Comments on the

DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024

Circulated by the Dept. of Legal Affairs via Press Release dated 18. 10. 2024

Drafted by:

ALTERNATIVE DISPUTE RESOLUTION BOARD (ADR BOARD) 2024-25

STUDENT INITIATIVE FOR PROMOTION OF LEGAL AWARENESS (SIPLA)

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Website: https://www.adrboardnlsiu.com/

Email: adrboard@nls.ac.in

To,

The Minister for Law & Justice,
Dept. of Legal Affairs,
4th Floor, A-Wing, Shastri Bhawan
New Delhi-110 001

Subject: Comments on the Draft Arbitration and Conciliation (Amendment) Bill, 2024 the students of the National Law School of India University, Bangalore.

Respected Ma'am/ Sir,

We write on behalf of the students of the National Law School of India University, Bangalore (NLSIU). We are writing to the Dept. of Legal Affairs with our recommendations on the Draft Arbitration and Conciliation (Amendment) Bill, 2024.

The ADR Board of NLSIU is committed to train young law students in the practice of various ADR mechanisms. In keeping with our mandate, we along with another student committee named Student Initiative for Promotion of Legal Awareness, constituted a research team which extensively studied and researched on the Draft Arbitration and Conciliation (Amendment) Bill, 2024. We do believe that with our participation in the legal community, it makes us important stakeholders of the Draft.

Purposively, we have collated our thoughts on the same in the form of these recommendations and comments on the Draft Bill – from a neutral, non-partisan perspective.

The following comments have been compiled by a research panel constituted by the Alternative Dispute Resolution Board (ADR Board) and Student Initiative for Promotion of Legal Awareness (SIPLA). We hope that our comments will add value to the consultation process, and help the ministers present a more robust Draft Bill to table before the Parliament.

Yours Sincerely,
Abhyudaya Singh and Aakarsh Bafna,
Co-Convenors, ADR Board 2024-25, NLSIU

Section 2(2) Proviso

The proviso to Section 2(2) provides that Section 9A(2) would apply to foreign-seated arbitrations automatically, unless there is an agreement to the contrary. However, this is under-inclusive and therefore results in a lacuna. Section 9A, by virtue of Section 9A(3), vests in the award the power to be enforced as if it were an order of the arbitral tribunal under Section 17(2). However, by only qualifying Section 9A(2) under Section 2(2), the enforceability of a foreign-seated emergency arbitrator's award is called into question, and seemingly cannot be enforced under Section 9A(3).

Despite the proposed amendment, parties would still have to approach the Court under Section 9 to give effect to the award of a foreign-seated emergency arbitrator, as Section 17 is not available to foreign-seated arbitration.

The solution would be to amend the proviso Section 2(2) to read "*Provided that subject to an agreement to the contrary, the provisions of section 9, ~~sub-section (2) of~~ section 9A, section 27 and clause …*".

Section 9A

To cement the applicability of Section 9A to foreign-seated emergency arbitrator orders, Section 9A(3) should be altered to read *"(3) Any order passed by an emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under sub-section (2) of section 17 of the Act, irrespective of whether the arbitration is seated in India or outside India.*"

This provision plays an instrumental role in codifying the concept of emergency arbitrations, as has been recognised by the Supreme Court in *Amazon NV Investment Holdings* and proposed by the 246th Law Commission Report and the Srikrishna Report. The amendment is thus a welcome move. However, a crucial lacuna in this regard is that the Bill fails to mention a specific timeline for the conduct of emergency arbitration proceedings, thereby raising concerns over its promptness and efficacy.

For instance, the Swedish Chamber of Commerce Rules at Appendix II, Rule 4, mandate an appointment of an emergency arbitrator within 24 hours of the application and grant him discretion to conduct the proceedings expeditiously. Moreover, the latest draft of the SIAC Rules propose that the emergency arbitrator dispose of the application in 10 (ten days). It is to be noted that India is still at a nascent stage with respect to institutional arbitrations. Therefore, a streamlined timeline and procedure for the appointment of an emergency arbitrator

best serve the object the provision initially set out to achieve. It will also guide arbitral institutions on arriving at suitable timelines for various aspects in their Rules.

Another issue to be considered is a principled one - When an emergency arbitration can be carried out? While clause (1) to section 9A mentions that it can be carried out for the grant of interim measures u/s 9 before the arbitral tribunal is constituted, Article 29 of the ICC Rules says that: "*A party that needs* ***urgent interim or conservatory measures*** *that* ***cannot await*** *the constitution of an arbitral tribunal…*" may apply for such an appointment. The language of section 9A(1) should thus suggest that such arbitrations are permissible only when the *urgency* of the interim measures is such that it cannot await the constitution of an arbitral tribunal.

Section 9

The substitution of *"before the commencement of arbitral proceedings"* instead of *"before or during arbitral proceedings"* in sub-section (1) of section 9 excludes the court's power to grant interim relief during the process of arbitration. This is problematic because parties often need urgent relief during proceedings when circumstances change. In any case, sub-section (3) of section 9, which has been omitted in the proposed amendments, limited the court's power to grant interim relief after post constitution of the arbitral tribunal to circumstances when relief under section 17 proved ineffective.

Admittedly, the Supreme Court had explained that Section 9 gives the court power to pass interim orders during the arbitration proceedings because orders passed by the arbitral tribunal under section 17 cannot be enforced as orders of a court (*Sundaram Finance Ltd v NEPC India*). That is no longer the case because the 2015 Amendment to section 17 made orders passed by the arbitral tribunal enforceable as orders of the court.

However, section 17 is not available to foreign-seated arbitrations. The Supreme Court has held that the choice of a foreign law or a foreign seat cannot be conclusive evidence of the parties' intention to exclude the applicability of section 9 of the Act to their foreign-seated arbitration (*Shanghai Electric Co Ltd v Reliance Infrastructure Ltd*). Moreover, article 9 of the UNCITRAL Model Law on International Commercial Arbitration reads *"it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."*

The suggestion would be to retain the current phrasing of sub-sections (1) and (3) of section 9.

Section 11

Sub-sections (3A), (14) of section 11 and section 11A stipulate that in arbitrations other than institutional arbitration, the payment to the arbitral tribunal will be in the manner specified by the arbitration council defined under section 43A, thereby obviating the fourth schedule. This is a welcome move because the council being an expert body is given greater control and because there was great ambiguity regarding the interpretation of the fourth schedule (*Oil and Natural Gas Corporation Ltd v Afcons Gunanusa JV*). However, the statute should also lay down the manner of specifying payment guidelines by the council. It could otherwise lead to issues involving lack of transparency and predictability. Moreover, the ambiguity surrounding the current payment structure provided in the fourth schedule will persist.

Section 17(da)

Addition of S. 17(da) gives the arbitral tribunal power to confirm, modify or vacate interim measures granted by the court under S. 9 or S. 9A.

While the High Court can vacate and modify its interim orders (High Court Bar Association, Allahabad v State of UP), and arbitral tribunals have been recently held capable of modifying the terms of their past interim orders (Airports Authority of India (Kolkata Airport) v TDI International India), there has been no clarity on whether arbitral tribunals can vacate the orders granted by supervisory courts.

S. 9(2) only provides that the arbitral proceedings shall be commenced within 90 days from the date of such order, and is silent on the status of an interim order of the court once arbitration commences. However, in line with the pro-arbitration approach of courts in India, High Courts have held interim orders under S. 9 to be subject to modification and vacation by Arbitral Tribunals once constituted (Virtuous Retail v Mantri Developers 2021 SCC OnLine Bom 3206; Monojit Das v. Sujit Roychowdhury, 2017 SCC OnLine Cal 16309). The addition of S. 17(da) confirms a position often taken by courts, and codifies the same in unambiguous terms.

Section 31(1)

The current amendment lacks clarity on when an arbitral award must be stamped, leading to enforcement issues and delays. This ambiguity in timing has allowed courts to interpret it differently: in *M. Anasuya Devi v. Manik Reddy*, the Supreme Court held that the need for stamping could wait until enforcement, while in *Rajasthan Builder v. Union of India*, the Delhi High Court required that the award be stamped based on the awarded amount at the time it was issued. This lack of consistency has led to confusion and delays, particularly when unstamped awards are brought for enforcement and require impounding. Specifying that an award must be stamped at the time of issuance would align with Section 17 of the Indian Stamp Act, which expects that

an instrument be stamped at or before execution. Such a clarification would reduce disputes about stamp duty compliance, prevent impoundment delays, and bring predictability to enforcement, making the process smoother for all parties involved.

Section 31(2A)

The amendment does not postulate the remedy/penalty for not complying with its requirements.

Section 32(4)

The introduction of subsection (4) regarding the return of arbitration records undoubtedly reflects well-intentioned objectives; however, it raises several practical concerns and introduces potential ambiguities that may hinder its effective implementation. Foremost among these concerns is the ambiguity surrounding the term "records of the arbitration." The phrase lacks specificity, potentially leading to disputes over the scope of materials that must be returned. Arbitration records can include a broad array of documents, such as submissions, evidence, interim orders, and correspondence, which creates uncertainty about what exactly needs to be returned. To mitigate this issue, it would be prudent to explicitly define the term "records of the arbitration" within the provision. For example, it could specify that these records include "documents and evidence submitted, interim orders, the final award, and any other materials deemed part of the official arbitration record." Such a definition would provide much-needed clarity, preventing misinterpretation and facilitating smoother enforcement.

Another notable issue within subsection (4) concerns the responsibility for and timing of the record-return process. Currently, the provision lacks a specific timeline for the return of records and fails to assign responsibility for the logistics of the return process. This omission risks creating unnecessary delays and ambiguity, especially where multiple parties or institutions are involved. To address this, a practical amendment would be to add a clause requiring that records be returned within a specific period—suggesting, for instance, "within 30 days of the termination of proceedings."

Section 34, 34A

In both Sections 34 and 34A, the bill introduces the notion of appellate arbitral tribunals. In the past, the SC has already upheld the validity of appellate arbitration clauses. However, by the introduction of appellate arbitral award within set aside provisions, the role of such appellate tribunals has become unclear.

First, there is still no clarity regarding when an arbitral award attains finality when there is an appellate mechanism. This is because in arbitral rules of some institutions, they have identified that the award with an appellate mechanism only becomes final post a challenge before an appellate tribunal, or post the completion of the limitation period of such challenge. However, the current amendment has not shed light on either of these aspects. When an appellate mechanism has been identified, it is important to have clarity on when an arbitral award is final. This determination will be needed to understand the different limitation periods, and the status of the initial arbitral award in law. It is suggested that a similar mechanism as seen in many institutional rules should be adopted, and a section under Section 34A should clarify that an award made under an appellate mechanism through an institution, will only attain finality post challenge under the appellate mechanism, or the limitation period for the same ending.

Second, the introduction of the appellate process, seems to misconstrue the generally accepted reasons behind having an appellate arbitral process. Generally, parties want a mechanism where either there is substantive review of merits, or where there is minor correction or modification of the already existing award. Rarely, do appellate mechanisms in arbitration lead to complete annulment of the award. The role of the review mechanism is very different from the construction that is seen in the amended Section 34. Here, the emphasis seems to be on annulment decision, which is not as such based on a review of merits, which is explicit in the section itself. This situation gets even more complicated when considering the scope of the Proviso under Section 34(1). The proviso seems to imply that as soon as there is an appellate mechanism, no application for set aside will be valid in court. However, this fails to account for the fact that as already stated, most appellate mechanisms intend to be a review on merits, and not annulment. Further, in many agreements with appellate mechanisms, there is already a demarcation of the scope of the appellate review process, which may not include within it annulment under the law of the seat. Due to this, there may be legal ambiguity regarding the maintainability of a Section 34 application when there is such an agreement in place.

Third, and adding to the second point, it may not be suitable for an appellate mechanism to replace the jurisdiction of the annulment court. Most provisions within the Arbitration Act for annulment, are on the basis of specific legal grounds based on domestic law requirements. When considering provisions such as “patent illegality” and “public policy of India”, there may be differing interpretations of these provisions in Indian

courts and by an appellate tribunal. Further, with the proviso in Section 34, it will be unclear whether Indian courts will even have the jurisdiction to interfere with an interpretation of "patent illegality" which they consider incorrect, considering that now under Section 34(1) an application for set aside cannot be made post a determination by the appellate mechanism.

In conclusion, the entire appellate mechanism as suggested by the bill, seems to misconstrue the role of the appellate mechanism within most arbitration clauses. Parties who enter into arbitration agreements aim to ensure there is a review on merits when they incorporate such clauses. Further, it may not be ideal to completely replace the judicial control over annulment decisions.

The SC has in M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd. upheld appellate arbitral mechanisms. As already stated, the amendment here seems to misconstrue the entire ambit of appellate mechanisms within arbitration agreements. Appellate mechanisms within arbitration clauses are better suited to ensure substantive review on merits. Another important function of appellate mechanisms is that when there are minor corrections, typically parties have to get their awards modified. The SC judgment in NHAI v M Hakeem, makes it clear that courts do not have power to modify awards, and only the SC has power under Article 142 to make some modifications. Appellate mechanisms can serve as better tools to make such modifications. Even though the bill does not explicitly restrict the role of appellate arbitral tribunal, by introducing these tribunals within the annulment provisions, there is no indication as to whether tribunals can have power outside annulment decisions too. It may be better to formulate some provisions which give greater indication as to the role these appellate tribunals have.
Consequently, the following recommendations may be incorporated.

Recommendation 1 - There should be a provision covering the scope of appellate tribunals including when the award attains finality, what is the scope of powers under the appellate mechanism. A concrete definition may serve better to indicate the same.

Recommendation 2 - While it may be suitable for some parties to replace annulment decisions of courts with appellate mechanisms, the bill does wrong to assume the same being true for all parties incorporating appellate mechanisms within their agreement. Consequently, the proviso that states "*Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section, no application for setting aside an arbitral award shall lie before the Court.*" should be replaced with "*Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section and waive their right to*

seek annulment before a domestic court, no application for setting aside an arbitral award shall lie before the Court." This allows parties to waive their right to annulment review by domestic courts. However, this waiver should be explicit, ensuring that parties actually consented to the appellate mechanism completely replacing the jurisdiction of annulment courts.

Recommendation 2 (Alternate) - While some civil law jurisdictions like Switzerland, Belgium and Sweden allow for waiver of jurisdiction of annulment courts, other jurisdictions based on common law, like the USA, refuse to reduce the power of annulment courts. There needs to be greater analysis of what role is more suitable for India, considering there may be a need to retain the power of national courts, especially considering the wide scope of review under Section 34, and there being provisions such as "patent illegality" and "public policy of India". Therefore, before even allowing waivers, these aspects need to be discussed through more stakeholder consultation.

Section 37(1A)

The 60-day appeal limit in sub-section (1A) seeks to expedite the process, but the unrestricted right to appeal to the Supreme Court in sub-section (3) could lead to prolonged litigation, undermining finality in arbitration. This discrepancy may create ambiguity, as some courts could apply the 60-day limit broadly, while others might treat Supreme Court appeals as unrestricted. Clarification would help maintain consistent practices and support the amendment's goal of timely dispute resolution.

Section 43-M

The bill empowers the council to maintain a depository of all arbitration cases using unique identification numbers. The existence of a depository with sanitized awards will be pivotal in furthering legal research especially pertaining to technical aspects of specific industries and the application of general principles of law to such disputes.

However, the act does not clarify the contents of the depository thus leading to a lot of ambiguity on this front. Another pertinent concern that arises from this setup is the potential violation of Section 42A (Confidentiality) as existing in the current act. As per Section 42A, the arbitrator, the arbitral institution and the parties to the

arbitration agreement are mandated to maintain confidentiality of all arbitral proceedings, notwithstanding any other law. The only exception to this is where the disclosure of the award is required for the purposes of enforcement. The same also leads us to raise broader questions on the rigid framework given under the impugned provision.

There is no gainsaying that arbitration's confidentiality is an essential element in determining the suitability of a seat of arbitration. It is essential that a regime for safeguarding confidentiality must include a robust list of exceptions coupled with guarantees that disclosures, if any, are only done to the extent necessary. Blanket confidentiality is certain to be a hindrance in the arbitral process as well as in the taking of evidence by courts. Once confidentiality has been breached, not much can be done, irrespective of whether the cause of disclosure was legitimate or not. It is therefore necessary to have the exceptions coupled with mechanisms of disclosures set out in law.

The only exception envisaged by the provision is for the enforcement of awards. Arbitration practice however reveals that disclosures may also be required for other purposes such as solicitation of third-party Funders, disclosure by an arbitrator (as seen in Haliburton v. Chubb), in public interest, interests of justice and protection of legitimate interests of the parties. All major arbitration hubs such as the United Kingdom, Singapore, Hong Kong and Australia have such well founded exceptions either in their statute or their common law jurisprudence. Notably, even the Justice B.N. Srikrishna Committee in its report had also recommended keeping "disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority" as exceptions. This suggestion, however, was not incorporated by the legislature.

Final Recommendation - The Act should also stipulate the contents of the depository and create an exception for it in Section 42A. The committee should also consider adding more exceptions to Section 42A enabling proper disclosure, solicitation of third party funders, revelation in the interests of justice or if there is a legal duty.

Recommendations not covered in the Bill

- Define the term reference given u/s 7(5) of the Act [Aditya]

To begin with, in the landmark judgment of *M.R. Engineers & Contractors v Som Datt Builders Ltd*, the court stated the need for a conscious acceptance of the arbitration clause which is synonymous with the intention of the parties. To broadly illustrate it laid down different types of possible references. Firstly, if the main contract

explicitly states that all the clauses of a particular document will be a part of the contract and that document contains an arbitration clause then the arbitration will be the mode of dispute resolution. Secondly, in the absence of such explicit wordings, the context of incorporation will be analyzed. That is, if the external document has been referred specifically for particular details such as a sale template, it will be construed that the intention was not to adopt the document in its entirety and hence there has to be a special reference to the arbitration clause.

The 'intention test' assessed using the objective evidence (wordings/ construction of the referencing clause) at hand does form a sound criterion but the water starts getting muddied when the courts themselves try to gauge whether the parties would be familiar with the terms of the referenced contract. This is because the courts have used it to deny the validity of references if there is a two-part contract. What is problematic is that the courts are undertaking an absolute assumption that the opposite party will be unfamiliar and in turn waiving the 'duty to read' and also making the intention aspect virtually irrelevant by underlooking the wordings/manner used to incorporate the arbitration clause. This has also led to inconsistencies. For example, in the *M/S. Inox Wind* Case, the court used *Habas Sinai v Sometal's* ratio and *M.R. Engineers'* ratio, which stated that reference to a standard form of contracts shall be construed as a single contracts case and a general reference will be sufficient if it is the standard form of contracts of a recognized trade or professional association. The Court expanded it by ruling that even if the document referred to is a standard form of contract of only one of the parties, it should be construed as a single contract case, without really providing reasons for the same. The list at best appears to be erratic and does not offer a consistent position.

On the textual front, while the text of section 7(5) may not be decisive, it stipulates that the "*reference is such as to make that arbitration clause part of the contract*". Hence, it points towards the fact that if the reference clause denotes an intention of the parties to incorporate another document in such a manner that it covers the arbitration clause contained in it, the same should be valid. However, one way of reducing satellite litigation wherein the courts or tribunals attempt to gauge the intention of the parties, the Act should lay down a clear and blanket requirement to notify of an arbitration clause's incorporation.

Final Recommendation - We recommend that the Act should add an explanation to Section 7(5) stating "where the arbitration clause is located in a document other than the main contract, the parties should explicitly mention in the reference clause that disputes occurring shall be resolved in accordance with the arbitration clause given in the said contract".

Law applicable to arbitration agreement [Shreyas]

The position of Indian arbitration jurisprudence on the question of law governing the arbitration agreement has remained uncertain, having evolved through ambiguous and often contradictory judicial pronouncements.

A series of judgments, including *National Thermal Power Corporation v. Singer Company* (1992) 3 SCC 551, *Sumitomo Heavy Industries Ltd v. ONGC* (1998) 1 SCC 305, *Indtel Technical Services Pvt Ltd v. W.S. Atkins Rail Ltd* (2008) 10 SCC 308 have adopted the position that the law governing the contract would be applicable to the arbitration agreement as well. The rationale for the same stems from the notion that the severability of the arbitration agreement from the main contract is limited only to those cases where arbitration is to be saved even as the rest of the contract may be declared void.

On the other hand, the Courts in *Katra Holdings Ltd v. Corsair Investments Ltd*, 2018 SCC OnLine Bom 4031 and *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd*, 2014 SCC OnLine Bom 102 have adopted a seat-centric approach where the law of the seat of the arbitration will govern the arbitration agreement. The underlying rationale is that the seat of the arbitration has a real and close connection with the arbitration.

It is recommended that the 2023 Amendments present an opportunity for the Parliament to resolve this ambiguity. The UK Arbitration Bill, 2024 through its clause 1(2) has also proposed to do the same. The UK proposed amendment adopts a seat-centric approach, in the absence of an *express* agreement to the contrary. This does away with the three-pronged test which looked, in the following order, at the express agreement, implied agreement, and lastly at the real and close connection criterion. The UN Working Group drafting the UNCITRAL Model Law on International Commercial Arbitration also takes a similar position.

The rationale for the seat-centric approach in the absence of contrary agreement is to ensure that the pro-arbitration approach as also party autonomy is respected. This will permit the parties to take advantage of pro-arbitration jurisdictions, which is the general intent behind the choice of seat. Should the applicability of contractual law invalidate the arbitration agreement itself, the purpose of seat selection is rendered infructuous. To that end, it is recommended to insert following section:

"Law Applicable to Arbitration shall be:

(a) The law that the parties *expressly* agree applies to the arbitration agreement, or
(b) Where no such agreement is made, the law of the seat of the arbitration."

Draft Arbitration and Conciliation (Amendment) Bill 2024

SECTION NO.	THE ARBITRATION AND CONCILIATION ACT, 1996
1.	Short title, extent and commencement
	PART I **ARBITRATION** **CHAPTER 1** **GENERAL PROVISIONS**
2.	Definitions
3.	Receipt of written communications
4.	Waiver of right to object
5.	Extent of judicial intervention
6.	Administrative assistance
	CHAPTER 2 **ARBITRATION AGREEMENT**
7.	Arbitration agreement
8.	Power to refer parties to arbitration where there is an arbitration agreement
9.	Interim measures, etc., by Court
	CHAPTER 3 **COMPOSITION OF ARBITRAL TRIBUNAL**
10.	Number of arbitrators
11.	Appointment of arbitrators
11A.	Power of Central Government to amend Fourth Schedule
12.	Grounds for challenge
13.	Challenge procedure
14.	Failure or impossibility to act
15.	Termination of mandate and substitution of arbitrator
	CHAPTER 4 **JURISDICTION OF ARBITRAL TRIBUNALS**
16.	Competence of arbitral tribunal to rule on its jurisdiction.
17.	Interim measures ordered by arbitral tribunal
	CHAPTER 5 **CONDUCT OF ARBITRAL PROCEEDINGS**
18.	Equal treatment of parties
19.	Determination of rules of procedure
20.	Place of arbitration.

	THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024	Remarks
	A BILL	-
	further to amend the Arbitration and Conciliation Act, 1996	-
	BE it enacted by Parliament in the Seventy-Fifth Year of the Republic of India as follows:-	-
Short title, and commencement	1. (1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2024.	-
	(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.	-
Amendment of Long Title	2. In the Arbitration and Conciliation Act, 1996 (26 of 1996) (hereinafter referred to as the principal Act), in the long title, the words ―as also to define the law relating to conciliation" shall be omitted	-
Amendment of Preamble	3. In the principal Act, in the Preamble, (i) para 3 and para 4 shall be omitted. (ii) in para 5, for the words - "and Rules make", the words – "makes" shall be substituted. (iii) in para 6, for the words – "respecting arbitration and conciliation, taking into account the aforesaid Model	-

	Law and Rules", the words – "relating to arbitration, taking into account the aforesaid Model Law" shall be substituted.	

Amendment of section 1	4. In the principal Act, in section 1, sub-section (1) the words ―*and Conciliation*‖ shall be omitted.	
	5. In the principal Act, in section 2, i) in sub-section (A), For clause (a), the following clause shall be substituted – "arbitration" means any arbitration whether or not administered by Amendment of section 2 Page 3 of 72 an arbitral institution and includes arbitration conducted, wholly or partly, by use of audio-video electronic means." (B) After clause (a), the following clause shall be inserted, namely- '(aa) – "audio-video electronic means" shall include use of any communication device for video conferencing, filing of pleadings, recording of evidence, transmission of electronic communication, for the purposes of conduct of arbitral proceedings and any other matter incidental thereto, in the manner as specified by the Council under sub-section 5 of section 19;" (C) For clause (ca), the following clause shall be substituted- '(ca) – "arbitral institution" means a body or organisation that provides for conduct of arbitration proceedings under Its aegis, by an arbitral tribunal as per its own rules of procedure or as otherwise agreed by the parties;" (D) For clause (e), the following clause shall be substituted, namely- '(e) "Court" means the court as referred to in section 2A" (E) After clause (e), the clause shall be inserted, namely- '(ea) –"emergency arbitrator" means an	The proviso to Section 2(2) provides that Section 9A(2) would apply to foreign-seated arbitrations automatically, unless there is an agreement to the contrary. However, this is under-inclusive and therefore results in a lacuna. Section 9A, by virtue of Section 9A(3), vests in the award the power to be enforced as if it were an order of the arbitral tribunal under Section 17(2). However, by only qualifying Section 9A(2) under Section 2(2), the enforceability of a foreign-seated emergency arbitrator's award is called into question, and seemingly cannot be enforced under Section 9A(3). Despite the proposed amendment, parties would still have to approach the Court under Section 9 to give effect to the award of a foreign-seated emergency arbitrator, as Section 17 is not available to foreign-seated arbitration. The solution would be to amend the proviso Section 2(2) to read "*Provided that subject to an agreement to the contrary, the provisions of section 9, sub-section (2) of section 9A, section 27 and clause ...*".

	arbitrator appointed under Section 9A." (ii) For proviso to sub-section (2), the following proviso shall be substituted, namely: — "Provided that subject to an agreement to the contrary, the provisions of section 9, sub-section (2) of section 9A, section 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to an arbitration, even if the seat of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act."	
New Section 2A	6. After section 2 of the principal Act, the following-section shall be inserted, namely- "2A. (1) In case of arbitration other than international commercial arbitration, (i) where seat of arbitration has been agreed by the parties or determined by the arbitral tribunal as per Section 20, the court means the court having pecuniary and territorial jurisdiction over the seat of arbitration. (ii) in all other cases, the court means the court having pecuniary and territorial jurisdiction to decide the disputes forming the subject-matter of the arbitration if the same had been the subject matter of a suit. (2) In case of international commercial arbitration, (i) where the seat of arbitration has been agreed by the parties or determined by the arbitral tribunal as per Section 20, Court means the High Court having territorial jurisdiction over the seat. (ii) in all other cases, Court means the High Court having territorial jurisdiction to decide disputes forming the subject matter of arbitration. (3) In arbitrations which are conducted solely through audio visual electronic means, the provisions of sub-section (1) or sub-section (2), as the case may be, shall mutatis mutandis apply	
Amendment of Section 6	7. For section 6 of the principal Act, the following-section shall be substituted: 'Administrative assistance. — (1) In order to facilitate the conduct of the arbitral proceedings, the parties, or the	

	arbitral tribunal with the consent of the parties, may arrange for administrative assistance by an institution or an administrative secretary. Explanation – Institution for the purpose of this section shall include an arbitral institution.	
Amendment of Section 7	8. In section 7 of the principal Act, (i) in clause (a) of sub-section (4), after the words 'parties', the words 'including through digital signature', shall be inserted. (ii) after sub-section (5), following sub-section shall be inserted, namely- "(6) The Council shall frame model arbitration agreements, which the parties may consider, while agreeing to submit disputes to arbitration."	**Recommendations not covered in the Bill** Define the term reference given u/s 7(5) of the Act. To begin with, in the landmark judgment of *M.R. Engineers & Contractors v Som Datt Builders Ltd*, the court stated the need for a conscious acceptance of the arbitration clause which is synonymous with the intention of the parties. To broadly illustrate it laid down different types of possible references. Firstly, if the main contract explicitly states that all the clauses of a particular document will be a part of the contract and that document contains an arbitration clause then the arbitration will be the mode of dispute resolution. Secondly, in the absence of such explicit wordings, the context of incorporation will be analyzed. That is, if the external document has been referred specifically for particular details such as a sale template, it will be construed that the intention was not to adopt the document in its entirety and hence there has to be a special reference to the arbitration clause. The 'intention test' assessed using the objective evidence (wordings/ construction of the referencing clause) at hand does form a sound criterion but the water starts getting muddied when the courts themselves try to gauge whether the parties would be familiar with the terms of the referenced contract. This is because the courts have used it to deny the validity of references if there is a two-part contract. What is problematic is that the courts are undertaking an absolute

		assumption that the opposite party will be unfamiliar and in turn waiving the 'duty to read' and also making the intention aspect virtually irrelevant by underlooking the wordings/manner used to incorporate the arbitration clause. This has also led to inconsistencies. For example, in the *M/S. Inox Wind* Case, the court used *Habas Sinai v Sometal's* ratio and *M.R. Engineers'* ratio, which stated that reference to a standard form of contracts shall be construed as a single contracts case and a general reference will be sufficient if it is the standard form of contracts of a recognized trade or professional association. The Court expanded it by ruling that even if the document referred to is a standard form of contract of only one of the parties, it should be construed as a single contract case, without really providing reasons for the same. The list at best appears to be erratic and does not offer a consistent position. On the textual front, while the text of section 7(5) may not be decisive, it stipulates that the "*reference is such as to make that arbitration clause part of the contract*". Hence, it points towards the fact that if the reference clause denotes an intention of the parties to incorporate another document in such a manner that it covers the arbitration clause contained in it, the same should be valid. However, one way of reducing satellite litigation wherein the courts or tribunals attempt to gauge the intention of the parties, the Act should lay down a clear and blanket requirement to notify of an arbitration clause's incorporation. **Final Recommendation -** We recommend that the Act should add an explanation to Section 7(5) stating "where the arbitration clause is located in a document other than the main contract, the parties should explicitly mention in the reference clause that disputes

		occurring shall be resolved in accordance with the arbitration clause given in the said contract".
Amendment of Section 8	9. In section 8 of the principal Act, after sub-section (3),- following sub-section shall be inserted, namely- '(4) An application filed under sub-section (1) shall be disposed of by the court expeditiously and in any event within a period of sixty days from the date of filing of the application.'	
Amendment of Section 9	10. In section 9 of the principal Act, (i) in sub-section (1), for the words 'or during', the words 'the commencement of', and for the words 'section 36,', the words 'the provisions of the Act' shall be substituted. (ii) For sub-section (2), the following sub-section (2) shall be substituted- '(2) Where, before the commencement of the arbitral proceedings, a party files an application for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of filing of such an application in the Court.' (iii) sub-section (3) shall be omitted.	The substitution of *"before the commencement of arbitral proceedings"* instead of *"before or during arbitral proceedings"* in sub-section (1) of section 9 excludes the court's power to grant interim relief during the process of arbitration. This is problematic because parties often need urgent relief during proceedings when circumstances change. In any case, sub-section (3) of section 9, which has been omitted in the proposed amendments, limited the court's power to grant interim relief after post constitution of the arbitral tribunal to circumstances when relief under section 17 proved ineffective. Admittedly, the Supreme Court had explained that Section 9 gives the court power to pass interim orders during the arbitration proceedings because orders passed by the arbitral tribunal under section 17 cannot be enforced as orders of a court (*Sundaram Finance Ltd v NEPC India*). That is no longer the case because the 2015 Amendment to section 17 made orders passed by the arbitral tribunal enforceable as orders of the court. However, section 17 is not available to foreign-seated arbitrations. The Supreme Court has held that the choice of a foreign law or a foreign seat cannot be conclusive evidence of the parties' intention to exclude the applicability of section 9 of the Act to their foreign-seated arbitration (*Shanghai Electric Co Ltd v Reliance*

		Infrastructure Ltd). Moreover, article 9 of the UNCITRAL Model Law on International Commercial Arbitration reads *"it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."* The suggestion would be to retain the current phrasing of sub-sections (1) and (3) of section 9.
Insertion of New section 9A	11. After section 9 of the principal Act, the following section shall be inserted, namely- - "9A. Emergency arbitrators – (1) Arbitral institutions may, for the purpose of grant of interim measures referred to in section 9, provide for appointment of emergency arbitrator prior to the constitution of an arbitral tribunal. (2) The emergency arbitrator appointed under sub-section (1) shall conduct proceedings in the manner as may be specified by the Council. (3) Any order passed by an emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under subsection (2) of section 17 of the Act. (4) An order of the emergency arbitrator may be confirmed, modified, or vacated, in whole or in part, by an order or arbitral award made by the arbitral tribunal."	To cement the applicability of Section 9A to foreign-seated emergency arbitrator orders, Section 9A(3) should be altered to read *"(3) Any order passed by an emergency arbitrator under sub-section (2) shall be enforced in the same manner as if it is an order of an arbitral tribunal under sub-section (2) of section 17 of the Act, irrespective of whether the arbitration is seated in India or outside India.*" This provision plays an instrumental role in codifying the concept of emergency arbitrations, as has been recognised by the Supreme Court in *Amazon NV Investment Holdings* and proposed by the 246th Law Commission Report and the Srikrishna Report. The amendment is thus a welcome move. However, a crucial lacuna in this regard is that the Bill fails to mention a specific timeline for the conduct of emergency arbitration proceedings, thereby raising concerns over its promptness and efficacy. For instance, the Swedish Chamber of Commerce Rules at Appendix II, Rule 4, mandate an appointment of an emergency arbitrator within 24 hours of the application and grant him discretion to conduct the proceedings expeditiously. Moreover, the latest draft of the SIAC Rules propose that the emergency arbitrator dispose of the application in 10 (ten days). It is to be noted that India is

		still at a nascent stage with respect to institutional arbitrations. Therefore, a streamlined timeline and procedure for the appointment of an emergency arbitrator best serve the object the provision initially set out to achieve. It will also guide arbitral institutions on arriving at suitable timelines for various aspects in their Rules. Another issue to be considered is a principled one - When an emergency arbitration can be carried out? While clause (1) to section 9A mentions that it can be carried out for the grant of interim measures u/s 9 before the arbitral tribunal is constituted, Article 29 of the ICC Rules says that: "*A party that needs* ***urgent interim or conservatory measures*** *that* ***cannot await*** *the constitution of an arbitral tribunal*…" may apply for such an appointment. The language of section 9A(1) should thus suggest that such arbitrations are permissible only when the *urgency* of the interim measures is such that it cannot await the constitution of an arbitral tribunal.
Amendment of Section 11	12. In section 11 of the principal Act, (i) in sub-section (3), after the words, 'Failing any agreement', the words – 'on a procedure for appointment of arbitrator or arbitrators' shall be inserted. (ii) in sub-section 3A, for the words – 'graded', the words – 'recognised' shall be substituted; for the words 'section 43-I', the words 'section 43K' shall be substituted; and for words – 'in the Fourth Schedule', the words – 'by the Council' shall be substituted. (iii) in sub-section (4), following proviso shall be inserted namely- 'Provided that the party in its application made under this sub-section shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.' (iv) in sub-section (5), after the words, 'Failing any agreement', the words – 'on a procedure for appointment of arbitrator or arbitrators' shall be inserted.	Sub-sections (3A), (14) of section 11 and section 11A stipulate that in arbitrations other than institutional arbitration, the payment to the arbitral tribunal will be in the manner specified by the arbitration council defined under section 43A, thereby obviating the fourth schedule. This is a welcome move because the council being an expert body is given greater control and because there was great ambiguity regarding the interpretation of the fourth schedule (*Oil and Natural Gas Corporation Ltd v Afcons Gunanusa JV*). However, the statute should also lay down the manner of specifying payment guidelines by the council. It could otherwise lead to issues involving lack of transparency and predictability. Moreover, the ambiguity surrounding the current payment structure provided in the fourth schedule will persist.

	(v) after sub-section (5), the following proviso shall be inserted, namely- 'Provided that the party in its application made under this sub-section shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.' (vi) in sub-section (6), for the words, 'an appointment procedure', the words 'a procedure, for appointment of arbitrator or arbitrators,' shall be substituted. (vii) after sub-section (6), the following proviso shall be inserted, namely- 'Provided that the party in its application made under this sub-section shall make a disclosure with respect to the number and details of arbitration proceedings pending between the parties and arbitral awards passed in respect of disputes having arisen between the parties from a common defined legal relationship, whether contractual or not.' (viii) after sub-section (6), the following sub-section shall be inserted, namely: - '(6A) An application under sub-section (4) or sub-section (5) or sub-section (6) shall be filed within 60 days from the failure or refusal of appointment of arbitrator or arbitrators, as the case may be.' (ix) in sub-section (13), after the words "the arbitral institution" the words "designated under sub-section (3A)" shall be inserted; and (x) in sub-section (14), after the words "The arbitral institution" the words " designated under sub-section (3A)" shall be inserted and for words – "subject to the rates specified in the Fourth Schedule", the words – "as per its rules or in absence thereof, in the manner as specified by the Council under section 11A." shall be substituted.	
Amendment of Section 11A	13. For section 11A of the principal Act, the following section shall be substituted, namely: - "(11A) Fees of arbitral tribunal – Unless otherwise agreed by the parties or where the arbitration is to be conducted under the aegis of an arbitral institution having rules for determining the fees payable to the arbitral tribunal, the fees of the arbitral tribunal shall be such as may be specified by the Council."	

Amendment of Section 16	14. In section 16 of the principal Act, in sub-section (5), after the words 'sub-section (3)', the words 'as a preliminary issue within thirty days of the filing of the application, unless for reasons to be recorded in writing, the arbitral tribunal deems it fit to decide the plea later' shall be inserted.	-

Amendment of section 17	15. In section 17 of the principal Act, in sub-section (1), after clause (d), the following clause shall be inserted, namely: "(da) confirm, modify or vacate, as the case may be, the ad interim measures granted under section 9 or order made by an emergency arbitrator under Section 9A subject to such conditions, if any, as it may deem appropriate after hearing the affected parties;"	Addition of S. 17(da) gives the arbitral tribunal power to confirm, modify or vacate interim measures granted by the court under S. 9 or S. 9A. While the High Court can vacate and modify its interim orders (High Court Bar Association, Allahabad v State of UP), and arbitral tribunals have been recently held capable of modifying the terms of their past interim orders (Airports Authority of India (Kolkata Airport) v TDI International India), there has been no clarity on whether arbitral tribunals can vacate the orders granted by supervisory courts. S. 9(2) only provides that the arbitral proceedings shall be commenced within 90 days from the date of such order, and is silent on the status of an interim order of the court once arbitration commences. However, in line with the pro-arbitration approach of courts in India, High Courts have held interim orders under S. 9 to be subject to modification and vacation by Arbitral Tribunals once constituted (Virtuous Retail v Mantri Developers 2021 SCC OnLine Bom 3206; Monojit Das v. Sujit Roychowdhury, 2017 SCC OnLine Cal 16309). The addition of S. 17(da) confirms a position often taken by courts, and codifies the same in unambiguous terms.
Amendment of section 18	16. In section 18 of the principal Act, for words 'full', the words 'fair and reasonable' shall be substituted	-
Amendment of section 19	17. In section 19 of the principal Act, (i) in sub-section (3), the following proviso shall be inserted, namely- "Provided that in cases where arbitration is conducted other than under the aegis of an	

	arbitral institution, the arbitral tribunal shall duly consider to carry on the arbitration proceedings as per the model rules of procedures or guidelines to be issued by the Council from time to time." (ii) after sub-section (4), the following sub-section shall be inserted, namely- "(5) The proceedings may be conducted through use of audio-video electronic means in the manner specified by the Council."	
Amendment of section 20	OPTION- I 18. In section 20 of the principal Act, (i) in the marginal heading, for the words – "place", the words – "Seat" shall be substituted. (ii) in sub-section (1), for the words – "place", the words – "seat" shall be substituted. (iii) in sub-section (2), for the words – "place", the words – "seat" shall be substituted. (iv) in sub-section (2), for the words – "place", the words – "venue" shall be substituted.	-
Note: If this option is selected then amendment to definition of Court will not be required.	OPTION- II For section 20 of the principal Act, the following section shall be inserted, namely- "20 (1) In case of domestic arbitration other than international commercial arbitration the seat of arbitration shall be the place where the contract/arbitration agreement is executed or where the cause of action has arisen. (2) Notwithstanding sub-section (1), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any venue it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property."	-
Amendment of Section 28	19. In section 28 of the principal Act, in sub-section (1), for the words –'place', the words – 'seat' shall be substituted.	
Amendment of Section 29A	20. In section 29A of the principal Act, (i) in sub-section (3), after the words – 'six months', the words –'or if there is no consent between the parties, then an application under sub-section (5) may be filed.' shall be inserted; (ii) in sub-sections (4), for the words 'Court,' the words 'arbitral institution under whose aegis arbitration is being conducted or Court' shall be substituted. (iii) in sub-section (5), after the words, 'imposed by', the words 'an arbitral institution for arbitrations being conducted under its aegis and in all other cases, by' shall	

	be inserted. (iv) in sub-section (6), for words 'court', the words 'arbitral institution or the Court, as the case may be,', shall be substituted. (v) in sub-section (9), for words 'court', the words 'arbitral institution or the Court, as the case may be,', shall be substituted.	
Amendment of Section 30	21. In section 30 of the principal Act, (i) in sub-section (1), the words – ', conciliation or other procedure' shall be omitted. (ii) in sub-section (2), for words 'an arbitral award', the words, 'a mediated settlement agreement enforceable in accordance with the provisions of Mediation Act, 2023' shall be substituted. (iii) sub-section (3) and sub-section (4) shall be omitted.	-
Amendment of section 31	22. In section 31 of the principal Act, (i) in sub-section (1), after the words – 'writing', the words – ', duly stamped' shall be inserted. (ii) after sub-section (2), the following sub-section shall be inserted, namely- "The arbitral award shall state that the following has been ensured, namely- (a) a party was not under some incapacity; (b) the arbitration agreement is valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; (c) parties were given proper notice of the appointment of arbitrator or of the arbitral proceedings or were otherwise able to present their case; (d) the composition of arbitral tribunal was as per the agreement of the parties; (e) the arbitration procedure followed during arbitration proceedings was in accordance with the agreement of the parties; (f) the subject matter of dispute is capable of settlement by arbitration under the law for the time being in force; (g) the arbitral award only deals with disputes contemplated by or falling within the terms of the submission to arbitration." (iii) in sub-section (4), for the words – 'place', the words – 'seat' shall be substituted.	**Section 31(1)** The current amendment lacks clarity on when an arbitral award must be stamped, leading to enforcement issues and delays. This ambiguity in timing has allowed courts to interpret it differently: in *M. Anasuya Devi v. Manik Reddy*, the Supreme Court held that the need for stamping could wait until enforcement, while in *Rajasthan Builder v. Union of India*, the Delhi High Court required that the award be stamped based on the awarded amount at the time it was issued. This lack of consistency has led to confusion and delays, particularly when unstamped awards are brought for enforcement and require impounding. Specifying that an award must be stamped at the time of issuance would align with Section 17 of the Indian Stamp Act, which expects that an instrument be stamped at or before execution. Such a clarification would reduce disputes about stamp duty compliance, prevent impoundment delays, and bring predictability to enforcement, making the process smoother for all parties involved. **Section 31(2A)** The amendment does not postulate the

	(iv) in sub-section (5), for the words 'copy', the words 'or digitally signed copy, as the case may be,' shall be substituted. (v) in sub-section (7), clause (b), for the words –'two percent higher than the current rate of interest', the words –'three percent higher than the prevailing repo rate of the Reserve Bank of India' shall be substituted. (vi) in sub-section (7), explanation to clause (b) shall be omitted.	remedy/penalty for not complying with its requirements.
Amendment of Section 31A	23. In section 31A of the principal Act, in sub-section (3), for clause (c), the following clause shall be substituted, namely- '(c) whether the party had made a frivolous claim or counterclaim; and'	

Amendment of Section 32	24. In section 32 of the principal Act, after sub-section (3), the following sub-section shall be inserted, namely- '(4) After the termination of the proceedings, the arbitral tribunal shall return the records of the arbitration to the arbitral institution in cases where the arbitral proceedings were conducted under the aegis of an arbitral institution and in all other cases, to the parties.'	The introduction of subsection (4) regarding the return of arbitration records undoubtedly reflects well-intentioned objectives; however, it raises several practical concerns and introduces potential ambiguities that may hinder its effective implementation. Foremost among these concerns is the ambiguity surrounding the term "records of the arbitration." The phrase lacks specificity, potentially leading to disputes over the scope of materials that must be returned. Arbitration records can include a broad array of documents, such as submissions, evidence, interim orders, and correspondence, which creates uncertainty about what exactly needs to be returned. To mitigate this issue, it would be prudent to explicitly define the term "records of the arbitration" within the provision. For example, it could specify that these records include "documents and evidence submitted, interim orders, the final award, and any other materials deemed part of the official arbitration record." Such a definition would provide much-needed clarity, preventing misinterpretation and facilitating smoother enforcement. Another notable issue within subsection (4) concerns the responsibility for and timing of the record-return process.

		Currently, the provision lacks a specific timeline for the return of records and fails to assign responsibility for the logistics of the return process. This omission risks creating unnecessary delays and ambiguity, especially where multiple parties or institutions are involved. To address this, a practical amendment would be to add a clause requiring that records be returned within a specific period—suggesting, for instance, "within 30 days of the termination of proceedings."
Amendment of Section 34	25. In section 34 of the principal Act, (i) in sub-section (1), after the words 'Court', the words 'or an appellate arbitral tribunal, as the case may be,' shall be inserted. (ii) after sub-section (1), the following proviso shall be inserted, namely- 'Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section, no application for setting aside an arbitral award shall lie before the Court.' (iii) after sub-section (1), the following sub-sections shall be inserted, namely:- "(1A) The party in its application made under sub-section (1) shall make a disclosure with respect to any challenge pending or decided in respect of all arbitral awards, if any, passed for any disputes having arisen between the parties from a common defined legal relationship, whether contractual or not. (1B) The Court or an appellate arbitral tribunal shall, prior to hearing an application under this Section, formulate specific grounds which arise and the application may thereafter be heard on whether the said grounds are made out or not, Provided that the nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear subsequently, for reasons to be recorded in writing, any other grounds not formulated by it earlier." (iv)for sub-section (2), the following sub-sections shall be substituted, namely:- "(2) An arbitral award may be set aside in whole by the Court or an appellate arbitral tribunal, as the case may be, only if the party making the application establishes on the basis of the record of the arbitral tribunal that—	In both Sections 34 and 34A, the bill introduces the notion of appellate arbitral tribunals. In the past, the SC has already upheld the validity of appellate arbitration clauses. However, by the introduction of appellate arbitral award within set aside provisions, the role of such appellate tribunals has become unclear. First, there is still no clarity regarding when an arbitral award attains finality when there is an appellate mechanism. This is because in arbitral rules of some institutions, they have identified that the award with an appellate mechanism only becomes final post a challenge before an appellate tribunal, or post the completion of the limitation period of such challenge. However, the current amendment has not shed light on either of these aspects. When an appellate mechanism has been identified, it is important to have clarity on when an arbitral award is final. This determination will be needed to understand the different limitation periods, and the status of the initial arbitral award in law. It is suggested that a similar mechanism as seen in many institutional rules should be adopted, and a section under Section 34A should clarify that an award made under an appellate mechanism through an institution, will only attain finality post challenge under the appellate mechanism,

	(i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or (v) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force." (v) for sub-section (2A), the following sub-section shall be substituted, namely- "(2A) An arbitral award may be set aside in whole or in part by the court or an appellate arbitral tribunal, as the case may be, only if the party making the application establishes on the basis of the record of the arbitral tribunal that— (i) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or (ii) the arbitral award is in conflict with the public policy of India. (iii) the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. Explanation 1. — For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, — (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of	or the limitation period for the same ending. Second, the introduction of the appellate process, seems to misconstrue the generally accepted reasons behind having an appellate arbitral process. Generally, parties want a mechanism where either there is substantive review of merits, or where there is minor correction or modification of the already existing award. Rarely, do appellate mechanisms in arbitration lead to complete annulment of the award. The role of the review mechanism is very different from the construction that is seen in the amended Section 34. Here, the emphasis seems to be on annulment decision, which is not as such based on a review of merits, which is explicit in the section itself. This situation gets even more complicated when considering the scope of the Proviso under Section 34(1). The proviso seems to imply that as soon as there is an appellate mechanism, no application for set aside will be valid in court. However, this fails to account for the fact that as already stated, most appellate mechanisms intend to be a review on merits, and not annulment. Further, in many agreements with appellate mechanisms, there is already a demarcation of the scope of the appellate review process, which may not include within it annulment under the law of the seat. Due to this, there may be legal ambiguity regarding the maintainability of a Section 34 application when there is such an agreement in place. Third, and adding to the second point, it may not be suitable for an appellate mechanism to replace the jurisdiction of the annulment court. Most provisions within the Arbitration Act for annulment, are on the basis of specific legal grounds based on domestic law requirements. When considering provisions such as "patent illegality" and "public policy of

	morality or justice. Explanation 2.— For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute." (vi) in proviso to sub-section (3), after the words 'court', the words 'or an appellate arbitral tribunal, as the case may be,' shall be inserted. (vii) in sub-section (4), after the words 'court', the words 'or an appellate arbitral tribunal, as the case may be,' shall be inserted (viii) after sub-section (6), the following sub-section shall be inserted, namely- "(7) Where the arbitral award is set aside in part, the Court or an appellate arbitral tribunal, as the case may be, may direct that the arbitral tribunal shall decide in a fixed time, only the issues on which the award has been set aside: Provided that the said arbitral tribunal shall make the award on the said issues on the basis of existing records in the original arbitral award, unless the Court or an appellate arbitral tribunal, as the case may be, directs to the contrary: Provided further that the arbitral tribunal shall be bound by the findings of the original arbitral award, which have not been set aside."	India", there may be differing interpretations of these provisions in Indian courts and by an appellate tribunal. Further, with the proviso in Section 34, it will be unclear whether Indian courts will even have the jurisdiction to interfere with an interpretation of "patent illegality" which they consider incorrect, considering that now under Section 34(1) an application for set aside cannot be made post a determination by the appellate mechanism. In conclusion, the entire appellate mechanism as suggested by the bill, seems to misconstrue the role of the appellate mechanism within most arbitration clauses. Parties who enter into arbitration agreements aim to ensure there is a review on merits when they incorporate such clauses. Further, it may not be ideal to completely replace the judicial control over annulment decisions.
Insertion of new section	26. After section 34 of the principal Act, the following section shall be inserted, namely- "34A. Appellate Arbitral Tribunal. – (1) The arbitral institutions may, provide for an appellate arbitral tribunal to entertain applications made under Section 34, for setting aside an arbitral award. (2) The appellate arbitral tribunal while deciding an application under Section 34 shall follow such procedure, as may be specified by the Council."	The SC has in M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd. upheld appellate arbitral mechanisms. As already stated, the amendment here seems to misconstrue the entire ambit of appellate mechanisms within arbitration agreements. Appellate mechanisms within arbitration clauses are better suited to ensure substantive review on merits. Another important function of appellate mechanisms is that when there are minor corrections, typically parties have to get their awards modified. The SC judgment in NHAI v M Hakeem, makes it clear that courts do not have power to modify awards, and only the SC has power under Article 142 to make some modifications. Appellate mechanisms can serve as better tools to make such modifications. Even though the bill does not explicitly restrict the role of appellate arbitral tribunal, by

		introducing these tribunals within the annulment provisions, there is no indication as to whether tribunals can have power outside annulment decisions too. It may be better to formulate some provisions which give greater indication as to the role these appellate tribunals have. Consequently, the following recommendations may be incorporated. Recommendation 1 - There should be a provision covering the scope of appellate tribunals including when the award attains finality, what is the scope of powers under the appellate mechanism. A concrete definition may serve better to indicate the same. Recommendation 2 - While it may be suitable for some parties to replace annulment decisions of courts with appellate mechanisms, the bill does wrong to assume the same being true for all parties incorporating appellate mechanisms within their agreement. Consequently, the proviso that states "*Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section, no application for setting aside an arbitral award shall lie before the Court.*" should be replaced with "*Provided that where parties have agreed to take recourse to an appellate arbitral tribunal under this sub-section and waive their right to seek annulment before a domestic court, no application for setting aside an arbitral award shall lie before the Court."* This allows parties to waive their right to annulment review by domestic courts. However, this waiver should be explicit, ensuring that parties actually consented to the appellate mechanism completely replacing the jurisdiction of annulment courts. Recommendation 2 (Alternate) - While some civil law jurisdictions like

		Switzerland, Belgium and Sweden allow for waiver of jurisdiction of annulment courts, other jurisdictions based on common law, like the USA, refuse to reduce the power of annulment courts. There needs to be greater analysis of what role is more suitable for India, considering there may be a need to retain the power of national courts, especially considering the wide scope of review under Section 34, and there being provisions such as "patent illegality" and "public policy of India". Therefore, before even allowing waivers, these aspects need to be discussed through more stakeholder consultation.
Amendment of Section 37	27. In section 37 of the principal Act, (i) in sub-section (1), after the words 'passing the order', the words 'or the appellate arbitral tribunal, as the case may be,' shall be inserted. (ii) in sub-section (1), after clause (a), the following clause shall be inserted, namely- "(aa) refusing to appoint an arbitrator under Section 11;" (iii) after sub-section (1), the following sub-section shall be inserted, namely:- "(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."	The 60-day appeal limit in sub-section (1A) seeks to expedite the process, but the unrestricted right to appeal to the Supreme Court in sub-section (3) could lead to prolonged litigation, undermining finality in arbitration. This discrepancy may create ambiguity, as some courts could apply the 60-day limit broadly, while others might treat Supreme Court appeals as unrestricted. Clarification would help maintain consistent practices and support the amendment's goal of timely dispute resolution.
Amendment of section 42	28. Section 42 of the principal Act shall be omitted	-
Amendment of Section 43C	29. For section 43C of the principal Act, the following section shall be substituted, namely:- "Composition of Council. – (1) The Council shall consist of the following Members, namely:— (a) a person of ability, integrity and standing having adequate knowledge and professional experience or shown capacity in dealing with problems relating to law, alternative dispute resolution preferably arbitration, public affairs or administration to be appointed by the	-

	Central Government—Chairperson; (b) a person having knowledge and experience in law related to arbitration or alternative dispute resolution mechanisms, to be appointed by the Central Government—Member; (c) an eminent person having experience in research or teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government—Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary—Member, ex officio; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary—Member, ex officio; (f) one representative of a recognised body of commerce and industry, chosen by the Central Government—Part-Time Member and (g) Chief Executive Officer—Member-Secretary, ex officio. (2) The Members of the Council, other than ex officio members, shall hold office as such, for a term of four years from the date on which they enter upon their office and shall be eligible for re-appointment: Provided that no Member other than ex officio Member shall hold office after he has attained the age of seventy years, in the case of Chairperson, and sixty-seven years, in the case of other Members: Provided further that if the Chairperson is appointed on Part-Time basis, then, at least one of the Members appointed under clauses (b) or (c) shall be a Full-Time Member. (3) The salaries, allowances and other terms and conditions of the Chairperson and Members referred to in clauses (b) and (c) of sub-section (1) shall be such as maybe prescribed by the Central Government. (4) The Part-time Member shall be entitled to such travelling and other allowances as may be prescribed by	

	the Central Government."	
Amendment of Section 43D	30. In section 43D of the principal Act, (i) in sub-section (1), the words – 'mediation, conciliation or other alternative dispute resolution mechanism' shall be omitted. (ii) for sub-section (2), the following sub-section shall be substituted, namely: - "(2) For the purposes of performing the duties and discharging the functions under this Act, the Council may— (a) recognize arbitral institutions and renew, withdraw, suspend or cancel such recognition; (b) specify the criteria for recognition of arbitral institutions (c) call for any information or record of arbitral institutions; (d) lay down experience and norms for voluntary registration of arbitrators; (e) lay down a model code of conduct for arbitrators; (f) lay down the model arbitration agreement provided under sub-section (6) of section 7; (g) issue the model rules of procedures or guidelines provided under proviso to sub-section (3) of section 19; (h) manner of conduct of proceedings through the use of audio-video electronic means under sub-section 5 of section 19. (i) manner of maintenance of the depository and the procedure for applying as referred in sub-section (1) of section 43 M. (j) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes; (k) frame, review and update norms to ensure satisfactory level of arbitration; (l) act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation; (m) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes through	-

	arbitration; (n) promote institutional arbitration by strengthening arbitral institutions; (o) conduct examination and training on various subjects relating to arbitration and award certificates thereof; and (p) such other functions as may be decided by the Central Government."	
Insertion of new section 43-I and 43J	31. After section 43H of the principal Act, following sections shall be inserted namely:– 43-I Chief Executive Officer. - (1) There shall be a Chief Executive Officer of the Council, who shall be responsible for day-to-day administration of the Council. (2) The qualifications, appointment and other terms and conditions of the service of the Chief Executive Officer shall be such as may be prescribed by the Central Government. (3) The Chief Executive Officer shall discharge such functions and perform such duties as may be specified by the regulations.	-
	43J. Secretariat of Council. - (1) There shall be a Secretariat to the Council consisting of such number of officers and employees as may be prescribed.	-
	(2) The qualifications, appointment and other terms and conditions of the service of the employees and other officers of the Council shall be such as may be prescribed.	-

Substitution of Sections	32. For sections 43-I, 43J and 43K, following sections shall be substituted, namely: "43-K Recognition of arbitral institutions- The Council shall recognise arbitral institutions in the manner and on the basis of criteria as may be specified by the Council. 43-L Norms for voluntary registration of arbitrators – The experience and norms for voluntary registration of arbitrators with the Arbitration Council of India shall be such as may be specified. 43-M. Depository. -(1) The Council shall maintain a depository of all arbitration cases by assigning a unique identification number to each case and the arbitral tribunal	The bill empowers the council to maintain a depository of all arbitration cases using unique identification numbers. The existence of a depository with sanitized awards will be pivotal in furthering legal research especially pertaining to technical aspects of specific industries and the application of general principles of law to such disputes. However, the act does not clarify the contents of the depository thus leading to a lot of ambiguity on this front. Another pertinent concern that arises from this setup is the potential violation of Section 42A (Confidentiality) as existing in the current act. As per Section 42A, the arbitrator, the arbitral institution and the

	or the arbitral institution as the case may be, upon appointment, shall apply to the Council for this purpose. (2) The manner of maintenance of the depository and the procedure for applying as referred in sub-section (1) shall be such as may be specified by the Council."	parties to the arbitration agreement are mandated to maintain confidentiality of all arbitral proceedings, notwithstanding any other law. The only exception to this is where the disclosure of the award is required for the purposes of enforcement. The same also leads us to raise broader questions on the rigid framework given under the impugned provision. There is no gainsaying that arbitration's confidentiality is an essential element in determining the suitability of a seat of arbitration. It is essential that a regime for safeguarding confidentiality must include a robust list of exceptions coupled with guarantees that disclosures, if any, are only done to the extent necessary. Blanket confidentiality is certain to be a hindrance in the arbitral process as well as in the taking of evidence by courts. Once confidentiality has been breached, not much can be done, irrespective of whether the cause of disclosure was legitimate or not. It is therefore necessary to have the exceptions coupled with mechanisms of disclosures set out in law. The only exception envisaged by the provision is for the enforcement of awards. Arbitration practice however reveals that disclosures may also be required for other purposes such as solicitation of third-party Funders, disclosure by an arbitrator (as seen in Haliburton v. Chubb), in public interest, interests of justice and protection of legitimate interests of the parties. All major arbitration hubs such as the United Kingdom, Singapore, Hong Kong and Australia have such well founded exceptions either in their statute or their common law jurisprudence. Notably, even the Justice B.N. Srikrishna Committee in its report had also recommended keeping "disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority" as exceptions. This suggestion, however, was not

		incorporated by the legislature.
Insertion of new sections 43N, 43-O and 43P.	33. After section 43M of the principal Act, the following sections shall be inserted, namely: -	
	" 43N. Grants by Central Government. - The Central Government may, after due appropriation made by Parliament by law in this behalf, pay to the Council in each financial year such sums of money and in such manner as it may think fit for being utilised for the purposes of this Act.	
	43-O Funds of Council. - (1) The Council shall maintain a Fund to which shall be credited, — (a) all monies provided by the Central Government; (b) all monies received by the Council for the services provided by it in pursuance of sub-section (2) of section 43D; (c) all monies received by the Council in the form of donations, grants, contributions and income from other sources; and (d) the amount received from the investment income.	
	(2) All monies credited to the Fund shall be deposited in such banks or invested in such manner as may be decided by the Council.	
	(3) The Fund shall be applied towards meeting the salaries and other allowances of Members and officers and other employees of the Council and the expenses of the Council including expenses incurred in the exercise of its powers and discharge of its duties under this Act.	
	43P- Accounts and audit. -(1) The Council shall maintain proper accounts and other relevant records and prepare an annual statement of accounts, including the balance sheet, in such form and manner as may be prescribed in consultation with the Comptroller and Auditor General of India.	
	(2) The accounts of the Council shall be audited by the Comptroller and Auditor General of India and any expenditure incurred by him in connection with such audit shall be payable by the Council to the Comptroller	

	and Auditor General of India.	
	(3) The Comptroller and Auditor General of India and any person appointed by him in connection with the audit of the accounts of the Council shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor General of India has in connection with the audit of the Government accounts, and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect the offices of the Council.	
	(4) The accounts of the Council as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and the Central Government shall cause the same to be laid before each House of Parliament."	
Substitution of new section for section 43L	34. For section 43L of the principal Act, the following section shall be substituted, namely: -	
	"43Q. Power to make regulations. - (1) The Council, may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations, consistent with the provisions of this Act and the rules made thereunder, for the discharge of its functions and perform its duties under this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may make provision for— (a) model arbitration agreement provided under sub-section (6) of section 7; (b) manner of conduct of proceedings by emergency arbitrator under sub-section (2) of section 9A; (c) fees of arbitral tribunal under section 11A; (d) manner of conduct of proceedings through the use of audio-video electronic means under subsection 5 of section 19.	

	(e) procedure to be followed by appellate arbitral tribunal under sub-section (2) of section 34A; (f) the terms and conditions of committee of experts under section 43H; (g) functions and duties of the Chief Executive Officer under sub-section (3) of section 43-I; (h) manner and criteria for recognition of arbitral institutions under section 43K (i) manner of voluntary recognition of arbitral institutions under section 43L; (j) manner of maintenance of depository of arbitration cases under sub-section (2) of section 43M; (k) any other matter in respect of which provision, in the opinion of the Council, is necessary for the performance of its functions under this Act.	

	(3) Every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation.”	-
Omission of Section 43M	35. Section 43M of the principal Act, shall be omitted.	-

Amendment of section 84	36. In section 84 of the principal Act, after sub-section (l), the following sub-section shall be inserted, namely:- "(lA) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:- (a) the salaries, allowances and other terms and conditions of the Chairperson and Members under sub-section (3) of section 43C; (b) the travelling and other allowances of Part-time Member under sub-section (4) of section 43C; (c) qualifications, appointment and other terms and conditions of the service of the Chief Executive Officer under sub-section (2) of section 43-I; (d) such number of officers and employees under subsection (1) of section 43J; (e) qualifications, appointment and other terms and conditions of the service of employees and other officers of the Council under sub-section (2) of section 43J; (f) the form and manner of annual statement of accounts, including the balance sheet under sub-section (1) of section 43P; and (g) any other matter which is required to be, or may be, prescribed or in respect of which provision is to be made by rules by the Central Government."	-
Amendment of Fourth schedule	37. Fourth Schedule of the Principal Act shall be omitted.	-
Additional Recommendation	**Law applicable to arbitration agreement**	The position of Indian arbitration jurisprudence on the question of law governing the arbitration agreement has remained uncertain, having evolved through ambiguous and often contradictory judicial pronouncements. A series of judgments, including *National Thermal Power Corporation v. Singer Company* (1992) 3 SCC 551, *Sumitomo Heavy Industries Ltd v. ONGC* (1998) 1 SCC 305, *Indtel Technical Services Pvt Ltd v. W.S. Atkins Rail Ltd* (2008) 10 SCC 308 have adopted the position that the law governing the contract would be applicable to the arbitration agreement as

		well. The rationale for the same stems from the notion that the severability of the arbitration agreement from the main contract is limited only to those cases where arbitration is to be saved even as the rest of the contract may be declared void. On the other hand, the Courts in *Katra Holdings Ltd v. Corsair Investments Ltd*, 2018 SCC OnLine Bom 4031 and *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd*, 2014 SCC OnLine Bom 102 have adopted a seat-centric approach where the law of the seat of the arbitration will govern the arbitration agreement. The underlying rationale is that the seat of the arbitration has a real and close connection with the arbitration. It is recommended that the 2023 Amendments present an opportunity for the Parliament to resolve this ambiguity. The UK Arbitration Bill, 2024 through its clause 1(2) has also proposed to do the same. The UK proposed amendment adopts a seat-centric approach, in the absence of an *express* agreement to the contrary. This does away with the three-pronged test which looked, in the following order, at the express agreement, implied agreement, and lastly at the real and close connection criterion. The UN Working Group drafting the UNCITRAL Model Law on International Commercial Arbitration also takes a similar position. The rationale for the seat-centric approach in the absence of contrary agreement is to ensure that the pro-arbitration approach as also party autonomy is respected. This will permit the parties to take advantage of pro-arbitration jurisdictions, which is the general intent behind the choice of seat. Should the applicability of contractual law invalidate the arbitration agreement itself, the purpose of seat selection is

		rendered infructuous. To that end, it is recommended to insert following section: "Law Applicable to Arbitration shall be: (a) The law that the parties *expressly* agree applies to the arbitration agreement, or (b) Where no such agreement is made, the law of the seat of the arbitration."

ACKNOWLEDGMENTS

On behalf of the ADR Board 2024-25 and SIPLA 2024-25, we would like to acknowledge and appreciate the research effort contributed by the following - towards the compilation of these comments and recommendations:

Rakshit Agarwal (Penultimate Year Student at National Law School of India University, Bangalore)
Shikhar Bau (Penultimate Year Student at National Law School of India University, Bangalore)
Pratyush Singh (Final Year Student at National Law School of India University, Bangalore)
Ananya Tangri (Penultimate Year Student at National Law School of India University, Bangalore)
Shreyas Datar (Penultimate Year Student at National Law School of India University, Bangalore)
Vedika Warrier (Penultimate Year Student at National Law School of India University, Bangalore)
Aditya Singh (Penultimate Year Student at National Law School of India University, Bangalore)
Anusha Sarkar (Final Year Student at National Law School of India University, Bangalore)
Shaneel Mehta (Final Year Student at National Law School of India University, Bangalore)

We hope that the Dept. of Legal Affairs finds some value in the students' perspective on the Draft Arbitration and Conciliation (Amendment) Bill – and that this contributes, if only a little, to the final draft to be presented.

Yours Sincerely,
Abhyudaya Singh and Aakarsh Bafna,
Co-Convenors, ADR Board 2024-25, NLSIU