

# Dispute Resolution in India

## An Introduction

April 2020

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# 1. Introduction

With an ever-growing economy aiming to step higher in the ease of doing business scale worldwide, the Indian commercial and judicial landscape has seen a major overhaul in the past three years.

The pace of legal reform in India has picked up in the last three 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**”), followed by further attempts to amend these legislations in 2018. While the Commercial Courts Act, 2018 received Presidential assent in August 2018, it is deemed to have come into force from May 2018.

The Arbitration & Conciliation Bill, 2018 is awaiting consideration by the Rajya Sabha at the time of writing this paper. It is expected that the enactment of these legislations governing the civil law landscape will substantially reduce the backlog of cases in courts, tackle the inefficiencies in the legal case-disposal system and turn the commercial legal community towards increased acceptance of alternate dispute resolution.

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 *Kesavananda Bharati*<sup>i</sup> 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

<sup>i.</sup> *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461.

which have the effect of law. An Ordinance remains in force only for a limited 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*”.<sup>2</sup> 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*”.<sup>3</sup>

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.<sup>4</sup> 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*,<sup>5</sup> 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,
- 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,

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.

- 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*,<sup>6</sup> *Minerva Mills*,<sup>7</sup> *Waman Rao*,<sup>8</sup> and *IR Coel ho*.<sup>9</sup> 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.

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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*.<sup>10</sup> 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<sup>11</sup> or from a Court subordinate to another state's High Court.<sup>12</sup> 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 discretionary powers to hear special appeals on any matter from any court except those of the

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<sup>10</sup>. Article 32, Constitution of India, 1950.

<sup>11</sup>. Article 139A, Constitution of India, 1950.

<sup>12</sup>. Section 25, Code of Civil Procedure, 1908.

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)<sup>13</sup> 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,<sup>14</sup> labor rights,<sup>15</sup> and rights of undertrials<sup>16</sup>) 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 Appel-late Divisions (“Special Courts”)

Earlier, commercial divisions of High Courts were established in places where High Courts have ordinary original civil jurisdiction.<sup>17</sup> These divisions dealt with commercial disputes of specified value i.e. INR 10,000,000 (Rupees Ten Million) or higher. However, the specified value is now reduced to INR 300,000 (Rupees Three Hundred Thousand). Accordingly, the Amendment now establishes commercial courts at the level of district judge even in places where High Courts exercise ordinary original civil jurisdiction. The State government may specify the pecuniary jurisdiction of such Commercial Courts. However, the state government cannot specify an amount which is less than three hundred thousand and more than the pecuniary jurisdiction of the District Courts in the said areas. This is discussed in further detail in Chapter VIII.

## IV. Tribunals

Specialized tribunals such as the Income Tax Appel-late Tribunal, the National Company Law Tribunal, the Goods and Services Tax Appellate

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 161.

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.

17. Delhi, Bombay, Madras, Calcutta and Himachal Pradesh.

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.<sup>18</sup>

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.<sup>19</sup>

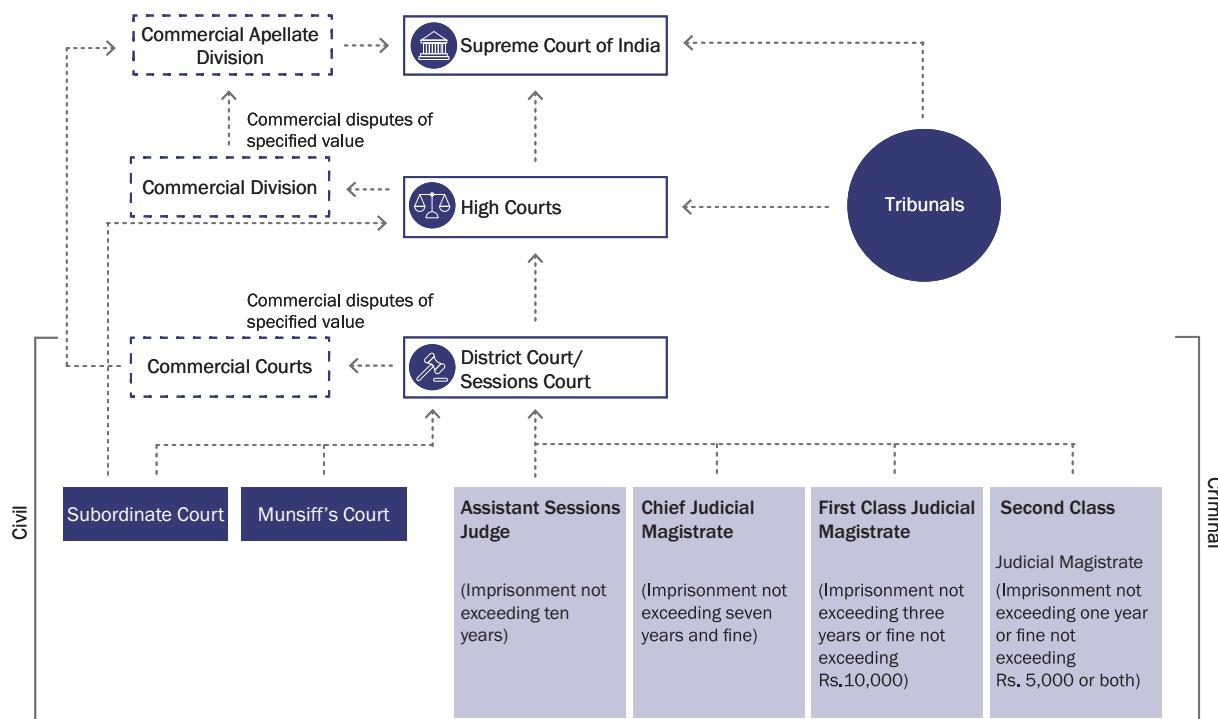
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18. Section 28, Code of Criminal Procedure, 1973.

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19. 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.<sup>20</sup> 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<sup>21</sup> and the Industrial Disputes Act, 1947<sup>22</sup> 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.

20. Article 22, Constitution of India, 1950.

21. Section 13, Family Courts Act, 1984.

22. 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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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, 2015 (“Commercial Courts Act”), as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (“Amendment Act”) 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 three hundred thousand 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 the Supreme Court<sup>26</sup> or the

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

24. Section 16, Code of Civil Procedure, 1908.

25. Section 6, Code of Civil Procedure, 1908.

26. Article 32, Constitution of India, 1950.

High Courts<sup>27</sup> 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 2<sup>nd</sup> Class, Judicial Magistrate 1<sup>st</sup> 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 Courts or the Commercial Appellate Divisions of the High Courts as applicable.

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<sup>27</sup>. 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 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.<sup>28</sup>

### 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.<sup>29</sup> The principle was elaborated in the celebrated judgment of *American Cyanamid Co. v. Ethicon Ltd.*<sup>30</sup>

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28. *Martin Burn Ltd. v. Banerjee*, AIR 1958 SC 79.

29. *Begg, Dunlop & Co. v. Satish Chandra Chatterjee*, AIR 1920 Cal 276.

30. (1975) 1 All ER 504.

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*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 plaintiff's 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.”*

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## 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.<sup>31</sup> In order to determine the same, the court may look into factors such as:<sup>32</sup>

- 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 position 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.<sup>33</sup>

## 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 Specific Relief Act, 1963 underwent a major overhaul in 2018. The Specific Relief (Amendment) Act, 2018 (“SR Amendment Act”) was passed by both houses of the Parliament and received Presidential assent on August 1, 2018.

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31. 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.

32. Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Co. & Ors.. (1995) 5 SCC 545.

33. Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Co. & Ors.. (1995) 5 SCC 545.

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

- i. Recovering possession of immovable property:

A person who is entitled to possession of a specific immovable property may recover it in the manner provided in the CPC.<sup>34</sup> However, the amended section 6 widens the provision and states that a suit for recovery of immovable property may be filed not only by the person himself, but also any person through whom he has been in possession or any person claiming through him.

- 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.<sup>35</sup>

- 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.<sup>36</sup>
- 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.<sup>37</sup>

- iii. Specific performance of contract

Prior to the amendment act, courts would provide specific relief only in two cases:

- When monetary compensation for breach of contract was inadequate; or
- When the extent of damage caused by the breach could not be ascertained

This relief was an equitable, discretionary relief. However, the amended Section 10 states that:

“The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.”

Thus, with the amendment to Section 10 under the **SR Amendment Act**, specific relief is no longer an exception but a rule. It is now a statutory remedy and would be provided in all cases, barring a few.

- Category of persons mentioned under Section 16

## A. Contracts which cannot be specifically enforced specifically enforced

As per the SR Amendment Act, the following contracts are not specifically enforceable:

1. Section 11(2)

A contract made by a trustee in excess of his powers as mentioned in Section 11(2) is not specifically enforceable.

2. Section 14:

The following contracts are not enforceable:

- i. Where a party has obtained substituted performance under Section 20;
- ii. Where a contract involves performance of a continuous duty which cannot be supervised by courts;
- iii. Where a contract is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
- iv. Where a contract is in its nature determinable.

3. Section 16:

Specific performance of a contract cannot be enforced in favour of a person—

- a. who has obtained substituted performance of contract under section 20; or
- b. who has become incapable of performing, or violates any essential term of, the

34. Section 5, Specific Relief Act, 1963.

35. Section 6, Specific Relief Act, 1963.

36. Section 7, Specific Relief Act, 1963.

37. Section 8, Specific Relief Act, 1963.

- contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- c. who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

## B.Special Provisions

### 1. Substituted Performance:

The erstwhile Section 20, which provided for discretion in relation to decreeing specific performance has now been replaced with the provision for 'Substituted Performance' of contract. This provision allows the party who has been aggrieved due to non-performance, to substitute the performance with a third party or by his own agency, and recover the costs and expenses incurred from the party that breached the contract. However, one cannot obtain its specific performance according to the amendment made to Section 16. It is important to note that the party who suffers such breach must give a notice in writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice. This section would ensure that the promisor himself performs the contract so as to avoid paying the subsequent costs and expenses incurred by the aggrieved party. Further, the thirty-day notice period allows the parties to renegotiate before diving into a lengthy litigation procedure.

### 2. Recognition of Limited liability partnership

The Amendment Act added Limited Liability Partnerships to the list of parties who may seek specific performance by adding Section 15(fa) to the Act. Further, Section 19(ca) also states that specific

performance of a contract may be enforced against Limited Liability Partnerships. Thus, specific performance may be sought by and enforced against Limited Liability Partnerships.

### 3. Special performance for contracts relating to infrastructure projects

The insertion of Section 20A grants certain benefits to infrastructural projects. It bars courts from granting injunction where it would cause impediment or delay in the progress or completion of such infrastructure project. Infrastructure projects would mean the category of projects specified in the Schedule.

The schedule specifies the following categories: transport; energy, water and sanitation, communication, social and commercial infrastructure. The schedule also contains various sub-categories within these broad categories. Further, Section 20B provides for the designation of one or more civil courts as special courts for trying cases in respect of contracts relating to infrastructure projects. All infrastructure activities have an element of public interest and therefore, it is necessary to cull out such projects and give them special treatment. Barring the courts from granting injunctions in particular cases would ensure that the public interest is protected.

### 4. Time Bound Cases

Section 20C provides that a suit must be disposed of by the court within a period of twelve months from the date of service of summons to the defendant. However, this period may be extended by another six months after recording the reason in writing for such extension. This section aims at a speedy disposal of cases.

The Amendment Act tries to prevent parties from breaching contracts. Further, limiting the discretionary power of the courts, carving out a provision for specific performance of contracts, reducing the types of contracts which cannot be

specifically enforced, etc. all show that India has entered a pro-performance regime. Recognizing the importance of infrastructural projects and providing special performance of such contracts acknowledges the stake of the public. Lastly, making the cases time bound will improve the efficiency of the courts while dealing with matters falling under the scope of Specific Relief Act.

### III. Damages

Under Common Law, the primary remedy for injury under tort law or breach of contract is that of damages. 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.<sup>38</sup> 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*<sup>39</sup> 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*".<sup>40</sup>

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*,<sup>41</sup> the Supreme Court stated:

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*"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."*

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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

38. Ratanlal & Dhirajlal, *The Law of Torts*, 26th ed., 2010, Lexis-Nexis Butterworths Wadhwa, Nagpur, pg. no. 184.

39. (1854) 9 Exch 341.

40. State of Kerala v. K. Bhaskaran, AIR 1985 Ker 49; Titanium Tantalum Products Ltd. v. Shriram Alkali And Chemicals, 2006 (2) ARBLR 366 Delhi.

41. (1964) 1 SCR 515.

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.

# 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 Proceeding

### 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 effectively and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectively and completely adjudicate upon the disputes.<sup>42</sup> 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*'.<sup>43</sup> 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)<sup>44</sup> 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 Suit Valuation Court Fee

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.

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

42. Sarvinder Singh v. Dalip Singh and Ors., (1996) 5 SCC 539.

43. 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.

44. Order VI Rule 1, Code of Civil Procedure, 1908.

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.<sup>45</sup> 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 plaintiff’s claim; effectively reducing the value of the plaintiff’s 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 be sought.<sup>46</sup>

<sup>45</sup>. Section 11, Limitation Act, 1963.

<sup>46</sup>. 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.<sup>47</sup> 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 in shortening the duration of the proceedings and minimizing costs. For this purpose, interrogatories may be submitted for answer by the opponent and discovery of documents may be asked for.<sup>48</sup>

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.<sup>49</sup>

#### 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.<sup>50</sup> 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.

47. Order XIV, Code of Civil Procedure, 1908.

48. Sarkar, Sudipto, Code of Civil Procedure, Volume I, 11th Edition, Lexis Nexis Butterworths Wadhwa, pg. no. 1323.

49. Order XI Rule 12, Code of Civil Procedure, 1908.

50. 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 of 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 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.<sup>51</sup>

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.<sup>52</sup>

## 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.<sup>53</sup> Within fifteen days of the pronouncement of a judgment, the concerned court is required to draw up the decree.<sup>54</sup> 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.<sup>55</sup>

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52. Section 126, Indian Evidence Act, 1872.

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

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

55. 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:<sup>56</sup>

- 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);

<sup>56</sup>. Section 13, Code of Civil Procedure, 1908.

- 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.<sup>57</sup> 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<sup>58</sup>

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

<sup>57</sup>. Punjab Co-operative Bank v. Naranjan Das, AIR 1961 PH 369.

<sup>58</sup>. Order XXXVII Rule 1, Code of Civil Procedure, 1908.

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.<sup>59</sup>

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59. 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*”.<sup>60</sup> 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.<sup>61</sup>

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*<sup>62</sup>; and

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

61. A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602.  
62. 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*,<sup>63</sup> 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.*<sup>64</sup>, 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 Order

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

63. 1966 SC 1423.

64. AIR 1962 SC 1314.

provide for the forum of an appeal. However, no particular time limit as such is prescribed for disposal of such appeals.

## 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 ("**2015 Ordinance**") 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 was amended in August 2018. The amendments were deemed to have come into force on May 3, 2018.

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 188<sup>th</sup> and 253<sup>rd</sup> 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.

Earlier, Section 2(i) of the Commercial Courts Act had defined *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 Amendment Act amends the lower limit of "specified value" from INR 10,000,000/- (Rupees Ten Million) [approx. USD 1,50,000] to INR 300,000/- (Rupees Three Hundred Thousand) [approx. USD 4,500]. 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 Amendment 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.

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.<sup>65</sup>

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

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.

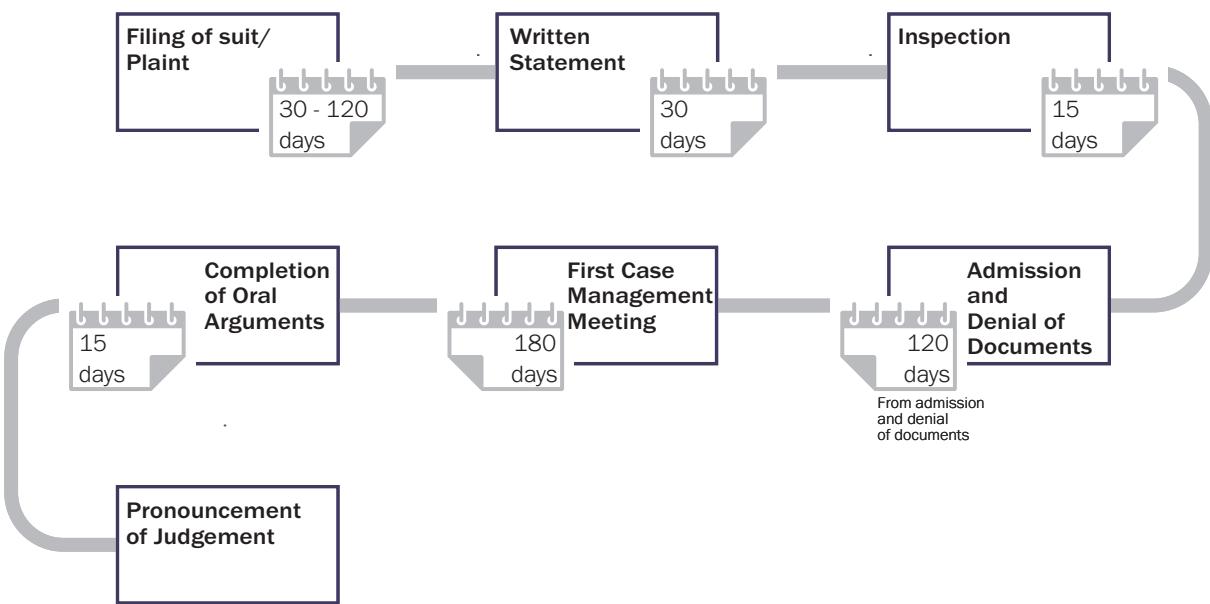
## B. Cost to Follow Event

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.

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



## 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*<sup>66</sup> 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 time-line 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

66. (2011) 8 SCC 249, at para 52.

Act for a summary judgment is akin to the existing procedure of Summary Suits<sup>15</sup> 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.<sup>67</sup>

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 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.

### III. Arbitration versus Commercial Courts

A crucial question arises in context of whether parties should choose to resolve their disputes by including an arbitration clause in their commercial contracts or resolving their disputes under the Commercial Courts Act. It must be noted that if there is an arbitration clause present in the parties' contract, courts and judicial authorities will refer parties to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996.

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 (from completion of pleadings) 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.

<sup>67</sup>. Bright Enterprises Private Ltd. & Anr. v. MJ Bizcraft LLP & Anr.

## 9. Insolvency and 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 resolution process in India has in the past involved the simultaneous operation of several statutory instruments. These include the Sick Industrial Companies Act, 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, and the Companies Act, 2013. Broadly, these statutes provided for a disparate process of debt restructuring, and asset seizure and realization in order to facilitate the satisfaction of outstanding debts. As is evident, a plethora of legislation dealing with insolvency and liquidation led to immense confusion in the legal system, and there was a grave necessity to overhaul the insolvency regime. All of these multiple legal avenues, and a hamstrung court system led to India witnessing a huge piling up of non-performing assets, and creditors waiting for years at end to recover their money.

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, in order to allow credit to flow more freely in India and instilling faith in investors for speedy disposal of their claims. 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.

The Code provides creditors with a mechanism to initiate an insolvency resolution process in

the event a debtor is unable to pay its debts. The Code makes a distinction between Operational Creditors and Financial Creditors. A Financial Creditor is one whose relationship with the debtor is a pure financial contract, where an amount has been provided to the debtor against the consideration of time value of money (“**Financial Creditor**”). Recent reforms have sought to address the concerns of homebuyers by treating them as ‘financial creditors’ for the purposes of the Code.

The Code was recently amended by the Insolvency and Bankruptcy (Amendment) Act, 2018, the Insolvency and Bankruptcy (Second Amendment) Act, 2018 and the Insolvency and Bankruptcy (Amendment) Act, 2019. The amendments ensure that the amount raised from allottees under a real estate project (a buyer of an under-construction residential or commercial property) is to be treated as a ‘financial debt’ as such amount has the commercial effect of a borrowing.<sup>68</sup> The Supreme Court upheld the constitutional validity of this amendment in the case of *Pioneer Urban Land and Infrastructure Limited v. Union of India*.<sup>69</sup>

An Operational Creditor is a creditor who has provided goods or services to the debtor, including employees, central or state governments (“**Operational Creditor**”). A debtor company may also, by itself, take recourse to the Code if it wants to avail of the mechanism of revival or liquidation. In the event of inability to pay creditors, a company may choose to go for voluntary insolvency resolution process – a measure by which the company can itself approach the NCLT for the purpose of revival or liquidation.

Some of its other noteworthy features are:

- a. Time-Bound Resolution: The Code created time-bound processes for insolvency

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68. Explanation to Section 5(8)(f) inserted by the Insolvency and Bankruptcy (Second Amendment) Act, 2018.

69. Writ Petition(s)(Civil) No. 43/2019

resolution - as per its provisions, every insolvency resolution process must be concluded within 180 days of commencement of the insolvency resolution process, which was extendable by another 90 days in case of delay. However, the Insolvency and Bankruptcy (Amendment) Act, 2019, which was notified on August 16, 2019, has amended this timeline. The insolvency resolution process must now be completed within 330 days of its commencement, including the time taken in legal proceedings in relation to such resolution process. Pending insolvency resolution processes which have not been completed within the period of 330 days must be completed within a period of 90 days from the commencement of the Insolvency and Bankruptcy (Amendment) Act, 2019..

- 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 2018, the judiciary played a very active role in ensuring that India’s new debt regime moved towards achieving its objectives and offered a robust and level playing field to both borrowers and lenders. 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. For a detailed analysis of the Code, please refer to our paper ‘Primer on the Insolvency & bankruptcy Code, 2016’.<sup>70</sup>

### Cross-Border Insolvency

An interesting introduction has been proposed to the IBC. The Insolvency Law Committee (“ILC”) has submitted its second report to the Government, recommending amendments to the IBC to include provisions on cross border insolvency (“**Proposed Amendment**”) based on the UNCITRAL Model Law on Cross Border Insolvency.<sup>71</sup> The Proposed Amendment seeks to incorporate the four major tenets from the UNCITRAL Model Law, namely, (a) direct access to foreign insolvency professionals and foreign creditors to participate in or commence domestic insolvency proceedings against a defaulting debtor; (b) recognition of foreign proceedings & provision of remedies; (c) cooperation between domestic and foreign courts & domestic and foreign insolvency practitioners; and (d) coordination between two or more concurrent insolvency proceedings in different countries. The Proposed Amendment would increase the access of Indian creditors to foreign assets and proceedings and vice versa, thereby strengthening the IBC regime and increasing investor confidence. However, there can be some challenges in the implementation and enforcement due to certain procedural gaps (dealt with in detail in our write up on the Proposed Amendment).

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<sup>70</sup>. [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/A-Primer-on-the-Insolvency-and-Bankruptcy-Code.pdf)

<sup>71</sup>. [https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport\\_22102018.pdf](https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf)

# 10. Alternative Dispute Resolution

## I. 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.

The Commercial Courts Amendment Act of 2018 has provided great impetus to mediation. The amendment has inserted a new Chapter IIIA into the Act. It entails that where a suit does not contemplate urgent interim relief, the plaintiff has to undergo pre-institution mediation.

The Commercial Courts Amendment Act 2018 introduces the “Commercial Courts (Pre-institution Mediation and Settlement) Rules, 2018”. These rules lay down the procedure for mediation which must be followed. The rules, read with the Act state that the Central Government may authorize the Authorities constituted under the Legal Services Authorities Act, 1987. This authority would regulate the mediation process by initiating the proceedings once an application is received by a party. It also assigns the dispute to a mediator and decides the venue of proceedings.

The mediation process must be completed within a period of three months from the date of receipt of application for pre-institution mediation. This period can be extended for two months with the consent of the parties. Further, the rules provide that the parties are obligated to act in good faith and they, along with the mediator are obligated to maintain confidentiality of proceedings. It also lays down the ethics to be followed by the mediator. It

further entails that the settlement arrived at by such mediation shall have the status and effect of an arbitral award under section 30(4) of the Arbitration and Conciliation Act, 1996 (“Act”). Across the globe experience of such pre-institution mediation provisions have been positive. Thus, the institution of this provision is laudatory.

## II. 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.

## III. 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 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 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.

#### IV. Arbitration in India

Arbitration proceedings in India are governed by the Arbitration & Conciliation Act, 1996. The 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 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 Act deals with Conciliation which does not have any bearing on the present Report. Part IV of the Act deals with supplementary provisions.

The 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 Act). The Second Schedule refers to Protocol on Arbitration Clauses (also covered under Section 53 of the Act). The Third Schedule refers to the Convention on the Execution of Foreign Arbitration Awards.

Pursuant to the enactment of the Arbitration and Conciliation (Amendment Act) on October 23, 2015 (“**Arbitration Amendment Act 2015**”), and the Arbitration and Conciliation (Amendment) Act, 2019 (“**Arbitration Amendment Act 2019**”) the arbitration landscape in India has changed significantly. The Act now contains several amended provisions, additional provisions and a total of seven Schedules.

The road to the Arbitration Amendment Act 2015 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.

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

After considering the recommendations of the report of the Committee to strengthen institutional arbitration in India, the Arbitration and Conciliation (Amendment) Bill, 2018 was proposed. The Bill was passed by the Lok Sabha on 10 August 2018 and was pending before the Rajya Sabha. However, the 2018 Bill lapsed as the 16th session of the Lok Sabha was dissolved.

Subsequently, Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and successfully enacted as the Arbitration and Conciliation (Amendment) Act on August 9, 2019 (“**2019 Amendment Act**”). The 2019 Amendment Act was passed with a view to make India a hub of institutional arbitration for both domestic and international arbitration.

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

- The Arbitration Amendment Act 2019 seeks to establish the Arbitration Council of India (“ACI”), which would exercise powers such as grading arbitral institutions, recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations.
- Further, Arbitration Amendment Act 2019 amends the Arbitration Amendment Act 2015 by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the ACI with the power to appoint arbitrators.
- The Arbitration Amendment Act 2015 had introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. The Arbitration Amendment Act 2019 2019 amends the start date of this time limit to the date on which statement of claim and defence are completed.
- The Arbitration Amendment Act 2019 also excludes ‘international commercial arbitration’ from this time-limit to complete arbitration proceedings.
- The Arbitration Amendment Act 2019 introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators.
- The Arbitration Amendment Act 2019 further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule.
- Importantly, the Arbitration Amendment Act 2019 also clarifies the scope of applicability of the Arbitration Amendment Act 2015. Arbitration Amendment Act 2019 provides that Arbitration Amendment Act 2015,

which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. However, this amendment on the applicability of the Arbitration Amendment Act, 2015 has been struck down by the Supreme Court as being unconstitutional in the case of *Hindustan Construction Company Limited v. Union of India*.<sup>72</sup>

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

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 2015 and 2019, Courts were taking an increasingly pro-arbitration approach. The Arbitration Amendment Act 2015 and 2019 take into account several of the findings in such pro-arbitration landmark judgments to provide clarifications and explanations in an attempt to cease out the ambiguities and inefficiencies prevalent in the Act as it stood prior to the amendment.

This chapter discusses certain key aspects of the 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

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<sup>72</sup>. Writ Petition (Civil) No. 1074 Of 2019.

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.

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.

## V. Applicability of the Amendment Act

Applicability of the Amendment Act under Section 26<sup>73</sup> 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, an issue arose with respect to court proceedings – whether initiated before the amendment or after the amendment.

In 2018, the Supreme Court of India dealt with the issue of prospectivity and retrospectivity of the Arbitration Amendment Act 2015. In the case of *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.*,<sup>74</sup> the Court made a clear distinction between the two limbs of Section 26. It held that the first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The Court noted that in the first limb of the Section 26, “the arbitral proceedings” and their commencement is mentioned in the context of Section 21 of the Principal Act and that the expression used is “to” and not “in relation to”. Regarding the second limb, the Court noted that the expression “in relation to” is used instead and the expression “the” arbitral proceedings and “in accordance with the provisions of Section 21 of the principal Act” is conspicuous by its absence.

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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 on or after the date of commencement of this Act.

74. (2018) 6 SCC 287

The Court further observed that the expression “the arbitral proceedings” refers to proceedings before an arbitral tribunal as is clear from the heading of Chapter V of the Principal Act. Thus, the Court concluded that the first part of the Section deals with arbitral proceedings before the Arbitral tribunal alone. The Court then went on to highlight the contrast between the first and second limbs of section 26 and held that the second part only deals with court proceedings which relate to the arbitral proceedings. It then concluded that the Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings which have commenced on or after October 23, 2015. The Supreme Court further held that the amendment to Section 36 of the Act, which pertains to removing the implied automatic stay on the execution of arbitral awards, applies retrospectively as it is procedural in nature.

Peculiarly, the Arbitration Amendment Act 2019 introduced Section 87 provides that Arbitration Amendment Act 2015, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. However, Section 87 has been struck down by the Supreme Court as being unconstitutional in the case of *Hindustan Construction Company Limited v. Union of India*.<sup>75</sup> Consequently, the position laid down by the Supreme Court in *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.*,<sup>76</sup> has been reinstated.

With this judgment of the Supreme Court, the applicability of the Arbitration Amendment Act 2015 has now been clarified. However, the Arbitration Amendment Act 2019 does not expressly specify which disputes it is applicable to. The various amendments would have to be individually interpreted to understand whether that amendment is substantive, procedural or clarificatory in nature. Judicial interpretation

on this aspect should provide clarity on the applicability of the amendments.

## VI. 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,<sup>77</sup> 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,<sup>78</sup> 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

77. Sundaram Finance v. NEPC India Ltd., AIR 1999 SC 565.

78. 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.

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.

The Amendment Act 2015, gave the tribunal the power to grant interim relief "during the arbitral proceedings, or at any time after the making of

the arbitral award, but before it is enforced in accordance with section 36". This had created some ambiguity as the tribunal becomes *functus officio* once the final award has been rendered. However, the Amendment Act 2019 resolved this issue by omitting the words "or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36" from Section 17.

## VII. 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.

The amendment addresses the concern arising out of issues raised by the Supreme Court of India ("Supreme Court") *rulings in Bhatia International*<sup>79</sup> and *Bharat Aluminum*.<sup>80</sup>

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.

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

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

In an interesting decision in *Raffles Design International India Pvt Ltd. vs. Educomp Professional Education Ltd.*<sup>81</sup>, 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.

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

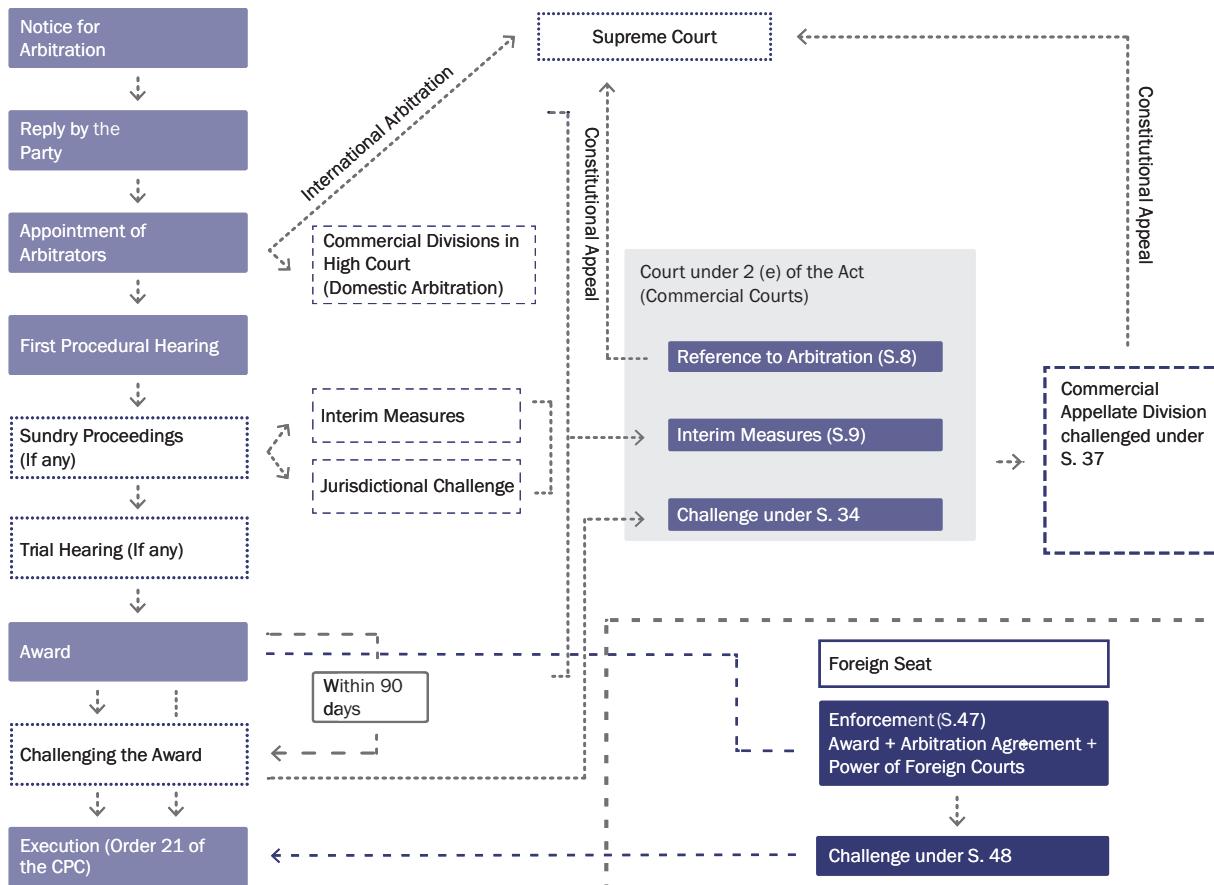
As previously mentioned, one of the main objectives of the Principal Act was to ensure that parties receive a speedy and cost-effective dispute resolution. In order to ensure that this

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 inter-national 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.

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<sup>81</sup>. O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016, IA Nos. 25949/2015 & 2179/2016.



#### Jurisdiction of Courts in Indian Seated Arbitrations

## IX. 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. U.E Development India Pvt. Ltd.*<sup>82</sup> 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.*<sup>83</sup>

82. (2008) 14 SCC 271.

83. AIR 2006 SC 450.

In *National Insurance 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.*<sup>84</sup> 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.<sup>85</sup> Issues relating to jurisdiction or arbitrability 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.

The Arbitration Amendment Act 2019 seeks to amend the Arbitration Amendment Act 2015 by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the ACI (Arbitration Council of India) with the power to appoint arbitrators. However, this provision has not been notified as of the date of this paper.

## X. 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:

84. (2009) 1 SCC 267.

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

- 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 after completion of pleadings (see discussion below).
- iii. Schedules V and VII introduced rigorous provisions for disclosure and appointment of independent and impartial arbitrators.
- iv. 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 with respect to appointment of employees as arbitrators. High Courts have differed, again. In *Assignnia Vil JV v Rail Vikas Nigam Ltd.*<sup>86</sup>, 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<sup>87</sup> and Madras<sup>88</sup> 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*,<sup>89</sup> 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.
- v. However, on appointment of former employees as arbitrators, the Punjab & Haryana High Court held in *Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.*<sup>90</sup> 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).
- vi. 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.

## XI. 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.

86. Arbitration Petition 677/2015.

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

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

89. Request Case No. 14 of 2016.

90. Arbitration Case 166/2016.

## XII. A Twelve-Month time-line 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 2015, 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.

The Arbitration Amendment Act 2019 has modified this timeline. The amendment now states that the tribunal must make the award within a period of 12 months from the date of completion of pleadings. The Arbitration Amendment Act 2019 further provides that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

The Arbitration Amendment Act 2019 provides that this time limit shall not apply to international commercial arbitrations.

## XIII. 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.

## XIV. 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 2015 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 2015 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 2015 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.

## XV. 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 2015 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 2015 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.

The Arbitration Amendment Act 2015 further clarifies that the ground of “patent illegality” under public policy is available as a ground for challenging domestic arbitral awards under Section 34 of the Act.

## XVI. 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:

- i. If a party can prove that either party was under some incapacity;
- ii. If the agreement is proved to be invalid under the applicable law;
- iii. If proper notice was not served or if the party seeking setting aside of the award was otherwise unable to present his case;
- iv. 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);
- v. If the composition of the tribunal or arbitral procedure agreed upon was not adhered to; or
- vi. 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*<sup>91</sup>. 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.

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*.<sup>92</sup>

## XVII. 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

91. (2003) 5 SCC 705

92. *Kinnari Mullick v. Ghanshyam Das Damani*.

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 decree 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. In the case of *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.*, the Court found that the automatic stay on execution under the old regime was only a procedural clog on the right of the decree holder, who could not execute the award in his favour unless the conditions under the un-amended Section 36 were met. This did not mean that there was a corresponding right in the judgment debtor to stay the execution of an award. Thus, it was the Court's conclusion that since execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as amended, would apply even in cases where an application for setting aside an award was pending on the date of commencement of the Amendment Act.

## XVIII. 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*,<sup>93</sup> 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 arbitration.

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<sup>93</sup>. 2013 (8) SCALE 489.

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.

In the case of *Ranbaxy Laboratories Ltd.*, the Delhi High Court allowed the enforcement of an award seated in Singapore, worth Rs 3,500 crores, against former promoters of India's Ranbaxy Laboratories Ltd. The Court upheld the enforcement of the award and observed that section 48 of the Arbitration Act does not allow the Court to reassess the correctness of an award on merits or re-appreciation of the evidence. In this case, the Court gave due recognition to the principle of minimum interference in a foreign award. The Delhi High Court maintained the trend of recent years where the scope of 'fundamental policy of India' has been narrowed down significantly to allow easier enforcement of foreign awards. Time and again, we have witnessed various debates and discussion over the enforceability of foreign awards in India. The Delhi High Court in this judgment has put to rest all the discussions by reaffirming that mere contravention of an Indian statute would not result in breach of the fundamental policy of Indian law and that it would take a breach of a substantial principle on which the Indian law is founded to have the award set aside.

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<sup>94</sup>* is not available as a ground to object to the enforcement of a foreign award.

In the case of *Sundaram Finance Ltd v Abdul*

*Samad and Anr.*, the Supreme Court considered whether an award can be directly filed and executed before the court where assets of a judgment debtor are located or if it needs to be first filed before the competent court having jurisdiction over the arbitration proceedings and then seeking transfer of the decree for execution. The Supreme Court held that an award holder can now initiate execution proceedings before any court in India where assets are located, thereby simplifying the process of execution of international awards.

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.

## XIX. Judgments that shaped the arbitration landscape in India and paved way for the amendments

### A. Law as prescribed in *Bhatia International*

The judgment of the Supreme Court of India in *Bhatia International<sup>95</sup>* 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

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

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

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<sup>96</sup> 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*<sup>97</sup> 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*<sup>98</sup> and *Venture Global*,<sup>99</sup> 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 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.

## B. Law as prescribed in BALCO

The law, as laid down in *Bhatia International*<sup>100</sup> and *Venture Global*,<sup>101</sup> was heavily criticized as it lead to high degree of judicial intervention in International Commercial Arbitration

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

97. (2008) 4 SCC 190.

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

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

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

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

seated outside India. This position was finally overturned in the case of *BALCO*.<sup>102</sup> The Supreme Court in *BALCO*<sup>103</sup> overruled *Bhatia International*<sup>104</sup> 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*<sup>105</sup> 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*<sup>106</sup> and as understood thereafter in *Venture Global*.<sup>107</sup>

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<sup>102</sup>.Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc, (2012) 9 SCC 552.

<sup>103</sup>.Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc, (2012) 9 SCC 552.

<sup>104</sup>.Bhatia International v. Bulk Trading S.A., AIR 2002 SC 1432.

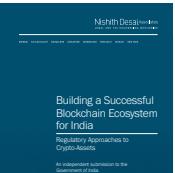
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<sup>105</sup>.Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc, (2012) 9 SCC 552.

<sup>106</sup>.Bhatia International v. Bulk Trading S.A., AIR 2002 SC 1432.

<sup>107</sup>.Venture Global Engineering v. Satyam Computer Service, MANU/SC/0333/2008.

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