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Research

International Commercial Arbitration

Law and Recent Developments in India

August 2022

SIAC
Singapore International Arbitration Centre

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About NDA

We are an India Centric Global law firm (www.nishithdesai.com) with four offices in India and the only law firm with license to practice Indian law from our Munich, Singapore, Palo Alto and New York offices. We are a firm of specialists and the go-to firm for companies that want to conduct business in India, navigate its complex business regulations and grow. Over 70% of our clients are foreign multinationals and over 84.5% are repeat clients. Our reputation is well regarded for handling complex high value transactions and cross border litigation; that prestige extends to engaging and mentoring the start-up community that we passionately support and encourage. We also enjoy global recognition for our research with an ability to anticipate and address challenges from a strategic, legal and tax perspective in an integrated way. In fact, the framework and standards for the Asset Management industry within India was pioneered by us in the early 1990s, and we continue remain respected industry experts. We are a research based law firm and have just set up a first-of-its kind IOT-driven Blue Sky Thinking & Research Campus named Imaginarium AliGunjan (near Mumbai, India), dedicated to exploring the future of law & society. We are consistently ranked at the top as Asia's most innovative law practice by Financial Times. NDA is renowned for its advanced predictive legal practice and constantly conducts original research into emerging areas of the law such as Blockchain, Artificial Intelligence, Designer Babies, Flying Cars, Autonomous vehicles, IOT, AI & Robotics, Medical Devices, Genetic Engineering amongst others and enjoy high credibility in respect of our independent research and assist number of ministries in their policy and regulatory work. The safety and security of our client's information and confidentiality is of paramount importance to us. To this end, we are hugely invested in the latest security systems and technology of military grade. We are a socially conscious law firm and do extensive pro-bono and public policy work. We have significant diversity with female employees in the range of about 49% and many in leadership positions.

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About SIAC

www.siac.org.sg

Since commencing operations in 1991 as an independent, not-for- profit organisation, the Singapore International Arbitration Centre (SIAC) has established a track record for providing best in class arbitration services to the global business community. SIAC arbitration awards have been enforced in many jurisdictions including Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA and Vietnam, amongst other New York Convention signatories.

SIAC is a global arbitral institution providing cost-competitive and efficient case management services to parties all over the world.

SIAC's Board of Directors and its Court of Arbitration consists of eminent lawyers and professionals from all over the world.

The Board is responsible for overseeing SIAC's operations, business strategy and development, as well as corporate governance matters.

The Court's main functions include the appointment of arbitrators, as well as overall supervision of case administration at SIAC. SIAC has an experienced international panel of over 500 expert arbitrators from over 40 jurisdictions. Appointments are made on the basis of our specialist knowledge of an arbitrator's expertise, experience, and track record. SIAC's panel has over 100 experienced arbitrators in the areas of Energy, Engineering, Procurement and Construction from more than 25 jurisdictions.

The SIAC Rules provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures.

SIAC's full-time staff manage all the financial aspects of the arbitration, including:

- Regular rendering of accounts
- Collecting deposits towards the costs of arbitration
- Processing the Tribunal's fees and expenses

SIAC supervises and monitors the progress of the case. SIAC's scrutiny process enhances the enforceability of awards. SIAC's administration fees are highly competitive.

SIAC established its first overseas liaison office in Mumbai, India in 2013 (the Indian office) in recognition of the significant role played by India towards SIAC's success over the years as an international arbitral institution. This was followed later that year with the opening of a second overseas liaison office at the International Dispute Resolution Centre in Seoul, South Korea. In March 2016, SIAC opened an office in the Free Trade Zone in Shanghai, China, followed by a second representative office in India in GIFT, Gujarat, in 2017. Recently, in 2020, SIAC opened its fifth overseas representative office in New York, USA.

The Indian office is the embodiment of SIAC's commitment to develop a greater awareness and consciousness of international arbitration in India. The Head of South Asia at SIAC is based and operates out of the Indian office and leads its business development initiatives in the region as well as oversees operations.

The primary objectives of the liaison offices are the dissemination of practical information on arbitration at SIAC and in Singapore; to promote the use of institutional arbitration; to create a line of communication for SIAC and the community in Singapore with key players in international arbitration; to obtain feedback on SIAC's services as an arbitral institution; and to exchange ideas on local "hot topics" and issues in international arbitration.

The physical presence of SIAC in India, South Korea, China and the Americas has proved immensely beneficial over the past couple of years, with users and the legal community reaching out to further understand the benefits of arbitration under the SIAC Rules. As a result, SIAC interacts closely with companies and the legal community in India, South Korea, China and the Americas thereby strengthening ties with its current and potential users.

I. SIAC Facilitates the Efficient Resolution of Your Dispute

- The SIAC Rules provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures
- We appoint arbitrators where parties are unable to agree under the SIAC Rules, UNCITRAL Rules and ad hoc cases. Appointments are made on the basis of our specialist knowledge of an arbitrator's expertise, experience and track record
- There are strict standards of admission for SIAC's Panel of Arbitrators, thus minimising the risk of challenges and delays
- Transparent financial management of the case according to published guidelines allows legal representatives to provide their clients with accurate cost projections, timelines and costs for each stage of the arbitration process
- We supervise and monitor the progress of the case. We conduct scrutiny of the arbitral award, thus enforcement issues are less likely
- SIAC's administration fees are competitive in comparison with all the major international arbitral institutions

II. Flexible, Effective and User-friendly Procedures

- The SIAC Arbitration Rules 2016, which came into effect on 1 August 2016, introduced a number of market-leading innovations, as well as new procedures to save time and costs, including:
  - a new procedure for the early dismissal of claims and defences (the first of its kind amongst major institutional rules for commercial arbitration)
  - new provisions to deal with disputes involving multiple parties, multiple contracts, consolidation and joinder of additional parties
  - enhancements to SIAC's emergency arbitrator and expedited arbitration special procedures (both of which were first introduced in July 2010)

III. SIAC Model Clause

In drawing up international contracts, we recommend that parties include the following arbitration clause:

> *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("*SIAC*") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("*SIAC Rules*") for the time being in force, which rules are deemed to be incorporated by reference in this clause.*

The seat of the arbitration shall be [Singapore].*

*If the parties wish to select an alternative seat to Singapore, please replace "[**Singapore]**" with the city and country of choice (e.g., "[**City, Country**]").

The Tribunal shall consist of _____ (1 or 3) arbitrator(s).

The language of the arbitration shall be _____.

Applicable Law

The applicable law clause should be drafted under legal advice. The following is a simple model clause:

*This contract is governed by the laws of _____**.*

** State the country or jurisdiction

IV. Contacts

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1. Introduction

An increase in international trade and investment is accompanied by growth in cross-border commercial disputes. International arbitration has emerged as the preferred option for efficiently resolving such cross-border commercial disputes and preserving business relationships. With open-ended economic policies acting as a catalyst, there has been an influx of foreign investments and an increase in cross-border transactions involving Indian parties. Consequently, international commercial disputes involving Indian parties are also steadily rising. This has drawn tremendous focus of the international community on India's international arbitration regime.

Due to certain contentious decisions by the Indian judiciary in the last three decades, particularly in cases involving a foreign party, the Indian judiciary was criticized for its interfering approach and extraterritorial application of domestic laws in foreign seated arbitrations. However, the developments over the last decade in the arbitration jurisprudence reflect a complete renewed approach in line with the international best practices. We have witnessed a series of pro-arbitration rulings by the Supreme Court of India (**"Supreme Court"**) and High Courts, which have significantly changed the arbitration landscape in India. From 2012 to 2022, the Supreme Court has delivered various landmark rulings such as declaring the Indian arbitration law as seat-centric; referring non-signatories to an arbitration agreement to settle disputes through arbitration; giving recognition to orders of emergency arbitrator; narrowing down the scope of public policy objection in context of domestic and foreign-seated arbitration; and clarifying the various nuances of the arbitrability of disputes.

The Indian legislature and the executive have also taken measures to bolster the *'ease of doing business in India'* and to clearly reflect a pro-arbitration policy. The Arbitration and Conciliation (Amendment) Act, 2015 (**"2015 Amendment Act"**) came into effect from October 23, 2015. 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 (**"Committee"**). After considering the Committee's recommendations (**"Committee Report"**), the Arbitration and Conciliation (Amendment) Act, 2019 was enacted on August 9, 2019 (**"2019 Amendment Act"**). On August 30, 2019, the Central Government notified Sections 1, 4–9, 11–13, 15 of the 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 arbitrations. However, certain provisions on the 2019 Amendment Act were criticised including the proposal to constitute an Arbitration Council of India and the provision to limit the applicability of the 2015 Amendment Act.[1] In way such criticism, lead to the enactment of only a limited set of provisions of the 2019 Amendment Act.

The ever-evolving arbitration regime in India witnessed its latest amendments in the year 2020. On November 4, 2020, the Arbitration and Conciliation (Amendment) Ordinance, 2020 (**"2020 Ordinance"**) was promulgated to further amend the Arbitration and Conciliation Act, 1996 (**"Act"**).[2] Subsequently, the 2020 ordinance took shape of the Arbitration and Conciliation (Amendment) Act, 2021 (**"2021 Amendment Act"**).

The legislature has continuously endeavoured to improve the arbitration landscape. Though occasionally hidden within the amendments were certain red herrings that have hampered the clear run of India towards being recognised without demur as a leading arbitration friendly jurisdiction.

1. For eg. - Vyapak Desai & Ashish Kabra, The Age of Orwellian Arbitration, Arbitration & Conciliation (Amendment) Bill, 2019, 18 July 2019, https://www.barandbench.com/columns/age-of-orwellian-arbitration-arbitration-conciliation-amendment-bill-2019

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

2. Indian Arbitration Regime

I. History of Arbitration in India

Before the enactment of the Act, the law governing arbitration in India consisted 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. The 1961 Act and the 1937 Act dealt with the enforcement of foreign awards and effected 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"**) respectively.

II. Background to the Arbitration and Conciliation Act, 1996

To address the concerns with then prevailing arbitration law and to ensure that arbitration is a cost-effective and time-efficient mechanism for the settlement of commercial disputes, in 1996, the parliament adopted a new legislation based on the "Model Law"[3] in the form of the Act.

III. Scheme of the Act

The objective of the Act is to provide a speedy and cost-effective dispute resolution mechanism that would give parties finality in their disputes. The Act comprises of three parts. Part I of the Act deals with (a) domestic arbitrations and (b) International Commercial Arbitrations (**"ICA"**) seated in India. For the purposes of Part 1 of the Act, an ICA is an arbitration where at least one of the parties is a foreign party.[4] Part II of the Act deals only with foreign awards[5] and their enforcement under the **New York Convention** and **Geneva Convention**. Part III of the Act contain provisions pertaining to conciliation.

In Part I of the Act, Section 8 ensures the adherence to arbitration agreements; Sections 3 to 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.[6] 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 have the autonomy to opt out of or derogate from. The other chapters of Part I of the Act contain non-derogable provisions that parties cannot contract out of.

3. UNCITRAL Model Law on International Commercial Arbitration (1985)
4. The term 'foreign party' is used for ease of understanding. The term International Commercial Arbitration is defined under Section 2(1)(f) of the Act.
5. A foreign award is award delivered in an arbitration seated outside India.
6. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc., 2012 (9) SCC 552.

Part II, contains provisions on referring parties to foreign seated arbitration and recognition /enforcement of a foreign award, and no provisions under the same can be derogated from by a contract between two parties.[7]

IV. Arbitration and Conciliation (Amendment) Act, 2015

The 2015 Amendment Act made significant changes to the Act and was a step in the right direction. Below is a snapshot of the major amendments made by the 2015 Amendment Act:

A. Pre-arbitral Proceedings

i. Independence and Impartiality

- Courts should endeavor to dispose applications for the appointment of an arbitrator within sixty (60) days from the date of service of notice on the opposite party.
- Drawing from the International Bar Association (**"IBA"**) Guidelines on Conflicts of Interest in International Arbitration, a detailed schedule on the ineligibility of arbitrators was introduced.

ii. Interim Reliefs

- Permitted parties to approach Indian courts for interim relief in aid of foreign seated arbitrations.
- Application for interim relief to be made directly before the High Court in case of ICAs seated in India and foreign seated arbitration.
- Deemed interim orders of the arbitral tribunal seated in India under Section 17 as the orders of the court and, thus, made enforceable in the new regime.
- Introduced court-subsidiarity model for interim reliefs i.e. ability to approach the court for interim relief is limited to circumstances where seeking interim relief from the tribunal would not be efficacious.
- Post the grant of interim relief by the court, required arbitration proceedings to commence within 90 days or any further time as determined by the court.

B. Arbitral Proceedings

i. Expeditious Disposal

- Introduced a twelve-month timeline for completion of arbitrations seated in India.[8]
- Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within six months.

7. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc., 2012 (9) SCC 552.
8. 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 time limit for filing the statements of claim and defense were prescribed to be six months from the date all members of the arbitral tribunal receive notice of their appointment.

ii. Costs

- Statutory recognition and introduction of the "Costs follow the event" regime.
- Detailed provision has been inserted for the determination of costs in arbitration seated in India.

C. Post-Arbitral Proceedings

i. Challenge and Enforcement

- In the case of an ICA seated in India:
  - the grounds for setting aside an arbitral have been narrowed down.
  - the petition for setting aside an award under Section 34 to be filed directly before the High Court.
- Petition for setting aside an award 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.
- Removed automatic stay on the execution of the award upon mere filing of a petition for setting aside an award under Section 34 of the Act. Stay on enforcement of the award requires a separate order from the Court.

V. Arbitration and Conciliation (Amendment) Act, 2019

As discussed above, the 2019 Amendment Act was passed with a view to promote institutional arbitration in India and included several critical changes. On August 30, 2019, the Central Government notified Sections 1, 4 –9, 11–13 and 15 of the 2019 Amendment Act. Certain provisions, in particular those relating to the proposed Arbitration Council of India have not been notified. The following are the important amendments made through the 2019 Amendment Act:

i. **Arbitration Council of India (ACI) :** Introduced provisions for establishing the Arbitration Council of India that would grade arbitral institutions, recognize professional institutes that provide accreditation to arbitrators, issue recommendations and guidelines for arbitral institutions, and take steps to make India a center of domestic and international arbitrations. However, this amendment has not been notified yet.

ii. **ACI Accredited Arbitral Institutions:** Amends the provisions of the 2015 Amendment Act by providing the Supreme Court and the High Court with the ability to designate arbitral institutions that have been accredited by the Arbitration Council of India with the power to appoint arbitrators. This amendment has also not been notified yet.

iii. **Time Limits:** 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.

iv. Excluded *'international commercial arbitration'* from this time-limit to complete arbitration.

v. **Confidentiality and Arbitrator Immunity:** Introduced express provisions on confidentiality of arbitration proceedings and immunity of arbitrators.

vi. **Arbitrator Qualifications:** Prescribed minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule. However, as discussed later in this paper, the Eighth Schedule was deleted by the 2021 Amendment Act.

vii. **Applicability of the 2015 Amendment Act:** The 2019 Amendment Act also attempted to clarify the applicability of the 2015 Amendment Act. The 2019 Amendment Act inserted Section 87 into the Act that provided that the 2015 Amendment Act, which entered into force on 23 October 2015, applies only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings that commenced after 23 October 2015. However, the Supreme Court has struck down Section 87 of the Act. The entire saga on the applicability of the 2015 Amendment Act including the current legal position is discussed below.

In 2018, the Supreme Court dealt with the issue of retrospective applicability of the 2015 Amendment Act. Section 26 of the 2015 Amendment Act stated 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 *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*,[9] (**"BCCI"**) the Supreme Court made a clear distinction between the two aspects of Section 26 of the 2015 Amendment Act viz. (a) arbitral proceedings before the arbitral tribunal and (b) court proceedings that relate to the arbitral proceedings. The Supreme Court 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 removed the automatic stay on the execution of the arbitral award on the filing of a petition for setting aside, applies retrospectively as it is procedural in nature.

Later, the 2019 Amendment Act introduced Section 87, which provided that the 2015 Amendment Act 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.

Putting an end to this ambiguity, the Supreme Court in *Hindustan Construction Company Ltd. v. Union of India* struck down Section 87 of the Act as being unconstitutional.Thus, the position laid down by the Supreme Court in *BCCI* has been reinstated. Additionally, the Supreme Court in *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff*,[10] has further clarified that a contractual clause that seeks to apply the 2015 Amendment Act retrospectively would be invalid in law for the reason that a general agreement cannot override the mandate of parliamentary legislation.

9. (2018) 6 SCC 287.

10. 2021 SCC OnLine SC 1032.

VI. Arbitration and Conciliation (Amendment) Act, 2020

The Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated on November 4, 2020, further amending the Act.[11] This ordinance introduced two amendments:

- 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;
- Deleted 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, 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.[12]

The 2020 Ordinance subsequently took shape of the 2021 Amendment Act.

11. Arbitration and Conciliation (Amendment) Ordinance, 2020 (No. 14 of 2020).
12. 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,[13] 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 its seat in India, involving a foreign party is regarded as an ICA. All arbitrations seated in India including ICAs are subject to Part I of the Act. However, where an arbitration is seated outside India, Part I of the Act would not apply, except Sections 9, 27 and 37, unless the parties have agreed to exclude the applicability of these sections.

Prior to the 2015 Amendment Act, a literal interpretation of Section 2(1)(f)(iii) would yield that even if a company had its place of incorporation as India, an arbitration could still qualify as an ICA if the central management and control of the company was outside India. However, in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*,[14] (**"TDM Infrastructure"**) despite TDM Infrastructure Pvt. Ltd. having foreign control, the Supreme Court concluded that *"a company incorporated in India can only have Indian nationality for the purpose of the Act"*. Thus, though the Act then recognized that arbitration involving companies with management and control outside India as an ICA, the Supreme Court still treated such arbitration involving foreign controlled but Indian incorporated company as domestic arbitration. The 2015 Amendment Act deleted the words *'a company'* from the Section 2(1)(f)(iii) thereby restricting the scope therein to only body of individuals or an association. Therefore, the current position is that if a company has its place of incorporation as India, then the place of central management and control of the company is irrelevant for the determination of the status of the arbitration.

In a recent case, where an Indian company was the lead partner in a Mumbai-based consortium (which also included foreign companies) and was the determining voice in appointing the chairman, the Supreme Court held that the central management and control was in India.[15]

13. '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).
14. (2008) 14 SCC 271.
15. 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 arbitration 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.*,[16] 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 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*,[17] 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, the arbitrator 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*[18], *held that the N. Radhakrishnan case did not lay down the correct law.* Subsequently, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,[19] the court 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.*[20] clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In *A Ayyasamy*, the Supreme Court noted that the decision in *Swiss Timing* did not overrule *Radhakrishnan* and held that: (a) allegations of fraud are arbitrable unless they are serious and complex in nature; and (b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud. 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.[21]

16. (2011) 5 SCC 532.
17. (2010) 1 SCC 72.
18. (2014) 6 SCC 677.
19. AIR 2014 SC 968.
20. (2016) 10 SCC 386.
21. Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr., (2018) 15 SCC 678.

4. Arbitrability Under Indian Law

In *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors.*,[22] the Delhi HC observed that its earlier decision in *Sudhir Gopi v. Indira Gandhi National Open University*[23] *was 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 ins tances which cannot be referred to arbitration. The court held that issues of alter ego can be decided by arbitral tribunal.

Thereafter, in *Rashid Raza v. Sadaf Akhtar*,[24] 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:

> *"(1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or*
>
> *(2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain"*[25]

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 cannot be referred to arbitration.[26]

In *Suresh Shah v. Hipad Technology India Pvt. Ltd.*,[27] disputes arose under a sub-lease agreement containing an arbitration clause. An application for appointment of arbitrator under Section 11 of the Act 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. 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*,[28] 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;

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).

22. 2017 SCC Online Del 11625.
23. 2017 SCC OnLine Del 8345.
24. Civil Appeal No. 7005 of 2019.
25. Page 4, Civil Appeal no. 7005 of 2019.
26. (2016) 8 SCC 788.
27. 2020 SCC OnLine SC 1038.
28. Civil Appeal No. 2402 of 2019.

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"**).[29] 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 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*,[30] in respect of voidable agreements and void agreements. The Supreme Court noted that disputes involving an allegation of fraud, misrepresentation, etc.,[31] 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. In *Avitel Post Studioz Limited v HSBC Pi Holding (Mauritius)*,[32] the Supreme Court harmonized existing jurisprudence on the arbitrability of fraud and held that "serious allegations of fraud" leading to non-arbitrability would arise only when: (a) the arbitration agreement ceases to exist due to it being vitiated by fraud; (b) where allegations are made against the State or its instrumentalities, relating to arbitrary, fraudulent, or *mala fide* conduct, giving rise to question of public law as opposed to questions pertaining to private and contractual relationship between parties. Hence, all cases of fraud except ones that involve "serious allegations" shall be arbitrable.

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.

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

30. (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 Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., Civil Appeal No. 5145 of 2016, and hence possesses precedential value.

31. 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.

32. Avitel Post Studioz Limited v HSBC Pi Holding (Mauritius) (2021) 4 SCC 713

5. International Commercial Arbitration with Seat in India

The law applicable to ICA when the seat of arbitration is in India is discussed below.

I. Notice of Arbitration

Under Section 21 arbitration commences when the notice of arbitration that requests for that dispute to be referred to arbitration is received by the opposite party (**"Notice of 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.

Commencement of Arbitration & the 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 on or after October 23, 2015, the provisions of the Act as amended by the 2015 Amendment Act is applicable.

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.

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.[33] However, it has been 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.[34]

Recently, the Supreme Court in *Indus Biotech Pvt. Ltd v. Kotak India Venture*,[35] held that a Section 8 application under the Act would not be maintainable when an application under Section 7 of the Insolvency and Bankruptcy Code 2016 (**"IBC"**) is admitted, on the premise that the dispute becomes non-arbitrable upon its admission and it would create a third-party interest, and will have an *erga omnes* effect. It further held that even when a Section 8 application under the IBC is filed prior to admission of Section 7 application of IBC, the adjudicating authority must first decide the application under Section 7 of IBC.

33. M/s. Caravel Shipping Services Pvt. Ltd. v. M/s. Premier Sea Foods Exim Pvt. Ltd., 2018 SCC OnLine SC 2417.
34. Parasramka Holding Pvt. Ltd. & Ors. v. Ambience Pvt. Ltd. & Anr., 2018 SCC OnLine Del 6573.
35. Indus Biotech Pvt. Ltd v. Kotak India Venture , 2021 6 SCC 436.

Clarification introduced through the 2015 Amendment Act

The 2015 Amendment Act introduced express words in Section 8 clarifying that at the stage of determining whether to refer the parties to arbitration, the court only makes a prima facie determination on the existence of the arbitration agreement. In this regard, an arbitration agreement has been considered to be valid if there is merely the incorporation of another 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 parties[38] 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 inserted the phrase "claiming trough or under him" to Section 8 of the Act to expand the scope of who can apply to initiate arbitration proceedings. This was also utilized to bind both the signatory as well as the non-signatory parties when there is a clear intention.[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. Further, the Delhi High Court in an Indian seated arbitration in *Shapoorji Pallonji and Co. v. Rattan India Power Ltd.*[45], held that a non-signatory which is directly involved in the negotiations and execution of the contract as well as a party which is a direct beneficiary of the contract can be compelled to arbitrate. Additionally, the Court also recognized the principle of *alter ego* to hold that the if the signatory is an *alter ego* of the non-signatory or *vice versa*, then in that case as well, the non-signatory can be compelled to arbitrate.

In *Cox & Kings Ltd. v SAP India Pvt. Ltd. & Anr.*,[46] the Supreme Court expressed dissatisfaction with the way the "Group of Companies Doctrine" (**"Doctrine"**) had been interpreted by *Chloro Controls* and subsequent judgments to bind non-signatory parties to arbitration, and concluded that the Doctrine should be contoured in a consistent manner by a larger bench. The concerns of the Supreme Court were couched in issues relating to grounds of establishing a legal relationship between the signatory and non-signatory: whether common intent could be a sufficient ground to invoke the Doctrine,[47] whether the doctrines of "single economic reality" and "alter ego/corporate veil" could be used to bind a third party,[48] and whether the words "claiming through or under" in Section 8 of the Act are broad enough to cover the doctrine. The Court held that since *Chloro Controls* laid down the subjective intention of the parties as the

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 Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
41. M/s SEI Adhavan Power Pvt. Ltd. v. M/s Jinneng Clean Energy Technology Ltd., (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 Ltd. & Anr. v. Aftab Singh, 2017 SCC OnLine Del 11437.
45. Shapoorji Pallonji and Co. Pvt. Ltd. vs. Rattan India Power Ltd. and Ors. 2021 SCC OnLine Del 3688
46. Cox & Kings Ltd. v SAP India Pvt. Ltd. & Anr., 2022 SCC OnLine SC 570
47. Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
48. Mahanagar Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767

basis of invoking the Doctrine resulting in it being interpreted broadly, the same should be relooked as it goes against the distinct legal identities of companies and party autonomy. The Court also stated that the doctrine was utilized on the basis of economic and convenience factors rather than being guided by a set standard of principles. The following questions were framed by J. NV Ramana and J. AS Bopanna to be referred to a larger bench:

- Whether the phrase "claiming through or under" in Section 8 of the Act could be interpreted to include the Doctrine?
- Whether the Doctrine as expounded by Chloro Controls Case and subsequent judgments are valid in law?

J. Surya Kant, in a separate but concurring judgment, formulated the following questions to be referred to a larger bench:

- Whether the Doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision?
- Whether the Doctrine should continue to be invoked on the basis of the principle of 'single economic reality'?
- Whether the Doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?
- Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the into operation even in the absence of implied consent?

III. Interim Reliefs

Under the Act, parties to an arbitration agreement 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 (in case of domestic awards), apply to a court for seeking interim measures and protections, including interim injunctions, under Section 9 of the Act. However, courts have held that an application under Section 9 can only be filed by a successful party after the award is made.[49]

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.*[50] Moreover, in *Medima LLC v. Balasore Alloys Ltd.*[51] the Calcutta High Court held that merely because the underlying agreement is governed by a foreign law, it would not mean that the parties intended to exclude the applicability of Section 9 to such arbitration. Parties can exclude the applicability of Section 9 of the Act to a foreign seated arbitration only by way of an agreement.

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 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.

49. Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited, 2013 (7) Bom.C.R 493; Tecnimont Private Limited & Anr. vs Ongc Petro Additions Limited, 2020 SCC OnLine Del 653.
50. Big Charter Pvt. Ltd. v. Ezen Aviation Pty Ltd., MANU/DE/1916/2020.
51. AP/267/2021

Court-Subsidiarity Model introduced through the 2015 Amendment Act

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

1. 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. However, if the court has already entertained the application and applied its mind to it, the bar under Section 9(3) would not apply and the court would continue to hear the application and make the order, even if the tribunal has been constituted in the meantime.[52]

2. 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.

3. Interim measures under Section 9 can be granted by courts against third parties as well, in certain circumstances.[53]

4. Interim relief is only available against the "fruits" of the arbitral award.[54]

B. Interim Reliefs Under Section 17

Section 17 has been amended to provide an arbitral tribunal with the same powers as a *'civil court'* in relation to the grant of interim measures. 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).

In *Indo Pacific Software & Entertainment Ltd. v. Nagpur Improvement Trust & Anr.*,[55] the Bombay HC held that Section 17 contemplates only interim order of "protection". Such measures aim to preserve the prevailing situation and keep property available to answer final adjudication as and when final award in passed by the arbitral tribunal.

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

52. Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd. 2021 SCC OnLine SC 797.

53. 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.

54. Zostel Hospitality Pvt. Ltd. Oravel Atays Private Ltd., OMP (I) (COMM›) 290/2021.

55. Indo Pacific Software & Entertainment Ltd. v. Nagpur Improvement Trust & Anr., (2011) Bom CR 870.

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. Emergency Arbitration

The Supreme Court in a landmark decision in *Amazon.com Investment Holdings LLC v. Future Retails Ltd*[56], upheld the validity of emergency arbitration seated in India, and ruled that the order passed by an emergency arbitrator has the same effect as an order passed by an arbitral tribunal under Section 17 of the Act. The Supreme Court, placing reliance on the 246th Law Commission Report and Srikrishna Report, noted that there is no embargo against an emergency arbitrator being appointed under the Act. The autonomy conferred on the parties to agree to arbitral institutional rules implies that parties have a right to make use of the emergency arbitration provisions in the institutional rules chosen by the parties. By virtue of Section 2(6), Section 2(8), and Section 19(2) of the Act, parties can (a) agree to authorize an arbitral institution to determine issues that arise between the parties, (b) agree to include any arbitration rules in their arbitration agreement, and (c) agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings. Therefore, an order passed by an emergency arbitrator in an Indian seated arbitration is not only valid under the Act but also akin to an order passed by an arbitral tribunal once properly constituted.

D. 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 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.[57] 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.[58]

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,

1. Existence of a prima facie case,
2. Balance of convenience,
3. Possibility of irreparable loss or prejudice, were interim relief not to be granted,
4. Consideration of public interest,
5. Emergent necessity of ordering interim measures,

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56. Amazon.com Investment Holdings LLC v. Future Retails Ltd, (2022) 1 SCC 209. Please also see: https://www.nishithdesai.com/SectionCategory/33/Dispute-Resolution-Hotline/12/57/DisputeResolutionHotline/4799/1.html
57. Gary B. Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2014) 2424 – 2563.
58. 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.

6. When the applicant manifestly intends to initiate arbitral proceedings.[59]

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"*.[60]

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.[61] 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.[62] However, if the parties have entered into an agreement with a particular mechanism for appointment of arbitrator, it is not open to ignore it and invoke the exercise of powers in Section 11(6) of the Act.[63]

The Supreme Court/High Court can authorize any person or institution to appoint an arbitrator.[64] 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 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. 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. 2015 Amendment Act addressed this delay by introducing a timeline.

The 2015 Amendment Act also limited the scope of inquiry by the Supreme Court in an India-seated ICA and the High Courts in domestic arbitrations while appointing an arbitrator and prescribed that the Court can examine only the existence of an arbitration agreement at the time of making such appointment.[65]

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.[66] The question of arbitrability of the issue would be decided by the arbitral tribunal and not the courts.

For example, notwithstanding the complexity of the issue of novation of the underlying contract which would involve appreciation of the evidence, the Supreme Court has held that the same shall only be decided by the arbitral tribunal.[67] Similarly, the arbitrability of a dispute falling within the realm of the Rent Control Act, while non-arbitrable, must only be decided by the arbitral tribunal under Section 16 of the Act.[68]

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59. O.M.P.(I) (COMM.) 177/2020 & I.As. 5463-65/2020, I.As. 5664-67/2020.
60. http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf.
61. Section 11(3) of the Act.
62. Section 11(6) of the Act.
63. CG Tollway v. NHAI, 2021 SCC OnLine Del 4838.
64. Section 11(6)(b) of the Act.
65. Section 11 (6)(a) of the Act.
66. Picasso Digital Media Pvt. Ltd. v. Pick-A-Cent Consultancy Service Pvt. Ltd., 2016 SCC Online Del 5581.
67. Sanjiv Prakash v. Seema Kukreja, MANU/SC/0238/2021; SPML Infra Ltd v. NTPC Ltd, MANU/DE/0664/2021.
68. Tulsi Developers India Pvt. Ltd. v. Appu Benny Thomas, Ar. No. 105 of 2020.

5. International Commercial Arbitration with Seat in India

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 amendment 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.[69] 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.[70] While the Court concurred with the finding in *Vidya Drolia*, it added a caveat that while exercising power under Section 11, the court should not conduct a mini trial, but only a *prima facie* review; and when the same is inconclusive, the court must relegate the parties to arbitration and leave the issues to be determined by the arbitral tribunal. In the case of *The Oriental Insurance Co. Ltd. & Anr. v. Dicitex Furnishing Ltd.*,[71] the Supreme Court has held that at the Section 11 stage,[72]

> *"..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 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."*

Additionally, the Delhi High Court in its recent ruling in *Hero Electric Vehicles Pvt. Ltd v. Lectro E-Mobility Pvt. Ltd.*[73] coined the *'chalk and cheese'* principle to state that courts should refer disputes to arbitration only except (a) when there is a 'chalk and cheese' case of non-arbitrability i.e. a very clear case of non-arbitrability, (b) where reference to arbitration would be opposed to public interest or public policy, and (c) a futility *ex facie*. It reasoned that the court exercises the very same jurisdiction which the arbitral tribunal would exercise under Section 16 of the Act while dealing with an issue of arbitrability, or any disputes *qua* the existence or validity of the arbitration agreement. Therefore, the court should not exercise this power in such a manner that would entirely erode or efface the authority of the arbitral tribunal to rule on these issues.

The Supreme Court in *National Highways Authority of India v. Sayedabad Tea Company*,[74] 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 National Highways Act, being a special law, would have an overriding effect on a general law such as Act.

69. Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714.
70. Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd., Civil Appeal No. 825 of 2021.
71. (2020) 4 SCC 621.
72. Section 11 of the Act describes the appointment of arbitrators in a domestic arbitration.
73. Hero Electric Vehicles Private Limited and Ors. vs. Lectro E-mobility Private Limited and Ors 2021 SCC OnLine Del 1058
74. 2019 SCC OnLine SC 1102.

The Supreme Court, in the case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*,[75] (**"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 in *N.N Global Mercantile did not agree with the view taken in Garware and SMS Tea Estates.* It relied on the doctrine of separability of the arbitration agreement to hold that the arbitration agreement has an existence of its own regardless of the status of the underlying agreement. Non-payment or insufficiency of stamp duty on the underlying agreement would not render the arbitration agreement invalid and consequently, the parties can be still relegated to arbitration. It held that non-payment of stamp duty on the underlying commercial contract is a curable defect, therefore, the court would impound the agreement to cure the defect. However, as the judgment in Garware was affirmed in the judgement of Vidya Drolia, the Court referred the issue to a Constitution Bench. 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 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.*[76] 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. However, in *Foodworld v. Indian Railway Catering,*[77] the High Court of Delhi has held that the issue of limitation is a jurisdictional issue, and hence, would be required to be decided by the arbitrator and not the court.

A. 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.[78]

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.[79]

Before appointment an arbitrator is required to disclose any circumstances that may give rise to justifiable doubts as to his impartiality or independence. The disclosure needs to be made as per the form in Sixth Schedule. Non-

75. (2019) 9 SCC 2019.
76. Civil Appeal No. 833-844 of 2021.
77. Arb. P. 658/2021
78. Section 12(1) of the Act.
79. Section 12(3)(b) of the Act.

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.[80] The 2015 Amendment Act introduced a new Fifth Schedule and Seventh Scheduled that are based on the Red and Orange list provided in the IBA Guidelines on Conflict of Interest in International Arbitration. The Fifth Schedule contains grounds that guide in determining whether circumstances exist that give rise to justifiable doubts as to the independence and impartiality. 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.[81] 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. The Seventh schedule contains circumstances where an individual becomes ineligible to act as an arbitrator.

In *HRD Corporation v. GAIL (India) Ltd.*,[82] 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.*,[83] the Supreme Court held since arbitration invoked prior to October 23, 2015, it was subject to Act as it stood prior to the 2015 Amendment Act. The 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. 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.*,[84] 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.*[85].

The Supreme Court in the case of *Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation Ltd.*[86] held that the fact that the proposed arbitrators were 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.

B. Unilateral Appointment of Arbitrator

The Delhi HC, in the case of *Kadimi International Pvt. Ltd. v Emaar MGF Land Ltd.*[87], 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.

80. C & C Construction Ltd. v. Ircon International Ltd., 2018 SCC OnLine Del 9240.
81. Section 13(5) of the Act.
82. 2017 (10) SCALE 371.
83. AIR 2017 SC 4450.
84. 2017 SCC OnLine Del 8675.
85. C.A. 27/2019, arising out of SLP(C) 20201/2018, dated 03/01/2019.
86. (2017) 4 SCC 665.
87. 2019 (4) ArbLR 233 (Delhi).

5. International Commercial Arbitration with Seat in India

The Supreme Court, in *TRF Ltd. v Energo Engineering Projects Ltd.*,[88] (**"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.*[89] (**"Perkins Eastman"**) and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* (**"Bharat Broadband"**)[90] 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 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. The Delhi High Court in *Proddatur Cable TV Digi Services v. Citi Cable Network Ltd*,[91] held that the company acting through its board of directors would be interested in the outcome of the dispute, and hence, the mandate of the unilaterally appointed arbitrator stands terminated *de jure*. It further relied on Perkins to reiterate that once Section 12(5) is attracted, the parties can directly approach the court under Section 14 of the Act.

The Delhi High Court in *City Lifeline Travels Pvt. Ltd. v. Delhi Jal Board*, held that the judgment in Perkins must not be interpreted in a restrictive manner such that it is only applicable to cases under Section 11(6)(a) of the Act and instead, an expansive interpretation must be given. The Court ruled that the ruling in *Perkins* in general is relevant to ensure that arbitrators are not appointed by persons who are otherwise interested in the matter in order to obviate any doubt with respect to the impartiality and independence of the Arbitral Tribunal.

However, in *Central Organisation for Railway Electrification v. M/S EVI-SPIC-SMO-MCML (JV)*,[92] (**"Central Organization"**) 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 shortlist 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.[93] A similar issue has cropped up before the Delhi High Court as well in *CMM Infraprojects Ltd. v. Ircon International Ltd.*[94] In this case, the Delhi High Court invalidated an arbitration clause that stipulated an appointment procedure wherein the petitioner would select at least two names from the panel of the arbitrators forwarded by the respondent, the respondent would then appoint the nominee arbitrator for the petitioner, and the remaining two arbitrators would appoint the presiding arbitrator.

88. (2017) 8 SCC 377.
89. (2019) SCC OnLine SC 1517.
90. (2019) 5 SCC 755.
91. 2020 SCC OnLine Del 350.
92. 2019 SCC OnLine SC 1635.
93. Union of India v. M/s Tantia Constructions Ltd., SLP No. 12670/2020.
94. Arb. P. 407/2020.

C. Mandate of The Arbitrator

The Supreme Court in its decision in *NBCC Ltd. v. J.G. Engineering Pvt. Ltd.*[95] 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.

In *Laxmi Continental Construction Co. v. State of U.P.*[96] the Supreme Court held that the mandate of the the arbitrator – the Chief Engineer of the respondent in this case – would not stand terminated upon his retirement from the office.

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.

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.*,[97] 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.

The Delhi High Court in *Surendra Kumar Singhal v. Arun Kumar Bhalotia*[98] proposed certain factors to be borne in mind when objections under Section 16 are raised:

i. if the issue of jurisdiction can be decided on the basis of admitted documents on record, the tribunal ought to proceed to hear the matter/ objections under Section 16 of the Act at the inception itself;

ii. If the tribunal is of the opinion that the objections under Section 16 of the Act cannot be decided at the inception and would require further enquiry into the matter, the tribunal could consider framing a preliminary issue and deciding the same as soon as possible;

iii. If the tribunal is of the opinion that objections under Section 16 would require evidence to be led, the tribunal could direct limited evidence to be led on the said issue and adjudicate the same;

95. (2010) 2 SCC 385.
96. 2021 SCC OnLine SC 750.
97. 2005 (8) SCC 618.
98. MANU/DE/0561/2021

iv. If the tribunal is of the opinion that detailed evidence needs to be led both written and oral, then after the evidence is concluded, the objections under Section 16 would have to be adjudicated first before proceeding to passing of the award.

Further, the Delhi High Court in *Jeph Bev Private Limited and Ors. vs. Delhi International Arbitration Centre and Ors.* clarified that any communication issued by an arbitral institution against any objection to the jurisdiction of the institution to administer the arbitration, prior to the constitution of the arbitral tribunal, shall not be construed as an order passed under Section 16 of the Act. Such communication by the institution must only be considered as a *prima facie* view, while the objection as to the jurisdiction shall be decided by the arbitral tribunal only after constitution.[99]

The Act provides for an appeal under Section 37(2) against an order of the tribunal accepting objection(s) to its jurisdiction raised under Section 16 application. However, there is no such provision of appeal against an order rejecting those objections. The Supreme Court in *Deep Industries v. ONGC*,[100] held that the drill of Section 16 does not allow an appeal against rejection of the application. Consequently, the aggrieved party must wait till the final award is passed and thereafter challenge the same under Section 34 of the Act. It further held that writ jurisdiction can only be invoked to correct jurisdictional errors, a mere error of law would not justify the invocation of writ jurisdiction. The legislature's intention against the provision of an appeal against an order rejecting a Section 16 application is clear from the language employed under Section 16(6) which provides for a right to challenge it under Section 34 and use of the word *"from no other"* in Section 37 which makes it amply evident that no appeal lies against an order rejecting an application made under Section 16 of the Act.[101]

Similarly, in *Bhaven Construction vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Ors.*,[102] the Supreme Court set aside an order of the Gujarat High Court allowing a writ petition against the tribunal's order rejecting a Section 16 application. The Court relied on Section 5 of the Act to emphasize on the very limited scope of judicial intervention available in the Act and held that a writ petition should only be allowed in exceptional cases where the aggrieved party is either "left remediless" or apparent "bad faith" is shown by the other party. Moreover, the court held that an aggrieved person is not rendered remediless as they have an option to challenge the award under Section 34 of the Act on the same grounds.

V. 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.[103] The arbitral tribunal is not bound by the CPC or the Indian Evidence Act, 1872.[104] 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.[105] The arbitral tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.[106] The place of arbitration can be decided by mutual

99. Jeph Bev Private Limited and Ors. vs. Delhi International Arbitration Centre and Ors 2021 SCC OnLine Del 1980
100. (2020) 15 SCC 706
101. M.P. Road Development Corpn. v. The Ministry of Road, Transport and Highways, W.P. No. 11783/2021.
102. MANU/SC/0008/2021.
103. Section 18 of the Act.
104. Section 19(1) of the Act.
105. Section 19(3) of the Act.
106. Section 19(4) of the Act.

agreement. However, if the parties do not agree to the place, the same will be decided by the tribunal.[107] Similarly, the language to be used in arbitral proceedings can be mutually agreed upon. Otherwise, the arbitral tribunal can decide on the same.[108]

The Supreme Court in *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*[109] held that designation of the seat is akin to an exclusive jurisdiction clause with relation to the courts exercising supervisory jurisdiction over the proceedings. Similarly, the Supreme Court in the case of *Roger Shashoua v. Mukesh Sharma*[110] 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. The Supreme Court, in the case of *Brahmani River Pellets v. Kamachi*,[111] 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 Bhubaneshwar, 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*[112] (**"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 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.*,[113] (**"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.*[114] (**"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.

107. Section 20 of the Act.
108. Section 22 of the Act.
109. (2017) 7 SCC 678.
110. 2017 SCC OnLine SC 697.
111. (2020) 5 SCC 462.
112. (2020) 4 SCC 234.
113. 2018 SCC Online Del 9338.
114. (2012) 9 SCC 552.

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. Further, the High Court of Bombay in a recent ruling in *Aniket SA Investments LLC v. Janapriya Engineers Syndicate Pvt. Ltd.*[115] dealt with a uniquely worded governing law clause which stated that the courts at Hyderabad shall have jurisdiction to deal with issues arising out of the agreement, *'subject to'* the arbitration agreement, wherein Mumbai was designated as the *'seat'* of the arbitration. The court held that there is no concurrent jurisdiction of two courts under Section 2(1)(e) of the Act and went on to state that the use of the word *'subject to'* is a clear indication that the parties intended to have Mumbai as the seat of arbitration. Therefore, only the Courts at seat shall have exclusive jurisdiction to deal with all matters with respect to the arbitration agreement. It ruled that a choice of seat is an expression of party autonomy and carries with it the effect of conferring exclusive jurisdiction on the courts of the seat.

While interpreting the term *'place'* in relation to 'seat', the Supreme Court in *Union of India v. Hardy Exploration and Production*,[116] 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*.[117]

Recently, in the case of *L&T Finance Ltd. v. Manoj Pathak & Ors.*,[118] 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."*

115. MANU/MH/0121/2021
116. AIR 2018 SC 4871.
117. (2012) 9 SCC 552.
118. 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.*,[119] 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.

The Supreme Court in *Inox Renewables ltd. v. Jayesh Electricals Ltd.*,[120] held that when the parties mutually agree on a change in the "venue" of the arbitration, the same could amount to a change in the "seat" as well.

With respect to applicability of institutional rules in determining the seat, the Delhi High Court in *S.P. Singla v. Construction and Design Services*,[121] has held that the rules of arbitral institutions do not determine the seat of the arbitral institution. These are only procedural in nature and come into play only after the commencement of the arbitration.

B. Submission of Statement of Claim and Defense

The Claimant should submit the statement of claim, 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.[122]

Time period for completion of pleadings

The 2015 Amendment Act permits Respondent to submit a counterclaim or plead a set-off provided such set-off or counterclaim falls within the scope of the arbitration agreement.[123] 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.[124]

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 than it solves. For instance, it is very common in arbitration proceedings for parties to bifurcate issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing the

119. (2020) 5 SCC 399.
120. 2021 SCC OnLine SC 448.
121. 2021 SCC OnLine Del 4454.
122. Section 23 of the Act.
123. Section 23(2A) of the Act.
124. Section 25(b) of the Act.

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 will be considered completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defence, or where a counterclaim is filed.

C. 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. However, if one of the parties requests the arbitral tribunal for a hearing, sufficient advance notice of hearing should be given to both parties.[125] Thus, unless one party requests, an oral hearing is not mandatory.

Expeditious conduct of hearings and the 2015 Amendment Act

For the expeditious conclusion of the arbitration proceedings, a proviso has been introduced by the 2019 Amendment Act on the conduct of 'oral proceedings' on a day to day basis 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.[126] However, a 6 (six) months extension may be granted to the arbitrator by mutual consent of the parties.[127] Beyond 6 (six) months, any further extension may be granted to the arbitrator at the discretion of the court[128] or else the proceedings shall stand terminated.[129] An application for extension of time towards completion of arbitral proceedings has to be disposed of expeditiously.[130] 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.[131]

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.[132]

125. Section 29 of the Act.
126. Section 29A(1) of the Act.
127. Section 29A(3) of the Act.
128. Section 29A(5) of the Act.
129. Section 29A(4) of the Act.
130. Section 29A(9) – the section endeavors the application to be disposed of within a period of 60 days.
131. Section 29A(2) of the Act.
132. ONGC Petro Additions Ltd. v. Ferns Construction Co. Inc., OMP(Misc)(Comm) 256/2019, I.A. 4989/2020

D. 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.[133]

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.[134]

Parties can, before the constitution of the arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure.[135] 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.[136]

VI. 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.[137]

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.

VII. 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.[138] Limitation period for filing a counter claim is computed as on the date of filling of the counter claim. However, if the respondent, against whom a claim has been made in arbitration, can satisfy that the respondent had previously made a claim against the claimant and sought arbitration by serving a notice to the claimant, then the earlier date of such notice would be considered for the determining if the counterclaim is within limitation.[139] 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. The Limitation Act also applies to arbitration proceedings conducted under the MSMED Act.[140]

133. Section 29B(2) of the Act.
134. Section 29B(4) of the Act.
135. Section 29B(1) of the Act.
136. Section 29B(3) of the Act.
137. Section 30 of the Act.
138. Section 43(2) of the Act.
139. Voltas Limited v. Rolta India Limited, (2014) 4 SCC 516
140. Silpi Industries v. Kerala State Road Transport Corp., MANU/SC/0390/2021.

VIII. 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.[141] The arbitral award must be in writing and signed by all the members of the tribunal.[142] It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.[143] The arbitral award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration).[144] A copy of the award should be given to each party. Arbitral tribunals can also make interim awards.[145]

IX. 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.[146]. 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*[147] 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 held that the arbitrator does not have the statutory power to direct that stamp duty be paid within a specific period. 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.[148]

X. Interest and Cost of Arbitration

As per Section 31(7)(b) of the Act, the interest rate payable on damages and costs awarded, unless the arbitral award otherwise directs, shall be two per cent higher than the current rate of interest prevalent on the date of the award, from the date of the award to the date of payment. 'Current Rate of Interest' has been defined in the Interest Act, 1978 as *"the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks..."*

141. Section 29 of the Act.
142. Section 31(1) of the Act.
143. Section 31(3) of the Act.
144. Section 31(4) of the Act.
145. Section 31(6) of the Act.
146. M. Anasuya Devi and Anr v. M. Manik Reddy and Ors., (2003) 8 SCC 565.
147. Mohini Electricals Ltd. v. Delhi Jal Board, OMP (ENF)(COMM) 2 of 2020.
148. M/S. Shri Ram EPC Ltd. v. Rioglass Solar SA (2018) SCC Online 147

Further, the Supreme Court, in *State of Rajasthan v. Ferro Concrete Construction (P) Ltd.*,[149] has defined 'current rate of interest' as *"the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by Reserve Bank of India under the Banking Regulation Act, 1949."* \

Payment of interest on award is essentially compensatory in nature.[150] The purpose of post award interest is to disincentivise delay in payment of the amount once the award has attained finality.[151] The interest awarded must be compensatory as it is a form of reparation granted to the award-holder. Further, the same must not be punitive, unconscionable or usurious in nature.[152]

Default Interest from the date of award to date of payment under the 2015 Amendment Act

Under the Act, the discretion of the arbitral tribunal to grant interest, pre- and post-award, remains unchanged. The 2015 Amendment altered the mandatory rate of post-award interest that can be imposed in situations where the tribunal chooses not to exercise its discretion in awarding interest. Earlier, the default rate of interest that could be awarded was eighteen percent per annum.

Post 2015 Amendment Act, the default interest rate was specified as 2% higher than the 'current rate of interest'.[153]

In *Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd.*,[154] 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,[155] 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.[156] The Act gives substantial discretion to the tribunal in awarding interest, therefore, the court would not be justified in reducing the rate of interest awarded by the tribunal unless there are specific reasons justifying the reduction in rate of interest.[157] There has to be an express exclusion clause in the agreement that prohibits the grant of interest, merely a blank on the interest column would not suffice the requirement of Section 31(7)(a) of the Act.[158]

A. Regime for Costs

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 with arbitral proceedings. The tribunal can decide the cost and share of each party.[159] 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

149. (2009) 12 SCC 1
150. Oriental Structural Engineers Pvt. Ltd. v. State of Kerala, (2021) 6 SCC 150.
151. Oil and Natural Gas Corporation Ltd. v. Dolphin Offshore Enterprises (I) Ltd. 2010 SCC OnLine Bom 1598 (Para 18).
152. Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd., (2019) 11 SCC 465 (Para 10)
153. Section 31(7)(b) of the Act.
154. 2018 SCC OnLine SC 1922.
155. Raveechee and Co. v. Union of India, 2018 SCC OnLine SC 654; Garg Builders v. BHEL, 2021 SCC OnLine SC 855.
156. Union of India v. Susaka (P) Ltd., (2018) 2 SCC 182.
157. PUNSUP v. Ganpati Rice Mills, SLP (C) No. 36655/2016.
158. Oriental Structural Engineers Pvt. Ltd. v. State of Kerala, MANU/SC/0299/2021.
159. Section 31(8) of the Act.

the court will decide the cost of arbitration and shall pay the same to arbitrators. Balance, if any, will be refunded to the party.[160]

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.

XI. 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 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—

160. Section 39 of the Act.

> *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.*
>
> *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."*

Section 34(3) provides that an application for setting aside an award must be made within a period of 3 months from the date on which the award is received. This period can be extended by 30 days if the Court is satisfied that the applicant was prevented from making the application in the first 3 months.

This has been further clarified by the Supreme Court in *Dakshin Haryana Bijli Vitran Nigam Ltd v. Navigant Tech. Pvt. Ltd.*,[161] wherein it held that the limitation period for filing a Section 34 application begins from the date on which a signed copy of the award is received by the parties.

The Supreme Court in *Noy Vallesina Engineering SpA v. Jindal v. Jindal Drugs Ltd. & Ors.*[162] 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 in accordance with Part II of the Act.

The court does not sit in appeal over the arbitral award. The court would not interfere with the arbitral award if the view taken by the tribunal is a possible view, even though there may be another tenable view available.[163] In *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum*,[164] the Supreme Court differentiated between an erroneous interpretation of the terms of the contract, and failure to act in terms of the contract. The Court held that the former is not a ground to set aside an arbitral award, however, the latter would result in an award being set aside under the rubric of public policy. The Court further stated that a contractual interpretation which results in rewriting the terms of the underlying agreement should result in setting aside of such an award.

161. 2021 SCC OnLine SC 157.
162. MANU/SC/0899/2020.
163. NTPC Ltd v. Deconar Services (P) Ltd., 2021 SCC OnLine SC 498.
164. 2022 SCC OnLine SC 131.

The Supreme Court, in *Kinnari Mullick v. Ghanshyam Das Damani,*[165] 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 to the arbitral tribunal.

The Supreme Court in *NHAI v. M. Hakeem,*[166] has held that Section 34 of the Act does not allow courts to modify an arbitral award. The only power available with the court is to either uphold the award or to set it aside. The decision of the Supreme Court is a welcome step as it furthers the policy of minimal judicial interference under the Act. In another Supreme Court decision, it was stated that even the power of the court to modify an award under Section 33 is only for the purpose of correcting any arithmetical or clerical error only.[167]

Additionally, in a recent case,[168] the Calcutta High Court faced a nuanced question of law under Section 34 of the Act. The Calcutta High Court was to decide whether a court can appoint an arbitrator different from the one who passed the impugned award under Section 34, for deciding the dispute between the award-debtor and the award-holder. Both the parties in the aforementioned case agreed that a different arbitrator should be appointed to decide the claim afresh. The Calcutta High Court granted this request stating that *"the parties who have come to the court cannot be left without a remedy when they have agreed that the matter should go before a different arbitrator."* Accordingly, the court decided to set aside the award, and giving primacy to party autonomy, appointed a different arbitrator to decide the matter afresh.

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, it is provided that an award is said to be in contravention of the public policy of India 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.[169] 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,[170] and unless absolutely necessary, the courts should not go beyond the record before the arbitrator in deciding an application for setting aside an award.[171]

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. However, the same applies only to domestic arbitrations. For ICAs seated in India, *'patent illegality'* has been kept outside the purview of the arbitral challenge.[172] An application for setting aside the award can be filed only after providing prior notice to the opposite party.[173] However, this procedural provision has been held to be directory, and not mandatory.[174] A

165. AIR 2017 SC 2785.
166. (2021) 9 SCC 1.
167. Gyan Prakash Arya v. Titan Industries Ltd, 2021 SCC Online SC 1100.
168. Jagdish Kishinchand Valecha v. Srei Equipment Finance Limited and Another 2021 SCC OnLine Cal 2076
169. Proviso to Section 34(2A) of the Act.
170. Explanation 2 to Section 48 of the Act.
171. Emkay Global Financial Services Ltd. v. Girdhar Sondhi, (2018) 9 SCC 49.
172. Section 34(2A) of the Act.
173. Section 34(5) of the Act.
174. State of Bihar v. Bihar Rajya Bhumi Vikas Bank, (2018) 9 SCC 472.

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.[175] 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 principles laid down by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*[176] (**"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)[177]

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.[178]

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)[179]

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.[180]

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 Supreme Court in *Ssangyong Engg. & Construction Co. v. NHAI*,[181] further narrowed down the scope of *"public policy"* as a ground to challenge the award. The Court clarified that perversity or irrationality of the finding of the arbitrator as understood in *Associate Builder* would no longer be a ground for challenge under *'public policy'* but would rather be a ground under *'patent illegality'*.

175. Section 34(6) of the Act.
176. (2015) 3 SCC 49.
177. Ibid, ¶29 - 31
178. Ibid, ¶36
179. Ibid, ¶29
180. Ibid, ¶29 - 31
181. (2019) 15 SCC 131.

With respect to challenge vis-à-vis statutory violations, the Supreme Court in *Delhi Airport Metro Express Pvt. Ltd. v. DMRC*, held that contravention of a statute which is not linked to the public policy or public interest would not make out a ground to set aside the arbitral award under the banner of patent illegality.[182]
In *Vijay Karia v Prysmian Cavi E Sistemi SRL*,[183] (**"Vijay Karia"**) while deciding whether the violation of the Foreign Exchange Management Act, 1999 (**"FEMA"**) would amount to a violation of *"public policy"*, the Supreme Court held that the fundamental policy of Indian law 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 followed by Courts. A violation of fundamental policy of Indian law must amount to a breach of some legal principle or legislation so basic to Indian law that it is not susceptible of being compromised. On that basis, the Supreme Court concluded that a mere violation of a statute such as the FEMA does not amount to a violation of *"public policy"*. The Court further clarified that the scope of public policy both under Section 34 and 48 is substantially identical.

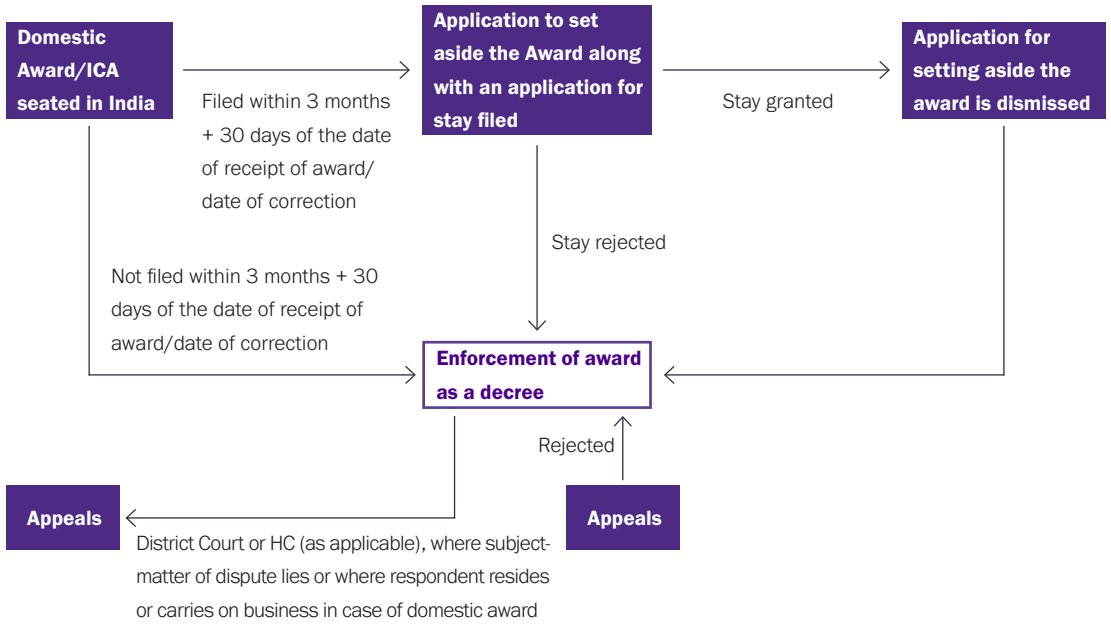
On limitation as ground for challenge, the Delhi High Court in *Megha Enterprises v. Haldiram Snacks Pvt. Ltd.*[184] held that even an erroneous decision of the arbitral tribunal on the issue of limitation of the substantive claims would not fall within the rubric of public policy as being in conflict with the notion of morality or justice. It further held that the court cannot set aside an award merely because it does not concur with the view taken by the tribunal and when two views are possible. The Court cannot reappreciate evidence to come to a contrary finding.

The Supreme Court in *PSA Sical Terminals Pvt. Ltd v. Board of Trustees of V.O. Chidambranar Port of Trust*,[185] held that the arbitral tribunal cannot make any unilateral addition or alteration to the terms of the agreement and foist it on an unwilling party as doing so would breach the fundamental principles of natural justice. It further held that an arbitral tribunal is the creature of the terms of reference, and hence, it must confine its jurisdiction to the issued referred to it. Similarly, in *BCCI v. Deccan Chronicle Holdings Ltd.*,[186] the Bombay High Court held that the principle of minimal judicial intervention does not mean the tribunal has the power to adopt shortcuts and render unreasoned awards on mere speculations and assumptions. Further, it held that arbitrator being the creature of the contract, must act within the confines of the contract. Unless the contract expressly allows, the arbitrator cannot determine the disputes on the notions of equity or fairness dehors the terms of the contract.

Recently, the Supreme Court in the case of *South East Asia Marine Engineering and Constructions (Seamec) v. Oil India Ltd.*[187] 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.

182. Delhi Airport Metro Express Pvt. Ltd. v. DMRC, (2022) 1 SCC 131.
183. 2020 SCC OnLine SC 177
184. 2021 SCC OnLine Del 2641.
185. 2021 SCC OnLine SC 508.
186. 2021 SCC OnLine Bom 834.
187. AIR 2020 SC 2323.

A. 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.[188] 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.[189]

The Supreme Court, in the case of *BCCI*,[190] 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 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*,[191] 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.[192] However, in a recent decision, the Calcutta High Court held that when a CIRP is initiated against the award debtor by its operational creditor wherein the resolution plan is accepted and the corporate debtor has already been taken over by a new entity, an award-holder's claims would stand extinguished on account of the award – and the proceedings emanating from it – being rendered infructuous.[193]

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

189. 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.

190. (2018) 6 SCC 287.

191. 2019 SCC OnLine SC 1520.

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

193. Sirpur Paper Mills Ltd. v. I.K. Merchants Pvt. Ltd. 2021 SCC OnLine Cal 1601.

B. Grounds for Challenge

Domestic Award/ICA seated in India

Pre-amendment (2015 Amendment Act)	Post-amendment (2015 Amendment Act)	Post-amendment (2021 Amendment Act)
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 ii. the arbitral award is in conflict with the public policy of India.	The grounds in the pre-amendment era have been retained with the addition of the following: 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.	All grounds and principles inserted by the 2015 Amendment Act have been retained with the addition of the proviso to Section 34(3), which states that an unconditional stay on the enforcement of the award would be granted pending disposal of the challenge if the court is *prima facie* satisfied that the arbitration agreement or the making of the award was induced by fraud or corruption. This has been given retrospective effect and shall apply to all court proceedings emanating from arbitral proceedings, irrespective of whether such arbitral proceedings commenced from October 23, 2015 or not.

C. 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.

To get a better understanding of the challenge and enforcement procedure under the Act, please refer to the Annexure that contains our detailed research paper on the same.

XII. 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. In case of an order passed under Section 17 of the Act; the aggrieved party can approach the court after such order is passed. Even a third party directly or indirectly affected by interim measures granted by the arbitral tribunal under Section 17 of the Act, has the remedy of an appeal under Section 37 of the Act.[194] Appeal to the courts is now permissible only on certain restricted grounds. An appeal is not permissible against an order of enforcement of interim orders passed under Section 17(2) of the Act. The act only allows for appeal against an order passed under Section 17(1) of the Act.[195] An appeal against an order refusing to condone delay in filing an application under Section 34 shall also lie under Section 37(1)(c) of the Act.[196]

The limitation period for filing an inter-court appeal, when the amount of dispute is below 3 lakhs, is 90 days as provided under Article 116 of the Limitation Act, while the limitation period for filing an intra-court appeal is only 30 days. However, when the amount of dispute is above Rs. 3 lakhs, then the provisions of Commercial Courts Act, 2015 would govern the limitation period for filing an appeal, therefore, the appeal must be filed within a period of 60 days. Section 5 of the Limitation Act also applies to Arbitration Act. However, such power must be exercised sparingly and only in exceptional cases.[197]

Table II - JUDGMENT

In arbitration matters having Specified Value	Limitation	Governing Provisions	Condonable
Less than INR 300,000	90 days	Article 116, The Schedule in Limitation Act	Yes – Provided the delays are short and subject to the thresholds for 'sufficient cause' laid down in *the present judgment, viz.:* a. whether actions of the appellant were bona fide, and b. no prejudice is caused to the opposite party.
Less than INR 300,000	30 days	Article 117, The Schedule in Limitation Act	
More than INR 300,000	60 days	Section 13(1A), CC Act	

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:[198]

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*,[199] 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.

The Supreme Court has clarified in *State of Chattisgarh v. Sal Udyog Pvt. Ltd*,[200] that in case of an additional ground of challenge by a party under Section 37 of the Act, grounds of challenge under Section 34 are equally available

194. Prabhat Steel Traders v. Excel Metal Processors, 2018 SCC OnLine Bom 2347.
195. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209.
196. Chintels India Ltd. v. Bhayana Builders Pvt. Ltd. MANU/SC/0070/2021
197. Government of Maharashtra v. Borse Brothers Engineers & Contractors Pvt. Ltd. MANU/SC/0195/2021.
198. Section 37 of the Act.
199. 2016 (12) SCALE 1015.
200. (2022) 2 SCC 275.

to such party. It further held that failure of party to take such a ground would not preclude it from taking such objection under in an appeal under Section 37. The court relied on the words *'if the court finds'* to hold that the court can invoke such a ground on its own as well without there being any specific plea for the same.

The 2015 Amendment Act has increased the type of orders that may be appealed to include an 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.

XIII. 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.

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.[201] An *ex parte* award passed by an arbitral tribunal under Section 28 of the Act is also enforceable under Section 36. Even an award on settlement 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.

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.[202] 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.[203]

In 2020, in the case of *Bhandari Engineers & Builders v. Maharia Raj Joint Venture*,[204] 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

201. N. Poongodi v. Tata Finance Ltd., 2005 (3) Arb LR 423 (Madras).
202. Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622.
203. Rule 10, Order XXI of the CPC.
204. EX.P. 275/2012 & EX.APPL. (OS) 193/2020.

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.[205]

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.[206]

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.[207]

While enforcing an award against a foreign state, the Delhi High Court has clarified that prior consent of Central Government is not necessary under Section 86(3) of the CPC. Further, a foreign State cannot claim sovereign immunity against the enforcement of an award arising out of commercial transaction which it willingly entered into.[208]

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 someplace 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.[209]

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.[210]

205. Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rahman, 1970 (1) SCC 670; Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises, 1999 (1) SCC 558.
206. Section 36(1) of the Act.
207. Proviso to Section 36(3) of the Act.
208. KLA Const. Technologies Pvt. Ltd. v. Embassy of Islamic Republic of Afghanistan, 2021 SCC OnLine Del 3424.
209. O.XXI R.54 of the CPC.
210. Section 64 of the CPC.

If during the pendency of the attachment, the judgment debtor satisfies the decree through the court, the attachment will be deemed to be withdrawn.[211] Otherwise, the court will order the property to be sold.[212]

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.[213]

XIV. Representation by Arbitral Tribunal for Contempt

The Bombay High Court, in the case of *Alka Chandewar v. Shamshul Ishrar Khan*,[214] 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.

211. O.XXI R. 55 of the CPC.
212. O.XXI R. 64 of the CPC.
213. O.XXI R.76 of the CPC.
214. (2017) 16 SCC 119.

6. International Commercial Arbitration with Seat in A Reciprocating Country

Post the decision of the Supreme Court in *BALCO*,[215] 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 *BALCO*.[216]	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).[217]

In *IMAX Corporation v. E-City Entertainment Pvt. Ltd.*,[218] 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.*,[219] 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*,[220] 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.[221]

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,

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

216. 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-youamended-your-arbitration-agreement-post-balco.html?no_cache=1&cHash=05954678cd27f35dbcb4ce62517c1fc3).

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

218. 2017 SCC OnLine SC 239.

219. 2017 SCC OnLine Bom 8480.

220. 2017 SCC OnLine Cal 13267.

221. 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.

being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

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. A notification by the Central Government declaring that country to be a territory to which the New York Convention applies is necessary. In the case of *Bhatia International v. Bulk Trading,*[222] (**"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 satisfied-[223]

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 44[224] 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.[225]

222. AIR 2002 SC 1432.

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

224. Section 44 of the Act.

225. 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.[226]

The Supreme Court, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,[227] 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*[228], 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, in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors.*,[229] relying on *Chloro Controls*, upheld the impleadment of a non-signatory to the arbitration agreement in a 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.*[230] 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.

B.Two Indian Parties Having A Foreign Seat of Arbitration

The issue of two Indian parties choosing a foreign seat of arbitration has attained finality with the judgment of the Supreme Court in PASL *Wind Solutions v. GE Power Conversion.*[231] The Supreme Court has held that party autonomy is the foundation on which the Act is built, and this autonomy includes the right of the parties to choose a foreign seat of arbitration. The court held that there is nothing in Section 23 and 28 of the Indian Contract Act to interdict

226. (2005) 7 SCC 234.
227. Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games 2010, Delhi, (2014) 6 SCC 677.
228. 2013 (1) SCC 641.
229. 2017 SCC OnLine Del 11625.
230. (2019) 7 SCC 62; Also see Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., 2019 SCC OnLine 995.
231. (2021) 7 SCC 1.

two Indian parties from choosing a foreign seat of arbitration. It further held that when two Indian parties opt for a foreign seat of arbitration, the award would be a foreign award enforceable under Part II of the Act. The Supreme Court decision is yet another testament to the pro-arbitration approach of the Indian judiciary.

Before this decision of the Supreme Court, various High Courts attempted to answer this quandary which resulted in a lot of conflicting judgments.

In *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*,[232] 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.

In *Sasan Power Ltd. v. North America Coal Corporation India Pvt. Ltd.*,[233] 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*[234] (**"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.

The Delhi HC, in *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd. & Ors.*,[235] 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* had ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration. More recently, the Delhi HC,[236] has affirmed the principle that two Indian parties can choose a foreign law as the law governing the conduct of arbitration proceedings or the seat of arbitration as a foreign nation.

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;

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*,[237] 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.

232. 2015 SCC OnLine Bom 7752.
233. (2016) 10 SCC 813.
234. (1999) 7 SCC 61.
235. 2017 SCC OnLine Del 11625.
236. Dholi Spintex Pvt. Ltd. v. Louis Dreyfus Company India Pvt. Ltd., CS (COMM) 286/2020.
237. AIR 1994 SC 1136.

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),*[238] 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,*[239] 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.*,[240] 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;*

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.*,[241] (**"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.*

238. AIR 1962 SC 1810.
239. 2016 SCC OnLine Del 6203.
240. AIR 1989 SC 2198.
241. (1994) 2 Arb LR 405.

6. International Commercial Arbitration with Seat in A Reciprocating Country

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa,*[242], 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.[243]

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 the 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.[244]

In 2019, the Delhi HC recognized and enforced a foreign award, while noting that the procedure followed under the SIAC rules (which the party had not agreed to) did not cause any prejudice to the judgement debtor.[245]

In the case of *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi S.r.l & Ors.*[246] the Supreme Court 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.*[247] 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.

242. 2013 (8) SCALE 480.
243. Section 49 of the Act.
244. Ssangyong Engg. and Construction Co. Ltd v. NHAI, (2019) 15 SCC 131.
245. Glencore International AG v. Indian Potash Ltd. & Anr., 2019 SCC OnLine Del 9591.
246. 2020 SCC OnLine SC 177; EIG (Mauritius) Ltd. v. McNally Bharat Engineering Company Ltd. 2021 SCC Online Cal 2915.
247. 2020 SCC OnLine Bom 781.

F. Limitation Applicable for Enforcing A Foreign Award

In a rare decision of this kind, the Supreme Court in 2020 refused the enforcement of a foreign arbitral award in the case of *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*,[248] 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*[249] 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, 1963, 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.*[250] 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.*[251] held that

> *"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.*,[252] 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.

248. 2020 SCC OnLine SC 381
249. 2020 SCC Online SC 749
250. 2020 SCC OnLine SC 324.
251. (2005) 7 SCC 234.
252. (2011) 8 SCC 333.

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.*,[253] 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.

253. (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 a 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 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 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. Arbitrability of Oppression and Mismanagement Cases

A landmark judgment on the arbitrability of oppression and mismanagement cases was delivered by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra*,[254] 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.

III. Arbitrability of Consumer Disputes

The National Consumer Dispute Resolution Commission (**"NCDRC"**), in *Aftab Singh v. Emaar MGF Land Ltd.*,[255] 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.

IV. 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*[256] laid down a four-prong test to determine when a dispute would be non-arbitrable:

254. (2015) 2 Comp LJ 288 (Bom).
255. Consumer Case No. 701/2015.
256. Civil Appeal No. 2402 of 2019.

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 omnes9 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 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 however held that disputes under the TP Act would be arbitrable.[257]

V. Enforcement of Foreign Interim Orders Including Emergency Awards

Unlike Section 17, there is no provision in Part II of the Act which provides for the enforcement of interim measures granted by an arbitral tribunal in a foreign-seated arbitration. In the absence of a specific provision under the Act, parties have taken recourse to Section 9 to seek interim measures from courts, wherever applicable.[258] However, it must be understood that a grant of similar reliefs under Section 9 does not imply the actual enforcement of an emergency award in a foreign-seated arbitration. Although Indian courts have been wary of the absence of a legislative stipulation on enforcement of emergency awards in a foreign seated arbitration, they have not shied away from admitting that similar reliefs can be granted under Section 9 by virtue of an *independent analysis.*[259]

Earlier, in *Ashwani Minda and ors. v. U-shin Limited and Ors.*,[260] (**"Ashwani Minda"**) the Delhi HC had observed that a party approaching the court under Section 9 in a foreign seated arbitration must establish that the remedy available before the arbitral tribunal is not efficacious.[261] However, the court 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.

In *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*,[262] the Delhi HC discussed Ashwani Minda and held that a foreign interim order/emergency award can be enforced under Section 9 of the Act in foreign-seated arbitrations. However, if such interim relief is sought during the arbitral proceedings, then it must be shown that a remedy before the arbitral tribunal under Section 17 was inefficacious. Considering that any meaningful reliefs

257. 2020 SCC OnLine SC 1038.

258. Section 9 of Part I of the A&C Act is applicable to foreign seated arbitrations subject to an agreement to contrary by the parties. Therefore, if parties have agreed to exclude the application of Section 9 to the foreign seated arbitration, a remedy to seek interim measures from Indian courts under Section 9 would be foreclosed.

259. Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd., (2016) 234 DLT 349 and Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., 2104 SCC OnLine Bom 929.

260. 2020 SCC OnLine Del 721.

261. Please see the complete analysis of the judgment of the division bench of the Delhi High Court in our earlier piece here.

262. Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd., 2022 SCC OnLine Del 2112.

such as attachment of assets and giving directions to third-parties could only be granted by the courts and not the foreign arbitral tribunal due to the absence of a corresponding provision to Section 17, the Delhi HC held that a remedy before the tribunal would be inefficacious, thereby allowing the Section 9 application.

Another route for the enforcement of emergency awards may be through enforcement proceedings under Part II of the Act. It must be noted that even when there is no provision under Part II which provides for enforcement of emergency / interim awards in a foreign seated arbitration, there is no express bar to the enforcement of emergency awards either.

A foreign award can be enforced in India if it qualifies the conditions stipulated under Section 48 of the Act, which is similar to the conditions under Article V of the New York Convention.[263] One of the pre-conditions for the enforcement of a foreign award is that the award must be binding on the parties. Leading arbitral institutions including the LCIA,[264] SIAC,[265] ICC,[266] HKIAC,[267] SCC,[268] etc., provide for an emergency award to be binding on the parties.

VI. Unconditional Stay on the Enforcement of Arbitral Award

The 2021 Amendment Act has introduced a new proviso to sub-section 3 of Section 36 of the Act, which allows 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.

While the amendment is 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 floodgates for numerous litigations, ultimately delaying the enforcement of arbitral award. The provision of stay is broadly worded under the existing regime, and the same did not warrant specifically mentioning 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. There are two legs of the Amendment, these are:

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 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.

263. Section 48 clarifies the scope of public policy of India and the scope of review in the contravention of the fundamental policy of Indian law; New York Convention stands for Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959.
264. Rule 9.9, LCIA Rules.
265. Para 12, Schedule I, SIAC Rules.
266. Rule 29.2, ICC Rules.
267. Para 16, Schedule V, HKAIC Rules.
268. Article 9, SCC Rules.

A party always has the right to challenge the jurisdiction of the arbitral tribunal under Section 16 of the 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 Act, and as such, can be challenged along with the final award under Section 34 of the Act, which has to be disposed of expeditiously, and in any event within a period of one year. Therefore, it is apparent that the existing position of law contemplated an effective remedy for the parties, and further amendments thereto were hardly necessitated.

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 the 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.

B. The making of the Award was Induced or Effected by Fraud or Corruption

The second leg of the amendment to the proviso to Section 36 of the Act – allowing an 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.

There can be many instances giving rise to an indication of fraud or corruption in the making of the arbitral award. This particular ground for granting a stay would entail greater responsibility on the part of arbitrators and arbitral institutions in dealing with corruption-related issues. Such issues could result from either the conduct of the parties or the involvement of the arbitral tribunal. While institutional rules seek to address the conduct of the parties, there is little guidance on (a) adjudication of allegations levelled against the arbitral tribunal; or (b) the nature of the role to be played by arbitral institutions in determining issues of corruption. While there are general provisions to challenge the appointment of an arbitrator before the relevant arbitral institution, such provisions can only be triggered on limited instances, and only as per a stipulated timeline. Therefore, it is important to stipulate such express requirements in the substantive arbitration law as well.

Under the existing scheme of the Act, challenge to an arbitral award can be filed if the making of the award has been induced by fraud or corruption, on account of it violating public policy. The decision of the Supreme Court in *Venture Global Engg. v. Satyam Computer Services Ltd.*,[269] has explained fraud in the context of making of an award, and held that, although suppression of facts before the arbitral tribunal may be construed as fraud during making of the award, the facts concealed must have a causative link. In case 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 on the basis of such an analysis, the award may be set aside as affected or induced by fraud.

The Delhi High Court in *Sandeep Kumar v. Dr. Ashok Hans*,[270] held that there is no requirement under the provisions of Section 34 for parties to lead evidence.[271] The Supreme Court in *Fiza Developers and Inter-Trade Private Limited*,[272] held that the application under Section 34 is in the nature of summary proceedings with

269. (2010) 8 SCC 660.

270. 2004 SCC OnLine Del 106.

271. AIR 2005 Delhi 95.

272. (2009) 17 SCC 796.

provision for objections by the defendant/respondent, followed by an opportunity to the aggrieved party 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 some 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 remains – 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 endeavour to delay the enforcement of the arbitral award. Consequently, 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.

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, and 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.

Hotline

July 06, 2022

I. Supreme Court's Quick Fix for Backlog in Arbitral Appointments by High Courts

- The Supreme Court took cognizance of the backlog in applications filed under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act 1996 before various High Courts, few of which had been pending for over four or five years.
- The Supreme Court directed the respective High Courts to ensure disposal of such pending applications within a period of six months from the date of the passing of its order (dated 19 May 2022).
- The Court also emphasized that the High Courts need to make an endeavor to dispose of appointment applications within six months from the date on which such applications are filed.

A. Introduction

While hearing the special leave petition in *Shree Vishnu Constructions* (**"Appellant"**) *v. The Engineering in Chief, Military Engineering Service & Ors.* (**"Respondents"**)[273], the backlog of applications for arbitral appointments came into light before the Hon'ble Supreme Court of India (**"Supreme Court"**).

The Supreme Court called for the statement/particulars with respect to the pending applications under Section 11(6) of the Arbitration and Conciliation Act 1996 (**"Arbitration Act"**) from all the High Courts so as to devise the solution for quicker disposal of such applications.

The jurisdiction of High Courts for the appointment of arbitrators can be invoked under Section 11 of the Arbitration Act in case the parties fail to agree on an arbitrator for the resolution of their disputes[274] or in the event that they fail to act on the appointment procedure agreed upon.[275] However, the Arbitration Act does not prescribe any timeline for courts to decide and dispose of such applications filed before Court for appointment of an arbitrator. Such lacuna has resulted in a situation where a number of such appointment applications are pending before various High Courts for years. The Supreme Court took cognizance of this issue which would otherwise defeat the object and purpose of the Arbitration Act itself, i.e., speedy and effective dispute resolution.

B. Background

The special leave petition was filed pursuant to a judgment and order passed by the Hon'ble Telangana High Court[276] rejecting the Appellant's application for appointment of an arbitrator filed under Section 11(5) of the Arbitration Act.

273. Special Leave Petition (C) No. 5306 of 2022 (Order dated 19 May 2022).
274. See Section 11(5) of the Arbitration and Conciliation Act, 1996.
275. See Section 11(6) of the Arbitration and Conciliation Act, 1996.
276. ARBA No. 151/2016.

During the hearings before the Supreme Court, it observed that the Telangana High Court took four years to dispose of the appointment application.

Referring to the amended Arbitration Act, the Supreme Court expressed concern that if an appointment application is not disposed of within one year, it would defeat the object and purpose of the Arbitration Act. Raising these concerns, the Supreme Court directed the Registrar General of the Telangana High Court to submit a detailed report highlighting the number of such appointment applications that are pending before the High Court, and from which year are such disputes pending. The Supreme Court also called for the statement/ particulars of such pending applications from all the High Courts.

C. Directions of The Supreme Court

The Supreme Court took cognizance of the fact that there were volumes of similar appointment applications pending in various other High Courts for more than four or five years. The Court was of the view that courts need to ensure that commercial disputes need to be resolved at the earliest, as pendency shall not only adversely impact the commercial relations between the parties, but also the economic health of the country. In this regard, the Supreme Court referred to the Arbitration Act as well as Commercial Courts Act 2015 which provide for time-bound dispute resolution. More specifically, Commercial Courts Act 2015 mandates that the commercial disputes are to be decided and disposed of within a period of one year. Further, under the Arbitration Act, arbitrators are mandated to render the awards within a period of one year. Therefore, pendency of appointment applications before courts for more than year in a few cases, and beyond a period of four or five years, as was observed in these cases, clearly defeats the objective of the Arbitration Act.

In view of the same, the Supreme Court directed all Chief Justices of the various High Courts to ensure that such pending appointment applications are disposed of within a period of six months from the date of the order of the Supreme Court passed in this case. Further, the High Courts were also directed to submit their respective compliance reports to the Supreme Court upon the completion of such period of six months. The court also opined that all High Courts must make endeavor to decide and dispose all appointment applications preferably within a period of six months from the date that such applications are filed.

D. Analysis

The Supreme Court's order promises a prompt disposal of such appointment applications which would in-turn ensure that arbitration proceedings commence and are disposed of expeditiously.[277]

This order is in sync with the present pro-arbitration landscape in India which primarily envisages expeditious disposal of commercial disputes. It is expected that this order would be intriguing for arbitration practitioners as well as parties willing to resolve commercial disputes through arbitration in India.

It may however be noted that the directions of the Supreme Court to the High Courts may be extraneous to international commercial arbitrations, in which case it is the Supreme Court which is requested for arbitral appointments.

The Supreme Court has been consistently taking a proactive role in furthering such pro-arbitration ecosystem in India. For example, in *BSNL v. Nortel Networks India*[278] the Supreme Court had to adjudicate upon the issue of the limitation period for filing of an appointment application in the absence of a provision in the Arbitration

277. See Article 141 of the Constitution of India 1950:
"The law declared by the Supreme Court shall be binding on all courts within the territory of India."

278. AIR 2021 SC 2849.

Act prescribing the same. The Supreme Court ruled that the limitation period for the filing of appointment applications would be covered by Article 137 of the Limitation Act, 1963.[279]

However, in the absence of a specific timeline provided in the Arbitration Act, such directions issued by the Supreme Court or the basis for capping the time period for disposal at six months, may be subject to further review or need to be incorporated in the statute itself.

Further, certain amendments were proposed in 2019 to Section 11 of the Arbitration Act for appointment of arbitrators through arbitral institutions designated by the by the Supreme Court, in case of international commercial arbitrations, or by the High Court, in case of arbitrations other than international commercial arbitrations. The said amendments which were intended to avoid such delays in arbitral appointments await notification. This may be an opportune time to relook at the proposed amendments and implement them.

279. *BSNL v. Nortel Networks India AIR 2021 SC 2849:*
"The limitation for invoking arbitration, and seeking appointment of an arbitrator is at par with a civil action, and would be covered by Article 137 of the Schedule to the Limitation Act, 1963. An action taken by a claimant must necessarily fall within the statutory period of 3 years from the date on which the right to apply accrues."

Limitation Act 1963, Schedule:

	Type of Suit	Period of Limitation	Time from which period begins to run
137	Any other application for which no period of limitation is provided elsewhere in this division	Three Years	When the right to apply accrues

July 28, 2022

II. United States Supreme Court Refuses Court Assistance Under 28 USC S.1782(A) to Obtain Evidence for Foreign Arbitration Proceedings – Part I (Analysis)

The US Supreme Court has held that:

- foreign private arbitral tribunals cannot seek assistance of US courts under 28 USC Section 1782 to obtain evidence located in the United States;
- a 'foreign or international tribunal' under 28 USC Section 1782 refers to 'governmental or intergovernmental authorities' and does not encompass private adjudicative bodies;
- arbitral tribunals in commercial or investment treaty arbitration do not constitute 'governmental or intergovernmental authorities', unless they have been constituted by governments or vested with some form of governmental authority.

A. Introduction

28 USC Section 1782 (**S.1782**) is a powerful tool available in the United States federal law to litigants before foreign and international tribunals. This legal provision allows litigants or tribunals to seek assistance of American courts in gathering evidence present in the United States, for use in foreign proceedings. This provision was particularly attractive for foreign arbitral tribunals or parties involved in foreign arbitration, since arbitral tribunals lack sovereign tools to ensure compliance of their orders directing third parties or parties to produce evidence. While arbitral tribunals can make orders drawing adverse inferences against a non-compliant party or impose costs, they require court assistance to obtain evidence from third parties or parties that are undeterred by such orders.

However, the issue of whether a foreign-seated arbitral tribunal is covered within the ambit of a 'foreign or international tribunal' in S.1782 has been a highly contested issue in the United States. The Second,[280] Seventh[281] and Fifth[282] Circuits had narrowly read S.1782 to exclude private arbitral tribunals from the ambit of 'foreign or international tribunal', such that they could not seek assistance of US courts in obtaining evidence for use in foreign arbitration proceedings. Conversely, the Fourth,[283] Sixth[284] and Eleventh Circuits[285] read S.1782 broadly and allowed private arbitral tribunals to seek assistance of US courts. Please see our detailed article on *'28 U.S.C. Section 1782(a) – The Good Samaritan for Taking Evidence in the USA for Foreign Arbitrations – A Comparative Analysis'*.[286]

280. National Broadcasting Co. v. Bear Stearns & Co., 165 F. 3d 184 (CA2 1999).
281. Servotronics, Inc. v. Rolls-Royce PLC, No. 19-1847 (7th Cir. Sept. 22, 2020).
282. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).
283. Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).
284. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F. 3d 710 (CA6 2019).
285. Consorcio Ecuatoriano De Telecomunicaciones S.A. v. Jas Forwarding (Usa), Inc, 685 F.3d 987 (11th Cir. 2012).
286. By Kshama A. Loya & Moazzam Khan, at : https://www.natlawreview.com/article/28-usc-section-1782a-good-samaritan-taking-evidence-usa-foreign-arbitrations.

On 13 June 2022, the USSC resolved this ambiguity and rendered a joint unanimous decision in *ZF Automotive US Inc. et al v. Luxshare, Ltd.* (**ZF Automotive case**), and Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States (**Alix Partners case**).[287] The USSC confirmed that a private arbitral tribunal does not fall within the ambit of a 'foreign or international tribunal' under S.1782, and cannot seek assistance of US courts in obtaining evidence for use in foreign-seated arbitration proceedings.

In this article, we will provide an analysis of the judgment (Part I). In our next article, we will provide the way forward and recourse for parties in need of evidence located in the US, for use in foreign-seated arbitration proceedings (Part II, published by *LexisPSL*).

B. Factual Background

a. *28 USC Section 1782(a)*

S.1782(a) states:

"*Assistance (by courts) to foreign and international tribunals and to litigants before such tribunals:*

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." (emphasis supplied)

b. *ZF Automotive US Inc. et al v. Luxshare Ltd.*

The first case before the USSC stemmed from the Sixth circuit and involved a dispute under a contract for sale (Contract). The dispute resolution clause in the Contract provided that all disputes would be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration (First Arbitral Tribunal).

When a dispute arose between the parties under the Contract, Luxshare filed an ex parte application under S.1782 in the US District Court of Eastern District of Michigan, seeking information about ZF and two of its senior officers before commencing arbitration proceedings. The District Court granted this application and allowed Luxshare to serve subpoenas on ZF and its officers. ZF moved to quash the subpoenas on the ground that arbitral tribunals do not constitute 'foreign or international tribunal' under S.1782. However, the District Court rejected ZF's application owing to the Sixth circuit precedents[288] which allowed arbitral tribunals to seek assistance of US courts under S1782.

287. Case number 21-401.

288. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F. 3d 710 (CA6 2019).

c. *Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States case*

The second case stemmed from the Second circuit and involved a dispute between Lithuania and the Fund for Protection of Investor's Rights in Foreign States (**Fund)** - a Russian corporation and an assignee of a Russian investor - under the Lithuania-Russia Bilateral Investment Treaty (BIT). The BIT provided that a dispute between one of the contracting parties to the BIT and an investor of the other party may be resolved by one of four forums, including an ad-hoc arbitration in accordance with the UNCITRAL Rules with a three-member arbitral tribunal (**Second Arbitral Tribunal**).

The dispute arose out of a Russian investor's investment in a Lithuanian bank AB Bankas SNORAS (Snoras) that was subsequently nationalized by the Lithuanian Government. As part of the nationalization process, Lithuania had appointed a CEO of a New York-based consulting firm as a temporary administrator of Snoras. The Fund commenced arbitration proceedings against Lithuania under the BIT, and alleged that the Russian investor's investment was expropriated by Lithuania due to its nationalization of Snoras. After commencing the arbitration, the Fund filed a S.1782 application in the US District Court for the Southern District of New York, seeking information about the temporary administrator. The temporary administrator resisted this application by arguing that the arbitral tribunal was not a 'foreign or international tribunal'. The District Court granted the Fund's request, despite the Second Circuit precedents[289] that had held that private arbitration tribunals do not constitute 'foreign or international tribunal' under S.1782. The District Court's decision was affirmed by the Second Circuit by adopting a multifactor test - which concluded that the arbitral tribunal constituted under the BIT "did not possess functional attributes commonly associated with private arbitration".

To resolve the split among the Courts of Appeal of the Sixth and Second Circuits, the USSC granted a stay and a certiorari in both these cases.

C. Judgment

a. *Inclusion of private adjudicative bodies in the phrase "foreign or international tribunal" in S.1782*

According to the USSC, the legislative history of S.1782 indicated that Congress used the term 'tribunal' in a broad sense, and did not restrict its meaning to a 'formal court'. However, it then found that the context of the term 'tribunal' in this section indicated that such a tribunal should exercise governmental authority. It based its findings on two reasons. First, it found that the term 'foreign tribunal' has governmental or sovereign connotations since a tribunal must belong to a foreign nation to be called a 'foreign tribunal'.

Second, it noted that S.1782 mentions that a district court order under this section "may prescribe the practice and procedure, which may be in whole or part the *practice and procedure of the foreign country*". Accordingly, it found that Congress could not have intended to cover foreign private arbitral tribunals within S.1782 since it cannot be presumed that foreign arbitral tribunals, which prescribe their own rules typically, would follow the 'practice and procedure of the foreign country'. Therefore, the USSC concluded that a 'foreign tribunal' clearly refers to a tribunal which is "imbued with governmental authority by [a] nation".

The USSC also held that 'international tribunal' then refers to a tribunal which has been "imbued with governmental authority by multiple nations". Citing the American Heritage Dictionary, the USSC found that international can mean either "involving two or more nations" or "involving two or more nationalities". USSC found that the first definition would be applicable in the present context and a tribunal will be international when it involves two or more nations, i.e. two or more nations have "imbued the tribunal

289. National Broadcasting Co. v. Bear Stearns & Co., 165 F. 3d 184 (CA2 1999).

with official power to adjudicate disputes". By reaching these findings, the USSC concluded that a 'foreign or international tribunal' under S.1782refers to 'governmental or intergovernmental authorities'.

The USSC also noted that this interpretation is consistent with the legislative intent behind introducing S.1782to promote comity and reciprocal assistance between the United States and foreign nations, which would not be achieved by aiding private adjudicative bodies in foreign nations.

It also noted that allowing assistance by US courts to foreign private arbitral tribunals under S.1782 would be in tension with the Federal Arbitration Act (**FAA**). This is because S.1782 would allow a foreign or international tribunal, or an interested person, to seek assistance of the US courts before arbitration proceedings have been commenced. However, there is no such provision for pre-arbitration discovery under the FAA for domestic arbitral tribunals. Accordingly, the USSC found that allowing private arbitral tribunals to be covered under S.1782 would lead to an absurd result where US courts would aid foreign arbitral tribunals but not domestic arbitral tribunals.

b. *Whether the arbitral tribunals in both cases qualify as "governmental or intergovernmental bodies"*

The arbitral tribunals in both cases were of a different nature. The First Arbitral Tribunal, dealing with a commercial arbitration, was constituted by parties privy to a contract. The second arbitral tribunal, dealing with an investment arbitration, was constituted by a country and an investor of another country under an international treaty. Accordingly, the USSC analyzed the nature of both arbitral tribunals to decide if they constituted "governmental or intergovernmental bodies" - such that they can be classified as 'foreign or international tribunals' under S.1782.

For the First Arbitral Tribunal, the USSC found that no government was involved in creating this arbitral tribunal or prescribing its procedures. Accordingly, it held that such an arbitral tribunal cannot be a governmental body. For the Second Arbitral Tribunal, the USSC acknowledged that the tribunal would be different from the First Arbitral Tribunal since there was a sovereign State on one side, and the option to arbitrate was contained in an international treaty rather than in a private contract.

However, it ultimately held that such a tribunal would not be a governmental body since neither Lithuania nor Russia could be said to have given such an ad-hoc tribunal "governmental authority". It noted that the treaty does not constitute the panel, and merely references the set of rules that govern the panel formation and procedure if an investor chose that forum. It also noted that the ad-hoc tribunal would function independently of Lithuania or Russia, and that the tribunal "lacks any potential indicia of governmental nature". Accordingly, the USSC found that the Second Arbitral Tribunal was *"indistinguishable in form and function"* from the First Arbitral Tribunal.

Therefore, the USSC held that neither the First Arbitral Tribunal nor the Second Arbitral Tribunal would constitute a 'foreign or international tribunal' under S.1782. Accordingly, it reversed the judgment of the Sixth Circuit District Court and the Second Circuit Court of Appeals in the first and second cases respectively.

D. Analysis and Outlook

While bringing clarity, the USSC decision may be considered as a setback for the international arbitration community. By denying arbitral tribunals or arbitrating parties the right to seek assistance of US courts in obtaining evidence, the USSC may have made it harder to seek crucial pieces of evidence in arbitration.

Arbitral tribunals may still be able to enforce their orders against the parties for document production and discovery by drawing adverse inferences or imposing costs. However, they would continue to need the

assistance of courts in procuring evidence in possession of third parties, or in situations where threats of adverse inference or costs are insufficient in ensuring compliance of parties with an order for production or discovery by an arbitral tribunal.

It may be argued that the USSC relied on circular definitions of 'foreign', 'international' and 'tribunal' to find that they strictly relate to governmental or intergovernmental bodies. The USSC found that these words may independently have broader connotations than governmental authority, but put together indicate that the legislature intended that assistance for governmental or intergovernmental bodies only under S.1782. However, without any further analysis into why such words put together have governmental connotations, it is hard to understand how the USSC reached this conclusion.

The USSC's argument that the discretion provided to district courts under S.1782 (to give an order prescribing the practices or procedures of the foreign country) indicates that a foreign tribunal has to be one which necessarily follows such practices or procedures, is not very persuasive.

First, providing such discretion to district courts under S. 1782 does not necessarily mean that the foreign tribunal is following the practices or procedures of its country. It could mean that a district court can give such an order when the foreign tribunal is following such practices or procedures. Second, this also does not mean that foreign arbitral tribunals do not follow practices or procedures of their countries. In fact, arbitral tribunals are bound by mandatory practices or procedures of the seat of arbitration. Therefore, it was possible for the USSC to take an alternative interpretation. This would have encouraged arbitration by providing the much-required assistance from courts in the United States.

This decision can have implications on proper functioning of arbitration. It is important that a symbiotic relationship be maintained between courts and arbitral tribunals to assist parties in fully utilizing the advantages of arbitration.

In our next article (Part II, published by LexisPSL), we will provide the way forward and recourse for parties in need of evidence located in the US, for use in foreign-seated arbitration proceedings.

III. What Recourse do Parties have after The US Supreme Court's Verdict on 28 USC Section 1782(A) Re Arbitrations?

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On 13 June 2022, the Supreme Court of Unites States (USSC) rendered its unanimous decision in ZF Automotive US Inc et al v Luxshare, Ltd. (ZF Automotive) and Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States (Alix Partners) (case number 21-401). Thereby resolving a long-drawn out circuit split on the use of section 1782 of Title 28 of the United States Code (Section 1782) by private arbitral tribunals to seek assistance of US district courts in obtaining evidence for use in arbitration proceedings seated outside the US.

Before the USSC decision, there was no consensus between the circuits on the interpretation of Section 1782. The judgment clarified that parties cannot seek assistance from US courts to gather evidence located in the US for use in foreign-seated arbitration proceedings.

While bringing clarity on a deeply-contested issue, this decision is a setback for the international arbitration community. The USSC may have made it harder for parties to seek crucial pieces of evidence located in US for use in arbitration.

Does this leave parties or arbitral tribunals remediless? Is there room for distinct approach for use of evidence in commercial and investment treaty arbitrations? In this article, we explore the way forward for parties to arbitrations seated outside the US and requiring evidence located in the US. We also provide brief strategies for parties and arbitration practitioners to navigate this conundrum.

A. Relevant Analyses from The Judgment

To understand the way forward, the following points from the judgment are pertinent to note. The USSC held that:

- the context of the term 'tribunal' in Section 1782 indicates that such a tribunal should be exercising governmental authority. It based its findings on two reasons:
  - first, it found that to be called a 'foreign tribunal', a tribunal must belong to a foreign nation and hence, has governmental or sovereign connotations
  - second, it noted that Section 1782 mentions that a district court order under this section 'may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country'. Congress could not have intended to cover foreign private arbitral tribunals within Section 1782 since it cannot be presumed that foreign arbitral tribunals, which prescribe their own rules typically, would follow the 'practice and procedure of the foreign country'
- 'foreign tribunal' clearly refers to a tribunal which is 'imbued with governmental authority by a nation'
- 'international tribunal' refers to a tribunal which has been 'imbued with governmental authority by multiple nations' ie two or more nations have 'imbued the tribunal with official power to adjudicate disputes'

B. Way Forward—Options, Strategies, Interpretations and Critique

In light of the above key analyses from the judgment, parties and members of the international arbitration community could consider the following options, strategies and creative interpretations depending on the nature of the dispute and applicable law.

C. Using 28 USC Section 1781 Instead

Without the availability of Section 1782, it seems likely that arbitral tribunals would now have to seek judicial assistance of courts at the seat to issue letters of request or letters rogatory which can in turn be executed by American courts under section 1781 of Title 28 of the United States Code (Section 1781). The US, is a party to the Hague Convention on the Taking of Evidence, and codified its obligation under the convention as Section 1781. This section, which is similar to Order 26, Rule 19 of the Indian Civil Procedure Code 1908, allows assistance of US courts to foreign courts, foreign tribunals or international tribunals when a letter of request or letter rogatory is issued by such foreign court or tribunal to the Department of State in the United States.

It is unclear whether an arbitral tribunal can directly issue such a letter rogatory under Section 1781. However, considering that Section 1781 covers 'foreign or international tribunals' like Section 1782, it seems likely that US courts would not execute letters issued by private arbitral tribunals. This process is likely to be very time consuming since it requires such letters to be processed through diplomatic channels rather than a more direct mechanism under Section 1782. However, this mechanism remains available.

D. The Role of Evidence, The Law of The Seat and International Conventions in Negotiations

Evidence plays a crucial role in determining the outcome of arbitration proceedings. Parties may struggle with gathering of evidence and access to witnesses, documents or third parties. Normally, witnesses belonging to the parties appear before arbitral tribunals to provide testimony or submit documents. However, some witnesses might refuse to appear before arbitral tribunals or submit documents in evidence, or the relevant evidence might be with third parties who are not part of the foreign arbitration proceedings (and hence, beyond the jurisdiction of the arbitral tribunal). In such cases, when arbitration is seated in a jurisdiction, but evidence is located in another jurisdiction, parties may be compelled to seek assistance of courts in the other jurisdiction to obtain evidence for use in arbitration proceedings.

The success of these applications depends on the national rules of procedure applied by courts. It is therefore worthwhile for parties to anticipate key pieces of evidence required to establish the case; location, availability of and access to such evidence; need for court assistance, the judicial approach in enabling such access, and the law of the seat, for strategizing the course of the dispute and submission of evidence.

While it is difficult for parties to anticipate disputes at the stage of negotiation of arbitration clauses, let alone location of evidence if disputes were to arise, it might be helpful to guesstimate and do some crystal ball gazing. Parties or advising counsel can anticipate the type of disputes that can arise, the location of subject matter of the dispute, location of key witnesses and documents, and possible involvement of third parties in the case. If majority are located in the US, a seat could be chosen in the US to benefit from the Federal Arbitration Act (FAA). However, since neutrality of seat is often insisted upon, parties could choose a seat that promises judicial support in taking of evidence during arbitration proceedings under its law, and that is party to international treaties and reciprocal arrangements with the US such as The Hague Convention on Taking of Evidence.

E. Expanding The Scope of FAA

USSC noted that allowing assistance by US courts to foreign private arbitral tribunals under Section 1782 would be in tension with the FAA. This is because the scope of Section 1782 is wider than the FAA and would allow pre-arbitration discovery. However, the FAA does not allow the same for domestic arbitral tribunals. Accordingly, allowing arbitral tribunals to be covered under Section 1782 would lead to an absurd result.

Rather than restricting Section 1782 to avoid tension with the FAA, a better approach could have been to expand the scope of the FAA to provide greater assistance by US courts to arbitral tribunals in the United States.

The US legislature could also take steps to ease the tension and make certain provisions of the FAA available for foreign-seated arbitrations. For instance, India amended its Arbitration & Conciliation Act, 1996 (Indian A&C Act) in 2015 to extend the applicability of Section 27 of the Indian A&C Act to foreign seated arbitrations. Section 27 of the Indian A&C Act allows court assistance to arbitral tribunals in taking of evidence. Section 2(2) of the Indian A&C (Amendment) Act, 2015 makes Section 27 available to parties, subject to an agreement to the contrary, in international commercial arbitrations seated outside India. These provisions allow foreign arbitral tribunals to seek assistance of Indian courts in gathering evidence. This approach of the Indian legislature is certainly more arbitration friendly towards this specific issue.

F. Practice and Procedure

USSC's interpretation that the discretion provided to district courts under Section 1782 to give an order prescribing the practices or procedures of the foreign country, indicates that a foreign tribunal has to be one which necessarily follows such practices or procedures, is not very persuasive.

First, providing such discretion to district courts does not necessarily mean that the foreign tribunal is following the practices or procedures of its country. It could mean that a district court can give such an order only when the foreign tribunal is following such practices or procedures.

Second, this also does not mean that foreign arbitral tribunals do not follow practices or procedures. In fact, arbitral tribunals are bound by mandatory practices or procedures of the seat of the arbitration. Therefore, an alternative interpretation encouraging arbitration by providing court assistance is possible.

G. Distinction between Commercial and Investment Arbitration Tribunals

For the arbitral tribunal in ZF Automotive, USSC found that no government would be involved in creating such an arbitral tribunal or prescribing its procedures. Accordingly, it held that such an arbitral tribunal cannot be a governmental body.

For the arbitral tribunal in the Alix Partners case, USSC acknowledged that the tribunal would be different from ZF Automotive, since there would be a sovereign on one side of the dispute, and the option to arbitrate was contained in an international treaty rather than a private contract.

However, it ultimately held that such a tribunal would not be a governmental body either since neither Lithuania nor Russia could be said to have given such an ad-hoc tribunal 'governmental authority'. It noted that the treaty does not constitute the arbitral panel, and merely references the set of rules that govern the panel formation and procedure if an investor chooses that forum. It also noted that the ad-hoc tribunal would function independently of Lithuania or Russia and that the tribunal 'lacks any potential indicia of governmental nature'. Accordingly, USSC found that the Alix Partners tribunal was 'indistinguishable in form and function' from the ZF Automotive tribunal.

USSC held that ad-hoc investment arbitral tribunals which were not 'pre-existing governmental bodies' but were constituted solely for arbitration cannot be 'governmental' or 'intergovernmental' bodies. However, this does not resolve ambiguity surrounding pre-existing arbitral institutions in investment arbitration such as the ICSID, or a potential Multilateral Investment Court imbued by governmental authority.

Unlike ad-hoc investment arbitral tribunals or arbitral tribunals in commercial arbitration, the ICSID is funded by parties as well as the World Bank, which is in turn financed by multiple nations. Further, the ICSID Convention requires member states to sign and ratify the convention to be able to access the ICSID dispute resolution mechanism—a step which is not required for other arbitral institutions or rules. Member states are also obligated to recognize ICSID awards as binding, and enforce them as if they were final judgments of a court of such state. These facts would reflect that there is a 'higher level of government involvement' in the ICSID which might make it an 'intergovernmental body'.

However, at the same time, an ICSID arbitral tribunal continues to derive its authority from the parties' consent to arbitrate. Unlike other governmental bodies such as courts, no party can be forced to resolve their disputes before ICSID. Therefore, there remains uncertainty whether arbitral institutions such as ICSID will be considered a 'private' body or a 'governmental/intergovernmental' body.

The situation would be similar for a Multilateral Investment Court which would be a product of a multilateral convention among states, imbued with governmental authority to resolve Investor-State disputes.

Such uncertainty may only be resolved when USSC directly deals with this question, or puts forwards a multifactor test like the Second Circuit did to decide the extent to which governmental involvement is required in order to term a body 'private' or 'governmental'.

H. Remedy with Arbitral Tribunals

Arbitral tribunals may still be able to enforce their orders for document production and discovery against parties to the arbitration by threat of adverse inferences or costs. Parties must seek such orders from arbitral tribunals where possible. However, they would continue needing the assistance of courts in procuring evidence in the possession of third parties, or in situations where threats of adverse inference or costs have been insufficient in ensuring compliance of parties with an order for production or discovery by an arbitral tribunal.

I. Comity

USSC noted that its interpretation was consistent with the legislative intent behind introducing Section 1782 to promote comity and reciprocal assistance between the US and foreign nations, which would not be achieved by aiding private adjudicative bodies in foreign nations.

The goals of comity and reciprocity could have been met by allowing foreign arbitral tribunals to seek assistance of US courts. Such a measure may have encouraged courts in such foreign countries to also aid arbitral tribunals in the US. It was possible for USSC to undertake a more arbitration-friendly interpretation of Section 1782.

J. Conclusion

This decision, as it stands, can have implications on the proper functioning of international arbitration. For such proper functioning, it is important that a symbiotic relationship is maintained between courts and arbitral tribunals, whether domestic or foreign. It is hoped that parties will be able to use some of the options, strategies or interpretations outlined above when they are in need of judicial or strategic assistance in taking of evidence for foreign-seated arbitral proceedings.

May 19, 2022

IV. Singapore Court of Appeal Allows A Non-Party to Enforce an Award

- The Appellate Court held that a non-party can enforce an award under Section 19 of the IAA when it is the correct party to the arbitration and it was not named in the award merely due to a misnomer.
- It further held that the mechanical approach under Section 19 of the IAA does not prevent a court from going beyond the names mentioned in the Award if it does not have to be embroiled in the Tribunal's reasoning or the merits of the dispute.
- The Appellate Court also found that the doctrine of estoppel does not prevent a non-party from claiming that it is the correct party to the award when the other party did not detrimentally rely on the non-party's representations during the arbitration proceedings.

The Singapore Court of Appeal (**Appellate Court**), in *National Oilwell Varco Norway AS v. Keppel FELS* (**Keppel**),[290] allowed a non-party, National Oilwell, to enforce an award in favor of a company named in the award, Hydralift, that had since dissolved. The Court found that such an enforcement is possible even after adopting a mechanical process prescribed under Section 19 of the International Arbitration Act (**IAA**) since National Oilwell had taken over all the assets, rights, liabilities and obligations of Hydralift subsequent to a merger in which Hydralift had dissolved as an entity. Allowing the enforcement of the award, the Appellate Court found that the legal personality of Hydralift continued in National Oilwell thereby making this a simple case of a misnomer.

A. Factual Background

In 1996, Keppel FELS (**KFELS**) entered into a contract with Hydralift, a Norwegian company, for the design and supply of a turret bearing system (**Contract**). The parties agreed that the Contract will be governed by Singaporean law and that any dispute between them shall be resolved by arbitration seated in Singapore. After a dispute arose between the parties in 1999, and the parties failed to mutually resolve it, KFELS commenced arbitration proceedings against Hydralift seeking damages for breach of contract in 2007.

However, before 2007, Hydralift had dissolved as a separate legal entity. In 2002, Hydralift became a wholly owned subsidiary of National Oilwell-Hydralift (**NOH**). Moreover, in October 2004, Hydralift merged with NOH and was struck off the Norwegian register of companies. In December 2004, NOH merged with National Oilwell Norway AS (which changed its name to NOV Norway in 2010).

In the arbitration proceedings commenced by KFELS, an arbitral tribunal was constituted in 2008. NOV Norway participated in these arbitral proceedings, by defending against KFELS' claim and filing a counterclaim, as Hydralift. In 2015, in all court proceedings that were initiated by KFELS in relation to the arbitration proceedings, Hydralift was named as the defendant and NOV Norway participated in all these proceedings as Hydralift. In September 2019, after 12 years, the arbitral tribunal passed an award in favor of Hydralift and ordered KFELS to pay SGD 0.7 million as damages and SGD 3.1 million as costs (**Award**).

290. [2022] SGCA 24.

Accordingly, NOV Norway filed an ex parte application before the General Division of the Singapore High Court (High Court) to enforce the Award. KFELS also filed an application in the High Court to resist the enforcement of the Award. The High Court allowed the application by KFELS and refused enforcement of the Award. Aggrieved by the decision of the High Court, NOV Norway filed an appeal in the Appellate Court.

B. Judgment

Effect of the 2004 Mergers under Norwegian Law

NOV Norway argued that during the merger, all the assets, rights, obligations and liabilities of Hydralift were transferred to it which effectively made NOV Norway the correct party to the arbitration. On the other hand, KFELS contended that NOV Norway is a distinct entity to Hydralift, and a decision to allow a non-party to enforce the award would be against the manifest intent of the arbitral tribunal.

The Appellate Court dismissed KFELS' contention that NOV Norway was a distinct entity to Hydralift after the 2004 mergers. It relied upon the law of Norway, as the law of the country of incorporation of both the companies, to determine the effect of the mergers upon the legal personality of Hydralift. Applying the principle of continuity under Norwegian law, the Appellate Court found that the legal personality of Hydralift continued in NOV Norway since all assets, rights, obligations and liabilities of Hydralift had automatically transferred to NOV Norway after the merger.[291]

Effect of the Non-Assignment Clause under the Contract

In the proceedings before the High Court, the High Court agreed with NOV Norway that the non-assignment clause under the Contract, which restrained Hydralift from assigning any rights or benefit under the Contract,[292] does not prohibit transmission of rights of Hydralift to NOV Norway under the arbitration agreement. On appeal, KFELS again contended, by relying on a different expert witness, that NOV Norway cannot arbitrate on behalf of Hydralift due to the non-assignment clause contained in the Contract.

The Appellate Court dismissed KFELS' contention by finding that under Norwegian law, a non-assignment clause needs to have a "specific basic" (i.e. it needs to specifically restrict rights) to restrain any transfer of rights during a merger. Therefore, it held that the broad non-assignment clause under the Contract does not prohibit the transmission of Hydralift's right to NOV Norway under the arbitration agreement.[293]

Power of Singapore courts to enforce awards when a party has been incorrectly named

KFELS argued that the Appellate Court should not enforce this Award since the Singaporean courts do not have the power to go beyond the names written by the arbitral tribunal in the award when enforcing an award under Section 19 of the IAA.[294] As per KFELS, undertaking any factual analysis would be in violation of the mechanical approach to enforcement prescribed under Section 19 of IAA. On the other hand, NOV Norway argued that courts have the power under Section 19 to give "effect" to the true state of affairs in a situation where one of the parties has been incorrectly named.

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291. *Id.* at 53.

292. Clause 21 of the Contract provided that "[Hydralift] may not assign the contract or any part thereof or any benefit interest [sic] therein or thereunder and, for the avoidance of doubt and without limiting the generality of foregoing [sic], [Hydralift] may not assign any receivables or any sums due from the company under the terms of the contract."

293. [2022] SGCA 24, at 61-71.

294. Section 19 of the IAA provides that "An award on an arbitration agreement may, by permission of the General Division of the High Court, be enforced in the same manner as a judgment or an order to the same effect and, where permission is so given, judgment may be entered in terms of the award." (emphasis supplied).

The Appellate Court agreed with NOV Norway and found that the power to enforce an award in a misnomer situation is not inconsistent with the mechanical approach to enforcement. It held that in a true misnomer situation where the court does not have to be embroiled in the Tribunal's reasoning or the merits of the dispute to identify the parties to an award, enforcing an award would not violate the mechanical approach required under Section 19 of the IAA.

Further, the Appellate Court found that there was a true misnomer situation in this case since Hydralift and NOV Norway are the same legal person even if the fact of the 2004 mergers was not disclosed to KFELS or the Tribunal.[295] The Appellate Court held that determination of the correct party to an award should be made basis the substance of the correct facts before the court and not the facts that were known by the parties, at the time of commencement of the arbitration or during the arbitration proceedings, which influenced the parties' intentions at these times.[296] It also found that it was not necessary that this misnomer should have been corrected during the arbitration proceedings.[297] Therefore, the Appellate Court found that it has the power to enforce the Award under Section 19. In reaching this finding, the Appellate Court emphasized that such an approach would be consistent with its aim to facilitate the enforcement of arbitral awards.[298]

Applicability of doctrine of estoppel to prevent NOV Norway from denying that Hydralift was the actual party

The High Court had refused the enforcement of the Award by finding that NOV Norway was estopped from denying that Hydralift was a separate and actual party since it represented that Hydralift (and not it) was the respondent in the arbitral proceedings for over 12 years. In the appeal, NOV Norway contended that while it did represent that Hydralift was the correct party in the arbitral proceedings, it was not prevented by the doctrine of estoppel to enforce the Award since there was no detrimental reliance by KFELS upon NOV Norway's representations.

The Appellate Court agreed with NOV Norway to find that there was no detrimental reliance on the part of KFELS upon NOV Norway's representations.[299] It found that there was no basis or evidence to conclude that KFELS would not have carried on with the arbitration proceedings if it knew that NOV Norway, and not Hydralift, was the correct party to the arbitration. Accordingly, the Appellate Court refused to find that NOV Norway was prevented by the doctrine of estoppel from denying that Hydralift was the correct party to the Award.[300]

C. Analysis and Outlook

This judgment reflects the pro-arbitration stance of the Singaporean courts as it emphasized the objective of upholding and enforcing arbitral awards while reaching its finding that NOV Norway, a non-party to the Award, may still enforce the Award. It also serves as a reminder to parties to correctly name the parties in arbitration proceedings. Despite allowing the appeal in favour of NOV Norway and enforcing the Award, the Appellate Court refused to award costs to NOV Norway due to NOV Norway's failure to correct its name in the arbitration proceedings for over 12 years. Therefore, the parties' failure to correctly state, or subsequently correct, the name of the parties is likely to result in increased costs of litigation for both parties.

295. [2022] SGCA 24, at 105.
296. *Id.* at 103.
297. *Id.* at 115.
298. *Id.* at 96 and 116.
299. *Id.* at 125.
300. *Id.* at 131.

Keppel can be contrasted with the judgment of the Indian Supreme Court in Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited (**Gemini Bay**).[301] In Gemini Bay, the Indian Supreme Court enforced a foreign award against a non-signatory to the arbitration agreement under Section 47 of the Indian Arbitration and Conciliation Act, 1996. The court found that the ability of a non-signatory to be bound by an award cannot be raised at the enforcement stage and can only be raised before the arbitral tribunal or in a challenge filed at the seat of the arbitration. However, unlike Keppel, the Indian Supreme Court was faced with a situation where the award explicitly provided relief against the non-signatory, therefore the intention of the arbitral tribunal to bind the non-signatory was manifestly present. As mentioned above, this is different from Keppel wherein the Appellate Court enforced the Award upon NOV Norway's application, despite NOV Norway not being explicitly named in the award, because failure to mention NOV Norway's name could not be imputed as the intention of the tribunal when the tribunal did not know of the merger of Hydralift into NOV Norway. It will be interesting to note the approach that the Indian courts will adopt when a non-party to an award seeks to enforce an award against a party in India.

301. (2022) 1 SCC 753. Also see https://www.natlawreview.com/article/indian-supreme-court-rules-enforcement-foreign-award-against-non-signatories-gemini.

V. Put Option Enforced: Conflict with Indian Exchange Control Laws Not A Ground for Setting Aside The Award in Singapore

- In a challenge to an arbitral award on the ground of contravention with the public policy of Singapore, courts cannot delve into the findings of fact by the arbitral tribunal, except when there is fraud, breach of natural justice or some other vitiating factor.
- For the Singapore court, an arbitral tribunal's findings on foreign law (Indian law) are findings of fact which cannot be interfered with in a challenge to an arbitral award on the ground of contravention with the public policy of Singapore.

A. Introduction

In *CHY & CHZ v CIA*,[302] the Singapore International Commercial Court (**"SICC")**expounded the scope of curial interference in a challenge to an arbitral award on the ground of contravention with the public policy of Singapore under Art. 34(2)(b)(ii) of the UNCITRAL Model Law as incorporated under Section 3 of the International Arbitration Act, 1994.[303] The SICC held that findings of an arbitral tribunal on Indian law are findings of fact and therefore cannot be interfered with in a challenge to the award on the ground of contravention with the public policy of Singapore.

B. Factual Background

CHY, an Indian company (**"Shareholder"**)was a shareholder of another Indian company CHZ (**"Company"**), collectivelythe "Plaintiffs". CIA, a Mauritius investment company (**"Investor"**) had invested in the Company. Parties entered into a Shareholders' Agreement (**"SHA"**),[304] which provided that the Plaintiffs should publicly list the Company by a cut-off date, failing which the Investor could exercise the Put Option upon the Shareholder.[305] Further, if the Shareholder were legally unable to purchase the Investor's shares, it was obligated to arrange a third party to do so at the 'Put Price' ("**Put Option"**).[306]

The Plaintiffs failed to fulfil the aforesaid conditions by the cut-off date. However, the Investor did not exercise this right after the cut-off date. Instead, the parties negotiated the Investor's exit and eventually executed an Amended SPA (**"ASPA"**).[307] Under the ASPA, the Shareholder would re-acquire the Put Shares from the Investor, which was subject to an approval by the Reserve Bank of India (**"RBI"**). The RBI did not approve of the transaction, and Shareholder did not ultimately re-acquire the Put Shares.

302. [2022] SGHC(I) 3
303. (Cap. 143A, 2002 Rev ED). S. 3 of the IAA states that UNCITRAL Model Law on International Commercial Arbitration shall have the force of law in Singapore.
304. Dated October 09, 2009.
305. June 30, 2012
306. Clause 11.2 of the SHA. Put Price: Total amount invested by Investor plus an amount equal to a 22% compounded annual rate of return on the invested amount
307. January 2013.

Subsequently, the Investor exercised the Put Option under the SHA. The Shareholder refused to act on the Put Option and stated that the Put Option was contrary to Indian law. As a result, the Investor instituted arbitration proceedings under the International Chamber of Commerce (**"ICC"**) Rules, 2017. The Tribunal upheld the validity of the Put Option and (a) directed the Shareholder to pay damages to the Investor in the amount of Put Price, and (b) directed the Investor to transfer its shares to the Shareholder upon receipt of such amount. (**"Award"**)

The Plaintiffs challenged the Award before the SICC on the ground that the Award was in contravention of the public policy of Singapore as the Award compelled the Plaintiffs to perform an illegal act. Particularly, the Plaintiffs contended that the Award compelled the Plaintiffs to violate the Foreign Exchange Management Act, 1999 (**"FEMA"**).[308] The Plaintiffscontended thatcompliance with the Put Option would compel the Plaintiffs to 'pay assured returns to the Investor', which is illegal under the FEMA and its Regulations. *Per contra*, the Investor submitted that the issue regarding illegality of the Put Option had already been dealt with by the Tribunal. Therefore, the SICC cannot interfere with such finding. The Investor further contended that even if the Put Option were illegal, the same would only amount to the Tribunal incorrectly interpreting the SHA and such incorrect interpretation cannot be a ground of setting aside the Award.

C. Judgment of The SICC

The SICC formulated three broad issues for deciding the Plaintiff's challenge to the Award. We have dealt with each issue separately.

To what extent can the Tribunal's findings based on Indian law be reviewed under Article 34(2)(b)(ii) of the Model Law?

The SICC discussed precedents on the question of illegality of the underlying agreement or transaction and its relation with 'public policy' as a ground for setting aside the award. The SICC referred to the ruling of the Singapore Court of Appeal (**"Court of Appeal"**) in *AJU v. AJT* and found that it concluded that:

a. the court can reopen findings of Singapore law to determine whether the underlying agreement is illegal and set aside the award;

b. the court cannot reopen findings of fact made by an arbitral tribunal except when such findings of fact are marred by fraud or other vitiating factors.

The SICC recognised that in *AJU v. AJT*, the court found that the arbitral tribunal had correctly recognised the principle of Singapore law. However, the arbitral tribunal on facts held that the agreement did not require parties to take steps that were otherwise illegal. Thus, in *AJU v. AJT*, the court refused to set aside the award as holding that it should not substitute the arbitral tribunal's findings on fact for its own.

The SICC further noted that where an arbitral tribunal has returned a finding on law which is a foreign law for the setting aside court, the said finding must be considered as a finding of fact. Consequently, setting aside courts must not interfere with such findings of foreign law. In the present case as well, the SICC found that since the Tribunal had returned findings on Indian law, the same must be considered as a finding of fact. The SICC therefore concluded that it could not reopen or delve into the Tribunal's findings on the legality of the agreement under Indian law.[309]

308. Indian statute governing the law relating to foreign exchange in India.

309. Para 43 and 44 of the Judgment.

The SICC found that the Tribunal had given due consideration to the objection regarding the SHA being contrary to FEMA Regulations. The SICC further observed that if the Shareholder were unable to purchase the Investor's shares due to any legal impediment, the Shareholder was required to procure a non-resident third party to purchase the shares as FEMA did not apply to non-resident third party purchasers. Based on such consideration, the Tribunal had decided the issue in the favour of the Investor. Therefore, the Plaintiffs' failure to appoint a non-resident third-party to purchase the Investor's Put Shares was not in circumvention of FEMA, and thus amounted to a clear breach of the SHA. Considering that such findings on Indian law amounted to findings of fact with which the courts cannot interfere, the SICC refused to set aside the award.

In addition to its reliance on *AJU v. AJT*, the SICC also discussed the approach taken by the Privy Council in *Betamax Ltd v. State Trading Corporation (Mauritius)*.[310] In *Betamax*, the Privy Council had held that findings of fact and law by an arbitral tribunal are final and binding on the setting aside court except in case of fraud or other vitiating factors. The SICC noted that the approach taken by Privy Council in *Betamax* is slightly divergent from the approach taken by the Court of Appeal in *AJU v. AJT*. The SICC noted that the approach taken by Privy Council implied that the setting aside court can reopen the findings of law of an arbitral tribunal only if such findings are marred by fraud or other vitiating factors. In light of the aforementioned lack of convergence, the SICC stated that it 'leaves it to the Court of Appeal' to decide whether a finding of law can be reopened by the seat court or it is also subject to the exceptions set out in *AJU v. AJT*.

Whether the SICC can interfere with the Tribunal's award of damages and return of shares under Article 34(2)(b)(ii)?

The Plaintiffs challenged the Award insofar as it required them to pay the Put Price as damages on the ground that it effectively ensured payment of assured returns which was in violation of the FEMA. The SICC found that the Plaintiffs never took such an objection in the arbitral proceedings, and therefore cannot seek to open up that finding at a later stage in front of the setting aside court. In any case, even if they had so objected during the arbitral proceedings, the Tribunal's findings on the objection would amount to a finding of fact. Since, finding of fact cannot be interfered with, the SICC held that it would not interfere with the Tribunal's findings on India law under Article 34(2)(b)(ii) of the Model Law.

The SICC further noted that the Tribunal considered Indian precedents with similar factual background. The Tribunal had referred to and relied on judgments of the Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited and NTT Docomo Inc. v. Tata Sons Limited* to conclude that the Investor was entitled to damages in the measure of the Put Price.[311]

During the hearing stage, the Plaintiff admitted that its grievance arose from the manner in which the Tribunal had calculated damages. Further, the Plaintiff also challenged the Award on the basis that the Tribunal ignored certain principles of Indian contract law.[312] The SICC noted that the above grounds relate to a findings on fact by the Tribunal and therefore all the more immune from a challenge under Art. 34(2)(b)(ii).

If the SICC could review the Tribunal's findings on Indian law and come to a contrary view on the findings, would the matters raised amount to grounds for setting aside an award under Article 34(2)(b)(ii)?

The Plaintiffs contended that the Award is 'palpably and indisputably illegal' as it compels performance of an illegal act in India and therefore, raised public policy concerns. The SICC relied distinguished the factual

310. [2021] UKPC 14

311. *Cruz City 1 Mauritius Holdings v. Unitech Limited* (2017) (3) ARBLR 20 (Delhi) and *NTT Docomo Inc. v. Tata Sons Limited, (2017) SCC* OnLine Del 8078

312. The Plaintiffs challenged the Award on the basis that the Tribunal the 'requirement of proof of loss for the grant of damages' under Section 73 of the Indian Contract Act.

background between *Soleimany v. Soleimany,*[313] and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd.* (**"OTV"**).[314] The SICC concluded that similar to OTV, the Award in the present case did not afford evidence of corruption or illegal practice. Therefore, the grounds do not meet the thresholds to trigger violation of the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law.[315]

D. Conclusion

The above judgment of the SICC provides guidance on the adjudication of setting aside petitions when the underlying agreement is governed by a law which is foreign to a seat court in Singapore. If a party makes a challenge to a finding by an arbitral tribunal on the basis of an incorrect application of a foreign law, the same will be immune from scrutiny by the seat court.

At times, the ground of public policy acts as a tool for award-debtors to challenge the award on diminutive aspects in an attempt to prolong the process till enforcement. The present judgment adds to the jurisprudence of narrow scope of curial intervention and is therefore, likely to dissuade such challenges.

It is further pertinent to note the manner in which Tribunal had deliberated on the enforceability of the Put Option under the FEMA Regulations. The Tribunal specifically stated that the FEMA Regulations do not impose an absolute bar to the exercise of a put option. The Tribunal further explained that on a proper interpretation of the underlying agreement, it was evident that if the Indian promoter were legally unable to purchase the Investor's shares, it ought to have procured a non-resident third party for the purpose.

313. [1999] QB 745

314. [1999] 2 Lloyd's Rep 222.

315. Including (a) 'shocking the conscience of the courts', (b) violating the most 'basic notions of justice and morality'.

VI. Who Appoints The Arbitral Tribunal under The SIAC Rules

- Reading Rule 28.3 of the SIAC Rules and Article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration, jurisdictional objections raised by a party before the arbitrator, after such party failed to participate in the proceedings and file a defence would be considered as out of time.
- A non-participating party is not precluded from raising jurisdictional objections subsequently before the court.
- In all cases under the SIAC Rules, 2016, it is the President of SIAC who shall appoint the tribunal
- Where parties intend to displace the appointment, procedure laid down in the SIAC Rules, 2016, such intent should be explicit and unequivocal.

In *Hunan Xiangzhong Mining Group Ltd. v Oilive Pte Ltd.*,[316] the Singapore High Court (**"Singapore High Court"**) ruled on the appointment of arbitrator under the rules of the Singapore International Arbitration Centre (**"SIAC"**). The Singapore High Court clarified the importance of raising a jurisdictional challenge at the earliest possible time. However, a non-participating party is still permitted to challenge the award subsequently before the court based on the jurisdictional objections.

A. Factual Background

On 18th May 2020, Hunan Xiangzhong Mining Group Ltd. (**"Hunan"**) entered into a contract with Oilive Pte Ltd. (**"Oilive"**) for the sale and purchase of a cargo of barrels of light cycle oil. The contract contained an arbitration agreement which prescribed that:

"the Tribunal shall consist of a single arbitrator agreed upon by both parties, or if not so agreed, by the Chairman for the time being of SIAC."

The arbitral proceedings were governed by the SIAC Rules.

Certain disputes arose and Oilive initiated arbitration as per the arbitration agreement in the contract. The notice of arbitration was sent to the Hunan proposing the appointment of a sole arbitrator which went unanswered. Consequently, Oilive requested SIAC to appoint the sole arbitrator. Receiving no response from Hunan upon several communications, SIAC requested the President to appoint the sole arbitrator in accordance with Rule 10.2 of the SIAC Rules, 2016. Rule 10.2 of SIAC Rules states that where the parties fail to agree on the nomination of a sole arbitrator within 21 days, the President of the SIAC would appoint the arbitrator.

316. [2022] SGHC 43

B. Arbitral Proceedings

The arbitrator ordered Hunan to file its written submissions and evidentiary documents by 5th April with an extension till 12th April 2021. Hunan failed to do so and failed to attend the first evidentiary hearing as well. It finally appointed counsel on 25th May 2021 and raised objections regarding the jurisdiction of the arbitrator to adjudicate the matter. It stated that the sole arbitrator was to be appointed by the Chairman of SIAC as stated in the arbitration agreement and not by the President as had happened in the present case.

It should be noted that in 2013 SIAC implemented a new governance structure. Under its earlier rules i.e. the 2007 and 2010 versions, the chairman of SIAC had the power to appoint the arbitrator. However, in 2013, with the new governance structure, the president of SIAC was empowered to appoint the arbitrator and vide SIAC Rules, 2013, its earlier rules were amended and the power to appoint arbitrators was moved from the Chairman to the President of SIAC.

The arbitrator dismissed Hunan's jurisdictional challenge on the following grounds:

1. **First,** the arbitration agreement merely provided that the parties or the Chairman of SIAC "agree" on an arbitrator and never conferred the power on the Chairman to "appoint" one. This also finds backing by Rule 9.2 of the SIAC Rules, 2016 which provides that wherever the arbitration agreement states that the parties or a third-person may "appoint" an arbitrator, it shall be deemed to be nomination. Rule 9.3 of the SIAC Rules, 2016 further mentions that upon such nomination, it shall be the President of SIAC who will actually appoint the arbitrator.

2. **Second,** there is nothing in the arbitration agreement to provide that the parties intended to displace SIAC Rules, 2016 in favour of their own clause.

3. **Third,** any reference to SIAC Rules will necessarily mean a reference to the latest edition, which provides that the President of SIAC will be the appointing authority. The reference to Chairman in the arbitration agreement does not mean that the parties intended for the older edition to apply. Further, a reference to the older rules would not change the effect, as regardless of whether the 2007, 2010 or 2013 version of rules was incorporated, the power to appoint would continue with the President. If the parties intended on the unamended version of the earlier rules to apply then they would have set that out expressly.

4. **Fourth,** Rule 10.2 of SIAC Rules, 2016 states that where the parties fail to appoint the sole arbitrator within 21 days, the President would appoint the same. This provision would also govern situations where a party does not participate in the proceedings at all. Since in the present case Hunan did not participate in the arbitral proceedings and 21 days had passed, Rule 10.2 would empower the President of SIAC to appoint the sole arbitrator. It was intended as a fall-back provision in case the parties could not reach an agreement on appointment due to non-participation of either party in the proceedings. Further, parties expressly wrote that the SIAC Rules "currently in force" were deemed to be incorporated into the arbitration agreement, indicating that most up to date rules apply. Further, Rule 10 of the SIAC Rules is not prefaced with the words *"unless the parties have agreed otherwise"*. Hence, Rule 10 has to be read with the arbitration clause as opposed to the clause superseding the language of Rule 10.

5. **Fifth,** Hunan had filed its jurisdictional challenge out of time, since it never filed its memorial within the time stipulated by the arbitrator and ignored repeated requests.

This decision on jurisdiction was challenged in the Singapore High Court under Section 10(3) of the International Arbitration Act, 2002 **("IAA")**.

C. Judgment of The Singapore High Court

On the jurisdictional objection being filed out of time

The Singapore High Court first ruled on whether Hunan's jurisdictional objection was filed out of time. Rule 28.3(a) of the SIAC Rules read with Article 16(2) of the UNCITRAL Model Law stipulates that a jurisdictional challenge has to be raised no later than the statement of defence is filed. Hunan argued that since no statement of defence had been submitted and that since it had not participated in the arbitration, it was free to raise such a jurisdictional objection at any point of time.

The Singapore High Court rejected the contention, holding that Hunan chose not to file a jurisdictional objection within the time stipulated by the arbitrator. It had received all correspondences and communications calling upon it to file a statement of defence but willfully ignored to do so. Relying on the rationale behind Rule 28.3 of the SIAC Rules and Article 16(2) of the UNCITRAL Model Law which was to require the parties to raise their jurisdictional objections at the earliest possible time, the Singapore High Court held that accepting Hunan's argument of raising the jurisdictional objection at any point of time while it willfully avoids filing of a statement of defence and participating in the arbitral proceeding would only serve to derail the arbitral process.

Nevertheless, the Singapore High Court held that it is not disentitled from hearing a jurisdictional challenge based on the procedural irregularity of the objection being filed out of time. The Singapore High Court relied on the UNCITRAL Analytical Commentary of Article 16(2) and *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd.*[317] to hold that the preclusive effect of failing to raise a jurisdictional challenge does not apply where a party fails to participate in the arbitral proceedings. Therefore, even if Hunan did not participate in the arbitration within the deadline stipulated by the arbitrator, the court could nevertheless address the question of the arbitrator's jurisdiction under Section 10(3) of the IAA and was not precluded from doing so solely on the ground that the objection was filed out of time.

On the jurisdiction of the arbitrator: whether appointed in accordance with the arbitration agreement

At the very outset, the Singapore High Court alluded to various principles of construction of an arbitration agreement. It observed that effect must be given to the agreement to the fullest extent wherever possible. This was termed to be the principle of "effective interpretation". Further, it reiterated that courts should not construe the arbitration agreement restrictively or strictly and should prefer a commercially logical and sensible construction.[318] Applying these principles, the Singapore High Court upheld the appointment of the sole arbitrator on the following grounds:

1. **First,** the Singapore High Court observed that the arbitration agreement used the words "agreed upon by" instead of "appoint" or "nominate". Hence, no power of appointment or nomination was conferred on the parties or the Chairman of SIAC. Further, Rule 9,2 of the SIAC Rules, 2016 states that where an arbitration agreement states that the parties or a third-party may appoint an arbitrator, such appointment has to be deemed as nomination. Rule 9.3 of the SIAC Rules, 2016 stipulates that the actual appointment shall be done by the President in all cases. Hence, even if the arbitration agreement stated that the parties or the Chairman would "appoint" the sole arbitrator, such appointment would only be deemed as nomination. It is the President of SIAC who would subsequently appoint the sole arbitrator.

2. **Second,** Hunan had sought to contend that the reference to the Chairman of SIAC being the appointing authority in the arbitration agreement would be akin to the application of an earlier version of the SIAC Rules

317. [2019] 2 SLR 131

318. BNA v BNB and another [2019] SGHC 142

that mentioned the Chairman of SIAC would appoint arbitrators. However, the Singapore High Court held that: (a) since the contract was entered into on 18th May, 2020, a reference to SIAC Rules would necessarily mean a reference to the latest version, wherein the President of SIAC had the power of appointment; and (b) if the parties intended for the Chairman of SIAC to "appoint" the sole arbitrator and displace the SIAC Rules, 2016 in favour of an earlier version, they would have explicitly mentioned so. Such explicit intent was absent from the arbitration agreement.

3. **Third,** the Singapore High Court rejected Hunan's contention that Rule 10.2 of the SIAC Rules, 2016 cannot be applied as a fall-back provision. It observed that since the rule is not prefaced by words such as "unless the parties have agreed otherwise", there is nothing to indicate that the parties intended to disapply the same. The Singapore High Court stated *"In the absence of any such clear indications, the court should incline towards reading the arbitration agreement harmoniously with the whole of the institutional rules as chosen by the parties."* Further, construing it as a fall-back provision would not only be commercially sensible, it would also render the arbitration agreement workable. Therefore, the appointment of the sole arbitrator by the President of SIAC in accordance with Rule 10.2 of the SIAC Rules, 2016 was held to be valid.

D. Conclusion

The Singapore High Court's approach towards giving full effect to the arbitration agreement is praiseworthy. Further, the Singapore High Court's approach towards parties that willfully ignore to participate proceedings and tend to use the wording of a provision to raise objections at their own whims is also noteworthy. Such a decision will go a long way in dissuading parties from raising objections while prolonging the arbitral proceedings. However, the decision also reflects the importance of taking due care in drafting the arbitration agreement. A flawed clause could result in objections being raised which leads to wastage of time and resources on tangential issues as opposed to the merits of the dispute.

The observation of the Singapore High Court is relevant in the Indian context. Article 16(2) of the Model Law has been imported into Section 16(2) of the Indian Arbitration & Conciliation Act, 1996 (**"the Act"**). Further, Section 16(4) of the Act allows the arbitral tribunal to condone the delay in raising such jurisdictional objection beyond filing of a statement of defence if such delay is justifiable. In *Gas Authority of India Ltd v Keti Const. (I) Ltd*,[319] the Supreme Court of India observed that a plea challenging the jurisdiction of the arbitrator has to be raised at very beginning of the proceedings and "normally not later than the statement of defence". The importance of raising a jurisdictional objection at the earliest possible opportunity was restated by the Bombay High Court in *Surendra Kapoor v Prabir Kumar*.[320] Hence, Indian jurisprudence is in concert with the principles of law the Singapore High Court laid down. However, procedurally, Indian law is slightly different. Under Singapore law, a decision of the arbitral tribunal holding it has jurisdiction to hear the dispute can be challenged before the court within 30 days of the jurisdictional ruling. However, in India, as per Section 16(5) and 16(6) of the Act, the ruling of the arbitral tribunal dismissing the jurisdictional objection, can be challenged under Section 34 of the Act once the final award is passed.

319. (2007) 5 SCC 38

320. 2008 (1) RAJ 133 (Bom) (DB)

March 11, 2022

VII. Interim Protection Available only Against The "Fruits" of The Arbitral Award

- Application for interim protection at the post arbitral award stage must be confined to only the "fruits" of the arbitral award;
- Complete consensus ad idem is required in all parts of a contract before specific performance can be directed;
- Granting a part entitlement to take measures for specific performance of a contract does not amount to directing specific performance of the contract itself.

Recently, the Delhi High Court (**"Delhi HC"**) in *Zostel Hospitality Private Ltd. v. Oravel Stays Private Ltd & Anr* held that a right to specific performance of the underlying agreement (under which the arbitration was invoked) in an arbitral award does not necessarily imply that specific performance is itself granted. It opined that the enforcement of such performance may still be subject to condition precedents and following the due process of law. The Delhi HC has also elaborated on the scope of an interim protection under Section 9 of the Arbitration and Conciliation Act, 1996 (**"Act"**) at the post-award stage and held that only the "fruit" of an arbitral award can be protected by way of interim measures.

A. Background

Zostel Hospitality Pvt Ltd (**"Zostel"**) and one of its investor shareholders, Orios, entered into a contract with Oravel Stays Pvt Ltd (**"Oravel/OYO"**), whereunder, essentially, Zostel agreed to transfer its hotel business to OYO and Orios, against which OYO was required to transfer to Zostel, *"identified assets"* which included 7% of OYO's shareholding. Pursuant to the commercial understanding, a term sheet (**"Term Sheet"**) was executed which stated that upon closing, Zostel's shareholders would be entitled to acquire shares in OYO not exceeding 7% of Oravel's diluted shareholding, and that upon completion of post-closing obligations, the founders would be entitled to a payout of US$ 1 million. The Term Sheet also entailed that closing would require finalizing multiple definitive agreements regarding the exact terms of the transfer, which were to be negotiated subsequently by Zostel and Oravel.

Zostel began taking steps to fulfil its obligations[321] under the Term Sheet, however, when Zostel attempted to finalize the definitive agreements, Oravel delayed citing dissent from a particular shareholder of OYO. Subsequently, owing to alleged defaults on the part of OYO, Zostel was unable to acquire its assets, and initiated arbitration proceedings. The arbitral award (**"Arbitral Award"**) held that Zostel was entitled to specific performance of OYO's obligations under the Term Sheet. Given that OYO was in the process of filing for an Initial Public Offer (IPO), Zostel filed a petition under Section 9 of the Act seeking a restraint on the IPO, so that the execution of the Arbitral Award in relation to the specific performance of the Term Sheet is not rendered unenforceable.

321. Such as, (i) facilitating transfer of its employees, (ii) facilitating transfer of the properties in its network to OYO's network, (iii) facilitating the process of consumer migration, (iv) facilitating the process of transfer of future bookings w.e.f. 31st December, 2015 and (v) providing the consumer data of OYO to Zostel.

B. The Arbitral Award

In the arbitration, the arbitrator (**"Arbitral Tribunal"**) had formulated multiple issues to adjudicate, including questions regarding bindingness of the Term Sheet, whether there was consensus ad idem between the parties regarding the definitive agreements, and whether the Zostel was entitled to a specific performance as per the terms of the Term Sheet.

The Arbitral Tribunal held that: **First,** on consideration of the Term Sheet as a whole, it could not be said to be a mere exploratory document. Even though the recital mentioned that the Term Sheet was not binding, clauses 4[322] and 7[323] of the Term Sheet clarified that the definitive documents were not independent of the Term Sheet. **Second,** OYO's acceptance of communication from Zostel regarding performance of acts mentioned in the Term Sheet also pointed towards its binding value.

Third, there could not have been complete consensus ad idem on the draft definitive agreements, on the premise that Zostel had forwarded multiple draft definitive agreements to OYO, and negotiations on the same were still underway. **Finally,** Zostel was entitled to specific performance of the Term Sheet, noting that Zostel had performed all its obligations under the Term Sheet successfully. However, as the definitive agreements were yet to be executed, the Arbitral Tribunal held that Zostel is entitled to file appropriate proceedings for specific performance and execution of definitive agreements as envisaged under the Term Sheet.

C. Submissions of Parties Before Delhi HC

Submissions for Zostel

First, as the Arbitral Tribunal had held that Zostel is entitled to specific performance of the Term Sheet, OYO's IPO should not be allowed as it would frustrate the enforcement of the award. **Second,** the arbitral tribunal had specifically found OYO to be in default and in breach of its obligations under the Term Sheet, by failing to execute definitive agreements and transfer 7% of its shares to Zostel. **Third,** the only hurdle in execution of the definitive agreements was the dissent of a particular shareholder of OYO, and but for that, the draft agreements were all but finalized. **Fourth,** the Term Sheet did not envision a situation where OYO did not transfer 7% of its share to Zostel, and hence claimed it to be a foregone inevitable conclusion. **Fifth,** the draft shareholders agreement between the parties granted Zostel the rights to 7% equity shares of OYO, resultantly, disqualifying OYO from issuing IPO under Regulation 5(2) of the SEBI (ICDR) Regulations.[324]

Sixth, the "proceedings for specific performance" mentioned in the Arbitral Award referred to the petition for enforcement of the arbitral award, as it is impossible to conclude that the Arbitral Tribunal would have intended Zostel to again seek specific performance of the Term Sheet separately.

Submissions for OYO

First, the Arbitral Award does not offer Zostel substantive rights, and contended that Zostel was relying on observations made within the Arbitral Award, while the operative part of the Award did not direct specific performance of the Term Sheet. There was no consensus ad idem between Zostel and OYO on the particulars of the Term Sheet, and hence, there remained no question of directing a specific performance.

322. Clause 4 indicated that execution of the definitive documents was not independent of the Term Sheet.

323. Clause 7 of the Term Sheet stipulated that the execution of the definitive documents was "subject to the conditions set forth in the Term Sheet".

324. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

Second, the draft agreements relied upon by Zostel, including the draft definitive agreements and shareholders agreement, were but drafts and could not be shown to be an indicator of consensus between the parties.

Third, the act of transferring 7% of OYO's shares to Zostel, which Zostel claimed OYO was in default of performing, was contingent upon the "closing" of the contract between the two parties, as envisioned in the Term Sheet.

Fourth, the issuing of IPO would not directly impact the agreement between Zostel and OYO, and submitted that the only relief Zostel might be able to claim is the difference in value of the 7% shareholding that OYO is to transfer to Zostel i.e., prior to and post the IPO.

D. Judgment

The Delhi HC primarily relied on two rulings: *Dirk India Pvt Ltd v. Maharashtra State Power Generation Co. Ltd*[325] (**"Dirk India"**) in relation to the scope of an interim protection under Section 9 of the Act at a post-award stage; and Mayawanti v. Kaushalya Devi[326] (**"Mayawanti"**) in relation to the requirement of consensus ad idem as a necessary condition for specific performance of the contract.

Scope of Section 9 when invoked at post-award stage:

The Delhi HC re-affirmed the position of law set out by the Bombay High Court in Dirk India, which clarifies that if the petition is filed at the post-award stage, it only serves to protect the "fruits" of the arbitral award. The Delhi HC thereafter analysed what "fruits" can be derived from the Arbitral Award in question and observed that the Arbitral Award provided Zostel with a mere *entitlement* to specific performance of OYO's obligations under the Term Sheet, and nothing further. The Delhi HC further observed that the Arbitral Award did not direct OYO to immediately hand over the properties it was to transfer to Zostel on the closing of the Term Sheet, but merely directed Zostel to take steps towards making OYO fulfil its obligations as per the Term Sheet.

Requirement of complete consensus ad idem for specific performance:

The Delhi HC restated the position in *Mayawanti* regarding the requirement of complete consensus ad idem for securing the remedy of specific performance. The Supreme Court in *Mayawanti* had held that if the terms of an agreement are uncertain, and the parties are not at ad idem, the contract does not exist in the first place, and consequently, there can be no scope for claiming the remedy of specific performance. It observed that, contrary to Zostel's claim that the parties were on the cusp of agreement, in the present case the terms of the definitive agreements were clearly not agreed upon.

E. Analysis

This is a well-reasoned and praise worthy judgment by the Delhi High Court. There are a few take away from the ruling, and they have been set out below.

First, contracting parties must take utmost care in drafting of term sheets. While the recital of the Term Sheet clarified that it is not binding[327], the Arbitral Tribunal held that the Term Sheet could not be held to be an exploratory document basis the fact that it required Zostel to perform several "closing obligations" towards

325. 2013 SCC OnLine Bom 481; also, Hindustan Construction Co v. Union of India, AIR 2020 SC 122

326. (1990) 3 SCC 1.

327. *"...This Term Sheet is non-binding and is intended solely as a summary of the current terms that are proposed by the parties provided that the paragraphs opposite the headings "Confidentiality", "Approvals", "Expenses", "Exclusivity" and "Governing Law and Arbitration" shall be legally binding provisions The parties do not intend to be bound until they enter into Definitive Agreements regarding the subject matter of this Term Sheet, and either party may, at any time prior to execution of such Definitive Agreements, unilaterally terminate all negotiations pursuant to this Term Sheet without any liability to the other party..."*

closing of the transaction, apart from the conditions mentioned in the definitive documents. The Arbitral Tribunal relied on the clauses of the Term Sheet and the actions taken by Zostel towards its fulfilment, and ultimately held that the parties acted upon it and it was a binding document. For the purposes of adjudication of the interim relief application, the Delhi HC assumed that the Arbitral Award is valid and binding, notwithstanding the challenge filed by OYO. Therefore, there is no finding on this aspect in the present judgment. However, such issues are likely to be discussed when the court hears the challenge to the Arbitral Award.

Summarily, although the recital may say that the term sheet is not binding, if the clauses set out in the main document create obligations, or links it with the definitive documents to be executed later, and if the parties take steps towards complying with such conditions, it can be later construed as a binding term sheet.

Second, an award passed by the Arbitral Tribunal must be thoroughly analysed to understand what exactly are the "fruits" of the Arbitration, especially given the development of legal jurisprudence in relation to protecting an asset in the post-award scenario. The Delhi HC at several places in the judgment has noted that *"...Zostel has not chosen to challenge the arbitral Award, possibly owing to its misconception that the Award directed specific performance of the Term Sheet..."*.

Third, another important aspect emanating from the judgment is that while the scope of the interim protection available prior to, or at the time of the arbitration extends to the subject matter of the arbitration agreement or the amount in dispute, only the "fruits" of the Arbitral Award can be protected at the post-award stage. Thus, the Delhi HC adopted a narrow approach vis-à-vis parties' rights to seek interim protection under Section 9 of the Act at the post-award stage, as against a wider contour in the pre-award stage. Practically, this may impact the grant of interim protections where the arbitral awards are vaguely drafted and allow limited recourse to the parties to protect the assets against which enforcement may be sought, and which are at the risk of being dissipated.

February 16, 2022

VIII. What is 'Acceptable Error' and 'Unacceptable Error' in an Arbitral Award? Supreme Court Clarifies The Scope of Judicial Intervention

- An erroneous contractual interpretation by an arbitrator should not lead to setting aside of an arbitral award if the interpretation is a plausible one.
- A contractual interpretation which results in rewriting the terms of the underlying agreement should result in setting aside of such an award.
- Courts and tribunals should avoid going beyond the scope of the underlying agreement while determining disputes arising thereunder.

The Supreme Court in a recent judgment of *Indian Oil Corporation Ltd Through its Senior Manager v. M/s Shree Ganesh Petroleum Rajgurunar Through its Proprietor Mr. Laxman Dagdu Thite*,[328] expounded upon the scope and limitations of an arbitrator's power to interpret the terms of the underlying agreement.

A. Factual Background

M/s Shree Ganesh Petroleum Rajgrunar (**"Dealer/Lessor"**) had leased a plot of land (**"Premises"**) to Indian Oil Corporation Ltd. (**"Appellant/IOC/Lessee"**) for a period of 29 years pursuant to a lease deed dated September 20, 2005 (**"Lease Deed"**). The Lease Deed contained a dispute resolution clause which prescribed arbitration as the dispute resolution mechanism for disputes arising out of the Lease Deed.

Subsequently, IOC had set up a retail outlet on the Premises and the Dealer was appointed as the dealer under a separate dealership agreement dated November 15, 2006 (**"Dealership Agreement"**). The Dealership Agreement prescribed that it shall remain in force for a period of 15 years and could be extended by one year until determined by either party. The Dealership Agreement also contained a dispute resolution clause which prescribed arbitration as the dispute resolution mechanism for disputes arising out of the Dealership Agreement. Therefore, IOC and the Dealer had entered into two separate agreements with independent dispute resolution mechanisms.

B. Procedural History

IOC noticed certain irregularities in the running of the retail outlet. Consequently, IOC directed the Dealer to halt further sales and supplies to the retail outlet. Pursuant to these irregularities, IOC terminated the Dealership Agreement and called upon the Dealer to vacate the Premises (**"Termination"**). Considering that the Dealer challenged the Termination, the dispute was referred to arbitration under the Dealership Agreement.

328. Civil Appeal Nos. 837-838 Of 2022

Although the arbitration was invoked under the Dealership Agreement, the Dealer also prayed for amendment of the Lease Deed to increase the lease rent. The Arbitrator partly allowed the Dealer's prayer under the Lease Deed by (a) increasing the lease rent, and (b) reducing the lease period (**"Award"**).

Aggrieved by the Award, IOC approached the Court of the District Judge, Pune (**"Dist. Judge"**) under Section 34 of the Arbitration and Conciliation Act, 1996 (**"Arbitration Act"**) to set aside the Award. The Dist. Judge partially set aside the Award to the extent of the decrease in the lease period. Both IOC and the Dealer preferred an appeal before a Division Bench of the Bombay High Court ("High Court") under Section 37 of the Arbitration Act.[329] While the Dealer's appeal pertained to the Dist. Judge's order which partially set aside the Award (**"Dealer's Appeal"**), IOC's appeal pertained to Dist. Judge's order upholding the rest of the Award (**"IOC's Appeal"**).

The High Court upon consideration of both the appeals upheld the Award in its entirety. The judgment of the High Court was challenged before the Supreme Court.

C. Judgment Of The Supreme Court

At the outset, relying on its judgment in Associate Builders v. Delhi Development Authority (**"Associate Builders"**),[330] the Supreme Court noted that a Court considering a setting-aside application under Section 34 of the Arbitration Act cannot look into the merits of the award except when the award is in conflict with the public policy of India as provided in Section 34(2)(b)(ii) of the Arbitration Act.

The Supreme Court further noted that an arbitral tribunal is a creature of contract and is therefore, bound to act in terms of the contract under which it is constituted. The Supreme Court further stated that an award can be said to be patently illegal where the arbitral tribunal failed to *act in terms of the contract or has ignored the specific terms of a contract.*

The Supreme Court drew a distinction between (a) failure to act in terms of a contract and (b) an erroneous interpretation of the terms of a contract. While adjudicating a contractual dispute, an arbitral tribunal is entitled to interpret the terms and conditions of a contract. Such an interpretation would not generally be interfered by a court in a setting aside proceeding unless such interpretation is patently unreasonable or perverse. The Supreme Court observed that an erroneous contractual interpretation by an arbitral tribunal which falls within the contours of the underlying agreement cannot be set aside.

The Supreme Court further explained that a setting aside court cannot substitute its interpretation of the underlying agreement with that of a plausible interpretation provided by an arbitral tribunal. The Supreme Court further remarked that a setting aside court cannot sit in appeal over the award passed by an arbitral tribunal.

The Supreme Court observed the following in regard to the factual background of the dispute:

- The Dealership Agreement and the Lease Deed were two distinct and separate agreements.
- Although the invocation of arbitration by the parties was under the Dealership Agreement only, the Award dealt with disputes under both the Dealership Agreement and the Lease Deed.

329. Arbitration Appeal No. 19 of 2013 filed by the Respondent; Arbitration Appeal No. 39 of 2013 by IOC

330. (2015) 3 SCC 49.

Considering that the Award dealt with matters outside the scope of the underlying agreement (i.e., Dealership Agreement), it was deemed to be against public interest and therefore, liable to be set aside on the ground of public policy.

In addition to the above, the Supreme Court briefly expounded the scope and limitations of an arbitrator's powers with respect to interpretation of the terms of a contract:

- Neither an arbitral tribunal nor the court can alter the terms and conditions of a valid contract.[331]
- Re-writing a contract for the parties would be breach of fundamental principles of justice.[332]
- If an arbitrator travelled beyond the contract, he would be acting without jurisdiction.[333]

D. Conclusion

In the past decade, courts have drastically reduced the extent of judicial intervention while reviewing arbitral awards. The approach has been to avoid any re-appreciation of pleadings, evidence and arguments submitted before the arbitral tribunal. This principle has been espoused in multiple judgments of the Supreme Court.

Within this narrow scope of review, courts have stated that if an erroneous contractual interpretation is a plausible one then the same would be considered as an 'acceptable error'. However, the Supreme Court, in the present judgment has clarified that any contractual interpretation having the effect of re-writing the agreement would be considered as an 'unacceptable error' and would render the arbitral award patently illegal.

Therefore, while the scope of intervention by courts is very narrow, it is nevertheless the court's mandate and judicial function to ensure that an arbitral award does not suffer from any 'unacceptable error'. The present judgment of the Supreme Court lends clarity with respect to such distinction between an 'acceptable error' and an 'unacceptable error'.

The aforesaid distinction imposes clear, identifiable constraints on the manner in which an arbitrator can perform its adjudicatory functions. However, courts should be wary of conducting an extensive and mechanical reappreciation of the merits of an arbitral award while determining whether such an award contains an 'acceptable error' or an 'unacceptable error'.

331. Paragraph 49 of the Judgment dated February 01, 2022.

332. *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.*, (2021) SCC Online SC 508; *SSangyong Engineering and Construction Company Limited v. NHAI*, (2019) 15 SCC 131; *Satyanarayana Construction Company v. Union of India & Ors.*, (2011) 15 SCC 101.

333. *PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin & Ors.*, (2021) SCC Online SC 508

IX. Courts Can Set Aside or Uphold an Arbitral Award - Not Modify

- *Section 34 of the Arbitration and Conciliation Act, 1996 ("*Arbitration Act"*) provides only for setting aside arbitral awards on very limited grounds;*
- *Section 34 of the Arbitration Act does not empower Courts to modify, revise or alter an arbitral award;*
- *Section 34 of the Arbitration Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration, 1985 ("*UNCITRAL Model Law"*), under which no power to modify an arbitral award is given to a court hearing a challenge to an arbitral award;*
- *To assimilate the jurisdiction under Section 34 of the Arbitration Act with the revisional jurisdiction of the court under Section 115 of the Code of Civil Procedure, 1908 ("*CPC"*) is fallacious.*

A division bench of the Supreme Court of India in *Project Director, National Highway Authority of India v. M Hakeem & Anr.*,[334] comprising of Justice R.F. Nariman and Justice B.R. Gavai, *ruled in favour of minimum judicial interference and* held that courts cannot modify, revise or alter an arbitral award under Section 34 of the Arbitration Act i.e. proceedings for setting aside the award.

A. Factual Background

Under Section 3A of the National Highways Act, 1956 (**"NHA"**), if the Central Government is satisfied that any land is required for a public purpose such as the building, maintenance, management or operation of a national highway, they can declare their intention to acquire such land by way of publishing a notification in the Official Gazette.[335] After publishing a notification, the Central Government conducts surveys,[336] hears objections to the acquisition of the land,[337] declares the acquisition of the land[338] and then takes possession of the land.[339] However, before taking possession of the acquired land, the competent authority under the NHA determines the compensation to be provided to the land owner.[340] If the amount determined by the competent authority is not acceptable to either the National Highway Authority of India (**"NHAI"**) or the land owner, either parties can make an application to the Central Government that will then appoint an arbitrator to determine the

334. 2021 SCC OnLine SC 473
335. Section 3A, National Highways Act, 1956
336. Section 3B, National Highways Act, 1956
337. Section 3C, National Highways Act, 1956
338. Section 3D, National Highways Act, 1956
339. Section 3E, National Highways Act, 1956
340. Section 3G, National Highways Act, 1956:
"*3G. Determination of amount payable as compensation.—*
(1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.
(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government--
(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act."

amount of compensation to be paid to the land owner.[341] If such an application is made, the provisions of the Arbitration Act apply subject to the provisions of the NHA.[342]

This case arose out of certain notifications issued under the NHA and the arbitral awards passed thereunder. The Special District Revenue Officer, who was the competent authority under the NHA, had determined very low compensation for the land owners. Accordingly, since the land owners were not satisfied with the compensation, the Central Government appointed the District Collector as an arbitrator. Under Section 3G (7) of the NHA, the competent authority and the arbitrator are obligated to, inter alia, take into account the market value of the land on the date of publication of the notification while determining the amount of compensation. However, in all the cases that were eventually challenged, the competent authority and the arbitrator had determined the compensation based on 'guideline value' of the lands in question (used for the purposes of stamp duty) and not on the basis of sale deeds of similar lands. It resulted in abysmally low amounts being granted as compensation by the competent authority, that were subsequently upheld by the arbitrator. Therefore, these arbitral awards were challenged under Section 34 of the Arbitration Act.

Court proceedings:

The land owners challenged the arbitral awards under Section 34 of the Arbitration Act before the District Court. The District Court modified the arbitral awards and substantially increased the compensation. For example, in certain cases, the compensation awarded under the arbitral award ranged from INR 46.55 to INR 83.15 per square meter. These amounts were enhanced to INR 645 per square meter by the District Court. NHAI appealed against these orders before the Madras High Court. The Madras High Court upheld the modifications made to the arbitral awards by the District Court.[343] The judgement of the Madras High Court was then challenged before the Supreme Court.

B. Judgment of The Supreme Court

i. Court does not have the power to modify an award

The Supreme Court examined the scope of Section 34 of the Arbitration Act and held that it provides only for setting aside awards on very limited grounds. Further, the Apex Court also emphasized that Section 34 of the Arbitration Act uses the term *"recourse"* while stating that *"recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-sections (2) and (3)." "Recourse"* is the method of enforcing a right.[344] Therefore, when the right is itself limited, the enforcement of such a right will also be limited. Consequently, since Section 34 of the Arbitration Act only provides a right to challenge an arbitral award on limited grounds, the application to be made by any party under Section 34 of the Arbitration Act, can only to set aside an arbitral award.[345]

The Apex Court also held that it is settled law that when an arbitral award is challenged under Section 34 of the Arbitration Act, no challenge can be made on the merits of the arbitral award. The Supreme Court relied on the judgement in MMTC Ltd. v. Vedanta Ltd. wherein the Court had held that *"the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under*

341. *Ibid*
342. *Ibid*
343. 2020 SCC OnLine Mad 1119
344. 2021 SCC OnLine SC 473, Paragraph 14
345. *Ibid*

Section 34 has not exceeded the scope of the provision."[346] The Supreme Court also placed reliance on judgements in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*[347] and *Renusagar Power Co. Ltd. v. General Electric Co.*,[348] wherein the Court made similar observations holding that there could be no challenge on the merits of an arbitral award.

The Supreme Court also clarified the scope of Section 34 sub section (4), under which the court is empowered to adjourn the proceedings under Section 34 of the Arbitration Act and give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such action as will eliminate the grounds for setting aside the arbitral award.[349] The Court highlighted that even under Section 34 (4) of the Arbitration Act, the Court could only adjourn the proceedings under Section 34(4) so as to give the arbitral tribunal an opportunity to cure the defects. However, it was only the arbitral tribunal that could eliminate the grounds for setting aside the award.[350] Reliance was placed on *Kinnari Mullick v. Ghanshyam Das Damani*, wherein the Court held that the Parliament had not vested any power in the courts to remand the matter to the arbitral tribunal, except to adjourn the proceedings for the limited purpose mentioned in Section 34(4) of the Arbitration Act.[351]

The Supreme Court reiterated and emphasized on the principle of limited judicial interference in arbitration.[352] Reliance was placed on *McDermott International Inc. v. Burn Standard Co. Ltd.*, wherein the Apex Court had held that the Arbitration Act of 1996 had only created a supervisory role for the courts to review an arbitral award for the limited purposes of ensuring fairness, such as in cases of fraud or bias by the arbitrators, violation of natural justice, etc. The Apex Court categorically held that the court cannot correct the errors made by the arbitrators and that it can only set aside the award, keeping the supervisory role of the court at minimum level. The rationale is that parties voluntarily chose to opt for arbitration, excluding the jurisdiction of courts because they want expediency and finality.[353]

ii. UNCITRAL Model Law & Arbitration Act, 1940:

The Supreme Court referred to the UNCITRAL Model Law and held that Section 34 of the Arbitration Act is modelled on the UNCITRAL Model Law, under which the courts have no power to modify an arbitral award while hearing a challenge to the arbitral award.[354]

The Supreme Court also drew a comparison with Sections 15 and 16 of the Arbitration Act, 1940 (**"1940 Arbitration Act"**), which prescribed that the court had the power to modify, correct or remit an award to the arbitral tribunal in the circumstances mentioned therein. The Court concluded that since the Arbitration Act does not specifically retain any provision like Sections 15 and 16 of the 1940 Arbitration Act, there was no legislative intent to include the powers to modify or remit the arbitral award, under the Arbitration Act.[355]

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346. (2019) 4 SCC 163, Paragraph 14
347. (2019) 15 SCC 131, Paragraphs 43 & 44
348. 1994 Supp (1) SCC 644, Paragraph 100
349. Section 34(4), Arbitration Act, 1996:
"(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."
350. 2021 SCC OnLine SC 473, Paragraph 14
351. (2018) 11 SCC 328, Paragraph 15
352. 2021 SCC OnLine SC 473, Paragraph 17
353. (2006) 11 SCC 181, Paragraph 52
354. Section 34, UNCITRAL Model Law on International Commercial Arbitration, 1985:

"Article 34. Application for setting aside as exclusive recourse against arbitral award
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (2) of this article.
(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

355. 2021 SCC OnLine SC 473, Paragraphs 20 and 46

iii. Section 115 of the CPC:

The Madras High Court had held that the jurisdiction under Section 34 of the Arbitration Act is almost like a revisional jurisdiction under Section 115 of the CPC and that the revisional jurisdiction normally includes the power to correct a patent illegality.[356] The Supreme Court dismissed this contention and held that the jurisdiction of the courts under Section 34 of the Arbitration Act cannot be assimilated with the revisional jurisdiction of courts under Section 115 of the CPC.[357] This is because Section 115 of the CPC categorically sets out three grounds on which a revision may be entertained and then states that the High Court may make *"such order as it thinks fit"*. These words do not find any place in Section 34 of the Arbitration Act.[358]

iv. Article 136 of the Indian Constitution

Although the Supreme Court ruled in favour of the Appellant on law, they did not exercise their jurisdiction under Article 136 of the Indian Constitution and dismissed the appeal on facts. The Supreme Court observed that under the NHA compensation scheme, the arbitrator was appointed by the Central Government only. Therefore, the arbitration under the NHA was not a consensual process with both parties having a role in appointing the arbitrator.[359] This is because the land owner has no say in the appointment of the arbitrator and in fact, the arbitrator was appointed by the Central Government which is the very authority that is acquiring the land of the land owner.[360] The Supreme Court clarified that the NHA compensation scheme involving an arbitrator, though seems unfair, cannot lead to the conclusion that the arbitral awards made by such arbitrators can be challenged on merits under Section 34 of the Arbitration Act.[361]

Subject to the above clarification, the Supreme Court relied the judgement in *Taherakhatoon v. Salambin Mohammad*,[362] and held that even after a court declares the law as incorrect and sets aside the judgment on law, the court is not obligated to interfere with the judgment on facts *"if the justice of the case does not require interference under Article 136 of the Constitution of India"*.[363] Accordingly, the Supreme Court stated that the arbitrator had awarded compensation on a *"completely perverse basis"* since the metric to determine compensation was by taking into account the 'guideline value', which is relevant only for the purposes of stamp duty. The arbitrator should have taken into account similar sale deeds, which would have been reflective of the appropriate market value of the land.[364]

The Supreme Court also stated in several similar cases, the NHAI had allowed similarly situated persons to receive compensation at a much higher rate than what was awarded. The Supreme Court relied on the judgement in *Nagpur Improvement Trust v. Vithal Rao*,[365] to hold that the State cannot make classifications on the basis of the public purpose for which the land is being acquired and cannot provide differential compensations accordingly. The Supreme Court also relied on the fact that most of the arbitral awards were made 7-10 years ago, and that it would not be fair to remand these cases back to the same arbitrator or some other arbitrator unilaterally appointed by the Central Government. Accordingly, the Supreme Court refused to exercise their jurisdiction under Article 136 of the Indian Constitution and dismissed the appeal on facts.[366]

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356. 2020 SCC OnLine Mad 1119, Paragraph 60
357. 2021 SCC OnLine SC 473, Paragraph 41
358. *Ibid*
359. 2021 SCC OnLine SC 473, Paragraph 12
360. *Ibid*
361. 2021 SCC OnLine SC 473, Paragraph 42
362. (1999) 2 SCC 635, Paragraph 20
363. (1999) 2 SCC 635, Paragraph 20
364. 2021 SCC OnLine SC 473, Paragraph 47
365. (1973) 1 SCC 500, Paragraphs 26-30
366. 2021 SCC OnLine SC 473, Paragraph 58

C. Conclusion

This judgement upholds the primary principle of arbitration, that is, minimum judicial interference. However, it also opens up questions for practical consideration. For instance, there have been scenarios wherein the courts have modified arbitral awards to rectify errors and that has been a more practically tenable option. The Supreme Court in this decision, has referred to the past judgments of the Apex Court where awards were modified and held that such modifications were made using powers under Article 142 of the Indian Constitution that provides wide powers to the Supreme Court to pass any order necessary for doing complete justice.[367] Even this decision is an example of a situation where the modification of the arbitral award was considered as a more suitable way of resolving the issue. So, while holding that arbitral awards cannot be modified, the Supreme Court does not interfere with the modifications that were made by the District Court, in the *"interest of justice"*.

Going forward, if there are errors in an arbitral award that has been passed and the simpler approach is to modify the arbitral award, the parties would be left with two options. Either they can arbitrate afresh, or they can approach the Supreme Court by way of a special leave petition under Article 136 of the Indian Constitution. It is likely that the parties would opt for the second option and start approaching the Supreme Court for any kind of modification that has to be made to the arbitral award, be it minor or major. This consequent incessant use of Article 136 may be against the object and purpose of Article 136 of the Indian Constitution.

While on one hand it may be said that this judgement propagates speedy disposal of disputes by upholding the finality of arbitral awards and the choice of the parties to resort to arbitration, on the other hand, it creates procedural issues and delays in matters that could have been resolved faster with the intervention by courts to modify the arbitral award, as was the situation in this decision.

367. "142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself"

Hotline

August 20, 2021

X. Amazon V. Future – Indian Supreme Court Recognizes Emergency Awards under The A&C Act

- Emergency Awards in India-seated arbitrations are enforceable under Section 17 of the Indian A&C Act.
- An appeal is not maintainable against an order of enforcement of an emergency award under Section 17(2) of the A&C Act.
- Depending on the circumstances, parties will need to evaluate whether emergency arbitration will provide a more effective remedy than seeking interim reliefs before courts in Section 9 of the A&C Act.

A. Introduction

On August 6, 2021, the Supreme Court pronounced its much-awaited judgment in the matter of *Amazon.com Investment Holdings LLC* (**"Amazon"**) *v. Future Retail Limited & Ors.* (**"Future Group"**). The Supreme Courtallowed the appeal filed by Amazon against the order of the Division Bench of the Delhi High Court dated March 22, 2021 (**"Impugned Order"**), and recognized the validity of an emergency award passed in an India-seated arbitration under Section 17 of the Arbitration and Conciliation Act, 1996 (**"A&C Act"**).

B. Background

We have captured the factual developments leading to the matter before the Supreme Court in an earlier piece which can be accessed here. To encapsulate the facts, Amazon initiated arbitration against Future Coupons Pvt, Ltd. (**"FCPL")** and Future Retail Ltd. (**"FRL"**) under the Rules of Singapore International Arbitration Centre (SIAC Rules), pursuant to a shareholders' agreement (**"FCPL SHA"**). As per the FCPL SHA, the seat of arbitration was New Delhi, India. An emergency award was rendered on October 25, 2020. Since FRL and FCPL did not comply with the emergency award, Amazon initiated proceedings in the Delhi High Court to enforce the emergency award. A Single Judge of the Delhi High Court recognized the emergency award and passed orders to enforce the emergency award. However, the Division Bench of the Delhi High Court granted stay on the operation of the order of the Single Judge.

In appeal against the order of the Division Bench of the Delhi High Court, the Supreme Court considered the following questions in the present matter:

- Whether an emergency arbitrator's award is contemplated under the A&C Act, and whether an emergency arbitrator's award is an order under Section 17 of the A&C Act.
- Whether an appeal against an order enforcing an emergency arbitrator's order under Section 17(2) is maintainable under Order 43, Rule 1(r) of the Civil Procedure Code.

C. Analysis of Issue I: Validity of an Emergency Award Under The A&C Act

The Supreme Court stated that the emergency award is not a nullity, and is enforceable under Section 17 of the A&C Act. The Supreme Court's analysis on the validity of an emergency award under the A&C Act can be placed under the following heads:

Parties have the autonomy to choose emergency arbitration

The Supreme Court noted that while the A&C Act does not contain the words "emergency award", the freedom granted to parties under the A&C Act to agree to arbitral institutional rules implies that parties have a right to make use of the emergency arbitration provisions in the institutional rules chosen by the parties. By virtue of Section 2(6),[368] Section 2(8),[369] and Section 19(2)[370] of the A&C Act, parties can (a) agree to authorize an arbitral institution to determine issues that arise between the parties, (b) agree to include any arbitration rules in their arbitration agreement, and (c) agree on the procedure to be followed by an arbitral tribunal in conducting its proceedings.

The Supreme Court noted that the parties have an indefeasible right to exercise party autonomy in respect of choosing institutional rules which can include emergency arbitrators.[371] The Supreme Court further stated that the parties, while exercising such a right to party autonomy, do not bypass any mandatory provision of the A&C Act, as there is nothing under the A&C Act which prohibits parties from agreeing on a set of rules providing for the appointment of an emergency arbitrator.[372]

'Arbitral tribunal' under the A&C Act includes an 'emergency arbitrator'

The Court then considered whether the definition of "arbitral tribunal" contained in Section 2(1)(d) should so constrict Section 17(1), making it apply only to an arbitral tribunal that can give final reliefs by way of an interim or final award, and not to an emergency arbitrator that passes an emergency award.

Section 2(1)(d) of the A&C Act defines 'arbitral tribunal' to mean a sole arbitrator or a panel of arbitrators. The Supreme Court noted that the definition of 'arbitral tribunal' under Section 2(1)(d) of the A&C Act does not include an "emergency arbitrator".[373] However, it stated that Section 1 opens with the words "unless the context otherwise requires". When read with Section 2(1)(a) [that provides for "any" arbitration, whether or not administered by a permanent arbitral institution]and Sections 2(6) and 2(8) [which permit incorporation of rules of arbitral institutions], it is clear that interim orders passed by emergency arbitrators under the rules of an arbitral institution would be included within the ambit and context of orders passed by an 'arbitral tribunal' under Section 17(1).

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368. Section 2 – Definitions – A&C Act
(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

369. Section 2 – Definitions – A&C Act
(8) Where this Part— (a) refers to the fact that the parties have agreed or that they may agree, or (b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.

370. Section 19 – Determination of rules of procedure - A&C Act
(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

371. The Supreme Court referred to earlier decisions in the following cases in which courts have stressed on party autonomy - *Antrix Corporation Ltd. V. Devas Multimedia Pvt. Ltd.* (2014) 11 SCC 560; *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126; *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228; *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*, 2021 SCC OnLine SC 331.

372. Para 17 of the judgment dated August 6, 2021

373. Section 2 – Definitions -
(d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

Therefore, the Court held that when Section 17(1) is concerned, the "arbitral tribunal" would, when institutional rules apply, include an Emergency Arbitrator, the context of Section 17 "otherwise requiring" – the context being interim measures that are ordered by arbitrators.

Recommendation of the 246th Law Commission Report

The 246th Law Commission Report had suggested that the definition of 'arbitral tribunal' be amended to include an emergency arbitrator. The Supreme Court noted that the mere fact that a recommendation of a Law Commission Report was not followed by the Indian Parliament, would not necessarily lead to the conclusion that the suggestion of the Law Commission can never form part of the interpretation of the statute.[374] The Supreme Court also referred to the report of the High-Level Committee constituted by the Government of India under the chairmanship of Justice B.N. Srikrishna (Retd.) to review the institutionalisation of arbitration mechanism in India ("Srikrishna Committee Report"). The Srikrishna Committee Report stated that it is possible to interpret Section 17(2) of the A&C Act to enforce emergency awards for India seated arbitrations and recommended that the A&C Act be amended so that it comes in line with international practice in favour of recognising and enforcing an emergency award.

Emergency arbitration occurs 'during arbitral proceedings'

Remedy under Section 17 of the A&C Act is available to a party only 'during the arbitral proceedings'. FRL argued that Section 17 provides for interim reliefs only during the arbitral proceedings i.e. after the arbitral tribunal is constituted. Hence, emergency arbitration that occurs prior to arbitral proceedings or prior to the constitution of the arbitral tribunal, is not covered by Section 17 of the A&C Act.

The Court disagreed. It relied on Section 21 of the A&C Act, which provides that arbitral proceedings in respect of a dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Similarly, Rule 3.3 of the SIAC Rules provides for the commencement of the arbitration as the date of receipt of the complete 'Notice of Arbitration' by the registrar. Taking into account these provisions, the Supreme Court noted that arbitral proceedings commence when a notice of arbitration is issued, which is prior to the constitution of an arbitral tribunal.[375]

Since a remedy under Section 17 is available to a party 'during the arbitral proceedings', the powers of a tribunal in granting such a remedy would include powers exercisable by an emergency arbitrator soon after arbitral proceedings commence.[376] Further, the Supreme Court also stated that the words 'arbitral proceedings' under Section 17 are not limited by any definition and thus encompass proceedings before an emergency arbitrator.

Emergency Arbitration furthers the object of the A&C Act

The Supreme Court further noted that the provision of an emergency award furthers multiple objectives, including, decongesting the court system and giving parties urgent interim relief in cases which deserve such relief.

Considering that party autonomy is respected by the A&C Act and that there is no prohibition under the A&C Act against the appointment of an emergency arbitrator, the Supreme Court concluded that an emergency arbitrator's award, which is exactly like an order of an arbitral tribunal once constituted, falls within the institutional rules to

374. Relying on Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713.

375. Rule 3.3, SIAC Rules - Notice of Arbitration
The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed to be the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 and Rule 6.1(b) (if applicable) are fulfilled or when the Registrar determines that there has been substantial compliance with such requirements. SIAC shall notify the parties of the commencement of the arbitration.

376. Para 12 of the judgment dated August 06, 2021.

which the parties have agreed. As a result, the same is validly covered under Section 17(1) of the A&C Act.

Moreover, the Court stated that a party having agreed to institutional rules, cannot thereafter argue that it is not bound by an emergency arbitrator's ruling. Such orders are valid and are made under Section 17(1) of the A&C Act.[377]

D. Analysis of Issue Ii: Maintainability of Appeal Under Order 43 Rule 1 (R)

The Supreme Court referred to Section 94 and Order 39 of the CPC which prescribes the power of a civil court to grant interim measures. Rule 2A of Order 39 of the CPC states that a civil court can attach the property of a party if the party fails to comply with an order passed under Rule 1 or Rule 2 of Order 39. In this respect, the Supreme Court referred to its previous judgment in *UC Surendranath v. Mambally's Bakery*.[378] In this judgment, the Supreme Court had laid down that for a party to seek remedial measures under Order 39 Rule 2A, there has to be a 'wilful disobedience' on the part of the counter-party (against which the interim order was passed). However, the Supreme Court has now observed that the judgment in *UC Surendranath* might not be correct in this respect and would require a review by a larger bench of the Supreme Court.

Further, the Supreme Court noted that the words 'in relation to' and 'any proceedings' under Section 9(1) are wide enough to include the scope of enforcing an order passed under Section 9(1). Thus, enforcement under Order 39 Rule 2-A of the CPC of an order passed under Section 9 of the A&C Act, would also be referable to Section 9(1) of the A&C Act. Considering that the 2015 Amendment Act has brought parity in the scope and enforcement of orders passed in Section 9 with those of orders passed in Section 17,[379] the scope of enforcing an interim measure granted by the tribunal is similarly referable to Section 17 itself.

The Supreme Court observed that the legal fiction created under Section 17(2) is limited to the purpose of enforcing orders passed by the arbitral tribunal as orders of the court (**"Deeming Fiction"**). In this regard, the Supreme Court referred to its previous judgments to hold that a legal fiction created under any statute is limited to the purpose for which it is created under law.[380] The Supreme Court specifically relied on its judgment in *Union of India v. Vedanta Ltd.*[381] that foreign award. In all other respects, an application to enforce a foreign award remains an application under the A&C Act only. Similarly, the Deeming Fiction under Section 17 cannot be extended to hold that appeals from court orders enforcing an order under Section 17(2) can be appealed in the same manner as a court order enforcing an interim measure under Section 9.

Thereafter, the Supreme Court referred to Section 37 of the A&C Act,[382] and noted that Section 37 is a complete code so far as appeals from orders and awards made under the A&C Act are concerned.[383] The Supreme Court

377. Para 35 – 36, Judgment of the Supreme Court dated August 6, 2021.

378. (2019) 20 SCC 666.

379. Arbitration and Conciliation (Amendment) Act, 2015.

380. *Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322; Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd.*, (2013) 5 SCC 470. The Supreme Court also referred to a judgment of the House of Lords in East End Dwellings Co. Ltd. v. Finsbury Borough Council, 1952 AC 109.

381. (2020) 10 SCC 1.

382. Section 37 - Appealable orders – A&C Act
(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) granting or refusing to grant any measure under section 9; (b) setting aside or refusing to set aside an arbitral award under section 34.
(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.— (a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or (b) granting or refusing to grant an interim measure under section 17.
(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

383. Relying on BGS SGS SOMA JV v. NHPC, (2020) 4 SCC 234; Deep Industries v. ONGC, (2020) 15 SCC 706 and Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715.

pointed out that Section 37(2)(b) provides the scope of appeal against, *inter alia*, an order granting (or refusing to grant) interim measures under Section 17(1). There is no scope of appeal, however, against a court order under Section 17(2) enforcing (or refusing to enforce) an interim measure.

In this regard, the Supreme Court discussed its recent judgment in which it held that a dismissal of an application seeking condonation of delay in filing an application under Section 34 amounts to 'refusal to set aside an arbitral award' under Section 34, and, therefore, such an order is appealable under Section 37(1)(c) of the A&C Act.[384] The Supreme Court distinguished this judgment on the basis that unlike Section 34, a literal reading of Section 17 would show that the grant (or non-grant) of interim measures under Section 37(2)(b) refers only to Section 17(1) in which the interim measures are granted, and not under Section 17(2) under which the said measures are enforced.

The Supreme Court thus concluded an appeal under Section 37 of the A&C Act cannot be maintainable against an order of enforcement of an emergency arbitrator's order made under Section 17(2). Post the pronouncement of the judgment, the Future Group has reportedly filed a Special Leave Petition before the Supreme Court against the order of the Single Judge of Delhi High Court.[385]

E. Our Analysis

Enforcement of emergency awards in India-seated arbitration

With respect to the seat of an arbitration, the A&C Act operates in two parts - Part I of the A&C Act is applicable to India-seated arbitration and Part II is applicable to the enforcement of foreign-seated arbitration. This application carries certain exceptions viz.,[386] Section 9, Section 27 and Section 37(1)(b) and Section 37(3) of Part I of the A&C Act also apply to foreign-seated arbitrations awards which are recognized and enforceable under Part II of the A&C Act.[387]

The pending SIAC Arbitration between Amazon and Future Group stems from the arbitration clause in the FCPL SHA (details on the factual background in the matter are covered in our earlier piece here). The FCPL SHA stipulates that an ensuing arbitration would have its seat in New Delhi, India and accordingly, be governed by Part I of the A&C Act. Therefore, the decision and accompanying observations of the Single Judge / Division Bench of the Delhi High Court and the Supreme Court in the present matter is a decision/observation on the provisions of Part I of the A&C Act, applicable in cases of India-seated arbitrations only.

Further, orders of Indian courts enforcing emergency awards in India-seated arbitrations under Section 17(2) will not be appealable.

Enforcement of emergency awards in foreign seated arbitration

Unlike Section 17, there is no provision in Part II of the A&C Act which provides for the enforcement of interim measures granted by an arbitral tribunal in a foreign seated arbitration. In absence of a specific provision under the A&C Act, parties have taken recourse to Section 9 to seek interim measures from courts, wherever applicable.[388] However, it must be understood that a grant of similar reliefs under Section 9 does not imply the

384. Chintels (India) Ltd. v. Bhayan Builders Pvt. Ltd., (2021) 4 SCC 602. Section 37: Appealable Orders, A&C Act - (1)(c) setting aside or refusing to set aside an arbitral award under Section 34.

385. See https://www.livemint.com/companies/news/kishore-biyani-future-group-companies-move-supreme-court-after-amazon-verdict-11628823626149.html (last accessed on August 18, 2021)

386. Applicability of this exception is further subject to an agreement to the contrary by the parties.

387. Under Section 44 of the A&C Act, foreign awards are enforceable if such award is seated in a notified territory.

388. Section 9 of Part I of the A&C Act is applicable to foreign seated arbitrations subject to an agreement to contrary by the parties. Therefore, if parties have agreed to exclude the application of Section 9 to the foreign seated arbitration, a remedy to seek interim measures from Indian courts under Section 9 would be foreclosed.

actual enforcement of an emergency award in a foreign seated arbitration. Although Indian courts have been wary of the absence of a legislative stipulation on enforcement of emergency awards in a foreign seated arbitration, they have not shied away from admitting that similar reliefs can be granted under Section 9 by virtue of an independent analysis.[389]

Earlier, in *Ashwani Minda and ors. v. U-shin Limited and Ors.*,[390] the Delhi High Court observed that a party approaching the court under Section 9 in a foreign seated arbitration must establish that the remedy available before the arbitral tribunal is not efficacious.[391] However, the court 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.

According to the authors, the efficacy of the remedy can also depend on its enforceability. Potential non-enforceability of interim measures in certain situations could render the remedy by the arbitral tribunal inefficacious, and thereby unlock the scope for approaching the court under Section 9 in foreign-seated arbitrations.

Another route for the enforcement of emergency awards may be through enforcement proceedings under Part II of the A&C Act. It must be noted that even when there is no provision under Part II which provides for enforcement of emergency / interim awards in a foreign seated arbitration, there is no express bar to the enforcement of emergency awards either.

A foreign award can be enforced in India if it qualifies the conditions stipulated under Section 48 of the A&C Act, which is similar to the conditions under Article V of the New York Convention.[392] One of the pre-conditions for the enforcement of a foreign award is that the award must be binding on the parties. Leading arbitral institutions including the LCIA,[393] SIAC,[394] ICC,[395] HKIAC,[396] SCC,[397] etc., provide for an emergency award to be binding on the parties.

Boost to Emergency Arbitration and Arbitral Institutions

The judgment provides significant boost to emergency arbitration provisions in institutional rules. Parties are expected to readily resort to institutional arbitration to avail benefits of emergency arbitration.

In its order, the Single Judge of the Delhi High Court had recognised arbitral institutions in India including Delhi International Arbitration Centre (DIAC), Mumbai Centre for International Arbitration (MCIA), Madras High Court Arbitration Centre India, Nani Palkhivala Arbitration Centre (NPAC); Indian Council of Arbitration (ICA); Indian Institute of Arbitration & Mediation (IIAM); and Bangalore International Mediation, Arbitration and Conciliation Centre (BIMACC) that provide for emergency arbitration.

389. Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd., (2016) 234 DLT 349 and Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., 2104 SCC OnLine Bom 929.

390. 2020 SCC OnLine Del 721

391. Please see the complete analysis of the judgment of the division bench of the Delhi High Court in our earlier piece here.

392. Section 48 clarifies the scope of public policy of India and the scope of review in the contravention of the fundamental policy of Indian law; New York Convention stands for Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1959.

393. Rule 9.9, LCIA Rules.

394. Para 12, Schedule I, SIAC Rules.

395. Rule 29.2, ICC Rules.

396. Para 16, Schedule V, HKAIC Rules.

397. Article 9, SCC Rules.

F. Take-Aways

Given the absence of guidance on enforcement of emergency awards in a foreign seated arbitration, it remains to be seen what approach Indian courts will adopt in enforcing such emergency awards. As for emergency awards in India-seated arbitration, the position on enforceability is now well-settled. However, depending on the facts and circumstances, parties will need to evaluate whether emergency arbitration will provide a more effective remedy than seeking interim reliefs before courts in Section 9 of the A&C Act.

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With Institutional Inputs from SIAC

SIAC Information Kit

I. Why SIAC?

- SIAC is **ranked 2nd among the world's top 5 arbitral institutions,** and is the most preferred arbitral institution in the Asia-Pacific.[1]
- The **SIAC Rules** provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures.
- SIAC's case management services are supervised by the **Court of Arbitration** which comprises of internationally renowned arbitration practitioners.
- SIAC's **Board of Directors** consists of highly respected lawyers and professionals from all over the world. The Board is responsible for overseeing SIAC's operations, business strategy and development, as well as corporate governance matters.
- SIAC has an experienced international **panel** of over 500 expert arbitrators from over 40 jurisdictions.
- SIAC's panel has over 100 experienced arbitrators in the areas of Energy, Engineering, Procurement and Construction from more than 25 jurisdictions.
- SIAC's multinational **Secretariat** comprises experienced lawyers qualified in civil and common law jurisdictions.
- Arbitrators' fees are subject to a **maximum cap** in accordance with the SIAC Schedule of Fees. Arbitrations at SIAC operate on an ad valorem system, in which the costs of the arbitration are generally based on the value of the claim. SIAC will estimate the maximum costs of the arbitration based on the total value of the claim(s) and counterclaim(s) in the arbitration proceedings in accordance with the SIAC Schedule of Fees.
- SIAC **controls timelines** of cases. According to SIAC's Costs and Duration Study released in October 2016, the mean duration of cases is 13.0 months for sole arbitrator tribunals and 15.3 months for three-member tribunals. In the event that parties would like a 'fast-track' arbitration, the SIAC Expedited Procedure requires the final award to be issued within 6 months of the constitution of the Tribunal, unless the Registrar extends the time for making the final award.
- SIAC conducts **scrutiny** of the arbitral award, thus enforcement issues are less likely. SIAC arbitration awards have been enforced in many jurisdictions including Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA and Vietnam, amongst other New York Convention signatories.
- The SIAC Arbitration Rules 2016, which came into effect on 1 August 2016, introduced a number of market-leading innovations, as well as new procedures to save time and costs, including:

  a. a new procedure for the early dismissal of claims and defences (the first of its kind amongst major institutional rules for commercial arbitration)

  b. new provisions to deal with disputes involving multiple parties, multiple contracts, consolidation and joinder of additional parties

1. Source: 2021 Queen Mary University of London and White & Case International Arbitration Survey: Adapting Arbitration to a Changing World

c. enhancements to SIAC's Emergency Arbitrator and Expedited Arbitration special procedures (both of which were first introduced in July 2010)

- SIAC has benefited from being situated in Singapore, and SIAC's key value propositions may be summarised as follows:

a. **Singapore's international arbitration framework:**

i. Open economy and business-friendly environment that is global hub for businesses and headquarters for leading companies.

ii. Trusted legal system / ranked jointly with London as the most popular seat in the world / strong tradition of rule of law/ supportive judiciary / arbitration-friendly legislation / no work visa requirements / foreign counsel can conduct arbitrations / digital infrastructure/ world class hearing facilities at Maxwell Chambers.

b. **SIAC People:** World's best arbitration practitioners on SIAC Court of Arbitration and SIAC Panel of Arbitrators. Multinational Secretariat administering the cases filed at SIAC.

c. SIAC Rules: Innovative, progressive, user-friendly, time and cost-saving provisions

i. SIAC Rules 2016: Commercial arbitration rules

ii. SIAC Investment Arbitration Rules 2017: 1st commercial arbitral institution to release a specialised set of rules for States, State-controlled entities and intergovernmental organisations to use in the conduct of international investment arbitration

II. Statistics

SIAC's Annual Report for 2021, which is available on SIAC's website[2] provides details of the number and value of cases handled by SIAC in 2021. Some important facts are as follows:

i. SIAC's average new caseload is of 400 -500 cases annually and has an active caseload of over 800 cases. In 2021, SIAC received 469 new cases from users from 6 continents and encompassing 64 jurisdictions. 86% of these new cases filed with SIAC were international in nature. For new cases filed in 2021, the total sum in dispute amounted to USD6.54 billion (SGD8.85 billion).

ii. Parties filed claims involving disputes spanning a host of sectors such as trade, commerce, maritime/shipping, corporate, construction/engineering, agriculture, arts/entertainment, aviation, banking/ financial services, commodities, education, employment, energy, government, healthcare/pharmaceuticals, hospitality/ travel, insolvency, insurance/reinsurance, IP/IT, media/broadcasting, real estate, technology/ science, and telecommunications.

iii. In 2021, Indian parties were the top foreign user of SIAC, followed by parties from the China and Hong Kong SAR. Parties from India and China have remained strong contributors of cases to SIAC over the past 6 years. SIAC's top 10 foreign users in 2021 were also spread across both common and civil law jurisdictions, a testament to the appeal of SIAC to both legal traditions. There was a significant increase in the number of parties from Hong Kong SAR, Malaysia, South Korea, UAE, Ukraine, and Vietnam compared to 2020.

2. http://www.siac.org.sg

iv. The average value for new case filings was USD21.81 million (SGD29.49 million), and the highest sum in dispute for a single administered case was USD1.95 billion (SGD2.64 billion).

v. The average sum in dispute at SIAC for cases involving Indian parties in 2021 was USD22.69 million (SGD30.68 million).

vi. The highest sum in dispute for cases involving Indian parties in 2021 was USD 513.48 million (SGD 694.47 million)

Indian users have contributed significantly to the success of SIAC. Recognising this, SIAC opened its first overseas representative office in Mumbai, India in May 2013. In August 2017, SIAC opened its second representative office in India in the International Financial Services Centre in Gujarat International Finance Tec-City, Gujarat. SIAC's Indian representative offices facilitate SIAC's interactions and information sharing on a regular basis with current and potential users from India.

III. Costs at SIAC

The cost of an arbitration at SIAC is determined in accordance with the Schedule of Fees. It can be easily calculated on SIAC's website using the Fee Calculator.[3]

On costs, it is important to note that SIAC's cost structure comprises of the following:

a. filing fees for a claim or counterclaim

b. administration fees and expenses

c. arbitrators' fees and expenses

From the Schedule of Fees, which is available on the SIAC website[4], it is possible to see that:

a. arbitrators' fees and SIAC's fees are determined on an ad valorem rate

b. the fees have caps (or ceilings) that are applicable to the administration fees and arbitrators' fees

In the first instance, when an arbitration commences, SIAC estimates the costs of arbitration as comprising:

a. SIAC's administration fees and expenses

b. the Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable

Deposits are sought from the parties on the basis of this estimate of the costs of arbitration. The actual costs are determined by the Registrar at the conclusion of a case and are based on the stage at which the matter has been concluded. Hence, the actual cost of an arbitration will likely be lesser than the cap indicated in the Schedule of Fees for a dispute of a particular sum. Parties are also free to agree upon alternative methods of determining tribunal's fees in SIAC arbitrations.

Several international surveys have been conducted comparing costs at various international arbitral institutions, and they categorise SIAC as a cost-effective option for parties. For more information on cost comparisons with other institutions, do feel free to contact us.

3. http://www.siac.org.sg/component/siaccalculator/?Itemid=448.

4. https://www.siac.org.sg/fees/siac-schedule-of-fees

IV. Costs and Duration of an Arbitration at SIAC

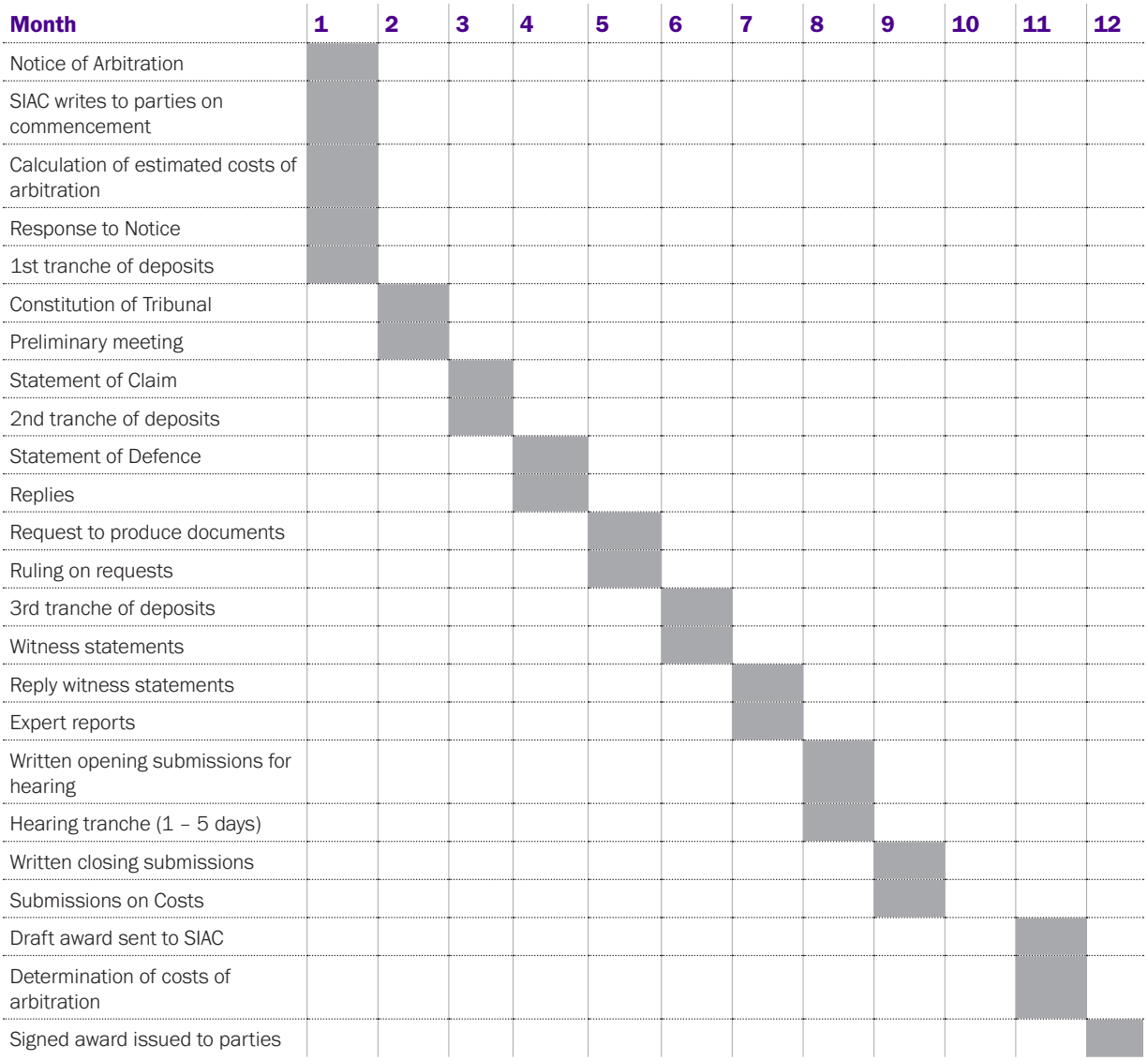
SIAC released its costs and duration study in October 2016 (Study). It considered 98 cases commenced and administered under the SIAC Rules 2013 during the period from 1 April 2013 to 31 July 2016 where a final award had been issued.

Key takeaways from the Study are as follows:

1. The mean total costs of arbitration is **USD 80,337 (SGD 109,729)**, and the median total costs of arbitration is **USD 29,567 (SGD 40,416).**

2. The mean duration of cases is 13.8 months, and the median duration is 11.7 months.

The following is a depiction of how a representative case might proceed at SIAC:



V. Innovations in Reducing Time and Costs in International Arbitrations at SIAC

Of some additional interest are two mechanisms to reduce the duration of proceedings or for use in cases where expedition or emergency relief is required.

A. Expedited Procedure

Parties may agree to SIAC's Expedited Procedure under Rule 5 of the SIAC Rules (i) in their contract by using the SIAC Expedited Procedure Model Clause (which is available on SIAC's website)[5]; or (ii) post-dispute by agreement between parties.

Alternatively, a party can choose to make an application to SIAC for the Expedited Procedure if the amount in dispute does not exceed the equivalent amount of SGD 6,000,000 or in cases of exceptional urgency.

If the President of the SIAC Court of Arbitration determines that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, an award will be made within six months of the constitution of the tribunal.

As of 31 December 2021, SIAC has received 715 requests for the application of the Expedited Procedure, of which 401 requests were accepted.

The following is a depiction of how a representative case might proceed at SIAC under the Expedited Procedure

Month	**1**	**2**	**3**	**4**	**5**	**6**	**7**
Notice of Arbitration	■						
SIAC writes to parties on commencement	■						
Calculation of estimated costs of arbitration	■						
Response to Notice	■						
1st tranche of deposits	■						
Determination of Expedited Procedure Application	■						
Constitution of Tribunal		■					
Preliminary meeting		■					
Statement of Claim			■				
2nd tranche of deposits			■				
Statement of Defence				■			
Replies, if any				■			
Request to produce documents					■		
Ruling on requests					■		
Witness statements					■		
Reply witness statements					■		
Expert reports, if any					■		
Written opening submissions for hearing						■	
Hearing tranche (1-5 days)						■	
Written closing submissions						■	
Submissions on Costs						■	

5. http://www.siac.org.sg/model-clauses/expedited-procedure-model-clause

Draft award sent to SIAC							
Determination of costs of arbitration							
Signed award issued to parties							

B. Emergency Arbitrator

A party in need of emergency relief prior to the constitution of the Tribunal may apply for such relief pursuant to Rule 30.2 and Schedule 1 of the SIAC Rules 2016. Under this mechanism:

a. the President of the SIAC Court of Arbitration will appoint an Emergency Arbitrator within 1 day of deciding to accept an application for emergency relief under these provisions

b. any challenge to the appointment of the Emergency Arbitrator must be made within two days of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed

c. the Emergency Arbitrator must establish a schedule for consideration of the application for emergency relief within two days of his appointment

Singapore's International Arbitration Act was amended in 2012 to provide for the enforceability of awards and orders issued by Emergency Arbitrators in Singapore. This makes Singapore the first jurisdiction globally to adopt legislation for the enforceability of such awards and orders. Most orders and awards issued by emergency arbitrators have been voluntarily complied with.

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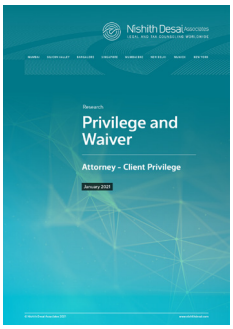

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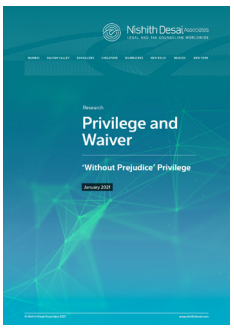

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Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

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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 unparallel 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 ecosystem 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.

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