESOL. 209, 237–40 (2021).

[90] https://www.ciarb.org/news/the-use-of-ai-in-international-arbitration-thoughts-from-the-coalface/

access to justice. Further, it is important to regulate the use of AI to ensure that arbitration remains an effective remedy. While AI is a tool for ensuring effectiveness and efficiency in arbitration, it cannot be allowed to replace human arbitrators and counsel.

4.13.8 The U.S *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* issued by the President ~~Joe Biden~~ requires Artificial Intelligence (AI) developers to share safety results with the US Government. It has also created the United States AI Safety Institute: inside NIST which will operationalize NIST's AI Risk Management Framework by creating guidelines, tools, benchmarks, and best practices for evaluating and mitigating dangerous capabilities and conducting evaluations including red-teaming to identify and mitigate AI risk.[91]

4.13.9 The U.K convened an international AI safety summit, which was attended by leaders from 27 governments around the world, as well as the heads of top artificial intelligence companies. The world's first AI Safety Summit "Bletchley Declaration" on AI, was signed by 28 countries, including the U.S., U.K., China, and India, as well as the European Union.[92]

4.13.10 Since the subject matter is evolving at a rapid pace, Governments across the world are setting up Committees to study the likely impact of AI on various areas of Governance and decision making including in the judicial process. The Committee is of the view that India may await further developments in this regard.

4.14 DIVERSITY IN ARBITRAL APPOINTMENTS AND GENDER DIVERSITY

4.14.1 The lack of diversity, including gender diversity, amongst international arbitrators has been a persistent issue in international arbitration. However, arbitral institutions have spearheaded significant improvement on the aspect of gender diversity in recent years. For example, of the 179 arbitrators appointed by SIAC in 2021, 64 (or 35.8%) were female.[93] Further, according to the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and

[91] https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe- secure-and-trustworthy-development-and-use-of-artificial-intelligence

[92] https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley- declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023

[93] SIAC Annual Report 2021 at Pg. 24, accessible at https://siac.org.sg/wp-content/uploads/2022/06/SIAC- AR2021-FinalFA.pdf.

Proceedings Report 2022, at least a quarter of all appointments by arbitral institutions between 2015 to 2020 have been women, increasing from 24.9% in 2015 to 37.9% in 2021.[94]

4.14.2 However, as confirmed by the 2021 International Arbitration Survey, less than a third of participants believe there has been progress in respect of geographic, age, cultural and, particularly, ethnic diversity. Over half of the participants (56%) stated that diversity across an arbitral tribunal has a positive effect on their perception of the arbitrators' independence and impartiality. Lastly, 59% of participants emphasised the role of appointing authorities and arbitral institutions in promoting diversity, including through the adoption of express policies of suggesting and appointing diverse candidates as arbitrators.

4.14.3 To empower women in public life, Government has enacted the Constitution (One Hundred and Eighth Amendment) Act, 2023 to provide for reservation of seats to women in Parliament and state legislatures. Logically, it follows that even in other spheres of public space, women should be given due representation. Hon'ble Chief Justice of India Dr Justice DY. Chandrachud, at the UNCITRAL seminar in New Delhi, stated that it is imperative that steps are taken to improve gender diversity amongst arbitrators.

4.14.4 The Committee notes the role of Arbitral Women,[95] an international non-governmental organisation which has existed informally since 1993, actively since 2000, and officially as a non-profit organization since 2005 which is working for advancing the interests women in Arbitration practice and in the alternative dispute resolution (ADR) in appointment of arbitrators and raise awareness about the role of women and diversity in arbitration.

4.14.5 The Committee also notes that aCross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings was established in 2019 by 17 international arbitral institutions, law firms and diversity initiatives. It aimed at gathering statistics and making recommendations, to promote and improve diversity in the international arbitration community. On 20 September 2022, it launched the 2022 Update of its Report on Gender Diversity in Arbitral Appointments and Proceedings at the International

[94] Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings Report 2022 by International Council For Commercial Arbitration at Pg. 6, accessible at https://cdn.arbitration-icca.org/s3fs- public/document/media_document/ICCA-Report-8u2-electronic3.pdf.
[95] https://www.arbitralwomen.org/aw-outline/

Council for Commercial Arbitration ("**ICCA**") in Edinburgh.

4.14.6 There is greater awareness on the lack of gender diversity in International arbitrations, and there is strong case for striving to enhance the number of women in arbitrations. Therefore, the Committee strongly recommends that arbitral Institutions must strive to empanel and appoint significantly more women arbitrators to arbitral panels.

4.15 TRAINING FOR ARBITRATORS

4.15.1 Many stakeholders perceive the poor quality of some domestic arbitrators, and the lack of professionalism amongst certain arbitrators as a key problem affecting the growth of arbitration in India. This results in Indian parties preferring foreign seated arbitration.

4.15.2 It is imperative for lawyers and arbitrators to constantly keep themselves abreast of the legal and technical developments across the globe. This is particularly in light of rapid globalisation.

4.15.3 Arbitral institutions could organise online seminar and workshops to familiarise potential arbitrators about the latest developments in arbitration. In addition, arbitral institutions should subscribe to online digital libraries with access to international arbitration reports which should be made available to arbitrators.

4.16 ARBITRATION AND JURISCONSULTS

4.16.1 Development of any branch of jurisprudence depends upon the the law laid down by courts. Both the conclusions and the reasoning provided by the courts, are relevant.

4.16.2 According to Maitland, the foundation for the Common law of England was laid down by the first published records of Bracton`s Notebook: A collection of cases decided in the King's Court[96] and his Pipe Rolls which contained reports of decided cases.

4.16.3 Publication of summaries of arbitral awards, particularly highlighting the legal principles involved in them (while maintaining confidentiality) would enable greater transparency in the arbitral process. It will also open the reasoning adopted by arbitrators to scrutiny by a larger

[96] 1887, Maitland ed., v.1, v.2, v.3/

audience. This is likely to ensure uniformity and consistency in arbitral awards.

4.16.4 This will also help parties have greater knowledge about the arbitrators' previous awards, enable them to know more about their approach to procedural and substantive issues, and have a clear picture of their availability to take on new cases.[97]

4.16.5 In this context, it is worth emulating the private initiative undertaken by the website - ***www.swissarbitrationdecisions.com*** operated jointly by Dr. Charles Poncet and Dr. Despina Mavromati. The site features 337 translations of the opinions of the Swiss Supreme Court (Federal Tribunal) in international arbitration since 2008. The originals are in French, German or Italian. Readers may download and use the translations as they wish at no charge. Moreover, the parties identities are masked and confidentiality is assured. This initiative was taken as a service to the international arbitration community.

4.16.6 Arbitral institutions should take the lead from this website and publish awards while ensuring that confidentiality of the parties is maintained. By doing so, on the one hand the parties are assured of confidentiality, while the reasoning adduced by the arbitrators to reach the conclusion is made available to younger generation of lawyers who lack the means of tapping the wisdom of senior legal practitioners.

4.16.7 Many arbitrators are eminent judges of the Supreme Court and various High Courts who have devoted their entire lifetime to law. Denial of such wisdom to future generations will be an injustice to the future lawyers. Roman Law was product of Jurisconsults who were private lawyers of eminence, whose opinions even Roman courts accepted as binding. Publication and citation of the reasoning in arbitral awards will be a small but significant step forward for development of arbitration jurisprudence in our country.

END OF THE REPORT

[97] https://arbitration.qmul.ac.uk/research/2018/