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NAVIGATING THE EXTENT OF JUDICIAL INTERVENTION IN PRE-ARBITRAL PROCEEDINGS VIS-A-VIS CONTEMPORARY JUDICIAL TRENDS IN INDIA

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ABSTRACT

The research article examines the scope of judicial intervention at the pre-arbitral stage under Indian arbitration law. Emphasizing the principle of party autonomy, the development of Indian arbitration has involved both statutory reforms through amendments and judicial interpretation aimed at reducing early court involvement and promoting arbitral independence. Key provisions such as Sections 8, 11, and 16 of the Arbitration and Conciliation Act, 1996 are analyzed in light of the 2015 and 2019 amendments, along with relevant judicial decisions. The research article considers the application of tests such as the "Eye of the Needle" and the "First Look" and "Second Look" doctrines, highlighting the shift between interventionist and restrained judicial approaches. Although the legislative intent has moved towards limiting court scrutiny to a prima facie review in line with the UNCITRAL Model Law, uncertainties remain due to partial implementation of the 2019 amendment and varying judicial interpretations. The research article also discusses the proposed Arbitration and Conciliation (Amendment) Bill, 2024 and its efficiency on pre arbitral proceedings. It concludes by underscoring the need for a balanced approach, where courts support the arbitral process without obstructing party autonomy or delaying proceedings.

Keywords: *Pre Arbitral proceedings, Judicial Trends, Commercial Disputes, Arbitration and Conciliation Act, Kompetenz-kompetenz, UNCITRAL*

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1. INTRODUCTION

According to Black's Law Dictionary, "Arbitration is a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding."[1] Arbitration stands at the intersection of party autonomy and judicial oversight, offering a compelling alternative to conventional litigation, particularly in commercial disputes. It is often praised for its efficiency, confidentiality, and the ability to tailor procedures to the specific needs of the parties involved. The principles of party autonomy and minimal court intervention form the cornerstone or the golden thread that runs across of the Arbitration and Conciliation Act[2] (hereinafter referred to as 'the Act of 1996'). Central to its functioning is the doctrine of *Kompetenz-kompetenz*, which grants arbitral tribunals the authority to rule on their own jurisdiction, including any challenges to the existence or validity of the arbitration agreement. In this context, judicial engagement at the pre-arbitral stage, particularly under Sections 8 and 11 of the Act of 1996, pose to be a site of friction. While these provisions are intended to expedite referral to arbitration and facilitate tribunal formation, courts have often undertaken expansive inquiries into the substantive merits of disputes, well beyond the preliminary question of whether a valid arbitration agreement exists. Such interventions have the potential to derail arbitration before it begins, transforming what should be a summary examination into a quasi-trial on jurisdictional issues. The legislative amendments introduced in 2015 and 2019 to the Act of 1996 aimed to reinforce this limited scope, bringing Indian arbitration law closer in line with the standards of the "UNCITRAL Model Law on International Commercial Arbitration" [3]. These reforms sought to restrict judicial scrutiny at the referral and appointment stages and empower arbitral tribunals to address jurisdictional issues as a first instance.

2. PRINCIPLE OF MINIMAL JUDICIAL INTERVENTION AT PRE-ARBITRAL PROCEEDINGS

Section 5 of the Act of 1996, is based on Article 5 of the UNCIRTAL Model Law, codifies the principle of limited judicial intervention:

> *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part"*[4]

1 Black's Law Dictionary 105 (6th ed. 1990).

2 The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

3 UNCITRAL Model Law on International Commercial Arbitration, 1985, U.N. Doc. A/40/17, Annex I, as amended by U.N. Doc. A/61/17 (2006).

4 Arbitration and Conciliation Act, *supra* note 2, § 5.

Part I of the Act deals with domestic arbitration and international commercial arbitration seated in India. The provisions encompassing the judicial intervention in pre arbitral proceedings are as follows:

a. Reference to arbitration by judicial authority (Section 8)

b. Interim measures, etc., by Court. (Section 9)

c. Appointment of arbitrators (Section 11)

The principle of minimal judicial intervention limits the involvement of courts in arbitral proceedings and reflects the parties' preference for a more flexible, neutral, and efficient method of dispute resolution. It ensures that the parties' decision to arbitrate, rather than litigate, is respected and that the process remains free from unnecessary procedural constraints. This principle is also recognised under key international instruments such as the New York Convention and the UNCITRAL Model Law, both of which affirm that courts should not interfere unless specifically permitted by law.

In the Indian context, this principle operates alongside provisions such as Section 9 of the Code of Civil Procedure, 1908, which grants courts, jurisdiction over civil matters unless expressly barred, and Section 28 of the Indian Contract Act, 1872, which renders void agreements that restrict legal remedies, except in the case of arbitration agreements. These provisions clarify that parties are permitted to refer disputes to arbitration without contravening general legal principles.

By agreeing to arbitration, parties give up the right to pursue disputes before national courts and instead agree to be bound by the procedures of the arbitral forum. In doing so, they also accept the departure from formal court procedures in favour of a process intended to be faster, more flexible, and commercially suited to their needs

3. SECTION 16 OF ARBITRATION AND CONCILIATION ACT, 1996

Section 16 of the Act of 1996, encapsulates the dual framework of empowering the arbitral tribunal to adjudicate upon objections concerning the existence or validity of the arbitration agreement. This procedural safeguard ensures that the tribunal, rather than the courts, is the primary forum for resolving jurisdictional disputes, thereby preserving the efficiency and autonomy of the arbitral process. This provision reinforces both the doctrine of *Kompetenz-kompetenz* and the principle of separability, affirming the arbitral tribunal's

authority to determine its own jurisdiction even in situations where the validity of the main contract is in question. Substantively, the doctrine asserts that the arbitration clause operates independently of the main contract, thereby allowing the tribunal's jurisdiction to survive even if the underlying agreement is declared void or has been terminated. This legal structure upholds the integrity of the arbitral framework and reflects a legislative intent to prevent premature judicial interference. Furthermore, while Section 16(2) permits parties to raise jurisdictional objections, it does so with procedural discipline by requiring that such objections be submitted no later than the filing of the statement of defense. In doing so, the provision strikes a careful balance between preserving the tribunal's competence and protecting procedural fairness, ultimately fostering an arbitration system that is both robust and responsive. When an arbitral tribunal overrules an objection to its jurisdiction, it must proceed with the arbitration and render a final award, as mandated by Section 16(5) of the Act of 1996. No interim judicial review is permissible on the sole ground that the tribunal has assumed jurisdiction; the aggrieved party is required to await the issuance of the award before mounting any challenge under Section 34 of the Act on limited grounds. Indian courts have consistently affirmed that an order rejecting a jurisdictional plea cannot be appealed until the arbitral award becomes final. Consequently, a petition under Section 34 of the Act, challenging the final award constitutes the only avenue for relief.

4. SECTION 8 OF ARBITRATION AND CONCILIATION ACT, 1996

Section 8 of the Act of 1996, functions as a pivotal referral mechanism, mandating judicial authorities to direct parties to arbitration when the dispute brought before the court is governed by a valid arbitration agreement. Anchored in the principle of party autonomy, this provision reinforces the contractual obligation to arbitrate, thereby curtailing judicial interference at the pre-arbitral stage. The original text of Section 8, as enacted in 1996, drew upon Article 8 of the UNCITRAL Model Law on International Commercial Arbitration.

The Indian judiciary adopted an expansive approach while interpreting Section 8. Judicial authorities were inclined to assess not merely the existence of an arbitration agreement, but also to engage with questions of arbitrability, public policy, and, at times, the substantive merits of the dispute. Such interpretations diluted the doctrine of *Kompetenz-kompetenz* and encroached upon the arbitral tribunal's jurisdictional domain.

4.1 Effect of Amendment of 2015 on Section 8 of the Act of 1996

The Arbitration and Conciliation (Amendment) Act, 2015[5] constituted a pivotal reform initiative aimed at strengthening the foundational objectives of the Act of 1996. Central to this amendment was the effort to mitigate procedural delays arising from unwarranted judicial intervention, thereby reinforcing the overarching goal of promoting efficiency and finality in arbitral proceedings.

Section 8 of the Act of 1996:

> *"A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him…., notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."*

Key Changes Introduced by the Amendment:

a. Prima Facie Standard: The amendment restricted the court's role to determining only whether a valid arbitration agreement prima facie exists, without engaging with broader questions of arbitrability or enforceability.

b. Non obstante Clause: The insertion of the "notwithstanding any judgment" clause was intended to override judicial precedents that had previously expanded the court's discretion under Section 8.

c. Expanded Scope of Applicability**:** The provision was expanded to apply to "any person claiming through or under" a party to the arbitration agreement, thereby extending the scope of its applicability, particularly in complex or multi-party disputes.

d. Commencement/ Continuation of arbitration proceedings when Section 8 application is pending: Sub section 3 of section 8 of the Act allows the tribunal to commence or continue the arbitration proceedings even if the application of section 8 is pending before a judicial authority.

Section 8 of the Act has made a departure from Article 8 of UNCITRAL Model Law as the former uses the expression 'judicial authority' rather than court and the words "unless

5 The Arbitration and Conciliation (Amendment) Act, 2016, No. 3, Act of Parliament, 2016 (India).

it finds that the agreement is null and void, inoperative and incapable of being performed" mentioned in Article 8 do not find place in Section 8.

Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and *kompetenz-kompetenz* and Section 34 of the Act of 1996, referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.

These amendments curtailed the scope of judicial examination at the appointment stage and sought to streamline the process of referral to arbitral tribunals.

5. SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Section 11 of the Act of 1996, governs the appointment of arbitrators and constitutes a foundational component of the arbitral framework. The provision sets out the procedural mechanism by which parties, in the event of failure to reach a mutual agreement, may seek court intervention to appoint arbitrators and thereby constitute the arbitral tribunal. The efficacy of this provision is critical, as the formation of the tribunal is a prerequisite for initiating arbitration proceedings. In its underlying philosophy, Section 11 reflects the principles of party autonomy, procedural efficiency, and restrained judicial involvement.

At the time of its enactment, Section 11 conferred the power of appointment upon the Chief Justice of India or the Chief Justice of the relevant High Court. However, this formulation gave rise to interpretative uncertainty regarding the nature of this function, whether the Chief Justice was exercising administrative authority or adjudicatory power.

This ambiguity was conclusively addressed by the Supreme Court in "*SBP & Co. v. Patel Engineering Ltd.*"[6], wherein the Court held that the power under Section 11 is judicial in character:

> **"***The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power. The power under Section 11(6) of the*

6 SBP & Co. v. Patel Engineering Ltd (2005) 8 SCC 618.

> *Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court. In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute."*[7]

The declaration of the judicial nature of this power had far-reaching implications. Courts began to undertake detailed inquiries at the pre-arbitral stage, including questions relating to the existence and validity of arbitration agreements, as well as the arbitrability of disputes. This judicial scrutiny, while rooted in safeguarding legal integrity, often led to significant procedural delays and undercut the efficiency of the arbitral process.

Recognising these challenges, and with a view to harmonising Indian arbitral practice with global standards, the legislature introduced substantial amendments to Section 11 through Amendment of 2015 followed by the Amendment of 2019.

5.1 Effect of Amendment of 2015 on Section 11 of the Act of 1996

The 2015 Amendment, aimed at reducing judicial delay, introduced Section 11(6A) to narrow the scope of court intervention. The inserted provision read:

> *"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4), (5), or (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*[8]

This legislative intervention marked a pivotal shift in the approach to Section 11, expressly curtailing the previously expansive judicial inquiry. In effect, it superseded precedents such as "*SBP & Co. v. Patel Engineering Ltd."*[9] and "*National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd."*[10], which had permitted a substantive evaluation of jurisdictional questions at the referral stage. The legislative objective was to entrust such determinations to the arbitral tribunal, as enshrined in Section 16 of the Act of 1996.

The Supreme Court in *Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman*[11], affirmed this

7 *Id,* para 46.

8 Arbitration and Conciliation (Amendment) Act, 2015, *supra* note 13.

9 SBP & Co. v. Patel Engineering Ltd, *supra* note 6.

10 National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd (2009) 1 SCC 267.

11 Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burma (2019) 8 SCC 714.

legislative shift, observing:

> *"The position of law prior to the 2015 Amendment, as laid down in Patel Engineering, is no longer applicable. Post amendment, the scope of power under Section 11 is confined only to the examination of the existence of the arbitration agreement."*

5.2 Amendment of 2019 and the Omission of Section 11(6A)

With a view to further institutionalizing arbitration in India, the Arbitration and Conciliation (Amendment) Act, 2019[12] proposed significant structural changes. Notably, it introduced Section 11(3A), which envisaged the appointment of arbitrators by designated arbitral institutions rather than by the courts. Section 11(3A) stated:

> *"The Supreme Court or the High Court shall designate arbitral institutions… for the purpose of performing the functions of appointment of arbitrators."*

The Amendment of 2019, proposed the omission of Section 11(6A). However, crucially, this omission has not been brought into force through a formal notification.

The legal consequence of this legislative inaction was clarified by the Supreme Court in *In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act*[13], where it held:

> *"Since Section 11(6A) has not been deleted by notification, it continues to operate and governs the scope of judicial review under Section 11."*[14]

Accordingly, despite the legislative intent signaled by the 2019 Amendment, the substantive law governing judicial scrutiny under Section 11 remains unchanged. Courts are still bound to undertake only a prima facie examination of the existence of the arbitration agreement, reaffirming a restrained and facilitative judicial role in the arbitral process unless and until Section 11(6A) is formally omitted.

12 Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Act of Parliament, 2019, (India).

13 In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act [2023] 15 S.C.R. 1081.

14 Ibid.

6. SCOPE OF INTERVENTION IN PRE ARBITRAL PROCEEDINGS UNDER ARBITRATION AND CONCILIATION ACT

6.1 Tests

Eye of the Needle Test

The "Eye of the Needle" test or "cut the deadwood" test, symbolizes the Indian judiciary's efforts to strike an appropriate balance between arbitral autonomy and judicial oversight during the pre-reference stage under Section 11 of the Arbitration and Conciliation Act, 1996. The test delineates the narrow scope of judicial intervention, ensuring that courts do not encroach upon matters better suited for arbitral determination.

The Hon'ble Supreme Court, in "*NTPC Ltd. v. SPML Infra Ltd.*"[15], articulated the scope of this test as follows:

> *"The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable."*[16]

Under this formulation, courts are required to undertake only a prima facie assessment to determine whether a valid arbitration agreement exists and whether the dispute in question is manifestly non-arbitrable.

Evolution of the Test

Prior to the 2015 amendment, Indian courts exercised broader discretion under Section 11. In *SBP & Co. v. Patel Engineering Ltd.*[17], the Supreme Court held that the Chief Justice or their designate was vested with judicial authority to decide on preliminary issues such as the existence of a valid arbitration agreement and the arbitrability of disputes. This led to courts engaging in extensive factual inquiries at the pre-reference stage.

The Amendment of 2015, introduced Section 11(6A), explicitly limiting the court's role to examining the existence of an arbitration agreement. This amendment was intended to reinforce the principle of *Kompetenz-kompetenz*, thereby recognizing the arbitral tribunal's primary jurisdiction to rule on questions of arbitrability and validity under Section 16 of the Act.

15 NTPC Ltd. v. SPML Infra Ltd (2023) 9 SCC 385.

16 Ibid.

17 SBP & Co. v. Patel Engineering Ltd., *supra* note 6.

In *Vidya Drolia v. Durga Trading Corporation*[18], the Supreme Court reaffirmed the limited scope of judicial scrutiny, "Referral courts must undertake a prima facie review to weed out manifestly and ex facie non-arbitrable disputes" This decision underscored that courts should not delve into complex factual assessments at the referral stage**.**

In the *NTPC Ltd.* Case, court further elaborated on the operational contours of the test. *Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves*.[19] The Court emphasized that only in cases where the dispute is manifestly non-arbitrable should the court refuse to refer the matter to arbitration.

The Doctrine of "First Look" And "Second Look"

Arbitration jurisprudence has progressively evolved towards minimizing judicial interference while preserving procedural safeguards. Within this framework, the doctrines of "First Look" and "Second Look" have emerged as analytical tools to delineate the permissible extent of court intervention. These twin concepts help clarify the judicial role under Sections 8, 11, and 34 of the Arbitration and Conciliation Act, 1996.

a. The **First Look** represents the court's preliminary scrutiny at the pre-reference stage, specifically under Sections 8 and 11.

b. The **Second Look** refers to post-award judicial review, primarily under Section 34 (and, where applicable, appellate scrutiny under Section 37).

First Look: Preliminary Judicial Review

The doctrine of First Look pertains to the court's initial assessment when a matter is brought before it for referral to arbitration. This arises under Section 8 (in judicial proceedings) and Section 11 (for appointment of arbitrators). At this juncture, the court is not to conduct a detailed inquiry but is confined to verifying the following:

- Whether a valid arbitration agreement exists;
- Whether the dispute is manifestly non-arbitrable;
- Whether any grounds exist that would render the arbitration untenable at the outset.

18 Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1.

19 NTPC Ltd. v. SPML Infra Ltd, *supra* note 15, para 1.2.

This confined judicial inquiry seeks to preserve arbitral autonomy while preventing reference in cases where arbitration is patently inappropriate.

This limited review serves as a gatekeeping mechanism, allowing courts to "cut the deadwood" and conserve arbitral resources by filtering out inherently non-arbitrable claims. It is cautioned against converting the referral stage into a preliminary trial, noting that such an approach would infringe upon the autonomy of the arbitral tribunal.

Second Look: Post-Award Judicial Review

The Second Look arises once the arbitral process has culminated in an award and a party seeks to set aside it under Section 34 of the Act. At this stage, courts are empowered to engage in a more substantive, albeit still circumscribed, review. The grounds for challenge are exhaustively enumerated in the statute, and judicial interpretation has further restricted the scope of interference.

In *"Ssangyong Engineering & Construction Co. Ltd. v. NHAI"*[20] the Supreme Court clarified the contours of the public policy ground under Section 34, *"The court does not sit in appeal over the arbitral award… Interference is permissible only when the award is against the fundamental policy of Indian law, interest of India, or justice and morality*." At this stage courts can evaluate the arbitrability and objections of jurisdiction with respect to the arbitral tribunal. The Second Look, while more extensive than the First Look, does not permit appellate-style review.

Criticism of the Tests

In the case of "*SBI General Insurance Co. Ltd. v. Krish Spinning*"[21] the Court questioned the practical utility of tests such as "ex-facie meritless" or "eye of the needle", observing:

> *"Tests like the eye of the needle and ex-facie meritless, although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of*

20 Ssangyong Engineering & Construction Co. Ltd. v. NHAI (2019) 15 SCC 131.

21 SBI General Insurance Co. Ltd. v. Krish Spinning 2024 INSC 532.

> *judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge."*[22]

The Hon'ble Supreme Court raised concerns regarding the practical application of such tests and observed that such tests, though doctrinally intended to limit intervention, may inadvertently necessitate factual scrutiny that undermines the objective of a streamlined arbitral process. The judgment underscored the risk of such formulations expanding judicial intervention under the guise of preliminary review, thereby defeating the legislative intent behind Sections 8 and 11 of the Act. Thus, the court in the aforementioned judgment, observed the following:

Accord and Satisfaction

In the case of NTPC[23] and Vidya Drolia,[24] court relied on "ex facie meritless test" or "eye of the needle test" and held that the courts could, in limited cases, reject applications for appointment of arbitrators where the claim is evidently barred due to prior settlement. This reasoning was revisited in Krish Spinning, where the Supreme Court clarified the boundaries of judicial scrutiny under Section 11(6). The Court held that the mere assertion of *accord and satisfaction* should not, by itself, warrant dismissal of a referral application and leave it for the arbitral tribunal to judge. Rather, the judicial authority is required to adopt a prima facie approach without engaging in detailed adjudication.

Limitation

The judicial position now affirms that while the court must ensure that the application under Section 11 of the Act of 1996, is filed within the prescribed period of limitation, any detailed examination of the limitation concerning the claims themselves is to be reserved for the arbitral tribunal.

> "*It is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. It is further clarified that the referral courts, at the stage of*

22 *Id,* para 118.

23 NTPC Ltd. v. SPML Infra Ltd, *supra* note 15.

24 Vidya Drolia v. Durga Trading Corporation, *supra* note 18.

deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator."[25]

6.2 Present Legal Position

In its current judicially interpreted form, and owing to the continued operation of Section 11(6A), the courts' role at the stage of appointing arbitrators is confined to a prima facie examination of the existence of an arbitration agreement. The legal threshold is unequivocal: where an arbitration agreement is apparent on the face of the record, the matter must be referred to arbitration without delving into substantive disputes.

In line with this limited mandate, courts are expressly precluded from adjudicating upon:

a. Arbitrability

b. Enforceability

c. Stamping and sufficiency of the agreement.

Such determinations fall squarely within the domain of the arbitral tribunal, pursuant to the principle of *Kompetenz-kompetenz* enshrined in Section 16 of the Act.

Recent Developments: Kompetenze-Kompetenz and its interplay with Sections 8 and 11

The scope of judicial intervention under Section 11(6A) and Section 8 of the Act of 1996, is deliberately narrow and confined to the ascertainment of the existence of an arbitration agreement, with reference to the requirements stipulated under Section 7. This provision does not invite an elaborate scrutiny into the substantive validity of the agreement, but rather limits the enquiry to matters of formal validity, such as whether the agreement is in writing. The legislative choice of the term "examination" in Section 11(6A), as opposed to the term "rule" employed in Section 16, reflects a conscious demarcation in the nature and intensity of judicial scrutiny permitted at this stage.

This doctrinal boundary was reinforced in *Dixon Technologies India Ltd v. Jaiico and Another*[26] by the Delhi High Court addressed whether a non-signatory to the arbitration

25 SBI General Insurance Co. Ltd. v. Krish Spinning, *supra* note 21, para 133.

26 Dixon Technologies India Ltd v. Jaiico and Another 2025 SCC OnLine Del 893.

agreement could prevent the appointment of an arbitrator under Section 11. The Court held "The appropriate forum for adjudicating whether a non-signatory ought to be impleaded in arbitration is the arbitral tribunal itself. The Court is not to pre-empt that process."

In contrast, when procedural safeguards or threshold statutory requirements are violated, courts may intervene to prevent arbitral reference. The Delhi High Court in *M/s Jaiprakash Associates Ltd v. NHPC Ltd.*[27], declined to refer the matter to arbitration under Section 8, despite the existence of an arbitral award already give. The Court held that the arbitration had been commenced without proper invocation, and the award was passed without notice to the other party. In rejecting the argument that the court was bound to refer the matter, it observed "Section 8 is a gateway provision. It cannot become a post-award ratification mechanism for an arbitration process that was neither consensual nor validly triggered."

This judgment is significant because it affirms that judicial referral is not automatic where the arbitration agreement has not been validly invoked. Courts still retain a limited gatekeeping role, to ensure that arbitration is not used as a shortcut around fundamental procedural fairness.

In Gayatri Balasamy v. ISG Novasoft Technologies Ltd.,[28], where the Supreme Court while examining the scope of Section 34, held *"Section 5 has two facets — positive and negative. The positive facet vests judicial authorities with jurisdiction over arbitral proceedings in matters expressly allowed in or dealt with under Part I of the Arbitration Act. The flip side to this approach is that judicial authorities are prohibited from intervening in arbitral proceedings in situations where the Arbitral Tribunal has been bestowed with exclusive jurisdiction"* [29]

Thus, the rulings draw a clear line that courts must respect arbitral autonomy when the process has been properly initiated, but are justified in intervening when the initiation itself is flawed. The reference court's task is not to assess the strength of the case but to ensure that the gateway to arbitration has been opened lawfully.

This collectively reinforce a nuanced reading of Kompetenz-Kompetenz, one that preserves the autonomy of arbitral tribunals while acknowledging that judicial intervention which plays a vital role in maintaining the legitimacy of the arbitral process.

27 M/s Jaiprakash Associates Ltd v. NHPC Ltd., 2025 SCC OnLine Del 226.

28 Gayatri Balasamy v. ISG Novasoft Technologies Ltd., (2025) 5 SCC 1.

29 *Id.* at para 87.

7. DIFFERENCE BETWEEN SECTION 8 AND 11 OF THE ACT

The distinction between Sections 8 and 11 of the Arbitration and Conciliation Act, 1996, is reflected in the scope and procedural framework of each provision. The following key differences may be noted:

Table 1

Feature	Section 8	Section 11
Authority	Judicial Authority (any court, tribunal, Quasi-judicial body)	Supreme Court or High Court
Judicial Standard	Prima facie assessment of validity and existence of arbitration agreement.	Confined to verifying existence of arbitration agreement.
Appellate Remedy	Appeal lies under Section 37 of the Act of 1996, if application refused.	No statutory appeal against refusal to appoint arbitrator. (until Draft Bill, 2024 is implemented)
Timing of Intervention	When a suit is pending, (arbitration may still commence even if not referred as per section 8(3) of the Act).	Before any arbitration can commence.

8. THE DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024 WITH REFERENCE TO PRE-ARBITRAL PROCEEDINGS

The Draft Arbitration and Conciliation (Amendment) Bill, 2024 represents a measured but meaningful legislative attempt to enhance procedural clarity and judicial efficiency at the pre-arbitral stage. It builds on the pro-arbitration reforms introduced in the 2015 and 2019 amendments and attempts to resolve interpretative uncertainties.

8.1 Key Changes and its implications

The Draft Arbitration and Conciliation (Amendment) Bill, 2024[30] has proposed the following changes:

30 The Draft Arbitration and Conciliation (Amendment) Bill, 2024, Ministry of Law and Justice.

Added sub section (4) to section 8 for speedy disposal of applications

"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."

In other words, once a Section 8 petition is filed, the court must hear and decide the matter promptly, on the order of two months. This codifies the long-standing goal of minimizing judicial delay at the referral stage. This development also reflects the principle of judicial restraint observed in jurisdictions such as Singapore.

Insertion of a new sub section under section 11.

"An application under sub-section (4) or subsection (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."

It solves the problem addressed by the Supreme Court in Bharat Sanchar Nigam Ltd. & Anr. V. M/S Nortel Networks India Pvt. Ltd (2021)[31] related to limitation of filing application of Section 11. As there was no provision earlier for the same. The court had interpreted the period of limitation to fall in the residuary category of Article 137 of Limitation Act (3 years). By sharply curtailing the filing period, the Bill moves Indian law closer to many international rules and best practices, which similarly impose tight appointment deadlines.

In sub-section (1) of Section 37 clause (aa) to be added

"refusing to appoint an arbitrator under Section 11"

The proposed insertion of Clause (aa) under Section 37(1), which renders a refusal to appoint an arbitrator under Section 11 appealable, seeks to address a judicial gap by allowing review of threshold-stage rejections. This codified right to appeal introduces a procedural safeguard against erroneous refusals and promotes greater accountability in judicial appointments. It affirms the status of arbitration as a binding and enforceable dispute resolution mechanism that cannot be denied without substantive examination

8.2 Structural Gaps

While the 2024 Bill makes earnest attempts to streamline pre-arbitral procedures, certain challenges remain:

31 Bharat Sanchar Nigam Ltd. & Anr. V. M/S Nortel Networks India Pvt. Ltd (2021)2 SCR 644.

a. Enforceability of the 60-day limits

The insertion of Section 8(4), which mandates that courts must dispose of referral applications within sixty days, intended to accelerate the initiation of arbitration. However, the amendment does not contain a non obstante clause that would prioritize this timeline over other procedural rules or judicial discretion. It lacks the necessary structural force to ensure compliance. [32] Its practical success depends on whether it is supported by institutional reform such as case management protocols. It is unclear whether Section 8 application is not decided within sixty days, the application can still be validly adjudicated or whether the delay can be challenged in higher courts. This legal grey area could become a new point of contention, leading to fresh procedural disputes about the validity of late Section 8 orders and undermining the very goal of reducing delay.

b. Limitation interplay

The Bill does not itself clarify whether Section 5 of the Limitation Act would apply to period of limitation of 60 days introduced to Section 11 on the applicant. If courts read the limitation as directory and permit condonation under Section 5 based on earlier jurisprudence, the procedural objectives of the Draft bill may be diluted. This ambiguity leaves the door open to inconsistent judicial interpretations.

c. Institutional Gaps due to Non-Implementation of the 2019 Amendments.

The Draft Bill must be understood in light of the fact that key provisions of the 2019 Amendment, especially Section 11(3A), which has not yet been brought into force. Section 11(3A) was meant to shift the power to appoint arbitrators from the courts to designated arbitral institutions. However, as confirmed by the Supreme Court *In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act*[33], this provision has not been notified yet. As a result, courts continue to appoint arbitrators under the older mechanism laid out in Section 11(6), which goes against the legislative intent.

32 White & Case, *Keeping Time: The Government of India Proposes New Arbitration Law Reforms,* WHITE & CASE LLP (Apr. 16, 2024), https://www.whitecase.com/keeping-times-government-india-proposes-new-arbitration-law-reforms.

33 In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act [2023] 15 S.C.R. 1081.

9. CONCLUSION

The legal framework governing arbitration in India has undergone a transformation, particularly in curbing judicial intervention during the pre-arbitral stage. Anchored in the principle of party autonomy and guided by the doctrine of Kompetenz-Kompetenz, the Arbitration and Conciliation Act, 1996, especially post its 2015 and 2019 amendments has sought to recalibrate the role of courts as facilitators rather than gatekeepers in arbitral proceedings. Sections 8 and 11, which were grounds for expansive judicial inquiry, have been deliberately narrowed in scope to mandate only a prima facie examination of the existence of a valid arbitration agreement. This legislative choice is both doctrinally significant and practically necessary to uphold arbitration as a time-efficient and procedurally autonomous dispute resolution mechanism.

The proposed Arbitration and Conciliation (Amendment) Bill, 2024, which introduces timelines and appealability at the referral stage, further reflects an intent to inject certainty and structural integrity into the arbitral process. However, there is a need to notify the amendment of 2019, with respect to Section 11 (3A) of the Act. Doing so would facilitate a structural transition from ad hoc to institutional arbitration, relieve the courts of procedural burdens, and reinforce the principle of minimal judicial interference at the pre-arbitral stage.

Ultimately, the future of arbitration in India depends on maintaining a principled balance: courts must act as gatekeepers of fairness without transgressing into the substantive domain reserved for arbitral tribunals. While judicial intervention is indispensable to preserve access to justice and check abuse of process, its exercise must remain confined to the statutory contours envisioned under the Act. A faithful adherence to these principles will not only boost confidence in the arbitral process but also elevate India’s standing as a pro-arbitration jurisdiction in line with global best practices.