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THE CONSTITUTIONAL CONUNDRUM OF CURATIVE JURISDICTION IN ARBITRATION: RECONCILING ARTICLE 142, FINALITY, AND THE PRO-ARBITRATION MANDATE OF SECTION 5 IN THE LIGHT OF DMRC V. DAMEPL

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I. ABSTRACT

The Supreme Court of India's curative ruling in Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd. (2024) has reopened a foundational question that lies at the seam between constitutional jurisdiction and arbitral autonomy: when, if ever, may the Court invoke its inherent powers under Article 142 of the Constitution to undo an arbitral award that has already withstood challenge under Sections 34 and 37 of the Arbitration and Conciliation Act, 1996, an appeal under Article 136, and a subsequent review? The Court answered "yes" annulling an award of approximately INR 7,600 crores in favour of a private concessionaire on the ground that it suffered from "patent illegality" amounting to a "grave miscarriage of justice." This paper undertakes a doctrinal and analytical inquiry into the constitutional architecture of arbitral finality in India after DMRC v. DAMEPL. It contends that the decision exposes an unresolved hierarchy problem in Indian law: while Section 5 of the Arbitration Act codifies a legislative command of minimum judicial intervention, the Supreme Court retains a constitutional jurisdiction under Article 142 that operates outside the statute and therefore beyond Section 5's textual reach. The paper argues that this jurisdictional asymmetry has been amplified by an emergent, largely unstated public-exchequer protectionism that risks running afoul of Article 14. Drawing on comparative jurisprudence from England, Singapore and the UNCITRAL Model Law, it proposes a "Constitutional Minimum Test" to cabin the Court's curative powers in arbitration: such review should lie only where the impugned arbitral process or its judicial ratification breaches a constitutional, rather than merely contractual, threshold. The paper

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concludes with calibrated suggestions for doctrinal containment, legislative reform, and the restoration of investor confidence in India's seat-of-arbitration credentials.

II. KEYWORDS

Curative Petition; Article 142; Arbitral Finality; Patent Illegality; Pro-Arbitration Mandate.

III. INTRODUCTION AND RESEARCH PROBLEM

A constitutional democracy structured around the rule of law is, almost by definition, suspicious of finality. Wrong judgments, the worry goes, ought to be capable of correction; otherwise, the State's coercive machinery becomes an instrument of injustice. Yet a commercial republic with the ambition of attracting investment is equally suspicious of the absence of finality: contractual expectations are worth little where they may be revisited indefinitely. India's contemporary law of arbitration sits awkwardly between these two anxieties. The Arbitration and Conciliation Act, 1996 (the "Act") was enacted to honour the second concern; the Constitution of India, however, provides the Supreme Court with extraordinary jurisdiction that is structurally responsive to the first. The two have generally lived in uneasy peace. In April 2024, that peace ended.

The discomfort runs deeper than a single ruling. Arbitration in India is not, and has never been, an island insulated from constitutional attention. The Court has repeatedly held that the constitutional remedies under Articles 32, 226 and 227 are not extinguishable by ordinary statute, and the Act itself is structured around the assumption of constitutional supervision, however restrained. What *DMRC v. DAMEPL* adds to this familiar landscape is the proposition that constitutional supervision extends, in appropriate cases, to the apex level itself: that even after Section 34, even after Section 37, even after an Article 136 appeal and a review, the Court retains a residual constitutional jurisdiction to reopen an arbitral award. The proposition is not, in the abstract, surprising. Its application to the facts of *DMRC* where the impugned "miscarriage" was, on close

analysis, a contested arbitral interpretation of a contractual clause is what generates the doctrinal anxiety this paper seeks to articulate.

In *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*² (“DMRC (Curative)”), a three-judge bench led by Chief Justice D.Y. Chandrachud allowed a curative petition and set aside an arbitral award of approximately INR 2,782 crores (which had grown, with interest, to nearly INR 7,600 crores by the date of the judgment) that the same Court had previously upheld in 2021 and refused to disturb on review.³ The award, made unanimously by a three-member tribunal in 2017 after sixty-eight hearings and a record running to thirty-five thousand pages, was annulled on the ground that it was “perverse and patently illegal” and that its restoration by an earlier bench of the Supreme Court had occasioned a “grave miscarriage of justice.”⁴ The Court invoked its curative jurisdiction recognised in *Rupa Ashok Hurra v. Ashok Hurra*⁵ and rooted in Articles 129 and 142 of the Constitution.

That a curative petition was entertained at all in an arbitration matter is itself doctrinally significant. *Rupa Ashok Hurra* envisaged this jurisdiction as an instrument of last resort, designed to address a “gross miscarriage of justice” or an abuse of the Court’s process—phenomena ordinarily associated with violations of natural justice or the failure of an interested judge to recuse. Its translation into the arbitration domain, where Section 5 of the Act codifies a legislative command that “no judicial authority shall intervene except where so provided,”⁶ is jurisprudentially uneasy. The Act expressly enumerates the grounds on which awards may be set aside and the forums in which such challenges may be made. Curative review is conspicuously absent from that scheme. The constitutional overlay introduced by *DMRC (Curative)* thus opens perhaps re-opens a route to judicial intervention that the legislature had attempted to close.

² *Delhi Metro Rail Corp. Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*, 2024 INSC 292 [hereinafter *DMRC (Curative)*].

³ *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corp. Ltd.*, (2022) 1 SCC 131.

⁴ *DMRC (Curative)*, supra note 1, ¶¶ 47–52.

⁵ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

⁶ Arbitration and Conciliation Act, 1996, § 5, No. 26, Acts of Parliament, 1996 (India).

A. Research Problem

The structural problem this paper addresses can be stated compactly. The 1996 Act, reinforced by the 2015 and 2019 amendments, codifies a policy of minimum judicial intervention in arbitration. That policy is grounded in legislative judgment, comparative best practice, and India's interests as a prospective seat of international arbitration. The Supreme Court, however, holds a constitutional jurisdiction under Articles 129 and 142 that no ordinary statute can foreclose. *DMRC (Curative)* demonstrates that this jurisdiction, in its curative form, can be deployed against arbitral awards that have already cleared every statutory and appellate hurdle. The problem is not whether such jurisdiction exists it plainly does but on what principled basis it should be exercised, and how it can be exercised without dismantling the very policy of finality that the legislature has carefully constructed.

The paper proceeds as follows. Section 2 sets out the research objectives; Section 3 the research questions; Section 4 the research hypotheses; and Section 5 the methodology and scope. Section 6 surveys the existing literature. Section 7, the core of the paper, presents the substantive research and analysis in five parts: Section 7.1 sketches the constitutional foundations of curative jurisdiction; Section 7.2 situates Section 5 of the Act within India's pro-arbitration framework, tracing the journey from *Renusagar* through *Saw Pipes*, *Associate Builders*, *Ssangyong*, and *Vedanta*; Section 7.3 reconstructs the *DMRC v. DAMEPL* saga; Section 7.4 identifies the constitutional fault lines – the Section 5 / Article 142 hierarchy, the Article 14 asymmetry, and what I term the “litigation-cascade externality”; and Section 7.5 offers a comparative perspective drawn from English, Singaporean, and Model Law jurisdictions. Section 8 proposes a Constitutional Minimum Test and ancillary reforms. Section 9 concludes.

B. Research Objectives

1. To analyse the constitutional origin and amplitude of the curative jurisdiction of the Supreme Court under Articles 137 and 142 in relation to arbitration.

2. To study the doctrinal clash between arbitral finality and constitutional powers, particularly the controversy between Section 5 of the Arbitration and Conciliation Act, 1996 and the inherent powers of the Supreme Court.
3. To critique the judgment of the Supreme Court in *DMRC v. DAMEPL* (2024) and its invocation of the concepts of “patent illegality” and “grave miscarriage of justice” to justify curative intervention.
4. To determine whether curative intervention impacts the pro-arbitration stance of limited judicial interference and party autonomy.
5. To analyse the effect of curative review on the constitutional guarantee of equality under Article 14, with special reference to potential judicial favour towards public sector entities.
6. To compare the approach to judicial intervention and arbitral finality in other common law jurisdictions and in the context of the UNCITRAL Model Law.
7. To postulate a doctrinal approach (Constitutional Minimum Test) on how the curative jurisdiction of the Supreme Court should be restricted in the case of arbitrations.
8. To recommend legislative and institutional reforms to promote balance between constitutional justice and the efficacy of arbitration and investor confidence in India.

C. Research Questions

This paper investigates four interlocking research questions arising from the Supreme Court’s curative ruling in *DMRC v. DAMEPL*:

1. Does the curative jurisdiction of the Supreme Court recognised in *Rupa Ashok Hurra v. Ashok Hurra* and rooted in Articles 129 and 142 of the Constitution legitimately reach arbitral awards that have already been the subject of

statutory and appellate scrutiny under the Arbitration and Conciliation Act, 1996?

2. Is the standard applied in *DMRC (Curative)* “patent illegality” rising to the level of a “grave miscarriage of justice” analytically coherent, or does it dissolve the carefully calibrated grounds of Section 34 of the Act into a free-floating standard of constitutional appeal?
3. Does the practical operation of the doctrine which on the facts of *DMRC (Curative)* benefited a public-sector petitioner against a private award-holder produce a structural asymmetry inconsistent with the equality guarantee of Article 14 of the Constitution?
4. What doctrinal, legislative, and institutional measures can cabin curative review of arbitral awards without disabling the Court’s residual responsibility to prevent a genuine miscarriage of justice?

D. Research Hypotheses

The paper advances four propositions corresponding to the research questions identified above:

1. The curative jurisdiction of the Supreme Court is constitutionally available in arbitration matters and cannot be foreclosed by Section 5 of the Arbitration and Conciliation Act, 1996, since a statutory provision cannot constrain a constitutional grant. However, this constitutional availability does not entail unfettered scope; the jurisdiction must be exercised in aid of, and not in derogation of, the substantive legislative policy of minimum judicial intervention.
2. The “patent illegality” standard, as applied in *DMRC (Curative)*, lacks the analytical discipline necessary to insulate the Act’s pro-arbitration architecture from de facto appellate review. By extending curative jurisdiction to a contested interpretation of a contractual clause, the Court has collapsed the

analytical boundary between Section 34's statutory standard and Article 142's constitutional standard, rendering the doctrine effectively standardless.

3. The doctrine, as currently framed, produces an unintended but structurally significant asymmetry favouring public-sector award-debtors. State entities possess both the institutional capacity to pursue extraordinary remedies and a political incentive to resist the outflow of public funds; in the absence of a neutral substantive standard, the doctrine is liable to operate in a manner inconsistent with the equality guarantee of Article 14.
4. A "Constitutional Minimum Test" anchored to:
 - a genuine jurisdictional defect,
 - a serious breach of natural justice,
 - a violation of a fundamental right under Part III, or
 - incompatibility with the basic structure of the Constitution can reconcile the Court's residual constitutional responsibility with the pro-arbitration mandate of Section 5, eliminating the public-private asymmetry and stabilising investor expectations.

E. Research Methodology

The paper follows a predominantly doctrinal and analytical method, guided by a close textual study of constitutional provisions, statutory law and important judicial pronouncements. The approach involves a thorough analysis of Supreme Court of India judgments, in order to provide a historical sketch of the development of the concept of curative jurisdiction vis-à-vis arbitral finality.

The methodological framework also draws on secondary materials including academic commentary, reports of the Law Commission, and analysis provided by scholars. Moreover, to evaluate the Indian position within the wider international debate on minimum judicial intervention, a restricted comparative approach has been incorporated;

judgments from arbitration-friendly common-law jurisdictions such as England and Singapore, as well as the UNCITRAL Model Law, have also been examined.

The approach is therefore both interpretive and normative in nature: not merely analysing the current status of the law but critically testing existing legal principles for their soundness and suggesting principled changes for the future.

F. Scope and Limitations

This paper examines the curative jurisdiction of the Supreme Court in the specific matter of arbitration, and in particular how it has been utilised and interpreted in the judgment of *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.* (2024). The enquiry is based primarily on domestic arbitration under the Arbitration and Conciliation Act, 1996, and its coexistence with the constitutional powers under Articles 137 and 142 of the Constitution of India.

While comparisons with various jurisdictions have been made for illustrative purposes and to highlight alternative doctrinal approaches, the comparative survey is not exhaustive; the paper does not undertake a detailed examination of investor-state arbitration or the enforceability of foreign awards under bilateral investment treaties, except where they shed light on the issues of finality and investor confidence.

The subject has been analysed primarily from a doctrinal perspective, and an empirical approach to legal analysis has not been undertaken; the conclusions are therefore grounded in legal reasoning rather than quantitative data.

G. Literature Review

This paper engages with three distinct but converging strands of legal scholarship: the classical commentary on Indian arbitration law, the constitutional jurisprudence on curative jurisdiction following *Rupa Ashok Hurra v. Ashok Hurra*, and the contemporary academic and practitioner response to the Supreme Court's ruling in *DMRC v. DAMEPL*.

The first strand the classical commentary is anchored by the leading treatises on Indian and international arbitration. O.P. Malhotra and Indu Malhotra's *The Law and Practice of*

*Arbitration and Conciliation*⁷ remains the most authoritative domestic treatment of the Arbitration and Conciliation Act, 1996, and is particularly attentive to the statutory architecture of Section 5 and the closed-list grounds of Section 34. The treatise establishes the orthodox position that the Act represents a legislative commitment to minimum judicial intervention and that the statutory grounds for setting aside an award are intended to be exhaustive. Fali S. Nariman's *India's Legal System: Can It Be Saved?*⁸ while broader in scope, captures the persistent practitioner anxiety about judicial delay and over-intervention in commercial dispute resolution; his diagnosis of systemic finality deficits informs this paper's concern with the litigation-cascade externality identified in Section 7.4.

At the international level, Gary B. Born's *International Commercial Arbitration*⁹ provides the most comprehensive comparative survey of judicial supervision of arbitral awards across leading jurisdictions, and is the principal source informing the comparative material developed in Section 7.5. Born consistently emphasises that the legitimacy of arbitration as a transnational dispute-resolution mechanism depends on a stable doctrine of finality at the seat-court level.

The second strand concerns the constitutional jurisprudence on curative jurisdiction. The doctrine was authoritatively articulated in *Rupa Ashok Hurra*¹⁰ and has been examined principally in the context of natural-justice violations and conflicts of interest among adjudicators. The scholarly literature on *Rupa Ashok Hurra* has, until recently, focused on the doctrine's interaction with review jurisdiction under Article 137, its grounding in Articles 129 and 142, and the procedural limitations imposed to prevent its degeneration into a generalised second appeal. What this literature has not adequately addressed is the application of curative jurisdiction to arbitral awards a gap that *DMRC (Curative)* now makes urgent. The related literature on the High Courts' supervisory jurisdiction under

⁷ O.P. Malhotra & Indu Malhotra, *The Law and Practice of Arbitration and Conciliation* (3d ed. LexisNexis 2014).

⁸ Fali S. Nariman, *India's Legal System: Can It Be Saved?* (Penguin India 2006).

⁹ Gary B. Born, *International Commercial Arbitration* (3d ed. Kluwer Law Int'l 2021).

¹⁰ *Rupa Ashok Hurra*, supra note 4.

Articles 226 and 227, particularly following *Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd.*¹¹ establishes that constitutional supervisory power survives statutory closure but must be exercised in “exceptional rarity.” The present paper extends this framework to the apex level.

The third strand is the contemporary commentary on *DMRC (Curative)* itself. Madhav Goel and Anjali Sharma, writing on *IndiaCorpLaw*,¹² have characterised the decision as opening a “fifth tier” of review and have expressed doctrinal anxiety about its implications for arbitral finality; their analysis identifies the structural problem but does not offer a corrective framework. Vasanth Rajasekaran and Harshvardhan Korada, in their SCC Online commentary,¹³ deconstruct the Court’s treatment of Clause 29.5.1(i) and the CMRS Certificate, demonstrating that the Supreme Court’s reasoning amounts to merits review in all but name; their analysis is largely descriptive and stops short of a constitutional critique.

The Linklaters Arbitration Links note,¹⁴ written from the perspective of the international arbitration bar, emphasises the precedent’s destabilising effect on investor confidence and India’s seat-of-arbitration credentials. The Law Commission of India’s 246th Report,¹⁵ while predating *DMRC (Curative)*, provides the legislative-policy foundation against which the decision must be assessed; its insistence on time-bound and minimally interventionist supervision is the textual root of the 2015 amendments and the analytical baseline of this paper’s normative argument.

¹¹ *Bhaven Constr. v. Exec. Eng’r, Sardar Sarovar Narmada Nigam Ltd.*, (2022) 1 SCC 75.

¹² Madhav Goel & Anjali Sharma, *The Debate Over Supreme Court’s Curative Intervention in Arbitration*, *IndiaCorpLaw* (July 6, 2024), <https://indiacorplaw.in/2024/07/06/the-debate-over-supreme-courts-curative-intervention-in-arbitration/>.

¹³ Vasanth Rajasekaran & Harshvardhan Korada, *Deciphering the Supreme Court’s Verdict on DMRC v. DAMEPL*, SCC Online Blog (May 6, 2024).

¹⁴ Linklaters, *Indian Supreme Court Annuls Arbitral Award by Exercising Extraordinary Power of Curative Review*, *ArbitrationLinks* (June 2024), <https://www.linklaters.com/en/insights/blogs/arbitrationlinks/2024/june/indian-supreme-court-annuls-arbitral-award-by-exercising-extraordinary-power-of-curative-review>.

¹⁵ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996, at 38–42 (2014).

What emerges from this survey is a literature that has identified the problem of *DMRC (Curative)* but has not yet offered a principled doctrinal response. The existing commentary documents the structural anomaly, anatomises the Court's reasoning, and registers institutional alarm; it does not, however, propose a constitutionally grounded standard to discipline the curative power going forward. Nor does it engage in any sustained way with the Article 14 dimension of the doctrine—the prospect that curative review operates with a sub-rosa preference for State petitioners. Finally, no extant treatment situates *DMRC (Curative)* systematically within the comparative Model Law architecture to demonstrate the Indian innovation's status as a regional outlier.

This paper aims to fill these three gaps. It develops the Constitutional Minimum Test as a principled corrective to the Court's open-textured "grave miscarriage of justice" standard; it advances the Article 14 critique as a structural rather than merely intuitive concern; and it embeds the comparative analysis squarely within the UNCITRAL Model Law family, drawing on English, Singaporean, Hong Kong, Swiss, and French practice. In doing so, the paper builds on the existing literature while attempting to move it from diagnosis to remedy.

IV. RESEARCH AND ANALYSIS

This Section presents the substantive analysis of the paper in five parts. Section 7.1 sketches the constitutional foundations of curative jurisdiction; Section 7.2 situates the pro-arbitration architecture of the Act and its doctrinal containment of judicial review; Section 7.3 reconstructs the *DMRC v. DAMEPL* saga; Section 7.4 unpacks the constitutional tensions the decision has produced; and Section 7.5 offers a comparative perspective from leading arbitration jurisdictions.

A. The Constitutional Foundations of Curative Jurisdiction

1. Article 142 and the Inherent Power of the Supreme Court

Article 142(1) of the Constitution authorises the Supreme Court to "pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending

before it.”¹⁶ The clause is, on its face, breathtakingly capacious. It is also, on closer inspection, structurally bounded. The Court has long acknowledged that Article 142 is not a substantive grant of legislative power; it cannot be wielded to override express statutory mandates or to undermine substantive legal rights. It is, in Justice Anand’s classic formulation, a power exercised in aid of justice a residual instrument, not a parallel jurisdiction.¹⁷

The duality is essential. On the one hand, Article 142 has been deployed to dissolve marriages where statutory grounds were technically unavailable, to issue directions in cases of mass tort liability, to rationalise the implementation of constitutional rights, and to do justice in matters where ordinary remedies failed. On the other hand, the Court has cautioned itself against using Article 142 to “ignore” substantive provisions of binding statutes, particularly where the statutory scheme reflects considered legislative policy.

The jurisprudential lineage of Article 142 reflects this duality. Early cases such as *Prem Chand Garg v. Excise Commissioner* read the provision restrictively, holding that “complete justice” could not be a licence for the Court to act *contra legem*.¹⁸ The expansive turn came with *Union Carbide Corp. v. Union of India*, where the Court relied on Article 142 to oversee the Bhopal gas disaster settlement.¹⁹ Even there, however, Justice Venkatachaliah was careful to root the power in the avoidance of “manifest injustice” rather than in the freestanding equity of the Court. The pendulum swung back in *Supreme Court Bar Association*, where the Court declined to reinstate an advocate’s licence under Article 142 because the Advocates Act provided a contrary statutory scheme. The lesson of these cases, taken in the round, is that Article 142 is most secure when it operates within the interstices of statute, and least secure when it is invoked to displace a legislative judgment.

2. The Birth of the Curative Jurisdiction: Rupa Ashok Hurra

¹⁶ India Const. art. 142, cl. 1.

¹⁷ *Supreme Court Bar Ass’n v. Union of India*, (1998) 4 SCC 409, ¶¶ 47–48 (per Dr. A.S. Anand, J.)

¹⁸ *Prem Chand Garg v. Excise Comm’r*, AIR 1963 SC 996.

¹⁹ *Union Carbide Corp. v. Union of India*, (1991) 4 SCC 584.

Curative jurisdiction is a relatively recent doctrinal innovation. In *Rupa Ashok Hurra v. Ashok Hurra*, decided in 2002, a Constitution Bench of the Supreme Court was confronted with the question whether an aggrieved party, having exhausted the ordinary remedies of appeal and review, could seek reconsideration of a final judgment on the ground of an alleged miscarriage of justice.²⁰ The Court answered affirmatively, fashioning the curative petition as a doctrinal instrument of last resort.

The grounds were narrowly framed: the petition would lie where the petitioner established a breach of the principles of natural justice for instance, where notice was not served on the petitioner, or where a judge with a disqualifying interest in the matter sat on the bench or an abuse of process resulting in a manifest miscarriage of justice. The procedural conditions are exacting; the petition must be certified by a senior advocate, must establish the substantial grounds set out in the petition without retreading the merits of the underlying controversy, and must be circulated to the three senior-most judges of the Court and, in so far as practicable, the judges who passed the judgment or order complained of.²¹

Three features of *Rupa Ashok Hurra* are important for present purposes. First, the curative jurisdiction was conceptualised as an extension of, and a corrective to, the review jurisdiction under Article 137 read with Order XLVII both of which are, by design, narrow.²² Second, the Court rooted the jurisdiction in its inherent powers under Articles 129 and 142. Crucially, no statutory fount was invoked, because none was available; the Constitution Bench was self-consciously creating a constitutional remedy. Third, and most significantly, the bench in *Rupa Ashok Hurra* expressly cautioned against the use of curative jurisdiction as a generalised second appeal. The doctrine was justified by the gravity of the rare miscarriage; its expansive use would defeat its own rationale.

3. Finality as a Constitutional Value

²⁰ *Rupa Ashok Hurra*, supra note 4, ¶¶ 38–52.

²¹ Order XLVIII, Supreme Court Rules, 2013.

²² India Const. art. 137; Order XLVII, Supreme Court Rules, 2013.

Article 137, the source of the Supreme Court's review power, presupposes finality. So does the principle of finality reflected in the Supreme Court Rules, 2013, under which a pronounced judgment may be altered only to correct a clerical or arithmetical mistake or an error arising from an accidental slip or omission.²³ The structural premise is that a constitutional court of last resort must, eventually, speak its last word. Without that premise, the Court's authority would dissolve into perpetual revisability; without authority, the rule of law would be merely an aspiration.

Curative jurisdiction therefore stands in productive tension with finality. It exists because there are rare cases in which finality must yield to justice. But this is not an unconditional surrender. The case for curative review must be made out on grounds natural justice, manifest abuse that themselves carry the weight of constitutional principle. Where curative review is invoked merely to revisit the merits, the doctrine ceases to serve its rationale and begins to corrode the very finality on which the Court's authority rests.

This tension is sharpened where the underlying decision is not a judgment of a court at all, but the award of a private tribunal whose constitutional standing rests on the consent of the parties and the limited supervisory mandate the legislature has given to the courts.

B. The Pro-Arbitration Architecture of the Act and the Doctrinal Containment of Judicial Review

1. Section 5 and the Statutory Closure of Judicial Intervention

The Arbitration and Conciliation Act, 1996, was enacted as Indian law's principal modernising response to the UNCITRAL Model Law on International Commercial Arbitration.²⁴ Its structural ambition was to replace the highly interventionist regime of the 1940 Act with a streamlined framework in which judicial intervention would be the exception, not the norm. Section 5 is the legislative articulation of that ambition. It provides that "in matters governed by this Part, no judicial authority shall intervene

²³ Supreme Court Rules, 2013.

²⁴ Statement of Objects and Reasons, Arbitration and Conciliation Act, 1996.

except where so provided in this Part.” The provision is non-obstante in form and exclusionary in substance: it forecloses judicial intervention except as the Act itself permits.²⁵

The Act’s permitted forms of intervention are tightly circumscribed. Section 8 enables a judicial authority to refer parties to arbitration where an action is brought before it; Section 9 confers limited powers of interim relief; Section 11 governs the appointment of arbitrators where the parties’ chosen mechanism fails; Section 16 enshrines the principle of *kompetenz-kompetenz*, allowing the tribunal to rule on its own jurisdiction; Section 27 facilitates assistance in evidence; Section 34 permits a single application to set aside an award on enumerated grounds; Section 36 governs enforcement; and Section 37 provides for an appeal from orders made under specified provisions. There is no provision for second appeal, no right of review (save under the limited common-law principles), and most importantly no curative remedy.

2. The Setting-Aside Standard: From *Renusagar* to *Ssangyong*

The grounds for setting aside an award under Section 34 reflect a deliberate choice to limit merits review. *Renusagar Power Co. v. General Electric Co.*²⁶ held, in the context of foreign awards, that “public policy” was to be construed narrowly: it would be offended only by violations of “(i) the fundamental policy of Indian law, (ii) the interests of India, or (iii) justice or morality.” The narrow approach was disturbed briefly and consequentially by *ONGC Ltd. v. Saw Pipes Ltd.*, which read into “public policy” a fourth, capacious limb of “patent illegality.”²⁷ The decision was widely criticised for re-opening merits review in domestic awards.

The Supreme Court attempted to reset the doctrine in *Associate Builders v. Delhi Development Authority*, where it sought to discipline “patent illegality” by tying it to errors that go to the root of the matter and that are not merely errors of law.²⁸ The 2015

²⁵ Arbitration and Conciliation Act, 1996, § 5.

²⁶ *Renusagar Power Co. v. Gen. Elec. Co.*, 1994 Supp (1) SCC 644.

²⁷ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, ¶¶ 31–32.

²⁸ *Associate Builders v. Delhi Dev. Auth.*, (2015) 3 SCC 49, ¶¶ 27–42.

amendment to the Act took up the project legislatively: it carved “patent illegality” out of “public policy” and confined it to domestic awards under Section 34(2A), expressly providing that an award shall not be set aside “merely on the ground of an erroneous application of the law or by re-appreciation of evidence.”²⁹ *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* consolidated the post-amendment position: an award could be set aside for patent illegality only where the tribunal had decided contrary to the substantive law, the contract, or natural justice in a manner so manifest that the award could not stand.³⁰

Three further developments in the post-2015 jurisprudence are worth noticing. First, in *Government of India v. Vedanta Ltd.*, the Court emphasised that the standard for refusing enforcement of a foreign award under the New York Convention regime is even narrower than the domestic patent-illegality standard, with public policy to be read in its narrowest sense.³¹ Second, in *BCCI v. Kochi Cricket Pvt. Ltd.*, the Court grappled with the prospective and retrospective application of the 2015 amendments and reaffirmed the legislative trajectory toward minimum intervention.³² Third, in *Vidya Drolia v. Durga Trading Corp.*, the Court articulated a four-fold test for arbitrability that, while controversial in some of its details, was uniform in its insistence that questions of arbitrability are presumptively to be decided by tribunals rather than referral courts.³³ Each of these decisions reinforces, in slightly different doctrinal registers, the basic insight that judicial supervision in arbitration must be the exception, not the norm.

It is against this jurisprudential background that *DMRC (Curative)* must be read. The Court did not, in 2024, write on a clean slate. It wrote against a slate carefully cleared, over a decade and a half, by a series of decisions all of which counselled against expansive merits review.

²⁹Arbitration and Conciliation Act, 1996, § 34(2A) (inserted by Act 3 of 2016).

³⁰*Ssangyong Eng'g & Constr. Co. Ltd. v. Nat'l Highways Auth. of India*, (2019) 15 SCC 131, ¶¶ 39–45.

³¹*Gov't of India v. Vedanta Ltd.*, (2020) 10 SCC 1, ¶¶ 90–96.

³²*Bd. of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*, (2018) 6 SCC 287.

³³*Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1, ¶¶ 76–88.

3. Constitutional Article 226/227 Encroachment and Bhaven Construction

The doctrine that the High Courts retain a constitutional supervisory jurisdiction under Articles 226 and 227 of the Constitution, notwithstanding Section 5, has produced its own jurisprudence.³⁴ In *Bhaven Construction*, the Supreme Court held that while constitutional jurisdiction was not extinguishable by ordinary statute, it was to be exercised only in “exceptional rarity” or where the statutory remedy was unavailable. The Court was careful to insist that the legislative scheme of the Act enjoyed a strong presumption of self-sufficiency. *DMRC (Curative)* arises in the same conceptual neighbourhood, but at the apex level: it asks whether the Supreme Court’s own constitutional jurisdiction, exercised at a stage beyond statutory appeal and review, is similarly disciplined.

C. The DMRC v. DAMEPL Saga: A Doctrinal Reconstruction

1. Factual and Procedural Background

In 2008, Delhi Metro Rail Corporation (“DMRC”) and Delhi Airport Metro Express Private Limited (“DAMEPL”), a special purpose vehicle owned jointly by Reliance Infrastructure and the Spanish rolling-stock manufacturer Construcciones y Auxiliar de Ferrocarriles, entered into a concession agreement for the construction, operation, and maintenance of the Airport Metro Express Line connecting New Delhi Railway Station to the Indira Gandhi International Airport.³⁵ The thirty-year concession was structured as a public-private partnership: DMRC retained responsibility for civil works and statutory clearances; DAMEPL undertook the design, supply, installation, operation, and maintenance of the system, including the rolling stock and signalling.

By 2012, defects had appeared in the viaduct bearings supporting the line. On 9 July 2012, DAMEPL issued a cure notice under Clause 29.5.1(i) of the agreement, which entitled the non-defaulting party to terminate where the defaulting party had “failed to cure such breach or to take effective steps for curing such breach” within ninety days. After the

³⁴ *Bhaven Constr.*, supra note 10.

³⁵ *DMRC (Curative)*, supra note 1, ¶ 4.

ninety-day period expired and after consultations with the Commissioner of Metro Railway Safety (“CMRS”), DAMEPL terminated the agreement on 8 October 2012 and ceased operations on 30 June 2013, handing the line back to DMRC.³⁶

DMRC invoked arbitration. The three-member tribunal, after sixty-eight hearings spread over four years, issued a unanimous award on 11 May 2017 in favour of DAMEPL. It directed DMRC to pay (i) a termination payment of approximately INR 2,782 crores plus interest; (ii) operating expenses and debt service of approximately INR 147 crores; (iii) a refund of bank guarantees of approximately INR 62 crores; and (iv) certain ancillary sums against which DMRC was entitled to set off concession fees of approximately INR 46 crores.³⁷

The litigation that followed was extensive. The Delhi High Court’s Single Judge dismissed DMRC’s Section 34 petition. A Division Bench, on Section 37 appeal, partly set aside the award. DAMEPL sought leave to appeal to the Supreme Court under Article 136. A two-judge bench of the Supreme Court allowed the appeal and restored the award in 2021. DMRC’s review petition was dismissed in November 2021. DMRC then filed a curative petition which was allowed by a three-judge bench led by Chandrachud CJ on 10 April 2024.

2. The Court’s Reasoning

The bench in *DMRC (Curative)* addressed two questions: (i) whether the curative petition was maintainable, and (ii) whether the earlier two-judge bench was justified in restoring the arbitral award which the Division Bench of the High Court had set aside on the ground of patent illegality. To both, the Court answered in a manner unfavourable to the award-holder.³⁸

On maintainability, the Court reaffirmed the principles of *Rupa Ashok Hurra* but extended their reach: a curative petition would be maintainable in arbitration matters where the

³⁶ Id. ¶¶ 8–10.

³⁷ Id. ¶ 13.

³⁸ Id. ¶¶ 24–25, 75–76.

impugned judgment had occasioned a “grave miscarriage of justice.” The Court held that the standard was satisfied because the earlier bench had “perpetuated patent illegality” by interfering with a Division Bench judgment that had correctly applied the test under Section 34.³⁹

On the merits, the Court held that the tribunal had failed to draw the analytical distinction commanded by Clause 29.5.1(i) between a failure to “cure” and a failure to “take effective steps to cure.” That a defect remained uncured at the expiry of the ninety-day period, the Court reasoned, did not establish the absence of effective steps; the tribunal had wrongly conflated outcome with effort, and in doing so had ignored vital evidence including the joint application before the CMRS and the resumption of operations under monitored conditions. The award, on this analysis, suffered from perversity within the meaning of *Associate Builders* and *Ssangyong*.⁴⁰

The CMRS Certificate occupies a central, and contested, place in the Court’s reasoning. The CMRS, established under the Metro Railways (Operation and Maintenance) Act, 2002, is the statutory authority charged with certifying the safety of metro operations. The Certificate issued in January 2013 had permitted resumption of metro operations under speed restrictions and other safety conditions. The arbitral tribunal had treated the Certificate as a discrete piece of evidence relating to operational safety, but not as dispositive of the question whether DMRC had taken effective steps to cure the underlying defects within the ninety-day window. The Supreme Court, in *DMRC (Curative)*, treated the Certificate quite differently: it read the Certificate as substantively conclusive of the cure question and held that the tribunal’s failure to so treat it constituted a wilful ignoring of vital evidence.

This re-characterisation of the evidentiary weight of a single document is, with respect, an exercise in merits review. Whether a particular document is “vital” or “incidental,” whether its weight is “conclusive” or “corroborative,” and whether the tribunal’s

³⁹ Id. ¶¶ 47–52.

⁴⁰ Id. ¶¶ 55–69; *Associate Builders*, supra note 28; *Ssangyong*, supra note 30.

appreciation of it falls within the range of reasonable arbitral judgment—these are precisely the questions that the limited grounds of Section 34(2A) were designed to remove from judicial competence. By treating the Certificate as constitutive of the cure question, the Court did not merely identify a failure of arbitral reasoning; it substituted its own appreciation of evidence for that of the tribunal, in a manner that the post-amendment Section 34 jurisprudence has consistently disclaimed.

3. The Aftermath: Doctrinal Vertigo

The decision provoked substantial scholarly disquiet. Practitioners pointed out that DMRC had now been afforded what was, in functional terms, a fifth tier of review: tribunal, Single Judge, Division Bench, Supreme Court (Article 136 appeal), Supreme Court (review), and finally Supreme Court (curative).⁴¹ The criticism was not merely procedural. The Court had, in effect, characterised the original two-judge bench's affirmance of the award—an exercise that itself involved scrutiny of the Division Bench's reasoning—as itself constituting the “miscarriage of justice” justifying curative review. In doing so, the Court collapsed the analytical wall between substantive merits review and the corrective function for which curative jurisdiction was designed.

Three structural consequences followed. First, the precedent makes available to State entities, in particular, a constitutional pathway by which to revisit large-value awards even after they have been judicially affirmed at the apex level. Second, by predicating intervention on “patent illegality” broadly construed, the standard creates an interpretive bridge between Section 34 and Article 142 that bypasses the Act's textual closure. Third, the decision generates a pronounced asymmetry in litigation incentives: parties facing adverse awards are now rationally disposed to pursue every available tier, including curative review, knowing that the route is open.

D. The Constitutional Tension Unpacked

1. The Section 5 / Article 142 Hierarchy Problem

⁴¹Goel & Sharma, *supra* note 11.

The first structural difficulty raised by *DMRC (Curative)* is what may be called the vertical hierarchy problem. Section 5 of the Act is a creature of ordinary statute. Article 142 of the Constitution is a constitutional grant. As a matter of formal hierarchy, the latter cannot be cabined by the former; this much was clarified, in a different context, in *Bhaven Construction*.⁴² It does not follow, however, that constitutional jurisdiction is therefore at large.

The teaching of *Supreme Court Bar Association v. Union of India* is that Article 142 is to be exercised in aid of substantive law, not in derogation of it.⁴³ Where the legislature has, in Section 5, articulated a substantive policy of minimum judicial intervention a policy borne out by the Statement of Objects and Reasons, by the Act's structure, and by repeated judicial dicta Article 142 ought, by self-imposed discipline, to honour that policy unless its honouring would itself produce constitutional injustice. *DMRC (Curative)* does not engage this question. The Court treats the existence of curative jurisdiction in arbitration as a settled premise rather than a contested doctrinal proposition and offers no theory of how Article 142 interacts with the Section 5 mandate.

The omission matters. Without a principled account of when curative review is constitutionally warranted in arbitration, the doctrine becomes effectively standardless: it lies wherever the Court is persuaded that the result below was sufficiently wrong. Such a standard, lacking principled content, is no standard at all.

2. The Article 14 Asymmetry: The Public-Exchequer Critique

A second structural concern, more delicate but no less serious, is the visible asymmetry that *DMRC (Curative)* produces between public and private award-debtors. The Court's reasoning was animated, at multiple points, by the observation that DAMEPL had received what it described as an "undeserved windfall" from a public exchequer.⁴⁴ The concern with public funds is institutionally legitimate, but it sits awkwardly within a

⁴² *Bhaven Constr.*, supra note 10, ¶¶ 12-14.

⁴³ *Supreme Court Bar Ass'n*, supra note 16, ¶¶ 47-48.

⁴⁴ *DMRC (Curative)*, supra note 1, ¶ 76.

doctrine that is, by its terms, agnostic as to the identity of the parties. Arbitration is a private mechanism of dispute resolution; the entire architecture of the Act is structured around the equality of disputants. Article 14 of the Constitution, in turn, prohibits the State and its instrumentalities from creating arbitrary classifications.⁴⁵

If *DMRC (Curative)* is read as inaugurating a sub-rosa classification under which awards against public-sector parties enjoy heightened scrutiny on curative review, the doctrine risks running into Article 14 difficulties. A private award-holder would, on this reading, face an additional procedural hurdle that a public award-holder would not. The classification, if such it be, lacks an intelligible differentia and bears no rational nexus to the object of the Act, which is the speedy and final resolution of commercial disputes.

The point is not that the Court intended to create such a classification; quite plainly it did not. The point is that the precedent operates in a manner that produces such an effect. Curative petitions in commercial arbitration are filed and, as a behavioural matter, are likely to be entertained disproportionately by State entities, because such entities have the institutional resources to pursue extraordinary remedies and the political incentive to resist the outflow of public funds. The doctrinal corrective is to ensure that the standard for curative review is articulated in terms that are blind to the public or private character of the disputants.

3. The Litigation-Cascade Externality

A third concern is what economists would call an externality and what arbitration practitioners would call simply “delay.” The DMRC dispute took nearly eleven years to attain finality from the constitution of the tribunal: four years before the tribunal, two years before the Delhi High Court, three years before the Supreme Court on appeal and review, and a further two and a half years before the curative bench. The award has, on the record, accumulated interest exceeding the principal.⁴⁶

⁴⁵ India Const. art. 14.

⁴⁶ Linklaters, *supra* note 13.

The literature on India's arbitration regime has long noted that delay is the system's most damaging feature.⁴⁷ The Law Commission of India's 246th Report, which underpinned the 2015 amendments, was substantially motivated by the need to compress the litigation cycle.⁴⁸ Section 29A, introduced by that amendment, imposed time limits on tribunals; Sections 9(2) and 11(13) directed expedition at the supervisory stage. *DMRC (Curative)* runs counter to that legislative trajectory. By legitimising a fifth tier of review at the apex level, the decision creates a precedent that will, in expectation, lengthen rather than shorten the litigation cycle. The externality is borne not by the parties to *DMRC* but by every future award-holder whose award is challenged and who must now anticipate the possibility of curative reopening.

4. Party Autonomy as a Constitutional Value

A final dimension of the constitutional tension under-theorised in the existing literature is the relationship between party autonomy and constitutional liberty. Indian courts have, with rare exceptions, conceptualised arbitration as a creature of contract: the tribunal's authority is derivative of the parties' consent, and its awards are binding because the parties have chosen to be bound. This formulation is doctrinally accurate but constitutionally incomplete. Party autonomy in arbitration is also an exercise of the constitutional liberty to order one's commercial affairs, a liberty that draws on Articles 19 and 21 of the Constitution and that has been articulated, in adjacent contexts, in *Maneka Gandhi v. Union of India* and in the contractual liberty jurisprudence of *Central Inland Water Transport Corp. v. Brojo Nath Ganguly*.⁴⁹

If party autonomy is so understood, it is itself a constitutional value, and judicial intervention with arbitral awards is not merely an interpretation of statutory grounds but an interference with constitutional liberty. This recharacterisation does not absolutise party autonomy – no constitutional liberty is absolute but it does reframe the analysis.

⁴⁷ *Vedanta*, supra note 31, ¶¶ 117–120.

⁴⁸ Law Commission of India, supra note 14.

⁴⁹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Cent. Inland Water Transp. Corp. v. Brojo Nath Ganguly*, (1986) 3 SCC 156.

The question is no longer whether the legislative grounds for intervention are met, but whether the constitutional reasons for intervention outweigh the constitutional reasons for restraint. On this analysis, “patent illegality” in contractual interpretation is a thin reason for intervention; manifest violation of natural justice is a thicker one; ouster of constitutional rights is the thickest. The Constitutional Minimum Test proposed in Section 8 below tracks precisely this gradation.

E. Comparative Perspective

1. The English Approach: A Statutory Closure

The English Arbitration Act 1996, on which substantial portions of the Indian Act were modelled, is uncompromising in its insistence on finality. Section 1(c) expressly enacts as a guiding principle that “the court should not intervene except as provided” in the Act. Section 67 permits challenge for substantive jurisdiction; Section 68 for serious irregularity; and Section 69 (which parties may exclude) for an appeal on a point of law with leave. There is no equivalent of the Indian curative jurisdiction; the English Supreme Court does not exercise an inherent power to revisit final commercial judgments outside the statutory scheme.

The English courts have been notably disciplined in applying the existing standards. In *Halliburton Co. v. Chubb Bermuda Insurance Ltd.*, the United Kingdom Supreme Court, while dealing with an application for removal of an arbitrator under Section 24 of the English Arbitration Act 1996, reaffirmed the stringent ‘fair-minded and informed observer’ test for apparent bias and held that the threshold was not met on the facts, despite recognising a legal duty of disclosure.⁵⁰ The restrained curial posture of English arbitration law is even more evident in award-challenge proceedings under Sections 67–69 of the Act, where courts have interpreted the concept of ‘serious irregularity’ narrowly. In *Lesotho Highlands Development Authority v. Impregilo Spa*, for instance, the House of Lords emphasised that Section 68 was designed to address only extreme departures

⁵⁰*Halliburton Co. v. Chubb Berm. Ins. Ltd.*, [2020] UKSC 48, ¶¶ 49–76.

from due process rather than ordinary errors of law or fact. The English approach is structurally pro-arbitration not because it is indifferent to injustice, but because it accepts that the marginal injustice averted by additional review is outweighed by the systemic injustice of perpetuated uncertainty.

2. The Singaporean Approach: Curial Restraint

Singapore's International Arbitration Act and its judicial elaboration in *AKN v. ALC* adopt a similar posture. The Singapore Court of Appeal in *AKN* held that courts will not intervene merely because the tribunal's reasoning was, on the merits, debatable; intervention is warranted only where there has been a serious breach of natural justice or a true jurisdictional defect.⁵¹ The Singaporean judiciary has been visibly proud of this discipline; it regards curial restraint not as a regrettable necessity but as a constitutive feature of Singapore's arbitration brand.

3. UNCITRAL Model Law and the International Convergence

The UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) embodies an international consensus around the following propositions: (i) tribunals are competent to determine their own jurisdiction (Article 16); (ii) judicial intervention is permitted only as the Model Law provides (Article 5); and (iii) recourse against an award is by way of an application to set aside on enumerated grounds (Article 34). The Model Law contains no analogue to a curative remedy; it presupposes finality at the level of the seat court's set-aside decision (or the corresponding decision under Article V of the New York Convention).⁵² The Indian curative jurisdiction is, in this comparative perspective, an outlier.

4. The Hong Kong, Swiss and French Approaches

The point is reinforced by the practice of leading civil-law and common-law arbitration seats. In Hong Kong, the Arbitration Ordinance (Cap. 609) substantially adopts the Model

⁵¹ *AKN v. ALC*, [2015] SGCA 18, ¶¶ 37–39.

⁵² UNCITRAL Model Law on International Commercial Arbitration arts. 5, 16, 34 (1985, amended 2006).

Law and the Court of Final Appeal has consistently interpreted public policy as a narrow ground.⁵³ Swiss law, governed by the Federal Statute on Private International Law (PILA), allows challenge before the Swiss Federal Tribunal on grounds even narrower than those in the Model Law; the Tribunal has insisted that “public policy” for these purposes captures only fundamental procedural and substantive principles of an essentially international character.

France, since the 2011 reform of its arbitration law, has been even more restrained: domestic arbitral awards may be challenged only on five enumerated grounds in Article 1492 of the Code of Civil Procedure, and international awards on the grounds in Article 1520, with appeal lying only by exceptional leave. None of these jurisdictions recognises an inherent appellate or curative function in the constitutional courts vis-à-vis arbitral awards. The Indian innovation is therefore not merely an outlier within the Model Law family; it is, comparatively speaking, *sui generis*.

5. The Investment-Treaty Shadow: White Industries

The comparative discussion would be incomplete without reference to *White Industries Australia Ltd. v. Republic of India*, the UNCITRAL tribunal decision that held India in breach of the India–Australia Bilateral Investment Treaty for the inordinate delay in enforcing a foreign award.⁵⁴ The tribunal located the breach in India’s failure to provide an “effective means of asserting claims and enforcing rights.” The decision shaped the policy environment in which the 2015 amendments were enacted. *DMRC (Curative)*, viewed through the *White Industries* lens, raises a discomfiting question: if the Supreme Court can re-open final awards through curative review, does India still provide “effective means” within the meaning of the treaty? The question is unsettled; its mere availability counsel’s institutional caution.

V. SUGGESTIONS AND RECOMMENDATIONS

⁵³ *Hebei Import & Export Corp. v. Polytek Eng’g Co.*, [1999] 2 HKC 205 (CFA).

⁵⁴ *White Indus. Austl. Ltd. v. Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011).

The objective of this Section is constructive rather than merely critical. The argument is not that curative jurisdiction in arbitration must be abolished a position that runs against the constitutional fabric and is, in any event, beyond the reach of doctrinal commentary but that the jurisdiction must be contained within principled limits.

A. The Constitutional Minimum Test

I propose that the Supreme Court adopt, in a future Constitution Bench reference, what may be called the “Constitutional Minimum Test.” Under this Test, curative jurisdiction in arbitration matters would lie only where the petitioner establishes that the impugned arbitral process or its judicial ratification has breached one or more of the following constitutional minima:

1. a true jurisdictional defect in the constitution of the tribunal or the scope of the reference;
2. a serious breach of the principles of natural justice;
3. a violation of a fundamental right protected by Part III of the Constitution; or
4. a result that is incompatible with the basic structure of the Constitution or with the binding constitutional command.

The Test does several things. First, it preserves the Court’s residual constitutional responsibility there will always be cases in which the integrity of the judicial process requires curative correction, and these are not vanishingly rare. Second, it cabins the doctrine by tying it to identifiable constitutional standards rather than to free-floating notions of merit. Third, it draws a clear analytical line between Section 34’s “patent illegality” which is and ought to be a statutory standard, applied at the statutory stage and Article 142’s curative mandate, which is and ought to be a constitutional standard. Fourth, it eliminates the public-exchequer asymmetry: the Test is blind to the public or private character of the parties and tracks the constitutional injuries that warrant correction regardless of the identity of the wrongdoer or the wronged.

B. Legislative Refinement of Section 34

The Test would be reinforced by a corresponding legislative refinement. Parliament could amend Section 34 to provide expressly that the grounds in sub-section (2A) are exhaustive and that the doctrine of patent illegality, properly understood, does not extend to errors of contractual interpretation that fall within the reasonable spectrum of arbitral judgment. The Draft Arbitration and Conciliation (Amendment) Bill, 2024, currently in circulation, contains provisions in this neighbourhood; Parliament should ensure that the final text addresses the doctrinal disquiet generated by *DMRC (Curative)* rather than aggravating it.⁵⁵ A clarificatory proviso to Section 34(2A), to the effect that “patent illegality shall not include disagreement with the tribunal’s interpretation of the contract where such interpretation is a possible view,” would close one of the principal interpretive routes by which curative reopening is presently rationalised.

C. Practice Directions on Curative Petitions in Arbitration

Within the existing framework, the Supreme Court could issue Practice Directions clarifying the procedural and substantive conditions for entertaining curative petitions in arbitration matters. Such Directions could include:

1. a presumption against admission, rebuttable only on a clear demonstration of one or more of the constitutional minima identified above;
2. a requirement that the petition be heard by a bench of at least five judges, given the doctrinal stakes;
3. a provision for cost consequences where curative petitions are filed without merit, calibrated to discourage strategic use; and
4. a recommendation that curative petitions in arbitration be disposed of within a fixed period from filing, given the collateral commercial consequences.

D. Investor-Confidence Measures: The Foreign-Award Carve-Out

⁵⁵ Draft Arbitration and Conciliation (Amendment) Bill, 2024 (Ministry of Law and Justice, Government of India).

A more institutionally significant recommendation concerns foreign awards. The reasoning of *DMRC (Curative)* was confined to a domestic award between two Indian parties (counting DMRC's status as a state entity). It does not, on its terms, reach foreign awards governed by Part II of the Act. There is, however, no doctrinal reason intrinsic to the curative jurisdiction why it could not be extended; the constitutional source is the same. To insulate India's enforcement regime from this risk, the Court could expressly hold in a future case or by way of Practice Direction that curative jurisdiction does not lie against orders enforcing foreign awards under the New York Convention regime. The carve-out would honour India's treaty commitments and stabilise expectations among foreign investors and commercial counterparties.

E. Institutional Self-Restraint and Bench Composition

Finally, and perhaps most importantly, the Court itself can do much by exercising disciplined self-restraint. Curative petitions in arbitration matters should be admitted sparingly, decided briefly, and accompanied by reasons that situate the disposition within the constitutional minima rather than within a generalised commentary on the soundness of the underlying tribunal's reasoning. The bench composition should signal the doctrinal weight of the jurisdiction: a habit of constituting larger benches for curative arbitration matters would underscore both the rarity of the remedy and its constitutional gravity.

F. Empirical Monitoring and the Arbitration Council of India

A final, more institutional, recommendation: the Arbitration Council of India, established by the 2019 amendment but only partially operational at the time of writing, should be tasked with publishing annual data on curative petitions filed in arbitration matters—including the identity of the petitioner (public or private), the disposition rate, the time taken from filing to disposal, and the average value of awards challenged. Empirical monitoring would discipline the doctrine in two ways. It would, first, provide a public record against which the Court could measure its own restraint. Second, it would furnish an evidentiary basis for the Article 14 critique developed in Section 7.4.2 above: if the data

revealed, as I suspect they would, that curative petitions in arbitration matters are filed predominantly by State entities and disproportionately succeed where the award-holder is a private party, the asymmetry would no longer be a doctrinal hypothesis but an empirical fact. The transparency itself would, in expectation, induce restraint.

VI. CONCLUSION

DMRC v. DAMEPL is the most consequential arbitration ruling of the post-amendment era, and not because of its commercial impact, considerable though that was. It is consequential because it has reopened a structural question that the legal community had assumed to be settled: whether the legislative architecture of arbitral finality, painstakingly constructed across the 1996 enactment and the 2015 and 2019 amendments, is impervious to constitutional reopening at the apex level. The Court has now answered that question in the negative. The achievement of that answer was, for the parties before the Court, doubtless the doing of justice in the case at hand. Its precedential consequences, however, extend well beyond the dispute and beyond the parties.

Three propositions emerge from the analysis offered in this paper. The first is doctrinal: curative jurisdiction in arbitration is constitutionally available, but it sits in an unresolved hierarchy with Section 5 of the Act and demands an analytical discipline that *DMRC (Curative)* does not provide. The second is normative: in the absence of such discipline, the doctrine produces structural pathologies asymmetry between public and private award-debtors, lengthening of the litigation cycle, and corrosion of the pro-arbitration mandate of Section 5 that the Constitution itself has reason to disfavour. The third is institutional: the discipline that the doctrine requires must come from the Court itself, supplemented by legislative clarification and procedural design. Constitutional power that is wielded without principled self-limitation invites resistance from those it does not serve.

The deeper lesson of *DMRC (Curative)* is that arbitration in India is not merely a commercial mechanism but a site of constitutional engagement. The principles of party autonomy, finality, and minimum judicial intervention that underpin the 1996 Act are

not extra-constitutional values; they are themselves consonant with the Constitution's commitments to liberty, equality, and the rule of law. Treating them as such – rather than as merely statutory considerations subordinate to the inherent powers of the Court – will, in time, restore the equilibrium between justice and finality that India's law of arbitration has, for a moment, lost. The Constitutional Minimum Test proposed here is one possible route to that restoration. There may well be others. What the present moment forecloses is the option of doing nothing.

The promise of arbitration in India was articulated almost three decades ago in the Statement of Objects and Reasons accompanying the 1996 Act: a system in which commercial disputes would be resolved expeditiously, finally, and with minimum judicial interference. That promise survives *DMRC v. DAMEPL*, but only just. Whether it will survive the next decade depends less on what the legislature does than on what the Supreme Court chooses to demand of itself. The Court's curative jurisdiction is, ultimately, an instrument of its own discipline; the discipline is, ultimately, what makes the instrument legitimate.

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