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## FORM VERSUS FUNCTION: RE-EXAMINING ARBITRATION CLAUSES IN COMMERCIAL CONTRACTS

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### ABSTRACT

Between 2025-2026, the Supreme Court of India decided a trilogy of cases, starting from the infamous *South Delhi Municipal Corporation v. SMS Ltd.*, *Alchemist Hospitals Ltd. v. ICT Health Technology Services India Pvt. Ltd.*, to the most recent *Nagreeka Indcon Products Pvt. Ltd. v. Cargocare Logistics (India) Pvt. Ltd.*, that collectively re-drew the boundary of an arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. Each decision struck down a clause that used the vocabulary of arbitration without its substance. This article argues that the deeper problem is structural rather than merely rhetorical: Indian arbitration law possesses no settled taxonomy for distinguishing agreements that never came into existence from agreements that exist but were imperfectly performed. Drawing on the jurisdiction vs. admissibility distinction that has matured in England, Singapore and Hong Kong, this article proposes a two-track 'curable-defect' framework under which only defects going to consensus ad idem, neutrality or the binding character of the outcome void the agreement, while procedural and multi-tier defects are treated as admissibility questions for the tribunal. It further proposes an original institutional mechanism - a voluntary Section 7 Compliance Certification issued by arbitral institutions at the contract-drafting stage as a preventive complement to post-hoc judicial correction. The article situates these proposals within the Mediation Act, 2023 and the growing use of AI-assisted drafting and closes with concrete recommendations for legislators, institutions and transactional lawyers.

**Keywords:** arbitration agreement, Section 7, jurisdiction and admissibility, multi-tier clauses, Mediation Act 2023, contract drafting, Indian arbitration reform.

## I. INTRODUCTION

Dispute resolution clauses are frequently drafted as an afterthought - a template paragraph inserted near the signature block rather than a provision that determines, years later, whether a commercial dispute is resolved in months or through a decade of litigation. Arbitration in India is governed by the **Arbitration and Conciliation Act, 1996**<sup>1</sup> ("the Act"). Where a clause is precisely drafted, arbitration delivers certainty and finality; where it is vague, hybrid or aspirational, it does the opposite - it originates a threshold dispute about the existence of the dispute-resolution mechanism itself, which must first be litigated before the underlying commercial grievance can even be addressed.

This structural irony came sharply into focus in *South Delhi Municipal Corporation of Delhi v. SMS Ltd.*<sup>2</sup>, where the Supreme Court held that a clause referring disputes to the Commissioner of the Municipal Corporation lacked the essential attributes of arbitration and was therefore no arbitration agreement at all. Less than a year later, in *Nagreeka Indcon Products Pvt. Ltd. v. Cargocare Logistics (India) Pvt. Ltd.*<sup>3</sup>, the Court held that a clause stating disputes "can be settled by arbitration" was merely permissive and could not be read as a binding commitment. Read together with *Alchemist Hospitals Ltd. v. ICT Health Technology Services India Pvt. Ltd.*<sup>4</sup>, which held that the mere invocation of the words "arbitration" and "arbitrator" cannot substitute for an independent, binding adjudicatory process. These three decisions form a trilogy that recalibrates Section 7<sup>5</sup> jurisprudence away from textual labelling and towards substantive scrutiny of consent and adjudicatory character.

Most commentary on this trilogy reads it as a caution to drafters: use "shall," not "can"; name an arbitrator, not an officer. That reading is correct but incomplete. It treats a systemic problem as a vocabulary problem. This article contends that the recurring failure of Indian arbitration clauses is not primarily linguistic; it is the absence of a doctrinal mechanism for triaging defective clauses once they reach a court. At present, Indian courts possess only one remedy for a defective clause: total invalidation. A clause that fails on any ground, however minor, however curable is declared not to be an arbitration agreement at all, with the same

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<sup>1</sup> Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

<sup>2</sup> *South Delhi Municipal Corporation of Delhi v SMS Limited*, 2025 SCC OnLine SC 1138.

<sup>3</sup> *Nagreeka Indcon Products Pvt. Ltd. v. Cargocare Logistics (India) Pvt. Ltd.*, 2026 INSC 384.

<sup>4</sup> *Alchemist Hospitals Ltd. v. ICT Health Technology Services India Pvt. Ltd.*, 2025 SCC OnLine SC 2354.

<sup>5</sup> Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

consequence as a clause that never contemplated arbitration in the first place.

The article reconstructs the doctrinal threshold for a valid arbitration agreement under Section 7, analyses the 2025–2026 trilogy as a coherent jurisprudential development, and examines why commercial arbitration clauses continue to fail despite decades of settled law. Then the article advances into a suggestion regarding a two-track curable-defect framework, adapted from the comparative jurisdiction and admissibility distinction, together with a proposal for voluntary institutional pre-certification of arbitration clauses. Finally, it situates this framework within the Mediation Act, 2023 and the growing use of AI-assisted drafting, before concluding with recommendations for courts, legislators and arbitral institutions.

## II. THE DOCTRINAL THRESHOLD: INGREDIENTS OF A VALID ARBITRATION AGREEMENT

Section 7 of the Act requires the agreement to be in writing, to clearly evidence the parties' intention to submit disputes to arbitration, and to establish a neutral adjudicatory mechanism capable of rendering a final and binding decision enforceable as an arbitral award.<sup>6</sup> The statutory text is deceptively short; its content has been built almost entirely through judicial elaboration. In *K.K. Modi v. K.N. Modi*<sup>7</sup>, the Supreme Court identified the now-canonical attributes of an arbitration agreement: the existence of a dispute capable of adjudication, a reference to a private tribunal rather than a court, an intention that the tribunal will determine the rights of the parties in a judicial manner, an intention that the result will be binding and critically that the process is genuinely adjudicatory rather than a mechanism for negotiation, conciliation or determination by an expert acting on his own knowledge. *Bihar State Mineral Development Corporation v. Encon Builders*<sup>8</sup> reaffirmed and consolidated these attributes and they have since been treated as a conjunctive checklist: a clause must satisfy all of them, not merely a majority.

Two structural features of this test deserve emphasis, because they explain why so much modern litigation clusters around ostensibly simple clauses. First, the test is substantive, not nominal courts look behind the label "arbitration" to the actual character of the process described. Second, the test is conjunctive and therefore fragile: because every attribute must be

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<sup>6</sup> *Id.*

<sup>7</sup> *K.K. Modi v. K.N. Modi*, (1998) 3 SCC 573.

<sup>8</sup> *Bihar State Mineral Dev. Corp. v. Encon Builders (I) (P) Ltd.*, (2003) 7 SCC 418.

present, a clause that gets four of five elements right nonetheless fails entirely if the fifth is missing. There is no partial credit. This fragility is doctrinally defensible when the missing element concerns consent or neutrality, a clause resolved by one party's own manager cannot become an arbitration agreement no matter how many other formalities are observed. It is far harder to defend when the missing element is a purely mechanical or procedural failing.

This substantive orientation was reinforced in *Vidya Drolia v. Durga Trading Corporation*<sup>9</sup>, which widened the inquiry beyond the four corners of Section 7 to ask whether the subject matter itself was arbitrable and in the Supreme Court's Constitution Bench ruling *In re: Interplay Between Arbitration Agreements and the Indian Stamp Act*<sup>10</sup>, which underscored that the existence of a valid arbitration agreement is a threshold, jurisdiction-conferring fact rather than a mere formality to be assumed. Taken together, these authorities show a judiciary that has spent three decades hardening the conditions for arbitral jurisdiction, precisely the backdrop against which the 2025–2026 trilogy must be read.

### III. THE 2025-2026 TRILOGY: A COHERENT JURISPRUDENTIAL MOMENT

#### ***A. South Delhi Municipal Corporation v. SMS Ltd. (2025)***

In *SMS Ltd.*<sup>11</sup>, three decade-long disputes turned on Article 20 of concession agreements for municipal parking facilities, which referred disagreements to the Commissioner of the Municipal Corporation of Delhi or his nominee. The Supreme Court held that this arrangement failed on two independent grounds: it did not refer disputes to a private, neutral tribunal and it did not guarantee a final and binding determination free from further departmental review. The Court was explicit that the drafting of arbitration clauses in Indian commercial agreements "leaves much to be desired," and treated the case as an opportunity to restate, rather than merely apply, the constitutive elements of Section 7.

#### ***B. Alchemist Hospitals Ltd. v. ICT Health Technology Services (2025)***

In *Alchemist Hospitals*<sup>12</sup>, the Court confronted a clause that used the language of arbitration but permitted a dissatisfied party to approach a civil court rather than treating the decision-

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<sup>9</sup>*Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

<sup>10</sup>*In re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*, 2023 INSC 1066.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 3.

maker's ruling as final. The Court held that a clause is not saved merely because it names an "arbitrator"; where the supposed award is not truly final and binding, the label is a fiction. This decision forecloses a common drafting workaround inserting arbitration terminology while quietly preserving a civil-court safety valve that had previously offered false comfort to drafters.

### ***C. Nagreeka Indcon Products v. Cargocare Logistics (2026)***

*Nagreeka Indcon*<sup>13</sup> provided that "disputes can be settled by arbitration in India." In the case, it was found that the word "can" indicated only possibility, but not a binding obligation and therefore there was no valid arbitration agreement under Section 7. Notwithstanding the fact that the clause contained specific stipulations as to the seat, governing law and the method of appointment of arbitrators, a single permissive verb made the clause invalid.

Altogether, these cases show the common approach of the courts to the construction of an arbitration clause, which has to satisfy the three basic requirements under Section 7 the neutrality, the finality and the unequivocal consent.

## **IV. WHY CLAUSES CONTINUE TO FAIL: DIAGNOSING THE DRAFTING PROBLEM**

### ***A. Four Recurring Pathologies***

The recurring drafting failures fall into four recognisable patterns, each mapping onto the vocabulary that arbitration scholarship has used since Frédéric Eisemann coined the term 'pathological clause' in 1974 to describe agreements that are defective in form or substance because one or more of arbitration's essential functions - producing mandatory consequences, excluding curial intervention before an award, empowering arbitrators to resolve the dispute, and yielding an enforceable result has been left incomplete.<sup>14</sup>

**1. Permissive language.** Clauses stating that disputes "may" or "can" be referred to arbitration introduce discretion where the statute requires obligation, as confirmed most recently in

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<sup>13</sup> *Id.* at 4.

<sup>14</sup> Frédéric Eisemann, La clause d'arbitrage pathologique, in Commercial Arbitration Essays in Memoriam Eugenio Minoli 129 (1974).

*Nagreeka Indcon*<sup>15</sup>.

2. **Captive adjudicators.** Clauses vesting decision-making power in an officer or department of one contracting party eliminate the neutrality that *K.K. Modi*<sup>16</sup> and *SMS Ltd.*<sup>17</sup> and in the closely related context of arbitrator appointment, *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*<sup>18</sup>, treat as indispensable.

3. **Undefined multi-tier escalation.** Hybrid clauses that move from negotiation to mediation to an undefined "final decision" fail to culminate in a formal arbitral determination, a defect traceable to the reasoning in *Wellington Associates Ltd. v. Kirit Mehta*<sup>19</sup> and *Jagdish Chander v. Ramesh Chander*<sup>20</sup>.

4. **Structural incompleteness.** Clauses that omit a seat, governing procedural law, or a mechanism for appointing an arbitrator generate secondary disputes about enforceability even where the primary intention to arbitrate is clear.

### ***B. Why Ambiguity Persists: Two Underdeveloped Explanations***

Two explanations for this persistence deserve more attention than they typically receive. First, ambiguity is not always inadvertent. Law-and-economics accounts of contractual incompleteness show that parties sometimes leave terms strategically vague where the cost of negotiating precision now is expected to exceed the expected cost of ex post dispute, particularly where one party anticipates retaining greater practical control over how the ambiguity is eventually resolved.<sup>21</sup> In contracts between parties of unequal bargaining power public bodies and private contractors, or large corporations and smaller vendors a clause that nominally invokes arbitration while covertly preserving institutional control (through a captive adjudicator or an undefined escalation path) can function as a deliberate hedge, allowing the dominant party to appear compliant with ADR norms while retaining the practical ability to

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, 2024 SCC OnLine SC 3219 (unilateral appointment clauses held to violate equal treatment of parties).

<sup>19</sup> *Wellington Associates Ltd. v. Kirit Mehta*, (2000) 4 SCC 272.

<sup>20</sup> *Jagdish Chander v. Ramesh Chander*, (2007) 5 SCC 719.

<sup>21</sup> Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87 (1989).

control or delay resolution.<sup>22</sup> Viewed this way, judicial insistence on substantive scrutiny is not merely a technical correction of sloppy drafting but a check on an underlying imbalance of contractual power. Second, and less remarked upon, the very success of arbitration as a global norm has generated a template culture: clauses are copied from precedent banks and international model forms without adaptation to the counterparty, the sector, or the jurisdiction, producing agreements that recite arbitral vocabulary without embodying arbitral substance.<sup>23</sup>

### ***C. Does India Already Have a Curative Doctrine?***

Before proposing a new framework, it is necessary to test rather than assume the claim that Indian law presently offers only one remedy for a defective arbitration clause. A survey of adjacent authority shows that Indian courts have in fact developed curative doctrines in closely related contexts, without ever generalising them into an explicit rule for Section 7 disputes over the existence of the agreement itself.

In *Datar Switchgears Ltd. v. Tata Finance Ltd.*<sup>24</sup>, the Supreme Court held that where the contractual mechanism for appointing an arbitrator has genuinely failed, a court may step in under Section 11(6) and supply the missing procedural element rather than treating the underlying agreement as void a court-supplied cure for a Track Two, mechanical defect. In *NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*<sup>25</sup>, a seven-judge Constitution Bench held that inadequate stamping of the underlying contract is a curable defect that does not, by itself, render the arbitration agreement void or unenforceable again, a defect in the instrument's formal compliance is corrected rather than treated as fatal to arbitral intent. Both lines of authority demonstrate that Indian courts already possess, and are institutionally comfortable exercising, a curative jurisdiction; what is missing is any signal that this curative jurisdiction extends to defects in the constitutive text of the clause itself, as opposed to defects in its formal execution (stamping) or its downstream operation (appointment). No reported Indian decision has yet asked whether an otherwise complete clause containing a single curable infirmity such as the permissive 'can' in Nagreeka Indcon should be saved through interpretive supplementation in the way a failed appointment mechanism is saved under *Datar Switchgears*. That gap, rather than an absence of curative doctrine altogether, is the precise target of the

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<sup>22</sup>Varsha Singh, Arbitration Agreement and Its Construction: An Analytical Study, 4 Legal Res. & Dev. 1 (2020).

<sup>23</sup>Loukas Mistelis & Larry Shore, Arbitration Clause Drafting in Complex Commercial Transactions: Practical Considerations and Emerging Trends, 45 J. Bus. L. 201 (2024).

<sup>24</sup>*Datar Switchgears Ltd. v. Tata Finance Ltd.*, (2000) 8 SCC 151.

<sup>25</sup>*NN Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*, (2023) 7 SCC 1.

framework proposed in Part V.

## V. TOWARDS A CURABLE DEFECT FRAMEWORK

### A. *Borrowing the Jurisdiction–Admissibility Distinction*

Comparative practice offers a more calibrated model than India's present binary. English, Singaporean, and Hong Kong courts distinguish between defects that go to a tribunal's jurisdiction which void its power to act and are reviewable by courts and defects that go merely to the admissibility of a claim before an otherwise validly constituted tribunal, which are for the tribunal itself to resolve and generally attract minimal curial intervention.<sup>26</sup> Each jurisdiction reached this position for a distinct policy reason, and those reasons matter for whether the distinction transplants sensibly to India. English courts in *Republic of Sierra Leone v. SL Mining Ltd.*<sup>27</sup> were animated principally by minimal curial intervention: the Arbitration Act 1996's non-interventionist philosophy counsels leaving procedural objections to the tribunal wherever possible, so that court review is reserved for genuine questions of consent. The Singapore Court of Appeal's reasoning in *BTN v. BTP*<sup>28</sup>, later applied in *DRO v. DRP*<sup>29</sup>, is grounded more explicitly in efficiency and party autonomy: parties who agree to arbitrate should be taken to have intended that procedural disputes about how they arbitrate, not whether they arbitrate, be resolved within the arbitral process itself, consistent with the competence-competence principle. Hong Kong's Court of Final Appeal in *C v. D*<sup>30</sup> followed the Model Law's own structure, reasoning that Article 16 assigns competence over procedural objections to the tribunal in the first instance almost as a matter of statutory design rather than judicial policy choice. The convergence of three major seats, reasoning from three distinct starting points, toward a single organising principle suggests the distinction is not an idiosyncratic doctrinal quirk of any one legal culture but a structural response to the same problem India faces: how to prevent procedural objections from swallowing the substantive question of consent.

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<sup>26</sup>Gary B. Born, *International Commercial Arbitration* § 5.04 (3d ed. 2021).

<sup>27</sup>*Republic of Sierra Leone v. SL Mining Ltd.*, [2021] EWHC 286 (Comm).

<sup>28</sup>*BTN v. BTP*, [2020] SGCA 105; *BBA v. BAZ*, [2020] SGCA 53.

<sup>29</sup>*DRO v. DRP*, [2025] SGHC 255.

<sup>30</sup>*C v. D*, [2023] HKCFA 16.

### ***B. A Two-Track Framework for Indian Section 7 Jurisprudence***

This article proposes that Indian courts adopt an explicit two-track framework -

Track One **Constitutive defects** comprises defects that prevent an arbitration agreement from coming into existence at all: absence of consensus ad idem to arbitrate (permissive language, as in *Nagreeka Indcon*), absence of a neutral adjudicator (captive officer clauses, as in *SMS Ltd.*), and absence of a binding, final outcome (as in *Alchemist Hospitals*). These defects should continue to result in total invalidation, because no amount of judicial interpretation can supply consent, neutrality, or finality that the parties never agreed to.

Track Two **Curable or performative defects**, comprises defects in the operation of an agreement whose constitutive elements are otherwise present: an undefined escalation sequence in a multi-tier clause, the absence of a named seat or appointing authority, or ambiguity as to procedural timelines. Where a court is satisfied applying the *K.K. Modi*<sup>31</sup> attributes as a threshold filter that the parties possessed a genuine, mutual, and unequivocal intention to arbitrate, but the mechanics of that intention are incompletely specified, the court, or preferably the tribunal itself under Section 16<sup>32</sup>, should sever the defective procedural term and supply a reasonable default institutional rules, or the seat of the registered office rather than declaring the entire agreement void. This is not a novel power: it generalises the reasoning already applied to appointment-mechanism failure in *Datar Switchgears* and to formal stamping defects in *NN Global Mercantile* into an explicit rule for the text of the clause itself.

### ***C. Anticipated Objections***

The proposed framework may invite four principal objections. First, it may be argued that curing defects undermines party autonomy by permitting courts to supplement incomplete agreements. This concern is valid only for **Track One** defects, which concern the absence of consent, neutrality, or finality. By contrast, **Track Two** defects relate only to the mechanics of an otherwise valid agreement, and supplying procedural defaults gives effect to, rather than overrides, the parties' intention to arbitrate.

Secondly, judicial supplementation may be criticised as rewriting the contract. However,

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<sup>31</sup> *Id.* at 7.

<sup>32</sup> Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), § 16.

implying standard procedural defaults differs fundamentally from altering substantive rights and reflects well-established contractual gap-filling principles.

Thirdly, it may be argued that Section 7 demands absolute certainty. Yet an undifferentiated invalidation rule often creates greater uncertainty, whereas a two-track framework provides clearer guidance by distinguishing fatal from curable defects.

Finally, the Track One/Track Two distinction may initially generate classification disputes. This risk is mitigated by anchoring Track One to the settled *K.K. Modi* requirements and by the certification mechanism proposed below.

#### ***D. Section 7 Compliance Certification***

To complement the curable-defect framework, this article proposes a voluntary **Section 7 Compliance Certification** administered by Indian arbitral institutions through an independent review panel. Using a published checklist based on the *K.K. Modi*<sup>33</sup> criteria, certification would assess only the constitutive elements of a valid arbitration agreement—consent, neutrality, and finality—while treating procedural matters as advisory.

Certification would remain institution-neutral, accessible through tiered fees, and purely advisory, leaving courts' powers under Section 16<sup>34</sup> unaffected. Although non-binding, it would provide contemporaneous evidence of the parties' intention to arbitrate, promote the use of pre-tested model clauses, strengthen institutional arbitration, and reduce avoidable litigation by identifying defective clauses before contract execution.

## **VI. COMPARATIVE SURVEY, THE MEDIATION ACT AND TECHNOLOGICAL CHANGE**

### ***A. Jurisdiction versus Admissibility Across Seats***

The table below summarises how major arbitral seats currently allocate the consequences of pre-arbitral non-compliance, and situates India's undifferentiated approach within that landscape.

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<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.* at 32.

| Jurisdiction    | Prevailing Approach                                                              | Principal Policy Rationale                                                | Leading Authority                                                               |
|-----------------|----------------------------------------------------------------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| India           | No settled distinction; any Section 7 defect voids the agreement in its entirety | Certainty of consent prioritised over curative flexibility                | SMS Ltd.; Nagreeka Indcon                                                       |
| England & Wales | Admissibility (tribunal decides); minimal curial intervention                    | Non-interventionist philosophy of the Arbitration Act 1996                | Fiona Trust v. Privalov <sup>35</sup> ; Sierra Leone v. SL Mining <sup>36</sup> |
| Singapore       | Admissibility for pre-arbitral steps and preconditions                           | Party autonomy and efficiency; procedural disputes belong to the tribunal | BTN v. BTP <sup>37</sup> ; DRO v. DRP <sup>38</sup>                             |
| Hong Kong       | Admissibility, aligned with UNCITRAL Model Law approach <sup>39</sup>            | Statutory design of Model Law art. 16 (kompetenz-kompetenz)               | C v. D <sup>40</sup>                                                            |
| France          | Broad enforcement via separability; minimal formal preconditions                 | Primacy of party consent over procedural formality                        | Code de procédure civile, arts. 1447–1448                                       |

<sup>35</sup> Fiona Trust & Holding Corp. v. Privalov, [2007] UKHL 40.

<sup>36</sup> *Id* at 27.

<sup>37</sup> *Id* at 28.

<sup>38</sup> *Id* at 29.

<sup>39</sup> UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006).

<sup>40</sup> *Id* at 30.

The comparison shows India as an outlier not in the strictness of its substantive test which is broadly consonant with international practice but in the coarseness of its remedial response. Every other listed jurisdiction has developed a mechanism for preserving an agreement with genuine arbitral intent despite a procedural imperfection; India has not.

### ***B. Multi-Tier Clauses and Statutory Reinforcement***

Commercial contracts increasingly require negotiation or mediation before arbitration may be invoked. Internationally, as Part VI shows, non-compliance with such preliminary steps is treated as a question of admissibility rather than jurisdiction. Although Indian law does not yet expressly adopt this distinction, the Supreme Court's pro-arbitration orientation across the trilogy each decision protecting the integrity of the arbitral process rather than obstructing it suggests that failure to complete a preliminary tier should not, without more, void the ultimate arbitration agreement. The Mediation Act, 2023<sup>41</sup> reinforces this direction: Section 27<sup>42</sup> renders mediated settlement agreements enforceable as court decrees, and Section 7<sup>43</sup> empowers courts to encourage mediation where a mediation clause exists, without treating mediation as a mandatory jurisdictional precondition to arbitration.

### ***C. AI-Assisted Drafting and Smart Contracts***

Technological change reinforces, rather than displaces, the framework proposed in Part V. AI-assisted drafting tools can reduce ambiguity by checking arbitration clauses against standardized templates for Section 7 Compliance Certification. Such tools can flag permissive language ("may" or "can"), detect captive-adjudicator clauses, and identify incomplete multi-tier dispute resolution mechanisms before contract execution. Properly conceived, AI serves as the operational front end of the proposed certification framework, acting as a first-level screening mechanism that reduces the number of clauses requiring detailed institutional review.<sup>44</sup> However, its effectiveness depends on the quality of the underlying templates and legal inputs. Human oversight<sup>45</sup> remains indispensable, particularly in assessing issues such as

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<sup>41</sup>The Mediation Act, 2023, No. 32, Acts of Parliament, 2023 (India).

<sup>42</sup>The Mediation Act, 2023, §27 No. 32, Acts of Parliament, 2023 (India).

<sup>43</sup>The Mediation Act, 2023, §7 No. 32, Acts of Parliament, 2023 (India).

<sup>44</sup>Bhavana Sharma et al., Engineering AI for Contract Analysis and Drafting Efficiency for Accuracy in Legal Workflows, in 2025 International Conference on Computational Engineering, Sensing Technology and Management (ICCETM) (IEEE 2025).

<sup>45</sup>Lindquist, Derick H., and Ylli Dautaj. "AI in international arbitration: Need for the human touch." J. Disp. Resol. (2021): 39.

neutrality and distinguishing Track One from Track Two defects. Smart contracts operating on blockchain infrastructure raise a further unresolved question: whether a coded dispute resolution mechanism satisfies Section 7's requirement that an arbitration agreement be "in writing." Although this issue lies beyond the scope of this article, it is a natural extension of the framework proposed here as commercial contracting increasingly moves on-chain.

## VIII. CONCLUSION AND RECOMMENDATIONS

The trilogy examined in this article dismantles the notion that arbitration can be conjured by labelling or preserved through internal departmental hierarchies; legitimacy depends on neutral, binding adjudication resting on unequivocal consent. But the trilogy also exposes what Indian arbitration law still lacks: a principled means of distinguishing agreements that never existed from agreements that exist but were imperfectly executed. Left uncorrected, that gap will continue to produce decade-long litigation over the threshold question of arbitrability, undermining the very efficiency that arbitration promises to deliver, and over time eroding investor confidence in India's ambition to become a leading international arbitration seat.

This article makes four concrete recommendations.

**1. Adopt the two-track curable-defect framework.** Courts should explicitly distinguish constitutive defects (consent, neutrality, finality) which void an agreement from curable procedural defects, which should be resolved through severance and reasonable default terms rather than wholesale invalidation.

**2. Treat neutrality as a bright-line jurisdictional requirement.** Clauses vesting adjudicatory power exclusively in one party's own officer should remain automatically invalid; neutrality, unlike procedural completeness, admits no cure.

**3. Establish institutional Section 7 Compliance Certification.** Arbitral institutions should offer voluntary, checklist-based pre-execution review of arbitration clauses, creating a documentary record of intent and a growing bank of pre-tested templates.

**4. Prefer institutional over ad hoc arbitration in high-value or public contracts.** Institutional rules supply the procedural defaults seat, appointment mechanism, timelines whose absence most often triggers the Track Two disputes this article addresses, reducing ambiguity at the point of drafting rather than at the point of litigation.

Reform, on this view, does not require legislative amendment as a first step. It requires courts to make explicit a distinction between agreements that never existed and agreements that exist but were imperfectly drafted that international arbitral practice has already validated, and that Section 16's competence-competence principle already implicitly accommodates. Judicial scrutiny of arbitration clauses is not an obstacle to India's arbitration ambitions; used with this sharper analytical toolkit, it is the mechanism by which those ambitions become credible.

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