



# Coromandel Law

Striding Forward Together

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## **The case for two-tiered arbitrations – A critique of the Arbitration and Conciliation (Amendment) Bill 2024**

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5 November 2024

**The case for two-tiered arbitrations – A critique of the Arbitration and Conciliation**  
**(Amendment) Bill 2024**

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1. The Government of India has called for comments on a proposed amendment to the Arbitration and Conciliation Act, 1996 (“**Act**”), on 18 October 2024 until 3 November 2024. The Act has seen major amendments including in 2015, 2019 and 2021. The proposed Arbitration and Conciliation (Amendment) Bill 2024 (“**Draft Bill**”) promises to be the most major amendment to the Act yet.
2. The Draft Bill proposes several major changes in India’s arbitration law including the following:
  - (a) References to conciliation have been expunged from the Act, which will now be called the Arbitration Act, 1996.
  - (b) Some minor clarifications (also clarified in Information Technology Act, 2000 under Section 10 A) like (i) arbitral awards may be digitally signed, and that (ii) an arbitration agreement includes an agreement digitally signed by the parties.
  - (c) Arbitral institutions have received two significant powers under the Draft Bill, the power to have emergency arbitrators who can provide emergency awards for ad interim relief before the arbitral tribunal is constituted under the parties’ agreement, and the power to establish appellate arbitral tribunals that will examine challenges to an award under the same grounds as section 34 of the Act.
  - (d) Applications under section 8 of the Act seeking reference of a dispute to arbitration will now be decided within 60 days.
  - (e) Parties seeking the appointment of an arbitrator under section 11 are required to disclose any pending arbitrations arising from the same commercial relationship.
  - (f) The Arbitration Council will prepare rules of procedure, evidence and virtual hearings which arbitral tribunals may consider adopting.
  - (g) An arbitral institution may extend the timeline of an arbitration being conducted under its rules upon an application by any of the parties.

Applications to extend the timeline of an ad-hoc arbitration will continue to lie before the appropriate Court.

- (h) An arbitral tribunal will be required to return the entire arbitral record either to the institution under whose rules the arbitration took place, or to the parties, upon the termination of proceedings in terms of section 32 of the Act.
- (i) The mandatory requirements as to the form of an arbitral award will now include that the award is stamped, and a statement to the effect that the grounds for setting aside the award under section 34 of the Act are not made out.
- (j) Arbitral awards will now carry an interest on the awarded sum at 3% above the repo rate fixed by the Reserve Bank of India.
- (k) An arbitral award may be partially set aside by an appellate arbitral tribunal or a Court on the grounds that:
  - (i) The award deals with issues beyond the terms of reference of the dispute to the tribunal; or
  - (ii) The award violates public policy; or
  - (iii) The award suffers from patent illegality.
- (l) Awards that are partially set aside may be remitted to the arbitral tribunal, which while being bound by its findings in the portion of the award that has not been set aside, is given a fixed period of time to reconsider the award and cure the defects in the award.
- (m) Arbitration Appeals are now required to be decided within 60 days.
- (n) Various amendments to Part IA of the Act on the composition and functioning of the Arbitration Council including importantly that the Arbitration Council will no longer be headed by a retired judge but by an arbitration expert appointed by the Central Government.
- (o) The Arbitration Council is also tasked with creating various resources for parties, tribunals and institutions to consider, such as a model arbitration clause, procedures for hearing applications for emergency awards, interim relief, setting aside by an appellate arbitral tribunal and the schedule of fees for arbitrators. These are not contemplated in the Draft Bill as being mandatory.

(p) The Fourth Schedule to the Act, which provides a scale of fees for arbitrators is proposed to be deleted. A similar schedule will be created by the Arbitration Council.

3. Given the significant changes in India's arbitration law that the Draft Bill proposes, it might be appropriate to await the Arbitration and Conciliation (Amendment) Bill 2024 in the form in which it is introduced before the Lok Sabha, likely during the upcoming Winter Session of Parliament commencing on 25 November 2024.

### **The law on Appellate Arbitrations**

4. Meanwhile, it might be apposite to examine some of the conceptual introductions that the Draft Bill contains, specifically the profound changes in the nature and powers of an appellate arbitral tribunal.
5. Multi-tiered dispute resolution clauses have become a common feature of complex commercial agreements. Parties regularly specify pre-arbitration steps such as negotiation or mediation before an arbitration under their arbitration agreement can be initiated.
6. Indian High Courts have had conflicting views on the mandatory nature of pre-arbitral steps prescribed in a multi-tiered dispute resolution clause. The Delhi Court in a line of decisions that includes *Ravindra Kumar Verma v. BPTP*<sup>1</sup> and *Siemens Ltd. v. Jindal India*<sup>2</sup>, has held that pre-arbitral steps are directory and not mandatory.
7. The Supreme Court has variously held in the context of computing the period of limitation in seeking the appointment of an arbitrator, that where the parties' correspondence disclosed that pre-arbitral steps such as conciliation would be an empty formality, parties could skip pre-arbitral steps and seek the appointment of an arbitrator<sup>3</sup>, and in another decision, that periods of good faith negotiations would be excluded in computing the limitation period applicable to the dispute<sup>4</sup>.
8. Some decisions have held however, that the competition of pre-arbitral steps is mandatory, these include the Bombay High Court's decision in *Tulip Hotels v. Trade*

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<sup>1</sup> *Ravindra Kumar Verma v. BPTP Ltd.* | (2015) 147 DRJ 175.

<sup>2</sup> *Siemens Ltd. v. Jindal India Thermal Power Ltd.* | 2018 SCC OnLine Del 7158

<sup>3</sup> *Demerara Distilleries P. Ltd. v. Demerara Distilleries Ltd.* | (2015) 13 SCC 610

<sup>4</sup> *Geo Miller & Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.* | (2020) 14 SCC 643

*Winds*<sup>5</sup> and that of the Rajasthan High Court in *Simpark Infrastructure v. Jaipur Municipal Corporation*<sup>6</sup>.

9. The issue of a post-arbitration stage of dispute resolution, or an appellate arbitration is one that has received judicial support in India for over a century. One of the earliest decisions affirming an appellate arbitration mechanism is the Bombay High Court's decision in *Fazlally Jivaji Raja v. Khimi Poonji and Co.*<sup>7</sup> where the High Court upheld an appellate arbitration under the Indian Arbitration Act, 1899.
10. The Supreme Court of India in its landmark decision in *Centrotrade Minerals v. Hindustan Copper*<sup>8</sup>, cemented this position under the current Act and upheld the validity of two-tier arbitration agreements. Pertinently it noted that the decision of the first arbitral tribunal would not be regarded as '*final and binding*' in terms of Section 35 of the Act unless the award attained '*finality*' in terms of the arbitration agreement.
11. The judicial precedent on two-tiered arbitration agreements is been based on party autonomy and recognises the right of parties to subject their arbitral awards to an appellate process where they are free to specify several important criteria including:
  - (a) The composition of the appellate tribunal;
  - (b) The extent of re-examination of evidence that is permissible;
  - (c) The contentions on merits that the appellate arbitral tribunal may consider; and
  - (d) A re-examination of jurisdictional issues that the first arbitral tribunal might have ruled on.

#### **Appellate Arbitration under the Bill**

12. The Draft Bill, however, dilutes party autonomy to provide for these criteria in their arbitration agreements, by circumscribing the grounds of appeal that the appellate arbitral tribunal may consider. It limits the tribunal's consideration to the grounds available for the setting aside of an arbitral award, which are globally recognised

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<sup>5</sup> Tulip Hotels Pvt. Ltd. v. Trade Wings Pvt. Ltd. | 2009 SCC OnLine Bom 1222

<sup>6</sup> Simpark Infrastructure Pvt. Ltd. v. Jaipur Municipal Corporation | 2012 SCC OnLine Raj 2738

<sup>7</sup> Fazlally Jivaji Raja v. Khimji Poonji & Co. | AIR (1934) Bom 476

<sup>8</sup> Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd. | (2017) 2 SCC 278

and purpose-designed to be narrow, and to rescue parties from egregious procedural impairments or severe legal defects.

13. Parties will no longer be able to seek a re-examination of the evidence they have led before their arbitral tribunal of first instance even if they agree that their disputes are likely to be extremely complex, hyper technical or based primarily on witness testimony.
14. Parties that operate in sectors like the Infrastructure, Information Technology, Pharmaceutical and Biotechnology might intend to have the additional comfort of two stages of appreciation of evidence by an arbitral tribunal. Such an appeal offers significant advantages including that:
  - (a) It would allow parties the comfort that two separate tribunals, comprising members appointed according to a procedure the parties chose, examining the evidence they have led; and
  - (b) Such an appeal would still enjoy all the advantages arbitration has over litigation including that it would be by a dedicated tribunal, be completed in faster timelines and could use tribunal members who possess a niche technical area of expertise.
15. While it is unclear if appellate arbitration will continue to be permissible for domestic ad-hoc arbitrations, the proposed “section 34A” under the Draft Bill suggests otherwise, the provision reads as follows –

*“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”*
16. The Draft Bill, therefore, seems to suggest that appellate arbitration or two-tiered arbitration agreements will no longer be permissible unless the parties provide for institutional arbitration where the institutional rules provide for an Appellate

Arbitral Tribunal. Even this appeal, would be on the narrow grounds for setting aside the award prescribed in section 34 of the Act and would follow the procedure specified by the Arbitration Council.

17. The objective appears to be to reduce the caseload of India's Commercial Courts and Commercial Divisions of the High Court that currently hear applications seeking the setting aside arbitral awards and to hasten this process by submitting these disputes to a specialized tribunal comprising empanelled arbitrators from an arbitral institution.
18. The cost for faster timelines to decide whether an award should ideally not be the autonomy of parties if the larger objective is to make India an international hub for arbitration. Appellate Arbitration has its own advantages, has existed in India for over a century and might be crucial for the resolution of certain kinds of disputes to the satisfaction of the parties. As a contractual creature, it has evolved to address a need felt by parties.
19. In our opinion, a better approach would perhaps be to prescribe separate timelines for an appellate arbitration by parties while retaining, in a different form, the proposed mechanism of having institutional arbitral tribunals to adjudicate applications to set aside arbitral awards.
20. Meanwhile, the form that the Draft Bill will take when it is introduced in Parliament remains to be seen.