



Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

Research



International Commercial Arbitration

Law and Recent Developments
in India

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International Commercial Arbitration

Law and Recent Developments in India

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1. Introduction

Increase in international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of foreign investments, overseas commercial transactions, and open-ended economic policies acting as a catalyst, international commercial disputes involving Indian parties are steadily rising. This has drawn tremendous focus of the international community on India's international arbitration regime.

Due to certain controversial decisions by the Indian judiciary in the last three decades, particularly in cases involving a foreign party, the international community has kept a close watch on the development of arbitration laws in India. The Indian judiciary has often been criticized for its interference in international arbitrations and extraterritorial application of domestic laws in foreign seated arbitrations.

However, the latest developments in the arbitration jurisprudence through recent court decisions clearly reflect the support of the judiciary in enabling India to adopt the best international practices. Courts have adopted a pro-arbitration approach and a series of pro-arbitration rulings by the Supreme Court of India ("**Supreme Court**") and High Courts are laudable efforts to change the arbitration landscape completely for India. From 2012 to 2021, the Supreme Court has delivered various landmark rulings taking a much-needed pro-arbitration approach, such as declaring the Indian arbitration law as seat-centric; referring non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy both in domestic and foreign-seated arbitration; and diving deep into the issue of arbitrability.

In furtherance of this approach, measures have been taken by the Indian government in support of the '*ease of doing business in India*', and after two aborted attempts in 2001 and 2010 to amend the arbitration law, the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**") came into effect, from October 23, 2015. The 2015 Amendment Act is prospective in nature and applies (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings that have commenced on or after October 23, 2015. However, the amendment to Section 36 of the Act, which pertains to removing the implied automatic stay on the execution of arbitral awards, applies retrospectively as it is procedural in nature.¹ The 2015 Amendment Act was well received and significantly improved the efficiency of arbitration in India.

Subsequently, a High-Level Committee to review the Institutionalizing of Arbitration Mechanism in India was set up under the chairmanship of retired Justice B.N. Srikrishna. The Committee was established to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a roadmap for making India a robust centre for international and domestic arbitration.

After considering the recommendations in the Committee report ("**Committee Report**") to strengthen institutional arbitration in India, the Arbitration and Conciliation (Amendment) Bill, 2018 was proposed. The Bill was passed by the Lok Sabha on 10 August 2018 and was pending before the Rajya Sabha. However, the 2018 Bill lapsed and did not see the light of the day.

Subsequently, Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and successfully enacted as the Arbitration and Conciliation (Amendment) Act on August 9, 2019 ("**2019 Amendment Act**"). The 2019 Amendment Act was passed with a view to make India a hub of institutional arbitration for both domestic and international arbitration. On August 30, 2019, the Central Government notified Sections 1, 4-9, 11-13, 15 of the 2019 Amendment Act.

1. The judgment of the Supreme Court in *BCCI v. Kochi* has been discussed later.

The ever-evolving arbitration regime in India witnessed its latest amendments late last year addressing the issues of unconditional stay on enforcement and deletion of Schedule on arbitral appointments. On November 4, 2020, the Arbitration and Conciliation (Amendment) Ordinance, 2020 (“**2020 Ordinance**”) was promulgated to further amend the Act.² The 2020 Ordinance, inter alia, introduced the following amendments: (i) an unconditional stay on the enforcement of an India seated arbitration award until the challenge to the award is determined, provided, there is a *prima facie* finding by the Court that the arbitration agreement or contract which is the basis of the award, or the making of the award was induced or effected by fraud or corruption; and (ii) the deletion of the Eighth Schedule of the Act, which contained the qualifications, experience and norms for accreditation of arbitrators. The Arbitration and Conciliation (Amendment) Bill, 2021, which incorporates the amendments in the 2020 Ordinance received the President’s assent on March 11, 2021 as the Arbitration and Conciliation (Amendment) Act, 2021 (“**2021 Amendment Act**”).

2. Arbitration and Conciliation (Amendment) Ordinance, 2020 (No. 14 of 2020).

2. Indian Arbitration Regime

I. History of Arbitration in India

Until the Arbitration and Conciliation Act, 1996 (“**Act**”), the law governing arbitration in India consisted mainly of three statutes:

- i. The Arbitration (Protocol and Convention) Act, 1937 (“**1937 Act**”);
- ii. The Indian Arbitration Act, 1940 (“**1940 Act**”); and
- iii. The Foreign Awards (Recognition and Enforcement) Act, 1961 (“**1961 Act**”)

The 1940 Act was the general law governing arbitration in India and resembled the English Arbitration Act of 1934.

II. Background to the Arbitration and Conciliation Act, 1996

The Indian government with the dual motive of addressing the rising concerns and encouraging arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international spheres, in 1996, adopted a new legislation based on the “Model Law” in the form of the Act. The Act also aimed to provide a speedy and efficacious dispute resolution mechanism in the existing judicial system which was marred by inordinate delays and a backlog of cases.

III. Scheme of the Act

The Act has three significant parts. Part I of the Act deals with Domestic Arbitrations and International Commercial Arbitrations (“**ICA**”) when the arbitration is seated in India. Thus, an arbitration seated in India between one foreign party and an Indian party, though defined as an ICA, is treated akin to a domestic arbitration. Part II of the Act deals only with foreign awards³ and their enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”) and Convention on the Execution of Foreign Arbitral Awards, 1927 (“**Geneva Convention**”). Part III of the Act is a statutory embodiment of conciliation provisions.

In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, and 28 to 33 regulate the conduct of arbitration, Section 34 regulates the challenge to the award and Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37 and 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary.⁴

Courts have found that Chapters III to VI, specifically Sections 10 to 33 of Part I of the Act, contain the curial or procedural law which parties would have the autonomy to opt out of. The other Chapters of Part I of the Act form part of the proper law,⁵ thus making those provisions non-derogable by parties, subject to Part I, even by contract.

3. A foreign award is award delivered in an arbitration seated outside India.

4. *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc.*, 2012 (9) SCC 552.

5. *Anita Garg v. M/s. Glencore Grain Rotterdam B.V.*, 2011 (4) Arb LR 59 (Delhi).

Part II, on the other hand, regulates arbitration only in respect to the commencement and recognition /enforcement of a foreign award, and no provisions under the same can be derogated from by a contract between two parties.⁶

The objective of the Act is to provide a speedy and cost-effective dispute resolution mechanism which that give parties finality in their disputes. A number of decisions from the courts slowly but steadily ensured that the preferred seat in any cross-border contract was always a heavily negotiated point and, more often than not, ended up being either Singapore, New York, or London (the established global arbitration centres). Foreign investors and corporates doing business in India were just not ready to take risks with the Indian legal system.

IV. Arbitration and Conciliation (Amendment) Act, 2015

The 2015 Amendment Act made significant changes to the Act and are in the right direction to clarify several issues with regard to the objectives of the Act.

The 2015 Amendment Act provided strict timelines for completion of the arbitral proceedings along with the scope for resolving disputes by a fast track mechanism. The 2015 Amendment Act introduced new provisions in addition to the amendments to the existing provisions governing the process of appointment of an arbitrator. It also clarified the grounds to challenge an arbitrator appointment for the lack of independence and impartiality. As a welcome move, the 2015 Amendment Act provided for assistance from the Indian courts, even in foreign seated arbitrations, in the form of interim relief before the commencement of the arbitration. Further, with the introduction of the '*costs follow the event*' regime in the Act, the regime for awarding costs in arbitration has been brought in line with the international standards. The process of enforcement and execution under the Act has also been streamlined so that challenge petitions do not operate as an automatic stay on the execution process. Below are the snapshots of the major amendments introduced by the 2015 Amendment Act:

A. Pre-arbitral Proceedings

i. Independence and impartiality

- Applications for appointment of an arbitrator should be endeavoured to be disposed of within a period of sixty (60) days from date of service of notice on the opposite party.
- Drawing from the IBA Guidelines on Conflict of Interest, a detailed schedule on the ineligibility of arbitrators has been put in place.

ii. Interim reliefs

- Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitrations.
- Section 9 applications to be made directly before the High Courts in case of ICAs seated in India as well as outside.
- Interim reliefs granted by arbitral tribunals seated in India are deemed to be the orders of courts and are, thus, enforceable in the new regime.
- Post the grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

6. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc., 2012 (9) SCC 552.

B. Arbitral Proceedings

i. Expeditious disposal

- A twelve-month timeline for completion of arbitrations seated in India was prescribed.⁷
- Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, the appointment of arbitrators, and challenging petitions.
- Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

ii. Costs

- “Costs follow the event” regime has been introduced.
- Detailed provisions have been inserted in relation to the determination of costs by arbitral tribunals seated in India.

C. Post-arbitral proceedings

i. Challenge and enforcement

- In the case of an ICA seated in India, the grounds on which an arbitral award can be challenged has been narrowed.
- Section 34 petitions to be filed directly before the High Courts in case of ICA seated in India.
- Section 34 petitions to be disposed of expeditiously and, in any event, within a period of one year from the date on which notice is served on the opposite party.
- Upon filing a challenge under Section 34 of the Act, there will not be an automatic stay on the execution of the award – and more specifically, an order has to be passed by the court expressly staying the execution proceedings.

V. Arbitration and Conciliation (Amendment) Act, 2019

The High-Level Committee to review the institutionalizing of arbitration mechanism in India was established to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a roadmap for making India a robust centre for international and domestic arbitration. The 2019 Amendment Act was passed with a view to make India a hub of institutional arbitration for both domestic and international arbitration.

The 2019 Amendment Act brought about several key changes to the arbitration landscape in India:

- The 2019 Amendment Act sought to establish the Arbitration Council of India, which would exercise powers such as grading arbitral institutions, recognizing professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations. However, this amendment has not been notified yet.

7. The time limit as prescribed by the 2015 Amendment Act was amended to be applicable to only domestic arbitrations by the 2019 Amendment Act.

- Further, the 2019 Amendment Act amends the 2015 Amendment Act by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the Arbitration Council of India with the power to appoint arbitrators. This amendment has also not been notified yet.
- The 2015 Amendment Act introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon the reference. The 2019 Amendment Act amends the start date of this time limit to commence once the pleadings are completed. The pleadings are to be completed within six months.
- The 2019 Amendment Act also excludes ‘international commercial arbitration’ from this time-limit to complete arbitration proceedings.
- The 2019 Amendment Act introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators.
- The 2019 Amendment Act further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule. The Eighth Schedule has since been deleted by the 2020 Ordinance.
- Importantly, the 2019 Amendment Act also attempted to clarify the scope of applicability of the 2015 Amendment Act. The 2019 Amendment Act provided that the 2015 Amendment Act, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. However, this particular provision, Section 87 of the Act, has now been struck down by the Supreme Court and has been discussed later in this paper.

On August 30, 2019, the Central Government notified Sections 1, 4–9, 11–13, 15 of the 2019 Amendment Act. The notified amendments include amendments relating to the timeline for arbitration, confidentiality and applicability of the 2015 Amendment Act. However, it must be noted that the provisions pertaining to the Arbitration Council of India have not been notified yet.

In 2018, the Supreme Court dealt with the issue of retrospective applicability of the 2015 Amendment Act. The text of the 2015 Amendment Act contains Section 26 which states that:

“

“Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

”

In the case of *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.*,⁸ (“BCCI”) the Supreme Court made a clear distinction between the two limbs of Section 26 of the 2015 Amendment Act and explained the applicability of the 2015 Amendment Act. The Court held that the first part of Section 26 deals with arbitral proceedings before the arbitral tribunal alone. The Court held that the second part only deals with court proceedings that relate to the arbitral proceedings. It then concluded that the 2015 Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings that have commenced on or after October 23, 2015. However, the Supreme Court also held that the amendment to Section 36 of the Act, which pertains to removing the implied automatic stay on the execution of arbitral awards, applies retrospectively as it is procedural in nature.

8. (2018) 6 SCC 287.

Peculiarly, the 2019 Amendment Act introduced Section 87, which provides that the 2015 Amendment Act, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. This was in clear contrast to the Supreme Court's ruling in BCCI insofar as the application of Section 36 of the Act was concerned.

However, Section 87 has been struck down by the Supreme Court as being unconstitutional in the case of *Hindustan Construction Company Ltd.v. Union of India*.⁹ Consequently, the position laid down by the Supreme Court in BCCI has been reinstated.

VI. Arbitration and Conciliation (Amendment) Act, 2021

The Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated on November 4, 2020, further amending the Act.¹⁰ This brought two amendments:

- a. Unconditional stay on the enforcement of an India seated arbitration award (including both, an award in a domestic arbitration and an award in an ICA) until the challenge to the award is determined where there is *prima facie* finding by the Court that the arbitration agreement or contract which is the basis of the award, or the making of the award was induced or effected by fraud or corruption;
- b. Deletion of the much-debated qualifications, experience and norms for accreditation of arbitrators stipulated under the Eighth Schedule of the Arbitration Act.

The amendment to the enforcement of an award in an arbitration marred by fraud or corruption has been given retrospective application, meaning whereby the amendment would apply to all court cases in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after October 23, 2015. For a more detailed analysis on the impact of the 2020 Ordinance prescribing automatic stay for such arbitration agreements, please visit our article on this issue [here](#).¹¹ The 2021 Amendment Act incorporates the amendments in the 2020 Ordinance.

9. AIR 2020 SC 122.

10. Arbitration and Conciliation (Amendment) Ordinance, 2020 (No. 14 of 2020).

11. <https://www.nishithdesai.com/information/news-storage/news-details/article/ever-changing-arbitration-landscape-in-india-yet-another-attempt-hit-or-a-miss.html>.

3. International Commercial Arbitration – Meaning

Section 2(1)(f) of the Act defines an ICA as an arbitration relating to disputes arising out of a legal relationship which must be considered commercial,¹² where either of the parties is a foreign national or resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under Indian law, an arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA, and will be subject to Part I of the Act. However, where an ICA is held outside India, Part I of the Act would have no applicability on the parties (save the stand-alone provisions introduced by the 2015 Amendment Act, unless excluded by the parties, as discussed later) but the parties would be subject to Part II of the Act.

The 2015 Amendment Act also deleted the words ‘a company’ from the purview of the definition thereby restricting the definition of ICA only to the body of individuals or association. Therefore, by inference, it has been made clear that if a company has its place of incorporation as India then central management and control would be irrelevant as far as its determination of being an “international commercial arbitration” is concerned.

Notably, the scope of Section 2 (1) (f) (iii) was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*,¹³ (“**TDM Infrastructure**”) wherein, despite TDM Infrastructure Pvt. Ltd. having foreign control, it was concluded that “*a company incorporated in India can only have Indian nationality for the purpose of the Act*”.

Thus, though the Act recognizes companies controlled by foreign hands as a foreign body corporate, the Supreme Court has excluded its application to companies registered in India and having Indian nationality. Hence, in case a corporation has dual nationality, one based on foreign control and the other based on registration in India, for the purpose of the Act, such corporation would not be regarded as a foreign corporation.

In a recent case, where the Indian company was the lead partner in a consortium (which also included foreign companies) and was the determining voice in appointing the chairman and the consortium was in Mumbai, the Supreme Court held that the central management and control was in India.¹⁴

12. ‘Commercial’ should be construed broadly having regard to the manifold activities which are an integral part of international trade today (R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136).

13. (2008) 14 SCC 271.

14. *M/s. Larsen and Toubro Ltd. SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority*, 2018 SCC OnLine SC 1910.

4. Arbitrability Under Indian Law

Arbitrability is one of the issues where the contractual and jurisdictional facets of ICA meet head-on. It involves the simple question of what type of issues can and cannot be submitted to arbitration.

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,¹⁵ the Supreme Court discussed the concept of arbitrability in detail and held that the term ‘arbitrability’ had different meanings in different contexts: (a) disputes capable of being adjudicated through arbitration, (b) disputes covered by the arbitration agreement, and (c) disputes that parties have referred to arbitration. It stated that in principle, any dispute that can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand excluded from the resolution by a private forum. Such non-arbitrable disputes include: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The Supreme Court, in *N. Radhakrishnan v. M/S Maestro Engineers*,¹⁶ held that where fraud and serious malpractices are alleged, the matter can only be settled by the court and such a situation cannot be referred to an arbitrator. The Supreme Court also observed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has limited jurisdiction. The courts are more equipped to adjudicate serious and complex allegations and are competent in offering a wider range of reliefs to the parties in dispute.

However, the Supreme Court, in *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games 2010, Delhi*¹⁷ and *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,¹⁸ held that allegations of fraud are not a bar to refer parties to a foreign-seated arbitration and that the only exception to refer parties to foreign seated arbitration are those which are specified in Section 45 of Act, i.e. in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. Thus, it seemed that though allegations of fraud are not arbitrable in ICAs with a seat in India, the same bar would not apply to ICAs with a foreign seat.

Later, the decision of the Supreme Court in *A Ayyasamy v. A Paramasivam & Ors.*¹⁹ clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In *A Ayyasamy*, the Supreme Court held that: (a) allegations of fraud are arbitrable unless they are serious and complex in nature; (b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud; (c) the decision in *Swiss Timing* did not overrule *Radhakrishnan*. The judgment differentiates between ‘fraud simpliciter’ and ‘serious fraud’ and concludes that while ‘serious fraud’ is best left to be determined by the court, ‘fraud simpliciter’ can be decided by the arbitral tribunal. In the same vein, the Supreme Court has held that an appointed arbitrator can thoroughly examine the allegations regarding fraud.²⁰

Further, in *Sudhir Gopi v. Indira Gandhi National Open University*,²¹ the Delhi High Court (“**Delhi HC**”) held that the principle of alter ego is not arbitrable. However, in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd.*

15. (2011) 5 SCC 532.

16. (2010) 1 SCC 72.

17. (2014) 6 SCC 677.

18. AIR 2014 SC 968.

19. (2016) 10 SCC 386.

20. *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr.*, (2018) 15 SCC 678.

21. 2017 SCC OnLine Del 8345.

& Ors.,²² the Delhi HC observed that the decision in *Sudhir Gopi* is *per incuriam* as it was passed without taking into consideration the decision of Supreme Court in *A Ayyasamy* wherein the Supreme Court had carved out instances which cannot be referred to arbitration.

Recently, in the case of *Rashid Raza v. Sadaf Akhtar*,²³ the Supreme Court relied upon its judgment in *A Ayyasamy* and set out the working tests for determining whether an allegation of fraud is arbitrable while appointing an arbitrator under Section 11 of the Act. It culled out two working tests from *A Ayyasamy* to determine this distinction between a simple allegation of fraud or otherwise, as follows:

- i. “does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or
- ii. whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain”²⁴

In *Vimal Shah & Ors. v. Jayesh Shah & Ors.*, the Supreme Court has held that disputes arising out of trust deeds and the Indian Trusts Act, 1882 also cannot be referred to arbitration.²⁵

In the case of *The Oriental Insurance Co. Ltd. & Anr. v. Dicitex Furnishing Ltd.*,²⁶ the Supreme Court has held that at the Section 11 stage,²⁷ “..the court which is required to ensure that an arbitrable dispute exists, has to be *prima facie* convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive (read: arbitration) proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding (about the finality of the discharge and its effect as satisfaction) final, thus, precluding the applicant of its right even to approach a civil court.”

In a more recent case of *Suresh Shah v. Hipad Technology India Pvt. Ltd.*,²⁸ disputes arose under a sub-lease agreement containing an arbitration clause. A Section 11 application was filed before the Supreme Court. Prior to considering the issue of appointment, the Court elaborated on the arbitrability of disputes relating to lease/tenancy agreements/deeds. The Court reiterated that insofar as the eviction or tenancy was governed by special statutes, where tenant enjoys statutory protection against eviction and whereunder a specific court is conferred jurisdiction, the disputes would be non-arbitrable. Tenancy disputes under the Transfer of Property Act, 1882 would be arbitrable. In 2019, in the case of *Vidya Drolia & Ors. v. Durga Trading Corporation*, a two-judge bench of the Supreme Court referred the matter of arbitrability of landlord-tenancy disputes to a three-judge bench of the Supreme Court. In 2020, the Supreme Court settled the law in *Vidya Drolia v. Durga Trading Corporation*,²⁹ and laid down a four-fold test to determine the arbitrability of disputes. It held that a dispute would be inarbitrable when:

- i. It relates to actions in rem or actions that do not pertain to subordinate rights in personam that arise from rights in rem.
- ii. Affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

22. 2017 SCC Online Del 11625.

23. Civil Appeal No. 7005 of 2019

24. Page 4, Civil Appeal no. 7005 of 2019

25. (2016) 8 SCC 788.

26. (2020) 4 SCC 621.

27. Section 11 of the Act describes the appointment of arbitrators in a domestic arbitration.

28. 2020 SCC OnLine SC 1038.

29. Civil Appeal No. 2402 of 2019.

- iii. It relates to the inalienable sovereign and public interest functions of the state; and
- iv. It is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The Court held that tenancy disputes are arbitrable as long as the disputes are not governed by special statutes. The Supreme Court also held that an arbitral tribunal is the preferred first authority to determine and decide all questions of arbitrability of disputes.

After the verdict in *Vidya Drolia*, the Supreme Court had to consider a similar question in *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors. (“Global Mercantile”)*.³⁰ In *Global Mercantile*, one of the issues determined by the Supreme Court was whether the fraudulent invocation of a bank guarantee is arbitrable. Holding the dispute to be arbitrable, the Supreme Court also upheld the thresholds of arbitrability of fraud and the nature of tests as laid down by the earlier decisions of the Supreme Court in *Vidya Drolia* and *Rashid Raza*.

Explaining the rationale behind the arbitrability of fraud, the Supreme Court upheld the distinction as laid down in *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*,³¹ in respect of voidable agreements and void agreements. The Supreme Court noted that disputes involving an allegation of fraud, misrepresentation, etc.,³² are voidable agreements under the Indian Contract Act, 1872 (“**Contract Act**”). Under the Contract Act, fraud is defined as an act committed with an intent to deceive another party, or to induce him to enter into the contract. The Supreme Court held that disputes involving allegation of fraud are arbitrable and the issue whether consent was procured by fraud, misrepresentation, etc., as the case may be, which requires to be adjudicated upon by leading cogent evidence can be decided through arbitration. Until it is proved that the agreement is unenforceable in terms of Sections 2(i) and (j) of the Contract Act, a voidable agreement remains enforceable.

With a series of decisions from the Supreme Court, it can now be conclusively said that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. However, an exception to this principle still exists. Under this exception, fraud cannot be a subject matter of arbitration when the alleged fraud vitiates and invalidates the arbitration clause itself.

30. Civil Appeal Nos. 3802-3803 of 2020.

31. (2014) 6 SCC 677. The Supreme Court held that even though *Swiss Timing Ltd.* was a decision of a designate of the Chief Justice under Section 11 (prior to the Amendment), and would have no precedential value in view of the judgment in *State of West Bengal v. Associated Contractors*, the reasoning in *Swiss Timing Ltd.* was cited with approval by the Supreme Court in *Avitel Post Studios Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, Civil Appeal No. 5145 of 2016, and hence possesses precedential value.

32. Circumstances mentioned inter alia in Sections 12, 14, 15, 16, 17, 18 of the Contract Act which include, contracts by an unsound person and when consent to contract is by coercion, undue influence, fraud, misrepresentation.

5. International Commercial Arbitration with Seat in India

The laws applicable to ICA when the seat of arbitration is in India have been discussed below.

I. Notice of arbitration

Arbitration is said to have commenced when the notice of arbitration requires the other party to take steps in connection with the arbitration or do something on his part in the matter of arbitration. Under Section 21 of the Act, a notice of arbitration has to be served to the other party, requesting that the dispute be referred to arbitration. The day on which the respondent receives the notice, arbitral proceedings commence under the Act. In a Notice of Arbitration, a party communicates: a) an intention to refer the dispute to arbitration; and b) the requirement that other party should do something on his part in that regard. This will generally suffice to define the commencement of arbitration under the Act.

Applicability of 2015 Amendment Act

The date of commencement of the arbitration in accordance with Section 21 of the Act is crucial with regards the applicability of the 2015 Amendment Act. In the event, the date of commencement is after October 23, 2015, the provisions of the 2015 Amendment Act will be applicable, as against the Act, with respect to arbitral proceedings.

II. Referral to arbitration

Under Part I, the courts can refer the parties to arbitration if the subject matter of the dispute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is the subject-matter of an arbitration agreement, upon an application by a party, the judicial authority is bound to refer the dispute to arbitration. Recently, the Supreme Court has opined that invoking party may invoke an arbitration even when the dispute settlement clause in the contract grants an option of getting the dispute adjudicated by arbitration or by court.³³ It is important to note that the above application must be made by the party either before or at the time of making his first statement on the substance of the dispute, and be accompanied by a duly certified or original copy of the arbitration agreement, and such an agreement need not be signed for it to be considered valid.³⁴ However, it has been recently held that there is no requirement of filing a formal application seeking a specific prayer for reference, as long as the party raised an objection on the maintainability of the suit in light of the arbitration clause.³⁵

Applicability of 2015 Amendment Act

The 2015 Amendment Act narrowed the scope of the judicial authority's power to examine the *prima facie* existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court. In this regard, an arbitration agreement has been considered to be valid if there is merely the incorporation of another

33. Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator, (2018) 9 SCC 774.

34. M/s. Caravel Shipping Services Pvt. Ltd. v. M/s. Premier Sea Foods Exim Pvt. Ltd., 2018 SCC OnLine SC 2417.

35. Parasramka Holding Pvt. Ltd. & Ors. v. Ambience Pvt. Ltd. & Anr., 2018 SCC OnLine Del 6573.

document/clause (relating to arbitration) by reference,³⁶ or even if there is a general reference to a standard form of the contract of one party.³⁷ In such situations, the intention of the parties³⁸ and consensus ad idem of the parties is critical, even if the same is apparent from their conduct.³⁹

More importantly, taking heed from the judgment of the Supreme Court in *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*⁴⁰ (“**Chloro Controls**”), which effectively applied only to foreign-seated arbitrations, the 2015 Amendment Act expanded the definition of the word ‘party’ to an arbitration agreement to also include persons claiming through or under such party, especially when there is a clear intention of the parties to bind both the signatory as well as the non-signatory parties.⁴¹ Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or India-seated ICA are concerned, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement,⁴² depending on the nature of reliefs claimed by or against such a party.⁴³ In case a judicial authority refuses to refer a matter to arbitration, the parties can file an appeal against such refusal in the court on which the statute creating the authority confers jurisdiction to hear such appeals.⁴⁴

Recently, the Delhi HC in *Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors.*, upheld the scope of reference of non-signatories to arbitration where the non-signatory entity is a part of the group company. Although the dispute involved two Indian parties, the principles upheld by the Delhi HC would equally apply to an ICA seated in India.

III. Interim reliefs

Under the Act, the parties can seek interim relief from courts and arbitral tribunals under Sections 9 and 17 respectively.

A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced, apply to a court for seeking interim measures and protections, including interim injunctions, under Section 9 of the Act.

An application for interim relief under Section 9 of the Act can also be preferred by a party in a foreign-seated arbitration as certain provisions of Part I of the Act (including Section 9) have been extended to foreign seated arbitrations. Recently, the Delhi HC reaffirmed this position in the case of *Big Charter Pvt Ltd v. Ezen Aviation Pty Ltd.*⁴⁵

The Arbitral Tribunal, in accordance with Section 17, can also provide interim measures of protection or ask a party to provide appropriate security in connection with the matter of the dispute, as is found appropriate, during the course of the arbitral proceedings. However, the powers of the Arbitral Tribunal were narrow, as compared to the powers of the court under Section 9, under the unamended Act.

36. *Elite Engineering v. Techtrans Construction India*, (2018) 4 SCC 281.

37. *M/s Inox Wind Ltd. v. M/S. Thermocables Ltd.*, (2018) 2 SCC 519.

38. *Elite Engineering v. Techtrans Construction India*, (2018) 4 SCC 281.

39. *OK Play Auto Pvt. Ltd. v. Indian Commerce and Industries*, 2018 SCC OnLine Del 8525.

40. *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

41. *M/s SEI Adhavan Power Private Limited v. M/s Jinneng Clean Energy Technology Limited*, (2018) SCC OnLine Mad 13299.

42. *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531.

43. *Suman Baburao Thapa v. Jigar K. Mehta and Ors.*, (2018) 3 AIR Bom R 215.

44. *Emaar MGF Land Limited & Anr. v. Aftab Singh*, 2017 SCC OnLine Del 11437.

45. *Big Charter Pvt. Ltd. v. Ezen Aviation Pty Ltd.*, MANU/DE/1916/2020.

Applicability of Amendment Acts

The 2015 Amendment Act made significant changes that affect the grant of interim reliefs in arbitration proceedings commenced after October 23, 2015.

A. Interim reliefs under Section 9

- a. If an arbitral tribunal has been constituted, an application for interim protection under Section 9 of the Act will not be entertained by the court unless the court finds that circumstances exist which may render the remedy provided under Section 17 inefficacious.
- b. Post the grant of interim protection under Section 9 of the Act, the arbitral proceedings must commence within a period of 90 (ninety) days from the date of the interim protection order or within such time as the court may determine.
- c. Interim measures under Section 9 can be granted by courts against third parties as well, in certain circumstances.⁴⁶

B. Interim reliefs under Section 17

Section 17 has been amended to provide the Arbitral Tribunal with the same powers as a ‘civil court’ in relation to the grant of interim measures. Notably, owing to the 2015 Amendment Act, an Arbitral Tribunal also has powers to grant interim relief post the award but prior to its execution. Further, the order passed by an Arbitral Tribunal in arbitrations seated in India is now deemed to be an order of the court and is enforceable under the Code of Civil Procedure, 1908 (“CPC”) as if it were an order of the court, which provides clarity on its enforceability. The underlying intention was to vest significant powers with the Arbitral Tribunal and reduce the burden and backlog before the courts.

There was confusion on the extent and scope of the arbitrator’s powers to grant interim relief, and enforceability of such orders was proving to be difficult. This was aptly addressed by making the enforceability of orders issued under Sections 9 and 17 of the Act identical in the case of domestic and ICAs seated in India. However, in certain situations, a party is still required to obtain an order of interim relief from a court only (e.g. injunctive relief against encashment of a bank guarantee).

The 2015 Amendment Act gave an arbitral tribunal the power to grant interim relief *“during the arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced in accordance with section 36”*. This aspect of the 2015 Amendment Act created some ambiguity as an arbitral tribunal becomes functus officio once the final award has been rendered. However, the 2019 Amendment Act resolved this issue by omitting the words *“or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36”* from Section 17 of the Act.

C. Threshold for awarding interim relief

There are no standards prescribed under the Act for grant of interim reliefs by a court under Section 9 of the Act. Some courts have sought to apply standards under the CPC such as Order XXXVIII and Order XXXIX. Courts have held that standards prescribed in the CPC would not be strictly applicable to proceedings under Section 9. In case of arbitrations, if a party can merely show that it has a good case on merits, it would likely succeed in obtaining an interim relief. In these situations, courts have been guided by the principle that denial of the grant of such interim

46. Value Advisory Services v. ZTE Corporation (2009) 3 Arb LR 315; Blue Coast Infrastructure Development Pvt. Ltd. v. Blue Coast Hotels Ltd. & Ors. O.M.P. (I) (COMM) No. 35/2020 and I.A. 3251/2020.

reliefs would lead to injustice to the applicant or that the resultant award would be rendered unenforceable/un-executable if such reliefs are not granted.

Arbitral tribunals have normally required (a) irreparable harm; (b) urgency; and (c) no prejudgment of the merits of the case.⁴⁷ In some cases, tribunals have also considered whether the party has established a *prima facie* case and that the balance of convenience weighed in favour of the party.⁴⁸

Recently, the Delhi HC in *Avantha Holdings Ltd. v. Vistra ITCL India Ltd.* provided additional pre-requisites for interim relief under Section 9 of the Act. The court noted that the following principles must be borne in mind while examining whether a case for ordering interim measures exists or not,

- i. Existence of a prima facie case,
- ii. Balance of convenience,
- iii. Possibility of irreparable loss or prejudice, were interim relief not to be granted,
- iv. Consideration of public interest,
- v. Emergent necessity of ordering interim measures,
- vi. When the applicant manifestly intends to initiate arbitral proceedings.⁴⁹

For a detailed understanding of the thresholds for interim reliefs, please refer to our paper on “*Interim Reliefs in Arbitral Proceedings Powerplay between Courts and Tribunals*”.⁵⁰

IV. Appointment of arbitrators

The parties are free to agree on a procedure for appointing the arbitrator(s). In absence of any agreement on the procedure for the appointment of arbitrators, for a tribunal with three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator.⁵¹ If one of the parties does not appoint an arbitrator within 30 days, or if the two appointed arbitrators fail to appoint the third arbitrator within 30 days, the party can request the Supreme Court or relevant High Court (as applicable) to appoint an arbitrator.⁵²

The Supreme Court/High Court can authorize any person or institution to appoint an arbitrator.⁵³ In case of an ICA, the application for appointment of the arbitrator has to be made to the Supreme Court and in case of domestic arbitration, the respective High Courts having territorial jurisdiction will appoint the Arbitrator.

The 2015 Amendment Act also limited the power of the Supreme Court in an India-seated ICA and the High Courts in domestic arbitrations and prescribed that the Court can examine only the existence of an arbitration agreement at the time of making such appointment.⁵⁴

47. Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2424 – 2563.

48. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, *International Arbitration Law Library Series Set (Book 13)* (Kluwer Law International) 159 – 236; *Shabnam Dhillon v. Zee Entertainment Enterprises Ltd. and Ors.* (2019) 176 DRJ 429.

49. O.M.P.(I) (COMM.) 177/2020 & I.As. 5463-65/2020, I.As. 5664-67/2020.

50. http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf.

51. Section 11(3) of the Act.

52. Section 11(6) of the Act.

53. Section 11(6)(b) of the Act.

54. Section 11 (6)(a) of the Act.

This should be noted against the threshold contained in a Section 8 application for referring a dispute to arbitration, which empowers a court only to examine the *prima facie* existence of an arbitration agreement. The Delhi HC has emphasized that the courts, while deciding an application for the appointment of an arbitrator must confine their enquiry to the existence of an arbitration agreement.⁵⁵ The question of arbitrability of the issue would be decided by the arbitral tribunal, and not the courts.

The 2019 Amendment Act amended Section 11 of the Act by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the Arbitration Council of India with the power to appoint arbitrators. However, this provision has not been notified yet.

The Supreme Court, while interpreting Section 11 of the Act as amended by the 2019 Amendment Act, held that Section 11 of the Act is still confined to the examination of only the existence of an arbitration agreement and is to be understood in the narrow sense.⁵⁶ However, the Supreme Court in *Vidya Drolia* held that ‘existence’ and ‘validity’ are intertwined, and an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. With this dictum, the Supreme Court has brought the scope of inquiry in a petition under Section 11 at *par* with that under Section 8. After *Vidya Drolia*, the Supreme Court, in one of its judgments, has also expressed the view that the parliament must amend Section 37 to provide for a scope of appeal against an order under Section 11.⁵⁷

The application for appointment of an arbitrator before the Supreme Court or the concerned High Court, as the case may be, is required to be disposed of as expeditiously as possible and an endeavour shall be made to do so within a period of 60 days; such appointment would not amount to delegation of judicial power and is to be treated as an administrative decision.

There has always been a concern in India with respect to the time taken for the appointment of arbitrators due to the existing jurisprudence and procedure. The time-frame for such an appointment was usually 12-18 months. This amendment seeks to address this delay by introducing a timeline and clarifying the procedure of appointment to be an exercise of administrative power by the courts.

The Supreme Court in *National Highways Authority of India v. Sayedabad Tea Company*⁵⁸ dealt with arbitral appointments under section 11 of the Act, vis-a-vis Section 3G(5) of the National Highways Act 1956 (“**Highways Act**”), which provides for the appointment of an arbitrator by the central government in special situations. The Supreme Court held that the Highways Act, being a special law, would have an overriding effect on a general law such as Act.

The Supreme Court, in the case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*,⁵⁹ (“**Garware**”) held that unless the agreement which prescribes the arbitration clause is sufficiently stamped, the court cannot appoint an arbitrator. The court must impound the agreement on which adequate stamp duty has not been paid and hand it over to the relevant stamp authority for rectification. The stamp authorities should resolve the issues relating to stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the agreement.

However, the Supreme Court’s judgment in *Garware* has now been referred to a constitution bench by the Court in the case of *Global Mercantile*. The question that has been referred is: “*Whether the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 applicable to instruments chargeable to Stamp Duty under Section 3 read*

55. *Picasso Digital Media Pvt. Ltd. v. Pick-A-Cent Consultancy Service Pvt. Ltd.*, 2016 SCC Online Del 5581.

56. *Mayavti Trading Pvt. Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714.

57. *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.*, Civil Appeal No. 825 of 2021.

58. 2019 SCC OnLine SC 1102.

59. (2019) 9 SCC 2019.

with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not chargeable to payment of stamp duty, as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?'". The final decision on this position of law is awaited.

Recently, the Supreme Court considered the question of limitation period on making an application for appointment of arbitrators under Section 11 in *Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd.*⁶⁰ The Supreme Court held that limitation period for filing an application under Section 11 would be three years from the date when there is failure to appoint the arbitrator and that a court may refuse to make the reference to arbitration where claims are *ex facie* time-barred. Additionally, the Supreme Court also noted that the parliament must amend Section 11 to include a provision on limitation period as the period of three years is unduly long and would be contrary to the spirit of the Act.

V. Challenge to appointment of arbitrator

Independence and impartiality of an arbitrator are the hallmarks of any arbitration proceedings. If there are circumstances due to which his/her independence and impartiality can be challenged, he/she must disclose the circumstances before his/her appointment.⁶¹

Appointment of an arbitrator can be challenged only if –

- a. Circumstances exist that give rise to justifiable doubts as to his/her independence or impartiality; or
- b. He/she does not possess the qualifications agreed upon by the parties.⁶²

The Supreme Court in the case of *Vinod Bhaiyalal Jain v. Wadhvani Parmeshwari Cold Storage Pty.*⁶³ interpreted the Act (as the present case applied the law as it stood prior to the 2015 Amendment Act) to determine that the arbitral award rendered by the appointed arbitrator should be set aside as the Appellants had a reasonable basis to doubt the arbitrator's ability to be independent and impartial in pronouncing the arbitral award.

The 2015 Amendment Act provides a form for disclosure in the new Fifth Schedule. Such disclosure is in accordance with the internationally accepted practices to be made applicable for arbitration proceedings commenced on or after October 23, 2015. Non-disclosure can lead to serious consequences for the arbitrator, including termination of his/her mandate, even if he/she has not been assigned work or given remuneration by the concerned party.⁶⁴ The challenge to the appointment on the basis of grounds mentioned in the Fifth Schedule has to be decided by the arbitrator himself. If he/she does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. In this situation, the party challenging the arbitrator can make an application for setting aside the resultant arbitral award in accordance with Section 34 of the Act. If the court agrees to the challenge, the arbitral award can be set aside.⁶⁵ Thus, even if the arbitrator does not accept the challenge to his/her appointment, the other party cannot stall further arbitration proceedings by rushing to the court.

60. Civil Appeal No. 833-844 of 2021.

61. Section 12(1) of the Act.

62. Section 12(3)(b) of the Act.

63. 2019 SCC OnLine SC 904.

64. C & C Construction Ltd. v. Ircon International Ltd., 2018 SCC OnLine Del 9240.

65. Section 13(5) of the Act.

In *HRD Corporation v. GAIL (India) Ltd.*,⁶⁶ the Supreme Court propounded certain important principles of law, such as: (i) if the arbitrator has passed an award in an earlier arbitration between the same parties about the same dispute, that does not mean that there are justifiable grounds for challenging his impartiality under Clause 16 of Fifth Schedule; (ii) while a challenge based on the Fifth Schedule can be decided only on the basis of the facts of the case and can only be brought before the court post-award, a challenge based on the Seventh Schedule renders the arbitrator ineligible ipso facto and can be brought pre-award before a competent court.

In *Aravalli Power Company Ltd. v. Era Infra Engineering Ltd.*,⁶⁷ the Supreme Court held that the employee named as an arbitrator in the arbitration clause should be given effect to, in the absence of any justifiable apprehension of independence and impartiality. However, the appointment of an employee as an arbitrator is not invalid and unenforceable in arbitrations invoked prior to October 23, 2015. Further, the Delhi HC, in *Afcons Infrastructure Ltd. v. Rail Vikas Nigam Ltd.*,⁶⁸ interpreted Section 12(5) read with Entry 12 of the Seventh Schedule of the Act to hold that former employees of parties are not precluded from being appointed as arbitrators. However, this decision is subject to certain qualifications, and has been upheld in the case of *The Government of Haryana, PWD Haryana (B and R) Branch v. M/s G.F. Toll Road Pvt. Ltd. & Ors.*⁶⁹.

The Supreme Court in the case of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*⁷⁰ held that the fact that the proposed arbitrators being government employees/ ex-government employees was not sufficient in itself to make them ineligible to act as arbitrators, especially since they were ex-employees of public bodies not related to the Respondent.

VI. Unilateral Appointment of Arbitrator

The Delhi HC, in the case of *Kadimi International Pvt. Ltd. v. Emaar MGF Land Ltd.*⁷¹, held that the 2015 Amendment Act has not done away with the unilateral right of a party to appoint an arbitrator. The Court further emphasized that the appointment of a person who is ineligible to be an arbitrator under Section 12(5) read with Schedule VII of the Act is void.

The Supreme Court, in *TRF Ltd. v. Energo Engineering Projects Ltd.*,⁷² (“**TRF**”) ruled that a court can be approached to plead the statutory disqualification of an arbitrator under the provisions of the Act and it is not necessary to approach the arbitrator for obtaining such a relief. Further, the Court held that when the designated arbitrator nominated under a contract is also responsible for the appointment of an alternate arbitrator, he/she would lose his/her authority to preside and/or nominate an arbitrator if he/ she stands disqualified under the amended provisions of the Act. Thus, the Court held that an ineligible arbitrator under Section 12(5) read with the Seventh Schedule to the Act, was also barred from nominating an arbitrator.

This interpretation was upheld by the Supreme Court in the cases of *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.*⁷³ (“**Perkins Eastman**”) and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* (“**Bharat Broadband**”) ⁷⁴ In *Perkins Eastman*, the court observed that the basis for the Managing Director being found to be ineligible to appoint an arbitrator in *TRF* was due to his interest in the outcome of the dispute. This interest in

66. 2017 (10) SCALE 371.

67. AIR 2017 SC 4450.

68. 2017 SCC OnLine Del 8675.

69. C.A. 27/2019, arising out of SLP(C) 20201/2018, dated 03/01/2019.

70. (2017) 4 SCC 665.

71. 2019 (4) ArbLR 233 (Delhi).

72. (2017) 8 SCC 377.

73. (2019) SCC OnLine SC 1517.

74. (2019) 5 SCC 755.

the dispute was the basis for the possibility of bias. Further, where only one party had the right to appoint a sole arbitrator, their choice would have the potential to chart out the course of the arbitration. The essence of the 2015 Amendment Act and the ruling in *TRF* was to prevent parties having an interest in the outcome of the dispute from having the sole right to appoint arbitrators.

However, in *Central Organisation for Railway Electrification v. M/S EVI-SPIC-SMO-MCML (JV)*,⁷⁵ (“**Central Organization**”) wherein the Supreme Court upheld an arbitration clause allowing one party to nominate a panel of four arbitrators (comprising such party’s employees), from which the counterparty would shortlist two nominees. The general manager of the former would select one from this short list as the counterparty’s nominee, as well as appoint the third and final arbitrator on the panel. In light of the conflicting decisions in *Central Organization* and *Bharat Broadband*, the Supreme Court has now referred the issue to a larger bench.⁷⁶

VII. Mandate of the arbitrator

An encouraging position of Indian arbitration law is the jurisprudence relating to the mandate of an arbitrator. The Supreme Court in its decision in *NBCC Ltd. v. J.G. Engineering Pvt. Ltd.*⁷⁷ laid down that the mandate of the arbitrator expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement. Again, in *Jayesh Pandya v. Subhtex India Ltd.*, applying Section 14 and 15 of the Act, the Supreme Court held that mandate of an arbitrator terminates after the expiry of the time period agreed by the parties, as the arbitrator becomes de jure unable to perform his functions.

Applicability of 2015 Amendment Act

The 2015 Amendment Act attempted to fill the lacuna that existed since the inception of the Act. The provision earlier only dealt with the expiration of the mandate of an arbitrator and did not deal with the procedure for re-appointment. For arbitrations commencing after October 23, 2015, a fresh application for appointment need not be filed in case of termination and substitution may be made, however, the practical application is yet to be tested.

This will surely help a party to ensure a time-bound arbitration process while entering into a contract and in compelling the arbitrator to deliver his award within the stipulated timelines. At the same time, it becomes equally important to stipulate realistic timelines for the conclusion of an arbitration process so as to avoid the forced expiry of the arbitrator’s mandate despite best efforts to deliver an award in a timely fashion.

VIII. Challenge to jurisdiction

Under Section 16 of the Act, an arbitral tribunal has the competence to rule on its own jurisdiction, which includes ruling on any objections with respect to the existence or validity of the arbitration agreement. The doctrine of ‘competence-competence’ confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*,⁷⁸ the Supreme Court had held that where the arbitral tribunal was constituted by the parties without judicial intervention, the arbitral tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act.

75. 2019 SCC OnLine SC 1635.

76. Union of India v. M/s Tantia Constructions Ltd., SLP No. 12670/2020.

77. (2010) 2 SCC 385.

78. 2005 (8) SCC 618.

IX. Conduct of arbitral proceedings

A. Flexibility in Respect of Procedure, Place and Language

The arbitral tribunal should treat the parties equally and each party should be given full opportunity to present its case.⁷⁹ The arbitral tribunal is not bound by the CPC or the Indian Evidence Act, 1872.⁸⁰ The parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal.

The arbitral tribunal has complete powers to decide the procedure to be followed unless parties have otherwise agreed upon the procedure to be followed.⁸¹ The arbitral tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.⁸² The Place of arbitration can be decided by mutual agreement. However, if the parties do not agree to the place, the same will be decided by the tribunal.⁸³ Similarly, the language to be used in arbitral proceedings can be mutually agreed upon. Otherwise, the arbitral tribunal can decide on the same.⁸⁴

The Supreme Court in the case *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*⁸⁵ held that designation of the seat is akin to an exclusive jurisdiction clause with relation to the courts exercising supervisory jurisdiction over the proceedings.

The Supreme Court in the case of *Roger Shashoua v. Mukesh Sharma*⁸⁶ had upheld the 2009 decision of the Commercial Court in London and held that the designation of the seat is the same as an exclusive jurisdiction clause.

Recently, the Supreme Court, in the case of *Brahmani River Pellets v. Kamachi*,⁸⁷ held where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter to the exclusion of all other courts. In this case, the contract specified that the venue of arbitration shall be Bhubaneswar, and the Supreme Court held that the intention of the parties is to exclude all courts except the Orissa High Court.

The Supreme Court in *BGS Soma JV v. NHPC*⁸⁸ (“**BGS Soma**”) recently held that:

“

“...whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause

79. Section 18 of the Act.

80. Section 19(1) of the Act.

81. Section 19(3) of the Act.

82. Section 19(4) of the Act.

83. Section 20 of the Act.

84. Section 22 of the Act.

85. (2017) 7 SCC 678.

86. 2017 SCC OnLine SC 697.

87. (2020) 5 SCC 462.

88. (2020) 4 SCC 234.

designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.”

”

However, in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*,⁸⁹ (“**Antrix**”) (now overruled) the division bench of the Delhi HC had held that only if the parties confer exclusive jurisdiction as well as the seat of the arbitration to a designated place, the territorial court of that designated place would have exclusive jurisdiction; otherwise, the jurisdiction will have to be determined on the basis of the subject matter and the seat of arbitration. The Delhi HC had also held that one of the ratios of the Supreme Court in paragraph 96 of *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc.*⁹⁰ (“**BALCO**”) is that courts would have concurrent jurisdiction, notwithstanding the designation of the seat of arbitration by the agreement of the parties. On appeal, the Supreme Court stayed the operation of this judgment.

However, the Supreme Court in the case of *BGS Soma* has declared that the Delhi HC’s judgment in *Antrix Corporation* is incorrect and overruled it as the finding of the Delhi HC runs contrary to the correct interpretation of Section 42 of the Act.

The Supreme Court held that the Delhi HC in *Antrix* had incorrectly interpreted the ratio of *BALCO*. It held that *BALCO* does not hold that two Courts have concurrent jurisdiction, *i.e.*, the seat Court and the Court within whose jurisdiction the cause of action arises. Such an interpretation would be contrary to the language in Section 42 of the Act, which is meant to avoid conflicts in the jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively.

The Supreme Court in *Union of India v. Hardy Exploration and Production*,⁹¹ has held that: (a) when only the term ‘place’ is stated or mentioned and no other condition is postulated, it is equivalent to ‘seat’ and that finalizes the facet of jurisdiction. But if a condition precedent is attached to the term ‘place’, the said condition has to be satisfied so that the place can become equivalent to the seat; (b) a venue can become a seat if something else is added to it as a concomitant. However, the Supreme Court in *BGS Soma* held that the Supreme Court’s judgment *Union of India v. Hardy Exploration and Production* is not good law as it is contrary to the five-judge bench decision in *BALCO*.⁹²

Recently, in the case of *L&T Finance Ltd. v. Manoj Pathak & Ors.*,⁹³ the Bombay High Court identified the tests applicable to identify a seat of arbitration:

“

“29. There emerges the following trifecta of propositions in regard to a domestic arbitration:

- (a) A stated venue is the seat of the arbitration unless there are clear indicators that the place named is a mere venue, a meeting place of convenience, and not the seat;
- (b) Where there is an unqualified nomination of a seat (*i.e.* without specifying the place as a mere venue), it is courts where that seat is situated that would have exclusive jurisdiction; and
- (c) It is only where no venue/seat is named (or where it is clear that the named place is merely a place of convenience for meetings) that any other consideration of jurisdiction may arise, such as cause of action.”

”

89. 2018 SCC Online Del 9338

90. (2012) 9 SCC 552.

91. AIR 2018 SC 4871.

92. (2012) 9 SCC 552.

93. 2019 SCC OnLine 12534.

However, in a decision issued on 5 March 2020, a three-judge bench of the Supreme Court in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*,⁹⁴ took a different approach in determining the seat of arbitration. Although the arbitration clause specified that ‘...the place of arbitration shall be Hong Kong...’, the clause also mentioned that ‘...courts at New Delhi shall have the jurisdiction...’. The Supreme Court held that:

- the reference to courts at New Delhi did not take away or dilute the intention of the parties that the arbitration be administered in Hong Kong, and such reference appeared to have been added to enable the parties to avail interim relief;
- a mere expression of ‘place of arbitration’ could not be the basis to determine the intention of the parties that the ‘seat’ of arbitration is at such place
- the intention of the parties as to the ‘seat’ of arbitration should be determined from other clauses in the agreement and the conduct of the parties.

Relying upon a clause in the agreement which stated that the dispute ‘shall be referred to and finally resolved by arbitration administered in Hong Kong’, and the place of the arbitration being Hong Kong, the Supreme Court held that the seat was in Hong Kong.

B.Submission of Statement of Claim and Defense

The Claimant should submit the statement of claims, points of issue and the relief or remedy sought. The Respondent should state his defence in respect of these particulars. All relevant documents must be submitted. Such claim or defence can be amended or supplemented at any time.⁹⁵

Applicability of Amendment Acts

The 2015 Amendment Act provides for an application for counterclaim/set-off to be adjudicated upon in the same arbitration proceeding without requiring a fresh one.⁹⁶ The arbitral tribunal, under the amended Section 25 of the Act, can also exercise its discretion in treating the right of the defendant to file the statement of defence as forfeited under specified circumstances.⁹⁷

The 2019 Amendment Act has now introduced a six-month time frame for completion of a statement of claim and defence. However, a provision of a six-month time frame may result in the creation of more issues. For instance, it is very common in arbitration proceedings for parties to bifurcate the issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing the statement of claim and defence would deprive parties of such flexibility and would effectively require them to file their complete pleadings at the very outset of the arbitration proceedings. Further, it is difficult to ascertain at what stage filing the statement of claim and defence be considered as completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defence, or where a counter-claim is filed.

X. Hearings and Written Proceedings

After submission of pleadings, unless the parties agree otherwise, the arbitral tribunal can decide whether there will be an oral hearing or whether proceedings can be conducted on the basis of documents and other materials.

94. (2020) 5 SCC 399.

95. Section 23 of the Act.

96. Section 23(2A) of the Act.

97. Section 25(b) of the Act.

However, if one of the parties requests the arbitral tribunal for a hearing, sufficient advance notice of hearing should be given to both parties.⁹⁸ Thus, unless one party requests, an oral hearing is not mandatory.

Applicability of Amendment Acts

For the expeditious conclusion of the arbitration proceedings a proviso has been introduced by the 2019 Amendment Act on the conduct of 'oral proceedings' and furnishing of 'sufficient cause' in order to seek adjournments. The amended provision has also made a room for the tribunal to impose costs including exemplary costs in case the party fails to provide sufficient reasoning for the adjournment sought.

By the 2015 Amendment Act, the time limit for the conduct of the domestic arbitral proceedings was streamlined and arbitrators were mandated to complete the entire arbitration proceedings within a span of 12 (twelve) months from the date the Arbitral Tribunal enters upon the reference.⁹⁹ However, a 6 (six) months extension may be granted to the arbitrator by mutual consent of the parties.¹⁰⁰ Beyond 6 (six) months, any further extension may be granted to the arbitrator at the discretion of the court¹⁰¹ or else the proceedings shall stand terminated.¹⁰² An application for extension of time towards completion of arbitral proceedings has to be disposed of expeditiously.¹⁰³ There is also a provision made for awarding additional fees, as consented upon by the parties, to them for passing the award within the time span of 6 months.¹⁰⁴

The 2019 Amendment Act has modified the start date of the 12 (twelve) month period to the date on which the statement of claim and defence is completed. As discussed earlier, the 2019 Amendment Act has also provided that pleadings must be completed within 6 months from the appointment of arbitrator(s).

The 2019 Amendment Act also exempted ICA from these time-limits. The 2019 Amendment Act introduced a non-binding proviso to this exemption stating that the award in an ICA may be made as expeditiously as possible and an endeavour may be made to dispose of the matter within 12 months from the date of completion of pleadings. While this provision does not contain a mandatory language, it may act as a guidance to parties and arbitrators to ensure the arbitral award is rendered within a period of 12 months from the date of completion of pleadings. In the case of *ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc.*, the Delhi HC held that the amendment to Section 29A in the 2019 Amendment Act applies retrospectively. In other words, the exemption from time limits given to ICAs under the 2019 Amendment Act would also apply to arbitrations initiated prior to the date when the 2019 Amendment Act came into force.¹⁰⁵

XI. Fast track procedure

The 2015 Amendment Act inserted new provisions to facilitate an expedited settlement of disputes based solely on documents subject to the agreement of the parties. The tribunal, for this purpose, consists only of a sole arbitrator, who shall be chosen by the parties.¹⁰⁶

98. Section 29 of the Act.

99. Section 29A (1) of the Act.

100. Section 29A (3) of the Act.

101. Section 29A (5) of the Act.

102. Section 29A (4) of the Act.

103. Section 29A (9) – the section endeavors the application to be disposed of within a period of 60 days.

104. Section 29A (2) of the Act.

105. *ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc.*, OMP(Misc)(Comm) 256/2019, I.A. 4989/2020

106. Section 29B (2) of the Act.

For the stated purpose the time limit for making an award under this section has been capped at 6 months from the date the arbitral tribunal enters upon the reference.¹⁰⁷

Parties can, before the constitution of the arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure.¹⁰⁸ Under the fast track procedure, unless the parties otherwise make a request for oral hearing, or the arbitral tribunal considers it necessary to have oral hearing, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.¹⁰⁹

XII. Settlement during arbitration

It is permissible for parties to arrive at a mutual settlement even when the arbitration proceedings are going on. In fact, even the tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the arbitral tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms, which is called a consent award. Such an arbitral award shall have the same force as any other arbitral award.¹¹⁰

Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

XIII. Law of limitation applicable

The Limitation Act, 1963 is applicable to arbitrations under Part I. For this purpose, the date on which the aggrieved party requests the other party to refer the matter to arbitration shall be considered. If, on that date, the claim is barred under the Limitation Act, the arbitration cannot continue.¹¹¹ If an arbitration award is set aside by the court, time spent in arbitration will be excluded for the purposes of the Limitation Act. This enables a party to initiate a fresh action in court or fresh arbitration without being barred by limitation.

XIV. Arbitral award

A decision of an arbitral tribunal is termed as an '*arbitral award*'. An arbitral award includes interim awards. However, it does not include interim orders passed by arbitral tribunals under Section 17.

The decision of the arbitral tribunal must be by a majority.¹¹² The arbitral award must be in writing and signed by all the members of the tribunal.¹¹³ It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.¹¹⁴ The arbitral award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration).¹¹⁵ A copy of the award should be given to each party. Arbitral tribunals can also make interim awards.¹¹⁶

107. Section 29B (4) of the Act.

108. Section 29B (1) of the Act.

109. Section 29B (3) of the Act.

110. Section 30 of the Act.

111. Section 43(2) of the Act.

112. Section 29 of the Act.

113. Section 31(1) of the Act.

114. Section 31(3) of the Act.

115. Section 31(4) of the Act.

116. Section 31(6) of the Act.

XV. Stamping of an arbitral award

The Indian Stamp Act, 1899 provides for stamping of arbitral awards with specific stamp duties and Section 35 provides that an award which is unstamped or is insufficiently stamped is inadmissible for any purpose, which may be validated on payment of the deficiency and penalty (provided it was original). Issues relating to the stamping and registration of an award or documentation thereof, may be raised at the stage of enforcement under the Act.¹¹⁷ The Supreme Court had also observed that the requirement of stamping an award and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Act. The quantum of stamp duty to be paid would vary from state to state depending on where the award is made. Recently, the Delhi HC, in the case of *Mohini Electricals Ltd. v. Delhi Jal Board*¹¹⁸ held that stamp duty on an award should be paid at the time of enforcement, unless the parties mutually decide to accept the award, thereby dispensing with the formality of instituting an enforcement petition. The Court further held that a xerox/photocopy of an award is not recognized as an 'instrument' under the Indian Stamp Act, 1899.

As far as foreign awards are concerned, the Supreme Court has categorically held that a foreign award is not liable to be stamped.¹¹⁹

XVI. Interest and cost of arbitration

The interest rate payable on damages and costs awarded, unless the arbitral award otherwise directs, shall be 18 per cent per annum, calculated from the date of the award to the date of payment.

Applicability of Amendment Act

The interest rate payable on damages and costs awarded, as per the 2015 Amendment Act shall, unless the arbitral award otherwise directs, shall be 2 per cent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.¹²⁰

In *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*,¹²¹ the Supreme Court laid down the guidelines for determining the interest payable u/s 31(7)(b) of the Act and stated that the award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the award, before a court of law, or thereafter. Here, the arbitrator has an inherent power to award interest *pendente lite*, unless the agreement expressly bars him from awarding the same,¹²² and if a party does not raise such a plea before the arbitral tribunal, the party shall be hit by the principle of waiver and precluded from raising such plea at a later stage.¹²³

A. Regime for Costs (Introduced by the 2015 Amendment Act)

Cost of arbitration means reasonable cost relating to fees and expenses of arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection

117. *M. Anasuya Devi and Anr v. M. Manik Reddy and Ors.*, (2003) 8 SCC 565.

118. *Mohini Electricals Ltd. v. Delhi Jal Board*, OMP (ENF)(COMM) 2 of 2020

119. *M/S. Shri Ram EPC Limited v Rioglass Solar SA* (2018) SCC Online 147

120. Section 31(7)(b) of the Act.

121. 2018 SCC OnLine SC 1922.

122. *Raveechee and Co. v. Union of India*, 2018 SCC OnLine SC 654.

123. *Union of India v. Susaka (P) Ltd.*, (2018) 2 SCC 182.

with arbitral proceedings. The tribunal can decide the cost and share of each party.¹²⁴ If the parties refuse to pay the costs, the arbitral tribunal may refuse to deliver its award. In such a case, any party can approach the court. The court will ask for a deposit from the parties and on such deposit, the award will be delivered by the tribunal. Then the court will decide the cost of arbitration and shall pay the same to arbitrators. Balance, if any, will be refunded to the party.¹²⁵

The regime for costs has been established which has applicability to both arbitration proceedings as well as the litigations arising out of arbitration.

The explanation defining the term ‘costs’ for the purpose of this sub-section has been added. The circumstances which have to be taken into account while determining the costs have been laid down in sub-section (3) of the freshly added section (Section 31A). In a nutshell, this provision has been added to determine the costs incurred during the proceedings including the ones mentioned under Section 31(8) of the Act.

XVII. Challenge to an award

Section 34 provides for the manner and grounds for challenge of the arbitral award. The time period for the challenge is before the expiry of 3 months from the date of receipt of the arbitral award (and a further period of 30 days on sufficient cause being shown for condonation of delay). If that period expires, the award holder can apply for execution of the arbitral award as a decree of the court. But as long as this period has not elapsed, enforcement is not possible.

Under Section 34 of the Act, a party can challenge the arbitral award on the following grounds-



“(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application 1 [establishes on the basis of the record of the arbitral tribunal that]—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

^{124.} Section 31(8) of the Act.

^{125.} Section 39 of the Act.

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]”

”

The Supreme Court in *Noy Vallesina Engineering SpA v. Jindal v. Jindal Drugs Ltd. & Ors.*¹²⁶ recently reaffirmed that proceedings under Section 34 of the Act cannot be initiated to challenge a foreign award. Objections to the enforcement of foreign arbitral awards can only be raised pursuant to Part II of the Act.

The Supreme Court, in *Kinnari Mullick v. Ghanshyam Das Damani*,¹²⁷ has held that a court can relegate the parties to the arbitral tribunal, only if there is a specific written application from one party to this effect; and relegation has to happen before the arbitral award passed by the same arbitral tribunal is set aside by the court. Once the award is set aside, the dispute cannot be remanded back to the arbitral tribunal.

A. Public Policy under the Act

There has been significant debate on the scope of ‘public policy’ under the Act. Following a series of judgments on the interpretation of ‘public policy’, the 2015 Amendment Act added an explanation to Section 34 of the Act. In the explanation, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81, or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice.

The 2015 Amendment Act clarified that an award will not be set aside by the court merely on an erroneous application of law or by re-appreciation of evidence.¹²⁸ A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law,¹²⁹ and unless absolutely necessary, the courts should not go beyond the record before the arbitrator in deciding an application for setting aside an award.¹³⁰

126. MANU/SC/0899/2020.

127. AIR 2017 SC 2785.

128. Proviso to Section 34(2A) of the Act.

129. Explanation 2 to Section 48 of the Act.

130. *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49.

The principles laid down by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*¹³¹ (“**Associate Builders**”), provides guidance as to what constitutes ‘public policy’ under the Act. In *Associate Builders*, the Supreme Court held that:

- a. A decision that is based on no evidence or which ignores vital evidence would be *perverse* and contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48(2)(b) - (para 29 to 31).
- b. If an arbitral award is without any *acceptable reason or justification* it would shock the *judicial conscience* and would consequently be contrary to Justice and as such refused enforcement (para 36).
- c. A decision that was passed in contravention of “judicial approach” would be contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48(2)(b) – (para 29)

Further, in *Associate Builders*, the Supreme Court set out the contours of what constitutes a “*judicial approach*” that is a prerequisite for an award being found to conform to the fundamental policy of Indian law (para 29 - 31):

- a. Decision is to be fair, reasonable and objective;
- b. Arbitrator must apply his mind;
- c. Principle of *audi alteram partem* was to be observed;
- d. Decision cannot be perverse or so irrational that no reasonable person would have arrived at the same. Where,
 - i. a finding is based on no evidence;
 - ii. irrelevant considerations are taken into account while arriving at a decision or
 - iii. a decision ignores vital evidence,

such a decision would be perverse and contrary to the fundamental policy of Indian law.

The 2015 Amendment Act also introduced a new section providing that the award may be set aside if the court finds that it is vitiated by patent illegality which appears on the face of the award, in case of domestic arbitrations. For ICAs seated in India, ‘patent illegality’ has been kept outside the purview of the arbitral challenge.¹³² A challenge under this section can be filed only after providing prior notice to the opposite party,¹³³ but this procedural provision has been held to be directory, and not mandatory, in nature.¹³⁴ A challenge has to be disposed of expeditiously, and, in any event, within a period of one year from the date of the prior notice referred above.¹³⁵ The amended section also states that where the time for making an application under section 34 has expired, then, subject to the provisions of the CPC, the award can be enforced.

The Supreme Court, in the case of *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*,¹³⁶ interpreted the post-2015 Amendment Act grounds for challenge of an arbitral award under Section 34 of the Act and the grounds for refusal of enforcement of an arbitral award under Section 48 of the Act. The Supreme Court has held that the ground of “patent illegality” is available only for the challenge of domestic arbitral awards under Section 34 of the Act. Inter alia, patent illegality would include the following:

131. (2015) 3 SCC 49.

132. Section 34(2A) of the Act.

133. Section 34(5) of the Act.

134. *State of Bihar v. Bihar Rajya Bhumi Vikas Bank*, (2018) 9 SCC 472.

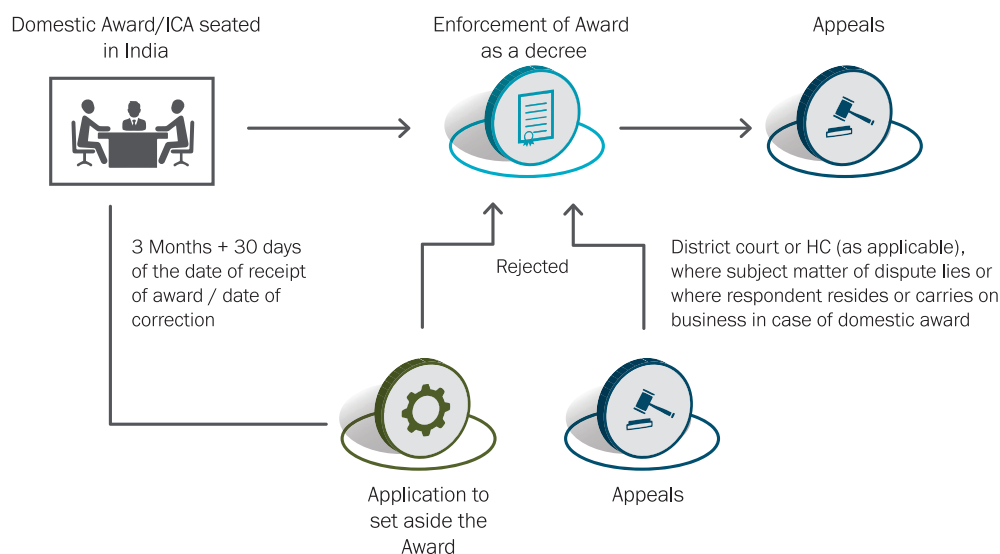
135. Section 34(6) of the Act.

136. (2019) 15 SCC 131.

- i. Patent illegality appearing on the face of the award, which goes into the root of the matter, and is not a merely an erroneous application of the law. Contravention of a statute not lined to public policy or public interest cannot be brought in by the backdoor for setting aside an award on the ground of patent illegality.
- ii. If the arbitrator fails to give reasons for an award.
- iii. If the arbitrator construes the contract in a manner no fair-minded or reasonable person would.
- iv. When a decision is perverse, based on no evidence or ignores vital evidence in arriving at the decision.

Recently, the Supreme Court in the case of *South East Asia Marine Engineering and Constructions (Seamec) v. Oil India Ltd.*¹³⁷ upheld a decision to set aside an arbitral award. In reaching its decision, the Supreme Court did not agree with the reasoning adopted by the tribunal, the District Court and the High Court, but chose to set aside the award on various grounds including that the tribunal provided an incorrect, perverse and impossible interpretation of the contract.

B. Process for Challenge & Enforcement



Under the Act, there was an automatic stay on the enforcement of the award once an application to set aside the award under Section 34 of the Act had been filed before the Indian courts. The 2015 Amendment Act required parties to file an additional application, and specifically seek a stay by demonstrating the need for such stay, to an Indian court, and the court can impose certain conditions on granting such stay, in the exercise of its discretion.¹³⁸ However, there was a lack of clarity on whether a challenge initiated after 23 October 2015 to an arbitral award passed prior to that date would result in an automatic stay because of conflicting High Court decisions on the same.¹³⁹

The Supreme Court, in the case of *BCCI*¹⁴⁰ held that law as amended by the 2015 Amendment Act will apply to those arbitral proceedings which commenced on or after October 23, 2015, and will apply to those court proceedings, (which relate to arbitration) which commenced on or after October 23, 2015. The judgment

¹³⁷. AIR 2020 SC 2323.

¹³⁸. *Ecopack India Paper Cup Pvt. Ltd. v. Sphere International*, 2018 SCC OnLine Bom 540.

¹³⁹. *New Tirupur Area Development Corporation Ltd. v. M/s. Hindustan Construction Co. Ltd.*, A. NO. 7674 of 2015 in O.P. No. 931 of 2015; *Tufan Chatterjee v. Rangan Dhar*, AIR 2016 Cal 213; *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia*, 2017 SCC Online Del 6402.

¹⁴⁰. (2018) 6 SCC 287.

particularly provided that Section 36 as amended would apply to even pending applications under Section 34 of the Act for setting aside the awards. Although the 2019 Amendment Act introduced Section 87 to the Act which modifies the interpretation of the applicability of the 2015 Amendment Act, the Supreme Court in the case of *Hindustan Construction Company Ltd. v. Union of India*,¹⁴¹ has struck down Section 87 of the Act as being unconstitutional. Consequently, the position laid down by the Supreme Court in *BCCI* continues to prevail.

Further, the Supreme Court has clarified that a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 cannot be initiated upon an application by an operational creditor if there is a pending application under Section 34 of the Act by the corporate debtor.¹⁴²

GROUNDS FOR CHALLENGE

Domestic Award/ICA seated in India

Pre-amendment (2015 Amendment Act)	Post-amendment (2015 Amendment Act)
<ul style="list-style-type: none"> i. a party was under some incapacity, or ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or b. the Court finds that— <ul style="list-style-type: none"> i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or ii. the arbitral award is in conflict with the public policy of India. 	<p>The grounds in the pre-amendment era have been retained with the addition of the following:</p> <ul style="list-style-type: none"> a. In the explanation to Section 34 of the Act, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice; b. A new section has been inserted providing that the award may be set aside if the court finds it vitiated by patent illegality which appears on the face of the award. For ICA seated in India, 'patent illegality' has been kept outside the purview of the arbitral challenge; c. An award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence; d. A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.

141. 2019 SCC OnLine SC 1520.

142. K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd., 2018 SCC OnLine SC 1013.

TIME-LINES FOR CHALLENGE

Pre-amendment	Post-amendment
NA	Challenge can be filed only after providing prior notice to the opposite party and has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice.

XVIII. Appeals

Only in exceptional circumstances, a court can be approached under the Act. The aggrieved party can approach the court only after an arbitral award is made or in case of an order passed under Section 17 of the Act after the order is passed, and even a third party, who is directly or indirectly affected by interim measures granted by the arbitral tribunal, will have a remedy of an appeal under Section 37 of the Act.¹⁴³ Appeal to the courts is now permissible only on certain restricted grounds.

An appeal lies from the following orders, and from no others, to the court authorized by law to hear appeals from original decrees of the court passing the order:¹⁴⁴

- i. *granting or refusing to grant any measure under Section 9;*
- ii. *setting aside or refusing to set aside an Arbitral Award under Section 34*

However, a three judge Bench of the Supreme Court has held, in *Centrotrade Minerals & Metal v. Hindustan Copper*,¹⁴⁵ that the parties may provide for an appeal to lie from the award to an appellate arbitral tribunal. Such a clause, sometimes termed as a multi-tier arbitration clause, was held not to be contrary to the laws of the country and, thus, enforceable. It appears that the scope of appeal in such cases is far wider than an appeal to a court.

Applicability of Amendment Act

The 2015 Amendment Act has widened the ambit of appeal by including the order refusing to refer the parties to arbitration under Section 8 of the Act.

Appeal shall also lie to a court from an order of the Arbitral Tribunal:

- i. *accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or*
- ii. *granting or refusing to grant an interim measure under Section 17.*

Moreover, no second appeal shall lie from an order passed in appeal under this Section but nothing in Section 37 shall affect or take away any right to appeal to the Supreme Court.

XIX. Enforcement and execution of the award

In India, the execution of arbitral awards, both domestic and foreign, are governed by the Act read with the CPC. While the former lays down the substantive law governing enforceability and execution of an award, the latter deals with the procedures required to be followed when seeking execution of an award.

According to Section 35 of the Act, an arbitral award shall be final and binding on the parties and persons claiming under them. Thus, an arbitral award becomes immediately enforceable unless challenged under Section 34 of the Act.

¹⁴³. *Prabhat Steel Traders v. Excel Metal Processors*, 2018 SCC OnLine Bom 2347.

¹⁴⁴. Section 37 of the Act.

¹⁴⁵. 2016 (12) SCALE 1015.

When the period for filing objections has expired or objections have been rejected, the award can be enforced under the CPC in the same manner as if it were a decree passed by a court of law.¹⁴⁶ An *ex parte* award passed by an arbitral tribunal under Section 28 of the Act is also enforceable under Section 36. Even a settlement reached by the parties under Section 30 of the Act can be enforced under Section 36 of the Act as if it were a decree of the court.

A. Institution of Execution Petition

For the execution of an arbitral award the procedure as laid down in Order XXI of the CPC has to be followed. Order XXI of the CPC lays down the detailed procedure for enforcement of decrees. It is pertinent to note that Order XXI of the CPC is the longest order in the schedule to the CPC consisting of 106 Rules.

Recently, in the case of *Bhandari Engineers & Builders v. Maharia Raj Joint Venture*,¹⁴⁷ the Delhi HC acknowledged that the present process of execution is not expeditious, and the form in the CPC is not exhaustive to ascertain all the assets, income, expenditure and liabilities of the judgment-debtor. The Delhi HC provided formats of affidavits (Annexures A, B and C) which are to be mandatorily filed, after considering the best international practices. The Delhi HC also held that these affidavits are to be filed by the judgment-debtor at the very threshold of the execution proceedings. The Court also issued further guidelines and directions to expedite execution proceedings. The Delhi HC also noted that these directions are applicable to execution proceedings under Section 36 of the Act.

Where execution of an arbitral award is sought under Order XXI CPC by a decree-holder, the legal position as to objections to it is clear. At the stage of execution of the arbitral award, there can be no challenge as to its validity.¹⁴⁸

The execution proceedings of an award can be filed anywhere in the country, and there is no requirement for obtaining a transfer of the decree from the court which exercised jurisdiction over the arbitral proceedings.¹⁴⁹ The court executing the decree cannot go beyond the decree and between the parties or their representatives. It ought to take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or in facts.

All proceedings in execution are commenced by an application for execution.¹⁵⁰ The execution of a decree against the property of the judgment debtor can be effected in two ways-

- i. *Attachment of property; and*
- ii. *Sale of property of the judgment debtor*

The courts have been granted discretion to impose conditions prior to granting a stay, including a direction for deposit. The amended section also states that where the time for making an application under Section 34 has expired, then, subject to the provisions of the CPC, the award can be enforced.¹⁵¹

Also, the mere fact that an application for setting aside an arbitral award has been filed in the court does not itself render the award unenforceable unless the court grants a stay in accordance with the provisions of sub-section 3 of Section 36, in a separate application. It is the discretion of the court to impose such conditions as it deems fit while deciding the stay application.¹⁵²

146. *N. Poongodi v. Tata Finance Ltd.*, 2005 (3) Arb LR 423 (Madras).

147. *EXP. 275/2012 & EX.APPL. (OS) 193/2020*.

148. *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rahman*, 1970 (1) SCC 670; *Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises*, 1999 (1) SCC 558.

149. *Sundaram Finance Ltd. v. Abdul Samad*, (2018) 3 SCC 622.

150. Rule 10, Order XXI of the CPC.

151. Section 36(1) of the Act.

152. Proviso to Section 36(3) of the Act.

B.Attachment of Property

‘Attachable property’ belonging to a judgment debtor may be divided into two classes: (i) moveable property and (ii) immovable property.

If the property is immovable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property and upon a conspicuous part of the courthouse.¹⁵³

Where an attachment has been made, any private transfer of property attached, whether it be movable or immovable, is void as against all claims enforceable under the attachment.¹⁵⁴

If during the pendency of the attachment, the judgment debtor satisfies the decree through the court, the attachment will be deemed to be withdrawn.¹⁵⁵ Otherwise, the court will order the property to be sold.¹⁵⁶

C.Sale of attached property

Order XXI lays down a detailed procedure for the sale of attached property whether movable or immovable. If the property attached is a moveable property, which is subject to speedy and natural decay, it may be sold at once under Rule 43. Every sale in execution of a decree should be conducted by an officer of the court except where the property to be sold is a negotiable instrument or a share in a corporation which the court may order to be sold through a broker.¹⁵⁷

XX. Representation by Arbitral Tribunal for Contempt

The Bombay High Court, in the case of *Alka Chandewar v. Shamshul Ishrar Khan*,¹⁵⁸ ruled that Section 27(5) of the Act does not empower the Tribunal to make representation to the Court for contempt. However, the Supreme Court overruled the judgment and held that under Section 27(5) of the Act any non-compliance of an arbitral tribunal’s order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971. The entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal were toothless. It was to give teeth to such orders that an express provision was made in Section 27(5) of the Act.

153. O.XXI R.54 of the CPC.

154. Section 64 of the CPC.

155. O.XXI R. 55 of the CPC.

156. O.XXI R. 64 of the CPC.

157. O.XXI R.76 of the CPC.

158. (2017) 16 SCC 119.

6. International Commercial Arbitration with Seat in A Reciprocating Country

Post the decision of the Supreme Court in *BALCO*,¹⁵⁹ the Indian arbitration law has been made seat-centric. The 2015 Amendment Act clarifies that Part I of the Act will not be applicable to foreign seated arbitrations, save and except the standalone provisions discussed below in the table.

Pre-BALCO (Bhatia International Regime)	Post-BALCO	2015 Amendment Act
Unless impliedly or expressly excluded by the parties, Part I of the Act will apply even to foreign seated arbitration.	Part I of the Act will not apply in case of foreign seated arbitration. The decision was given prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. If the arbitration agreement was executed prior to September 6, 2012, necessary modifications would have to be made in the arbitration agreement in order to be governed by the ruling in <i>BALCO</i> . ¹⁶⁰	Part I of the Act will not apply in case of foreign seated arbitration except Sections 9, 27 and 37 unless a contrary intention appears in the arbitration agreement. The 2015 Amendment Act is applicable prospectively with effect from October 23, 2015 (i.e. the commencement of the arbitral proceedings, or the court proceeding should be on or after October 23, 2015). ¹⁶¹

In *IMAX Corporation v. E-City Entertainment Pvt. Ltd.*,¹⁶² the Supreme Court has upheld the choice of foreign seat by an arbitral institution as an exclusion of Part I of the Act, under the pre-BALCO regime.

Following the ratio laid down in *BALCO*, the Bombay High Court, in *Katra Holdings v Corsair Investments LLC & Ors.*,¹⁶³ held that Part I of the Act will not apply to arbitration proceedings where the parties have agreed to conduct the arbitration in New York in accordance with the Rules of American Arbitration Association, and the Calcutta High Court, in *Government of West Bengal v. Chatterjee Petrochem*,¹⁶⁴ held that Part I of the Act will not apply to arbitration, where the parties agreed to conduct the arbitration in Paris in accordance with the Rules of Arbitration of International Chamber of Commerce. These orders demonstrate a continued pro-arbitration approach by courts and a positive wave of arbitration in India.

Part II of the Act is applicable to all foreign awards sought to be enforced in India and to refer parties to arbitration when the arbitration has a seat outside India. Part II is divided into two chapters, Chapter 1 being the most relevant one as it deals with foreign awards delivered by the signatory territories to the New York Convention which have reciprocity with India, while Chapter 2 is more academic in nature as it deals with foreign awards delivered under the Geneva Convention.¹⁶⁵

A foreign award under Part II is defined as (i) an arbitral award (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as commercial under the law in force in India, (iv) made on or after 11th day of October, 1960 (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies and (vi) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

159. *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.*, 2012 (9) SCC 552.

160. *Harmony Innovation Shipping Ltd v. Gupta Coal India Ltd.& Anr.*, (2015) 9 SCC 172 (for our analysis please see: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/have-you-amended-your-arbitration-agreement-post-balco.html?no_cache=1&cHash=05954678cd27f35dbcb4ce62517c1fc3).

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

162. 2017 SCC OnLine SC 239.

163. 2017 SCC OnLine Bom 8480.

164. 2017 SCC OnLine Cal 13267.

165. As mostly all parties signatory to the Geneva Convention are now members of the New York Convention, Chapter 2 of Part II remains primarily academic.

Thus, even if a country is a signatory to the New York Convention, it does not *ipso facto* mean that an award passed in such a country would be enforceable in India. There has to be further notified by the Central Government declaring that country to be a territory to which the New York Convention applies. In the case of *Bhatia International v. Bulk Trading*,¹⁶⁶ (“**Bhatia International**”) the Supreme Court expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award.

About 48 countries have been notified by the Indian government so far. They are:- Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Chile; China (including Hong Kong and Macau) Cuba; Czech Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Malagasy Republic; Malaysia; Mauritius, Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America.

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied¹⁶⁷

- i. *the award passed should be an arbitral award,*
- ii. *it should be arising out of differences between the parties;*
- iii. *the difference should be arising out of a legal relationship;*
- iv. *the legal relationship should be considered as commercial;*
- v. *it should be in pursuance of a written agreement to which the New York Convention applies; and,*
- vi. *the foreign award should be made in one of the aforementioned 48 countries.*

I. Referring parties to arbitration under Part II

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who, under Section 44¹⁶⁸ of the Act have entered into an arbitration agreement. Section 45 is based on Article II(3) of the New York Convention and, with an in-depth reading of Section 45 of the Act, it can be clearly understood that it is mandatory for the judicial authority to refer parties to the arbitration.

Section 45 of the Act starts with a *non obstante* clause, giving an overriding effect to the provision and making it prevail over anything contrary contained in Part I of the Act or the CPC. It gives the power to the Indian judicial authorities to specifically enforce the arbitration agreement between the parties.

However, as an essential pre-condition to specifically enforcing the arbitration agreement, the court has to be satisfied that the agreement is valid, operative and capable of being performed. A party may not be entitled to a stay of legal proceedings initiated in contravention to the arbitration agreement, under Section 45, in the absence of a review by the court to determine the validity of the arbitral agreement. The review is to be on a *prima facie* basis.¹⁶⁹

166. AIR 2002 SC 1432.

167. National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ARBLR 37.

168. Section 44 of the Act.

169. Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234; Korp Gems (India) Pvt. Ltd. v. Precious Diamond Ltd., 2007 (3) ArBLR 32.

A. Distinction between Section 8 and Section 45

Section 8 and Section 45 of the Act, both pertaining to the court referring disputes to arbitration, vary with regards to the threshold of discretion granted to the courts. The primary distinction appears to be that Section 8 of the Act leaves no discretion with the court in the matter of referring parties to arbitration, whereas Section 45 grants the court the power to refuse a reference to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.¹⁷⁰

The Supreme Court, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,¹⁷¹ has opined that no formal application is necessary to request a court to refer the matter to arbitration under Section 45 of the Act. In case a party so requests, even though an affidavit, a court is obliged to refer the matter to arbitration, with the only exception being the cases where the arbitration agreement is null and void, inoperative or incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dispute to foreign seated arbitrations.

Thus, though Section 8 of the Act envisages the filing of an application by a party to the suit seeking a reference of the dispute to arbitration, Section 45 needs only a 'request' for that purpose.

Further, Section 45 can only be applied when the matter is the subject of a New York Convention arbitration agreement, whereas Section 8 applies in general to all arbitration clauses falling under Part I of the Act. In *Chloro Controls*¹⁷², the Supreme Court has held that the expression '*person claiming through or under*', as provided under Section 45 of the Act, would mean and include within its ambit multiple and multi-party agreements. Hence, even non-signatory parties to some of the agreements can pray and be referred to arbitration.

This ruling has widespread implications for foreign investors and parties as now, in certain exceptional cases involving composite transactions and interlinked agreements, even non-parties such as a parent company, subsidiary, group companies or directors can be referred to and made parties to an ICA.

The Delhi HC, recently, in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors.*,¹⁷³ relying on *Chloro Controls*, upheld the impleadment of a non-signatory to the arbitration agreement in an Singapore International Arbitration Centre ("SIAC") arbitration.

The Supreme Court, in the case of *Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing India Pvt. Ltd. & Anr*¹⁷⁴ had occasion to revisit the principles expounded in *Chloro Controls*. The Supreme Court has held that it is upon the party seeking to implead a non-signatory to show its intention to consent to the arbitration agreement. Further, it held that a non-signatory without any causal connection with the process of negotiations preceding the arbitration agreement cannot be made party to the arbitration. Importantly, it has also ruled that circumstances and correspondence post-execution of an arbitration agreement cannot bind a non-signatory to the arbitration agreement.

II. Enforcement and execution of foreign awards

When a party is seeking enforcement of a New York Convention award under the provisions of the Act, he/she must make an application to the Court of competent jurisdiction with the following documents-

- i. *The original/duly authenticated copy of the award;*

170. (2005) 7 SCC 234.

171. *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games 2010, Delhi*, (2014) 6 SCC 677.

172. 2013 (1) SCC 641.

173. 2017 SCC OnLine Del 11625.

174. (2019) 7 SCC 62; Also see *Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors.*, 2019 SCC OnLine 995.

- ii. *The original/duly authenticated copy of the agreement; and*
- iii. *Such evidence as may be necessary to prove that the award is a foreign award.*

There are several requirements for a foreign arbitral award to be enforceable under the Act –

A. Commercial transaction

The award must be given in a convention country to resolve commercial disputes arising out of a legal relationship. In the case of *RM Investment & Trading v. Boeing*,¹⁷⁵ the Supreme Court observed that the term “commercial” should be liberally construed as having regard to manifold activities which are an integral part of international trade.

B. Written agreement

The Geneva Convention and the New York Convention provide that a foreign arbitral agreement must be made in writing, although it does not have to be worded formally or be in accordance with a particular format.

C. Agreement must be valid

The foreign award must be valid and arise from an enforceable commercial agreement. In the case of *Khardah Company v. Raymon & Co. (India)*,¹⁷⁶ the Supreme Court held that an arbitration clause cannot be enforceable when the agreement of which it forms an integral part of is declared illegal. The Delhi HC in *Virgoz Oils and Fats Pte. Ltd. v. National Agricultural Marketing Federation of India*,¹⁷⁷ held that a contract containing an arbitration agreement must be signed by all the parties to the contract, in order to make the arbitration agreement valid and binding upon the parties.

D. Award must be unambiguous

In the case of *Koch Navigation v. Hindustan Petroleum Corp.*,¹⁷⁸ the Supreme Court held that courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

E. Grounds for Refusing the Enforcement of a Foreign Arbitral Award

Under Section 48 of the Act, in case of a New York Convention award, an Indian court can refuse to enforce a foreign arbitral award if it falls within the scope of the following statutory defences-

- i. *the parties to the agreement are under some incapacity;*
- ii. *the agreement is void;*
- iii. *the award contains decisions on matters beyond the scope of the arbitration agreement;*
- iv. *the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;*

175. AIR 1994 SC 1136.

176. AIR 1962 SC 1810.

177. 2016 SCC OnLine Del 6203.

178. AIR 1989 SC 2198.

- v. *the award has been set aside or suspended by a competent authority of the country in which it was made;*
- vi. *the subject matter of dispute cannot be settled by arbitration under Indian law; or*
- vii. *the enforcement of the award would be contrary to Indian public policy.*

The term “*public policy*”, as mentioned under Section 48(2)(b), is one of the conditions to be satisfied before enforcing a foreign award. The Supreme Court, in *Renusagar Power Co. Ltd. v. General Electric Co.*,¹⁷⁹ (“**Renusagar**”) held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to –

- i. *fundamental policy of India; or*
- ii. *the interest of India; or*
- iii. *justice or morality.*

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,¹⁸⁰ it was held that enforcement of a foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

On fulfilling the statutory conditions mentioned above, a foreign award will be deemed to be a decree of the Indian court enforcing the award and thereafter, will be binding for all purposes on the parties subject to the award.

The Supreme Court has held that no separate application needs to be filed for the execution of the award. A single application for the enforcement of the award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention grounds) would be determined. Foreign arbitration awards, if valid, are treated at par with a decree passed by an Indian civil court and they are enforceable by Indian courts having jurisdiction as if the decree had been passed by such courts.¹⁸¹

Once the court decides that the foreign award is enforceable, it shall proceed to take further steps for execution of the same, the process of which is identical to the process of execution of a domestic award.

The 2015 Amendment Act specifically provides an explanation to Section 48 of the Act, for the avoidance of all doubts on the point that an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention of the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

The 2015 Amendment Act, in the amendment to Section 34 of the Act (which deals with challenge of an arbitral award with a seat in India) also specifies that the ground of ‘patent illegality’ is not available as a ground for setting aside an arbitral award in ICA. The language and grounds for setting aside and refusing arbitral awards under Sections 34 and 48 are similar, except for the ground of ‘patent illegality’ which is available only for domestic arbitrations.

Recently, the Delhi HC recognized and enforced a foreign award, while recognizing that the procedure followed under the SIAC rules (which the party hadn’t agreed to) hadn’t caused any prejudice to the judgement debtor.¹⁸²

179. (1994) 2 Arb LR 405.

180. 2013 (8) SCALE 480.

181. Section 49 of the Act.

182. *Glencore International AG v. Indian Potash Ltd. & Anr.*, 2019 SCC OnLine Del 9591.

In the case of *Vijay Karia & Ors. v. Prysman Cavi E Sistemi S.r.l & Ors.*¹⁸³ (“**Vijay Karia**”) the Supreme Court recently held that Courts should refuse the enforcement of foreign arbitral awards only in exceptional cases of a blatant disregard of Section 48 of the Act. The Supreme Court further held that a violation of Rule 21 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (issued under the FEMA) would not constitute a violation of the fundamental policy of Indian law under Section 48(2)(b)(ii). The Supreme Court held that the fundamental policy refers to the core values of India’s public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts.

The Bombay High Court in *Banyan Tree Growth Capital L.L.C. v. Axiom Cordages Ltd. & Ors.*¹⁸⁴ upheld the enforcement of two foreign arbitral awards which were administered by the SIAC. The Bombay High Court relied upon the Supreme Court’s ruling in *Renusagar* and *Vijay Karia* and held that an alleged violation of FEMA in the underlying contract is not sufficient ground to refuse the enforcement of a foreign arbitral award.

F. Limitation applicable for enforcing a foreign award

In a rare decision of this kind, the Supreme Court recently refused the enforcement of a foreign arbitral award in the case of *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*,¹⁸⁵ on the ground that it would be contrary to the public policy of India. In doing so, the Supreme Court interpreted the terms of the contract to find that the agreement between the parties should have been rendered void due to a contingency clause in it. Therefore, the arbitral award upholding the agreement could not be enforced.

The Supreme Court, in the case of *Government of India (GOI) v. Vedanta*¹⁸⁶ recently enforced a foreign arbitral award, rejecting all the objections raised against it for resisting enforcement. Pertinently, in the present case, the enforcement proceeding was filed over 3 years after the date of the arbitral award. The Supreme Court, interpreting the Limitation Act, 1936, held that an application of enforcement of a foreign arbitral award must be filed within a period of 3 years from when the right to apply accrues.

In an earlier ruling, the Supreme Court in the case of *Bank of Baroda v. Kotak Mahindra Bank Ltd.*¹⁸⁷ held that the period of limitation for the execution of a *foreign decree* would be determined by the limitation periods prescribed in the country wherein the decree was made.

III. Appealable orders

Under Section 50 of the Act, an appeal can be filed by a party against the orders passed under Section 45 and Section 48 of the Act. However, no second appeal can be filed against the order passed under this Section. These orders are only appealable under Article 136 of the Constitution of India, 1950 (“**Constitution**”), and such an appeal is filed before the Supreme Court.

The Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*¹⁸⁸ held that

183. 2020 SCC OnLine SC 177.

184. 2020 SCC OnLine Bom 781.

185. 2020 SCC OnLine SC 381.

186. 2020 SCC Online SC 749.

187. 2020 SCC OnLine SC 324.

188. (2005) 7 SCC 234.

“

“While a second appeal is barred by Section 50, appeal under Article 136 of the Constitution of India to the Supreme Court has not been taken away. However, Article 136 does not provide a party a right to an appeal; it is a discretion which the Supreme Court may choose to exercise. Thus, where there existed an alternative remedy in the form of a revision under Section 115 of the Civil Procedure Code or under Article 227 of the Constitution before the High Court, the Supreme Court refused to hear an appeal under Article 136 even though special leave had initially been granted...”

”

Out of several issues raised in *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*,¹⁸⁹ one was whether a letters patent appeal would lie against an order under Section 50 of the Act wherein a petition seeking execution of an award was dismissed and no appeal was maintainable under the Act. Further, the Single Judge, under Section 45, had refused to refer the parties to the arbitration. A letters patent appeal was filed against the impugned order. The matter was later referred to the Supreme Court to clarify whether the appeal was maintainable.

The Supreme Court in its decision held –

“

“... In light of the discussions made above, it must be held that no letters patent appeal will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act, 1996...”

”

Further, the Supreme Court in *Kandla Export Corporation & Anr. v. M/s. OCI Corporation & Anr.*,¹⁹⁰ clarified the law on appeals in case of enforcement of foreign awards, and held that Section 13(1) of the Commercial Courts Act, 2015, being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would not apply to cases unless they are expressly covered under Section 50 of the Act, i.e., while Section 50 deals with the conditions of filing an appeal against a foreign award (under Part II of the Act), Section 13(1) of the Commercial Courts Act, 2015 deals with the forum for the same. Interestingly, parties seeking enforcement have access to a two-stage appeal process for enforcing foreign awards - before Commercial Appellate Division, and then the Supreme Court. However, the only remedy left to parties resisting enforcement would be approaching the Supreme Court directly, if their objections to enforcement are rejected. No appeal can be filed by parties resisting enforcement before the Commercial Appellate Division, in the current legislative framework.

Thus, it is clearly understood that an order under Section 45 is only appealable under Article 136 of the Constitution.

189. (2011) 8 SCC 333.

190. (2018) 14 SCC 715.

7. Emerging Issues in Indian Arbitration Laws

In the recent past, there has been a lot of enthusiasm around the evolving laws of arbitration in India and the emerging issues therein, such as (a) prospective applicability of the Amendment Act; (b) whether two Indian parties can choose a foreign seat of arbitration; (c) whether it is possible to arbitrate a dispute arising out of allegations of oppression and mismanagement.

I. Issues in the 2019 Amendment Act

The 2019 Amendment Act aims to provide certification to arbitral institutions and arbitrators through grading and accreditation by the Arbitration Council of India. However, the constitution of the Arbitration Council of India itself is largely government-dominated, which may risk the independence of arbitration in India. However, it must be noted that provisions pertaining to the Arbitration Council of India in the 2019 Amendment Act have not been notified yet.

The 2019 Amendment Act also may have missed the opportunity to provide adequate exceptions to the obligation of confidentiality. The inadequacy of exceptions to the confidentiality obligation may give rise to multiple issues. For instance, the following circumstances would require disclosure and would not strictly fall within the scope of the exception proposed in the 2019 Amendment Act:

1. proceedings under Section 9, 11, 14, 27 and 34 of the Act;
2. where one party wishes to initiate criminal proceedings along with the arbitration;
3. where a party files for an anti-arbitration injunction before the civil court;
4. where a party approaches a government regulator on facts which also gives rise to a contractual dispute;
5. where information is proposed to be shared with third-party experts (such as forensic, accounting, delay or quantum experts); or
6. where information is required to be shared with a third-party funder to obtain funding for a claim.

Further, the Eighth Schedule to the 2019 Amendment Act commences with the phrase “*a person shall not be qualified to be an arbitrator unless..*”. Thus, although the provision pertains to accreditation of arbitrators, the Eighth Schedule appears to be specifying minimum qualifications for a person to act as an arbitrator. This amendment *was* ambiguous and could have been interpreted to imply that no foreign legal professional could act as an arbitrator in India, as one of the requirements under the Eighth Schedule is for the person to be an advocate within the meaning of the Indian Advocates Act, 1961. However, as a welcome move, the Eighth Schedule is now omitted by the 2021 Amendment Act, and no minimum qualifications and experience of arbitrators are now mandated under the law.

Further, the introduction of an additional six-month period for completion of pleadings is owing to the Committee Report which noted that arbitrators felt that 12-month timeline should take effect post completion of pleadings. The Committee Report did not discuss the reason why arbitrators had given this suggestion. However, it can be understood that due to due process concerns, arbitrators are constrained from taking strong procedural decisions in relation to the completion of pleadings. Time taken by the parties in completing pleadings therefore, takes up most part of the 12-month time-frame, leaving a very short period for completion of the rest of the process.

However, the resolution of this concern by providing a six-month time frame for completion of statement of claim and defence will may result in the creation of more issues. For instance, it is very common in arbitration proceedings for parties to bifurcate the issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing of statement of claim and defence may deprive parties of such flexibility and would effectively require them to file their complete pleadings at the very outset of the arbitration proceedings. Further, it is difficult to ascertain at what stage filing the statement claim and defence be considered as completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defence, or where a counter-claim is filed.

II. Conundrum surrounding two Indian parties having a foreign seat of arbitration

Even though this issue has been addressed by a number of High Courts in the past, there is still no clarity from the Supreme Court or from the legislature on the ability of two Indian parties to choose a foreign seat of arbitration. In *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*,¹⁹¹ the Bombay High Court expressed a view that two Indian parties choosing a foreign seat and a foreign law governing the arbitration agreement could be considered to be opposed to the public policy of the country.

Recently, in the case of *Sasan Power Ltd. v. North America Coal Corporation India Pvt. Ltd.*,¹⁹² the Madhya Pradesh High Court opined that two Indian parties may conduct arbitration in a foreign seat under English law.

The Madhya Pradesh High Court primarily relied on the ruling in the case of *Atlas Exports Industries v. Kotak & Company*¹⁹³ (“**Atlas Exports**”), wherein the Supreme Court ruled that two Indian parties could contract to have a foreign-seated arbitration; although, the judgment was in the context of the 1940 Arbitration Act. Under appeal, although expected, the Supreme Court did not opine on this issue.

Recently, the Delhi HC, in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors.*,¹⁹⁴ after relying on the decision of the Madhya Pradesh High Court in *Sasan Power Ltd. v. North American Coal Corporation (India) Pvt. Ltd.*, *Sasan Power*, and *Atlas Exports* ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration. The Delhi HC’s decision to re-affirm that two Indian parties can seat their arbitration outside India is yet another testament to the pro-arbitration approach of Indian courts, with the Delhi HC leading the charge. More recently, the Delhi HC,¹⁹⁵ and the Gujarat HC¹⁹⁶ have affirmed the principle that two Indian parties can choose a foreign law as the law governing the arbitration or the seat of arbitration as a foreign nation.

However, one must be wary of the ruling in *TDM Infrastructure*,¹⁹⁷ wherein the Supreme Court ruled that two Indian parties could not derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign law. But as *TDM Infrastructure* was a judgment under Section 11 of the Act, and much prior to a series of pro-arbitration judgments from various courts, there are serious doubts over its precedential value.¹⁹⁸

191. 2015 SCC OnLine Bom 7752.

192. (2016) 10 SCC 813.

193. (1999) 7 SCC 61.

194. 2017 SCC OnLine Del 11625.

195. Dholi Spintex Pvt. Ltd. v. Louis Dreyfus Company India Pvt. Ltd., CS (COMM) 286/2020.

196. GE Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd., MANU/GJ/1345/2020 [R/Petn. Under Arbitration Act Nos. 131 & 134 of 2019]

197. TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.

198. West Bengal v. Associated Contractors, (2015) 1 SCC 32.

III. Arbitrability of oppression and mismanagement cases

A landmark judgment on this issue was delivered by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra*,¹⁹⁹ wherein the court held that disputes regarding oppression and mismanagement cannot be arbitrated, and must be adjudicated upon by the judicial authority itself. However, in case the judicial authority finds that the petition is mala fide or vexatious and is an attempt to avoid an arbitration clause, the dispute must be referred to arbitration. Arguably, this could have an unintended impact on the *prima facie* standard in Section 8, as amended and introduced by the 2015 Amendment Act.

The Bombay High Court opined that a petition under Sections 397 and 398 of the Companies Act, 1956 may comprise of conduct of clandestine non-contractual actions that result in the mismanagement of the company's affairs or in the oppression of the minority shareholders, or both.

In such cases, even if there is an arbitration agreement, it is not necessary that every single act must, *ipso facto*, relate to that arbitration agreement. Further, the fact that the dispute might affect the rights of third parties who are not a party to the arbitration agreement renders such disputes non-arbitrable. In addition to the above emerging issues, please find enclosed the Annexure containing the detailed list of our hotlines which cover the analysis of the recent judgments and issues faced in the arbitration regime in India.

IV. Arbitrability of consumer disputes

The National Consumer Dispute Resolution Commission (“NCDRC”), in *Aftab Singh v. Emaar MGF Land Ltd.*,²⁰⁰ has held that an arbitration clause in an agreement between a builder and consumers cannot circumscribe the jurisdiction of the NCDRC, notwithstanding the amendments made to Section 8 of the Act. It held that the non-obstante clause did not oust the jurisdiction of consumer fora, since they were specially designated authorities to deal with consumer issues.

V. Arbitrability of land-lord tenancy disputes

After a series of judgments on the arbitrability of landlord-tenancy disputes under the Transfer of Property Act, 1882 (“TP Act”), the Supreme Court, in the case of *Vidya Drolia & Ors. v. Durga Trading Corporation*²⁰¹ laid down a four-prong test to determine when a dispute would be inarbitrable:

1. it relates to actions in rem or actions that do not pertain to subordinate rights *in personam* that arise from rights in rem.
2. it affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
3. it relates to the inalienable sovereign and public interest functions of the state; and
4. it is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

199. (2015) 2 Comp LJ 288 (Bom).

200. Consumer Case No. 701/2015.

201. Civil Appeal No. 2402 of 2019.

Applying these tests, the Supreme Court held that there is nothing in the TP Act that expressly or impliedly bars arbitration. Such disputes were not actions in rem, but actions in personam that arose from rights in rem. They did not affect third-party rights or have erga omnes effect. They also do not relate to any sovereign functions of the state. The Court further held that grounds of public policy can be determined by the appointed arbitral tribunal. In a subsequent case pertaining to the appointment of an arbitrator under Section 11 of the Act, the Supreme Court held that insofar as the eviction or tenancy was governed by special statutes, where tenant enjoys statutory protection against eviction and whereunder a specific court is conferred, the disputes would be non-arbitrable. The Court held that disputes under the TP Act would be arbitrable.²⁰²

VI. Arbitrability of fraud

The tests laid down by the Supreme Court in *Vidya Drolia & Ors. v. Durga Trading Corporation*²⁰³ are applicable to determine whether fraud is arbitrable as well. In previous decisions, the Supreme Court²⁰⁴ has held that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In this case, the Court differentiated between ‘fraud simpliciter’ and ‘serious fraud’, and concluded that while ‘serious fraud’ is best left to be determined by the court, ‘fraud simpliciter’ can be decided by the arbitral tribunal.

202. 2020 SCC OnLine SC 1038.

203. Civil Appeal No. 2402 of 2019.

204. A Ayyasamy v. A Paramasivam & Ors., (2016) 10 SCC 386.

8. Conclusion

A fast-growing economy requires a reliable stable dispute resolution process in order to be able to attract foreign investment. With the extreme backlog before Indian courts, commercial players in India and abroad have developed a strong preference to resolve disputes via arbitration.

Despite India being one of the original signatories to the New York Convention, arbitration in India has not always kept up with the international best practices. However, the last five years have seen a significant positive change in approach. Courts and legislators have acted with a view to bringing Indian arbitration law in line with the international best practices. With the pro-arbitration approach of the courts, the 2015, 2019 and the 2021 Amendment Acts, in place, there is reason to look forward to these best practices being adopted in the Indian arbitration law in the near future.

Exciting times are ahead for the Indian arbitration jurisprudence and our courts are ready to take on several matters dealing with the interpretation of the multiple amendments to the Act.

9. Appendix

I. Are Tenant - Landlord Disputes Arbitrable? Supreme Court of India Overturns its Own Judgment

“

- Leased properties exempted under rent control legislations would be governed by Transfer of Property Act;
- Landlord-tenancy disputes governed by Transfer of Property Act are arbitrable;
- Arbitrators can grant reliefs provided under landlord-tenancy provisions of the Transfer of Property Act;
- Landlord-tenancy disputes governed by special rent control legislations continue to be non-arbitrable;

”

Are disputes between landlords and tenants arbitrable under Indian law? If yes, are all types of disputes arbitrable? Can arbitration clauses in lease agreements be enforced? After significant confusion and long-standing disputes around the arbitrability of tenancy matters, it may now be possible to answer some of these questions. In two judgments passed within a month, *Suresh Shah v. Hipad Technology India Private Limited*²⁰⁵ (“**Suresh Shah**”) and *Vidya Drolia & Ors. v. Durga Trading Corporation*²⁰⁶ (“**Vidya Drolia II**”), the Supreme Court has settled the dust on whether landlord-tenancy disputes under the Transfer of Property Act, 1882 (“**TP Act**”) are arbitrable under the Arbitration & Conciliation Act, 1996 (“**Arbitration Act**”).

Overruling many of its own as well as other High Courts’ judgments, the Court in *Vidya Drolia II* has set out the broad principles on which arbitrability of disputes may be decided. Applying the principles, the Court held that landlord-tenant disputes under TP Act, and not any special statute (such as state-specific rent legislations, etc.), would be arbitrable.

Additionally, the *Vidya Drolia II* judgment also demarcates the scope of inquiry by courts in determining questions of arbitrability at the pre-arbitration / reference stage under Section 8²⁰⁷ and 11²⁰⁸ of the Arbitration Act, along-with issues relating to the arbitrability of disputes involving fraud and debt recovery, among others. In this piece, however, we analyse the critical judgments that have brought arbitrability of landlord-tenancy disputes to the fore and steered the analysis till date.

205. 2020 SCC OnLine SC 1038

206. Civil Appeal No. 2402 of 2019

207. Section 8, Arbitration and Conciliation Act, 1996 – (1) “A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.”

208. Section 11, Arbitration and Conciliation Act, 1996 – “(4) If the appointment procedure in sub-section (3) applies and—
 (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
 (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;
 (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court...”

A. History of Controversy on Landlord Tenancy Disputes

i. Natraj Studios (P) Ltd. v. Navrang Studios & Ors. - 1981

One of the early cases involving arbitrability of landlord-tenant disputes arose in 1981 in the judgment of the Court in *Natraj Studios (P) Ltd. v. Navrang Studios & Ors.*²⁰⁹ (“**Natraj Studios**”). In *Natraj Studios*, the Court held that disputes between landlord and tenant under Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (“**Bombay Rent Act**”) cannot be referred to an arbitrator. This was because:

- a. the dispute was governed by the Bombay Rent Act;
- b. Bombay Rent Act is a welfare legislation aimed at the definite social objective of protecting tenants against harassment by landlords. Accordingly, parties cannot be permitted to contract out of the legislative mandate which is rooted in public policy; and
- c. Bombay Rent Act conferred jurisdiction on the Court of small causes, under Section 28, to entertain and decide all matters arising thereunder.

ii. Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors. - 2011

In 2011 with *Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. and Ors.*²¹⁰ (“**Booz Allen**”), the Court held that a suit to enforce a mortgage must be decided by courts of law and not by arbitral tribunals. The Court held that a suit to enforce a mortgage involved enforcement of a right *in rem*. It explained that a right *in rem* is a right exercisable against the world and is not amenable to arbitration. In contrast, a right *in personam*, in which interest is protected against specific individuals, is arbitrable. It was also stated that disputes relating to subordinate rights *in personam* arising from rights *in rem* are arbitrable.

The Court further held that every civil or commercial dispute which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration, unless it is excluded expressly (as a matter of public policy) or by necessary implication.

In the judgment, the Court enumerated examples of non-arbitrable disputes. Regarding landlord-tenant disputes, the Court stated in obiter that tenancy disputes are not arbitrable when (i) the eviction or tenancy matters are governed by special statutes; (ii) the tenant enjoys statutory protection against eviction; and (iii) only specified courts are conferred jurisdiction to grant eviction or decide the disputes (“**Booz Allen Criterion**”).

iii. Himangni Enterprises v. Kamaljeet Singh Ahluwalia - 2017

In 2017, in the case of *Himangni Enterprises v. Kamaljeet Singh Ahluwalia* (“**Himangni**”),²¹¹ the Court was again seized with the question of whether landlord-tenant disputes are arbitrable. Here, a landlord sued the tenant in a civil court. The property in question was leased under a lease agreement that contained an arbitration clause. The tenant applied under Section 8 of the Arbitration Act before the civil court, praying for reference of the dispute to arbitration. The landlord objected to the application on the ground that the subject matter of the suit was incapable of reference to arbitration. The civil court and the Delhi High Court (in appeal) accepted the landlord’s plea and refused the application for reference to arbitration.

209. (1981) 1 SCC 523

210. (2011) 5 SCC 532

211. (2017) 10 SCC 706

In the appeal before the Court, it was contended that under normal circumstances, landlord-tenant disputes in the jurisdiction would be governed by the Delhi Rent Act, 1995 (“**Delhi Rent Act**”). However, by virtue of Section 3²¹², the Delhi Rent Act did not apply to the leased premises. As the Delhi Rent Act did not apply to the leased premises, the matter was no longer governed by a special statute (i.e. Delhi Rent Act). Therefore, it did not meet the Booz Allen Criterion - leaving the dispute capable of reference to arbitration.

However, the Court was not impressed by the above contention. It held that, mere inapplicability of the Delhi Rent Act to the leased premises did not make the dispute arbitrable. The exemption from applicability of the Delhi Rent Act to the leased premises could be withdrawn by the government at anytime. In such a case, Delhi Rent Act (which is a special legislation) will start to apply again, thereby ousting the jurisdiction of the arbitrator (as per Booz Allen Criterion). As such, merely because the premises are exempted from the applicability of the Delhi Rent Act does not mean that the matter can be referred to arbitration. In such a case, the matter will be governed by the TP Act and must be decided by civil courts. Ignoring the exemption provided under the Delhi Rent Act, the Court held that the facts of this case were covered by the judgments of Natraj Studios and Booz Allen.

iv. Vidya Drolia & Ors. v. Durga Trading Corporation – 2019 (Vidya Drolia I)

In *Vidya Drolia & Ors. v. Durga Trading Corporation*, a tenancy agreement was entered into between the landlord and the tenant regarding certain godowns and other structures. The maximum period of tenancy was ten years. The tenancy agreement provided an arbitration clause. After ten years, the landlord called upon the tenant to vacate the premises. Upon the tenant’s failure to vacate the premises, the landlord issued a notice of arbitration to the tenant. The landlord applied under Section 11 of the Arbitration Act for the appointment of an arbitrator. The High Court of Calcutta rejected the tenant’s objections relating to the non-arbitrability of the dispute and referred the matter to arbitration.

Meanwhile, the Court passed its judgment in the case of Himangni Enterprises (ruling that landlord and tenant disputes governed by the TP Act would not be arbitrable). Based on the judgment in Himangni Enterprises, a review / recall application was filed in the High Court of Calcutta against the order appointing the arbitrator. The High Court of Calcutta rejected this application, against which an appeal was preferred before the Court.

When a two-judge bench first heard the appeal in 2019 (“**Vidya Drolia I**”), the Court held that a dispute between landlord-tenant governed by TP Act was never covered under either Natraj Studios (as this was a case under Bombay Rent Act) or Booz Allen (as this was a case involving enforcement of mortgage which was a right in rem). The Court differed with its judgment in Himangni Enterprises and held that the decision was not based on sound reasoning. It held that merely because the government could withdraw the exemption (from the applicability of Delhi Rent Act) would not render the dispute inarbitrable.

The Court agreed that if the Delhi Rent Act becomes inapplicable, the dispute would be governed by TP Act. However, it was not convinced that an arbitrator could not decide landlord-tenancy matters governed under TP Act. Analysing the provisions of the TP Act (particularly Sections 111, 114 and 114A, which specifically cover landlord-tenants’ rights and liabilities), the Court held that the disputes under TP Act can be decided by an arbitrator, and there is nothing in the TP Act that prohibits arbitrability.

Having thus found itself at odds with its judgment in Himangni Enterprises, the Court referred the matter to a larger bench of three judges, which culminated in the present Vidya Drolia II judgment.

212. The Delhi Rent Act, 1995, Section 3 – “(1) Nothing in this Act shall apply--

(a) to any premises belonging to the government or a local authority;

(b) to any tenancy or other like relationship created by a grant from the government in respect of the premises taken on lease, or requisitioned, by the government...”

v. Vidya Drolia & Ors. v. Durga Trading Corporation – 2020 (Vidya Drolia II)

In the Vidya Drolia II Judgment, the Court laid down a four-fold test to determine the arbitrability of disputes. It held that a dispute would be inarbitrable when:

1. it relates to actions *in rem* or actions that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.
2. it affects third party rights; have *erga omnes*²¹³ effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
3. it relates to the inalienable sovereign and public interest functions of the state; and
4. it is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

Applying the above principles to the present landlord-tenant dispute under TP Act, and referring to Sections 111, 114 and 114A of the Transfer of Property Act, the Court held that there is nothing in the TP Act that expressly or impliedly bars arbitration. Such disputes were not actions *in rem*, but actions *in personam* that arose from rights *in rem*. They did not affect third-party rights or have *erga omnes* effect. They also do not relate to any sovereign functions of the state.

As regards the grounds predicated on public policy, the Court held that the same could well be raised before the arbitrator as they could be raised before a civil court. As under other acts of legislature, the arbitrator would be bound by the TP Act, and would have to decide disputes in line with the benefits and protections provided to tenants. The Court further held that an award passed in a landlord-tenant dispute would be enforceable like a decree of civil Court. Accordingly, it held that landlord-tenant disputes covered under the TP Act would be arbitrable.

vi. Suresh Shah v. Hipad Technology India Private Limited - 2020

In the more recent Suresh Shah case, the parties had entered into a sub-lease agreement containing an arbitration clause. Disputes arose under the sub-lease agreement. An application was filed in Court under Section 11 of the Arbitration Act for the appointment of an arbitrator. Before considering the appointment of an arbitrator, the Court elaborated on the arbitrability of disputes relating to lease/tenancy agreements/deeds.

The Court reiterated that insofar as the eviction or tenancy was governed by special statutes, where tenant enjoys statutory protection against eviction and whereunder a specific court is conferred jurisdiction (i.e. Booz Allen Criterion), the disputes would be non-arbitrable. In other words, holding that landlord-tenancy disputes under TP Act would be arbitrable.

B. Analysis & Conclusion

The Suresh Shah and Vidya Drolia II judgments now offer much needed clarity to landlords and tenants on the type of tenancy disputes that can be referred to arbitration. The four-pronged test laid down by the Court in Vidya Drolia II to determine arbitrability would also help to determine arbitrability of disputes in general. With clarity on the arbitrability of landlord-tenancy disputes governed by the TP Act, it is believed that the courts' burden will also reduce going forward.

²¹³. *Erga omnes* meaning “towards all” or “towards everyone” are obligations owed to the community as a whole. In the context of arbitration, having *erga omnes* effect means “affecting rights and liabilities of persons who are not bound by the arbitration agreement.”

It must be noted that the applicability of rent control legislation is typically exempted on certain types of premises. For example, under the Maharashtra Rent Control Act, 1999 (“**MH Rent Act**”), premises let or sub-let to banks, public sector undertakings or any corporation established by any state or central act, or foreign missions, multinational companies, international agencies, are exempted. The MH Rent Act also does not apply to premises let to private limited and public limited companies with a paid-up share capital of rupees one crore or more. Similarly, the Delhi Rent Act does not apply to any premises belonging to the government or to any tenancy created by a grant from the government. Thus, the present judgments have cleared the way for many disputes relating to such exempted premises to be referred to arbitration.

However, the judgments must be explicitly read in the context of landlord-tenancy disputes under specific provisions of the TP Act. Caution must be exercised in considering the nature of dispute under action. The judgment cannot be broadly applied to mean that all provisions under the TP Act are arbitrable. Disputes having any element of in rem action or *erga omnes* effect under the TP Act will continue to be non-arbitrable and will have to be assessed on a case by case basis.

II. Ever changing arbitration landscape in India, yet another attempt: Hit or a Miss!

One fails to understand the teething hurry in passing the ordinance, without any deliberations or inviting public comments on the impact of amendments.

Yet another ordinance has been promulgated to amend the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). One fails to understand the teething hurry in passing the ordinance, without any deliberations or inviting public comments on the impact of amendments, which perhaps is the reason why we have had so many amendments to the Arbitration Act since 2015.

There are two important inclusions:

- a. Unconditional stay on the enforcement of an India seated arbitration award until the challenge to the award is determined, provided, there is prima facie finding by the Court that the arbitration agreement or contract which is the basis of the award, or the making of the award was induced or effected by fraud or corruption;
- b. Deletion of the much debated qualifications, experience and norms for accreditation of arbitrators stipulated under the Eight Schedule of the Arbitration Act.

While the amendments are well intended, prescribing the scope of the stay on the operation of an India seated arbitral award, may lead to unintended consequences and open the doors to a floodgate of litigations, ultimately delaying the enforcement of arbitral award. The provision of stay is broadly worded under the existing regime, and there was no need to specifically mention scenarios where a stay can be granted.

The amendment in relation to the provision of stay has been given a retrospective effect, as the explanation clarifies that it shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after 23 October 2015. This is likely to be litigated by the parties before the courts.

The deletion of Eight Schedule is surely a praiseworthy development and was long awaited.

A. Stay on Enforcement of the India seated arbitral award

Under the existing regime, the Court has the power to stay the operation of the arbitral award, subject to conditions as it may deem fit, having regard to the provision for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908. Resultantly, a wide power is conferred on the Court to deliberate on a wide range of issues, including but not limited to issues such as the arbitration agreement or contract or the making of the award being induced or effected by fraud or corruption.

a. **The arbitration agreement or contract which is the basis of the award being induced or effected by fraud or corruption:**

This issue could have been addressed by the parties in the specific stay application filed under Section 36 of the Arbitration Act (in the enforcement proceedings), and the Court has the wide power to pass appropriate directions as deemed fit in the case. With the new set of amendments, a Respondent to the arbitral proceeding will be tempted to plead that the underlying contract was induced by fraud and corruption, knowing fully that this can be used as a ground to seek a stay on the operation of the arbitration award.

A party always has the right to challenge the jurisdiction of the arbitral tribunal under Section 16 of the Arbitration Act, and such **jurisdictional challenges** are to be made before filing the statement of defence. In the jurisdictional challenge, a party can always plead that the underlying arbitration agreement was induced or effected by fraud or corruption, and the **arbitral tribunal** has to adjudicate on the jurisdictional challenge before continuing with the arbitral proceedings. The decision on the jurisdictional challenge is not appealable under Section 37 of the Arbitration Act, and as such, can be **challenged along with the final award** under Section 34 of the Arbitration Act, which has to be disposed of expeditiously, and in any event within a period of one year. Therefore, the existing position of law contemplated an effective remedy for the parties, and there was no need for any further amendments.

Assuming that a jurisdictional challenge was not taken before the arbitral tribunal, it is difficult to see how the court hearing enforcement of the arbitral award will determine whether the underlying contract was induced by fraud or corruption in absence of any evidence before the judge. It may be difficult to take a prima facie view on the aspect of fraud and corruption, on a mere reading of the documents and a detailed enquiry may be required for the purposes of adjudication. Importantly, a party who decided not to challenge the jurisdiction at the inception, should they be allowed to make additional plea at the time of enforcement of the arbitral award and stay its operation? Certainly, it will be extremely unfair if a party is allowed to agitate an issue of jurisdiction at such a belated stage.

b. **The making of the award was induced or effected by fraud or corruption:**

The second leg of amendment to proviso of Section 36 of the Arbitration Act allowing unconditional stay on the operation of the award, if a prima facie case is made out that the making of the award, was induced or effected by fraud or corruption is at par with international standards. The global arbitral institutions are brainstorming on issues relating to transparency as well as significance of compliance with laws and been a bone of discussion in international arbitration landscape across the world in last few years. The International Chamber of Commerce (ICC) formed a Task Force in 2019 on “*Addressing Issues of Corruption in International Arbitration*”. The work of the Task Force is currently underway to determine issues that may be of significance for the Tribunal and the arbitral institutions while dealing with issues of corruption. The newly introduced LCIA Rules 2020 has added a provision on requirement for compliance with applicable laws to the party or LCIA relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions to ensure that corruption cannot be pleaded as one of the grounds for setting aside of the award.

There can be many issues relating to fraud or corruption in making of the arbitral award. The making of the award being induced by fraud or corruption being a ground for stay, would entail greater responsibility on the role of arbitrators in adjudicating corruption related issues and also on the arbitral institutions. Such issues could result from the conduct of the parties, or the involvement of the arbitral tribunal. While the institutional rules seeks to address the conduct of the parties, there is little guidance if the allegations are against the arbitral tribunal, how the same should be adjudicated or if arbitral institutions should take an active role in determining issues of corruption. While there are general provisions to challenge the appointment of arbitrator before the arbitral institution, but that can be triggered on limited instances, and there is always a timeline attached to it. Therefore, it is important to stipulate such express requirements in the substantive arbitration law.

Under the existing scheme of the Arbitration Act, a challenge to an arbitral award can be filed if making of the award was induced by fraud or corruption, as that would offend the **public policy**. The decision of the Supreme Court in *Venture Global* has explained fraud in the context of making of an award, and held that suppression of facts before the arbitral tribunal may be construed as a fraud while making of the award, but the facts concealed must have a causative link, and if the concealed facts disclosed after the passing of the award have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and the award may be set aside as affected or induced by fraud.

The Delhi High Court in *Sandeep Kumar v. Dr. Ashok Hans*, held that there is no requirement under the provisions of Section 34 for parties to lead evidence or it would completely **defeat the purpose**. The record of the Arbitrator was held to be sufficient in order to furnish proof of whether the grounds under Section 34 had been made out. The Supreme Court in *Fiza Developers and Inter-Trade Private Limited* held that the application under Section 34 is in the nature of summary proceedings, an opportunity to the aggrieved party has to be afforded to prove existence of any of the grounds under Section 34(2) of the Act.

The scope of enforcement proceedings under Section 36 is further limited to only enforcing the arbitral award as the decree of the court. Resultantly, there needs to be a clarity on how a prima facie view can be taken on allegations of fraud and whether evidence has to be led in Section 36 proceedings. There appears to be no guidance on what may amount to corruption in making of an arbitral award, and again how a prima facie view can be taken. Therefore, the question is was there a need to introduce a specific provision for stay of the operation of the arbitral award. The court already had the power under Section 36 (3) to grant a stay after recording the reasons in writing, if required, pending the challenge to the arbitral award. The new insertion can potentially be abused by recalcitrant Respondents, who will make every endeavor to delay the enforcement of the arbitral award. Resultantly, we can expect endless applications seeking a stay on the operation of the arbitral award, along with the challenge to the arbitral award.

A possible solution to reduce the scope of the litigation would be to impose heavy costs on failed attempts to allege and seek a stay on the operation of the award, on the premise that the making of the award was induced by fraud or corruption.

B. Deletion of qualifications, experience and norms for accreditation of arbitrators stipulated under the Eight Schedule

The insertion of the Eight Schedule had been a bone of contention since its inception. Many have argued that it violates party autonomy, as it restricts the ability of the parties to choose their arbitrators. The Eight Schedule has been criticized widely due to imposition of unfair restrictions on the ability to nominate a non-Indian arbitrator in India seated arbitrations. It also discouraged foreign parties to seat their arbitration in India due to inability to appoint foreign legal professionals and restricting their choice of potential arbitrators by nationality, likelihood

of lack of experience in handling international arbitrations. Similarly, the requirements that the arbitrator should be conversant with the Constitution of India, labour laws etc. did not help at all. Insertion of such a Schedule in a pro-arbitration regime led to India being perceived as adopting unnecessary restrictions on arbitral appointments. The Eight Schedule became a roadblock rather than aiding the cause of projecting India as a global hub of international arbitration.

While on the other end of the pendulum, certain practitioners and academicians felt that the Eight Schedule necessitating compliance with the basic standards were essential to improve the quality of arbitral appointments. While the debate continued, the Government had not notified the Eight Schedule, and therefore, while it was prescribed, it never had the force of law and was restricted to academic debates.

Party autonomy is the hallmark of arbitration. The amendment is a welcome step, and the removal of the Eight Schedule is in the right direction and clearly reflects India's message to the global arbitration community. While there can be informal guidance on the parameters the parties can keep in mind, while nominating the arbitrator, certainly, such provisions should not be made mandatory.

Conclusion

Overall, the amendment was well intended and praise worthy and yet another attempt to make India an arbitration friendly country, save and except, the stay on operation of the award in the event there is *prima facie* finding that the underlying contract or the making of the award was included by fraud or corruption.

There was no background to the amendment, and it is not clear why such an amendment was required at this stage. As set out above, this provision is likely to be abused by the parties, considering the existing provisions already had the ability to deal with such scenarios, and there was no need to specifically amend the law. The 2015 amendment clarified that fraud and corruption in making of arbitral award amounted to offending public policy of India and was part of the scheme of the provisions, and there was no need to make special references in relation to stay of the award.

The ordinance could have been utilized to clarify some of the adverse effects of the 2019 amendments to the Arbitration Act. First, the timeline stipulated under Section 29A of the Arbitration Act has been clarified not to apply to international commercial arbitration. The timelines worked well and should have been made applicable even on international arbitrations which are ad-hoc, and only institutional arbitration could have been kept outside the purview of the provision. Second, the limited exception to the confidentiality obligation notified in the 2019 amendments i.e., for implementation and enforcement of an award, poses serious challenges to the process of arbitration. For example, the provision does not take into consideration that disclosure of the arbitral proceedings may be required in case of seeking interim protections or several other court proceedings in relation to the conduct of the arbitration, in cases where experts are engaged to work on a dispute. While the provision obligates arbitrators, parties and arbitral institutions to maintain confidentiality, it is silent on the obligations of counsel, witnesses, transcribers, tribunal secretary etc. in this regard. These aspects could have been clarified in the ordinance.

Nevertheless, the deletion of the Eight Schedule certainly would come as a breath of fresh air for the foreign parties to seat their arbitrations in India and also allow distinguished foreign legal professionals to sit as arbitrators.

III. Delhi High Court Provides Additional Pre-Requisites for Interim Relief Under Section 9 of The A&C Act



- Section 9 of the A&C Act calls for requirements in addition to the general principles for grant of interim reliefs under the CPC, such as emergent necessity and manifest intent to initiate arbitration
- Exercise of jurisdiction by courts under Section 9 is limited in light of Section 17 of the A&C Act
- Interim relief under Section 9 must be granted when the reliefs cannot await constitution of the arbitral tribunal



A. Introduction

In a recent ruling in *Avantha Holdings Limited v. Vistra ITCL India Limited*,²¹⁴ the Delhi High Court (Court) held that in addition to the general principles for grant of interim reliefs under the code of Civil Procedure, 1908 (CPC), the petitioner is required to satisfy the courts on an emergent necessity that could not await constitution of an arbitral tribunal. The Court recognised the power of an arbitral tribunal to grant interim reliefs under Section 17 of the A&C Act, and held that the same could not be usurped by a court even at a pre-arbitration stage. The judgment sets out the additional criteria to be satisfied in addition to the general principles for interim injunctions in its bid to distinguish, and defer to, the jurisdiction of arbitral tribunals in appropriate cases seeking interim reliefs.

B. Facts

Avantha Holdings Limited (“**Avantha / Petitioner**”) borrowed INR 1265 crores from KKR India Financial Services Pvt. Ltd. and KKR India Debt Opportunities Fund (collectively, “**KKR**”), M/s L & T Finance Ltd., L & T Fincorp Ltd and Family Credit Ltd. (collectively, “**L & T**”) and M/s BOI AXA Corporate Credit Spectrum Fund (“**BOI**”), against 12,650 debentures, each with face value of ₹10 lakhs. KKR, L&T and BOI are collectively referred to as “debenture holders”. Vistra ITCL India Limited (“**Vistra / Respondent**”) was the debenture trustee under the Debenture Trust Deed dated January 5, 2017. The debentures were redeemable on July 6, 2019.

To secure the debenture, the Petitioner pledged (i) 13,53,92,496 equity shares held by it in Crompton Greaves Power and Industrial Solutions Ltd. (CGP); and (ii) 32,26,89,019 equity shares held by it in Ballarpur Industries Ltd. (BILT). A Memoranda of Pledge was executed on January 5, 2017 and June 27.

Of (i), KKR purchased 6,71,87,692 shares between July 2019 and September 2019 sold in the open market. In November 2019, L&T purchased 6,26,00,000 of the remaining pledged shares sold in the open market. Requisite disclosures were made by the Petitioner to SEBI. 56,04,804 shares of CGP remain available for sale. Of these, 50,96,248 shares remain which were invoked by the Respondent in March 2019 against the debentures held by L & T.

Under the Debenture Trust Deed, the Petitioner was required to maintain a security cover. Due to the Petitioner’s continuous default in maintaining the same, the Respondent issued several notices to the Petitioner. On June 30, 2020, the Respondent issued a notice to the Petitioner referring to the aforesaid notices and alleging other breaches by the Petitioner. It was also stated that the Petitioner had also defaulted in paying all outstanding amounts on the

²¹⁴ O.M.P.(I)(COMM.) 177/2020 & I.As. 5463-65/2020, I.As. 5664-67/2020

final redemption date of July 10, 2019. These constituted Events of Default under the Trust Deeds. The Respondent therefore called upon the Petitioner to pay the entire outstanding amounts to the debenture holders within a period of ten days, failing which the respondent reserved its right to invoke and sell the shares of BILT, pledged against the payment of the outstanding amounts by the Petitioner. The Petitioner was called upon to treat the notice as one under Section 176 of the Indian Contract Act, 1872²¹⁵.

The Petitioner filed the a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (A&C Act) seeking interim measures of protection in “extraordinary circumstances”, pending initiation of arbitration proceedings in terms of the Debenture Trust Deeds and Memoranda of Pledge. Among other prayers, the Petitioner prayed that the Respondent be (a) called upon to forthwith transfer the Pledged CG Shares into the demat account of the Petitioner and to do all necessary and incidental acts in relation to the same; (b) directed and restrained from selling the shares of BILT held by the petitioner and/or acting in furtherance and/or in implementation of the notice dated June 30, 2020; and (c) directed/ restrained from taking any steps against the petitioner under the Debenture Trust Deeds and/or the Memoranda of Pledge.

C. Contentions Of The Parties

In its response to the June 30, 2020 notice, the petitioner had responded that it had been agreed between the Petitioner and KKR (who was acting on behalf of the Debenture Holders) that the pledged CGP shares, after being moved to the DEMAT account of the respondent, would continue to be held as collateral to enable the Petitioner to repay the Outstanding Amounts under the Debenture Trust Deeds. The Petitioner alleged that the sale of the CGP shares between July and September 2019 was in violation of the said agreement and understanding. The manner in which the debenture holders had acted reflected market manipulation, using the Petitioner as a scapegoat. In view thereof, it was submitted that the Debenture Trust Deeds and the Memoranda of Pledge stood vitiated and the Petitioner had no liability under the debenture trust deeds which accordingly stood rescinded. Petitioner also pointed out that it had complained to the SEBI which was enquiring into the matter.

In response to the present petition, the Respondent contended that it invoked the pledged CGP shares due to the Petitioner’s continuous default in maintaining the required security cover, as per the Debenture Trust Deeds. This constituted an “Event of Default” under the Debenture trust Deeds. The Respondent also contended that the Petitioner fraudulently conspired with KKR and others in a manner that involved (i) transfer of CGP shares to the Respondent’s DEMAT account; (ii) artificial depression in the value; followed by (iii) purchase of shares by KKR and L & T from the open market at lower prices. Thus, the “transfer” of the pledged CGP shares to the DEMAT account of Respondent was not a simpliciter transfer accompanied by an “oral agreement” but was by way of invocation of the pledged shares.

D. Judgment

The Court dismissed the petition for interim reliefs. The analysis of the Court is set out below.

Firstly, the Court examined the nature and the intent behind interim reliefs that could be granted under Section 9 of the A&C Act. It held that the expression “interim measures, etc.” was required to be interpreted as per the *ejusdem generis* (applied where the words preceding the word “etc.” constituted a genus), and the *noscitur a sociis*

215. “176. Pawnee’s right where pawnor makes default. — If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. —

If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.”

(applied more universally) rules of interpretation.²¹⁶ The Court recognised that the measures needed to be in the nature of interim measures “granted to serve the temporary purpose of protecting the plaintiff’s interest so that the suit is not frustrated”²¹⁷.

Secondly, the Court examined the nature of Section 9 in light of its interplay with Section 17 of the A&C Act. It recognised that even at a pre-arbitration stage, the Court could not usurp the jurisdiction which would vest with an arbitral tribunal after its constitution in light of Section 17 of the A&C Act. This was evident from the fact that reliefs under Section 9 were to be granted only when circumstances exist which did not render the remedy under Section 17 efficacious.

Thirdly, the Court enunciated the principles upon which interim reliefs were granted under Section 9 vis-à-vis principles that have judicially evolved to grant reliefs under Order 39 of the Civil Procedure Code, 1908 i.e. establishing the existence of a prima facie case, whether the balance of convenience lies in favour of the plaintiff/applicant seeking the relief, and the possibility of irreparable loss or prejudice if the interim relief was not granted.

Although the Court ultimately dismissed the application for interim relief on the ground that no prima facie case was established by the applicant, the Court made a distinction between the principles for grant of interim reliefs under the CPC and that under Section 9 of the A&C Act. It held that in light of Section 17 of the A&C Act, a Court seized with a petition under Section 9 also needed to assess if circumstances were such that interim reliefs could not await the constitution of the arbitral tribunal and subsequent application under Section 17 before the arbitral tribunal. Therefore, ‘emergent necessity’ of ordering interim measures is an additional sine qua non to be satisfied before granting relief under Section 9 of the A&C Act.

In line with the purpose of interim reliefs, the Court needs to assess if failure to order interim measures under Section 9 would frustrate or render the recourse to arbitration futile. The Court relied on several cases the case of²¹⁸ wherein it was held that under Section 9, the Court is only formulating interim measures to protect the right under adjudication before the Arbitral Tribunal from being frustrated. The jurisdiction under the “just and convenient” clause is quite wide in amplitude, but must be exercised with restraint. It did not allow the Court the discretion to exercise unrestrained powers and frustrate the very object of arbitration. Pursuant to Section 9(2) of the A&C Act, it was also essential to assess if the petitioner manifestly intended to initiate arbitral proceedings.

On the basis of the aforesaid principles, the Court ruled that none of the prayers in the petition warranted interim reliefs under Section 9. In terms of prayer (a), the Court held that invocation of the pledged CGP shares had taken place, the shares had been dematerialised, sold in the open market and purchased by KKR and L & T. In such circumstances, a petition under Section 9 could not justify setting the clock back to a stage anterior to the invocation of the pledge by the Respondent, which took place as far back as in March 2019.

In terms of prayer (b), the Court held that in its response to the Respondent’s notice dated June 30, 2020 (alleging failure to maintain the required security cover, and to liquidate all outstanding amounts by the final redemption date), the Petitioner had not denied the allegations. Even in the petition, the Petitioner has remained silent on failure to maintain the required security cover, and repayment of outstanding amounts. The Court held that prima facie, the “Event of Default” had occurred under the Debenture Trust Deeds. Therefore, there was no

216. According to Black’s Law Dictionary, ejusdem generis means, “A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals - despite its seeming breadth - would probably be held to include only fourlegged, hooved mammals typically found on farms, and thus would exclude chickens.” Noscitur a sociis means, “A canon of construction holding that the meaning of an unclear word or phrase, esp. one on a list, should be determined by the words immediately surrounding it. Also termed associated-words canon”.

217. Relying on Bank of Maharashtra v. M.V. River Oghese, AIR 1990 Bom 107

218. Firm Ashok Traders v. Gurmukh Das Saluja (2004) 3 SCC 155; Adhunik Steels Ltd v. Orissa Manganese and Minerals (P) Ltd. (1997) 5 SCC 134; V. Shekhar v. Akash Housing, AIR 2011 Mad 110.

occasion for the Court to interdict the invocation and sale, if any, of the pledged BILT shares. Any such direction would amount to a proscription on the exercise of rights by the Respondents under the Debenture Trust Deeds. This was not permissible and no interim relief could be under Section 9.

On the Petitioner's allegation of conspiracy and fall in CGP share prices owing to a misleading report by a law firm, the Court found that the same was speculative and presumptuous in nature. As such, no judicial notice could be taken of such allegations in the absence of solid and unimpeachable evidence. Irrespective, this issue was not related to the Petitioner's failure to comply with its obligations under the Debenture Trust Deed and the Respondent's consequent right to invoke the pledged shares and sell them in the stock market for realisation of the outstanding amounts.

In terms of prayer (c), the Court held that this equated with an absolute embargo on the Respondent's exercise of its rights under Debenture Trust Deeds and could not be granted in the absence of any denial to the alleged defaults by the Petitioner. The Court also held that this prayer was based on an assumption that the Debenture Trust Deeds and Memoranda of Pledge stand rescinded which had no merit.

E. Analysis

Interim reliefs are in the nature of urgent remedies, granted in exceptional circumstances. These are generally subject to satisfaction of the three judicially evolved principles for examining grant of reliefs under Order 39 of the Civil Procedure Code, 1908, i.e. the existence of a prima facie case, whether the balance of convenience lies in favour of the plaintiff/applicant seeking the relief, and the irreparable harm or injury in the event relief is not granted. In addition to the above, public interest has also evolved as an additional ground.²¹⁹

However, the nature of interim reliefs relating to arbitration is distinguishable from those that come within the ambit of general interim reliefs under the CPC. Section 9 of the A&C Act makes no reference to the CPC, and Section 19 of the A&C Act provides that the arbitral tribunal shall not be bound by the CPC. The grant of interim reliefs under Section 9 will therefore need to be tested on its own purpose and intent in furtherance of arbitration.

Parties consenting to arbitration intend to exclude jurisdiction of courts, save for their limited supervisory role. The Indian A&C Act vests an arbitral tribunal with powers to grant reliefs under Section 17 of the A&C Act, literally identical to the reliefs and powers it vests in the Court under Section 9 of the A&C Act. In fact, to cater to emergencies arising prior to constitution of the tribunal, arbitral institutions have long incorporated emergency arbitrator provisions that need not await constitution of the tribunal, and save the applicant from resorting to court remedies. In light of this, the powers of a court to grant interim relief should be limited.

Additionally, the content of Section 9 only provides for an efficacy test, not a test of urgency (or emergent necessity as interpreted by the Court), unlike Section 44 of the English Arbitration Act, 1996 which specifically provides:

“

“(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets. (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.”

”

219. Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134; and Raunaq International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492.

In light of absence of specific grounds for grant of reliefs under Section 9, Courts in India have either read in general principles applied while granting interim reliefs under the CPC,²²⁰ or have held that CPC has no application to Section 9, and that a real, imminent danger of removal or disposal of the properties for such an extreme measure is to be proven.²²¹

Irrespective of either approach, in a petition under Section 9 of the A&C Act it may be additionally necessary to demonstrate a manifest intention on the part of the applicant to initiate arbitration proceedings. It will also help to demonstrate a higher degree of urgency or an ‘emergent necessity’. Circumstances will need to be demonstrated to satisfy the court that the petitioner cannot await constitution of an arbitral tribunal to prefer an application under Section 17, lest the subject matter of the arbitration might be lost. The grant of interim relief by Court will therefore be critical in such situations to preserve the subject matter of the arbitration. After all, an arbitration without existence of its subject matter is akin to a bird without wings.

IV. Limitation Period for Enforcement of Foreign Awards in India

“

- The period of limitation for filing a petition for enforcement of a foreign award is three years from the date the right to apply accrues.
- Enforcement court can only refuse enforcement of a foreign award and cannot set aside a foreign award.
- A party can file an application for condonation of delay for an enforcement petition of a foreign award.
- The amendment made to Section 48 of the Arbitration & Conciliation Act, 1996 from 2015 are prospective.

”

A. Introduction

The Supreme Court in the case of *Government Of India (“GOI”) v. Vedanta Limited*,²²² (“**Vedanta**”) recently upheld the enforcement a foreign arbitral award in that the enforcement petition was filed within 3 years from the date when the right to apply accrued. The Supreme Court, interpreting the Limitation Act, 1936 (“**Limitation Act**”), held that an application of enforcement of a foreign arbitral award can be filed up to a period of 3 years from when the right to apply accrues.

B. Background

A production sharing contract (“**PSC**”) was executed between the parties and Oil and Natural Gas Corporation Limited (“**ONGC**”) on October 28, 1994 for the development of the Ravva Oil and Gas Field (“**Field**”). Disputes arose between the parties with respect to recovery of development costs, which were referred to arbitration seated in Malaysia. The arbitral tribunal delivered its award on January 18, 2011 (“**Award**”), which required the GOI to pay an amount of USD 278.87 million to Vedanta. Pursuant to the Award, in April 2011, Vedanta made certain

220. *ITI v. Siemens Public Communication* (2002) 5 SCC 510; *Leighton India Contractors Private Ltd. vs. DLF Ltd.* O.M.P.(I) (COMM)109/2020 decided on May 13, 2020.

221. *M/s. KGS Constructions Limited v. Karishmaa MEP Services Pvt. Ltd.*, (2017) 4 CTC 51 (DB)

222. Civil Appeal No. 3185 of 2020 (Arising out of SLP (Civil) No.7172 of 2020).

adjustments with respect to recovery of the development costs, and these adjustments were accepted by the GOI. The GOI challenged the Award before the Seat Courts at Kuala Lumpur on three principal grounds, a) the Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; b) the Award contains decisions on matters beyond the scope of the submission to arbitration; and c) the Award is in conflict with public policy. The challenge was rejected by both, the Malaysian High Court and Malaysian Court of Appeal. An application for Leave to Appeal before the Malaysian Federal Court was also rejected by order dated May 17, 2016.

On July 10, 2014, the GOI issued a notice to Vedanta, raising a demand of US \$ 77 million towards the Government's share of Profit Petroleum under the PSC and to show cause as to why oil marketing companies to whom the product extracted from the Field was sold, should not directly pay the GOI towards recovery of its share of profit petroleum with interest, which was alleged to be underpaid.

In October 2014, the Vedanta filed an enforcement petition under Sections 47²²³ and 49²²⁴ of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the Delhi High Court, along with an application for condonation of delay. On the other hand, the GOI raised objections to the enforcement of the Award under Section 48²²⁵ of the Arbitration Act contending, that the enforcement petition was filed beyond the period of limitation, the enforcement of the Award was contrary to the public policy of India, and contained decisions on matters beyond the scope of the submission to arbitration.

The Delhi High Court rejected the objections to the Enforcement Petition, *vide* judgment dated February 19, 2020,²²⁶ allowed the application for condonation of delay filed by the Vedanta, and directed the enforcement of the Award. The Delhi High Court had also held that the limitation for filing an enforcement petition arising out of a foreign award is twelve years as foreign arbitral award attains the status of a decree after it clears the tests of 'access' and 'recognition' contemplated under the Arbitration Act ("**Impugned Judgment**"). Aggrieved by the Impugned Judgment, the Government filed the appeal before the Supreme Court.

Our analysis of the Delhi High Court's ruling can be accessed [here](#).

223. 47. Evidence -

(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India...."

224. 49. Enforcement of foreign awards -

Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court."

225. 48. Conditions for enforcement of foreign awards -

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,— (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]...."

226. O.M.P.(EFA)(Comm.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015 : MANU/DE/0506/2020.

C.Part A - Limitation for Filing an Application for Enforcement of A Foreign Award Under Section 47 of The Arbitration Act

1. The Supreme Court observed the conflicting stands taken by various High Courts and proceeded to settle the issue.²²⁷
2. The Supreme Court relied on a Report of the General Assembly of the United Nations Commission on International Trade Law,²²⁸ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”)²²⁹ to conclude that recognition and enforcement of arbitral awards should be done in accordance with the rules of procedure of the State where the award is to be enforced.²³⁰
3. Supreme Court noted that Section 43 of the Limitation Act, 1963 states that it shall apply to arbitrations, as it applied to proceedings in court. It then noted that Limitation Act does not contain any specific provision for enforcement of foreign award. It then took into account Article 136 (which provides a limitation period of 12 years for execution of a decree) and Article 137 (which is a residuary provision providing a limitation period of 3 years). The Supreme Court relied on its judgment in *Bank of Baroda v. Kotak Mahindra Bank* where it had observed that Article 136 of the Limitation Act is not applicable to foreign decrees.²³¹ (Our analysis of the Supreme Court’s ruling can be accessed [here](#)) The Supreme Court then noted that a legal fiction created in law is only for a specific purpose that it is created. Accordingly, under Section 49 of the Arbitration Act,²³² a foreign award is deemed to be a decree of ‘that court’ for the limited purpose of enforcement and otherwise it is not a decree of an Indian court. Accordingly, for the purposes of the Limitation Act, the application for enforcement of the foreign award would be governed by the residuary provision i.e. Article 137. Hence, the limitation period is three years from when the right to apply accrues.²³³
4. The court further held that a party can file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case.²³⁴ The bar contained in Section 5 of the Limitation Act against condonation of delay excludes an application filed under any of the provisions of Order XXI of the CPC.²³⁵ The Supreme Court held that this bar would not be applicable to an enforcement petition filed under the Arbitration Act, 1996. In the instant case, the Supreme Court held that there were sufficient grounds to condone the delay in filing the enforcement/execution petition on account of lack of clarity with respect to the period of limitation for enforcement of a foreign award.²³⁶

D.Part B - Scheme of The Arbitration Act for Enforcement of New York Convention Awards

1. The Supreme Court observed that a foreign award is not a decree by itself, which is executable as such under

227. *Noy Vallesina Engineering Spa v Jindal Drugs Limited*, 2006 (3) Arb LR 510; *Louis Dreyfous Commodities Suisse v Sakuma Exports Limited*, (2015) 6 Bom CR 258; *Imax Corporation v E-City Entertainment (I) Pvt. Limited*, (2020) 1 AIR Bom 82; *M/s. Compania Naviera ‘SODNOC’ v Bharat Refineries Limited*, (2008) 1 Arb LR 344; *Caim India Limited v Union of India*, 2020 SCC Online SC 324 (Impugned Judgment).

228. 41st Session dated June 16 - July 03, 2008.

229. Article III, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, UN Doc A/CN.9/656/Add.1.

230. Page 29 of the judgment.

231. *Bank of Baroda v. Kotak Mahindra Bank*, (2020) SCC OnLine 324.

232. Enforcement of foreign awards – Where the court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court.

233. Page 34 of the judgment.

234. Page 35 of the judgment.

235. 5. Extension of prescribed period in certain cases: Any appeal or any application, *other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908)*, may be admitted after the prescribed period ...

236. *Id.*

Section 49 of the Act. A foreign award is enforced as a deemed decree of the Indian Court only after it has been adjudicated upon in a petition filed under Section 47, and the objections raised under Section 48 by the party which is resisting enforcement of the award.²³⁷

2. Relying on *Fuerst Day Lawson Ltd. v Jindal Exports Ltd.*,²³⁸ and *LMJ International Ltd. v. Sleepwell Industries*,²³⁹ the Supreme Court stated that the legislative intent insists that the maintainability of an enforcement petition and the adjudication of the objections filed therein are required to be decided in a common proceeding.
3. The Supreme Court held that the enforcement court cannot set aside a foreign award because the power to set aside a foreign award vests only with the court at the seat of arbitration.²⁴⁰ Relying on a series of judgments from various jurisdictions,²⁴¹ the Supreme Court also stressed on the discretion available with the enforcement court to enforce the award even if one or more grounds under Section 48 are made out. Lastly, it also held that the grounds put forth in Section 48 are exhaustive.

E. Part C - Whether The Malaysian Courts Were Justified in Applying The Malaysian Law of Public Policy While Deciding The Challenge to The Foreign Award

1. The Supreme Court noted that the enforcement of an award is a subsequent and distinct proceeding from the setting aside proceedings at the seat and thereby an enforcement court cannot sit in appeal over the findings of the seat court. The courts before which the foreign award is brought for recognition and enforcement would exercise 'secondary' or 'enforcement' jurisdiction over the award, to determine the recognition and enforceability of the award in that jurisdiction.²⁴²
2. The Supreme Court analysed the four types of laws applicable to international arbitration²⁴³ and concluded that the Malaysian Courts being the seat courts were justified in applying the Malaysian Act to the public policy challenge raised by the Government of India. However, in an enforcement petition, the enforcement courts can examine the challenge to the foreign award without being constrained by the findings of the Seat Court, even if the findings were based on Indian law.²⁴⁴

F. Part D - Whether The Foreign Award is in Conflict with The Public Policy of India

1. The Supreme Court relied on a series of judgments which have set out the framework for adjudication of an enforcement petition.²⁴⁵ Section 48 was amended in 2015 to provide that an enforcement court cannot delve into the merits of the dispute in an enforcement petition ("**2015 Amendment**").²⁴⁶ Since the agreements

237. Page 36 of the judgment.

238. (2001) 6 SCC 356.

239. (2019) 5 SCC 302.

240. Page 40 of the judgment.

241. *China Nanhai Oil Joint Service Corp v Gee Tai Holdings Co. Ltd.*, Yearbook Commercial Arbitration, XX-1995, 671, 677; *Westacre Investments Inc. v Jugoimport-SDRP Holding Co. Ltd.* [1999] APP. L.R. 05/12; *Paklito Investment Ltd. v Klockner East Asia* Yearbook Commercial Arbitration XIX (1994) pp.664-674 (Hong Kong No.6); *Nanjing Cereals, Oils & Foodstuffs Import & Export Corporation v Luckmate Commodities Trading Ltd.* Yearbook Commercial Arbitration XXI (1996) pp. 542-545 (Hong Kong No.9)

242. Page 49 of the judgment.

243. (i) Substantive Law determining the rights and obligations of the parties, (ii) Law governing the Arbitration Agreement, (iii) Curial Law (determined by the Seat of Arbitration) and (iv) lex fori, which governs the proceedings for recognition and enforcement of the award in other jurisdictions.

244. Page 51 of the judgment.

245. *Shri Lal Mahal Ltd. v. Progetto Grano SPA*, (2014) 2 SCC 433; *Renusagar Power Co. v General Electric Co.*, 1994 Supp (1) SCC 644.

246. Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) dated December 31, 2015 w.e.f. October 23, 2015.

were entered into prior to the amendment of 2015, the Court proceeded to decide the issue on the basis of the unamended Section 48. The Supreme Court observed that the 2015 Amendment cannot have a retrospective effect as the amendment had substantially altered the position of law. The Supreme Court held that when a clarification is brought by way of an amendment which substantially changes the earlier position of law, such clarification cannot have a retrospective effect.²⁴⁷

2. The Supreme Court held that an enforcement court, exercising jurisdiction under Section 48, cannot re-assess or re-appreciate the evidence led in the arbitration. An enforcement court cannot refuse enforcement by taking a different interpretation of the terms of the contract. Thereby, in the present case, the Supreme Court concluded that the enforcement of the foreign award in favour of the Vedantas did not contravene the public policy of India.²⁴⁸

G. Comment

A settled position on the period of limitation applicable of enforcement of a foreign award provides reliability to the arbitration regime in the country. Parties to a cross border dispute will now be in a favourable position in that they are aware of the settled legal position on the time period within which an enforcement petition for a foreign award is to be filed.

The Supreme Court's judgment does not provide clarity on the status of pending enforcement applications which were filed after 3 years from when the right accrued, by relying on the earlier judgments which had held that the limitation period for filing such applications is 12 years. However, one can deduce that Courts may be open to condoning the delay in such circumstances by applying Section 5 of the Limitation Act.

It is also worth noting that the Supreme Court did not delve into the aspect of when the right to apply accrues in the enforcement of a foreign award. It is likely that 'accrual of the right to apply' will be subject of further scrutiny by the judiciary considering that such right to apply could accrue differently depending on the seat of arbitration. (Special thanks to Adimesh Lochan for his contribution)

V. Delhi High Court Gives Expression to 'Express Agreement in Writing' in Section 12(5) of The A&C Act

“

- Clause authorising a party's Chairman to appoint the sole arbitrator renders the arbitrator de jure unable to continue with the proceedings under Section 12(5) read with Section 14(1)(a) of the A&C Act
- De jure inability results in automatic termination and does not require initiation of separate challenge proceedings
- Continuation of proceedings by the other party does not result in waiver of its right to object to termination of arbitrator mandate
- De jure inability of the arbitrator can be superseded only by an 'express agreement in writing' subsequent to the disputes

”

²⁴⁷. Page 58 of the judgment.

²⁴⁸. Page 65 of the judgment.

A. FACTS

JMC Projects India Ltd. (“**Petitioner / JMC**”) executed a work order with Indure Private Ltd. (“Respondent / Indure”) on September 6, 2011. The Respondent is a major manufacturing company of the Desein Group.²⁴⁹ The General Conditions of Contract in the work order contained an arbitration clause, stating, “*The arbitration will take place before a Sole Arbitrator who shall be nominated by Mr. N. P. Gupta, Chairman of Desein Private Limited.*”

Disputes arose between the JMC and Indure (collectively “**Parties**”) and Petitioner issued a notice of arbitration on July 1, 2016 and called upon nomination of an arbitrator through Mr. N.P. Gupta as per the arbitration clause. On July 26, 2016, Mr. N.P. Gupta nominated a retired judge of the High Court of Delhi (“**Court**”) as the sole arbitrator. On November 11, 2016, the Petitioner filed its Statement of Claim. Proceedings continued, leading to two requests for extensions by Petitioner on January 6, 2020 and January 20, 2020 for filing of affidavit of evidence. Petitioner finally filed its evidence on January 27, 2020.

Petitioner filed an application before the Court under Section 14(1)(a) of the A&C Act seeking termination of the mandate of the arbitrator.

B. Contentions of Parties

The Petitioner contended that the arbitrator had become de jure incapable of performing his functions under the A&C Act owing to his ineligibility under Section 12(5) read with Schedule VII of the A&C Act.²⁵⁰ The Petitioner relied on the first category in Schedule VII of the A&C Act wherein “employees, consultants, advisors, and persons who have any other past or present business relationship with either of the parties to the arbitration, are disqualified from arbitrating, vide S. No. 1 of the Seventh Schedule to the 1996 Act.”

The Respondent argued that parties had waived the applicability of Section 12(5) and had expressly consented in writing to the functioning of the arbitrator by seeking two extensions in writing for the filing of evidence of its witnesses. It also relied on Section 13(4) of the A&C Act to state that the petition could not have been filed directly before the Court without raising a challenge before the arbitrator. Further, it stated that the proceedings were not maintainable before the Court as the agreement between the parties was not stamped.

C. Judgment

The Court held that by virtue of Section 12(5) of the A&C Act, the learned arbitrator appointed by Mr. N.P. Gupta, the Group Chairman, was rendered de jure incapable of continuing to function as arbitrator within the meaning of Section 14(1)(a) of the A&C Act. The Court allowed the petition and substituted the original arbitrator with a retired judge of the Court. The Court’s analysis is briefly set out below.

The Court assessed the law in relation to Section 12(5) of the A&C Act read with category 1 in Schedule VII of the A&C Act. It analysed the position in *TRF Ltd. v. Energo Engineering Projects Ltd.*²⁵¹ (“**TRF case**”) where the Supreme Court of India assessed an arbitration clause authorising the Managing Director of the Corporation to act as a sole arbitrator or appoint a nominee. The Court held that there was no doubt that by virtue of the Seventh Schedule, the Managing Director of the Corporation was ineligible by operation of law.

249. Not referred to in the judgment but available at <https://www.desein.com/about/group-companies1.php> accessed on September 16, 2020

250. “12. Grounds for challenge.— (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

“The Seventh Schedule: Arbitrator’s Relationship with the Parties or Counsel.

(1) The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”

251. (2017) 8 SCC 377

Further, the Court held that the arbitrator becomes ineligible as per prescription contained in Section 12(5). It is therefore inconceivable in law that a person who is statutorily ineligible to act as an arbitrator can nominate another person as an arbitrator. The Court also analysed *Perkins Eastman Architects DPC v. HSCC (India) Limited*²⁵² (“Perkins case”) where the Supreme Court of India held that even the nominee of the managing director of the respondent could not competently function as the sole arbitrator on the basis of bias and interest in the outcome of the case.

In response to the Respondent’s argument that the petitioner had waived the applicability of Section 12(5) by seeking written extensions, the Court stated that the only means to be free of the rigours of Section 12(5) was to have an express agreement in writing after disputes have arisen between the parties.

The agreement in writing must reflect awareness, on the parties, to the applicability of the said provision as well as the resultant invalidation of the arbitrator to arbitrate on the disputes, as well as a conscious intention to waive the applicability of Section 12(5). The express agreement in writing was an irreplaceable condition which could not be substituted by conduct, howsoever extensive or suggestive.

Accordingly, the extensions applications did not constitute an “agreement in writing” to waive the applicability of Section 12(5).

The Court relied on *Bharat Broadband Network Ltd. vs. United Telecoms Ltd.*²⁵³ which contrasted the proviso to Section 12(5) with Section 4 of the A&C Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them. The expression “express agreement in writing” refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct.

The Court also rejected the Respondent’s argument that the petition could not be filed directly in Court without making a challenge before the arbitrator himself. With respect to the issue of stamping, the Court held that this contention was neither raised in the arbitration proceedings nor in the Respondent’s reply to the petition before the Court. As such, it appeared to be an after-thought and a desperate attempt to wriggle out of the court proceedings. The Court refrained from making any finding on the issue.

D. Analysis

The Court has helpfully drawn a nuance in the type of clauses and capacities an employee can hold in relation to arbitral appointments. TRF Energo case provided that the Managing Director of a party, who is himself ineligible to be appointed as an arbitrator, cannot validly nominate another as an arbitrator in his stead. In TRF Energo, the Managing Director therefore held two capacities – either as an arbitrator, or nominating authority. The present case is distinct, in as much as the Group Chairman merely held the capacity of a nominating authority. The Court therefore relied on Perkins case to bring such situations under the rigors of ineligibility under Section 12(5). Where a party’s employee only held the second capacity i.e. to nominate an arbitrator, his interest in the outcome of the case could continue into his capacity to nominate, forming the basis for bias. It is critical for parties to re-look and assess their arbitration clause with the above lens.

It would be relevant to analyse the distinction between cases where parties would need to file a separate application for challenge before the arbitrator, versus where the mandate of the arbitrator automatically terminates. Where doubts exist as to independence or impartiality of an arbitrator resulting from disclosure, the appointment can be challenged under Section 12(3) read with Section 13. However, where the arbitrator

252. 2019 SCC OnLine SC 1517

253. (2019) 5 SCC 755

becomes de jure unable to perform his functions by virtue of ineligibility under Section 12(5), his or her mandate terminates automatically under Section 14(1)(a). In the latter case, the appointment cannot be challenged before an arbitrator. If any controversy arises as to whether the arbitrator is indeed de jure unable to continue with the proceedings, the Court would adjudicate upon such a question.

Further, the judgment provides expression and substantive interpretation to the words “express agreement in writing” under Section 12(5) of the A&C Act. The phrase would appear to be sufficiently clear. However, its analysis alongside Section 4 and 7 of the A&C Act, and the distinction drawn by the Court in the contours of waiver by implied conduct in Section 4, vis-à-vis “agreement in writing” under Section 7, versus a requirement of “express agreement in writing” under Section 12(5) offers clarity on the nuance that runs among these terms. It may not be simple for parties to escape the express requirement through indirect or implied means.

It is important to note that in the present case, the disputes arose after the enactment of the amendments to Section 12(5) in 2015 and the corresponding introduction of the Seventh Schedule to the A&C Act. This implies that the arbitrator was de jure unable to perform his functions by virtue of the ineligibility under Section 12(5) since his appointment in July 2016. However, it is surprising to note that despite settled law in this regard under Section 12(5) read with Schedule VII since 2015 and TRF Energo case in 2017, the Petitioner brought forth an application to terminate the mandate on the subject ground only in 2020 - four years after initiation of arbitral proceedings.

It is possible that without sufficient safeguards against such ignorance of the law (which cannot be an excuse), parties could abuse arbitration proceedings, where arbitrators are de jure unable, to their advantage upto a stage where they desire to substitute the arbitrator by taking aid of the de jure inability and lack of an express agreement in writing under Section 12(5) read with Section 14(1)(a). Conversely, a party that is ignorant of the automatic termination of an arbitrator’s mandate under Section 14(1)(a) could continue with the arbitration proceedings resulting in an award that has no legal status and is amenable to a challenge. It is evident, and not novel, that a spectrum of issues could arise out of a brief, seemingly simple arbitration clause. Parties must closely look at their arbitration clauses and seek legal advice while drafting and contemplating initiation of arbitration proceedings.

VI. Npac's Arbitration Review: Validity of Unilateral Appointment of Arbitrators: Indian Courts Blow Hot and Cold

Bar and Bench

NPAC's Arbitration Review: Validity of unilateral Appointment of Arbitrators: Indian courts blow hot and cold

The article enumerates the various judgments which interpret the method of appointment of arbitrators.

Moazzam Khan & Tanisha Khanna

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In recent times, there has been a spate of litigation in India concerning the validity of clauses allowing the unilateral appointment of an arbitrators by one party. While there are different variants of such clauses, (which we have discussed in some depth in this article), they essentially vest one party to an arbitration agreement with the sole right to appoint the arbitrator. These clauses typically feature in contracts with Government entities or public sector undertakings, empowering them to appoint one from among their ranks to arbitrate disputes involving them, thereby creating an *inherent bias* in the arbitration process.

The Arbitration and Conciliation (Amendment) Act, 2015 (“**Amendment Act**”) introduced provisions to curb such bias through Section 12(5)[1] and the seventh schedule to the Arbitration and Conciliation Act, 1996 (“**the Act**”), which rendered certain categories of people ineligible to act as arbitrators.

In 2017, a 3 - judge bench of the Supreme Court (“**SC**”) purposively interpreted these provisions and held in the case of *TRF Limited v Energo Engineering Projects Limited*[2] that an ineligible arbitrator under Section 12(5) read with the seventh schedule to the Act, was also barred from *nominating* an arbitrator. The court in *TRF* held that it was inconceivable in law that once a person had become statutorily disqualified from acting as an arbitrator, they should be permitted to appoint an arbitrator. As the court observed, ‘*once the infrastructure collapses, the superstructure is bound to collapse as well.*’ Once the identity of the Managing Director as the sole arbitrator had been lost, his power to appoint an arbitrator was also obliterated.

This interpretation was upheld by the Supreme Court in the cases of *Perkins Eastman Architects DPC & Anr. v HSCC (India) Ltd*[3] and *Bharat Broadband Network Ltd. v United Telecoms Ltd*[4]. In *Perkins Eastman*, the court observed that the basis for the Managing Director being found to be ineligible to appoint an arbitrator in *TRF* was due to his interest in the outcome of the dispute. This interest in the dispute was the basis for the possibility of bias. Further, where only one party had the right to appoint a sole arbitrator, their choice would have the potential to chart out the course of the arbitration. The essence of the Amendment Act and the ruling in *TRF* was to prevent parties having an interest in the outcome of the dispute from having the sole right to appoint arbitrators.

However, the latest word on unilateral appointment of arbitrators from the SC has come in the case of *Central Organisation for Railway Electrification v M/S EVI-SPIC-SMO-MCML (JV)*[5], wherein the SC has upheld an arbitration clause allowing one party to nominate a panel of four arbitrators (comprising such party’s employees), from which the counterparty would short list two nominees.

The general manager of the former would select one from this short list as the counterparty's nominee, as well as appoint the third and final arbitrator on the panel.

The *Railway Electrification* case seems to be a departure from the ratio in *TRF Limited* and the cases that followed, by vesting an ineligible party with the power to nominate an arbitrator. The SC in *Railway Electrification* also appears to have incorrectly interpreted the ratio of *Voestalpine Schinen GmbH v Delhi Metro Rail Corporation Ltd*[6] in reaching its conclusion, as we will touch upon in this article.

In this article, we explore the nascent jurisprudence on unilateral appointment of arbitrators, by examining which types of appointments have been upheld, or struck down by the Indian courts, and certain ambiguities created by these precedents.

1. Appointment of an ineligible arbitrator or its nominee

This category of arbitration clauses seeks to appoint an ineligible individual as arbitrator, failing which, such individuals have the sole right to appoint another arbitrator.

For instance, the arbitration clause in *TRF Limited* prescribed that the Managing Director of one of the parties, or their nominee, was to act as the arbitrator. The arbitration clause in *Bharat Broadband* also prescribed that the Chairman and Managing Director (“CMD”) of one of the parties was to act as sole arbitrator, and if they were unable or unwilling to act as the arbitrator, another person appointed by the CMD was to act as arbitrator.

Managing Directors are prohibited from acting as arbitrators under the seventh schedule to the Act, which disqualifies an arbitrator who is a ‘manager, director or part of the management, or has a similar controlling influence in one of the parties.’[7]

The SC in *TRF* held that once an arbitrator had become ineligible by operation of law, he could not nominate another as an arbitrator; such a situation was ‘inconceivable in law.’

The SC in *Bharat Broadband* relied upon *TRF* to hold that an appointment by an ineligible person was void *ab initio*, irrespective of any prior agreement between the parties. The court also underscored that when the appointing party was State authority, it was even more critical to appoint an independent and impartial arbitrator.

2. Appointment of an ineligible arbitrator's nominee

This category of arbitration clauses vests an ineligible arbitrator with the right to appoint a sole arbitrator to adjudicate disputes between parties.

This type of clause came up for consideration in *Perkins Eastman*, in which case the clause empowered the CMD of one of the parties to appoint an arbitrator, and prescribed that no person other than a person appointed by the CMD could act as an arbitrator.

The court distinguished between the first category of cases (i.e., the *TRF* category), and the present category of cases, wherein a managing director was not empowered to act as arbitrator himself, but empowered to appoint an arbitrator. The SC held that *reason* for the ineligibility of a managing director (i.e., interest in the dispute) would apply equally to both categories of cases. The court relied upon *TRF* and held that if a person was ineligible himself, such a person should also not ‘have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator...’

A similar clause came up for consideration before the High Court of Bombay in the case of *Lite Bite Foods Pvt Ltd. v Airports Authority of India*[8] which empowered one of the parties, the Airports Authority of India, to appoint a sole arbitrator to adjudicate disputes. The court held that the clause was clearly covered by the *Perkins Eastman* category of cases, and held that it violated Section 12(5) read with the Seventh Schedule to the Act.

3. Appointment from a panel of arbitrators

This category of clause finds its roots in a confusing exception to the principles set out in the first two categories of cases by a division bench of the SC in the *Voestalpine* case.

Let us first revisit the facts of *Voestalpine*- One of the parties in *Voestalpine* was the Delhi Metro Rail Corporation (“DMRC”), a public-sector company that operated the Delhi Metro rail service. The arbitration clause in the *Voestalpine* case contemplated a panel of three arbitrators to adjudicate disputes. The DMRC would nominate a panel of five serving or retired engineers of the DMRC, Government departments or public sector undertakings. From this panel, both parties were to select one arbitrator each, and the two selected arbitrators were to appoint the third and final arbitrator from the remaining nominees. However, thereafter, the DMRC forwarded a list of 31 names to the petitioner to select its nominee. This list *excluded* serving or retired employees of the DMRC, but contained names of retired officers from the Indian railways, as well as other government bodies.

The SC in *Voestalpine* struck down the procedure originally contained in the arbitration clause, holding that it gave a very limited choice to the counterparty, and created room for suspicion that the DMRC would select its own favorites.

However, the SC upheld the process of selection from a wider list of 31 nominees. The court noted that none of the nominees in the list were employees or ex-employees of DMRC, and the seventh schedule did not proscribe government/ex-government employees from acting as arbitrators. However, the court also directed that engineers from the private sector, accountants, as well as judges and lawyers also be included in the pool for selection.

Relying upon *Voestalpine*, the SC in *Railway Electrification* upheld the arbitration clause in that case. However, arguably, the courts reliance on *Voestalpine* was misplaced as: (i) the clause in *Railway Electrification* contemplated a panel of arbitrators comprising of retired railway officers, (i.e., retired employees of one of the parties), which was specifically struck down by the court in *Voestalpine*; (ii) the panel in *Railway Electrification* was limited to this category of individuals, and was not broad-based like the list of 31 nominees in *Voestalpine* (ii) the number of nominees in *Railway Electrification* was only five, which was held to be too narrow a selection in *Voestalpine*.

Therefore, the ruling in *Railway Electrification* appears to be on a shaky foundation, and appears to have diluted the principles enshrined in the first two categories of cases.

Status of Unilateral Appointment Clauses today: Clear as Mud

Both the *Voestalpine* and *Railway Electrification* decisions appear to be a deviation from the *TRF* and *Perkins Eastman* category of cases. The courts in the former have diluted these rulings by empowering a disqualified entity to nominate *several* arbitrators from which the panel of arbitrators is ultimately selected. Arguably, if a disqualified party is proscribed from nominating *one* arbitrator, such a party should also be prohibited from nominating *a list* of arbitrators.

It also cannot be said that the power of such party to nominate a list of arbitrators, is counter balanced by the power of a counterparty to select their nominee from that list. As we have seen, in cases such as *Railway Electrification*, the options provided to the counterparty may be limited to just a few ex-employees of the former.

The ‘list’ exception created by *Voestalpine* and *Railway Electrification* may thus be susceptible to being exploited by unscrupulous parties seeking to appoint arbitrators of their choice, and therefore go against the spirit and purport of the Amendment Act. These cases appear to have derailed a steady line of precedents seeking to eradicate all bias in the arbitrator – selection process.

It is also apt to note that in case of conflict, *TRF*, being a case determined by a three-judge bench, would overrule both *Voestalpine*, (which was decided by a division bench of the SC), and *Railway Electrification* (which was decided by a single judge).

This issue is once again pending before the Supreme Court in the case of *Bhayana Builders Pvt. Ltd. v Oriental Structural Engineers Pvt. Ltd.* [9]. Hopefully, the SC will put this matter to rest by prohibiting *all* types of unilateral appointments.

The authors are lawyers at Nishith Desai Associates.

[1]Section 12 - Grounds for challenge...

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

[2](2017) 8 SCC 377

[3] (2019) SCC OnLine SC 1517

[4] Civil Appeal Nos. 3972 of 2019 arising out of SLP (C) No. 1550 of 2018

[5] Civil Appeal No. 9486-9487 of 2019 arising out of SLP (C) No. 24173-74 of 2019

[6] Arbitration Petition (C) No. 50 of 2016

[7] Schedule 7, Section 12

[8] Comm Arbitration Application (L) No. 495 of 2019

[9] SLP (C) No. 007161 of 2018

VII. Delhi High Court Clears The Air on Retrospective Applicability of Time-Lines Under Section 29A



- Time line of 12 months applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015 under the Arbitration and Conciliation Act, 1996.
- No time line of 12 months in international commercial arbitration seated in India.
- Any amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability will be prospective in nature and any amendment to the provisions of statute dealing with procedural laws will be retrospective in nature, unless there exist a contrary intention.



The Delhi High Court in its recent ruling of *ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc.*,²⁵⁴ held that Section 29A of the Arbitration and Conciliation Act, 1996 (“**Act**”) shall be applicable to all pending arbitrations seated in India as on August 30, 2019 and commenced after 23 October 2015, except international commercial arbitrations. Section 29A of the Act inserted by way of amendment in 2015 (“**2015 Amendment**”) prescribes the time limit for passing an arbitral award. Pursuant to the report of the High-Level Committee to ‘*Review the Institutionalisation of Arbitration Mechanism in India*’ under the chairmanship of Justice B. N. Srikrishna, the Arbitration and Conciliation (Amendment) Act, 2019²⁵⁵ (“**2019 Amendment**”) introduced further changes to Section 29A.

Provision prior to 30 August, 2019	Provision post 30 August, 2019
Time limit of twelve months for all arbitrations.	Time limit of twelve months for all arbitrations other than International Commercial Arbitration. ²⁵⁶
Time period to be calculated from the date on which the arbitrators have received notice of their appointment.	Time period to be calculated from the date of completion of pleadings.

A. Background Facts

Pursuant to an agreement between ONGC Petro Additions Limited (“**Petitioner**”) and FERNAS India Private Ltd (Indian Subsidiary of Ferns Construction Co. Inc. (“**Respondent**”)), disputes arose between the parties. The parties invoked the arbitration clause and an Arbitral Tribunal was constituted to adjudicate the disputes. The Respondent had earlier filed an anti-arbitration injunction against the Petitioner contending that it is not bound by the arbitration clause, which was rejected by the Delhi High Court in April 2019; the Delhi High Court granted the Respondent liberty to raise this issue before the Arbitral Tribunal. The issue of Respondent being a proper party is currently pending for determination before the Arbitral Tribunal.

During the course of arbitration, the Petitioner approached the Delhi High Court seeking extension of time limit under Section 29A of the Act. The Hon’ble Single Judge, in his order dated 25 September 2019 extended the time for the Arbitral Tribunal to complete the proceedings and render the award by 18 months, effective from 24 June, 2019.²⁵⁷ However, during the pendency of the proceedings, Section 29A of the Act was amended

254. OMP(MISC) (COMM) 256/2019, I.A. 4989/2020.

255. The Arbitration and Conciliation (Amendment) Act, 2019 No. 33 of 2019 [S. 29A enforced on 30 August 2019]

256. International Commercial Arbitration has been defined under Section 2(1)(f) of the Act to mean arbitrations where one of the parties is (i) an individual residing in a foreign country, or (ii) a company incorporated in a foreign country, or (iii) an association whose management and control is exercised in a foreign country, or (iv) the government of a foreign country.

257. O.M.P (MISC.) (COMM.) 256/2019

by the 2019 Amendment. Considering the Respondent is a company incorporated under the laws of Turkey, the current arbitration is in the nature of an International Commercial Arbitration under the Act. In light of the 2019 Amendment, the Arbitral Tribunal asked the parties to seek clarifications from the court on its order dated 25 September 2019.

B. Developments on Retrospective Application of Amendments to Arbitration Act

Section 26 of the 2015 Amendment Act explicitly provided for a prospective application of the amendments and came into force on 23 October 2015. As a result, the 2015 Amendment only applied to arbitrations commenced after 23 October 2015. The Supreme Court in *BCCI v. Kochi*²⁵⁸ (“**BCCI Judgment**”) interpreted Section 26 of the 2015 Amendment and distinguished arbitral proceedings from court proceedings in relation to arbitral proceedings. The Supreme Court held that 2015 Amendment is applicable to all arbitral proceedings and court proceedings initiated after 23 October 2015, regardless of the fact that such court proceedings stem out of arbitrations initiated before 23 October 2015. However, Section 87 of the Act, inserted vide the 2019 Amendment, attempted to disregard the BCCI Judgment and provided for a prospective application of 2015 Amendment only to arbitration and court proceedings commenced after 23 October 2015. Section 87 was however struck down in *Hindustan Construction Company Limited and Ors. v. Union of India and Ors.*²⁵⁹ essentially reviving the applicability of Section 26, as interpreted by the BCCI Judgment.

In this background, the issue before the present court was if the proceedings before the arbitral tribunal are in nature of an international commercial arbitration, whether the time limit as fixed by this Court vide Order dated September 25, 2019 shall be applicable to the present proceedings?

C. Contentions by Parties

- a. The Petitioner submitted that the changes brought in Section 29A of the Act by the 2019 Amendment will have retrospective effect from 23 October 2015 i.e. the date on which the 2015 Amendment came into force, as Section 29A has been classified a procedural law.
- b. The Petitioner relied on a series of rulings to draw a distinction between substantive law and procedural law.²⁶⁰ Further, the Petitioner submitted that all procedural laws and amendments to procedural laws, are retrospective in nature, unless the statute expressly states the contrary.²⁶¹
- c. The Petitioner further relied on the BCCI Judgment which classified Section 29A as a procedural law and clarified that the retrospective operation of Section 29A was not given effect only due to the presence of Section 26 in the 2015 Amendment. Since the 2019 Amendment does not have any provision akin to Section 26, the changes brought to Section 29A by way of the 2019 Amendment will have a retrospective effect. Moreover, the changes brought to Section 29A vide the 2019 Amendment also do not create any new rights and/or liabilities on a party to any arbitration proceeding. The Petitioner thus concluded that, the new Section 29, having a retrospective effect, applies to the current arbitration proceedings between the parties.

258. (2018) 6 SCC 287.

259. AIR 2020 SC 122

260. Thirumalai Chemicals Ltd. v. Union of India (2011) 6 SCC 739 and Rajendra Kumar v. Kalyan (D) by Lrs. (2000) 8 SCC 99

261. Sudhir G. Angur and Ors. v. M. Sanjeev and Ors. (2006) 1 SCC 141

- d. The Petitioner relied on a ruling of the Delhi High Court this year which dealt with the issue of retrospective application of Section 29A of the Act.²⁶² Interestingly, the Delhi High Court in **MBL Infrastructures Ltd. v. Rites Ltd.** (“**MBL Infrastructure**”) took a view that Section 29A shall only have a prospective application. It was clarified that in MBL Infrastructure, the court did not consider the procedural aspect of Section 29A and solely relied upon a Notification dated August 30, 2019, which did not reveal any legislative intention for the 2019 Amendment.
- e. The Respondent agreed with the Petitioner’s contentions and accepted the submissions only to reiterate that a judgment subsequent in time and rendered in ignorance of earlier judgments of the benches of co-equal strength was *per incuriam*.²⁶³

D. Judgment and Analysis

The Delhi High Court’s judgment settles the storm over the applicability of Section 29A on time-line to deliver awards. It clarifies that the said section applies retrospectively.

The Ld. Single Judge held that MBL Infrastructure is *per incuriam* and not binding on the Court.²⁶⁴ The Ld. Single Judge hailed the decision in *Shapoorji* as a binding decision and held that since the 2019 Amendment is procedural in nature, it shall apply to all pending arbitrations as on the date of amendment, including the current arbitration proceedings. The Delhi High court based its reasoning on the principle laid down by the Supreme Court in *BCCI Judgment*, that Section 29A is a procedural law as it does not create new rights and/or liabilities.

The Court further discussed the scope of the impact on rights and liabilities of the parties by any change to law. Relying on *Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.*,²⁶⁵ and the *BCCI Judgment*, the court held that any amendment to substantive laws affecting the rights and liabilities of a party or imposing a disability must be prospective in nature. On the other hand, any amendment to the provisions of statute dealing merely with matters of procedure shall be retrospective in nature, unless there exist a contrary intention of the legislature.²⁶⁶ The Delhi High Court concluded that Section 29A (1) is applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015. For the present case, it was clarified that if the arbitration is adjudicated to be an international commercial arbitration, the arbitral tribunal would not be bound by the time line prescribed vide order of the court dated 25 September 2019.

Section 29A places the 12-month clock to start ticking from the date of completion of pleadings in domestic arbitration. Needless to say, completion of pleadings is a subject-matter of interpretation, which can lead to further delay and a larger issue to be dealt with, which will no doubt shine the spotlight on Section 29A again.

VIII. Interim Relief in Foreign-Seated Arbitrations – Efficacious Remedy and Implied Exclusion



- After the commencement of arbitral proceedings, Courts can be approached for interim relief only if it can be demonstrated that there is no efficacious remedy available before the Arbitral Tribunal. This principle applies

262. *Shapoorji Pallonji and Co. Pvt. Ltd v Jindal India Thermal Power Limited*

263. *State of Assam v. Ripa Sharma* (2013) 3 SCC 63

264. *National Insurance Co. Ltd. v. Pranay Sethi* (2017) 16 SCC 680 and *Sandeep Kumar Bafna v. State of Maharashtra and Ors.* (2014) 16 SCC 623

265. (1973) 1 SCC 813

266. *Supra* at fn 7

equally to foreign-seated and India-seated arbitrations.

- The issue regarding an ‘implied exclusion’ of Section 9 of the Arbitration and Conciliation Act, 1996 in a foreign seated arbitration has been left open by the Division Bench of the Delhi High Court.

”

A. Introduction

The Division Bench of the Delhi High Court (“**Division Bench**”) in the case of *Ashwani Minda and Ors. v. U-shin Limited and Ors.*²⁶⁷ recently held that the proceeding initiated by the Petitioners/Appellants under Section 9 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for interim relief in aid of a foreign seated arbitration was not maintainable.

In arriving at its decision, the Division Bench held that even when an application for interim relief before Indian courts under Section 9 of the Act in a foreign-seated arbitration is maintainable, such application would not lie after the constitution of the arbitral tribunal, unless it can be proven that there is no efficacious remedy before the tribunal. On the facts of the case before it, the Division Bench held that there is nothing to show that remedy before the arbitral tribunal is inefficacious and that the arbitral tribunal had been constituted.

On July 31, 2020, the Supreme Court refused to interfere with the judgment of the Division Bench and dismissed the Special Leave Petition filed by the Appellants.

B. Background

The dispute arose out of a joint-venture agreement (“**JVA**”), wherein the arbitration clause provided that if the Indian party to the agreement were to initiate arbitration, the proceedings would be held in Japan pursuant to the Rules of the Japan Commercial Arbitration Association (“**JCAA Rules**”). The Appellants invoked the clause and applied for an emergency measure of protection pursuant to the JCAA rules. An emergency arbitrator was appointed, and she/he dismissed the application for interim reliefs merits on April 2, 2020 (“**EA Order**”). During the pendency of the emergency arbitration proceedings, the Appellants also issued a request for arbitration pursuant to the JCAA Rules.

Subsequently, the Appellants filed an application under Section 9 of the Act before the Single Judge of the Delhi High Court (“**Single Judge**”) seeking interim relief measures. On May 12, 2020, the Single Judge held that the petition under Section 9 was not maintainable for the following reasons:²⁶⁸

- The parties, by agreement had impliedly excluded the applicability of Part I of the Act (which includes Section 9) by seating the arbitration in Japan and agreeing to the application of the JCAA Rules;
- The JCAA Rules provide a detailed mechanism for seeking interim measures, which the parties agreed to in their arbitration clause;
- The Appellants have already raised the issues before the emergency arbitrator, and it is not open to them to take a second bite at the cherry before Indian courts under Section 9 of the Act. Further, there have been no changes in the circumstances after the EA Order. The Court cannot sit in appeal over the EA Order.²⁶⁹

267. FAO (OS) (COMM) 65/2020

268. OMP (I) (COMM.) 90/2020

269. For a detailed comment on the Single Judge’s judgment, please see:

http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/200626_A_India_parties_cannot_apply_to_courts_after_emergency_arbitration.pdf

Our analysis of the Single Judge’s ruling can be accessed [here](#).

On May 13, 2020, the arbitral tribunal was constituted under the JCAA Rules (“**Tribunal**”).

The Appellants filed an appeal against the order of the Single Judge before the Division Bench.

C. Judgment

i. Applicability of Section 9(3) of the Act

The Division Bench considered Section 9(3) of the Act which provides that,

“

“(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”

”

Section 17 of the Act pertains to “Interim measures ordered by arbitral tribunal” and the provision does not extend to foreign-seated arbitrations. The Appellants argued that Section 17 of the Act does not apply to foreign-seated arbitrations, as interim measures granted by India-seated tribunals alone are automatically enforceable in India under Section 17(2) of the Act, and thus the principle behind in Section 9(3) would not extend to the present case. The Appellants also argued that any order passed by the Tribunal would be unenforceable in India, and thus, the Appellants would be left without any efficacious remedy.

The Division Bench rejected the Appellants’ argument and held that the principles behind Section 9(3), i.e., (i) resolution of disputes by a tribunal of the parties’ choice; and (ii) reduced interference by courts, would continue to apply. Section 9(3) shows the legislative preference for these principals. Thus, the Division Bench concluded that even in the case of a foreign-seated arbitration, the remedy under Section 9 of the Act is available after the constitution of the arbitral tribunal only if there is no efficacious remedy before the tribunal. While determining the efficaciousness of the remedy, courts should consider whether the tribunal is sufficiently empowered to grant effective interim measures of protection. The Division Bench refrained from making a finding on whether the availability of a remedy before an emergency arbitrator would impede Indian courts from granting interim relief under Section 9 of the Act.

Further, the Division Bench held that it cannot sit in appeal over the EA Order as no such appellate remedy is provided for under the Act.

ii. Implied Exclusion of Section 9

As noted previously, the Single Judge had held that the parties had impliedly excluded the applicability of Section 9 of the Act by seating the arbitration in Japan and agreeing to the JCAA Rules. However, the Division Bench did not make a determination on this point and left it open to parties to resolve in subsequent proceedings. The Division Bench also noted that the Single Judge’s order should not be treated as having decided the issue finally. This is a welcome move, as the Single Judge’s finding on this issue was fraught with problems. Our analysis of the Single Judge’s ruling can be accessed [here](#).

D. Supreme Court's Dismissal

The Appellants appealed the judgment of the Division Bench to the Supreme Court of India by way of a Special Leave Petition.²⁷⁰ On July 31, 2020, the Supreme Court dismissed the Special Leave Petition and refused to interfere with the order of the Division Bench.

E. Comment

i. Primary Powers Given to Tribunals

Division Bench's decision that Section 9 cannot be invoked after the constitution of an arbitral tribunal in foreign-seated arbitrations, when there is an efficacious remedy available to the parties, is laudable. This is in line with the rationale for the insertion of Section 9(3) to the Act through the Arbitration and Conciliation (Amendment) Act, 2015 ("**Amendment Act 2015**"). The 246th Law Commission Report,²⁷¹ which suggested this amendment, had noted that this amendment seeks to "*reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.*" Thus, the court recognized the adoption of the court-subsidiarity model for interim reliefs by India, which gives primacy to tribunals over the courts.

Interestingly, the UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006) ("**UNCITRAL Model Law**") did not ultimately determine whether the court power should be a secondary option available only where an arbitrator cannot act effectively.²⁷² In fact, the proposal that the court could only act in circumstances where, and to the extent that, the arbitral tribunal did not have the power to so act or was unable to act effectively, was specifically kept for consideration at a later stage.²⁷³ Thus, reliance on UNCITRAL Model Law for adoption of this approach may not be cogent.

However, considering that courts in India are generally overwhelmed with cases, the Indian legislature's intent to shift the primary power to arbitral tribunals, unless it is not efficacious, is a welcome move. This is in line with the position of law in certain other countries such as England²⁷⁴ and Singapore.²⁷⁵ By incorporating Section 9(3) into the Act, the India has also adopted the view that once an arbitral tribunal has been constituted, all applications for interim measures should be determined by the tribunal itself, barring the circumstance where it is inefficacious to do so. The Division Bench in this judgment has appropriately clarified the extension of the application of this principle to foreign-seated arbitrations as well.

ii. Efficacy of the Remedy

Another interesting observation by the Division Bench is in relation to how to determine the "efficacy" of the remedy before an arbitral tribunal. The Division Bench held that the efficacy of the remedy before the arbitral tribunal would depend on the facts and circumstances of each case. In the present case it relied upon the following facts and circumstances to hold that the remedy before the arbitral tribunal was efficacious:

270. Special Leave to Appeal (C) No(s). 9003/2020

271. Law Commission Report No. 246 on Amendments to the Arbitration and Conciliation Act, August 2014.

272. Note by the UNCITRAL Secretariat, Interim measures of protection, A/CN.9/WG.II/WP.125, 2 October 2003 at para 44, available at: <https://undocs.org/en/A/CN.9/WG.II/WP.125>.

273. A/CN.9/589 - Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3-7 October 2005) dated 12 October 2005, para 103 available at: <https://undocs.org/en/A/CN.9/589>

274. Section 44 of the Arbitration Act, 1996 (England).

275. Section 12A, International Arbitration Act (Singapore).

- The Tribunal was constituted and had the powers to grant interim measures pursuant to the JCAA Rules, notwithstanding the findings of the emergency arbitrator;
- The Respondents were Japanese entities and the interim reliefs sought were in the nature injunctions against them. The Division Bench also noted that the Respondents made voluntary statements before the Court that they would comply to with any interim measures passed by the Tribunal;
- It was the Appellants who first approached the emergency arbitrator under the JCAA Rules, thus, it can be presumed that the Appellants did not have any reservations on the efficacy of the remedy.

The efficacy of the remedy also depends on its enforceability. The Indian legislature realized this problem and consequently gave tooth to arbitral tribunals by making their interim orders enforceable as if they are orders of the court in Indian-seated arbitrations. A similar provision is not present for interim reliefs awarded in foreign-seated arbitrations. However, the Division Bench in this case was not affected by potential non-enforceability of the interim measures in India. However, by holding that the efficacy of a remedy would have to be determined on a case by case basis, the Division Bench has left it open to parties in the future to raise an argument that the potential non-enforceability of interim measures in certain situations could render the remedy by the arbitral tribunal inefficacious.

iii. Enforceability of Interim Measures

The move towards giving primacy to the powers of the arbitral tribunal in granting interim relief is promising, however, the enforcement interim reliefs granted in foreign-seated arbitrations is not entirely simplistic. To enforce interim reliefs (including emergency arbitrator reliefs) granted in foreign-seated arbitrations, parties would be required to file a fresh application under Section 9 of the Act, which may be based on the interim relief granted by the foreign tribunal.²⁷⁶ This creates an additional burden upon the parties to prove a case for interim relief which has already been determined by the arbitral tribunal. In order to continue the move towards giving the primacy of the power to grant interim relief to arbitral tribunals, the English position laid down in the case of *Patley Wood Farm LLP v. Nihal Mohammed Kamal Brake, Andrew Young Brake*²⁷⁷ can be considered. In this case, it was held that it is not the Court's role to review or second-guess the arbitrator's interim order. However, the Court may intervene if the arbitrator has proceeded on a wholly mistaken basis, or the exercise of powers by the arbitrator was fatally undermined in some fundamental respect. Unless such an approach is adopted by Indian courts the remedy of seeking an interim relief in a foreign seated arbitration may remain an inefficacious remedy, if such an interim relief were to be enforced in India. In similar vein, orders passed in emergency arbitrations too may also continue to remain ineffective.

The question that has been left open by the Division Bench on the implied exclusion of Section 9 of the Act in foreign seated arbitrations is concerning. For a detailed criticism on the Single Judge's ruling, please read our earlier **analysis**. For now, we can take comfort in the fact that the Division Bench has expressly stated that the Single Judge's ruling on this issue should not be treated as having decided the issue finally. It is hoped that this position of law will quickly be clarified to dispel any notions of an 'implied exclusion' of Section 9 of the Act in foreign-seated arbitrations.

276. *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.*, (2016) 234 DLT 349

277. [2014] EWHC 4499 (Ch)

IX. India—Delhi High Court Revisits The Law on Granting Interim Relief to Non-Signatories in Arbitration (Blue Coast Infrastructure Development V Blue Coast Hotels)

Lexis®PSL ARBITRATION

India—Delhi High Court revisits the law on granting interim relief to non-signatories in arbitration (Blue Coast Infrastructure Development v Blue Coast Hotels)

[First published on Lexis®PSL Arbitration on 23/07/2020](#)

Arbitration analysis: The Delhi High Court refused to grant interim relief under section 9 of the Arbitration and Conciliation Act, 1996 (ACA 1996) against a non-signatory to the arbitration agreement on the facts and circumstances of the case. However, the Delhi High Court held that it was possible to award interim relief against a non-signatory in certain circumstances. For instance, the property of a third party holding property on behalf of a party to the arbitration may be attached pursuant to ACA 1996, s 9. Vyapak Desai, partner and head of the International Dispute Resolution and Investigations Team at Nishith Desai and Bhavana Sunder, member of the team, discuss this decision.

Blue Coast Infrastructure Development Pvt Ltd v Blue Coast Hotels Ltd and others OMP (I) (COMM) No 35/2020 and IA 3251/2020 (not reported by LexisNexis® UK)

Note: other Indian judgments not reported by LexisNexis® UK

What are the practical implications of this decision?

The Delhi High Court interpreted ACA 1996, s 9, which provides courts the power to award interim measures to parties before, during or after the arbitral proceedings and prior to the enforcement of an arbitral award. The court contrasted these powers against the powers of the arbitral tribunal under ACA 1996, s 17 to award interim measures during arbitral proceedings. The court held that while under ACA 1996, s 17, the arbitral tribunal can award interim measures only to the parties to the arbitration agreement, this limitation is not applicable to a court under ACA 1996, s 9.

Thus, the court held that in certain situations, interim measures can be awarded by the court against even non-parties to an arbitration agreement. Particularly, the court observed that it is possible to pass an order to attach a property held by a third party if it is being held on behalf of a party to the arbitration.

However, on the facts of the present case, the court held that the third party, the second respondent, ie, IFCI Ltd. (IFCI), cannot be said to be holding the property on behalf of the first respondent, ie Blue Coast Hotels Ltd. (Blue Coast Hotels), thereby, the question of awarding interim relief to the applicant against IFCI did not arise.

What was the background to this decision?

The applicant, Blue Coast Infrastructure Development Pvt. Ltd. (the Applicant) had entered a Joint Development Agreement (JDA) with Silver Resort Hotel India Private Limited (Silver Resort). Silver Resort was a special purpose vehicle floated by Blue Coast Hotels to develop a commercial space in the New Delhi International Airport (Aerocity Project). An Infrastructure Development and Service agreement had been executed between Delhi International Airport Limited (DIAL) and Silver Resort.

Pursuant to the JDA, the Applicant had been authorised by Silver Resort to raise and collect funds from investors for allotting commercial shops to the investors in the Aerocity Project. The JDA between the Applicant and Silver Resort contained an arbitration clause. It is pertinent to note that Blue Coast Hotels and IFCI were not party to the JDA. However, the Applicant filed the present application before the court pursuant

to the arbitration clause contained in the JDA. Further, Silver Resort was not joined as a respondent in the present proceedings.

The Applicant filed a petition under ACA 1996, s 9 against Blue Coast Hotels and IFCI seeking interim orders from the Delhi High Court. The Applicant requested the court to order IFCI to deposit certain amounts with the registry of the court or alternatively, not to release these amounts to Blue Coast Hotels or otherwise without the permission of the court.

Blue Coast Hotels had issued letters of comfort to the Applicant that, *inter alia*, the monies collected by the Applicant for the Aerocity Project would not be used for any other purpose. Further, Blue Coast Hotels assured the Applicant that in the event the Aerocity Project was not completed a stipulated time, Blue Coast Hotels would refund the monies collected by the Applicant and indemnify the Applicant to the extent of refunding the funds collected by the Applicant.

Due to certain disputes between Silver Resort and DIAL, the Aerocity Project could not be completed. Subsequently, there were multiple proceedings that were initiated in various fora:

- Blue Coast Hotels and IFCI had executed a corporate loan agreement which was secured by the property of Blue Coast Hotels in Goa. A Debenture Subscription Agreement was also executed between PACL Limited (PACL) and Blue Coast Hotels to subscribe to non-convertible debentures which was secured by a second charge on the property of Blue Coast Hotels in Goa. As Blue Coast Hotels defaulted in its obligations, IFCI and PACL issued loan recall notices and initiated proceedings under the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. Pursuant to these proceedings, Blue Coast Hotel's property in Goa was sold through auction. Being the first charge holder, IFCI received approximately INR 3,11,71,85,424
- meanwhile, commercial space holders in the Aerocity Project instituted a representative suit before the Delhi High Court against the Applicant, Blue Coast Hotels, IFCI, Silver Resort and DIAL seeking a refund of booking consideration. The court directed IFCI not to disburse an amount of INR 85 crores out of the amounts received from the sale of Blue Coast Hotel's property in Goa
- subsequently, the Securities Exchange Board of India (SEBI) filed an application with the court to have IFCI release the INR 85 crores out of the surplus available with it in favour of SEBI towards the second charge of PACL. The court had ordered that INR 85 crores should be released in favour of SEBI/PACL. Subsequently, the court recalled its earlier order and directed IFCI and SEBI not to disburse any amounts for a period of six weeks, and provided liberty to the parties to file legal proceedings for their claims. This suit is pending
- further, Blue Coast Hotels filed a writ petition before the High Court of Bombay at Goa to exercise its right of redemption of the Goa property under pursuant to the Transfer of Property Act, 1882
- There are also several execution petitions, contempt petitions and complaints against the Applicant initiated by the investors

In the present proceedings, the Applicant prayed for interim measures to protect the amount of INR 85 crores which was allegedly in the custody of IFCI on behalf of Blue Coast Hotels. IFCI, *inter alia*, raised an objection that the court cannot grant any relief against it as it was not a signatory to the arbitration agreement under the JDA.

What did the court decide?

Relying on various case law, the Delhi High Court noted that the scope of ACA 1996, s 9 is not limited to parties to an arbitration agreement, and that it is possible to extend it to third parties as well. Thus, the court dismissed IFCI's objection, and held that the court can pass interim directions against a non-party to the arbitration agreement under ACA 1996, s 9. Relying on the case of *Value Advisory Services v ZTE Corporation and Ors*, OMP No. 65/2008, the court indicated that a party would have the right to seek attachment against a third party if the third party holds the property in its possession *on behalf of* a party to the arbitration agreement.

After considering the law, the court noted that the representative suit filed by investors was still pending before the Delhi High Court, to which the Applicant is a party. In those proceedings, SEBI/PACL had acquired a right to claim the sum of INR 85 crores and their charge is yet to be satisfied. Thus, any direction by the court in the present proceedings would be in conflict with the court's earlier orders in the representative suit.

Considering this, the court held that it is not correct to state that IFCI is holding the sum of INR 85 crores as a custodian of, or on behalf of, Blue Coast Hotels. Therefore, the reliefs sought by the Applicant cannot be granted. In light of these facts, the Court held that the objection by IFCI that it was not a signatory to the arbitration agreement was irrelevant. Consequently, the Court dismissed the petition for interim relief.

Commentary on the decision

The Delhi High Court considered various judgments which have held that courts have the power to award interim relief against a non-signatory to an arbitration agreement in certain situations. Particularly, in the case of *Gatx India Pvt Ltd v Arshiya Rail Infrastructure Ltd*, 2015 VAD (Delhi), which relies upon *Value Advisory Services v ZTE Corporation and others*, OMP No 65/2008, the Court held that, 'the court may issue interim orders against the third parties to arbitration only in exceptional circumstances which are such that denial thereof might frustrate the petitioner's rights in arbitration; defeat the very object of arbitration between the parties thereto; render the arbitration proceedings infructuous; lead to gross injustice; and/or, leave the petitioner remediless, depending on facts of each case.'

Thus, it is clear that interim relief against a non-signatory can be awarded on a case-by-case basis. In the present case, the court held that if IFCI was holding property on behalf of Blue Coast Hotels, the Court would have had the jurisdiction to award interim relief under ACA 1996, s 9, and the objection that IFCI is not a party to the arbitration agreement would not be sustained.

However, it is surprising that the court arrived at this conclusion prior to analysing how interim relief could be awarded against Blue Coast Hotel's property (as allegedly held by IFCI) in the first place, considering that even Blue Coast Hotels was also not a party to the arbitration agreement contained in the JDA. From the facts, it is clear that it was only the Applicant and Silver Resort who were parties to the JDA which contained the arbitration clause. While Silver Resort is a special purpose vehicle floated by Blue Coast Hotels, it would have been beneficial if the Court had undertaken an analysis to clarify that Silver Resort was possibly an alter ego of Blue Coast Hotels, and thereby suggest that relief could be awarded against Blue Coast Hotels, despite it not being a signatory to the arbitration agreement. Parties and practitioners would have benefited from further clarity from the court on this aspect in order to understand the various circumstances wherein interim relief can be granted by courts against non-signatories.

X. India—Delhi High Court’s Vaccine for Combating Multiplicity of Arbitral Proceedings (Gammon India V National Highways Authority of India)

Lexis®PSL ARBITRATION

India—Delhi High court’s vaccine for combating multiplicity of arbitral proceedings (Gammon India v National Highways Authority of India)

[First published on Lexis®PSL Arbitration on 24/07/2020](#)

Arbitration analysis: Vyapak Desai, partner and head of the International Dispute Resolution and Investigations Team at Nishith Desai Associates, Payel Chatterjee, leader and Shweta Sahu, senior member of the same team, discuss a recent decision of the High Court of Delhi on multiplicity of arbitral proceedings.

Gammon India Ltd & another v National Highways Authority of India ([OMP 680/2011 \(New No O M P \(COMM\)392/2020\)](#)) (subscription to Lexis Advance® required)

Note: other Indian judgments not reported by LexisNexis® UK

What are the practical implications of this decision?

The court in this ruling rightly pointed that there is nothing in Arbitration and Conciliation Act 1996 (ACA 1996), which prohibits parties from raising claims and counter-claims in multiple proceedings arising out of the same contract. Therefore, the observations and directions issued by the Court to curb the nuances of multiplicity of proceedings, are laudable and expected to provide clarity and lay guidelines for parties in case of future disputes. However, in the absence of a binding statutory obligation or a Supreme Court ruling putting to rest this issue, the same are only recommendatory in nature.

Considering the guidelines are only in the form of directions, the court has taken an additional step to enforce it by conveying its suggestions to the Registry for considering amendments to the Rules of the Delhi High Court framed under the Act as well as to the Ministry of Law and Justice. The court also referred to its practice directions, such as, the mandatory requirement for petitions seeking interim reliefs under the Act for the party to mention that no other petition on the same cause of action was filed (see, Practice Direction No 16/Rules/DHC, dated 7 December 2009).

It may be noted that the court relies on the premise where parties to an arbitration are expected to adhere to a bona fide discipline of use of arbitral processes. However, the same may not succeed in case of recalcitrant parties.

While the codification and further implementation of the recommendations are awaited in India, reference may be drawn to internationally recognised tools already in existence such as ‘consolidation’ of arbitral proceedings. Such consolidation of proceedings is usually driven by the consent of parties (see, ICC Rules 2017, Article 10; SIAC Rules 2016, Rule 8; HKIAC Rules 2013, Article 28; SCC Rules 2017, Article 15; CIETAC Rules 2015, Article 19) or when the varying arbitration agreements are compatible (*Ameet Lal Chand Shah v Rishabh Enterprises* (2018) 15 SCC 678) *P R Shah, Shares & Stock Brokers (P) Ltd v B H H Securities (P) Ltd*, (2012) 1 SCC 594).

What was the background to this decision?

This article analyses a recent ruling of the High Court of Delhi (court) in *Gammon India Ltd & another v National Highways Authority of India* (OMP 680/2011 (New No O M P (COMM)392/2020), judgment dated 23 June 2020). While hearing a petition challenging an arbitral award, the court took cognisance of the issues surrounding ‘multiplicity’ of arbitral proceedings, ie, multiple invocation, multiple references to arbitrations,

constitution of multiple tribunals, multiple awards being rendered and consequently multiple challenges thereto—between the same parties, in respect of the same contract or the same series of contracts.

A construction contract (the contract) was entered between Gammon-Atlanta JV, a joint venture of Gammon India Ltd and Atlanta Ltd (the contractor) and National Highways Authority of India (NHAI) on 23 December 2000. During the execution of the road project underlying the contract, certain disputes arose between the parties. Thereafter, the contractor invoked arbitration against NHAI. The parties appointed three different arbitral tribunals, adjudicating different claims arising out the contract. An overview of the arbitral awards rendered, has been produced below:

	Claims made	Findings in the arbitral award	Status of the award
Award dated 5 October 2007 (Award No 1)	(i) Compensation for losses incurred on account of overhead and expected profit; (ii) Compensation for reduced productivity of machinery and equipment deployed; and (iii) Revision of rates to cover for increase of cost of materials and labour during extended period over and above the relief available under escalation (price adjustment) provision in the agreement (the Third Claim)	The arbitral tribunal allowed the first two claims but rejected the Third Claim, as being outside the terms of reference.	The Award No 1 was challenged before Single Bench of the Delhi High Court which upheld claims (i) and (ii) and granted liberty to raise the Third Claim before the second arbitral tribunal. Subsequently, the Award No 1 was upheld by two Division Benches and eventually the Supreme Court in August 2017–September 2017 and attained finality.
Award dated 21 February 2011 (Award No 2)	The contractor invoked arbitration in respect of additional claims in 2007 including the Third Claim, pursuant to the permission granted by the court. Note: This arbitration was invoked while the challenge proceedings against Award No 1 was still pending.	The Third Claim filed before the arbitral tribunal—was rejected by a 2:1 majority. The minority award granted the claims of the contractor. Note: This award was rendered during the pendency of the third arbitration.	This award was challenged, leading to the present proceedings.
Award dated 20 February 2012 (Award No 3)	A third arbitration, in respect of recovery of amounts collected as liquidated damages, along with other claims, was invoked by the contractor on 23 December 2008.	The contractor's claim for recovery of amounts paid as liquidated damages to NHAI, was allowed. It was also observed that NHAI had failed ' <i>to provide a hindrance-free site and had also taken over the road</i> '.	NHAI has paid the awarded sum and Award No 3 had attained finality.

Issues considered

Considering the observations in Award No 3 holding NHAI responsible for some delay in the road project, the court considered whether it is permissible for the court to rely on the findings of a subsequent award (Award No 3) in deciding the objections raised against a previous award (Award No 2)?

While determining the afore-mentioned issue, the court also took note of the underlying problem of multiplicity of arbitral proceedings between the same parties under the same contract.

Decision of the court

The court upheld the rejection of the Third Claim in Award No 2. While dealing with this issue, the court also analysed the observations made in Award No 3 as compared with Award No 1, and its impact on Award No 2.

Contradictory decisions in the Arbitral Awards

Award No 1	Award No 3
Award No 1 held that though the initial work of the contractor was affected by NHAI's inability to fulfil its obligations, once the hindrances were removed, the contractor was unable to accelerate the progress of the work.	Award No 3 recorded that NHAI could not impose liquidated damages on the contractor when it had failed to provide a hindrance-free site and had also taken over the road. Award No 3 also held that NHAI did not provide sufficient evidence to support the claim that delay was caused by the contractor.

The court clarified that notwithstanding the aforementioned difference, the awards stand independently on their own and Award No 2 is well-reasoned and passed in accordance with the terms of the contract. The court observed that a finding in a subsequent award would not render the previous award illegal or contrary to law. Instead, the impugned award would have to be examined as on the date when it was rendered, on its own merits. Accordingly, the court held that the findings in Award No 3 cannot be deployed to argue that Award No 2 ought to be set aside.

The court was, however, of the view that one arbitral tribunal ought to have dealt with all claims, since the core issue in the underlying awards was of 'delay'. Thereafter, the court dealt with the issue of multiplicity of arbitral proceedings arising out of the same contract.

Legal position on multiple arbitrations and awards

- the court observed that ACA 1996 contemplates disputes, which can be raised at different stages and there can be multiple arbitrations in respect of a single contract. (see, ACA 1996, ss 7, 8, 21)
- the court also referred to the principles of *res judicata* and provisions of the Code of Civil Procedure 1908 (CPC), which enshrine the legislative intent to avoid multiplicity of proceedings (see, CPC 1908, Order II, Rule 2). It further stated even though arbitral proceedings are not strictly governed by the CPC, multiplicity of proceedings ought to be avoided as per the principles of public policy and *res judicata* principles apply to arbitral proceedings. (see *Dolphin Drilling Ltd v ONGC* AIR 2010 SC 1296) and *K V George v Secretary to Government, Water and Power Department, Trivandrum & others*, R [1990 SC 53](#))
- the court also noted that multiplicity of arbitral proceedings involves parallel adjudication of overlapping issues resulting in uncertainty and confusion, which further defeats the purpose of arbitration as a mechanism for speedy and effective resolution of disputes

The court also observed that multiplicity of arbitral proceedings may arise in the following situations:

- arbitrations and proceedings between the same parties under the same contract
- arbitrations and proceedings between the same parties arising from a set of contracts constituting one series, which bind them in a single legal relationship
- arbitrations and proceedings arising out of identical or similar contracts between one set of entities, wherein the other entity is common

Guidelines to tackle multiplicity of proceedings

The court having dealt with the root cause, made certain suggestions for reducing multiplicity of arbitral proceedings:

- in respect of a particular contract or a series of contracts that bind the parties in a legal relationship, the endeavour always ought to be to make one reference to one arbitral tribunal

- a party invoking arbitration under a contract ought to raise all its claims that have already arisen as on the date of invocation for reference to arbitration. In order to deter parties from raising only 'few' disputes instead of 'all' the disputes that have arisen, such other disputes/claims that had arisen but not included (in the invocation letter or in the terms of reference) ought to be held as being barred/waived. Such non-inclusion may be condoned only on being specifically permitted by the arbitral tribunal for any legally justifiable/sustainable reasons
- if an arbitral tribunal is constituted for adjudicating some disputes under a particular contract or a series thereof, any further disputes which arise in respect of the same contract or the same series of contracts, ought to ordinarily be referred to the same tribunal. The arbitral tribunal may pronounce separate awards in respect of the multiple references. However, the possibility of contradictory and irreconcilable findings would be avoided, since the tribunal would be the same
- in case of proceedings initiated to challenge arbitral awards:
 - the parties approaching the court ought to disclose any other proceedings pending or adjudicated in respect of the same contract or series of contracts, the stage of the said proceedings (if any) and the forum where the said proceedings are pending or have been adjudicated
 - during challenge proceedings—parties ought to disclose the pendency of all challenge petitions, if any, in respect of the same contract. Parties should also seek disposal of such said petitions together in order to avoid conflicting findings
- during challenge proceedings—parties ought to disclose the pendency of all challenge petitions, if any, in respect of the same contract. Parties should also seek disposal of such said petitions together in order to avoid conflicting findings
- regarding appointment of arbitrators:
 - in petitions seeking appointment of an arbitrator, parties ought to disclose if any arbitrator has already been appointed—for adjudication of the claims of either party arising out of the same contract or the same series of contracts
 - appointing authorities under contracts having arbitration clauses ought to avoid appointment or constitution of separate arbitrators/arbitral tribunals for different claims/disputes arising from the same contract, or same series of contracts

XI. India—Parties Cannot Apply to Courts After Emergency Arbitration (Ashwani Minda V U-Shin)



India—parties cannot apply to courts after emergency arbitration (Ashwani Minda v U-Shin)

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Arbitration analysis: The Delhi High Court found a petition for interim reliefs under section 9 of the Arbitration and Conciliation Act 1996 (ACA 1996), filed after the party had unsuccessfully applied for reliefs in an Emergency Arbitration in Japan, was not maintainable on multiple grounds. This ruling, while highlighting the growing importance of emergency arbitration, also finds that the parties had by agreement excluded the applicability of ACA 1996, s 9, which raises certain questions. Vyapak Desai, head of the International Dispute Resolution and Investigations at Nishith Desai Associates and Ashish Kabra, leader, Singapore office of Nishith Desai Associates discuss this decision.

Ashwani Minda v U-Shin Ltd [2020 DEL 1266, OMP \(I\) \(COMM\) 90/2020](#) (subscription to Lexis Advance® required)

Note: other Indian judgments not reported by LexisNexis® UK

What are the practical implications of this decision?

References:

[Arbitration and Conciliation Act 1996](#)

A number of cases have now emerged wherein the parties have initiated emergency arbitration outside India and obtained relief; and thereafter applied for and obtained the same relief in India under ACA 1996, s 9 (*HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studios Ltd*, Arbitration Petition No 1062 of 2012; *Raffles Design International India Private Ltd v Educomp Professional Education Ltd*, OMP(I) (Comm) 23/2015, CCP(O) 59/2016; *Plus Holdings v Xeitgeist Entertainment Group*, Com Arb Pet No 399 of 2019).

An application under ACA 1996, s 9 is made considering that there are no clear provision in ACA 1996 or otherwise any jurisprudence on direct enforcement of foreign emergency arbitration awards in India. However, in these cases, while the courts have taken into account the orders passed in emergency arbitration, they have clarified that the findings have also been independently arrived at. These cases reflect that Indian courts have given a certain degree of deference to emergency arbitration proceedings which have previously taken place. From that perspective, the dismissal of the ACA 1996, s 9 petition in this decision and the approach of the court to give deference to emergency arbitration appears reasonable and cogent.

What was the background to this decision?

A dispute arose out of a joint venture agreement between an Indian party and a Japanese party. The dispute resolution clause under the joint venture agreement provided:

'In case of failure to reach a settlement, such disputes, controversies or differences shall be submitted to the arbitration under the Commercial Rules of the India Commercial Arbitration Association to be held in India if initiated by [the Japanese Party], or under the Rules of the Japan Commercial Arbitration Association to be held in Japan if initiated by [the Indian Party].'

The Indian party commenced arbitration proceedings seated in Japan and applied for interim relief through an emergency arbitration under the rules of the Japan Commercial Arbitration Association (JCAA). However, the emergency arbitrator declined to grant the relief. Thereafter, the Indian party approached the Delhi High Court praying for the same interim relief.

What did the court decide?

The court duly traced the law on the ability of parties to claim interim relief in India in aid of foreign seated arbitration. Having traced the march of law, the court found that the proviso to section 2(2) of the Act was inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (the Amendment Act), to cover the gap in law created by the BALCO judgment (*Bharat Aluminum and Co v Kaiser Aluminium and Co*, (2012) 9 SCC 552) ie non-availability of interim reliefs in India, in aid of foreign seated arbitration. ACA 1996, s 2(2) provides:

'This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.'

The court held that with the Amendment Act, the position of law went back to as it stood prior to the BALCO judgment, namely as expounded in *Bhatia International v Bulk Trading SA and another*, (2002) 4 SCC 105, to the limited extent of applicability of ACA 1996, ss 9, 27, 37(1)(a) and 37(3).

With that background, the court held that the applicability of ACA 1996, s 9 was impliedly excluded by the parties. The court stated:

'The Dispute Resolution Mechanism agreed to, in the present case envisages conduct of Arbitration in Japan and regulated by the JCAA Rules. JCAA Rules provide a detailed mechanism for seeking interim and emergency measures and was known to the parties when entering into the Agreement. Reading of the Arbitration clauses clearly evinces the intention of the parties to exclude the applicability of part I of the Act.'

The court also held that:

- the applicant, having unsuccessfully tried to obtain relief in an emergency arbitration, cannot have a second bite at the cherry by asking for same interim relief from a court
- even as per the doctrine of election, the parties having chosen to go down the path of emergency arbitration, cannot seek relief from the court, and
- the court cannot effectively sit in appeal over the judgment of the emergency arbitrator

The court interestingly distinguished *Raffles Design Int'l India Pvt v Educomp Professional Education* (2016) 234 DLT 349. In the *Raffles* case, the party after having successfully obtained reliefs in an emergency arbitration under SIAC Rules (with the seat in Singapore), had applied for and obtained the same relief in India under ACA 1996, s 9. The court distinguished the case on following grounds:

'Firstly, in that case [Raffles case], there was no Clause in the Dispute Resolution Mechanism by which the parties had excluded the applicability of Section 9 of the Act and secondly, unlike in the present case, the Rules governing the Arbitration were SIAC Rules, which permit the parties to approach the Courts for interim relief.'

Consequently, the court having found that ACA 1996, s 9 was impliedly excluded, it held that the petition was not maintainable.

Concerns with implied exclusion of section 9

Even though the overall approach of the court is welcome, the finding that parties had impliedly excluded ACA 1996, s 9. raises certain questions. The judgment states that the arbitration clause evinces an intention to exclude 'ACA 1996, Pt 1'. We understand by ACA 1996, Pt 1, the reference is to ACA 1996, s 9. It is difficult to ascertain how the arbitration clause in this case evinced an intention to exclude applicability of ACA 1996, s 9. The application of pre-BALCO test for determination of implied exclusion of ACA 1996, Pt 1, for inferring an implied exclusion of ACA 1996, s 9 pursuant to the proviso to ACA 1996, s 2(2), is not appropriate.

In this case, the arbitration clause provided for a Japan seated arbitration under the JCAA Rules in the event the arbitration was initiated by the Indian party. The selection of a foreign seat itself cannot imply an exclusion of section 9. If that were the case, then it would conflict with the proviso to ACA 1996, s 2(2), which was inserted by the Amendment Act for the very purpose of making the ACA 1996, s 9 applicable to foreign seated arbitrations. Additionally, merely choosing of institutional rules for administering the arbitration also per se on its own cannot imply that the parties intended to exclude ACA 1996, s 9.

Further, under the arbitration law of Japan (Article 3(2) read with Article 15 of the (Japan) Arbitration Act, 2003), parties are permitted to approach the courts in aid of arbitrations seated in Japan and outside. Additionally, the absence of a provision similar to Rule 30.3 of the SIAC Rules 2016 or Article 28.2 of the ICC Rules, 2017 in the JCAA Rules does not make any difference. Rule 30.3 of the SIAC Rules, 2016 and Article 28.2 of the ICC Rules, 2017 clarify that approaching a court for interim relief is not contrary to the choice of arbitration. These rules are not positively conferring the ability on a party to approach the court. Thus, simply an absence of such a provision in the rules of an institution, should not imply that parties agreed to exclude their ability to approach courts for interim relief. This also calls into question the basis on which the court distinguished the *Raffles* case.

It appears that the courts' approach is driven by the fact that an emergency arbitrator had previously declined to grant the relief. However, an exclusion of section 9 has to be considered irrespective of the outcome of the prior emergency arbitration. An exclusion of section 9, implies that the parties may not have any ability of obtain enforceable interim reliefs in India. Thus, in this case, had the Indian party succeeded in obtaining the interim relief, it may not have any clear path of effectuating those reliefs in India.

This case highlights the importance of the choice between the parties to choose between court proceedings or emergency arbitration for the purpose of obtaining the interim reliefs. On the whole, the approach of the court is welcome. However, going forward this case should not form the basis on which a determination of an implied exclusion of ACA 1996, s 9 pursuant to proviso to ACA 1996, s 2(2) is made. The courts may recognise the findings of the emergency arbitrator as part of the tests for granting relief under ACA 1996, s 9 and through that give deference to the orders of the emergency arbitrator.



XII. Signatory or Not – A Group of Companies Can Be Referred to Arbitration, Rules Delhi High Court

A. Introduction

In the recent case of *Magic Eye Developers Pvt. Ltd. (“Plaintiff”) v. Green Edge Infra Pvt. Ltd. & Ors. (“Defendants”)*,²⁷⁸ the High Court of Delhi (“Court”) considered whether non-signatories to an arbitration agreement are amenable to arbitration under Section 8 of the Arbitration & Conciliation Act, 1996 (“A&C Act”), by applying the *group of companies* doctrine.

B. Facts

The Plaintiff entered into a business relationship with the Defendant No. 1 through execution of several agreements namely a Shareholders Agreement dated 4th July 2012, (“SHA”), Share Purchase Agreement dated 24th July 2013 (“SPA”) and Memorandum of Understanding (“MOU”). The Defendant No. 1 was required to render services to the Plaintiff, including but not limited to arrangement of necessary and applicable licenses for launching a real estate project in Gurgaon. As part of the composite transaction, the Plaintiff company advanced a sum of INR 8,00,00,000 to the Defendant No. 1. Of the said amount, an amount of INR 5,20,00,000 was advanced as a short term loan to Mr. S.K. Hooda (the erstwhile managing director of the Defendant No. 1 company).

Breach of contractual obligations by Defendant No.1 resulted in delays in launch of the project. The Plaintiff filed a commercial suit in the High Court of Delhi, claiming recovery of loan, along-with damages for breach of contract, loss of reputation and loss of business opportunity. Additionally, the Plaintiff alleged that Defendant No. 1 was a sham company used by Mr. S.K. Hooda’s family, alongwith other front companies namely Defendants Nos. 2 and 3, to launder and siphon away money advanced by way of loan and other borrowings from companies such as that of the Plaintiff and members of the public. It was also alleged that there were several FIRs and criminal investigations filed against Mr. S.K. Hooda and that he had been arrested by the Economic Offences Wing.

The Defendant No. 1 filed an application under Section 8 of the A&C Act, and prayed for reference of disputes to arbitration under the SHA, SPA and MOU. It was averred that the said agreements are interconnected and cover the subject matter of the suit. Defendant Nos. 2 and 3 filed written statements and objected to being impleaded in the commercial suit.

C. Issues

The High Court dealt with the following issues:

1. Whether or not the claim is capable of settlement by arbitration in light of the Plaintiff’s twin-claim for recovery and damages?
2. Whether Defendant Nos. 2 & 3 can be made amenable to arbitration despite being non-signatories to the arbitration agreement(s)?

278. CS(COMM) 1290/2018

D.Judgment

i. Bifurcation of Reliefs

The Plaintiff contended that in addition to recovery of the loan, the Plaintiff had also claimed damages for which there was no arbitration agreement between the parties. The Plaintiff relied on the decision in *Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya*²⁷⁹ and stated that since the reliefs claimed under the suit could not be bifurcated, the parties could not be referred to arbitration. The Court rejected the argument and held that the claim for damages was based on the failure of Defendant No.1 to perform its contractual obligations under the various agreements. This was an arbitrable dispute duly governed by arbitration clauses under the various agreements. As such, the two reliefs were not required to be bifurcated and could be decided by arbitration.

ii. Group of Companies Doctrine

The Plaintiff claimed that since the disputes involved third parties such as Defendant Nos. 2 and 3 who were not signatory to the various agreements, the disputes could not be referred to arbitration.

The Court referred to the seminal decision of the Supreme Court of India (“**Supreme Court**”) on the *group of companies* doctrine, in the case of *Chloro Controls India (P) Ltd. Vs. Severn Trent Water Purification Inc.*²⁸⁰ It reiterated that a non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction.²⁸¹

The Court also relied upon the Supreme Court’s decision in *Cheran Properties Limited vs Kasturi & Sons Limited*²⁸² wherein the Supreme Court acknowledged that there may be transactions within a group of companies. The circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group.²⁸³

The Court stated that the evolving body of academic literature as well as adjudicatory trends indicated that in certain situations, an arbitration agreement between two or more parties may operate to bind other parties as well. Relying on the requirement of an arbitration agreement to be in writing, the Court quoted from legal authorities such as Redfern and Hunter on International Arbitration, to state that the requirement of an agreement to arbitrate in writing inter alia does not exclude the possibility of an arbitration agreement concluded in proper form between two or more parties also binding other parties. This could be by operation of the group of companies doctrine, or by operation of law such as agency, assignment, agency or succession.²⁸⁴

After expounding on the above principles, the Court considered the Plaintiff’s averments to the effect that Defendant Nos. 1, 2 and 3 belonged to the Hooda family. As such, the Plaintiff had itself averred that the Defendants formed a group of companies. Additionally, the Court noted the pleadings of Defendant Nos. 2 and 3. In response to the cause of action in the Plaint (whereby the Plaintiff stated that the subject matter of the suit cannot be referred to arbitration as there is no provision for splitting the cause or the parties), the Defendant Nos. 2 and 3 had simply rebutted the said paragraph as ‘denied for want of knowledge and that it did not pertain to

279. 2003 (5) SCC 531

280. (2013) 1 SCC 641

281. Ibid. para 73

282. 2018 (16) SCC 413

283. Ibid. para 23

284. Redfern and Hunter on International Arbitration, 5th Edn., 2.13, pages 89-90

defendant Nos.2 and 3'. Further, during the course of arguments, the Defendant Nos.2 and 3 did not oppose the plea of Defendant No.1 to the effect that disputes should be referred to arbitration.

The Court held that from the intent of the parties as noticed from the various agreements, as also the averments in the plaint and the arguments, it was evident that not only would Defendant No.1 but also the Defendant Nos. 2 and 3 were amenable to arbitration. The Court accordingly referred all parties to arbitration.

E. Analysis

Indian courts have been called upon several times to consider amenability of non-signatory parties to arbitration. An oft-faced question by courts as well as arbitrators is - whether an arbitration agreement signed by an entity belonging to a group of companies can be extended to include other entities in the group. Since companies have separate legal entities, it could be difficult to argue that one or more separate legal entities be treated as a single entity under a group of companies, for the purposes of jurisdiction. However, this may not be strictly impossible.

Several factors need to be considered by court and arbitrators when a claim relates to entities in a group of companies. For instance, a party attempting to claim against non-signatories in an arbitration could demonstrate that the relevant group of companies can be considered to be 'one and the same economic reality'. This can be done in various ways such as by establishing that a parent company owns all the shares of the subsidiaries, such that it can control every movement of the subsidiaries. Parties can demonstrate that performance under an agreement with a group entity is intrinsically linked with performance by another non-signatory group entity. In some circumstances, involvement of an entity in negotiation of the agreement could also be considered as a tacit agreement by the non-signatory party to be bound by the agreement. Several factors need to be demonstrated before a party can pierce the corporate veil to locate the "true" party in interest and to target the creditworthy member of a group of companies.

In contradistinction, a party resisting a claim to involve its sister entities could demonstrate under some circumstances that the involvement of the sister entity had no bearing on performance under the agreement, and its involvement was merely ancillary to the main agreement. One could plead that there are not enough circumstances to look at the economic entity of the whole group and ignore the separate legal entities of various companies within a group. Through all factors and circumstances, a party needs to either prove (or disprove) a common thread of intention that runs between the signatories and the non-signatories to be bound by the agreement. Consent of parties, express or implied, therefore plays a pivotal role in either fortifying or dismantling a claim under the group of *companies* doctrine.

The present judgment expounds on the principles underlying application of group of *companies* doctrine. However, it throws sparse light on the circumstances that led the Court to refer the non-signatories to arbitration in the case at hand. The Plaintiff's averred that Defendant Nos. 2 and 3 siphoned off loan advanced by Plaintiff to Defendant No. 1, and that they belonged to a group of companies operated by the Hooda family. However, the judgment does not cull out circumstances to connect the Defendant Nos. 2 and 3, or demonstrate their involvement or intention to be bound, by the various agreements (although the Court merely stated that intent of the parties could be noticed from the agreements).

Additionally, the Court relied on inadequacies in the pleadings and arguments of Defendant Nos. 2 and 3 in response to reference of disputes to arbitration. While this may be considered as a win on technicality, in substance, this may not be adequate to apply the group of companies doctrine. Circumstances must be spelt out clearly to connect the non-signatory entities in the group with the subject transaction, as also to demonstrate an objective intention of non-signatory parties to be bound by the subject agreement.

The group of companies doctrine is an exception to the rule of privity of contract i.e. the arbitration agreement

between parties. It is also an exception to Section 7 of the A&C Act that an arbitration agreement must be in writing, thereby being enforceable only against parties who are signatories to the agreement. Therefore, application of the group of companies doctrine to non-signatories must be made only when certain circumstances (some referred above) are demonstrated that can pull the separate signatory and non-signatory entities into a 'single economic reality'. It may also help to be cautious of contradictory pleadings and arguments. After all, adversarial dispute resolution is not a matter of mere substance, but also of constructive pleading and court craft.

XIII. India—Supreme Court Refuses Enforcement of Foreign Arbitral Award Finding Underlying Contract Void (National Agricultural Cooperative Marketing Federation of India V Alimenta)

Lexis[®]PSL ARBITRATION

India—Supreme Court refuses enforcement of foreign arbitral award finding underlying contract void (National Agricultural Cooperative Marketing Federation of India v Alimenta)

[First published on Lexis[®]PSL Arbitration on 02/06/2020](#)

Arbitration analysis: In a case relating to an international commercial arbitration seated in London, the Supreme Court of India ruled that when the underlying contract is rendered void as a result of the operation of a contingency event contemplated by the contract, the enforcement of an arbitral award upholding such a contract would be contrary to the public policy of India. Vyapak Desai, Head of the International Dispute Resolution and Investigations at Nishith Desai Associates, Kshama Loya and Bhavana Sunder, members of the team, discuss this decision.

National Agricultural Cooperative Marketing Federation of India v Alimenta SA 2020 SCC OnLine SC 381 (Indian judgments not reported by LexisNexis[®] UK)

What are the practical implications of this decision?

In a rare decision of this kind, the Supreme Court of India refused the enforcement of a foreign arbitral award on the ground that it would be contrary to the public policy of India. In doing so, the Supreme Court interpreted the terms of the contract to find that the agreement between the parties should have been rendered void due to a contingency clause in it. Therefore, the arbitral award upholding the agreement could not be enforced.

The ruling of the Supreme Court in this decision is worrying for several reasons. The court conducted a detailed review of the merits of the dispute—nearly 40 years after the dispute arose between the parties. The court also did not discuss the reasons for applicability of provisions of the Indian Contract Act, 1872 to a contract which was in fact governed by English law. Further, the court missed an opportunity to interpret several other pressing issues in the award such as the petitioner's ability to present its case in the arbitration, and the independence of the arbitration itself.

Indian courts have consistently been following the internationally accepted approach of minimum intervention while interpreting objections to enforcement of foreign arbitration awards. The Supreme Court's approach here will hopefully be viewed by enforcing courts as an anomaly, and foreign arbitral awards will continue to be assessed based on the principles laid down in the cases of *Renusagar Power v General Electric Co* 1994 Supp (1) SCC 644, *Shri Lal Mahal Ltd v Progetto Grano SPA* (2014) 2 SCC 433 and *Vijay Karia v Prysmian Cavi E Sistemi* (2014) 2 SCC 433.

What was the background to this decision?

A dispute arose between the parties when the petitioner was unable to export the contracted quantity of ground nuts to the respondent, due to denial of export permission by the Government of India (the Government). The agreement between the parties contained a clause which provided that during the contract period, in the event of prohibition of export by an executive or legislative act by the Government, such restriction shall be 'deemed by both parties to apply to the contract'. The clause further provided that in the event the shipment proved impossible, in the extended period, the contract fulfilment would be cancelled (the Contingency Clause).

The respondent, initiated arbitration proceedings before the Federation of Oil, Seeds and Fats Association Ltd (the FOFSA) in London. In 1981, the petitioner sought a stay on the arbitration proceedings as the agreement between the parties did not contain an arbitration clause. The Delhi High Court issued a stay on the arbitration proceedings (the Order). Disregarding the Order, the FOFSA appointed an arbitrator on behalf

of the petitioner. The petitioner approached the courts in India to restrain the respondent and the FOFSA from continuing the proceedings. The Supreme Court issued an order to restrain the proceedings, however, the FOFSA continued the arbitration by communicating to the court that it had no power to act in the matter or stay the arbitration proceedings. In its final judgment, the court ordered that the arbitration proceedings may continue.

The arbitral award was issued in favour of the respondent in 1989. Aggrieved, the petitioner appealed against the award before the FOFSA Board of Appeal (the Board). The Board disallowed the petitioners request to be represented by its solicitor firm. In its decision, the Board upheld the initial award and enhanced the interest component of the award even in the absence of an appeal by the respondent (the Award). In fact, the arbitrator who made the Award, represented the respondent in the appellate proceedings before the Board.

The respondent filed an application to enforce the Award in 1993. The petitioner objected to its enforcement stating that the Award was contrary to Section 7(1)(a)(ii) and Section 7(1)(b) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act) which provides:

7. Conditions for enforcement of foreign awards.

(1) A foreign award may not be enforced under this Act-

(a) if the party against whom it is sought to enforce the award proves to the court dealing with the case that-

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case—or.

....

(b) if the court dealing with the case is satisfied that-

(i) the subject-matter of the difference is not cap-able of settlement by arbitration under the law of India—or

(ii) the enforcement of the award will be contrary to public policy.

The Supreme Court was faced with the question of whether a foreign arbitral award, the Award, was enforceable under the Foreign Awards (Recognition and Enforcement) Act, 1961 (the Foreign Awards Act). The court interpreted the Foreign Awards Act (which is a precursor to the present Arbitration and Conciliation Act, 1996 (the A&C Act)) as the enforcement application was filed in 1993.

The Supreme Court considered the following issues:

(1) Whether the petitioner was unable to carry out its contractual obligations due to the Government's refusal to provide permission to export, thereby rendering the contract void and unenforceable pursuant to the Contingency Clause—

(2) Whether the Government's prohibition to export was sufficient to render the Award unenforceable—

(3) Whether the arbitrator was appointed in violation of the Order—

(4) Whether the petitioner was not permitted to have legal representation before the Board—

(5) Whether the arbitrator appearing as a counsel for the respondent before the Board was bad in law—and

(6) Whether the Board could have enhanced the interest rate in the absence of an appeal.

What did the court decide?

On the first issue and the second issue, the Supreme Court held that the export of groundnuts could not have taken place without the approval of the Government. Considering that the Contingency Clause would have become applicable, the contract itself would have been cancelled. The contract was thereby rendered void under Section 32 of the Indian Contract Act, 1872 which provides that, 'Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void'. Thus, enforcing an award

seeking payment of damages for breach of a contract (which was rendered void) is contrary to the fundamental policy of Indian law. The court further held that export without the Government's permission would have violated the law, thus, enforcement of the award would be violative of the public policy of India and basic notions of justice.

On the third issue, the Supreme Court held that the question of appointment of the arbitrator in violation of the Order should have been raised at the relevant time when the Supreme Court permitted the arbitration proceedings to continue. The court held that it was not inclined to examine the merits of this argument at the stage of enforcement.

On the fourth issue, the court held that the petitioner had been unable to show prejudice caused to it due to the refusal of the Board to permit the petitioner from being represented by a legal firm.

On the fifth issue, the Supreme Court held that while it would be opposed to Indian law and ethical standards for the arbitrator to defend the award passed by him, no material had been placed to substantiate this objection under the prevailing practice and English law at the relevant time. On the final issue, the Supreme Court held that it was not open to the Board to enhance the interest amount in the absence of an appeal.

The Supreme Court concluded that since it had held that the Award is unenforceable under section 7 of the Foreign Awards Act, the other submissions did not require determination. The court concluded that the enforcement of the Award was contrary to the fundamental policy of Indian law as the petitioner had been held liable under an Award to pay damages under a contract that was rendered void and unenforceable.

Why is the decision of interest?

The Foreign Awards Act and the A&C Act both contain similar grounds for refusal of enforcement of an arbitral award as they are both based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). The Supreme Court noted in *Shri Lal Mahal*, that the expression public policy in the A&C Act has the same import as the expression public policy under the Foreign Awards Act. While interpreting the Foreign Awards Act and the A&C Act, the Supreme Court has consistently held that the scope of enquiry by the enforcing court does not entail a review of the foreign award on merits.

However, in the present case, it appears that the Supreme Court adjudicated the merits of the dispute in a manner that a court would adjudicate an appeal. The court interpreted the terms of the contract and the entire factual matrix to hold that the arbitral tribunal had incorrectly decided the matter, as the underlying contract had become void due to the occurrence of a contingency event. The court applied Section 32 of the Indian Contract Act, 1872 to hold that the contract has become void upon the occurrence of a contingent event, while the contract was agreed to be governed by English Law.

The Supreme Court in the present case not only expressed its views on the merits and the correctness of the arbitral award, but also held that, 'The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India'. Upon perusing the judgment, it is clear that the arbitral award did not contemplate that export should be conducted without Government permission. Rather, it merely prescribed that damages should be paid for a breach of the contract. Thus, the finding on a breach of 'fundamental policy of Indian law' appears to be misplaced. Further, this finding deviates from the carefully constructed, well-settled meaning of 'fundamental policy of Indian law' laid down by the Indian Supreme Court. In the Supreme Court's judgment in *Renusagar*, it was clearly held that the award must invoke something more than merely a violation of Indian law to be refused enforcement. In *Vijay Karia*, the Supreme Court held that even violation of the Foreign Exchange Management Act, 1999 is not necessarily a violation of the fundamental policy of Indian law. Further, it re-iterated its ruling in *Renusagar*, wherein it was held that, "fundamental policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by courts'. Thus, the Supreme Court's finding in the present case, even if considered *obiter dictum*, does not comply with the meaning of fundamental policy of Indian law as set out in its previous judgments.

The Supreme Court has also missed an opportunity to interpret the other, perhaps more jarring, issues in the Award, such as the appointment of an arbitrator without the petitioner's consent, the petitioner's inability to present its case as it was disallowed legal representation before the Board, and the fact that the arbitrator

who issued the award in fact represented the respondent in an appeal before the Board. These procedural issues would perhaps create sufficient ground to refuse the enforcement of the Award under Section 7 of the Foreign Awards Act. However, the court refused enforcement on the ground of public policy and refrained from providing a substantive determination on the remaining issues.

Case details

- Court: Supreme Court of India
- Judges: Arun Mishra, MR Shah, BR Gavai JJ
- Date of judgment: 22 April 2020

XIV. Does The Selection of A “Seat” Determine A Court’s Supervisory Jurisdiction? Supreme Court’s Decision in Bgs Soma and Beyond

“

The Supreme Court:

- Held that the concept of concurrent jurisdiction stipulated in BALCO must be read holistically. When parties have chosen a seat of arbitration, or if the arbitral tribunal has determined a seat, such a determination automatically confers jurisdiction on the courts at such seat of arbitration for the purposes of interim orders and challenges to an award.
- Held that unless there are any contrary indications, the designation of a ‘venue’ in an arbitration clause can indicate the ‘seat’ of the arbitration;
- Reiterated that an appeal is permissible only under the limited grounds prescribed in the Arbitration Act.

”

A. Introduction

A three-judge bench of the Supreme Court of India (“**Supreme Court**”) in *BGS SGS SOMA JV v. NHPC Ltd.*²⁸⁵ (“**BGS Soma**”) demystified ‘paragraph 96’²⁸⁶ of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*,²⁸⁷ (“**BALCO**”), clarified the role of the ‘seat’ in an arbitration and set out the tests for determining the ‘seat’ of arbitration.

285. Civil Appeal No. 9307 OF 2019.

286. “...In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.” (emphasis supplied)

287. (2012) 9 SCC 552

Consequently, the decision of the Division Bench of the Delhi High Court in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*²⁸⁸ (“**Antrix Corporation**”) was overruled, and the law set out by the Supreme Court in *Union of India v. Hardy Exploration and Production (India) Inc.*²⁸⁹ (“**Hardy Exploration**”), which provided a contrary view, was declared as not being good law.

B. Background

The Petitioner was awarded a contract by the Respondent for constructing a large hydropower project in Assam and Arunachal Pradesh (“**Agreement**”). Clause 67.3 of the Agreement between the parties provided for dispute resolution, and the arbitration agreement stated that, “*Arbitration Proceedings shall be held at New Delhi/Faridabad, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*” (emphasis supplied).

Disputes arose between the parties and an Arbitral Tribunal was constituted. Between August 2011 and August 2016, 71 sittings of the Arbitral Tribunal took place at New Delhi. The Arbitral Tribunal delivered a unanimous arbitral award in favour of the Petitioner in Delhi on August 26, 2016 (“**Award**”). Aggrieved by the Award, the Respondent filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) seeking to set aside the Award before the Court at Faridabad.

The Petitioner filed an application seeking a return of the petition challenging the Award for presentation before the appropriate court at New Delhi and/or the District Judge at Dhemaji Assam. In 2017, the Special Commercial Court at Gurugram (“**Commercial Court**”) allowed the application of the Petitioner and returned the challenge petition before the courts in New Delhi.

Thereafter, the Respondent filed an appeal under Section 37 of the Arbitration Act read with Section 13(1) of the Commercial Courts Act, 2015 before the Punjab & Haryana High Court (“**High Court**”). The High Court passed a judgment in favour of the Respondent, where it held that the appeal filed was maintainable, and that Delhi was only a *convenient venue* where arbitral proceedings were held and not the seat of the arbitration proceedings. The High Court held that Faridabad courts would have jurisdiction on the basis of the cause of action having arisen in part in Faridabad. Aggrieved by the order of the High Court, the Petitioner filed a special leave petition before the Supreme Court.

C. Issues Before The Supreme Court

The Supreme Court had to consider the following issues: (a) Whether the appeal before the High Court under Section 37 of the Arbitration Act was maintainable?; (b) Whether the designation of a “seat” is akin to an exclusive jurisdiction clause?; and (c) What is the test to determine the “seat” of arbitration?

D. Judgment of The Supreme Court

a. Maintainability of Section 37 Appeal before the High Court:

The High Court had held that it has jurisdiction to hear the appeal as the Commercial Court’s order that the challenge petition be returned to court in New Delhi amounts to an order “*refusing to set aside an arbitral award under section 34*”.

288. 2018 SCC Online Del 9338

289. 2018 SCC Online SC 1640

The Supreme Court referred to earlier judgments²⁹⁰ and reiterated that Section 37²⁹¹ of the Arbitration Act makes it clear that appeals shall lie only pursuant to the grounds provided in sub-clauses 1(a) – (c) and from no others. Further, the Supreme Court observed that the order of the Commercial Court did not relate to a refusal to set aside an arbitral award, and merely provided that the Commercial Court does not have jurisdiction to hear challenge to the Award. Considering all these factors, the Supreme Court held that the appeal filed before the High Court was not maintainable.

b. *The Juridical Seat of Arbitration Proceedings:*

The High Court, while referring to the Supreme Court's decisions in *BALCO and Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited & Ors.*,²⁹² ("**Indus Mobile**") observed that the arbitration clause in the present case only refers to the venue of arbitration proceedings and not the seat of arbitration. On this basis, the High Court held that since a part of the cause of action arose in Faridabad, and the Faridabad Commercial Court was approached first, the Faridabad courts alone would have jurisdiction over the arbitral proceedings.

The Supreme Court held that a reading of paragraphs 75, 76, 96, 110, 116, 123 and 194 of *BALCO* shows that when parties have selected the seat of arbitration, such a selection would confer an exclusive jurisdiction clause to the courts at the seat of arbitration for the purposes of interim orders and challenges to Award.

Applying this principle, the Supreme Court concluded that:

- a. If the conflicting portion of *BALCO* is kept aside, the very fact that parties have chosen a seat would necessarily intend that the courts at the seat have exclusive jurisdiction over the entire arbitral process.
- b. The ratio in *BALCO* does not unmistakably hold that two courts have concurrent jurisdiction. This is incorrect as the subsequent paragraphs of *BALCO* clearly and unmistakably state that choosing a seat amounts to choosing the exclusive jurisdiction of the courts at which the seat is located.

The Supreme Court observed that Section 42 of the Arbitration Act²⁹³ has been inserted to avoid conflicts in jurisdiction of courts by placing the supervisory jurisdiction over all arbitral proceedings in one court exclusively. An application must be made to a Court which has the jurisdiction to decide such an application. When a seat has been designated, the courts at the seat alone would have jurisdiction and all further applications must be made to the same Court by operation of Section 42 of the Arbitration Act.

The Supreme Court also held that when a seat has not been designated by the arbitration agreement, and only a convenient venue has been designated, there may be several courts where a part of cause of action may have arisen. An application for interim relief before the commencement of arbitration under Section 9 of the Arbitration Act may then be preferred in any court where a part of the cause of action has arisen as the parties / arbitral tribunal has not determined the seat yet. In such a case, the earliest court before which an application has been made would be deemed the court having exclusive jurisdiction and all further applications must lie before this court by virtue of Section 42 of the Arbitration Act.

290. The Supreme Court relied upon the judgments in the cases of *Kandla Export Corporation & Anr. v. M/s OCI Corporation & Anr.* (2018) 14 SCC 715 and *South Delhi Municipal Corporation v. Tech Mahindra EFA (OS)* (Comm.) 3 of 2019.

291. "37. *Appealable Orders.* -

(1) *An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-*

(a) *refusing to refer the parties to arbitration under section 8;*
 (b) *granting or refusing to grant any measure under section 9;*
 (c) *setting aside or refusing to set aside an arbitral award under section 34."*

292. (2017) 7 SCC 678

293. "42. *Jurisdiction.* *Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all sequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."*

c. Tests for Determination of “Seat”

Relying upon the English Court’s decision in *Roger Shashoua & Ors. v. Mukesh Sharma*,²⁹⁴ (“**Shashoua Principle**”) the Supreme Court set out that “...wherever there is an express designation of a “venue”, and no designation of any alternative place as the “seat”, combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding.” (emphasis supplied)

The Court further held that when there is a designation of a venue for “arbitration proceedings”, the expression “arbitration proceedings” make it clear that the venue should be considered the “seat” of arbitration proceedings. Further, the expression “shall be held” at a particular venue would further anchor the arbitral proceedings to a particular place and signify that such place is the seat of arbitral proceedings.

On the contrary, language such as “tribunals are to meet or have witnesses, experts or the parties” may signify that such a place is only the “venue” of the arbitral proceedings. These factors, along with the fact that there are no other significant contrary indicia to state that the venue is merely a venue and not the seat, would show that a venue has indeed been designated the “seat” of arbitral proceedings.

The Supreme Court held that the three-judge bench in *Hardy Exploration*²⁹⁵ did not follow the *Shashoua Principle* which was confirmed by the Supreme Court in *BALCO*. Consequently, the Supreme Court declared that the law laid down in *Hardy Exploration* is not good law.

d. Application of the Tests to the Facts of the Case

Upon the facts of the case before it, the Supreme Court noted that the venue of the arbitration in the arbitration agreement had been designated as New Delhi/Faridabad. However, as there was no other contrary indication, applying the *Shashoua Principle*, the Supreme Court held that either New Delhi or Faridabad is the designated seat under the arbitration agreement. It was therefore up to the parties to choose in which place the arbitration is to be held.

The Supreme Court held that since all the arbitral proceedings were held in New Delhi and the final award was also signed in New Delhi, the parties chose New Delhi *and not Faridabad* as the “seat” of the arbitration under Section 20 of the Arbitration Act. Therefore, the courts at New Delhi would have exclusive jurisdiction over the arbitral proceedings. Even if some part of the cause of action did arise in Faridabad, it is irrelevant as the “seat” has been designated by the parties at New Delhi and exclusive jurisdiction vests in the courts of New Delhi. Accordingly, the judgment of the High Court was set aside and the Supreme Court ordered that the Section 34 petition be presented before the courts in New Delhi.

E. Further Updates

Relying upon the Supreme Court’s judgment in *BGS Soma*, the Bombay High Court²⁹⁶ has recently identified the tests to be applied while determining a seat of arbitration: (a) A stated venue is the seat of the arbitration unless there are clear indicators that the place named is a mere venue, a meeting place of convenience, and not the seat; (b) Where there is an unqualified nomination of a seat (i.e., without specifying the place as a mere venue), the courts at the seat would have exclusive jurisdiction; and (c) Where no venue/seat is named (or where it is clear that the named place is merely a place of convenience for meetings), then any other consideration of jurisdiction may arise, such as cause of action.²⁹⁷

294. [2009] EWHC 957 (Comm).

295. 2018 SCC Online SC 1640

296. *L&T Finance Ltd. v. Manoj Pathak & Ors.*, Com. Arb. Petition No. 1315 of 2019.

297. *Id.* at Paragraph 29.

Recently, a three-judge bench of the Supreme Court in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd*²⁹⁸ had to determine the seat of arbitration. Although the arbitration clause specified that “...*the place of arbitration shall be Hong Kong...*”, the clause also mentioned that “...*courts at New Delhi shall have the jurisdiction...*”²⁹⁹

The Supreme Court held that (a) the reference to courts at New Delhi do not take away or dilute the intention of the parties that the arbitration be administered in Hong Kong, and such reference appears to have been added to enable the parties to avail interim relief; (b) a mere expression of “place of arbitration” cannot be the basis to determine the intention of the parties that the “seat” of arbitration is at such place; and (c) the intention of the parties as to the “seat” of arbitration should be determined from other clauses in the agreement and the conduct of the parties. Relying upon a clause in the agreement which stated that the dispute “*shall be referred to and finally resolved by arbitration administered in Hong Kong*”, and the place of arbitration being Hong Kong, the Supreme Court held that the seat is in Hong Kong.

298. Arbitration Petition No. 32 OF 2018

299. The governing law and dispute resolution clause has been reproduced below:

“...17. *Governing Law and Dispute Resolution* 17.1 *This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.*

17.2 *Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong. The place of arbitration shall be Hong Kong. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language.*

17.3 *It is agreed that a party may seek provisional, injunctive, or equitable remedies, including but not limited to preliminary injunctive relief, from a court having jurisdiction, before, during or after the pendency of any arbitration proceeding.*

XV. The Arbitration and Conciliation Amendment Act, 2019 – A New Dawn or Sinking into A Morass?

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The Arbitration and Conciliation Amendment Act 2019 *A new dawn or sinking into a morass?*



The Indian arbitration landscape is thriving - three years and two rounds of changes, one too many for the practitioners, arbitrators and the domestic/foreign parties to cope with. The Arbitration and Conciliation (Amendment) Act 2015 ("2015 Amendment") came as a sigh of relief, trying to plug most of the loopholes to bring Indian arbitration at par with international standards. However, the same cannot be said about the next round of changes.

The Arbitration & Conciliation (Amendment) Act 2019 ("2019 Amendment") came into force with effect from 9 August 2019. The 2019 Amendment continues to retain most of the provisions of the Arbitration and Conciliation (Amendment) Bill, 2018,

("2018 Bill"), even the regressive ones. Despite the severe criticism and year long wait for the 2018 Bill to translate into amendment, the not so forward-looking provisions seem to see the light of the day, a clear anti-thesis to the very object of arbitration.

Key Take-Aways

- Arbitration Council of India

The 2018 Bill proposed the introduction of an Arbitration Council of India ("ACI") to grade arbitral institutions and arbitrators, issue guidelines, accreditation of arbitrators etc. The 2019 Amendment continues to retain them. The Justice B.N. Srikrishna Committee Report recommended the concept of ACI, with the intention to shift from ad-hoc to institutional

arbitration. The erstwhile provisions of the Arbitration and Conciliation Act 1996 ("Act") vested the Supreme Court and High Court with powers to appoint arbitrators under Section 11. This power was broadened in 2015, to include individuals or institutions being designated by the Supreme Court or High Court as the case maybe, for appointment of arbitrators, a move to encourage institutional arbitration. The 2019 Amendment now states that courts may designate institutions for appointment of arbitrators as graded and accredited by the ACI.¹ The ACI has been entrusted with grading of arbitral institutions basis criteria relating to infrastructure, quality and caliber of arbitrators, performance and compliance of time-limits for disposal of domestic or international commercial arbitrations.² The members who may be part of the ACI are enlisted in Section 43C of the 2019 Amendment.³ This is where the root of the problem lies. A closer look at the constitution is a clear signal how the body intends to regulate the arbitration process in India, with greater government control and interference but no clarity on mode of grading, implementation and effectiveness.

- Qualifications of Arbitrators

Party autonomy is one of the basic tenets of arbitration. Introduction of this provision is another handcuff for parties to select arbitrators. The minimum qualifications, experience and guidelines for accreditation of arbitrators is specified in the Eighth Schedule.⁴ The new amendments have faced one of the biggest criticisms, owing, amongst other reasons, to

¹Section 11 (3A) of the 2019 Amendment

²Section 43I of 2019 Amendment

³(a) A person, who has been, a Judge of the Supreme Court or, Chief Justice of a High Court or, a Judge of a High Court or an eminent person, having special knowledge and experience in the conduct or administration of arbitration, to be appointed by the Central Government in consultation with the Chief Justice of India–Chairperson; (b) An eminent arbitration practitioner having substantial knowledge and experience in institutional arbitration, both domestic and international, to be nominated by the Central Government–Member; (c) An eminent academican having experience in research and teaching in the field of arbitration and alternative dispute resolution laws, to be appointed by the Central Government in consultation with the Chairperson–Member; (d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary–Member, ex officio; (e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary– Member, ex officio; (f) One representative of a recognized body of commerce and industry, chosen on rotational basis by the Central Government–Part-time Member; (g) Chief Executive Officer–Member–Secretary, ex-officio.

foreign legal professionals not being eligible to acts as arbitrators. This disincentivizes foreign parties to have their arbitrations seated in India as arbitrators of their choice can no longer be appointed. The international arbitration community would no longer be keen to have arbitrations seated in India.

- Timelines

India being infamous for the long delays in litigation and arbitration, the 12-month time-frame (with 6 months extension by consent of parties) came as a breath of fresh air to the arbitration fraternity in India. Just when, all concerned parties were getting used to the strict time-frame and making endeavors to abide by it, the 2019 Amendment has extended it by initiating the 12-month time-frame, to post completing of the pleadings. Completion of pleadings can take long with no definite time-frame and could delay the arbitration indefinitely, rather than aiding the process, it could lead to considerable delays. International commercial arbitration has been excluded from the ambit of time-lines with a proviso to complete it expeditiously and endeavor to finish within 12 months of completion of pleadings. Both these changes have invited harsh criticism. There was no requirement to leave international commercial arbitration out but rather, a simple change, that of leaving out institutional arbitration, i.e. leaving institutions to decide the time-frame, would have possibly been more appropriate.

- Confidentiality

It has been considered an innate advantage of arbitrations and one of the reasons for selecting this mode to resolve disputes. But the arbitration community has questioned at times is there even a need for it. Parties

can decide if they wish to keep the proceedings confidential. There was no express provision on confidentiality in the Indian statute earlier. The 2019 Amendment has included a blanket provision on confidentiality encompassing the entire arbitral proceedings except for awards where disclosure is necessary for its enforcement. Certain scenarios where disclosure may be necessary have not been taken into consideration and the exceptions suggested by the Committee have been ignored. An absolute confidentiality provision has been inserted, which will go down as an additional flaw.

- Applicability

The applicability of the 2015 amendments gave rise to a series of conflicting decisions across High Courts. The Supreme Court ruling tried to settle the issue in the Kochi decision⁵. The 2018 Bill overturned the Supreme Court ruling. Several changes were proposed and drafts with suggestions sent to the Ministry to address them to prevent the overturn, but all seem to have fallen on deaf ears. The 2019 amendment has deleted Section 26 from the Act, with an intent for the 2015 amendments to be applicable only to arbitral proceedings commenced on or post 23 October 2015 and court proceedings which emanate from such arbitral proceedings. A change yet again on the applicability is moving towards chaos and uncertainty.

The 2019 Amendments have been recently notified except for the provisions related to the constitution of the Arbitration Council of India. Interestingly, the issue on applicability of 2019 Amendments itself will, in all likelihood, be litigated just as the Supreme Court ruling. However, the issue on applicability of 2019 amendments itself will have to be

clarified. There are one too many complexities and faulty drafting that has led to this complicated arbitration regime, one can only hope that good sense will prevail, and the Supreme Court of India will step in to bring some much-needed clarity.



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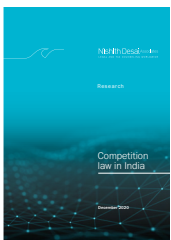


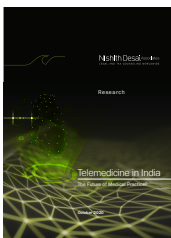

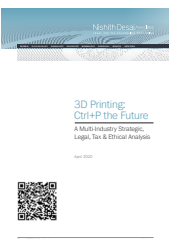



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⁵Eight Schedule: A person shall not be qualified to be an arbitrator unless he: (A) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an Advocate; or (B) is a chartered accountant within the meaning of Chartered Accountants Act, 1949 having ten years of practice experience as a chartered accountant; or (C) is a cost accountant within the meaning of the Cost and Works Accountants Act, 1959 having ten years of experience as a cost accountant; or (D) is a company secretary within the meaning of the Companies Secretaries Act, 1980 having ten years of practice experience as a company secretary; or (E) has been an officer of the Indian Legal Service or (F) has been an officer with law degree having ten years of experience in the legal matters in the government, autonomous body, public sector undertaking or at a senior managerial position in private sector; or (G) has been an officer with engineering degree having ten years of experience as an engineer in the government, autonomous body, public sector undertaking or at a senior level managerial position in a private sector or self-employed; or (H) has been an officer having senior level experience of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute; (I) is a person, in any other case, having educational qualification at degree level with ten years of experience in scientific or technical stream in the fields of telecom, information technology, intellectual property rights or other specialized areas in the Government, Autonomous Body, Public Sector Undertaking, or a senior level managerial position in a private sector as the case may be.

⁶Board of Cricket Control of India v. Kochi Cricket Private Limited Civil Appeal No. 2879-2880 of 2018

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Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparalleled mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com

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