Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI MUNICH NEW YORK

Dispute Resolution in India

An Introduction

February 2018

Dispute Resolution in India

An Introduction

February 2018

ndaconnect@nishithdesai.com

Contents

1. Introduction

With India opening up its markets in the early 1990's, the Indian legal and judicial system has had to come to terms with the reality of globalization as well. As a large country, both in terms of population and area, there is tremendous pressure on India's resources and its institutions. The legal system is no exception to this.

There has, however, been a slow and steady pace of reform in the legal and judicial system. India still has a long way to go, but will undoubtedly get there. In fact, the pace has picked up in the last two years as is evident from the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (**"Commercial Courts Act"**) and the Arbitration and Conciliation (Amendment) Act, 2015 (**"Arbitration Amendment Act"**). The backlog of cases in courts across the country is reducing gradually and the acceptance of alternate dispute resolution is also increasing. The Commercial Courts Act, along with the Arbitration Amendment Act, promises to improve the traditional legal system and also clean up the inefficiencies that had crept into the system.

This paper attempts to provide an introduction to the Indian legal and judicial system. Whilst we have endeavored to cover the key provisions, the minute details will have to be studied by the readers. Applicability of certain provisions could differ based on the facts and circumstances of each case.

2. The Constitution of India

The Constitution of India, 1950 (**"Constitution"**) is the supreme law of the land. It constitutes India into a Sovereign, Socialist, Secular, Democratic, Republic and secures to the people of the country the right to Justice, Liberty, Equality, and Fraternity.

The Constitution provides for a Parliamentary form of Government which is quasi-federal in nature. Though the structure remains primarily federal it has prominent unitary characteristics.

The Constitution provides for the distribution of legislative powers between the Centre and the States. The Parliament has the power to make laws for the whole or any part of India and the state legislature has the power to make laws for the whole or any part of the State. The legislative powers of the Parliament and state legislatures are enumerated in three lists that are annexed as the Seventh Schedule to the Constitution:

1. Union List (consists of subjects on which the Parliament may legislate);
2. State List (consists of subjects on which the state legislative assembly may legislate); and
3. Concurrent List (consists of subjects on which both, the Parliament and the state legislative assembly, may legislate).

In case of a conflict between the Centre and the State over a matter in the Concurrent List, the will of the Centre prevails. Neither the Central Government nor the State Governments can override or contravene the provisions of the Constitution.

The Constitution provides for three organs for the governance of the country; the Legislature, the Executive, and the Judiciary. While the Legislature and the Executive are responsible for creating and executing laws to govern the country, respectively, the Judiciary is the interpreter and guardian of the Constitution.

I. Separation of Powers

Article 50 of the Constitution provides that there must be a separation of the Judiciary from the Executive. However, this Article falls under the Chapter of Directive Principles of State Policy and, according to Article 37, is therefore not enforceable in a Court of Law. However, Article 37 also provides that it shall be the duty of the State to apply these Directive principles of State Policy while making laws.

The Courts however, have tried to adhere to the Doctrine of Separation and to enforce it in cases before it.

In the case of *Keshavananda Bharati*[1] it has been held by Justice Beg that:

> *"Separation of powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over the functions assigned to the other"*

To a great extent, the Legislature and the Judiciary have well defined areas of activities and they are supreme in their own spheres. The roles of the three organs are supplementary and complementary to each other. Nevertheless, in reality, the Parliament has been accorded a more important position in the political set-up. It has the necessary authority for enacting new laws and for amending the existing ones to suit the changing needs of the people with the changing times. The Parliament, and in certain cases, the Parliament and the state legislatures together, can also amend the Constitution.

The Executive enforces the law and, in exceptional circumstances, passes Ordinances which have the effect of law. An Ordinance remains in force only for a limited

1. *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461

period. However, an Ordinance can remain effective beyond its limited period (usually 6 months) if the Parliament passes a law or a statute confirming it, in the absence of which it shall lapse and be inapplicable.

The Judiciary, independent and impartial, has been made the custodian of the rights of the citizens. All the legislations (Union, State, or delegated) have been made subject to judicial review and can be declared *ultra vires*/void if they are not in consonance with the provisions of the Constitution.

Furthermore, *"the Court is bound by its oath to uphold the Constitution"*.[2] The Judiciary has the power to interpret the Constitution and the laws made by the Legislatures (Union and State). *"The judiciary has been made the interpreter of the constitution and has been assigned the delicate task to determine as to what is the power conferred on each branch of the government and to see that it does not transgress such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law"*.[3]

Normally, the power of the Courts is limited to interpreting laws. In a strict sense, they are law-interpreters and not law-makers, as they cannot prescribe how the Legislatures or the Executive should function in their respective areas. However, it has been seen that the Courts are allowed to clarify the law, or lay down guidelines where either no law exists on a subject matter or the existing law is ambiguous.[4] They have been given the power to fill in the loop-holes that exist in the legal system.

Although the scope of the Judiciary remains limited to considering whether a legislation falls within the ambit of the Constitution or otherwise is inconsistent with any of the existing laws, or with judicial activism; it has been seen that the Judiciary has adopted a more active role, bringing it close to a quasi-legislative body. However, any such power is exercised by the Judiciary with a high degree of caution and restraint.

II. Basic Structure of The Constitution

The Constitution is the supreme and sovereign authority of the State. However, in order to keep up with the changing times and changing needs of the people, the Constitution cannot be rigid. It must be flexible enough to be able to adapt itself to the present times.

The Parliament is vested with the constituent power to amend any of the provisions of the Constitution. However, amendments have to be made keeping in mind the Basic Structure or the framework of the Constitution. The authority to decide what the 'Basic Structure' of the Constitution is lies with the Supreme Court.

In the *Keshavananda Bharati case*,[5] a Constitution Bench consisting of 13 judges of the Supreme Court, including the Chief Justice of India, declared that *"Parliament's constituent power was subject to inherent limitations. The Parliament could not use its amending powers to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution"*.

In this landmark judgment, the judges set out an illustrative list of features which could be considered to be a part of the 'Basic Structure' of the Constitution:

- power of judicial review,
- supremacy of the Constitution,
- republican and democratic form of government,

2. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27
3. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625
4. For instance, guidelines to prevent sexual harassment at work- place were laid down by the Supreme Court in *Vishaka & Ors. v. State of Rajasthan & Ors.*, (1997) 6 SCC 241
5. *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461.

- separation of powers between the Legislature, the Executive, and the Judiciary,
- federal character of the Constitution,
- the mandate to build a welfare state as contained in the Directive Principles of State Policy,
- unity, integrity, and sovereignty of India,
- essential features of the individual freedoms secured to the citizens,
- the states, the High Courts in the states and Union Territories, representation of states in the Parliament and the Constitution,
- the sovereign, democratic, and secular character of the polity,
- rule of law,
- independence of the Judiciary, and
- fundamental rights of citizens

The other landmark judgments, which upheld Parliament's power to amend the Constitution subject to the Basic Structure doctrine, include *Indira Nehru Gandhi*,[6] *Minerva Mills*,[7] *Waman Rao*,[8] *and IR Coelho*.[9] Thus, the Parliament has the power to amend the Constitution in so far as it does not alter any of the Basic Features of the Constitution.

6. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299
7. *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625
8. *Waman Rao And Ors. v. Union Of India*, (1981) 2 SCC 362
9. *I.R. Coelho (Dead) By LRs v. State Of Tamil Nadu & Ors.*, (2007) 2 SCC 1

3. The Judiciary

The Indian legal system has grown and evolved with the lives and aspirations of its diverse people and cultures. It is inspired and strengthened by age-old concepts and precepts of justice, equity, and good conscience, which are, indeed, the hallmarks of common law.

The Constitution is the fundamental source of law in India, giving due recognition to statutes, case law, and customary law consistent with its dispensations. A single unified judicial system is a unique feature of the Indian judicial system. The Supreme Court is at the apex of the entire judicial system, followed by High Courts in each state or group of states. Below each state's High Court lies a hierarchy of subordinate courts. Panchayat Courts also function in some states under various names like Nyaya Panchayat, Panchayat Adalat, and Gram Kachheri to decide civil and criminal disputes of petty and local nature. Lok Adalat is another form of judicial forum that has been set up to dispose of smaller cases and to decrease the burgeoning case load.

Each state is divided into judicial districts. In each district there exist the principal courts of original jurisdiction for civil and criminal cases. The District Judge normally is the principal court for civil matters in a district, while the Sessions Judge enjoys the same stature for criminal matters. Below these courts lie several other courts with varying pecuniary and subject matter jurisdictions. In such a hierarchical system, it is very crucial to decide the appropriate jurisdiction required to entertain and try a dispute.

I. Supreme Court

The Supreme Court of India is the highest court of appeal and is the final interpreter of the Constitution and the laws of the land. The Supreme Court has the original and exclusive jurisdiction to resolve disputes between the Central Government and one or more states and union territories, as well as disputes between different states and union territories.

In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to the enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto and certiorari*.[10] The Supreme Court has been conferred with a wide array of powers including the power to direct transfer of any civil or criminal case from one state's High Court to another state's High Court[11] or from a Court subordinate to another state's High Court.[12] The Supreme Court may, if satisfied that cases involving the same or substantially the same questions of law which are of substantial importance are pending before it and before one or more High Courts or before two or more High Courts, dispose of all such cases itself.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned, under Articles 132(1), 133(1) or 134 of the Constitution, in respect of any judgment, decree or final order of a High Court in, both civil and criminal cases. The Supreme Court also has a very wide appellate jurisdiction over all courts and tribunals in India in as much as it may, in its discretion, grant special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence, or order in any cause or matter passed or made by any court or tribunal in the territory of India. Especially if the same involve substantial questions of law of general importance or relating to the interpretation of the Constitution.

The Supreme Court is further empowered to issue advisory rulings on issues referred to it by the President of India under Article 143 of the Constitution. The Supreme Court has wide

10. Article 32, Constitution of India, 1950
11. Article 139A, Constitution of India, 1950
12. Section 25, Code of Civil Procedure, 1908

discretionary powers to hear special appeals on any matter from any court except those of the armed services. It also functions as a Court of Record (i.e. its acts and judicial proceedings are recorded for perpetuity and it has power to fine and imprison for contempt of its authority[13]) and supervises every High Court and subordinate court.

A. Public Interest Litigation

In India, a concept popularly referred to as 'Public Interest Litigation' or 'PIL' has evolved. Under this concept, the Supreme Court of India and the High Courts entertain matters in which interest of the public at large is involved. A PIL can be instituted by any individual or group of persons either by filing a Writ Petition or by addressing a letter to the Chief Justice of India or to the Chief Justice of the relevant High Court highlighting the question of public importance for invoking the jurisdiction. Several issues of public importance (including release of bonded labor,[14] labor rights,[15] and rights of undertrials[16]) have turned out to be the subject matter of landmark judgments.

II. High Courts

As part of a single integrated hierarchical Judicial System, the High Courts are placed directly under the Supreme Court. Each High Court consists of a Chief Justice and a number of *puisne* judges. Every High Court is a Court of Record. The High Court entertains appeals from subordinate courts and tribunals which lie within its jurisdiction. It also acts as a court of revision for the subordinate courts and the tribunals. Some High Courts also exercise original jurisdiction in civil and admiralty matters.

Apart from the original and appellate jurisdiction, the Constitution vests in the High Courts some additional powers including the following:

- Under Article 226 of the Constitution, the High Court has the power to issue directions, writs, or orders for the enforcement of Fundamental Rights or for any other purpose;
- Under Article 227 of the Constitution, the High Court has the power of judicial and administrative superintendence over all courts and tribunals in the state, except those dealing with the armed forces;
- Under Article 228 of the Constitution, the High Court has the power to transfer cases concerning the interpretation of the Constitution from subordinate courts to itself.

III. Commercial Courts, Commercial Divisions and Commercial Appellate Divisions ("Special Courts")

Pursuant to the Commercial Courts Act, special Commercial Courts have been established in each state. For territories where the High Courts itself are vested with the original jurisdiction, i.e. where particular suits may directly be filed before the High Court (Delhi, Bombay, Madras, Calcutta & Himachal Pradesh), Commercial Division within such High Courts have been constituted. As per the Commercial Courts Act, 'Commercial Disputes' of a 'Specified Value' are to be heard by such Commercial Courts/ Division. Further, Commercial Appellate Divisions within the High Courts have also been constituted. Appeals from commercial courts/commercial divisions are heard by the Commercial Appellate Division. This is discussed in further detail in Chapter VIII.

13. Aiyar, Ramanatha P., *The Law Lexicon*, 2nd ed., 1997, Wadhwa & Co., Nagpur, page 433
14. *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161a
15. *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473
16. *Hussainara Khatoon & Ors. v. Home Secretary, State Of Bihar*, 1979 SCR (3) 169

IV. Tribunals

Specialized tribunals such as the Income Tax Appellate Tribunal, the National Company Law Tribunal, the Goods and Services Tax Appellate Tribunal, the Consumer Forum, the Central and State Administrative Tribunals, the Debt Recovery Tribunal, and the Intellectual Property Appellate Tribunal are established under various enactments. Appeals from the orders of these tribunals/appellate tribunals lie to the High Court and the Supreme Court, as the case maybe. The organization of the subordinate courts and tribunals varies slightly from state to state.

V. Subordinate Courts

Next in the hierarchy of the courts are the subordinate courts and tribunals.

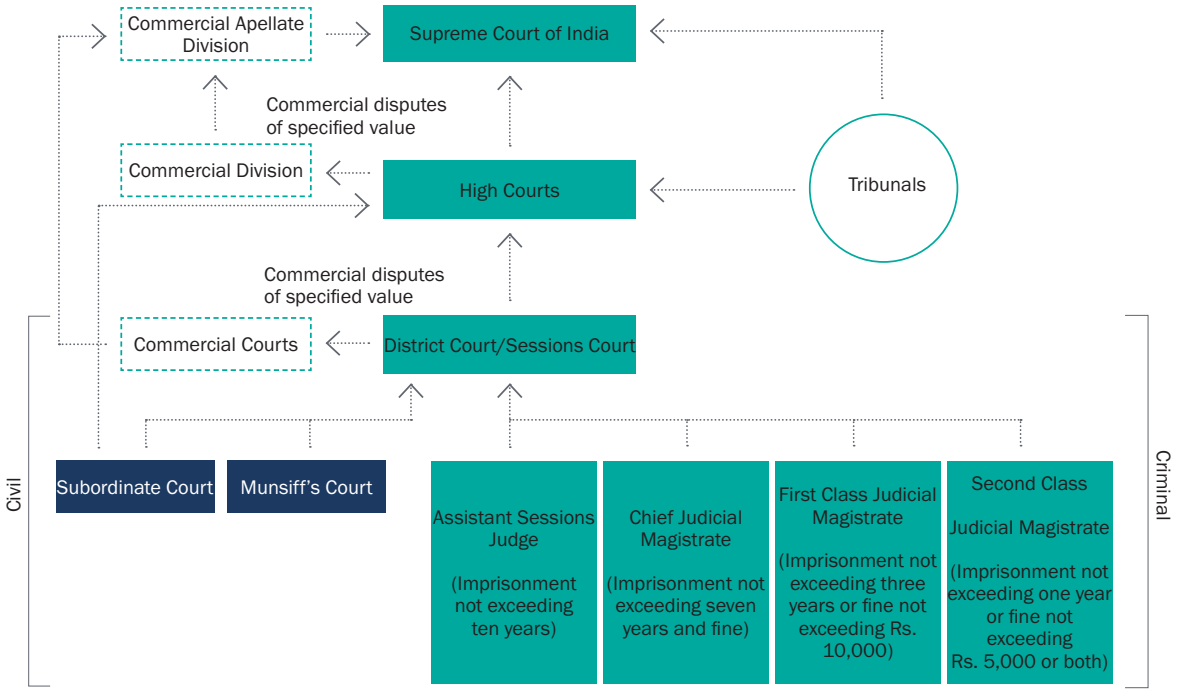
The highest civil court in each district is that of the District Judge. Below such courts are several others, depending on the individual set up of each district, including the Court of Small Causes for petty matters.

On the criminal side, the highest court is the court of the Sessions Judge, which has the power to impose any sentence, including capital punishment.[17]

In addition to the Sessions Judge, the court of Additional Sessions Judge (having the same powers as the Sessions Judge) may also exist in some districts. Next in hierarchy is the court of the Assistant Sessions Judge, which may pronounce any sentence barring a death sentence or a sentence of imprisonment exceeding 10 years. This is followed by the court of the Chief Judicial Magistrate (known as Chief Metropolitan Magistrate in metropolitan regions like Mumbai), which has the power to pass a sentence of a term not exceeding seven years and/or impose fine. The court of the Judicial Magistrate (First Class) (known as Metropolitan Magistrate in metropolitan regions like Mumbai) is the second lowest court in the hierarchy of subordinate courts. It has the power to order imprisonment of up to three years and impose fines not exceeding Rs. 10,000. Last in the rung of criminal courts is the court of the Judicial Magistrate, Second Class, which has the power to pass a sentence of imprisonment of up to one year and/or impose a fine of up to Rs. 5000.[18]

17. Section 28, Code of Criminal Procedure, 1973
18. Sections 28 and 29, Code of Criminal Procedure, 1973

Indian legal System- Hierarchy of Courts



VI. Representation Before the Judiciary

For a dispute to be presented and argued before a court, the norm is that a litigating party is represented by an advocate. In fact, in cases where a person has been arrested by the State, the arrested person has the fundamental right to be represented by a legal practitioner of his choice.[19] However, there is no specific bar on disputing parties appearing on their own before the courts and thereby submitting and arguing their own case. In fact, under certain specific statutes, such as the Family Courts Act, 1984[20] and the Industrial Disputes Act, 1947[21] the representation of a party by a legal practitioner is not granted as a matter of right but the same may be dependent upon other conditions such as the permission of the court concerned or the consent of the other parties of the suit.

In so far as the scope of an advocate to appear before the Indian courts is concerned, one may observe that India follows a unified system for practice in courts. Therefore, an advocate enrolled on the Bar of any state is free to practice in the courts of any other state of India. Furthermore, India does not create any distinction between barristers, i.e. persons who may appear and plead before the courts and solicitors, i.e. persons who may have direct contact with the clients and may in turn instruct the barristers. Any advocate, in so far as he is registered on the Rolls of the Bar Council of a state in India, has the liberty to solicit clients and plead before all the courts in India.

However, with respect to practicing and appearing in the Supreme Court, with the exception of senior advocates, only those advocates who are 'Advocates on Record', as required under the Supreme Court Rules, 1966 can appear and practice in the Supreme Court.

19. Article 22, Constitution of India, 1950
20. Section 13, Family Courts Act, 1984
21. Section 36, Industrial Disputes Act, 1947

4. Jurisdiction

Jurisdiction may be defined as the power or authority of a court to hear and determine a case, to adjudicate and exercise any judicial power in relation to it. The jurisdiction of a court, tribunal, or authority may depend upon fulfillment of certain conditions or upon the existence of a particular fact.[22] If such a condition precedent is satisfied only then does the authority or court, as the case may be, have the jurisdiction to entertain and try the matter. Jurisdiction of the courts may be classified under the following categories:

I. Territorial or Local Jurisdiction

Every court has its own local or territorial limits beyond which it cannot exercise its jurisdiction.[23]

All suits are required to be tried in the lowest courts which have the territorial jurisdiction to hear them. Subject to certain limitations under Sections 16 to 19 of the Code of Civil Procedure, 1908 (**"CPC"**) every suit must be instituted in a Court within the local limits of whose jurisdiction:

a. The defendant(s) at the time of the commencement of the Suit, actually and voluntarily resided, or carried on business, or personally worked for gain; or

b. Any of the defendants at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain. However, in such a case, either the leave of the Court must be taken, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

c. the cause of action, wholly or in part, arises.

II. Pecuniary Jurisdiction

The CPC provides that a court will have jurisdiction only over those suits in which the amount or value of the subject matter does not exceed the pecuniary limits of its jurisdiction.[24] Some courts have unlimited pecuniary jurisdiction, i.e., no upper cap, like the High Courts and District Courts (in certain states); however, other courts have prescribed pecuniary limits below or beyond which monetary limit they do not have the jurisdiction to decide the suit.

The Commercial Courts Act now vests Commercial Courts and Commercial Divisions with the jurisdiction to try disputes of a 'commercial nature', as defined in the act. However, the Commercial Courts Act also provides that only those commercial disputes of a 'specified value', i.e. disputes which are valued at or **above ten (10) million rupees, or such higher value** as may be notified by the Central Government, can be tried by such special courts. Thus, setting its lower pecuniary limit.

III. Jurisdiction as to Subject Matter

Different courts have been empowered to decide different types of suits and some courts are precluded from entertaining certain suits. For example, the Small Causes Courts have no jurisdiction to try suits for specific performance of contract, partition of immovable property, or injunction. Similarly, matters pertaining to violations of Fundamental Rights can be heard only by

22. *Ujjam Bai v. State of U.P.*, AIR 1962 SC 1621

23. Section 16, Code of Civil Procedure, 1908

24. Section 6, Code of Civil Procedure , 1908

the Supreme Court[25] or the High Courts[26] and therefore, no other court would have jurisdiction to entertain and try such matters. Further, cases where immovable property constitutes the subject matter of the suit, then such suits are normally triable by the courts within whose territorial jurisdiction the subject matter, i.e. the immovable property, is situated.

When the subject matter of the dispute pertains to "Commercial Disputes", the Commercial Courts Act vests jurisdiction upon Commercial Courts and Commercial Divisions, provided that the value of such disputes is above the specified value. The Commercial Courts Act gives a broad definition to 'Commercial Disputes' which includes, *inter alia;* disputes arising out of shareholder agreements, joint venture agreements, construction and infrastructure contracts, management and consultancy agreements, franchising agreements, distribution and licensing agreements, partnership agreements, technology development agreements, etc.

IV. Original and Appellate Jurisdiction

The jurisdiction of a court may be classified as original and/or appellate. In the exercise of original jurisdiction courts entertain and decide suits, and under appellate jurisdiction courts entertain and decide appeals. The Munsif's Courts, Courts of Civil Judge and Small Cause Courts on the civil side, and the Courts of Judicial Magistrate 2nd Class, Judicial Magistrate 1st Class and the Metropolitan Magistrate on the criminal side, possess original jurisdiction only. District Courts and High Courts have original as well as appellate jurisdictions, subject to certain exceptions. For 'Commercial Disputes' of a 'Specified Value", the original jurisdiction would lie with the Commercial Courts and Commercial Divisions in the High Courts and appeals arising out of them would be heard by the Commercial Appellate Divisions.

25. Article 32, Constitution of India, 1950

26. Article 226, Constitution of India, 1950

5. Reliefs

I. Interim Relief

Interim/interlocutory orders are those orders which are passed by a court during the pendency of a suit or proceeding. Interim orders do not determine with finality the substantive rights and liabilities of the parties in respect to the subject matter of the suit or proceeding. Interim orders are necessary to deal with and protect the rights of the parties in the interval between the commencement of the proceedings and final adjudication. They enable the court to grant such relief or pass such order as may be necessary, just, or equitable. Hence, interim proceedings play a crucial role in the conduct of litigation between the parties. Further, considering the extensive time taken in final disposal of a suit or legal proceeding in India, interim reliefs are of significant importance. Interim reliefs, accordingly, also play a crucial role in settlement discussions between litigating parties. Injunctions, security deposit, and attachment of property are popular forms of interim reliefs which are prayed for.

A temporary/interim/interlocutory injunction restrains a party temporarily from doing the specified act and is granted until the disposal of the suit or until further orders of the court. It is regulated by the provisions of Order XXXIX of the CPC and may be granted at any stage of the suit.

The grant of an interim injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the court. While exercising discretion the court applies the following tests:

i. whether the plaintiff has a *prima facie* case;

ii. whether the balance of convenience is in favor of the plaintiff; and

iii. whether the plaintiff would suffer an irreparable injury if his request for interim injunction is disallowed.

A. Prima facie case

The applicant must make out a *prima facie* case in support of the right claimed by him and should be able to show to the court that there is a *bona fide* dispute raised by the applicant. He should also establish that there is a strong case for trial which needs investigation and that upon a decision based on merits, and the facts of the case, there is a probability of the applicant being entitled to the relief claimed by him. While determining whether a *prima facie* case had been made out, the relevant consideration is whether the basis of the evidence presented would make it possible for the Court to arrive at the conclusion proposed by the applicant. It is not necessary to establish that such conclusion would be the only conclusion which could be arrived at on the basis of the presented evidence.[27]

B. Irreparable injury

The applicant must further assure the court that he will suffer irreparable injury if the interim relief as requested is not granted, and that there is no other remedy open to him by which he can be protected from the consequences of apprehended injury. Irreparable injury does not mean that there must be no physical possibility of repairing the injury, but that the injury must be a material one, and one that cannot be adequately compensated for in damages. [28] The principle was elaborated in the celebrated judgment of *American Cyanamid Co. v. Ethicon Ltd.*:[29]

27. *Martin Burn Ltd. v. Banerjee*, AIR 1958 SC 79
28. *Begg, Dunlop & Co. v. Satish Chandra Chatterjee*, AIR 1920 Cal 276
29. (1975) 1 All ER 504

"The governing principle is that, the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiffs undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."

C. Balance of Convenience

In addition to the above two conditions, the court must also be satisfied that the balance of convenience must be in favor of the applicant. The court must compare the amount of mischief done or threatened to the plaintiff and weigh the same against that inflicted by the injunction upon the defendant.[30] In order to determine the same, the court may look into factors such as:[31]

- Whether it could cause greater inconvenience to the plaintiff if the injunction was not granted.
- Whether the party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial posi- tion to pay them.

The decision whether or not to grant an interim injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial, on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before such uncertainty can be resolved.[32]

II. Specific Relief

The Specific Relief Act, 1963 (**"SR Act"**), provides for specific relief for the purpose of enforcing individual civil rights, not for the mere purpose of enforcing civil law, and includes all the cases where the court can order specific performance of an enforceable contract. The SR Act provides for remedies of the nature of injunctions, recovery of property, specific performance of contracts, rescission of contracts, rectification of instruments, and declaratory reliefs.

The SR Act applies to movable and immovable properties and is, *inter alia*, enforceable in the following cases:

i. Recovering possession of immovable property:

30. *Nani Bala Saha v. Garu Bala Saha, AIR 1979 Cal 308; Dorab Cawasji Warden v. Coomi Sorab Warden and Ors..* AIR 1990 SC 867; *Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Co. & Ors..* (1995) 5 SCC 545
31. *Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Co. & Ors..* (1995) 5 SCC 545
32. *Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Co. & Ors..* (1995) 5 SCC 545

- A person who is entitled to possession of a specific immovable property may recover it in the manner provided in the CPC.[33]
- If any person is dispossessed of his immovable property without his consent otherwise than by course of law, he can recover possession of the same by way of a summary suit. Such suit shall be instituted within 6 months. No suit can be filed against Government for recovery of possession.[34]

ii. Recovering possession of specific movable property:

- A person who is entitled to possession of a specific movable property may recover it in the manner provided in CPC.[35]
- If any person is in possession or control of a specific movable property of which he is not the owner, he can be compelled to specifically deliver it to the person entitled to immediate possession.[36]

iii. Specific performance of contract

As per Section 10 of the SR Act, specific performance of contract can be ordered at discretion of Court in the following cases:

- Where there is no prescribed standard for ascertaining the actual damages caused by the non-performance of the contract; and
- Where monetary compensation would not be an adequate relief in the prevalent conditions.

As per explanation (ii) to Section 10, breach of a contract in respect to movable property can be relieved (by paying damages) unless the property is not an ordinary article of commerce or is of specific value or interest to the tariff, or consists of goods which are not easily available in the market. In other words, the Court may order a party to deliver a specific article only if it is a special or unique article, not available in market. In other cases, the Court will order damages but not order specific performance of the contract. In cases of immovable property, normally, specific performance will be ordered, as such property is considered unique.[37]

A. Contracts which cannot be specifically enforced

Generally, the following contracts cannot be specifically enforced:[38]

- Where compensation is adequate relief;
- Contract runs into such minute, or numerous details, or depends on personal qualifications of parties, or is such that the Courts cannot enforce specific performance of its material terms;
- Contract which in its nature is determinable;
- Where the performance of a Contract involves a continuous duty which the Courts cannot supervise.

B. Powers of the Courts

The Courts however can exercise discretionary powers while granting specific performance and can impose any reasonable condition including payment of an additional amount by one party to the other. Also, the SR Act stipulates the fulfillment of certain necessary ingredients/conditions and provides that the Courts shall not direct specific performance unless those necessary ingredients have been complied with to the satisfaction of the Court.

III. Damages

Under Common Law, the primary remedy for injury under tort law or breach of contract is that of damages.

33. Section 5, Specific Relief Act, 1963
34. Section 6, Specific Relief Act, 1963
35. Section 7, Specific Relief Act, 1963
36. Section 8, Specific Relief Act, 1963
37. *Uttar Pradesh State Electricity Board v. Ram Barai Prasad*, AIR 1985 All 265
38. Section 14, Specific Relief Act, 1963

The goal of damages in tort actions is to make the injured party whole through the substitutionary remedy of money to compensate for tangible and intangible losses caused by the tort.

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. The word *'damage'* is used in the ordinary sense of injury, loss, or deprivation of some kind, whereas the word *'damages'* refers to the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties. The word *'injury'* is strictly limited to an actionable wrong, while 'damage' means loss or harm occurring in fact, whether actionable as an injury or not.[39] Under the Indian Contract Act, 1872 (**"Contract Act"**), the remedy of damages is laid down in Sections 73 to 75.

Section 73 states that where there has been a breach of contract, the party suffering from the breach thereof is entitled to receive compensation from the party who is responsible for the breach. However, no compensation is payable for any remote or indirect loss or damage so caused. The issue of remoteness which was expounded in *Hadley v. Baxendale*[40] has been followed by the Indian courts, and the courts have stated that *"Section 73 of the Contract Act reflects in full the principles in Hadley v. Baxendale"*.[41]

Section 74 deals with liquidated damages and provides for the measure of damages in two classes: (i) where the contract names a sum to be paid in case of breach; and (ii) where the contract contains any other stipulation by way of penalty. In both the cases the measure of damages is reasonable compensation not exceeding the amount or penalty stipulated for. In *Fateh Chand v. Balkishan Das*,[42] the Supreme Court stated:

> *"Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of parties predetermined or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party. It merely declares the law that notwithstanding any term in the contract for determining the damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."*

Section 75 provides a party which rightfully rescinds/revokes a contract will have a right to be compensated for any damage which he may have sustained through the non-fulfillment of the contract.

The aforementioned Sections of the Contract Act, give assurance to the contracting party that he may safely rely on the fulfillment of the promise and upon breach of any terms and conditions he will have the right to claim damages from the defaulting party. However, it should also be noted that, traditionally, Indian courts have not been known to grant substantial damages even if the amount claimed is the actual loss. However, this seems to be changing now and hopefully, we will see the courts becoming more favorable in their outlook to grant of damages.

39. Ratanlal & Dhirajlal, *The Law of Torts*, 26th ed., 2010, LexisNexis Butterworths Wadhwa, Nagpur, pg. no. 184

40. (1854) 9 Exch 341

41. *State of Kerala v. K. Bhaskaran, AIR 1985 Ker 49; Titanium Tanta- lum Products Ltd. v. Shriram Alkali And Chemicals, 2006 (2)* ARBLR 366 Delhi

42. (1964) 1 SCR 515

6. The Course of a Suit

There are various stages that a suit goes through from its institution to its conclusion. The Commercial Courts Act now also provides for special proceedings in relation to disputes which are of a commercial nature and of a specified value, so that such disputes can be dealt with more expeditiously than is otherwise provided for. The various stages in the course of a suit shall be discussed in the following chapters.

I. Pre-Trial Proceedings

A. Institution of Suits

A suit is instituted by filing of a 'plaint'. One of the key factors at the time of filing of the suit is to consider the persons who would be parties to the suit. All persons who constitute necessary or proper parties are made parties to the suit.

A necessary party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes.[43] Further, as per Order II of the CPC, as a general rule, a suit is required to include the whole of the claim which the plaintiff is entitled to in respect of the *'cause of action'*.[44] Order IV of the CPC provides that every plaint shall comply with the rules contained in Order VI (pertaining to Pleadings, i.e., a plaint or a written statement[45]) and Order VII (pertaining to Plaints) of the CPC.

The principles of pleadings, as stated in Order VI Rule 2(1) are:

- Pleadings should state facts and not law;
- The facts stated therein should be material facts;
- Pleadings should not state the evidence;
- The facts stated therein should be in a concise form.

The plaint is the document which is required to be filed to institute a civil proceeding in a court of law. The plaint is the plaintiff's pleading, a statement of claims in which he/she sets out his/her cause of action with all necessary particulars. Every plaint, under Order VII of the CPC, should contain the following particulars;

- Name of the court (including the relevant jurisdiction);
- Name, description, and full address of the plaintiff;
- Name, description, and full address of the defendant;
- Cause of action and when it arose;
- Facts to show that the court has jurisdiction;
- The relief(s) sought, mentioning the value of the subject matter.

B. Remitting the Court Fees

The court fees payable upon filing of a suit is derived from the central Court Fees Act, 1870 with each state then stipulating the court fees. Certain states have also enacted separate statutes for the determination of court fees payable by the plaintiff. Depending on the subject matter of the litigation, the court fee prescribed may be:

1. A percentage of the value of the compensation claimed or the value of the property in dispute; or
2. A fixed amount for certain categories of cases, such as partition cases.

43. *Sarvinder Singh v. Dalip Singh and Ors.*, (1996) 5 SCC 539
44. Cause of action is a group of operative facts giving rise to one or more bases for suing; See Black's Law Dictionary, 6th ed., 1990, West Publishing Co., U.S.A., pg. no. 221
45. Order VI Rule 1, Code of Civil Procedure, 1908

Court fees vary from state to state and therefore, the "fee schedule" of the Court Fees Act, 1870, as stipulated in the concerned state must be checked. Generally, for cases involving recovery of money, the court fees ranges from 5 – 10 percent of the claim. Certain states have capped the court fees payable by the plaintiff(s).

C. Suit Valuation

Further, the court within whose pecuniary jurisdiction the suit would fall under is determined by the valuation of the suit. The valuation of the suit is determined by the Suits Valuation Act, 1887, with certain states having state specific amendments and rules. In some cases, states have enacted separate statutes for the purpose of determining of the value of the suit, such as the Karnataka Court Fee and Suits Valuation Act, 1958.

D. Limitation Period

A suit is required to be filed within the period of limitation prescribed under the Limitation Act, 1963 (**"Limitation Act"**). If the suit is instituted after the expiry of the limitation period, which is, in general, a period of 3 years, then the same may be dismissed as barred by the Limitation Act. The Limitation Act will also be applicable, barring certain exceptions, to suits instituted in India in respect to contracts entered into in a foreign country.[46] In certain cases, the court may condone any delay in filling of the suit, if cogent reasons are shown for the delay.

E. Notifying the Defendant

After completion of certain preliminary scrutiny by the registry of the relevant court, the case will be listed before a judge to who the case would be assigned. Notice, under Order V of the CPC, is issued to the defendant summoning his appearance and directing him to file his reply within a specified date. Every Writ of Summons should be served upon the defendant(s) in the manner prescribed along with a copy of the plaint and documents.

F. Filing of Written Statement

After the plaintiff has instituted the suit and notified the defendant, the defendant is required to file its written statement, along with a set-off or counter claim, if any, in the court within a total period of 90 days from service of the summons.

Order VIII of the CPC deals with the written statement, which is the defendant's response to the plaint, admitting or specifically denying each material fact alleged by plaintiff in the plaint. The defendant may set out any additional facts which may be relevant to the case, and any legal objections to the claim of the plaintiff may also be set out in the written statement.

The defendant may also claim a set-off or make a counterclaim in the written statement. A set-off is any ascertained sum of money legally recoverable by the defendant against the plaintiff, which would be "set off" against the plaintiffs claim; effectively reducing the value of the plaintiffs claim to the extent of the value of the set off. A counterclaim is any right or claim of the defendant against the plaintiff in respect of a cause of action accruing to the defendant against the plaintiff at a point in time before the defendant has delivered his defense in the current suit and has the effect of a cross suit.

In the event of a set-off or counterclaim being alleged by the defendant in the written statement, the plaintiff in turn responds with a written statement, either admitting or making specific denial of each material fact.

While the plaintiff has the right to respond to the claim for set-off or counter claim of the defendant, any other subsequent pleadings, such as the rejoinder to the written statement and the sur-rejoinder to the rejoinder, cannot be filed as a matter of right and a leave of the court must sought. [47]

46. Section 11, Limitation Act, 1963

47. Order VIII Rule 9, Code of Civil Procedure, 1908

II. Trial Proceedings

A. Framing of Issues by the Court

After the parties complete the pleadings in the suit, the court frames the issues.[48] Framing of issues involves identifying issues that raise specific questions of law or fact and separating those issues from irrelevant facts of the case. After the court frames the issues, the parties to the suit decide upon a list of documents to be provided to the court. The parties have to submit these documents and prove the relevance and authenticity of the documents in accordance with the CPC and the Indian Evidence Act, 1872 (**"Evidence Act"**).

B. Filing Documents & Leading Evidence

i. Discovery, inspection and Interrogatories

Under Order XI of the CPC, a party, by means of discovery, is enabled to obtain from his opponent material facts or information in the form of documents or admissions which will support his own case or damage his opponent's case. Though the nature of each party's case is set out in the plaint and the written statement, they may not sufficiently disclose their respective cases. Thus, the machinery provided in Order XI of the CPC may be availed of with the leave of the court for elicitation of additional materials for better preparation of a case before it is brought to trial. This further assists inshortening the duration of the proceedings and minimizing costs. For this purpose, interrogatories maybe submitted for answer by the opponent and discovery of documents maybe asked for.[49]

Interrogatories, which are a set of questions eliciting specific answers from the opposite party, must be confined to the facts which are relevant to the matters in question in the suit and must be submitted to the concerned court, under Rule 2 of Order XI of the CPC, before the same are tendered on the opposite party.

An application for discovery of documents may be made to the court under which the court may direct the other party to the suit to make discovery of the documents which are or have been in his possession or power. However, discovery shall not be ordered if the court is of the opinion that it is not necessary either for disposing of the suit or for saving costs.[50]

ii. Examination of Witnesses

Within fifteen days after the framing of issues, the parties are required to present a list of witnesses. For this purpose, any party to the suit may apply to the court for the issuance of a summons to persons whom they propose to call as witnesses.

Sections 30 to 32 and Orders XVI to XVIII of the CPC contain the necessary provisions for summoning, attendance, and examination of witnesses.

Examination of a witness would usually involve the following steps:

- **Examination-in-chief:** The examination of a witness by the party who calls him is called examination-in-chief.[51] It is the province of a party by whom the witness is called to examine him in-chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove the party's case. Examination-in-chief is also known as Direct Examination.
- **Cross-examination:** The examination of a witness by the adverse party is known as cross-examination. This stage of examination constitutes one of the key stages to refute or disprove the case presented by the other party either in his pleadings and/or in his evidence.

48. Order XIV, Code of Civil Procedure, 1908
49. Sarkar, Sudipto, *Code of Civil Procedure*, Volume I, 11th Edition, Lexis Nexis Butterworths Wadhwa, pg. no. 1323
50. Order XI Rule 12, Code of Civil Procedure, 1908
51. Section 137, the Indian Evidence Act, 1872

- **Re-examination:** The examination of a witness by the party who called him, subsequent to cross-examination, is called re-examination. However, the ambit f re-examination is restricted. Often, re-examination has been permitted in situations where a new fact has been introduced during cross-examination or when a particular fact or statement suffers from ambiguity and merits explanation.

After the parties have cross-examined, and re-examined the witnesses on both sides as the case may be, the next stage of trial will be commenced i.e. arguments by the parties.

iii. Privileged communication between an advocate and a client

Though the parties in most instances are at liberty to either call for production of evidence or to examine and cross-examine witnesses to establish their case and prove the contentions and facts put forth by them, communications between an advocate and his client form exception to this rule.

No advocate, at any time during or after his engagement as the advocate of the client, is permitted to disclose any communication made to him by or on behalf of the his client, in the course of or for the purpose of his employment as such advocate. Furthermore, an advocate is also forbidden from stating the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. He must also not disclose any advice which is given by him to his client in the course of or for the purpose of such employment. However, any such disclosure may be made by the advocate if the client has tendered his express consent for the same.[52]

However, any such privilege of non-disclosure enjoyed by the communications of the advocate and the client are not applicable to any communication which may be made in furtherance of any illegal purpose or if any fact is observed by the advocate that a crime or fraud has been committed since the commencement of his employment as the advocate.[53]

C. Posting for Final Arguments

The right to begin or the privilege of opening the case is determined by the rules of evidence. The general rule is that the party on whom the burden of proof lies should begin first. But where there are several issues to be proved, and the burden of proving some of which lies on either party, the plaintiff may, at his option, either go into the whole case in the first instance or may merely adduce evidence on those issues which lie upon him, reserving his right to rebut the evidence, should his opponent make out a *prima facie* case.

Arguments by both sides are intended to brief the judge with a summary of the evidences produced by each side. At this stage there are examinations and submissions by the parties in order to prove their point or substantiate their argument.

D. Judgment and Decree

After the hearing of a matter is completed the judge pronounces the judgment in open court.[54] Within fifteen days of the pronouncement of a judgment, the concerned court is required to draw up the decree.[55] Order XX Rule 6 of the CPC lays down, that the decree shall agree with the judgment. Copies of the judgment and decree ought to be provided to the parties to a suit.

An appeal maybe preferred against the decree without filing a copy of the decree. To that effect a copy of the judgment would be treated as the decree. However, a judgment ceases to have the effect of the decree as soon as the decree is drawn up.[56]

52. Section 126, Indian Evidence Act, 1872

53. Section 126, Indian Evidence Act, 1872

54. Order XX Rule 1, Code of Civil Procedure, 1908

55. Order XX Rule 6-A, Code of Civil Procedure, 1908

56. Order XX Rule 6-A, Code of Civil Procedure, 1908

E. Execution of the Decree

The party in whose favor the decree is passed is called the decree holder, and the other party is called the judgment debtor. The judgment debtor has to abide by and honor the decree. If the judgment debtor fails to honor the decree passed against him, the decree holder can seek execution of the decree by filing an Execution Petition in the court.

F. Enforcement of foreign judgments

The enforceability of a foreign judgment in India depends upon whether the judgment has been passed by a court in a "reciprocating territory" or whether it has been passed by a court from a non-reciprocating territory. A *"reciprocating territory"* is one in which is notified by the Government of India as a "reciprocating territory" under section 44A of the CPC. For instance, U.K. has been notified by the Government of India as a reciprocating territory, whereas, the U.S. has not been so recognized. The judgment of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy the claim. Judgments of specified courts in reciprocating countries can be enforced directly by execution proceedings as if these foreign judgments are decrees of the Indian courts. A foreign judgment of non-reciprocating countries can be enforced in India only by filing a suit based on the judgment and has to be proven as evidence under the provisions of the Evidence Act.

A foreign judgment would be recognized by Indian courts unless it is proven that:[57]

- It was pronounced by a court which did not have jurisdiction;
- It was not given on the merits of the case;
- It appeared, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize Indian law (where applicable);
- Principles of natural justice were ignored by the foreign court;
- The judgment was obtained by fraud; or
- The judgment sustained a claim founded on a breach of Indian law.

Further, the claims may be barred under the Limitation Act, 1963, if the suit is instituted after the expiry of the limitation period, in general the limitation period is of 3 years.

Where any judgment from a reciprocating territory is in question, a party may directly apply for execution under S. 44A of the CPC. A judgment from a non-reciprocating country cannot be enforced under this section.[58] The party approaching the Indian court must supply a certified copy of the decree together with a certificate from the foreign court stating the extent to which the decree has been satisfied or adjusted, this being treated as conclusive proof of the satisfaction or adjustment. Execution of the foreign judgment is then treated as if it was passed by a district court in India, however, the parties may still challenge the enforcement under the provisions of Section 13 of the CPC.

III. Summary Suit

A summary suit, dealt with under Order XXXVII of the CPC, is a relatively shorter procedure which may be adopted by a plaintiff in cases such as those relating to:

- bills of exchange,
- promissory notes,
- suits where the plaintiff seeks to recover a debt or a liquidated demand arising out of a contract, a guarantee or an enactment where a liquidated demand, or where a fixed sum of money or a debt needs to be recovered[59]

57. Section 13, Code of Civil Procedure, 1908

58. *Punjab Co-operative Bank v. Naranjan Das*, AIR 1961 PH 369

59. Order XXXVII Rule 1, Code of Civil Procedure, 1908

Under a summary suit, the plaintiff is required to institute a plaint specifying that the suit is instituted under Order XXXVII of the CPC. After the service of the Writ of Summons to the defendant, the defendant must enter an appearance and request leave to defend the summary suit within ten days of the service. Unless the defendant does so he will not be entitled to defend the summary suit, and the plaintiff will be entitled to a decree which will be executed forthwith. However, if the defendant requests leave to defend, the same will be given unconditionally if the defendant shows a *prima facie* case or raises a triable issue. The leave to defend should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put by him is frivolous or vexatious.[60]

IV. Summary Judgment

The Commercial Courts Act provides for an additional provision, i.e. Order XIII-A in the CPC wherein parties can request for summary judgments in all Commercial Disputes of Specified Value, irrespective of the nature of relief sought.

As per the new provision, if a party approaches the Court before the issues have been framed, then the Court, after taking into consideration the other party's real prospect of succeeding, has the discretion to pass a summary judgment. There are various considerations, dealt with in more detail in Chapter VIII, which are to be taken into account by the Court before deciding whether a summary judgment can be passed or not.

60. *Sunderam v. Valli Ammal*, (1935) 68 MLJ 16

7. Appeal

Any person who is aggrieved by any decree or order passed by the court may prefer an appeal to a superior court (or, in some instances, to a higher bench of the same court) if a provision for appeal is provided against that decree or order, or he may make an application for review or revision. As a general rule, every person has a right of First Appeal against any decree passed by any court. In certain cases, a subordinate court may make a reference to a High Court. The provisions relating to Appeals, Reference, Review, and Revision may be summarized thus:

I. Essentials of an Appeal

The expression, "appeal", has not been defined in the CPC, but it may be defined as *"the judicial examination of the decision by a higher court of the decision of an inferior court"*.[61] Every appeal has three basic elements:

- A decision (usually a decree of a court or the ruling of an administrative authority);
- A person aggrieved, who is often, though not necessarily, a party to the original proceeding; and
- An appellate body ready and willing to entertain an appeal.

A right of appeal is not a natural or inherent right. It is well settled that an appeal is a creature of the statute, and there is no right of appeal unless it is given clearly and in express terms by a statute. Again, the right of appeal is a substantive right and not merely a matter of procedure. It is a vested right and accrues to the litigant and exists as, on and from the date, the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment if it so provides, either expressly or by necessary implication, and not otherwise.

Thus, if, for instance, an appeal lies against an order passed by a single judge of the High Court under Sections 397 and 398 of the Companies Act, 1956, to the Division Bench, the said right cannot be taken away on the ground that the High Court has not framed the necessary rules for filing such an appeal. Substitution of a new forum of appeal should not be readily inferred. The right being a creature of the statute, conditions can always be imposed by the statute for the exercise of such right.[62]

The Commercial Courts Act in Section 13 now provides that appeals against decisions/ orders of the Commercial Courts/Commercial Division, enumerated under Order XLIII of the CPC as amended by the Commercial Courts Act, can only be brought before the Commercial Appellate Division of the concerned High Court within sixty (60) days from the date of decision. It also provides that the Commercial Appellate Division should endeavor **to dispose of appeals within six (6) months from** the date of filing of such an appeal.

II. Who May Appeal

Section 96 of the CPC recognizes the right of appeal from every decree passed by any court exercising original jurisdiction. It does not refer to, or enumerate, the persons who may file an appeal. But before an appeal can be filed under this Section, two conditions must be satisfied:

a. The subject-matter of the appeal must be a "decree", i.e. a preliminary or final conclusive determination of *"the rights of the parties with regard to all or any of the matters in controversy in the suit"*[63] ; and

61. *Lakshmiratan Engg. Works v. Asstt. Commr. of Sales Tax*, AIR 1968 SC 488

62. *A.R. Antulay v. R.S. Nayak*, (1988) 2 SCC 602

63. Section 2, Code of Civil Procedure, 1908

b. The party appealing must have been adversely affected by such determination.

Under the general principles of Section 92 of the CPC, the following persons are entitled to appeal:

- A party to the suit who is aggrieved or adversely affected by the decree or, if such party is dead, his legal representative;
- A person claiming under a party to the suit or a transferee of the interests of such a party, who, so far as such interest is concerned, is bound by the decree, provided his name is entered on the record of the suit;
- A guardian *ad litem* appointed by the court in a suit by or against a minor;
- Any other person, with the leave of the court, if he is adversely affected by the decree.

III. First Appeal and Second Appeal

A. First Appeal

A first appeal lies against a decree passed by a court in exercise of its original jurisdiction. A first appeal is maintainable on a question of fact, a question of law, or on a mixed question of fact and law. In *Dayawati v. Inderjit*[64], speaking for the Supreme Court, Hidayatullah, J. stated:

> *"An appeal has been said to be "the right of entering a superior court, and invoking its aid and interposition to redress the error of the court below." (Per Lord Westbury in Attorney General v. Sillem (63 I.A. 47.). The only difference between a suit and an appeal is this that an appeal "only reviews and corrects a proceeding in a cause already constituted but does not create a cause."*

B. Second Appeal

A second appeal lies against a decree passed by a first appellate court. As per Section 100 of the CPC, a second appeal can be filed before a High Court from every decree passed in appeal by a subordinate court, if the High Court is satisfied that *"the case involves a substantial question of law"*. Though the expression substantial question of law has not been defined in the CPC, in *Chunilal Mehta v. Century Spinning & Manufacturing Co. Ltd.*[65], the Supreme Court observed that:

> *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

C. Appeals from Orders

Sections 104 to 106 and Order XLIII deal with appeals from orders. These provisions provide for certain appealable orders. No appeal shall lie in case of any other orders not provided therein; however, such orders can be attacked in an appeal from the final decree. They also provide for the forum of an appeal. However, no particular time limit as such is prescribed for disposal of such appeals.

64. AIR 1966 SC 1423

65. AIR 1962 SC 1314

D. Review and Revision

Sections 114 and 115 and Order XLVII of the CPC deal with the review and revision of orders and decrees. A person may, subject to certain conditions, apply to the same court for review of an order or a decree. A person may, in certain cases, apply for revision of an order passed by a subordinate court where such order, if it had been decided in favor of the person seeking revision of the order, would have finally disposed of the suit or other proceedings.

The Commercial Courts Act now bars parties from applying for a revision of any interlocutory order of a Commercial Court or a Commercial Division of the High Court. Any such grievance against the order may only be raised in an appeal against the final decree of the Court. The Commercial Court Act has also taken away the ability of parties to appeal or apply for a revision of orders under Section 115 of the CPC, wherein a Commercial Court or a Commercial Division has found that it has jurisdiction to hear a Commercial Dispute under the Commercial Courts Act.

8. Introduction of Commercial Courts, Commercial Division and Commercial Appellate Division

An overburdened legal system in India aggravates the potential for inefficient case management and indefinite delays in disposal of cases. There has been a long standing requirement for a stable and efficient dispute resolution system ensuring quick enforcement of contracts, easy recovery of monetary claims, and award of just compensation for damages suffered - all of which are critical in encouraging investment and economic activity.

After more than a decade of extended deliberations and a fresh impetus by the government to improve India's legal system and its image as an investment-friendly destination, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Ordinance, 2015 (**"Commercial Courts Act"**) was promulgated on October 23, 2015. On December 31, 2015, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was enacted replacing the 2015 Ordinance. However, the Commercial Courts Act was deemed to have come into force on October 23, 2015.

The Commercial Courts Act provides for the constitution of Commercial Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and connected matters. It is in line with international trends, aided by the in-depth study of Commercial Courts of United Kingdom, United States of America, Singapore, France etc. as carried out by the Law Commission of India (**"Law Commission"**) in its 188th and 253rd reports.

While certain aspects of the Commercial Courts Act have been briefly discussed earlier, this chapter will focus on a more in-depth analysis of the same.

I. Commercial Disputes of Specified Value

Section 2(c) of the Commercial Courts Act provides a broad definition of *Commercial Disputes*. It covers every commercial transaction including general commercial contracts, shareholder & joint venture agreements, intellectual property rights, contracts relating to movable and immovable property and natural resources, amongst others.

Similarly, Section 2(i) of the Commercial Courts Act defines *Specified Value* as the value of the subject matter in respect of the suit which shall not be less than one crore (ten million) rupees or such higher value, as may be notified by the Central Government. The purpose of segregation of Commercial Disputes of the given Specified Value from other disputes is to ensure that the selected disputes are speedily and efficiently resolved by the special courts constituted under the Commercial Courts Act.

II. Constitution of Commercial Courts, Commercial Division and Commercial Appellate Division ("Special Courts")

Under the Commercial Courts Act, the State Government may by notification, after consultation with the concerned High Court, constitute Commercial Courts at District level as it may deem necessary for the purpose of exercising jurisdiction and powers conferred on those Courts under the Commercial Courts Act. Where the High Court is vested with original jurisdiction, no Commercial Court shall be constituted for the territory. Instead, the Chief Justice of such High Court may constitute

a Commercial Division within such High Court. The Commercial Division of the said High Court shall have jurisdiction to try all suits and applications relating to a *Commercial Dispute of a Specified Value*.

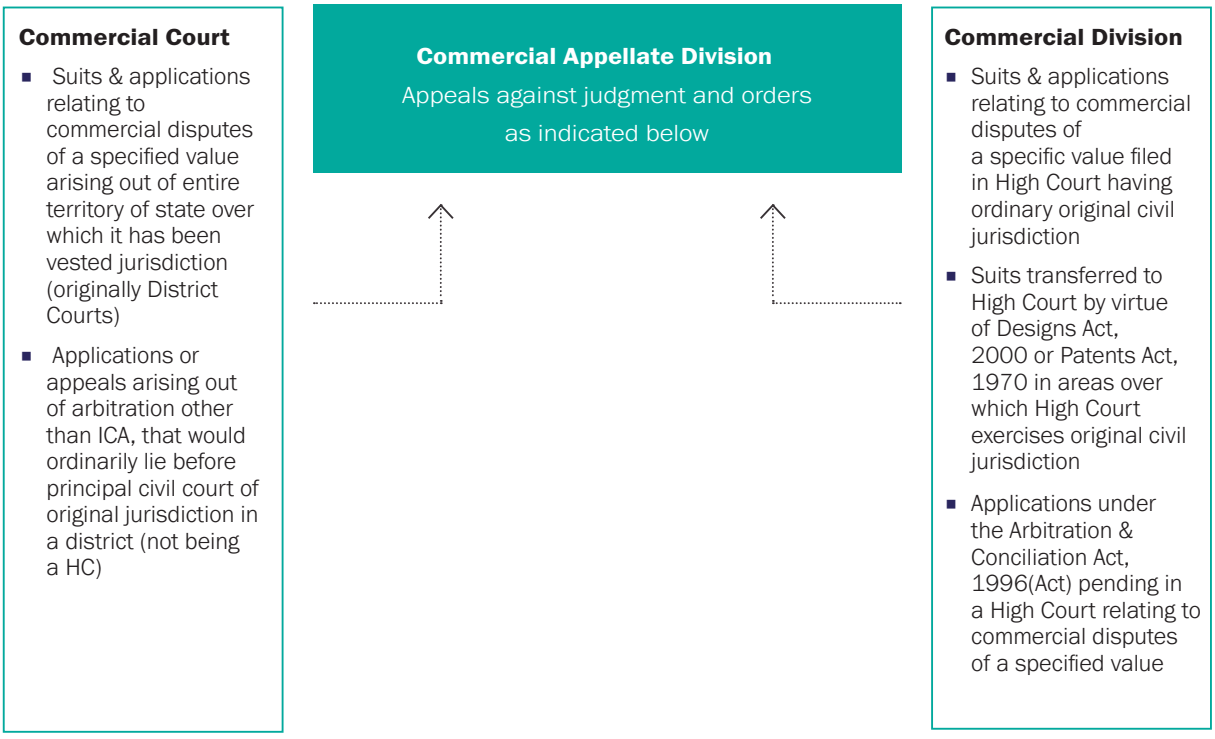
Once the Commercial Court/Division is established, the Chief Justice of the High Court of concern would be required to constitute the Commercial Appellate Division. Pursuant to the Commercial Courts Act, most states have Commercial Courts/Commercial Divisions and Commercial Appellate Divisions to resolve commercial disputes.

In order to ensure that commercial matters are dealt with by persons with the requisite skillsets, the Commercial Courts Act specifically requires the judges of such courts/divisions to be experienced in dealing with commercial disputes.

The diagram below provides a brief outline of the above discussion;

- An appeal would lie against only certain identified orders[66] of the Commercial Court/Division and that no other appeal under any law including the Letters Patent of a High Court could be preferred against the orders of Commercial Court/Division.
- No civil revision application/petition shall lie against any interlocutory order of a Commercial Court and any such grievance against the order may only be raised in appeal against the final decree.

Post enactment of the Commercial Courts Act, the issue of transfer of cases pending before the District Court and the High Court to the Commercial Division or the Commercial Appellate Division of the High Court invited some attention by the judiciary. Key provisions of focus have been Sections 7 and 10 of the Commercial Courts Act.



66. Appealable orders as identified under Order XLIII of the Code of Civil Procedure, 1908; Section 37, Arbitration & Conciliation Act,

In Guiness World Records v. Sababbi Mangal, the Court observed that as per Section 7 of the Commercial Courts Act where suits and applications relating to commercial disputes of a specified value were stipulated by a statute to be filed in a court not inferior to the District Court and had been filed with the High Court in pursuance of its original jurisdiction, the same would have to be heard and disposed by the Commercial Division. The court stated that Section 7 of the Ordinance could have the following interpretations: (a) as long as a Suit had been originally filed in the High Court, the Commercial Division of the High Court would continue to hear and dispose of the suit, irrespective of whether the value of the suit was of the specified value as mentioned in the Ordinance, 2015, or (b) the Commercial Division of the High Court would be able to continue hearing a suit only if the value of the suit was above the specified value as mentioned in the Ordinance, 2015.

The Court referred to Section 7 of the Act, where the words "or pending" were indeed supplied by the Legislature after "and filed". The Court observed that the Legislature had expanded the scope of the provisions such that cases filed and/or pending on the date of commencement of the Act would continue to be heard by the Commercial Division. The purpose of changing the wording of the first proviso to Section 7 would have been defeated, if pending matters were to be transferred depending on the value. Thus the Court observed that the intention behind enacting Section 7 of the Ordinance and the Act was to ensure that where specific statutes mandated certain suits to be instituted either in District Courts or High Courts, these matters were to be heard and disposed of by the Commercial Division of the High Court irrespective of whether the pecuniary value of the matter was above the specified value.

Section 10 of the Commercial Courts Act, 2015 has also been a subject of uncertainty and judicial interpretation, particularly with respect to cases adjudicated upon between the date of the Ordinance (October 23, 2015) and the date of receiving assent (December 31, 2015). Under the Commercial Courts Ordinance – before it received presidential assent - Section 10 (2) of the Ordinance mandated that all applications or appeals arising out of arbitration of commercial disputes of the specified value under the provisions of A&C Act, filed on the original side of the High Court, shall be heard and disposed of by the Commercial Appellate Division where such Commercial Appellate Division has been constituted in such High Court.

This created an inherent inconsistency in the reading of Section 10 (2) of the Commercial Courts Act, 2015 -inasmuch as it took away the statutory right of filing an appeal under Section 37 of the A&C Act.[67]

The Commercial Courts Act amended Section 10(2) of the Ordinance. It provided that all applications or appeals arising out of arbitration other than international commercial arbitration under the provisions of the A&C Act, 1996, filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court (instead of Commercial Appellate Division).[68]

A peculiar case that was adjudicated upon in the interim period between the Ordinance and the Commercial Courts Act was Simplex Infrastructures Limited v. Energo Engineering Projects Limited & Anr. On December 10, 2015, the Commercial Appellate Division of the High Court of Bombay adjudicated upon a petition under Section 9 of the A&C Act and held the same to be not maintainable. After coming into force of the Commercial Courts Act on December 31, 2015, the Petitioners sought review of the order dated December 10, 2015 and. The Court recalled the order and directed review of the same. It held that subsequent interpretation of law under the Commercial Courts Act, affecting the jurisdiction of this Court, would constitute a valid ground for review and that issue of jurisdiction can be raised at any stage of the proceedings. The Court restored the petition back to the file and directed

67. Roger Shashoua v. Mukesh Sharma, OMP (Comm) No. 1 of 2015

68. Ascot Estates Pvt. Ltd. v. Bon Vivant Life Style Limited, OMP (Comm) No. 16 of 2015

it to be listed before the roster bench. The amended Section 10(2) removes the inconsistency and brings in clarity on the jurisdiction of Commercial Division and Commercial Appellate Division of the High Courts.

Section 13 of the Commercial Courts Act provides that appeals against decisions of the Commercial Courts and/or Commercial Division can only be brought before the Commercial Appellate Division of the concerned High Court within sixty (60) days from the date of decision and that the Commercial Appellate Division should endeavor to dispose it within six (6) months.

As discussed earlier, a number of interlocutory/ interim orders of a court are currently subject to an appeal or revision petition leading to delay in adjudication of principal disputes. The Commercial Courts Act has reduced the ability of defaulting parties to use such appeal/ revision provisions as delaying tactics by providing that no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.

III. Fresh Procedure for Hearing Suits

A number of amendments have been made to the CPC in order to streamline the processes and completely alter the prevalent litigation culture. These amendments include strict timelines, costs to follow event, streamlined process of procedures, case management, and summary judgments. The abovementioned amendments will now be discussed in further detail.

A. Strict Timelines

Litigants often fail or deliberately refuse to file pleadings in matters during the time period prescribed and thereafter approach the Court to condone their delay, which is more often than not granted by the Courts to avoid miscarriage of justice. Hence, there had always been a long standing requirement for a stable and efficient dispute resolution system ensuring quick enforcement of contracts. In order to discourage such practices, it is now prescribed that if the defendant fails to file the written statement within one hundred and twenty days (120) from the date of having been served the summons, then he would abdicate his right to file a written statement and the Court would be bound to not take such a delayed submission on record. In *Oku Tech Private Limited v. Sangeet Agarwal*, the Court referred to the amendments to the CPC which were introduced to expedite litigation process in India. The Court held that the substituted provisos to Order V Rule 1, Order VIII Rule 1 and Order VIII Rule 10 place an outer limit of 120 days from the date of service of summons up to which the Court could allow a defendant to file their WS. A failure to file the WS within such a stipulated time would amount to instant forfeiture of the right to file a WS.

The Court also mentioned that the very object of the Act and the amendments brought about in the CPC was for strict adherence of the timelines for the various stages in a commercial suit. Therefore, it could not be construed that the time for filing a WS in a commercial suit in terms of the Act would get postponed till the disposal of an application under Order VII Rule 11 CPC. This implies that the provisions of the Act would be applicable to pending suits as well, as long as the date of institution of the suit is after the date of commencement of the Act, which is October 23, 2015.[69]

Other indicative timelines/measures have been prescribed to ensure speedy resolutions such as:

69. Gulf DTH FZ LLC v. Dish TV India Limited and Others

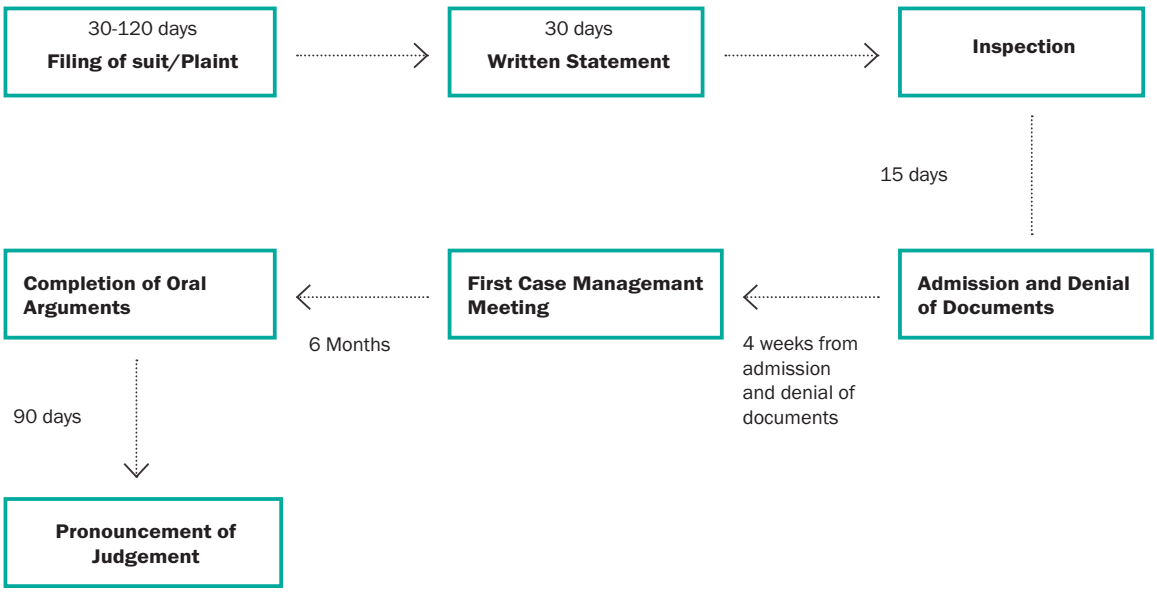
1. Closure of arguments not later than six (6) months from the date of first case management hearing;
2. Written arguments to be submitted before four (4) weeks of the oral hearing following revised written arguments, and within one (1) week if any post oral hearing;
3. Judgment to be pronounced within ninety (90) days of the conclusion of arguments;
4. Recording of evidence on a day to day basis;
5. Six (6) month period for disposal of appeals; and
6. Adjournments not permitted on account of appearing advocate not being present.

B. Cost to Follow Event

One of the biggest contributors to the endemic delays of the Indian legal system are the litigants themselves. More often than not, parties resort to dilatory tactics like false and vexatious counter claims, frivolous applications, and meritless appeals to delay and effectively deny due process of law. Litigants indulge in such behavior as courts would normally not impose the burden of costs on unsuccessful parties and lacked flexibility to impose costs of a quantum which may act as a deterrent. The Commercial Courts Act has sought to correct this, by incorporating a cost to follow the event regime.

Several important parameters have been introduced for the court to take into consideration while awarding costs. One of the key parameters is an *unreasonable refusal of a reasonable offer for settlement made by a party*. This clearly is aimed at promoting settlement of disputes and encouraging a reasonable approach by parties towards such discussions.

The Commercial Courts Act also provides an illustration by which it states that even an unsuccessful party can be awarded costs if it comes to light that the successful party had made frivolous and vexatious claims. Therefore, the intention of the legislature has been to ensure that litigants come to court with clean hands and that Courts have the requisite statutory power to impose costs on erring litigants. It is important to note that the legislature has also taken into account the fact that Courts had, in the past, imposed a *nominal cost* on litigants which were not commensurate with *actual costs*. However, the Commercial Courts Act has specifically mentioned that *"legal fees" and "fees and expenses of witnesses"* are to be taken into consideration while awarding costs to the successful party.



C. Streamlined Process

The Commercial Courts Act has provided new and detailed procedures regarding disclosure, discovery, inspection, admission, and denial of documents and nature of verification of pleadings, with a view to bring forth greater clarity, objectivity, and efficiency in the proceedings. Such procedures should end the delays occasioned due to prevalent practices such as bald denials without proper reasoning, introduction of fresh documents, and amendment of pleadings during the course of the proceedings which were not disclosed at the outset. Care must be taken to meet the prescribed timelines for disclosure filing, which a party may not be permitted to rely upon the same. Further, it may be particularly difficult to comply with the extensive filing requirements contemplated under the Commercial Courts Act.

D. Case Management

The Supreme Court in *Rameshwari Devi v Nirmala Devi*[70] had observed that, at the time of filing a suit, the trial court should finalize a timeline for all filings and pleadings and all parties should adhere to these timelines. The observations of the Supreme Court follow the best practices from different jurisdictions like United States and Australia where Case Management is an essential and integral part of the legal system.

The Commercial Courts Act has, in Section 7 of its Schedule inserted Order XV in the CPC, provided for the concept of Case Management whereby the Court would mandatorily have to hold a meeting between the parties where the Court will decide upon a timeline for the most important stages in a proceeding. Such stages include; recording of evidence, filing of written arguments, commencement, and conclusion of oral arguments. The court is further authorized to pass a wide variety of orders at such case management hearings to ensure smooth and effective disposal of suits.

The Court is further empowered to dismiss a petition, foreclose the right to make certain pleadings or submissions, or order payment of costs in the event of non-compliance of the orders passed in a Case Management Hearing.

E. Summary Judgment

On many occasions, certain disputes linger on in courts without any substance to them, as the entire process envisaged in the CPC has to be followed by the Court and all stages need to be completed before a judgment can be passed. Courts are duty bound to follow the principles of natural justice and afford to the defendants all kinds of statutory remedies available. The process envisaged in the Commercial Courts Act for a summary judgment is akin to the existing procedure of Summary Suits15 in the CPC. The principal difference being the ability of parties to request for summary judgments in all commercial disputes of specified value irrespective of the nature of relief sought and ability to request for such summary judgment at any stage prior to framing of issues.

On this basis, it has the discretion to pass a summary judgment. There are various considerations which are to be taken into account by the Court to decide as to whether a summary judgment can be passed. The provisions relating to summary judgments are exceptional in nature, and out of the ordinary course that a normal suit would follow. For this reason, the conditions mentioned in Order XIII A are to be followed scrupulously, lest it may result in gross injustice.[71]

The Commercial Courts Act has struck a balance in providing equal opportunity and protection for litigants. It has ensured that all facets of natural justice are met with, wherein both litigants are asked to provide their individual explanations including documentary evidence as to why a summary judgment should or should not be passed. The Commercial Courts Act has also empowered Courts to pass conditional

70. (2011) 8 SCC 249, at para 52

71. *Bright Enterprises Private Ltd. & Anr. v. MJ Bizcraft LLP & Anr*

orders, which are akin to interim measures. When a Court believes that a particular entity may succeed but is improbable for it to do so, it can pass a conditional order against that litigant including, but not limited to, deposit of a sum of money. Practically, putting a party to such terms will work to bring about an amicable resolution of many disputes.

IV. Arbitration versus Commercial Courts

A crucial question arises in context of whether parties should select Commercial Courts over arbitration.

The Arbitration Amendment Act, which shall be discussed in further detail in Chapter X, has brought about changes such as a twelve (12) month deadline for completion of arbitration, deeming interim orders passed by arbitral tribunals as orders of court and the ability to involve third parties in arbitrations seated in India, which have in fact taken India beyond the global standards.

Further, Section 10 of the Commercial Courts Act prescribes that applications and appeals arising out of arbitration are to be heard by the Commercial Court (in cases where the High Court is not the Court with original jurisdiction) or the Commercial Division (in cases where the High Court is vested with original civil jurisdiction). Thus, the intent is to look at the two regimes as complementing each other.

However, in scenarios where a party may not have preferred opting for arbitration, such as in cases of back to back transactions, but still opted to do so and was deterred by delays prevalent in the Indian courts, would now be bolstered to adopt a pure court process over arbitration.

9. Insolvency & Bankruptcy Code, 2016

With the emergence of India as a fast-growing economy, it had become imperative for the Indian government to provide a stable and favourable legal environment to potential investors. In light of this, over the last few years, the various arms of the government have been labouring towards setting up a well-functioning and efficient corporate insolvency framework. The Insolvency and Bankruptcy Code, 2016, (**"Bankruptcy Code/ Code"**), which came into effect on December 15, 2016, is a welcome overhaul of the erstwhile fragmented and time-consuming bankruptcy regime in India. The Bankruptcy Code is a comprehensive insolvency legislation as it consolidates the existing laws relating to insolvency of companies, limited liability entities (including limited liability partnerships), unlimited liability partnerships, and individuals into a single legislation. Some of its most noteworthy features are:

a. **Time-Bound Resolution:** The Code creates time-bound processes for insolvency resolution as per its provisions, every insolvency resolution process must conclude within 180 days of commencement with limited extension of 90 days in case of delay. This amendment marks the onset of a monumental change in the bankruptcy regime, and has renewed faith amongst investors, both nationally and internationally.

b. **Streamlined Processes:** The resolution processes are conducted by licensed Insolvency Resolution Professionals (**"IRPs"**); and the specialised National Company Law Tribunal adjudicates insolvency resolution for companies. The Code establishes a specialised Insolvency and Bankruptcy Board of India which is responsible for the regulation of various aspects of insolvency and bankruptcy, including issuing and formulating regulations, and regulation of insolvency professionals. Specific Information Utilities have been appointed to collect, collate and disseminate financial information related to debtors.

c. **Regulatory & Legislative Impetus:** The Central Government, central banking institute, and the central securities exchange regulator in India have added teeth to the Code by ensuring that its implementation is smooth and efficient. With their inputs, the Code is not merely an amendment to a statutory act- but the overhaul of an entire flawed framework.

In June, 2017, the Central Government promulgated an Ordinance to amend the Banking Regulation Act, 1949 and the Joint Lender Forum (**"JLF"**) norms. Although the Code had been implemented, the banks were still being very selective about the accounts they proceeded against under the Code. Noting this, the Reserve Bank of India (**"RBI"**) was given sweeping powers to resolve stressed assets by compelling banks to initiate proceedings against defaulters under the Bankruptcy Code. The Ordinance also lowered the percentage of affirmative votes needed to implement a Corrective Action Plan under the JLF norms, thereby avoiding delays caused due to lack of unified creditor consent.

Pursuant to the Ordinance, the RBI via its Press Note dated June 13, 2017, identified 12 accounts which amounted to approximately 25% of the total gross non-performing assets in the banking system. The creditor-banks for these 12 accounts were compelled to initiate proceedings against them in the National Company Law Tribunal. Other Accounts with outstanding debts of more than INR 5000 Crore were ordered to execute their resolution plans within 6 months.

In just days after the Ordinance, on June 21, 2017, the Securities Exchange Board of India issued a press release providing exemptions to certain investors helping

solve the crisis. As per the amendment, if an investor was to acquire shares of a distressed listed company, this would be exempt from the open offer requirements under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Such a transaction would also be exempt from the preferential issue requirements under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009. This press note clarified that a mandatory open offer need not be made every time a lender proposes to divest the shares of a distressed listed company, which, much to their dismay, used to be the case.

On August 16, 2017, the Bankruptcy Code was amended to include a third class of creditors besides the Financial and Operational creditors that are already provided for in the Code. This amendment comes in light of a judgment of the National Company Law Appellate Tribunal that opined that the dues owed to a person may not fall under the category of either Financial or Operational creditors. In such cases, individuals should not be left without a remedy under the Code.

d. Judicial Interpretation: Historically, one of the biggest roadblocks for efficient resolution of disputes in India has been the adversarial attitude of litigants; the usage of dilatory tactics had become more the norm than exception. It was important that the well-intended provisions of the Code were interpreted and implemented constructively. In less than a year of its operation, the Code has already brought about a sea change in the market player's previously callous attitudes. While the administrative bodies in India have enacted bold measures to check stressed assets, courts have ensured that dilatory practices of debtors are curbed. For instance,

In February, 2017, the Bombay High Court held that RBI Circulars have statutory force and need to be mandatorily followed by Banking Companies. Accordingly, before any winding up proceedings can be initiated, a Banking Company would have to comply with the JLF guidelines. These guidelines, which now have statutory force, provide mechanisms to revive stressed assets to avoid creation of Non-Performing Assets. They inter alia, require all banks to monitor the asset quality closely; and provide dissenting lenders a chance to sell their exposure in case they wish to opt out of the restructuring.

In June, 2017, the National Company Appellate Tribunal defined the scope of a "dispute" under the Code to include "any other actions, proceedings, conciliation, mediation pending before any Court or Tribunals under any existing act or law in relation to an operational debt", besides existing suits and arbitrations. This judgment brought an end to the confusion created by conflicting judgments of State Tribunals and reaffirming the strong stance the judiciary has taken against the overly-litigious community.

In July, 2017, the Gujrat High Court passed an order compelling Essar Steel (one of the 12 identified accounts in the June 13 Press Note) to appear before the National Company Law Tribunal for insolvency proceedings. This was ordered despite the fact that Essar Steel is a large company and was actively considering restructuring. Further, in several judgments, the Tribunal itself ordered that the Moratorium under the Code could not be abused by debtors seeking to dodge payment under personal guarantee agreements. Again, an order of the judiciary gave effect to both regulatory mechanisms and legislative intent.

The Supreme Court in the July, 2017 case of Lokhandwala Kataria Constructions confirmed that the National Company Law Tribunal does not have any inherent power under the Code to allow a creditor to withdraw an application after it has been admitted. Although the court used its special discretionary power under Article 142 of the Constitution of India to allow the withdrawal in this specific case, this was done in light of the mutually acceptable settlement reached by the parties. It is pertinent to note that rulings under Article 142 are considered specific to the facts of the given case and are not binding as precedents. Thus, the rule remains that once admitted, an application cannot be withdrawn without permission under the provisions of the Bankruptcy Code.

In August, 2017, the National Company Law Appellate Tribunal held that the Limitation Act, 1963, is not applicable to the Bankruptcy Code. In effect, debts which were otherwise not recoverable due to being time barred, can now be basis for initiating insolvency proceedings. This has provided the opportunity for recovery of debt to scores of creditors who were otherwise left without a remedy in law. Since then the Supreme Court has provided a stay on the effect of this ruling and is currently considering this point of law.

In another important ruling in August, 2017, the NCLT held that an ongoing debt reconstruction scheme outside the scope of the Code would not hinder the CIRPs under the Code. Any such resolution plan can be brought within the ambit of the Code itself. The NCLT also clarified that the principles of natural justice have to be complied with while the NCLT considers a CIRP application.

In September, 2017, the Supreme Court interpreted the provisions of the Code for the first time. The Court held – *first*, that *"erstwhile"* directors of a debtor cannot represent it in case of an appeal under the Code; and *second*, that moratorium under the Code would override the moratorium imposed under any State legislation. The Apex Court took this opportunity to comment on the purpose and object of the code, and interpreted the provisions widely to hold that the Code would override any repugnant state legislation. Further, it was held that once an IRP has been appointed, the directors cannot represent the debtor in an appeal.

In September 2017, the Allahabad High Court was faced with a question regarding the scope of the moratorium under the Code and its applicability to the proceedings against the personal property of the guarantors of a Corporate Debtor. It was held that in light of the widely worded moratorium provisions of the Code, creditors could not be allowed to split proceedings against the debtor and the guarantor in different forums during the pendency of the CIRP.

In the wake of controversies surrounding the status of home buyers in the insolvency proceedings initiated against Jaypee Infratech Limited, the Supreme Court passed an interim order to protect the interest of home buyers. This order directed Jaiprakash Associates Limited to deposit INR 2,000 Crores with the Court in relation to the insolvency proceedings pending against its subsidiary, Jaypee Infratech Limited. The Court *inter-alia*, directed that the directors and managing director (both at the time of institution of insolvency proceedings as well as presently holding office) of JAL and JIL were not to leave the country without prior approval of the Court. The Court also directed certain lawyers of home buyers to participate in the meetings of committee of creditors to espouse their cause and protect their interest.

The NCLAT in its judgment dated August 29, 2017 held that an Arbitral Award concludes the disputes between parties and is a valid record of default under the Code, and that therefore pendency of a proceeding for execution of an Arbitral Award or a judgment and decree does not bar an operational creditor from preferring any petition under the Code. It also observed that an insolvency resolution process is not a money suit for recovery nor a suit for execution of any decree or award and is distinct from Section 36 of the Arbitration and Conciliation Act, 1996 which relates to the enforcement of an Arbitral Award.

The Supreme Court in a judgment in September finally settled the issue regarding the interpretation of '*dispute in existence*' under the Code. The term "*dispute*" must be interpreted in a wide an inclusive manner to mean any proceeding which had been initiated by the debtor before any competent court of law or authority. The Court acknowledged the fact that situations may exist where a debtor company may have a dispute qua an operational creditor, which it may have chosen not to escalate to a court/arbitral tribunal. This provided much-needed relief and clarity to operational debtors who may have a genuine dispute regarding the debt, but may not have yet initiated legal proceedings. The Court also stated that the NCLT would have to check the *prima facie* existence of the dispute and not go into the merits of the same.

The Supreme Court in December 2017, interpreted the provisions of the Code in the contrastive and harmonious manner to state that operational creditors need not mandatorily procure a certificate from a Financial Institution registered in India to be able to initiate the insolvency resolution process under the Code. Further, the Code also allowed advocates to act on behalf of creditors to initiate the process and issue notices under the Code.

The legislature, RBI, SEBI, and the judiciary have presented a unified front, unprecedented in India so far. Any apparent loopholes are being plugged at the earliest and the law is evolving rapidly. It comes as no surprise, then, that as in June 2017, India had already secured its position in the top 30 developing countries for retail investment worldwide and that insolvency resolution in India has become a more streamlined, consolidated and expeditious affair.

What needs to be seen is whether these measures can successfully be used to reduce the burden of stressed assets on the banking system and whether India can come on par with other developed nations in respect of insolvency resolution.

10. Alternative Dispute Resolution

I. Arbitration

Due to the huge pendency of cases in courts in India, there was a dire need for effective means of alternative dispute resolution. India's first arbitration enactment was the Arbitration Act, 1940. Other complementary legislations were formed in the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards Act, 1961. Arbitration under these laws was never effective and led to further litigation as a result of rampant challenges of awards. The legislature enacted the Arbitration & Conciliation Act, 1996 (**"Act"**) to make arbitration, domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and facilitates International Commercial Arbitration as well as domestic arbitration and conciliation. Under said Act, an arbitral award can be challenged only on limited grounds and in the manner prescribed. India is also party to the New York Convention on The Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**"NYC"**).

The following are the different kinds of Arbitrations found in India:

a. Ad-hoc Arbitration – One in which there is no institution to administer the arbitration.

b. Institutional Arbitration – Usually administered by an arbitral institution.

c. Statutory Arbitration – Imposed on the parties by operation of law.

d. Foreign Arbitration – Proceedings are conducted in a place outside India.

The increasing pro-arbitration approach adopted by the Courts in the recent past, coupled with India's desire to become an international arbitration hub, led to the enactment of the Arbitration Amendment Act. The Arbitration Amendment Act is deemed to have come into force on the date on which the Arbitration & Conciliation (Amendment) Ordinance, 2015 (**"Ordinance"**) came to be promulgated i.e. October 23, 2015.

The Arbitration Amendment Act was enacted with the objective of taking drastic and reform-oriented steps to bring Indian arbitration law at par with global standards and provide an effective mechanism for resolving disputes with minimum court interference.

II. Arbitration in India

Arbitration proceedings in India are governed by the Arbitration & Conciliation Act, 1996 (**"A&C Act"**). The A&C Act covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and where both parties are Indian nationals, respectively.

Part I of the 1996 Act titled 'Arbitration' is general in nature and contains ten chapters. Part II deals with 'Enforcement of Certain Foreign Awards'. Chapter I of Part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. Part III of the 1996 Act deals with Conciliation which does not have any bearing on the present Report. Part IV of the 1996 Act deals with supplementary provisions.

The 1996 Act also contains three Schedules. The First Schedule refers to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (also covered under Section 44 of the 1996 Act). The Second Schedule refers to Protocol on Arbitration Clauses (also covered under Section 53 of the 1996 Act). The Third Schedule refers to the Convention on the Execution of Foreign Arbitration Awards.

Pursuant to the enactment of the Arbitration Amendment Act on October 23, 2015, the arbitration landscape in India has changed significantly. The A&C Act now contains several amended provisions, additional provisions and a total of seven Schedules.

The road to the Arbitration Amendment Act was set by 'The Law Commission of India's Report No. 246' (**"Law Commission Report"**), which proposed several amendments to the principal Act of 1996. A similar attempt was made in 2010, wherein the Ministry of Law and Justice had released a consultation paper suggesting certain amendments to the principal Act. Overall, most of the amendments brought in the Act are a reflection of the Law Commission Report.

With several recent landmark judgments of the Supreme Court, the arbitration regime in India has witnessed a paradigm change with greater degree of sanctity being afforded to arbitral decisions and arbitration as a mechanism for resolution of disputes. Even prior to the coming into force of the Arbitration Amendment Act, Courts were taking an increasingly pro-arbitration approach. The Arbitration Amendment Act takes into account several of the findings in such pro-arbitration landmark judgments to provide clarifications and explanations in an attempt to crease out the ambiguities and inefficiencies prevalent in the Act as it stood prior to the amendment.

This chapter discusses certain key aspects of the A&C Act as it stands today.

Section 2(1)(f) of the Act defines an 'international commercial arbitration' to mean an arbitration arising from a legal relationship which must be considered commercial where either of the parties is a foreign national or resident or is a foreign body corporate, is a company, association, or body of individuals whose central management or control is in foreign hands. The question as to the meaning of the term 'commercial' was answered by the Supreme Court where it prescribed that the word 'commercial' should be construed broadly having regard to the manifold activities which are an integral part of international trade today. [72]

Section 5 of the Act provides that, notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I (Sections 2 to 43), no judicial authority shall intervene except where so provided in the said part. This clearly indicates the legislative intent to minimize supervisory role of courts to ensure that the intervention of the court is minimal. Section 4 is a deeming provision, which lays down that when a party proceeds with the arbitration without stating his objection to either a non-compliance of any derogable provision of Part I, or any requirement under arbitration agreement, then such a party shall be deemed to have waived its right to object to the above.

Section 7 of the Act provides that the arbitration agreement shall be in writing and such an agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (4) of Section 7 provides the conditions under which a document or exchange of letter or exchange of statement of claim and defense may amount to an arbitration agreement. As per recent judgments an arbitration clause in an agreement is construed as an arbitration agreement and even if the contract in which the clause is incorporated is terminated, the arbitration clause/agreement shall still be valid.

Sections 8 and 45 of the Act provide that the judicial authority shall refer the parties to arbitration where a party applies to court in relation to disputes that are subject of an arbitration agreement. The amended Section 8 narrows the scope of the judicial authority's power to examine existence of a valid arbitration agreement for the purpose of reference of disputes to arbitration.

72. *R.M. Investments & Trading Co. Pvt. Ltd v. Boeing Co.*, AIR 1994 SC 1136

III. Applicability of the Amendment Act

Applicability of the Amendment Act under Section 26[73] remains the most significant and controversial provision. It provides 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".*

The Amendment Act necessarily applies to arbitral proceedings instituted after the amendment. However, the issue arises with respect to court proceedings – whether initiated before the amendment or after the amendment. Courts have given contrasting views. The issue is pending before the Supreme Court, as on date of publication of this paper.

In New Tirupur Area Development Corporation Ltd. (**"NTADCL"**) v. M/s Hindustan Construction Co. Ltd. (**"HCC"**),[74] the Madras High Court detected a distinction between the language of S. 85(2) in the Arbitration & Conciliation Act, 1940 and the amended Section 26, suggesting 'intended' deletion of the words 'in relation to' arbitration proceedings in the opening lines of Section 26 of the Amendment Act. It held that the Amendment Act would apply to court proceedings initiated after amendment, irrespective of emanating from an award made prior to amendment. A similar reasoning was adopted by the court in Raffles Design International India Pvt Ltd. v. Educomp Professional Education Ltd.[75]

In a diametrically opposite ruling in Ardee Infrastructure Pvt. Ltd. vs. Anuradha Bhatia,[76] the Delhi High Court held that the term 'to arbitral proceedings' should be given the same expansive meaning as 'in relation to arbitral proceedings'. This implies that the old Act would apply to arbitral proceedings commenced prior to amendment, including court proceedings emanating from such arbitral proceedings, whether initiated before or after amendment. The Court categorized cases into three buckets. The first bucket envisaged an award made and court proceedings initiated, after amendment. The second dealt with award passed prior to amendment and court proceedings initiated after amendment. The third bucket considered an award passed and proceedings initiated prior to amendment, but pending at the time of amendment. The Court held that if the term 'arbitral proceedings' is construed to exclude court proceedings, "then the first part of Section 26 would only deal with the first category. There would be nothing in Section 26 which pertained to the second and third categories of cases." In *Tufan Chatterjee vs. Sri Rangan Dhar,*[77] a division bench of the Calcutta High Court held that the amendments would apply to court proceedings pending under Section 9 on the date of the amendment. Needless to say that the Amendment Act would necessarily apply to court proceedings instituted after the amendment.

IV. Interim Relief in aid of Arbitration

A. Before Courts

Section 9 of the Act, based on Article 9 of the UNCITRAL Model Law, lays down certain cases wherein parties may approach the appropriate court for interim measures. It has been held that this power of the court may be exercised even before an arbitrator has been appointed,[78]

73. **Section 26: Act not to apply to pending arbitral proceedings:** - 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 or on after the date of commencement of this Act.
74. Application No. 7674/2015 in O.P. 931/ 2015
75.
76. 2017 SCC Online Del 6402
77. 2016 SCC Online Cal 483
78. Sundaram Finance v. NEPC India Ltd., AIR 1999 SC 565

overruling the earlier position that the power may only be exercised if a request for arbitration has been made.

Further, in a number of judgments,[79] the Supreme Court has held that the principles applicable to grant of interim reliefs under Order XXXVIII and Order XXXIX of the CPC, i.e. balance of convenience, prima facie cases, irreparable injury, and the concept of just and convenient shall also govern the grant of interim measures of protection under section 9 of the Act.

Where interim relief is being sought before commencement of arbitration, the amended Section 9 requires a party to commence arbitration within 90 days from the date of such order or within such further time as the Court may determine.

Where arbitral proceedings have commenced, the amended version of Section 9 requires parties to first attempt to receive an interim order under Section 17 by the arbitral tribunal before applying to the court to grant an interim order. Interim protection shall no longer be entertained by the Court unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious. This is clearly a welcome development as it encourages matters being referred to the arbitral tribunal in an expedited manner and thus reducing judicial interference.

B. Before Arbitral Tribunal

Prior to the Arbitration Amendment Act, the powers of an arbitral tribunal to award interim orders under Section 17 of the Act were narrower in scope when compared to the powers of the Courts to grant interim protection under Section 9. However, the Arbitration Amendment Act has now enlarged the scope of an arbitral tribunal to grant interim measures of protection in respect of:

i. Preservation, interim custody or sale of any goods which are the subject matter of the arbitration;

ii. Securing the amount in dispute in the arbitration;

iii. The detention, preservation, or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorizing any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purposes of obtaining full information or evidence; and

iv. Interim injunction or appointment of a receiver.

Therefore, it can be concluded that section 17 has been suitably amended to provide the arbitration tribunal the same powers as a *'civil court'* in relation to the granting of interim measures. This is a welcome step and will work to enable parties to obtain satisfactory and efficacious relief from an arbitral tribunal.

The powers under Sections 9 and 17 of the principal Act are rather identical. The distinction lay in respect of whom said powers are vested in. Notably, the arbitral tribunal would have powers to grant interim relief post award but prior to its execution under Section 17.

V. Flexibility for parties to approach Indian courts for interim reliefs in aid of foreign-seated arbitrations

Some welcome changes have been made for international arbitrations. Section 2(2) of the Amendment Act makes Sections 9, 27 and 37 (1) and (3) applicable to foreign seated arbitrations, unless an agreement exists to the contrary.

79. M/s Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation, (2007) 6 SCC 798; Adhunik Steels Ltd. v Orissa Manganese and Mineral Pvt. Ltd., (2007) 7 SCC 125

The amendment addresses the concern arising out of issues raised by the Supreme Court of India (**"Supreme Court"**) rulings in *Bhatia International*[80] and *Bharat Aluminum*.[81]

In *Bhatia International*, the Supreme Court held that interim reliefs would be available unless Part I of the Act is expressly or impliedly excluded in the agreement. However, *Bharat Aluminum* clarified that if arbitration is seated outside India, interim reliefs cannot be sought from Indian courts. This created an issue since parties with arbitration seated outside India, would not have access to avail interim reliefs from an Indian court.

International jurisdictions such as Singapore (Section 12A of the International Arbitration Act) and U.K. (Section 2 of the Arbitration Act, 1996) provided for the flexibility to approach courts even if the arbitration was not located within their jurisdiction. The present amendment brings the Act at par with the other international enactments.

In an interesting decision in *Raffles Design International India Pvt Ltd. vs. Educomp Professional Education Ltd.*,[82] the Delhi High Court held that Section 9 was available to parties in a foreign seated arbitration, even if the arbitration commenced prior to the Amendment Act. This stands as a stark example of purposive interpretation adopted by the Court.

This amendment would empower parties with foreign-seated arbitrations to approach Indian courts in aid of foreign-seated arbitration. The intention appears to be to facilitate interim protection to parties from an Indian court as interim protections awarded by the foreign-seated arbitral tribunals is not directly enforceable in India. Parties might consider renegotiating their arbitration clauses depending on the facts involved and necessity to approach the Indian courts for interim protection.

VI. Jurisdiction in so far as International Commercial Arbitrations are concerned, whether seated in India or abroad, to lie before the High Court

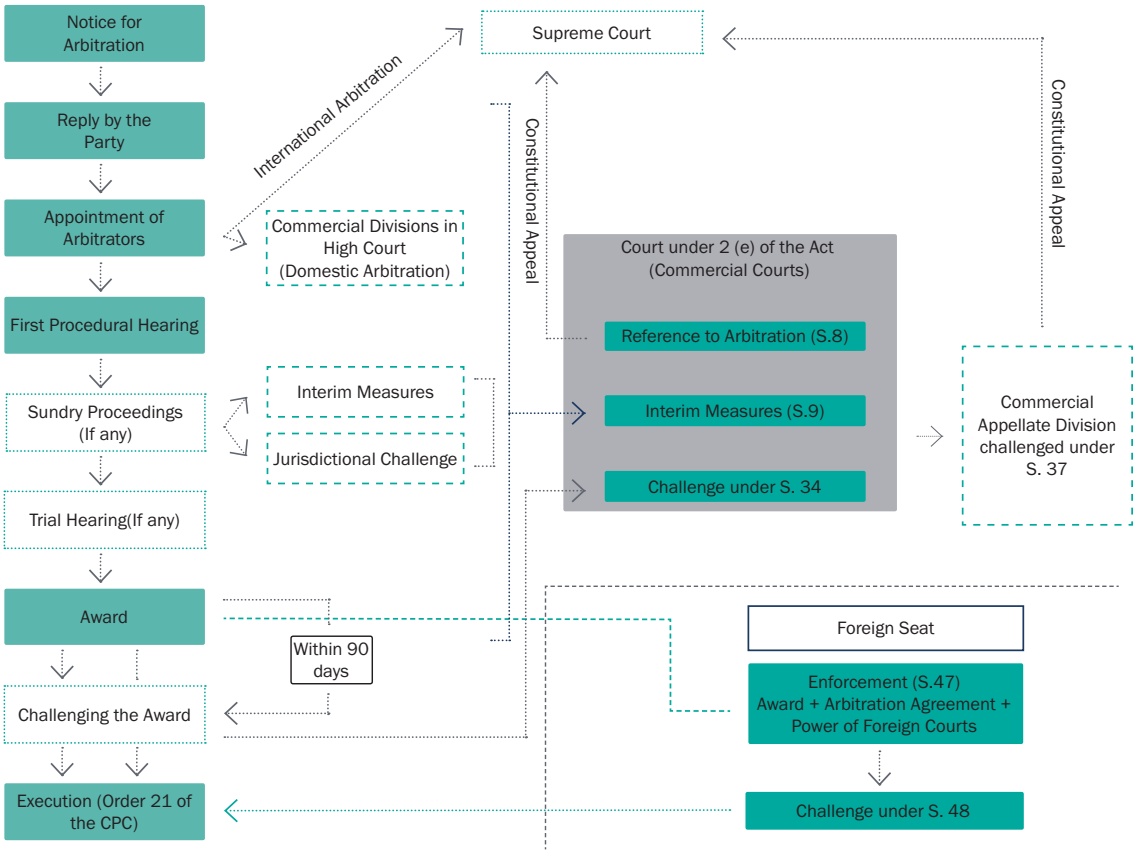
As previously mentioned, one of the main objectives of the Principal Act was to ensure that parties receive a speedy and cost-effective dispute resolution. In order to ensure that this objective continues in the right direction, the Arbitration Amendment Act now allows for international commercial arbitrations to be brought before the High Court.

It was found that the definition of "Court" under Section 2 of the Act should be elaborated upon to expand the jurisdiction of courts in relation to international commercial arbitrations. The definition of "court" has now been amended and substituted to include two different sub-sections in relation to domestic and international commercial arbitrations, whereby jurisdiction is to be exercised only by the High Court in matters arising out of international commercial arbitrations seated in India and abroad. This will work to impart a sense of confidence in parties to an international commercial arbitration. Thus, allowing international commercial arbitrations seated in India to approach High Courts directly, and thereby having access to qualified and experienced judges with commercial understanding of complex cross border disputes in the first instance itself, thereby reducing delays in litigation.

80. Bhatia International v Bulk Trading SA (2002) 4 SCC 105

81. Bharat Aluminium Co v. Kaiser Aluminium Technical Services (2012) 9 SCC 559

82. O.M.P.(I) (COMM.) 23/2015 & CCP (O) 59/2016, IA Nos. 25949/2015 & 2179/2016



Jurisdiction of Courts in Indian Seated Arbitrations

VII. Appointment of Arbitral Tribunal

Section 11 of the Act, based on Article 11 of the UNCITRAL Model Law, provides for the appointment of arbitrators, granting the parties the power to appoint arbitrators or to agree on procedures for such appointment. In the event that an arbitrator cannot be appointed, sub-section (6) empowers a Chief Justice or any person or institution designated by him to make such an appointment on the happening of certain conditions enumerated in clauses (a), (b) or (c). Interestingly, in the case of international commercial arbitrations, the Chief Justice of India must be approached. Whereas, in other cases, it is the Chief Justice of the High Court under whom the principal civil court having jurisdiction over the subject matter of the dispute lies which would be approached by the parties.

In *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*,[83] it was argued that as the petitioner company was incorporated in India but had its central management and control in Malaysia, application for appointment of an arbitrator would lie before the Hon'ble Chief Justice of India, as this would be a case of international commercial arbitration under section 2(f)(iii) of the Act. The court held that as the company was incorporated in India, there was no question of the arbitration being an international commercial arbitration as defined under the Act and proceeded to dismiss the application with costs.

Judicial interpretations differed on whether the power accorded to the Chief Justice or his designate constituted judicial or administrative power. This was finally settled in SBP & Co. vs. Patel Engineering Ltd.[84] In *National Insurance*

83. (2008) 14 SCC 271

84. AIR 2006 SC 450

Co. Ltd. v. Boghara Polyfab (P) Ltd. the Supreme Court relied on *SBP & Co. v. Patel Engineering Ltd.*

Following SBP & Co. vs. Patel Engineering, the Supreme Court offered an all-encompassing role to the Courts while examining an application under Section 11, in National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.[85] Courts could examine whether the petitioner had approached the appropriate High Court or whether the claim is a dead (long barred) claim or a live claim, amongst other issues.

The Amendment Act seeks to shorten the judicial cord and handle appointments in an administrative manner. Under the Amendment Act, the scope of examination by Courts under section 11 has been interpreted to be confined to existence of a valid arbitration agreement.[86] Issues relating to jurisdiction or arbitrabililty of the dispute would be left for the arbitrator.

Further, the time-frame for appointment of arbitrators has been long in India – running usually between twelve (12) to eighteen (18) months. The amendment seeks to address this delay by stating that Courts must endeavor to dispose applications filed under Section 11 of the A&C Act within 60 days from date of notice to the respondent and clarifying that the procedure of appointment would be an exercise of administrative power by the courts.

VIII. Extensive guidelines incorporated relating to the independence, impartiality, fees and ineligibility of Arbitrators

The Arbitration Amendment Act has now amended particular sections within the principal Act that relates to the model fees, independence, impartiality and ineligibility of arbitrators when appointed.

A new section has been inserted pertaining to the model fee schedule for the arbitrators as provided in the Fourth Schedule to the Principal Arbitration Act. The Court is now empowered to frame rules as necessary for the purpose of determination of the fees of the tribunal in domestic ad-hoc arbitration only, i.e. it will not have this power in case of international commercial arbitration or in case of institutional arbitration.

Before appointing an arbitrator, the Supreme Court or the High Court, as the case may be, shall seek a disclosure in writing from the prospective arbitrator as to whether any circumstances exist which are likely to give rise to justifiable doubts as to his independence and impartiality. This disclosure requirement, as detailed in the new Fifth Schedule, is an internationally accepted practice and is a step ahead in ensuring independence and impartiality of arbitrators.

The Arbitration Amendment Act has added detailed guidelines under the Fifth and Seventh Schedule to the principal Act. Before taking on an appointment, the arbitrator must disclose his interests in writing with respect to circumstances such as:

i. The existence, direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

ii. Which are likely to affect the arbitrators' ability to devote sufficient time to the arbitration and in particular his ability to finish the entire arbitration within twelve (12) months (see discussion below).

Schedules V and VII introduced rigorous provisions for disclosure and appointment of independent and impartial arbitrators.

The circumstances under which an arbitrator can be rendered ineligible are now listed under a newly added Seventh Schedule. The most significant overhaul was proposed to be made

85. (2009) 1 SCC 267

86. Picasso Digital Media Pvt. Ltd. vs. Pick-A-Cent Consultancy Service Pvt. Ltd.,

with respect to appointment of employees as arbitrators. High Courts have differed, again. In *Assignia-Vil JV v Rail Vikas Nigam Ltd.*,[87] the Delhi High Court held that existing employees of public sector undertakings could not be appointed as arbitrators, irrespective of a contract to the contrary. High Court of Delhi[88] and Madras[89] followed suit. In Dream Valley *Farms Pvt. Ltd. & Anr.vs. Religare Finvest Ltd. & Ors., the* Punjab & Haryana High Court held that disclosure is mandatory and not left to the discretion of the arbitrator for circumstances under Fifth Schedule. In SDB- SPS (JV) vs. Bihar Rajya Pul Nirmaan Nigam,[90] the Patna High Court was the first to hold that provisions of Amendment Act prevailed over the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 wherein employees could be appointed as arbitrators.

However, on appointment of former employees as arbitrators, the Punjab & Haryana High Court held in Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.[91] that a conflict of interest arose only if the arbitrator is *currently* an employee. The only past relationships covered are 'any other business relationships'. The Court found that a reading of item 1 of the above-mentioned Schedules reflects a clear division between "a person who is, at the time of employment, an employee, consultant or advisor..." and "or has any other past or present business relationship with a party". The use of "any other" referred to a relationship other than that of a serving employee, consultant or advisor. The Court therefore found that the ex-Chief Secretary cannot be brought within the ambit of Item 1 since he/she is not a serving an employee, consultant, and advisor (owing to retirement) and has no business relationship (since there could not be a presumed business relationship between the ex-Chief Secretary and the Respondent).

This distinction between existing and former employees, coupled with disclosure nuances, provides a ripe ground for parties to stall arbitrations by way of challenge proceedings, both under Section 13 and Section 34.

IX. Principle of Kompetenz-Kompetenz

Section 16 of the Act, again based on Article 16 of the Model Law, is very important in its effect as it incorporates the doctrines of *Kompetenz-Kompetenz* (Competence-Competence) and Severability. In essence, the doctrine of *Kompetenz-Kompetenz* allows the arbitral tribunal to rule on matters regarding its own competence. The doctrine of Severability entails that the arbitral clause would not be vitiated if the contract itself is invalid or defective.

X. A Twelve-Month timeline for completion of Arbitration seated in India

One of the main issues plaguing the principal Act was the time taken from the commencement of arbitral proceedings till the date of passing of the award. As previously mentioned, it would take at least twelve (12) to eighteen (18) months simply to appoint an arbitrator, and thus the initial objective to resolve a dispute in a timely manner would be negated. In order to enhance the speed of arbitrations, the Arbitration Amendment Act has inserted a new provision, now known as Section 29A, which provides a time limit for completion of arbitral proceedings. As per the Arbitration Amendment Act, an award shall now have to be made within a period of twelve (12) months from the date the arbitral tribunal enters upon the reference and such period may be extended by a maximum period of six (6) months by the parties.

87. Arbitration Petition 677/2015

88. Hindustan Construction Co. Ltd. vs. IRCON International Ltd. [Arbitration Petition 596/2016]

89. Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited & Ors. [O.P. No. 466/2016]

90. Request Case No. 14 of 2016

91. Arbitration Case 166/2016

XI. Incorporation of expedited/fast track Arbitration Procedures

For the purpose of efficacious dispute resolution, the Arbitration Amendment Act has introduced a new provision to the principal Act outlining the fast track procedure. It states that parties can, before constitution of the arbitral tribunal, agree in writing to conduct arbitration under a fast track procedure.

Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have an 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. Here, the award under this procedure must be made within six (6) months from the date the arbitral tribunal enters reference.

The amendments are akin to an expedited arbitration under various institutional rules. However, the major difference here is that under the Arbitration Amendment Act, adoption of such an expedited procedure is solely based on consent of the parties as opposed to the rules, wherein the designated authority may determine, upon application by a single party, whether expedited procedures should be followed or not. This provides for independence of the parties while simultaneously attempting to encourage expeditious dispute resolutions.

XII. Detailed provisions in relation to awards and determination of costs by tribunals seated in India – Introduction of costs follow regime

The Arbitration Amendment Act provides more detailed provisions that explicitly define the 'ingredients' of an arbitral award as well as the awarding of costs by tribunals seated in India. For instance, the Arbitration Amendment Act under Section 31 departs from the original 18% p.a. that was detailed in the principal Act by amending the rate to be 2% p.a. more than the current rate of interest, from the date of the award to the date of payment.

The Arbitration Amendment Act has introduced a new provision, now known as Section 31A, that provides comprehensive provisions for cost regime to both arbitrators as well as courts. It is interesting to note that any agreement between the parties on the issue of costs of the arbitration will be valid only if such agreement is made after the dispute has arisen. The Arbitration Amendment Act introduces a brand new comprehensive regime for costs which will be applicable to arbitrations as well as proceedings related to arbitrations before the court. This should minimize frivolous and meritless litigation and arbitration.

XIII. Limitation of grounds on which awards arising out of International Commercial Arbitrations seated in India may be challenged

The principal Act provided certain conditions under which foreign awards can be enforced. The Arbitration Amendment Act provides further clarifications and explanation in order to narrow the scope of challenge of an award arising out of international commercial arbitrations seated in India. For instance, the Arbitration Amendment Act provides an explanation in order to clarify that an award would be 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 contravention with the most basic notions of morality or justice.

It is no longer possible for the Court to review the merits of the dispute in deciding whether the award is in contravention with the fundamental policies of Indian law. The tightening of the provisions seeking to challenge the enforcement of arbitral awards is yet another welcome move and should work towards imparting confidence in arbitration as an effective and speedy dispute resolution mechanism for foreign parties. Pursuant to the ruling on ONGC vs. Saw Pipes,[92] domestic awards can be set aside if vitiated by patent illegality. While this ground has been built into the amended Section 34 for domestic arbitrations, it has been specifically provided that patent illegality would not be available as a ground for challenging awards under international commercial arbitrations seated in India.[93]

XIV. Challenge to Arbitral Awards

Section 34 envisages challenge to an arbitral award; an application for setting aside the arbitral award. This is not akin to an appeal under the CPC. The Arbitration Act actively seeks to limit court interference at all stages and provides limited grounds for challenge to the award. The grounds on which an award can be set aside are:

1. If a party can prove that either party was under some incapacity;
2. If the agreement is proved to be invalid under the applicable law;
3. If proper notice was not served or if the party seeking setting aside of the award was otherwise unable to present his case;
4. If the award deals with issues falling outside the arbitration agreement (in which case only those issues that fall outside its scope will be set aside);
5. If the composition of the tribunal or arbitral procedure agreed upon was not adhered to; or
6. If the court is of the opinion that the subject matter of the dispute was not capable of settlement through arbitration or that the award was in conflict with the public policy of India.

A host of cases have interpreted the ambit and grounds under Section 34. Key issues observed in the interpretation of this provision are: excessive interference by courts into the merits of the arbitral award, re-assessment of evidence adduced and recorded under arbitration proceedings, broad interpretation of 'public policy' and delay of several years in adjudication of petitions under Section 34. It is noteworthy that there has been no well-defined head of 'public policy'. What constitutes 'public policy of India' has been extensively expounded by the Supreme Court in *Oil and Natural Gas Corporation Ltd. (ONGC) v. Saw Pipes Ltd*[94] It was held that the expression 'public policy' includes within its folds the test of 'patent illegality'. Patent illegality was explained to mean anything which is contrary to any provision of Indian law or the contract between the parties. This has led to a very wide ground being available to the parties to an arbitration to challenge an arbitral award under section 34. The decision was criticized as being contrary to the principles of finality of arbitration awards and minimal judicial intervention as espoused internationally.

The amended Section 34 has attempted to correct these issues. Section 34 now clarifies 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; *(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.

92. (2003) 5 SCC 705

93. Xstrata Coal Marketing AG vs. Dalmia Bharat Cement Ltd. IX AD(Delhi) 617

94. (2003) 5 SCC 705

Further, it provides that 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. Further, it provides that an award shall not be set aside merely on the ground of erroneous application of the law or by reappreciation of evidence.

In order to curb the extension of the ground of "patent illegality" to international commercial arbitrations, Section 34 provides that an arbitral award may be challenged on the ground of patent legality except for awards arising out of international commercial arbitrations.

In order to provide notice to the party against whom the challenge has been filed, the amended Section 34 provides that an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

The amended Section 34 further places a timeline of one year (from the date of service of the notice on other party) for expeditious disposal of applications under Section 34.

Section 34(4) of the A&C Act provides that upon an application by either party, the Court may adjourn the proceedings for a period of time in order to give an opportunity to arbitral tribunal 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.

The quintessence for exercising the power under this provision is that the arbitral award has not been set aside. The Parliament has not vested any power on courts to remand the parties to the Tribunal or defer the proceedings, except within the limited scope prescribed under Section 34(4) of the Act. Such power under Section 34(4) can be exercised only on a written application being made by a party and not suo motu.[95]

XV. No more automatic stay on filing of a challenge to an arbitral award – requirement of specific order from the Court

An unwanted/unintended consequence that emanated when awards were challenged under the provisions of the Act was that of an automatic stay which was granted to parties on mere filing of an application to challenge the award. This resulted in many awards becoming unenforceable for years as an application challenging their validity lay pending in the Courts. The Arbitration Amendment Act seeks to undo this mischief of indefinite delay by now requiring parties to file an additional application and specifically seek a stay by demonstrating the need for such stay to an Indian court. In other words, a stay can be granted only on making a separate application, by a court order in writing, recording the reasons in accordance with the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908.

Additionally, in entertaining a challenge to an arbitral award for payment of money, the court will have due regard to provide a grant of stay of a money decreed under the Code of Civil Procedure, 1908. This would include putting parties to terms, including deposit of monies, which would practically work to bring many disputes to an amicable resolution.

Practically speaking, this would operate as a deterrent against frivolous applications in light of the revised costs regime and also address the long outstanding issue of delay in enforcement of arbitral awards.

95. Kinnari Mullick v. Ghanshyam Das Damani

XVI. Enforcement of foreign awards and judgments

A Foreign Award is defined in Section 44 and Section 53 of the Act of 1996. India is a signatory to the NYC as well as the Geneva Convention. Thus, if a party receives a binding award from another country which is a signatory to the NYC or the Geneva Convention and is notified as a reciprocating country by India, the award would be automatically enforceable in India. The condition of reciprocity would only apply to the country where the award is made. This condition is only applicable for enforcement in India and a U.S court may still enforce an award rendered in India although India would not extend the same privilege back.

In India, enforcement of a foreign award can be objected to on the following grounds: (a) the parties to the agreement were under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. In addition, enforcement may also be refused if the Court finds that the subject-matter of the difference is not arbitrable in India or the enforcement of the award would be contrary to the public policy of India.

Recent pro-arbitration judgments of the Supreme Court have significantly curtailed the scope of the expression 'public policy' as found under Section 48(2) (b) of the Act, being grounds for refusing the enforcement of an award.

Recently, in the judgment of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,[96] the Supreme Court has significantly curtailed the scope of the expression 'public policy' as found under Section 48(2)(b) of the Act and thereby has clearly improved the sanctity of foreign seated.

The Arbitration Amendment Act seems to have taken into account the findings of the court in pro-arbitration judgments such as *Shri Lal Mahal Ltd. vs Progetto Grand Spa.* It specifically provides an explanation in Section 48 to the effect 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; (ii) it is in contravention with the fundamental policies of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Further, by virtue of amendment to Section 34, , the broad ground of 'patent illegality' forming part of the expression 'public policy' by virtue of the judgment in *ONGC*[97] is not available as a ground to object to the enforcement of a foreign award.

Most of the protections afforded to awards which are made in countries party to the NYC are also applicable to those made in countries party to the Geneva Convention. The Act also provides for one appeal from any decision where a court has refused to enforce an award, and while no provision for second appeal has been provided, a party retains the right to approach the Supreme Court.

Importantly, the Act is silent on how to treat an arbitral award passed in a country which is not a signatory to either the Geneva Convention or the NYC as also a country which is a signatory but has not been notified as a reciprocating country.

96. 2013 (8) SCALE 489

97. *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, AIR 2003 SC 2629

Most of the protections afforded to awards which are made in countries party to the NYC are also applicable to those made in countries party to the Geneva Convention. The Act also provides for one appeal from any decision where a court has refused to enforce an award, and while no provision for second appeal has been provided, a party retains the right to approach the Supreme Court.

Importantly, the Act is silent on how to treat an arbitral award passed in a country which is not a signatory to either the Geneva Convention or the NYC as also a country which is a signatory but has not been notified as a reciprocating country.

2 judgments that shaped the arbitration landscape in India and paved way for the amendments:

Law as prescribed in *Bhatia International*[98]

The judgment of the Supreme Court of India in *Bhatia International*[99] is of great importance. The facts were that a foreign company and an Indian company had submitted their dispute to the ICC in Paris in pursuance of an arbitral clause within their contract. In order to ensure that any award rendered could eventually be enforced, the foreign company approached the appropriate court in India and asked for an interim injunction against the Indian company to prevent it from alienating its properties in any way. It was argued that Part I[100] of the Act, modeled as it is on the UNCITRAL Model Law, applies only to domestic arbitrations and hence, the court could not grant interim relief. The Supreme Court held that the definition of an *"International Commercial Arbitration"* does not differentiate between an International Commercial Arbitration taking place in India and one that takes place outside India. The only difference is for Part II which would apply only to International Commercial Arbitrations taking place in countries signatory to the NYC and Convention on the Execution of Foreign Awards, 1923 (**"Geneva Convention"**). The Supreme Court also held that the parties to an International Commercial Arbitration taking place outside India had the right to expressly derogate from the applicability of Part I of the Act.

The reason this ruling is considered to be a landmark is because the Supreme Court has granted foreign parties the right to ask for interim relief so that the efficacy of International Commercial Arbitration is not vitiated by allowing domestic parties to dispose of their properties, thereby rendering the award redundant.

This decision was later followed in the case of *Venture Global Engineering v. Satyam Computer Services*[101] which reiterated the principle that Part I would be applicable to all International Commercial Arbitrations, regardless of whether the place of arbitration is situated in India or elsewhere. In this case the Supreme Court held that a foreign award was open to challenge under Section 34 of the Act.

Thus, as per *Bhatia International*[102] and *Venture Global*,[103] unless expressly or impliedly excluded by the parties, Part I of the Act applies to even a foreign-seated arbitration. Thus, in cases where Part I of the Act was not expressly or impliedly excluded by the parties, foreign awards were amenable to being challenged and set aside under Section 34 of the Act. Also, interim relief could be sought from the courts in India, in aid of an arbitration seated outside India.

While the law under Bhatia continues to apply to arbitration agreements signed before September 6, 2012 (after judgment of the Supreme Court in Balco case, as detailed below), the contemporary approach of courts appears to be more relaxed in terms of implying exclusions

98. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

99. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

100. Section 2 to Section 43, Arbitration and Conciliation Act, 1996

101. (2008) 4 SCC 190

102. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

103. *Venture Global Engineering v. Satyam Computer Service*, MANU/SC/0333/2008

under arbitration agreements. In Etizen Bulk A/S v. Ashapura Minechem Ltd. and Anr., the Court stated that the intention of the parties was to subject the disputes to English Law. This necessarily implied that any objection or challenge to the conduct of the arbitration or the Award would also be governed by English Law. The Court referred to a Supreme Court judgment which dealt with a similar fact pattern to observe the seat of arbitration was agreed to be London and that the arbitration proceedings were to be held in accordance with English Law therefore excluding the applicability of Part I of the Act. The Court concluded that the award debtor would not be entitled to challenge the award by raising objections under Section 34 of the Act before an Indian Court. Significantly, the Court thereafter cited a passage from Redfern and Hunter on International Arbitration and observed that the mere choosing of a juridical seat of arbitration would attract the law applicable to such a location to the arbitration proceedings thereby automatically excluding the operation of Part I of the Act.

Law as prescribed in BALCO[104]

The law, as laid down in *Bhatia International*[105] and *Venture Global*,[106] was heavily criticized as it lead to high degree of judicial intervention in International Commercial Arbitration seated outside India. This position was finally overturned in the case of *BALCO*.[107] The Supreme Court in BALCO[108] overruled *Bhatia International*[109] and held that Part I of the Act is not applicable to arbitrations seated outside India. Thus, a foreign award is now not amenable to challenge under Section 34 of the Act before the courts in India. The flip side though is that the party to a foreign seated arbitration can now not seek any interim reliefs from the courts in India in aid of the arbitration.

A crucial aspect of the *BALCO*[110] judgment is that the law, as laid down thereunder, is applicable only to arbitrations where the arbitration agreement is executed post the judgment, i.e. post September 6, 2012. Accordingly, all arbitration agreements executed prior to September 6, 2012, shall be governed by the law as laid down in *Bhatia International*[111] and as understood thereafter in *Venture Global*.[112]

XVII. Conciliation

Conciliation has been inserted in Part III of the Act and it has been adopted as one of the efficient means of settlement of disputes. The Act is drafted on the lines of the UNCITRAL Model Arbitration Law and the UNCITRAL Conciliation Rules and it is the first time that the process of conciliation has been given statutory recognition by providing elaborate rules of engagement. It is a non-binding procedure in which a neutral conciliator assists the parties to a dispute in reaching a mutually agreed settlement. Section 61 of the Act reads that conciliation shall apply in disputes arising out of a legal relationship whether contractual or not, and to all proceedings relating thereto.

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

105. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

106. *Venture Global Engineering v. Satyam Computer Service*, MANU/SC/0333/2008

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

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

109. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

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

111. *Bhatia International v. Bulk Trading S.A.*, AIR 2002 SC 1432

112. *Venture Global Engineering v. Satyam Computer Service*, MANU/SC/0333/2008

XVIII. Mediation

While the Act first introduced mediation in Section 30 as a form of alternative dispute resolution, it does not draw up the rules for mediation as it does for conciliation. However, in 1999, the Government enacted the Code of Civil Procedure (Amendment) Act, 1999 (**"CPC Amendment Act"**) where a new Section 89 was introduced into the CPC. This newly inserted section introduces the concept of judicial mediation', as opposed to `voluntary mediation'. A court can now identify cases where an amicable settlement is possible, formulate the terms of such a settlement, and invite the observations thereon of the parties to the dispute.

Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

KLRCA

AIAC Information Kit

About the KLRCA (soon to be AIAC)

The Kuala Lumpur Regional Centre for Arbitration (KLRCA), soon to be known as the Asian International Arbitration Centre (Malaysia), was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation (AALCO). The first centre of its kind to be established by AALCO in Asia, the KLRCA has a proven track record, continuing to provide world class institutional support as a neutral and independent venue for the conduct of domestic and international arbitration and other alternative dispute resolution (ADR) proceedings.

Established pursuant to the host country agreement between Malaysia and AALCO, the Centre has been accorded privileges and immunities for the purposes of executing its functions as an independent, international organisation. The Government of Malaysia has accorded KLRCA independence and certain privileges and immunities for the purposes of executing its functions as an international institution. The core function of KLRCA is the administration of arbitration proceedings. The KLRCA was the first centre in the world to adopt the UNCITRAL Rules for Arbitration as revised in 2013 and has its own set of procedural rules which governs the conduct of the entire arbitration proceedings from its commencement to its termination.

As a testament to its front-line stance in paving the way for innovation in ADR, KLRCA developed its own rules to cater to the growing demands of the global business community such as the KRLCA i-Arbitration Rules, the KRLCA Fast Track Rules as well as the Mediation and Conciliation Rules, which are constantly reviewed to ensure relevance with commercial practicalities and expectations. There has been tremendous interest in the i-Arbitration Rules and this is evident with KLRCA winning the prestigious Global Arbitration Review Award for 'innovation by an individual or organisation in 2012'.

The Centre also publishes guides and circulars to facilitate the use of and understanding of its rules. The Centre provides institutional support for domestic and international arbitration and other alternative dispute resolution (ADR) proceedings. In addition, the KLRCA offers hearing facilities and ancillary administrative services to tribunals operating ad hoc or under the auspices of another institution.

KLRCA is also tasked with the mission of promoting and building capacity in the area of ADR. In its continuous efforts in capacity building and disseminating information on ADR, the KLRCA organizes various courses and forums on the different avenues of ADR.

The Centre is led by the Director, Datuk Professor Sundra Rajoo under the supervision of the Secretary-General of AALCO and has an advisory board chaired by the Attorney General of Malaysia and comprises renowned international arbitrators.

KLRCA's success could not be imagined without our people, it is them who make us who we are, a global leader in dispute resolution.

Led by the Director, Datuk Professor Sundra Rajoo, our people are a tight-knit community of smart and driven professionals with a passion for alternative dispute resolution.

As an international institution, our team is diverse and constantly expanding. We come from:

- Malaysia
- Australia
- Belgium
- Benin
- China
- India
- Greece
- Indonesia
- Mexico
- Poland
- Russia
- Spain
- Turkey

11. Asian International Arbitration Centre (AIAC)

2018 marks the 40th year of KLRCA's existence, and having grown to become a niche ADR centre in the world, the Centre will officially be rebranded from the Kuala Lumpur Regional Centre for Arbitration (KLRCA) to the Asian International Arbitration Centre (AIAC).
The new name, AIAC, was recently tabled in Parliament, after obtaining approval from the Asian African Legal Consultative Organisation (AALCO) and conducting a series of thorough consultation with key stakeholders and authorities. The name change was formalised on 7th February 2018 at a historic signing ceremony. In light of the name change efforts, a Pro Tem Committee was formed under the guidance of our illustrious chairman, Tun Arifin bin Zakaria.

Behind the new AIAC brand, we are still the same organisation, dedicated to providing the best possible services and innovations. Despite the change in identity, we remain loyal to the heritage we have built, a driving reason for the retention of our iconic blue triangle in our new logo.

Through the leadership of the Centre's Director, Datuk Professor Sundra Rajoo, KLRCA also continues to shape the ADR arena through training programmes in niche areas such as sports arbitration and Islamic finance.
The Centre's efforts were recently recognised with the appointment of Datuk Professor Sundra as Deputy Chairman of the FIFA Ethics Committee. Datuk Professor Sundra was also recently appointed as Chairman of the Asian Domain Name Dispute Resolution Centre (ADNDRC), an honourable recognition of the Centre's continued dedication to this area.

KLRCA's new brand identity signals our continued passion to broaden boundaries, beyond the horizon. The new identity will spearhead an era of development and expansion, both for the Centre and the global ADR ecosystem.

Key highlights for 2018 include the introduction of KLRCA's online case management system, which is the product of several months of

Part of our extensive blueprint for the future includes its recent expansion into holistic dispute management and dispute avoidance. Over the past seven years, we have seen record growth of 2,152 cases to date, collaborated on 48 Memorandums of Understanding and conducted over 350 capacity building events for more than 12,000 participants.

intricate coding by expert global programmers working closely with the Centre's Legal Services team; a special edition of the Kuala Lumpur International ADR Week consisting of several key conferences and networking events to commemorate our 40th Anniversary celebrations; a dedicated ADR in Construction Symposium; roadshows across Asia showcasing our new Arbitration Rules and the introduction of AIAC; continuous cutting-edge upgrades to

the Centre's audio visual, video conferencing, live broadcast, court recording and transcription systems in view of KLRCA offering a complete and live virtual hearing experience; enhanced topical and interactive evening ADR talks, seminars and lectures; international arbitration moot competitions; and a host of other timely ADR programmes.

To this end, 2018 will also mark the establishment of the Asian Institute of Alternative Dispute Resolution (AIADR), which will be set up with the objective of localized capacity building and training for Asian and African countries. The AALCO has welcomed this initiative and has extended its support to recognising and endorsing the courses.
In the coming months, KLRCA's new brand identity will be unveiled through our official website, events, and communication channels. We look forward to sharing this next phase of our journey while we remain committed to our object of revamping the scope of ADR in the world and to work forward our commitment in "Delivering the Future".

The name change represents many things, foremost the ambition of key departments both within and without the Centre to remain and continue to grow as a regional hub for arbitration. Furthermore, it is a reflection of the commitment to this goal, an integral step that imposes a new standard of excellence and of keeping up with internationally recognised best practices.

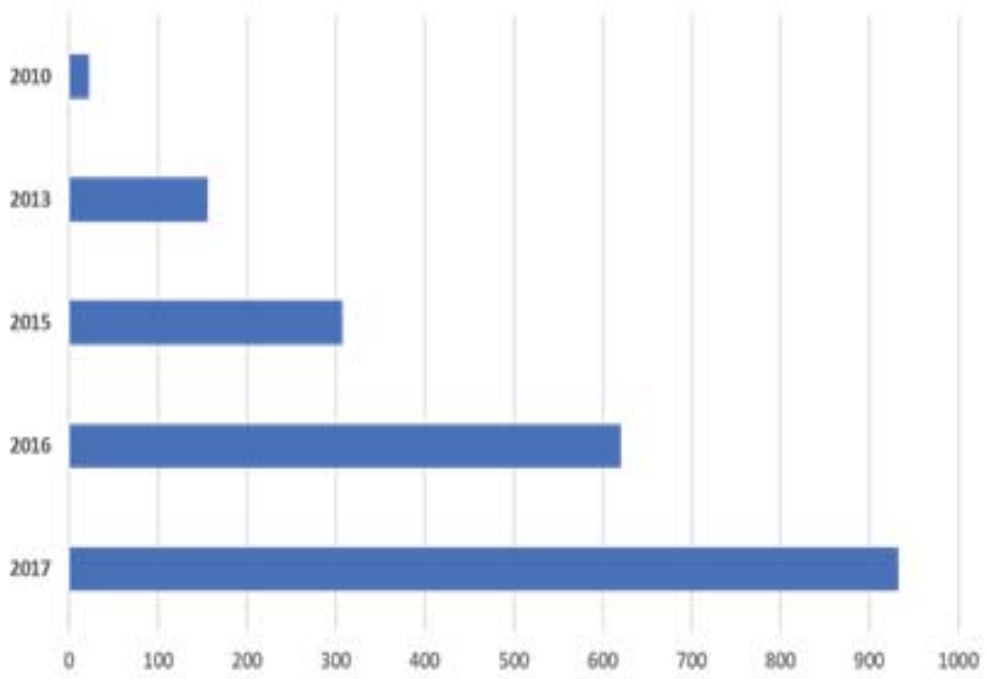
I. The Growth of ADR

The landscape of alternative dispute resolution has seen dramatic change in the last half-century. Parties to disputes have cottoned on to the time and cost-efficiency of ADR, while also preserving and exercising their right to tweak procedural and technical aspects of the ADR process to more adequately cater to their circumstances.

As a result, the growth and development of ADR has prompted responsive change, growth, development and modernisation of the respective frameworks around the world. Naturally, the economic impact of being an ADR"hub" makes it valuable both in the precipitation of investment but also in the development of technically advanced systems promoting efficient dispute resolution.

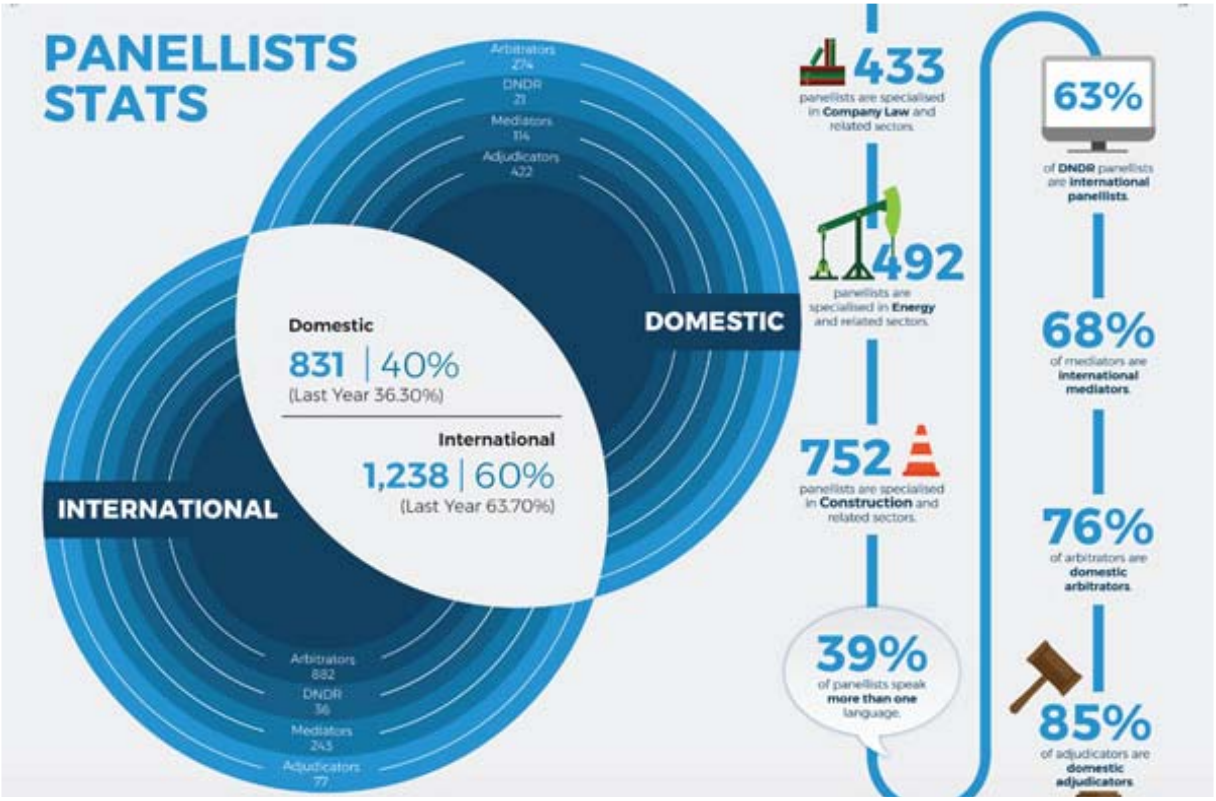
Perhaps the greatest achievement of ADR is the growth and wholesale adoption of arbitration. It has become a global tool that has provided clarity, finality, neutrality and added a breadth of expertise and autonomy that overshadows what have become old-fashioned methods of resolving disputes.

Malaysia is no different. The greater part of the last decade has been dedicated to integrate ADR, enhance Malaysia's arbitration profile and to establish Malaysia as a safe seat for arbitration. There is little doubt that this has been achieved. In 2017, the KLRCA dealt with 932 total cases, with, for example, a 60% increase in the number of Adjudication matters.



Total cases handled by KLRCA including arbitration (domestic and international) and adjudication

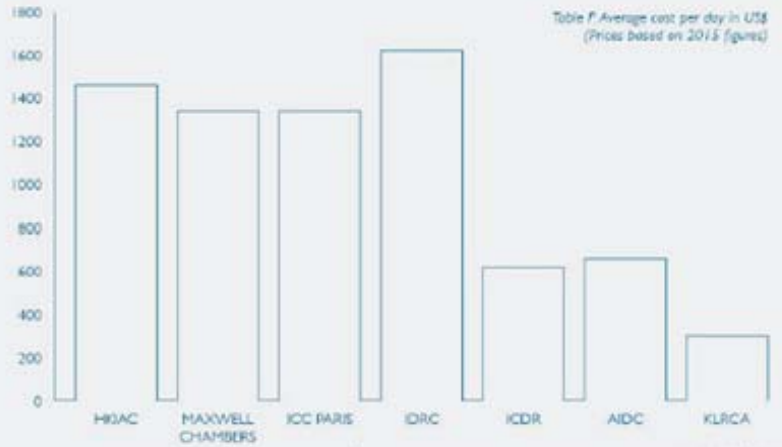
As a result, this increase in adjudication matters has replaced many of what would otherwise be domestic arbitrations, a testament to the success and effectiveness of the adjudication framework. To more adequately reflect the increase in arbitration, one can consider the number of international arbitrations, where there was an increase of 100% for the registration of international arbitrations at the KLRCA in 2017. The number of arbitrators is also at an all-time high, with 1,069 empanelled arbitrators and counting. Malaysia's 'fly-in fly-out' provision remains particularly appealing for arbitrators, as there is no withholding tax.



We have had over 3,000 bookings of our facilities in the past two years. Bangunan Sulaiman was gazetted as a heritage site in 1983, located conveniently close to the railway station and a stone's throw away from the Central Station, Kuala Lumpur's transportation hub.

Couple with cutting edge features and facilities, KLRCA remains one of the most affordable options for parties as it offers competitive rates as a venue for hearings in the region and beyond. Parties can also benefit from any special arrangements or individualised services they may require for their hearings, upon request.

Cheapest facilities amongst all arbitration institutions as surveyed by GAR:



Source: *https://globalarbitrationreview.com/benchmarking/guide-to-regional-arbitration- volume-6- 2018/1150108/survey-results*

II. The KLRCA and India

India has already marked its presence as one of the fastest if not the fastest growing economy in the world, and is considered to be one of the most attractive destinations for inbound investment. Accordingly, and particularly with the realisation of significant projects such as the Belt and Road initiative, it is no secret that ADR in India will continue to see exponential growth in the near future. The need for and the desire to be involved in arbitration has become increasingly prevalent, and the KLRCA has recognised this as a result of multiple collaborations both domestically and internationally.

Indeed, there has been overwhelming interest to be involved in ADR, and the KLRCA constantly has staff from India contributing substantially to its success. Our esteemed Assistant Director is from India and has been in this capacity for several years. Moreover, 2017 alone has seen 9 internships awarded to students from India, significantly more than from any other country. Additionally, the Annual KLRCA-ICC Pre-Moot has seen India heavily represented, and successfully so. The 2017 KLRCA-ICC Pre-Moot saw 6 teams from Indian universities, 5 of which qualified for the final round of 8. In fact, the final four teams were all from Indian universities, resulting in 3 internships awarded to Indian students – 2 at the KLRCA and 1 at a prominent Malaysian law firm. The most prestigious awards (Best Speaker – General Rounds, and Best Speaker – Finals) also went to Indian students.

2017 KLRCA-ICC Pre-Moot winners, from Rajiv Gandhi University

The 2018 KLRCA-ICC Pre-Moot is almost upon us, with 12 teams from 9 Indian universities already registered from Dr Ambedkar Government Law College, ILS Law College, Gujarat National Law University, Institute of Law at Nirma University, National Law School of India University, National Law University, Amity Law School, National Law University, and NALSAR University of Law. We expect the Indian teams to perform very well once again. Further showcasing the talent coming out of India was the 1st KLRCA Young Practitioners Group (YPG) Essay Competition, which saw entries coming in from both domestic and international practitioners and students. The 1st prize was won in both categories (Young Practitioner and Student) by participants from India, each earning RM3,000 and publication in the KLRCA Newsletter.

The KLRCA has also assisted in the organisation and delivery of capacity building events and conferences in India. Our counsels and Director, Datuk Sundra Rajoo, have recently been involved in the following:

1. "Selected Items on the Agenda of the International Law Commission" (Delhi);
2. 4th General Meeting on "Law of the Sea (Marine Bio-Diversity)" (Delhi);
3. Working Group on "International Law in Cyberspace" (Delhi);
4. "Violations of International Law" (Delhi);
5. 3rd Meeting of Delegation of AALCO Member States (Delhi);
6. "National Initiative Towards Strengthening Arbitration and Enforcement in India" (Delhi);
7. The Society of Construction Law 7th International Conference, "Constructing Law of Construction and Dispute Resolution" (Delhi);
8. Engaging Asia Arbitration Summit, "Sharing the Experiences of Established International Arbitration Seats" (Delhi);
9. "The Conduct of Arbitration – A Journey Around the World" (Delhi);
10. "Ushering in Sustainable Development of Arbitration in India" (Mumbai); and
11. "International Conference on Contemporary Issues in International Arbitration" (Pune).

In addition to the above, the KLRCA has also signed an MoU with the Government Law College, Mumbai, further evidencing the healthy collaborative efforts that India maintains with the KLRCA.

III. The Future of Arbitration in the Region

A. Asian Institute of ADR

Concurrent to the name change, the KLRCA's 40th year also sees the conception of the Asian Institute of ADR (AiADR), which formalises much of the capacity building and educational targets set by the KLRCA on a larger scale. The KLRCA is committed to the cause of capacity building and knowledge dissemination in ADR and, to this end, it has taken many innovative and pioneering measures to facilitate education. The AiADR was born due to the need to have a central hub for converging ADR practices, building capacity, and providing affordable and accessible ADR education for all stakeholders of the economy in resolving disputes and seeing projects and investments through. It was found that most institutions today that do provide for these are either national, or regional centric – often neglecting emerging Asian and African economies, and the cultural nuances of doing business and settling disputes in these continents.

It was also found that existing institutions do not take into account the spending capacity of Asian and African professionals, both young and experienced. This not only sidelines wider participation in ADR development, but also precludes this demographic from gaining the education, training, exposure and experience they and their economies deserve.

Today, Asia and Africa are pivotal markets given the plethora of multi and trans-national trade agreements being formulated – particularly the Belt & Road initiative which is set to connect Asia, Africa and parts of Europe through large land and sea infrastructure development. Despite the shift of commercial focus to the East, we have yet to see Asian and African economies being made the focal point of ADR capacity building – which needs to be addressed now as both continents sit at the heart of all these trade agreements. An action plan needs to be put in place to cater for the many inevitable disputes that are bound to arise stemming from these trade deals, while paying mind to the multiplicity of arbitral institutions within Asian and African sub-regions.

AiADR is setting up to address these issues and more. By drawing from the experience and knowledge of the most distinguished members, AiADR will sculpt a wide range of educational and training courses aimed at equipping practitioners and non-practitioners alike for the Asian and African ways of conducting business and resolving consequential disputes. The programmes will take into account geopolitical and socioeconomic intricacies of these markets while being affordable, while also capitalising on technology to help disseminate our programmes across the globe. This will create a continental hub for building capacity and compounding knowledge, which will eventually branch out to strategic locations across target continents.

The AiADR will be all-inclusive and focused. Dedicated committees will be set up to cater to the needs of all our stakeholders –practitioners, non-practitioners, students, universities, arbitral institutions, as well as corporate stakeholders in the ADR field. It will create a platform for our members to share information on career opportunities, while also providing career counselling for our younger members. A knowledge repository will also be compiled drawing from the thought leadership of the most experienced members, so that the contributors may profile their expertise while moulding the future of the profession by granting younger members access to this database of ADR resources.

AiADR will also set the standards and benchmark professionalism of all members. In fact, the AIADR will be implementing a Code of Conduct binding all members, as well as a Continuous Practice Development Scheme to ensure that all members stay up to date with the latest market and industry trends and developments. A Panel

of Expert Practitioners qualified to resolve disputes across Asia, Africa, the Caribbean and beyond will also be established so that investors in these emerging economies may look to Malaysia in seeing their investments through. This all ties back into keeping Malaysia as investment and arbitration-friendly as possible.

For now, membership is by invitation only. However, during this period, all of the benefits will be made freely available together with continuous updates on the website and other social media platforms. Training programmes will also be conducted and which are anticipated will be rolled out in 2018.

To join the mailing list for updates on AiADR's developments and activities, please send an e-mail to **thesecretariat@aiadr.org.**

B. Domain Name Dispute Resolution

In this growing age of digitalism, almost everyone – young and old alike – has an interest in the Internet. Flashing an Internet address has become a *sine qua non* for almost every organisation.

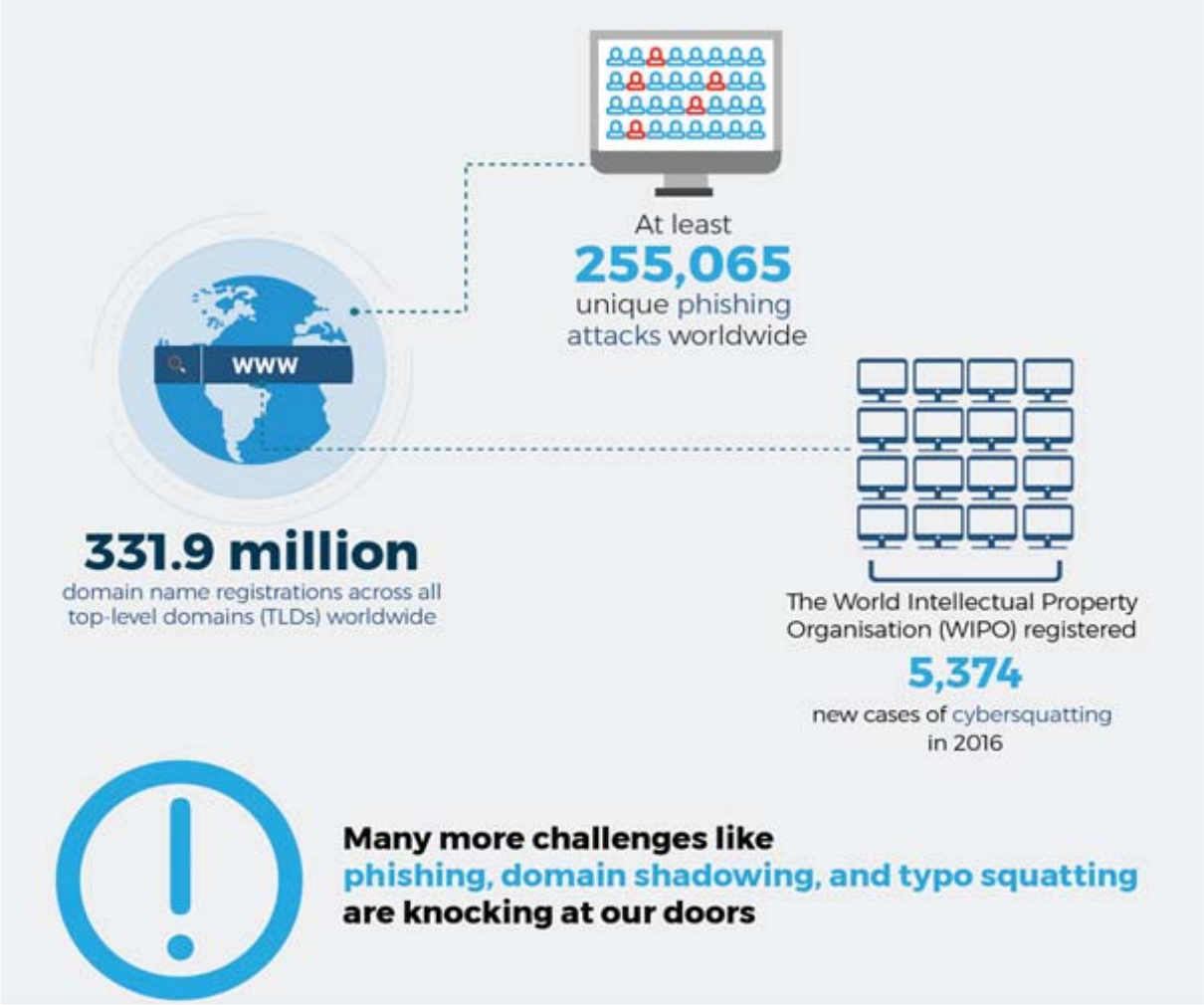
To wit, as of the second quarter of 2017, there were approximately 331.9 million domain name registrations across all top-level domains (TLDs). There is no denying that with such colossal number of registered domain names, there are ought to be disputes of trademark infringement. And the numbers are not surprising at all. There were at least 255,065 unique phishing attacks worldwide and, according to the latest statistics, the World Intellectual Property Organization (WIPO) registered 5,374 new cases of cybersquatting in 2016. The numbers are staggering and at this juncture, many more challenges like phishing, domain shadowing, and typo squatting are knocking at our doors.

To address the growing concerns of stakeholders, a number of institutions worldwide developed policy, rules and procedures aimed at cost and time effective resolution of domain name disputes. Domain Name Dispute Resolution is particularly relevant in the context of India, where greater time and cost-efficiency would be welcome.

Among those institutions focused on the Asian region are the Asian Domain Name Dispute Resolution Centre (ADNDRC) which was established by the KLRCA, Internet Address Dispute Resolution Committee (Seoul), CIETAC and HKIAC, and the Malaysian Network Information Centre (MYNIC) Berhad, an agency of the Ministry of Communications and Multimedia Malaysia (KKMM) and the sole administrator of ∗.my∗ domains.

Under the umbrella of ADNDRC, KLRCA administers disputes related to all top-level domains under the Uniform Domain Resolution Policy (UDRP) and as far as ".my" domains are concerned, MYNIC appointed KLRCA as the dispute resolution service provider for the ".my" domain name. Such domain name disputes are governed and administered in accordance with the MYNIC's Domain Name Dispute Resolution Policy (MYDRP) and KLRCA Supplemental Rules.

Staring from 1st January 2018, ADNDRC will be chaired by the Director of KLRCA, Datuk Professor Sundra Rajoo. On a strong foundation built by the past Chairman, Mr Edward Rubin, under the revitalised leadership of the Director of KLRCA, the ADNDRC will pave the road for future success and innovation. The 2018 will see a number of ADNDRC road shows, events and conferences throughout Asia to raise awareness on domain name dispute settlement in general and the products that the ADNDRC institutions offer.



Advantages of bringing domain names disputes to KLRCA

1. KLRCA administers disputes under the ADNDRC rules in generic top-level domains offering resolution of ∗.my∗ domain name disputes (amongst others), through the Malaysian Network Information (MYNIC) rules and policy;
2. Domain name disputes are usually settled in less than 60 days at KLRCA, being one of the most time and cost-effective providers in Asia;
3. Domain Name Dispute Resolution is the fastest form of dispute resolution for online trademark infringement;
4. KLRCA provides dispute resolution services of sensitive domain names using Sensitive Name Dispute Resolution Policy (SNDRP) governed and administered in accordance with .my DOMAIN REGISTRY's Sensitive Name Dispute Resolution Policy (SNDRP), Rules of the ∗.my∗ DOMAIN REGISTRY's SNDRP and KLRCA Supplemental Rules;
5. KLRCA has the most reputed and experienced experts in its DNDR panel, which also comprises 62% of international panellists;
6. The DNDR proceedings at KLRCA are totally hassle-free, with only a form to fill in order to file a complaint;
7. KLRCA in collaboration with Brunei Darussalam Network Information Centre (BNNIC) administers all disputes pertaining to either the registration or use of ∗.bn∗, the Brunei country-code top-level domain name;
8. KLRCA has a top-notch and expert legal team administering domain name disputes; and

9. KLRCA has a state of the art infrastructure and is located at the heart of Kuala Lumpur.

C. Proposed amendments to the Malaysian Arbitration Act

The landscape of international commercial arbitration is constantly evolving to enhance its efficacy and more adequately cater to the increasing global demand, exponential levels of which continue to be seen not only in international arbitration, but in alternative dispute resolution generally. Party autonomy, enforceability, finality, neutrality and expertise all remain cornerstones of arbitration, upheld not only via the New York Convention and the UNCITRAL Model Law, which have become longstanding and quintessential instruments in international commercial arbitration, but also as a result of the efforts of prominent arbitral jurisdictions. Arguably the most defining feature of a seat of arbitration is its *lex arbitri*, being the legislation underpinning arbitral proceedings and which governs all facets of the arbitration proceedings.

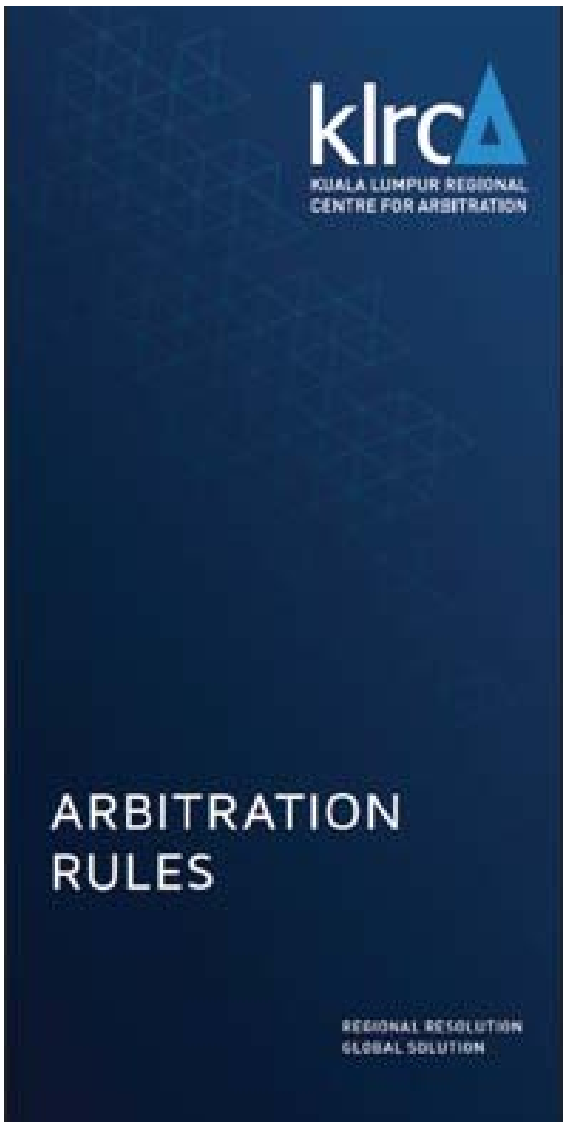
Malaysia has to date established itself as a prominent arbitral jurisdiction. The Arbitration Act 2005 (as amended in 2011) has kept with the leading global standards in arbitration and is, at present, well equipped to manage the arbitral proceedings that it provides for. Nevertheless, several material developments in international arbitration, both globally and domestically, have raised the need for revision.

In line with those developments, the proposed amendments adequately address and further improve on the existing arbitral framework of Malaysia that has seen consistently increasing demand for effective dispute resolution. The amendments can broadly be described as an effective means through which arbitration proceedings governed by the Arbitration Act 2005 will gain greater clarity, enhanced procedural efficiency, while safeguarding and increasing party autonomy, access to justice, as well as innovative measures that will reinforce Malaysia's status as an attractive arbitral jurisdiction and a safe seat for all parties.

Importantly, the amendments will ensure that Malaysia remains at the forefront of arbitration in the region alongside other prominent arbitral jurisdictions, perhaps most notably exemplified by the proposed introduction of Third-Party Funding for international arbitration.

As an integral component of the proposed amendments, a public consultation workshop was organised by the KLRCA to facilitate and encourage feedback from experts, practitioners, stakeholders and commentators alike in order to provide and document a complete and transparent consideration of all relevant issues surrounding the amendments.

D. KLRCA Arbitration Rules 2017



As part of its continuous efforts to meet the ever-changing demands of the business world, the KLRCA undertook a revision of its Arbitration Rules. The 2017 revision to the Arbitration Rules, which came into effect on 1st June 2017, was last revised in 2013. The decision of the KLRCA to revise its Arbitration Rules served as a response to the recent trends of costs and length optimisation of arbitration proceedings, improving efficiency and quality in the conduct of KLRCA-administered arbitration and ensuring the enforceability of arbitral awards. The revision of the Arbitration Rules is in line with the Centre's need to keep up with the rapidly evolving nature of the arbitration regime, whilst remaining competitive and efficient.

The KLRCA Arbitration Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

With the revision of its Arbitration Rules, the KLRCA has taken a new turn, balancing its "light-touch" approach with more cost and time effective procedural mechanisms, such as provisions pertaining to the expeditious appointment of emergency arbitrators. The inclusion of a Guide to the KLRCA Arbitration Rules provides a comprehensive overview of the ten most relevant definitions used throughout the Rules and is designed to make the rules more user-friendly by having the key terms in one place for reference. The simplification off the fee-schedule also makes for easy understanding and calculation, setting out both the arbitrator's fees and KLRCA's administrative fees based on the value of the amount in dispute using a unified banding structure.

The 2017 amendments are also designed to reflect international best practice in the case of multi-party disputes. As it stands, the growing global trend gives arbitral institutions the discretion to decide on consolidation of cases in the absence of party agreement. As such, in order for the parties to have faster and more cost-efficient proceedings, the new rules provide for consolidation of disputes.

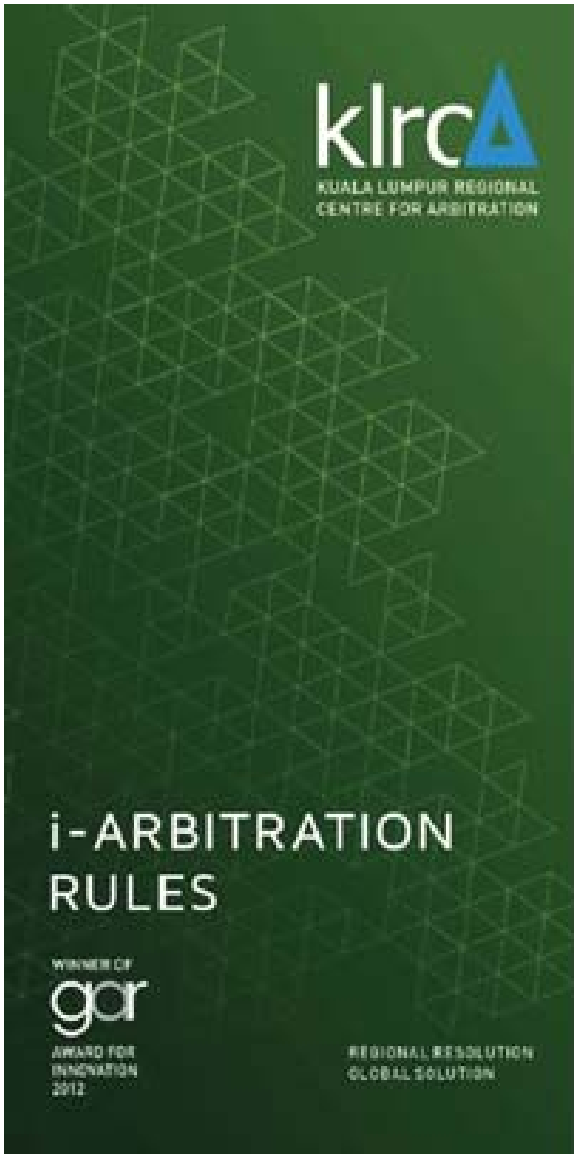
In consonance with the practices of international arbitration institutions, the Arbitration Rules 2017 now makes provision for the joinder of third parties to proceedings. These provisions allow for a tribunal to join additional parties to the arbitration subject to the consent of all the parties and the additional party.

With the aim of improving the quality and enforceability of awards, the Arbitration Rules 2017 introduced what is referred to as a "Technical review of awards". The provision set outs a detailed procedure and timeline during which time, the arbitral tribunal is required to submit to the KLRCA a draft final award after having declared the proceedings closed.

The model arbitration clause sees a new attempt to have parties seek amicable settlement of a dispute by mediation in accordance with the KLRCA Mediation Rules. This is consistent with the Centre's aim to establish Malaysia as a multi-service global hub for ADR and not just international arbitration, focusing on an expansion into holistic dispute management and dispute avoidance. The model submission agreement also enables parties seeking to substitute an existing arbitration clause for one referring the dispute to arbitration under the KLRCA Arbitration Rules.

Since its enforcement, the changes have been received positively by the arbitration community in Malaysia and overseas. The Arbitration Rules 2017 has been lauded as a welcome attempt to bring the arbitration rules of the KLRCA into line with international best practices, and resonates with an aspiration to identify the KLRCA as the go-to arbitral centre in South East Asia and beyond.

E. KLRCA i-Arbitration Rules 2017



In keeping to its reputation as one of the world's most innovative arbitral institutions, the KLRCA undertook a revision of its i-Arbitration Rules in 2017. The i-Arbitration Rules first drew international recognition in 2012 after receiving the prestigious Global Arbitration Review Award for 'Innovation by An Individual or Organisation' where the i-Arbitration Rules was lauded as the first set of arbitration rules in the world that catered exclusively to the resolution of disputes arising from commercial contracts containing Shariah issues.

The need to amend the i-Arbitration Rules, which was last revised in 2013, grew tremendously to mark KLRCA as a favourable and conducive choice for conducting arbitral proceedings dealing with the modalities and nuances of Shariah Law and to keep abreast with the transformation in the Malaysian arbitration landscape. The i-Arbitration Rules which came into effect on 9th June 2017 is designed to effectively cater to the evergrowing needs and demands of commercial transactions premised on Islamic principles.

The Model Islamic Arbitration Clause accommodates additions regarding the seat of arbitration, the language to be used in arbitral proceedings, the governing substantive law of the contract and the subscription of the parties towards an amicable settlement under the KLRCA Mediation Rules. The Guide to the KLRCA Rules has included thirteen definitions that highlight the cardinal concepts contained in the Rules and provide an introductory note to the same.

The i-Arbitration Rules have been broadened to include provisions with respect to Shariah experts and Shariah Advisory Council which would include Islamic scholars or experts qualified to issue religious rulings as well. The 2017 amendment to the i-Arbitration Rules has incorporated provisions where the arbitral tribunal may refer a matter to the relevant Council or Shariah expert when designated to form an opinion on a specific point related to Shariah principles.

The aforementioned specific provisions have been provided in addition to covering all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

Any dispute which arises out of an agreement which is premised on the principles of Shariah may be resolved under the KLRCA i-Arbitration Rules, thus granting it a rather broad spectrum which is comprehensive and in tandem with internationally accepted principles and practices of arbitration. The amended KLRCA i-Arbitration Rules are Shariah-compliant and suitable for arbitration of disputes arising from commercial transactions premised on Islamic principles and

have been lauded for the inclusive and balanced approach towards Islamic principles in such transactions.

KLRCA is the first arbitral institution worldwide to launch a suite of this kind that is suitable for all building construction projects in Malaysia and which is customisable and complimentary.

In the coming months, all of our products will be updated to reflect our rebranding to the Asian International Arbitration Centre, with further amendments scheduled for implementation concurrent with the rebranding.

F. Standard Form of Contract

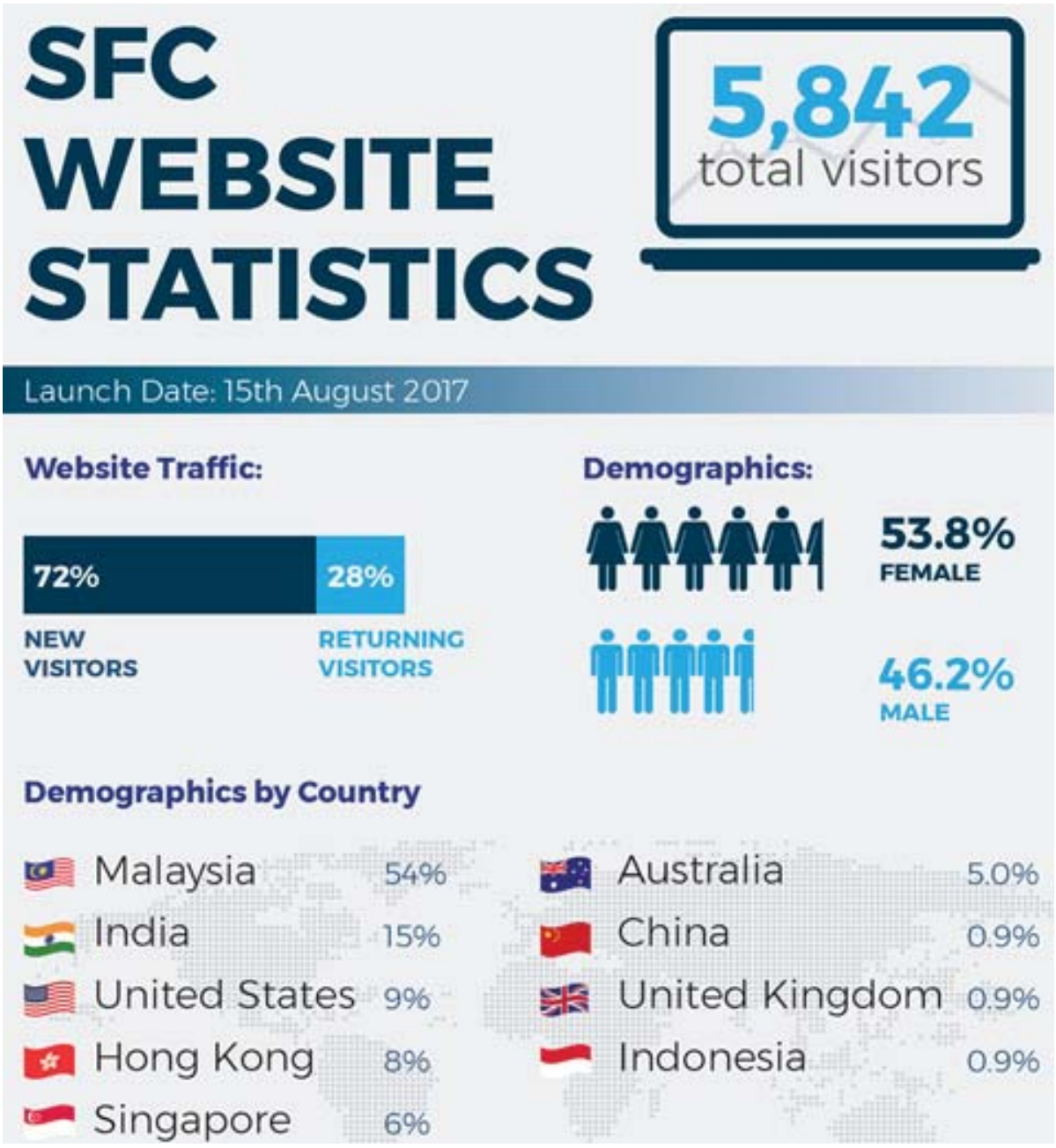
KLRCA's Standard Form Contracts (SFC) is a suite of standard form contracts inspired by the prevalent issues plaguing the construction industry, aimed at filling the gaps of existing standard form building contracts in governing relationships, rights and duties of parties to a building construction project.

KLRCA's SFC contains more mechanisms for parties to resolve disputes and deadlocks including mediation, encouraging parties to continue work despite disputes, while preserving parties' rights until completion – making continuity of works and working relationships its highest priorities.

KLRCA's SFC were engineered in a way to become a hybrid that bridges and fills the gaps of local and foreign standard form contracts with due consideration given to current laws and judicial precedents impacting the construction industry while simultaneously maintaining a recognisable model.

Additionally, alongside the Standard Form Contracts, a further suite of contracts will be introduced including the Design & Build Contract.

The launch of the SFC was followed by road shows introducing the contracts and providing guidance on how the contracts can be used, and were held in Johor, Penang, Sabah and Sarawak, together creating an audience of over 3,000 key industry players.



G. Belt and Road

In 2013, China's President Xi Jinping announced the launch of the Belt and Road initiative, a project that is meant to establish trade, investment and other cooperative relations between the countries along the old Silk Road. India has been predicted to play a pivotal role in the project.

The number of contracts signed by the Chinese enterprises in 61 countries along the Belt and Road reached 1,862, and the value of the newly-signed contracts amounted to US$31.85 billion, taking up 51.5% of China's total contract value of the contracted projects over the same period of time, going up 2.3% year-on-year. The turnover reached US$ 18.95 billion, taking up 48.1% of the total, up 5.6% year-on-year.

A project of such magnitude will create a number of situations that have not been seen before, and many opportunities for development will go hand-in-hand with challenges yet to be witnessed. However, being at the forefront of alternative dispute resolution globally and in the Belt and Road region in particular, KLRCA is well accoutred and embattled to handle these new challenges.

For example, 1,182 of the KLRCA's panellists come from the Belt and Road countries bringing on board expertise in 41 jurisdictions along the Belt and Road. Moreover, the KLRCA held 12 Belt and Road related events in 2017: 1,200 attendees from 9 countries, including, China, Russia, Hong Kong, Singapore, Sri Lanka, Spain, Bangladesh, Australia, United Arab Emirates in which simultaneous translation in Mandarin was available at some of the events held.

On 9th May 2017, the KLRCA, CRCICA and the Beijing Arbitration Commission (BAC) or Beijing International Arbitration Center (BIAC) signed a Belt & Road Arbitration Initiative Cooperation Agreement. The strategic alliance will foster cooperation between leading arbitral institutions and extend their reach in three of the key Belt and Road countries: China, Malaysia, and Egypt. A further 4 meetings were held with dignitaries and other stakeholders, including the China Council for the Promotion of International Trade (CCPIT) to further strengthen the present alliances in the Belt Road region, resulting in the signing of 39 MoUs to date.

H. Sports arbitration

2017 proved to be a historic year for Malaysia, successfully hosting the Kuala Lumpur Southeast Asian (SEA) Games 2017 (KL2017) from 19th to 30th August 2017, featuring 404 events in 38 sports. In a historic move, the Olympic Council of Malaysia (OCM) introduced the KLRCA as an independent ad-hoc body for the adjudication of cases and disputes arising during the KL2017. For the duration of the KL2017, only one dispute was lodged at the KLRCA with the matter efficiently and expeditiously deliberated by a panel of arbitrators in time sensitive and exigent circumstances using the administrative and secretarial facilities KLRCA had to offer.

It was also with a sense of pride that the KLRCA saw several candidates of its inaugural edition of the Certificate Programme in Sports Arbitration conducted in 2016, the first of its kind in the Asia Pacific region aimed to create a pioneering batch of specialized sports dispute resolution experts, shortlisted and empanelled as members of the ad-hoc disputes panel for KL2017.

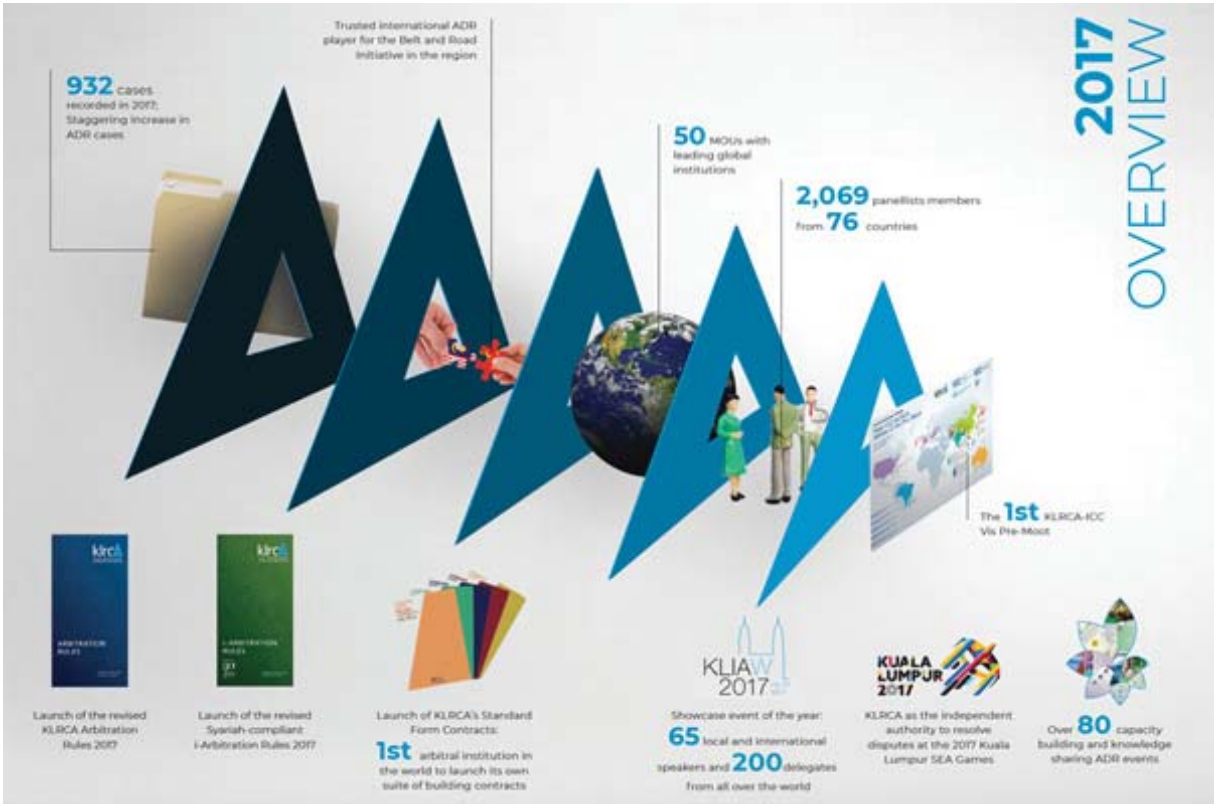
Having received international acclaim and recognition, in September 2017, KLRCA conducted the second edition of its Certificate Programme in Sports Arbitration. Attended by 39 individuals of various backgrounds from all over the world including UK, China, Jamaica, Bangladesh, India, Kenya, Trinidad & Tobago, Indonesia, Singapore and Malaysia, this second edition also proved to be a success with candidates who successfully completed the course, going to play significant roles in the resolution of sporting disputes in their respective countries.

Asian passion for sports has played a pivotal role in removing the Eurocentric lens through which much of sports history has been viewed. Today, Asia is quite notably a huge market for sports with a dominating fan base, and stands as preferred venue for many sports activities as

seen with the upcoming Olympic Games that is to be staged in Asia such as the 2018 Winter Olympics in PyeongChang, the 2020 Summer Olympics in Tokyo and the 2022 Winter Olympics in Beijing. Considering this wide landscape of sports activities in Asia, a marked increase in sports disputes is foreseeable in the near future.

Having identified the need for resolution of disputes in the sports industry in Malaysia, the KLRCA, in collaboration with OCM, proposes to spearhead the development of this industry modelled upon the Court of Arbitration for Sport in Lausanne, Switzerland (CAS). Arbitration has been known to be an effective medium to resolve disputes amicably and that conviction remains a principal catalyst that led to the inception of the Malaysian Sports Tribunal (MST). The upcoming establishment of the MST is timely and apt as it embodies the global vision that the KLRCA's transformation to the AIAC has sought out to achieve. It is the aspiration of the Centre that the sports ministry and associations alike will be able to pass on the intricacies of dealing with sporting disputes to the newly formed body and in turn, focus on the development and capacity refinement of their respective portfolio. Together with the OCM, the AIAC will be undertaking efforts to finalize a specialized set of MST arbitration rules along with a specialist panel of sports arbitrators drawing on both arbitration and sports communities and the drafting of a flexible cost structure.

Strategically located in the centre of Asia, what we can now dub as "the next Sporting Continent" and tapping from CAS's recognition of the KLRCA as an official Alternative Hearing Centre as well as KLRCA's state-of-the-art facilities, Malaysia is set to become the go-to place for sports dispute resolution. In this regard, KLRCA remains proactive in undertaking efforts in the field of sports dispute resolution and has placed itself formidably in the Southeast Asia region for the provision of dispute resolution services in the sports industry with competitive quality and at a low cost.



IV. Concluding Remarks

The KLRCA, soon to be the AIAC, is very proud to be spearheading the growth and development of arbitration in the region from the ground up. India has shown to be one of the driving forces for this growth and development, and there is little doubt that the existing collaboration between India and the KLRCA will continue to thrive in the coming years. We certainly look forward to an exciting period ahead in the short, medium and long term, and we welcome any and all inquiries and expressions of interest. To learn more about the KLRCA, please visit our website at **http://www.klrca.org** or **http://www.aiac.world,** or feel free to contact us at:

Kuala Lumpur Regional Centre for Arbitration
Bangunan Sulaiman,
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur, Malaysia

T : +603 2271 1000
F : +603 2271 1010
E : **enquiry@klrca.org** / **enquiry@aiac.world**
If you are a journalist or a researcher with an enquiry, please contact the KLRCA communications team at **communications@klrca.org** or **communications@aiac.world.**

About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium *Aligunjan*, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech & Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the **Most Innovative Indian Law Firm.**

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

A brief chronicle our firm's global acclaim for its achievements and prowess through the years -

- **AsiaLaw 2019:** Ranked 'Outstanding' for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **RSG-Financial Times:** India's Most Innovative Law Firm (2014-2017)
- **Merger Market 2018:** Fastest growing M&A Law Firm
- **IFLR 1000 (International Financial Review - a Euromoney Publication):** Tier 1 for TMT, Private Equity
- **IFLR:** Indian Firm of the Year (2010-2013)
- **Legal 500 2018:** Tier 1 for Disputes, International Taxation, Investment Funds, Labour & Employment, TMT
- **Legal 500 (2011, 2012, 2013, 2014):** No. 1 for International Tax, Investment Funds and TMT

- **Chambers and Partners Asia Pacific (2017 – 2018):** Tier 1 for Labour & Employment, Tax, TMT
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm"

Please see the last page of this paper for the most recent research papers by our experts.

Disclaimer

Contact

For any help or assistance please email us on ndaconnect@nishithdesai.com
or visit us at www.nishithdesai.com

The following research papers and much more are available on our Knowledge Site: **www.nishithdesai.com**

Fund Formation: Attracting Global Investors

March 2018

Social Impact Investing in India

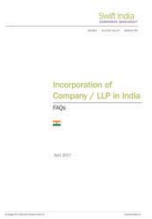
July 2018

The Curious Case of the Indian Gaming Laws

February 2018

Corporate Social Responsibility & Social Business Models in India

March 2018



Incorporation of Company LLP in India

April 2017

Outbound Acquisitions by India-Inc

September 2014

Internet of Things

January 2017

Doing Business in India

September 2018

Private Equity and Private Debt Investments in India

March 2018

NDA Insights

TITLE	TYPE	DATE
Blackstone's Boldest Bet in India	M&A Lab	January 2017
Foreign Investment Into Indian Special Situation Assets	M&A Lab	November 2016
Recent Learnings from Deal Making in India	M&A Lab	June 2016
ING Vysya - Kotak Bank : Rising M&As in Banking Sector	M&A Lab	January 2016
Cairn – Vedanta : 'Fair' or Socializing Vedanta's Debt?	M&A Lab	January 2016
Reliance – Pipavav : Anil Ambani scoops Pipavav Defence	M&A Lab	January 2016
Sun Pharma – Ranbaxy: A Panacea for Ranbaxy's ills?	M&A Lab	January 2015
Reliance – Network18: Reliance tunes into Network18!	M&A Lab	January 2015
Thomas Cook – Sterling Holiday: Let's Holiday Together!	M&A Lab	January 2015
Jet Etihad Jet Gets a Co-Pilot	M&A Lab	May 2014
Apollo's Bumpy Ride in Pursuit of Cooper	M&A Lab	May 2014
Diageo-USL- 'King of Good Times; Hands over Crown Jewel to Diageo	M&A Lab	May 2014
Copyright Amendment Bill 2012 receives Indian Parliament's assent	IP Lab	September 2013
Public M&A's in India: Takeover Code Dissected	M&A Lab	August 2013
File Foreign Application Prosecution History With Indian Patent Office	IP Lab	April 2013
Warburg - Future Capital - Deal Dissected	M&A Lab	January 2013
Real Financing - Onshore and Offshore Debt Funding Realty in India	Realty Check	May 2012

Research @ NDA

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.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build 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 eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at

research@nishithdesai.com

Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI

93 B, Mittal Court, Nariman Point
Mumbai 400 021, India

tel +91 22 6669 5000
fax +91 22 6669 5001

SILICON VALLEY

220 California Avenue, Suite 201
Palo Alto, CA 94306-1636, USA

tel +1 650 325 7100
fax +1 650 325 7300

BANGALORE

Prestige Loka, G01, 7/1 Brunton Rd
Bangalore 560 025, India

tel +91 80 6693 5000
fax +91 80 6693 5001

SINGAPORE

Level 30, Six Battery Road
Singapore 049 909

tel +65 6550 9856

MUMBAI BKC

3, North Avenue, Maker Maxity
Bandra–Kurla Complex
Mumbai 400 051, India

tel +91 22 6159 5000
fax +91 22 6159 5001

NEW DELHI

C–5, Defence Colony
New Delhi 110 024, India

tel +91 11 4906 5000
fax +91 11 4906 5001

MUNICH

Maximilianstraße 13
80539 Munich, Germany

tel +49 89 203 006 268
fax +49 89 203 006 450

NEW YORK

375 Park Ave Suite 2607
New York, NY 10152

tel +1 212 763 0080

Dispute Resolution in India