Dispute Resolution in India

An Introduction

April 2019
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At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium Aligunjian, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

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

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

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Accolades

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- **Chambers and Partners Asia Pacific:** Band 1 for Employment, Lifesciences, Tax and TMT 2019, 2018, 2017, 2016, 2015
- **IFLR1000:** Tier 1 for Private Equity and Project Development: Telecommunications Networks. 2019, 2018, 2017, 2014
- **AsiaLaw 2019:** Ranked ‘Outstanding’ for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **RSG-Financial Times:** India’s Most Innovative Law Firm 2017, 2016, 2015, 2014
- **Merger Market 2018:** Fastest growing M&A Law Firm
- **IFLR:** Indian Firm of the Year 2013, 2012, 2011, 2010
- **Asia Mena Counsel’s In-House Community Firms Survey 2018:** Only Indian Firm for Life Science Practice Sector
- **Who’s Who Legal 2019:** Global Thought Leaders - Nishith Desai (International Corporate Tax and Private Funds,) Dr. Milind Antani (Lifesciences) Vikram Shroff (HR and Employment Law,) and Vaibhav Parikh (Data Practices and Telecommunication)
- **IDEX Legal Awards 2015:** Nishith Desai Associates won the “M&A Deal of the year”, “Best Dispute Management lawyer”, “Best Use of Innovation and Technology in a law firm” and “Best Dispute Management Firm”
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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 Keshavananda Bharati1 it has been held by Justice Beg that:

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

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

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

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

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

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

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

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

II. Basic Structure of the Constitution

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

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

In the *Kesavananda Bharati* case, 5 a Constitution Bench consisting of 13 judges of the Supreme Court, including the Chief Justice of India, declared that “*Parliament's constituent power was subject to inherent limitations. The Parliament could not use its amending powers to 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or framework of the Constitution*”. In this landmark judgment, the judges set out an illustrative list of features which could be considered to be a part of the ‘Basic Structure’ of the Constitution:

- power of judicial review,
- supremacy of the Constitution,
- republican and democratic form of government,
- separation of powers between the Legislature, the Executive, and the Judiciary,
- federal character of the Constitution, the mandate to build a welfare state as contained in the Directive Principles of State Policy,
- unity, integrity, and sovereignty of India,

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.
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*, *Minerva Mills*, *Waman Rao*, and *IR Coelho*. 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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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. 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 or from a Court subordinate to another state’s High Court. 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

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)\(^\text{13}\) and supervises every High Court and subordinate court.

**A. Public Interest Litigation**

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

**II. High Courts**

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

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

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

**III. Commercial Courts, Commercial Divisions and Commercial Appellate Divisions (“Special Courts”)**

Earlier, commercial divisions of High Courts were established in places where High Courts have ordinary original civil jurisdiction.\(^\text{17}\) 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 Appellate Tribunal, the National Company Law Tribunal, the Goods and Services Tax Appellate

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\(^{15}\) 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.\(^\text{18}\)

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.\(^\text{19}\)

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. 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 and the Industrial Disputes Act, 1947 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.

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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. 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.

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. 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, 2018 now vests Commercial Courts and Commercial Divisions with the jurisdiction to try disputes of a ‘commercial nature’, as defined in the act. However, the Commercial Courts Act also provides that only those commercial disputes of a ‘specified value’, i.e. disputes which are valued at or above 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 or the High Courts and therefore, no other court would have jurisdiction to entertain and try such matters. Further, cases where immovable

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property constitutes the subject matter of the suit, then such suits are normally triable by the courts within whose territorial jurisdiction the subject matter, i.e. the immovable property, is situated.

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

### IV. Original and Appellate Jurisdiction

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

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.

The principle was elaborated in the celebrated judgment of American Cyanamid Co. v. Ethicon Ltd:

30. (1975) 1 All ER 504.
“The governing principle is that, the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.”

C. Balance of Convenience

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

- 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.

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.

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. 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.

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.

- 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.

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

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 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

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.
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. 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 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”.

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, the Supreme Court stated:

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

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

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

39. (1854) 9 Exch 341.
41. (1964) 1 SCR 515.
6. The Course of a Suit

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

I. Pre-Trial 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 effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. 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'. 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) 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
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 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. In certain cases, the court may condone any delay in filling of the suit, if cogent reasons are shown for the delay.

E. Notifying the Defendant

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

F. Filing of Written Statement

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

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

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

In the event of a set-off or counterclaim being alleged by the defendant in the written statement, the plaintiff in turn responds with a written statement, either admitting or making specific denial of each material fact. While the plaintiff has the right to respond to the claim for set-off or counter claim of the defendant, any other subsequent pleadings, such as the rejoinder to the written statement and the sur-rejoinder to the rejoinder, cannot be filed as a matter of right and a leave of the court must sought.


II. Trial Proceedings

A. Framing of Issues by the Court

After the parties complete the pleadings in the suit, the court frames the issues. 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 maybe submitted for answer by the opponent and discovery of documents maybe asked for.

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.

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. 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.
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.51

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.52

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

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51. Section 126, Indian Evidence Act, 1872.
52. Section 126, Indian Evidence Act, 1872.
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:

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

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

Where any judgment from a reciprocating territory is in question, a party may directly apply for execution under S. 44A of the CPC. A judgment from a non-reciprocating country cannot be enforced under this section.\(^{57}\) 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.\(^{58}\)

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Under a summary suit, the plaintiff is required to institute a plaint specifying that the suit is instituted under Order XXXVII of the CPC. After the service of the Writ of Summons to the defendant, the defendant must enter an appearance and request leave to defend the summary suit within ten days of the service. Unless the defendant does so he will not be entitled to defend the summary suit, and the plaintiff will be entitled to a decree which will be executed forthwith. However, if the defendant requests leave to defend, the same will be given unconditionally if the defendant shows a _prima facie_ case or raises a triable issue. The leave to defend should not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put by him is frivolous or vexatious.\(^59\)

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”. 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.

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”; and

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, speaking for the Supreme Court, Hidayatullah, J. stated:

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

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

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63. 1966 SC 1423.
64. AIR 1962 SC 1314.
D. Review and Revision

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

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

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

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

The Commercial Courts Act 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 188th and 253rd reports.

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

I. Commercial Disputes of Specified Value:

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

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

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.

1. Commercial Courts in Jurisdictions where High Courts have Ordinary Original Jurisdiction

Earlier, commercial divisions of High Courts were established in places where High Courts have OOC Jurisdiction. 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 OOC Jurisdiction by amending the proviso to Section 3(1). 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.

2. Commercial Courts in Jurisdictions where the High Courts have no ordinary original jurisdiction

The amendments now make provision for constitution of two types of commercial courts in jurisdictions where the high court does not exercise ordinary original civil jurisdiction being:

a. Commercial courts at the level of a district judge; and

b. Commercial court below the level of a district judge.

The intention behind creating these two types of courts could be linked with the reduction of the specified value. While not stated specifically, it may be that lower value disputes would now be adjudicated by Commercial Courts below the level of a district judge and high-value disputes would go to Commercial Courts at the level of a district judge,

3. Commercial Appellate Court

The Amendment Act envisages the establishment of commercial appellate courts in jurisdictions where the high court does not exercise OOC Jurisdiction. Appeals from commercial courts below the level of district judge shall lie before the Commercial Appellate Court. The Appeals from Commercial Courts at the District Judge level would continue to lie before the Commercial Appellate Division.

Further, according to Section 13, any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

Fresh Procedure for Hearing Suits

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

A. Strict Timelines

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

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

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.

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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* 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.

E. Summary Judgment

On many occasions, certain disputes linger on in courts without any substance to them, as the entire process envisaged in the CPC has to be followed by the Court and all stages need to be completed before a judgment can be passed. Courts are duty bound to follow the principles of natural justice and afford to the defendants all kinds of statutory remedies available. The process envisaged in the Commercial Courts Act for a summary judgment is akin to the existing procedure of Summary Suits 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.67

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 select Commercial Courts over arbitration. The Arbitration Amendment Act, which shall be discussed in further detail in Chapter X, has brought about changes such as a twelve (12) month deadline for completion of arbitration, deeming interim orders passed by arbitral tribunals as orders of court and the ability to involve third parties in arbitrations seated in India, which have in fact taken India beyond the global standards. Further, Section 10 of the Commercial Courts Act prescribes that applications and appeals arising out of arbitration are to be heard by the Commercial Court (in cases where the High Court is not the Court with original jurisdiction) or the Commercial Division (in cases where the High Court is vested with original civil jurisdiction). Thus, the intent is to look at the two regimes as complementing each other.

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

9. Insolvency 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. By a recently promulgated ordinance, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 ("the Ordinance"), 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. The Ordinance does not clarify whether allottees are secured or unsecured financial creditors. Such classification will be subject to the agreement entered into between the homebuyers and the corporate debtor. In the absence of allottees having a clear status, there may be uncertainty about their priority when receiving dues from the insolvency proceedings. 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 creates time-bound processes for insolvency resolution- as per its provisions, every insolvency resolution process

68. Explanation to Section 5(8), Insolvency and Bankruptcy Code, 2016 (As amended by the Insolvency and Bankruptcy (Amendment) Ordinance, 2018)
must conclude within 180 days of commencement with limited extension of 90 days in case of delay. This amendment marks the onset of a monumental change in the bankruptcy regime, and has renewed faith amongst investors, both nationally and internationally.

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

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

In 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 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’.

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[1]. 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).

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 ("Arbitration 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 ("Act") to make arbitration, domestic and international, more effective in India. The Act is based on the UNCITRAL Model Law (as recommended by the U.N. General Assembly) and 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.


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 (“A&C Act”). The A&C Act covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and where both parties are Indian nationals, respectively.


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

The road to the Arbitration Amendment Act was set by ‘The Law Commission of India’s Report No. 246’ (“Law Commission Report”), which proposed several amendments to the principal Act of 1996. A similar attempt was made in 2010, wherein the Ministry of Law and Justice had released a consultation paper suggesting certain amendments to the principal Act. Overall, most of the amendments brought in the Act are a reflection of the Law Commission Report. However, further amendments have been proposed to the Act in 2018, through the Arbitration & Conciliation Amendment Bill, 2018.

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

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

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

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 remains the most significant and controversial provision. It provides that:

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

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

In New Tirupur Area Development Corporation Ltd. (“NTADCL”) v. M/s Hindustan Construction Co. Ltd. (“HCC”),71 the Madras High Court detected a distinction between the language of S. 85(2) in the Arbitration & Conciliation Act, 1940 and the amended Section 26, suggesting ‘intended’ deletion of the words ‘in relation to’ arbitration proceedings in the opening lines of Section 26 of the Amendment Act. It held that the Amendment Act would apply to court proceedings initiated after amendment, irrespective of emanating from an award made prior to amendment. A similar reasoning was adopted by the court in Raffles Design International India Pvt Ltd. v. Educomp Professional Education Ltd.72

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70. 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.

71. Application No. 7674/2015 in O.P. 931/ 2015

72.
In a diametrically opposite ruling in Ardee Infrastructure Pvt. Ltd. vs. Anuradha Bhatia, the Delhi High Court held that the term ‘to arbitral proceedings’ should be given the same expansive meaning as ‘in relation to arbitral proceedings’. This implies that the old Act would apply to arbitral proceedings commenced prior to amendment, including court proceedings emanating from such arbitral proceedings, whether initiated before or after amendment. The Court categorized cases into three buckets. The first bucket envisaged an award made and court proceedings initiated, after amendment. The second dealt with award passed prior to amendment and court proceedings initiated after amendment. The third bucket considered an award passed and proceedings initiated prior to amendment, but pending at the time of amendment. The Court held that if the term ‘arbitral proceedings’ is construed to exclude court proceedings, “then the first part of Section 26 would only deal with the first category. There would be nothing in Section 26 which pertained to the second and third categories of cases.” In Tufan Chatterjee vs. Sri Rangan Dhar, a division bench of the Calcutta High Court held that the amendments would apply to court proceedings pending under Section 9 on the date of the amendment. Needless to say that the Amendment Act would necessarily apply to court proceedings instituted after the amendment.

In 2018, the Supreme Court of India dealt with the issue of retrospectivity or otherwise of this provision. In the case of Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd., 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. 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.

Peculiarly, after arguments had been concluded, Government of India issued a press release dated March 7th, 2018, referring to a new Section 87 in a proposed Arbitration & Conciliation (Amendment) Bill, 2018. The new proposed Section 87 seeks to make the Amendment Act only applicable to “arbitrations commenced after 23 October 2015; and court proceedings initiated in relation to arbitrations, if the arbitration was itself commenced after 23 October 2015”.

The Court heavily critiqued the proposed amendments on the ground that the proposed Section 87, if approved, would result in the Amendment Act not applying to a very substantial chunk of arbitrations which can benefit from the progressive regime adopted by the Amendment Act. The court went so far as directing that its judgment be forwarded to the Law Ministry for a more thorough consideration on these matters keeping the statement of objects and reasons of the Amendment Act at the forefront. The Court held that the Law Commission Report had itself bifurcated proceedings into two parts. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced.

73. 2017 SCC Online Del 6402
74. 2016 SCC Online Cal 483
as the very object of the enactment of the Amendment Act would otherwise be defeated.

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,\(^1\) 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,\(^2\) the Supreme Court has held that the principles applicable to grant of interim reliefs under Order XXXVIII and Order XXXIX of the CPC, i.e. balance of convenience, prima facie cases, irreparable injury, and the concept of just and convenient shall also govern the grant of interim measures of protection under section 9 of the Act.

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

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

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

1. Preservation, interim custody or sale of any goods which are the subject matter of the arbitration;
2. Securing the amount in dispute in the arbitration;
3. 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
4. Interim injunction or appointment of a receiver.

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

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

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\(^1\) Sundaram Finance v. NEPC India Ltd., AIR 1999 SC 565.
Thus, 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 has created some ambiguity as the tribunal becomes functus officio once the final award has been rendered. According to the Amendment Act, the tribunal can exercise its power till the award is enforced, which runs contrary to the general notion of arbitration. Therefore, the bill proposes to remove the words “or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36”.

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 rulings in Bhatia International77 and Bharat Aluminium m.78

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 Aluminium clarified that if arbitration is seated outside India, interim reliefs cannot be sought from Indian courts. This created an issue since parties with arbitration seated outside India, would not have access to avail interim reliefs from an Indian court. International jurisdictions such as Singapore (Section 12A of the International Arbitration Act) and U.K. (Section 2 of the Arbitration Act, 1996) provided for the flexibility to approach courts even if the arbitration was not located within their jurisdiction. The present amendment brings the Act at par with the other international enactments.

In an interesting decision in Raffles Design International India Pvt Ltd. vs. Edupomp Professional Education Ltd79, 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

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

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. UE Development India Pvt. Ltd.*, 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. v. Patel Engineering Ltd.*

In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, the Supreme Court relied on *SBP & Co. v. Patel Engineering Ltd.* Following *SBP & Co. v. 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.* 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. 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.

### 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:

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81. AIR 2006 SC 450.
82. (2009) 1 SCC 267.
i. The existence, direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

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

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 Assignia-Vil JV v Rail Vikas Nigam Ltd, 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 and Madras 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 Nirmana Nigam, 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. 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 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.

84. Arbitration Petition 677/2015.
85. Hindustan Construction Co. Ltd. vs. IRCON International Ltd. [Arbitration Petition 596/2016].
86. Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited & Ors. [O.P. No. 466/2016].
87. Request Case No. 14 of 2016.
88. 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, 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.

However, the Amendment Bill states that tribunal must make the award within a period of 12 months from the date of completion of pleadings. The statement of claim and defence under this section 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.

However, the Bill 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 under Section 31 departs from the original 18% p.a. that was detailed in the principal Act by amending the rate to be 2% p.a. more than the current rate of interest, from the date of the award to the date of payment.

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

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 provides further clarifications and explanation in order to narrow the scope of challenge of an award arising out of international commercial arbitrations seated in India. For instance, the Arbitration Amendment Act provides an explanation in order to clarify that an award would be in conflict with the ‘public policy’ of India only if:

i. The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

ii. It is in contravention with the fundamental policy of Indian law; or

iii. It is in contravention with the most basic notions of morality or justice.

It is no longer possible for the Court to review the merits of the dispute in deciding whether the award is in contravention with the fundamental policies of Indian law. The tightening of the provisions seeking to challenge the enforcement of arbitral awards is yet another welcome move and should work towards imparting confidence in arbitration as an effective and speedy dispute resolution mechanism for foreign parties.

Pursuant to the ruling on ONGC vs. Saw Pipes, domestic awards can be set aside if vitiated by patent illegality. While this ground has been built into the amended Section 34 for domestic arbitrations, it has been specifically provided that patent illegality would not be available as a ground for challenging awards under international commercial arbitrations seated in India.

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

90. Xstrata Coal Marketing AG vs. Dalmia Bharat Cement Ltd. IX AD(Delhi) 617.
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 Ltd91. 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.92

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

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91. (2003) 5 SCC 705
Courts. The Arbitration Amendment Act seeks to undo this mischief of indefinite delay by now requiring parties to file an additional application and specifically seek a stay by demonstrating the need for such stay to an Indian court. In other words, a stay can be granted only on making a separate application, by a court order in writing, recording the reasons in accordance with the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908.

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

Practically speaking, this would operate as a deterrent against frivolous applications in light of the revised costs regime and also address the long outstanding issue of delay in enforcement of arbitral awards. In the case of Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd detailed earlier provided. As per the old Section 36, if an application under Section 34 was filed, the arbitral award could be enforced only after the Section 34 was refused. There was thus an automatic stay on the execution of the arbitral award by mere filing of a Section 34. The Counsel representing the judgment debtors argued that a substantive change has been made to an arbitral award, which earlier became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege enjoyed by judgment debtors.

The Court however 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, 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.

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 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.

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

93. 2013 (8) SCALE 489.
94. Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629.
Law as prescribed in *Bhatia International*

The judgment of the Supreme Court of India in *Bhatia International*\(^95\) is of great importance. The facts were that a foreign company and an Indian company had submitted their dispute to the ICC in Paris in pursuance of an arbitral clause within their contract. In order to ensure that any award rendered could eventually be enforced, the foreign company approached the appropriate court in India and asked for an interim injunction against the Indian company to prevent it from alienating its properties in any way. It was argued that Part 1\(^96\) 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*\(^97\) 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*\(^98\) and *Venture Global*\(^99\) 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.

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\(^{96}\) *Section 2 to Section 43, Arbitration and Conciliation Act, 1996.*

\(^{97}\) *(2008) 4 SCC 190.*


Law as prescribed in BALCO

The law, as laid down in *Bhatia International*\(^{100}\) and *Venture Global*,\(^{101}\) was heavily criticized as it lead to high degree of judicial intervention in International Commercial Arbitration seated outside India. This position was finally overturned in the case of *BALCO*.\(^{102}\) The Supreme Court in *BALCO*\(^{103}\) overruled *Bhatia International*\(^{104}\) 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*\(^{105}\) 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*\(^{106}\) and as understood thereafter in *Venture Global*.\(^{107}\)

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About the AIAC

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

Established pursuant to the host country agreement between the Government of Malaysia and the AALCO, the AIAC has been accorded privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organisation. The core function of the AIAC is the administration of arbitration proceedings.

The AIAC was the first centre in the world to adopt the UNCITRAL Arbitration Rules (as revised in 2013) and it has its own set of procedural rules which governs the conduct of arbitration proceedings from commencement to termination.

The AIAC suite of rules include the AIAC Arbitration Rules, the AIAC i-Arbitration Rules, the AIAC Fast Track Arbitration Rules as well as the AIAC Mediation Rules, all of which are reviewed periodically to ensure their relevance with commercial practicalities and expectations. In recognition of the AIAC’s front line stance in paving the way for innovation in ADR, the AIAC received the prestigious Global Arbitration Review Award (GAR) for ‘innovation by an individual or organisation in 2012’.

The AIAC also publishes guides and circulars to facilitate the use of and understanding of its rules. It provides institutional support for domestic and international arbitrations and other ADR proceedings. In addition, the AIAC offers hearing facilities and ancillary administrative services.

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

The AIAC is presently led by its Director (Acting), Mr Vinayak P. Pradhan and functions under the auspices of the AALCO helmed by its Secretary-General, H.E. Prof. Dr. Kennedy Gastorn. The AIAC also has an advisory board, customarily chaired by the Attorney General of Malaysia, and comprises of renowned foreign and Malaysian arbitration practitioners.
2018 marked the 40th year of the AIAC’s existence. Having grown to become one of the region’s leading ADR centres, the Centre officially rebranded itself from the Kuala Lumpur Regional Arbitration Centre to the Asian International Arbitration Centre on 7th February 2018.

Despite its re-branding, the AIAC is still the same organisation it has always been, dedicated to providing high standards of quality in the provision of ADR services, and at competitive rates. The AIAC remains loyal to the heritage it has built, being one of the key driving reasons for the retention of its iconic blue triangle in its new logo.

Part of the AIAC’s extensive blueprint for the future includes its recent expansion into holistic dispute management and dispute avoidance through the development of the AIAC’s Standard Form Contracts, designed to minimize the occurrence of disputes between contracting parties and to avoid them altogether at the outset of their commercial (construction) transactions.

Over the past nine years, the AIAC has seen record growth of over 2,500 cases to date, collaborated with various institutions, signed 48 Memorandums of Understanding, and conducted over 350 capacity building events for more than 12,000 participants. The AIAC continues to shape the ADR arena through the training programmes in niche areas such as sports arbitration and domain name disputes. The AIAC’s Director (Acting) also acts as the Chairman of the Asian Domain Name Dispute Resolution Centre (ADNDRC), an honourable recognition of the Centre’s continued dedication to this area. The AIAC’s new brand identity signals its continued passion to broaden boundaries, beyond the horizon. The new identity will spearhead an era of development and expansion, for the AIAC and the global ADR ecosystem.

Key highlights for 2019 include the 3rd edition of the AIAC-ICC Pre-Moot of the 26th Willem C. Vis International Commercial Arbitration Moot; the 2nd Asia ADR Week which will provide a platform for a host of local and foreign ADR practitioners to share their experiences and key insights on the latest ADR trends and the AIAC 2019 September Sports Month. The AIAC will also be organizing evening ADR
talks, seminars, lectures and a number of other ADR programmes on topical issues which will feature in its calendar for 2019.

I. The Growth of ADR

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

As a result, the growth and development of ADR has prompted responsive change, growth, development and modernisation of the respective frameworks around the world. Naturally, the economic impact of being an ADR “hub” makes it valuable both in the precipitation of investment but also in the development of technically advanced systems promoting efficient dispute resolution. Perhaps the greatest achievement of ADR is the growth and wholesale adoption of arbitration. It has become a global tool that has provided clarity, finality, neutrality and added a breadth of expertise and autonomy that overshadows what have become old-fashioned methods of resolving disputes.

Malaysia is no different. The greater part of the last decade has been dedicated to integrate ADR, enhance Malaysia’s arbitration profile and to establish Malaysia as a safe seat for arbitration. There is little doubt that this has been achieved. In 2018, the AIAC dealt with over 900 cases, with, for example, a 10% increase in the number of Adjudication matters.

As a result, this increase in adjudication matters has replaced many of what would otherwise be domestic arbitrations, a testament to the success and effectiveness of the adjudication framework.

To more adequately reflect the increase in arbitration, one can consider our arbitration statistics where since 2016, the average number of arbitrations has increased by 35%. The number of arbitrators is also at an all-time high, with 1,236 empanelled arbitrators and counting. Malaysia’s ‘fly-in fly-out’ provision remains particularly appealing for arbitrators, as there is no withholding tax.

The AIAC has had over 3,000 bookings of its facilities in the past three years. Bangunan Sulaiman was gazetted as a heritage site in 1983, located conveniently close to the railway station and a stone’s throw away from the Central Station, Kuala Lumpur’s transportation hub. In 2019, the historical Bangunan Sulaiman building itself was gazetted as a heritage building by the Ministry of Tourism, Arts and Culture.

Coupled with cutting edge features and facilities, the AIAC remains one of the most affordable options for parties as it offers competitive rates as a venue for hearings and takes the lead in the quantity of its offering of hearing rooms, in the region and beyond, as reported in the GAR Survey of 2nd January 2019. Parties can also benefit from any special arrangements or individualised services they may require for their hearings, upon request.
Cheapest Facilities Amongst All Arbitration Institutions as Surveyed by GAR in the Guide to Regional Arbitration – Volume 7 (2019)

Most Number of Hearing Rooms Amongst All Arbitration Institutions as Surveyed by GAR in the Guide to Regional Arbitration – Volume 7 (2019)
II. The AIAC and India

India has already marked its presence as one of the leading economies in the world. It is considered to be one of the most attractive destinations for commerce and inbound investment. Parties that engage in international commerce require effective dispute resolution mechanisms to mitigate their business risks and provide legal certainty on the enforcement of their contractual rights. Against that background, the need for proper appreciation and understanding of the various fora for dispute resolution, be it arbitration or otherwise, has become increasingly prevalent, and the AIAC has recognised this as a result of multiple collaborations both domestically and internationally.

With the AIAC stepping up to fill this lacuna with its efforts in promoting and increasing awareness on ADR, there has been overwhelming interest from Indian nationals of varying educational and working backgrounds to be a part of that process. In that respect, the AIAC has benefitted from the expertise of Indian nationals and constantly has staff from India contributing substantially to the projects undertaken at the AIAC and its successes. The AIAC’s former Deputy Director hailed from India and was an integral part of the AIAC’s growth in her 5-year tenure. Moreover, in 2018, the AIAC had two international case counsels from India and it awarded at least 5 internships to students from India, significantly more than from any other country. Additionally, the Annual AIAC-ICC Pre-Moot has seen India heavily represented, and successfully so. Indeed, both the champion and the runner up for the 2nd edition of the AIAC-ICC Pre-Moot for the 25th Willem C. Vis International Commercial Arbitration Moot were teams from Indian Universities – Gujarat National Law University and National Law University of Delhi.

Indian Participation in the AIAC-ICC Pre-Moots

The AIAC-ICC Pre-Moot has witnessed excellent representation by students from Indian law schools. Last year, the 2018 AIAC-ICC Pre-Moot saw the participation of teams from Amity Law School, Dr Ambedkar Government Law College, ILS Law College (Pune), Gujarat National Law University, Institute of Law at Nirma University, National Law School of India University (Bangalore), National Law University (Delhi), National Law University (Jodhpur), and NALSAR University of Law. This 2019 edition of the AIAC-ICC Pre-Moot will see even greater participation from Indian students with 19 different universities having registered teams for the event. We expect the Indian teams to perform very well once again. Further showcasing the talent coming out of India was the 1st AIAC Young Practitioners Group (YPG) Essay Competition, which saw entries coming in from both domestic and international practitioners and students. The 1st prize was won in both categories (Young Practitioner and Student) by participants from India, each earning RM3,000 and publication in the AIAC Newsletter.

The AIAC has also assisted in the organisation and delivery of various conferences in India. Our counsels and upper management have recently been involved in the following:

1. “Selected Items on the Agenda of the International Law Commission” (Delhi);
2. 4th General Meeting on “Law of the Sea (Marine Bio-Diversity)” (Delhi);
3. Working Group on “International Law in Cyberspace” (Delhi);
4. “Violations of International Law” (Delhi);
5. 3rd Meeting of Delegation of AALCO Member States (Delhi);
6. “National Initiative Towards Strengthening Arbitration and Enforcement in India” (Delhi);
7. The Society of Construction Law 7th International Conference, “Constructing Law of Construction and Dispute Resolution” (Delhi);
8. Engaging Asia Arbitration Summit, “Sharing the Experiences of Established International Arbitration Seats” (Delhi);
Around the World” (Delhi);
10. “Ushering in Sustainable Development of
Arbitration in India” (Mumbai);
11. “International Conference on Contemporary
Issues in International Arbitration” (Pune);
12. 2nd PCA India Conference (Delhi);
13. IITARB Conference, “International and
Domestic Arbitration: Current Scenario
and Way Ahead” (Chennai);
14. NLU Jodhpur, “3rd CARTAL Conference on
International Arbitration” (Jodhpur);
15. MCIA 3rd Annual Conference (Delhi); and
16. AIAC’s India Roadshow on Domain Name
Disputes (Delhi).

In addition to the above, the AIAC has also
signed a MoU with the Government Law
College, Mumbai, which collaboration, the
AIAC looks forward to fostering.

III. The Future of Arbitration in
the Region

A. Domain Name Dispute Resolution

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

To wit, as of the first quarter of 2018, there were
approximately 333.8 million domain name
registrations across all top-level domains (TLDs).
There is no denying that with such a colossal
number of registered domain names, there are
ought to be disputes of trademark infringement.
And the numbers are not surprising at all.
There were at least 255,065 unique phishing
attacks worldwide and, according to the latest
statistics, the World Intellectual Property
Organization (WIPO) registered 5,655 new
cases of cybersquatting in 2018. The numbers
are staggering and at this juncture, many more
challenges like phishing, domain shadowing,
and typo squatting are knocking at our doors.

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

Among those institutions focused on the Asian
region are the Asian Domain Name Dispute
Resolution Centre (ADNDRC) and the Malaysian
Network Information Centre Berhad (MYNIC).

The ADNDRC comprises of four Asian offices
- the Hong Kong International Arbitration
Centre (HKIAC), Korean Internet Address
Dispute Resolution Committee (KIDRC), China
International Economic and Trade Arbitration
Commission (CIETAC), and the AIAC. Under the
umbrella of the ADNDRC, the AIAC administers
disputes related to all top-level domains (e.g.
.com, .net, .org domains) under the Uniform
Domain Resolution Policy (UDRP). Starting from
1st January 2018, the Secretariat of the ADNDRC
has been the AIAC. Presently, the Chairman
of the ADNDRC is Mr. Vinayak P. Pradhan,
the Director (Acting) of the AIAC. 2018 saw a
number of ADNDRC road shows, events and
conferences throughout Asia to raise awareness
of domain name dispute settlement in general
and the products that the ADNDRC institutions
offer. In 2019, the AIAC will continue in its
efforts to promote the work of the ADNDRC.

MYNIC, on the other hand, is an agency of the
Ministry of Communications and Multimedia
Malaysia (KKMM) and the sole administrator
of *.my* domains. As far as “.my” domains are
concerned, MYNIC appointed the AIAC as the
dispute resolution service provider for the “.my”
domain name. Such domain name disputes are
governed and administered in accordance with
the MYNIC’s Domain Name Dispute Resolution
Policy (MYDRP) and AIAC Supplemental Rules.
Advantages of bringing domain names disputes to the AIAC

1. The AIAC administers disputes under the ADNDRC rules in generic top-level domains and also offers the resolution of *.my* domain name disputes (amongst others), through the Malaysian Network Information (MYNIC) rules and policy;

2. Domain name disputes are usually settled in less than 60 days at AIAC, being one of the most time and cost-effective providers in Asia;

3. DNDR is the fastest form of dispute resolution for online trademark infringement;

4. The AIAC provides dispute resolution services of sensitive domain names using Sensitive Name Dispute Resolution Policy (SNDRP) governed and administered in accordance with .my DOMAIN REGISTRY’s Sensitive Name Dispute Resolution Policy (SNDRP), Rules of the *.my* DOMAIN REGISTRY’s SNDRP and AIAC Supplemental Rules;

5. The AIAC has the most reputed and experienced experts in its DNDR panel, which also comprises 62% of international panellists;

6. The DNDR proceedings at AIAC are totally hassle-free, with only a form to fill in order to file a complaint;

7. The AIAC, in collaboration with Brunei Darussalam Network Information Centre (BNNIC), administers all disputes pertaining to either the registration or use of *.bn*, the Brunei country-code top-level domain name;

8. The AIAC has a top-notch and expert legal team administering domain name disputes; and

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

B. Amendments to the Malaysian Arbitration Act

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

Malaysia has to date established itself as a prominent arbitral jurisdiction. The Arbitration Act 2005 has kept with the leading global standards in arbitration, and with its most recent amendments in 2018, has defined a framework that facilitates efficient conduct of arbitration proceedings and enforcement of awards.

On 8th May 2018, the Arbitration (Amendment) Act (No.2) Act 2018 (the “Amendment Act”) came into force, heralding a new era of arbitration in Malaysia. The Amendment Act incorporates the 2006 revision of the UNCITRAL Model Law as well as elements of arbitral laws of leading jurisdictions in the region and worldwide.

The amendment of Section 2 of the Arbitration Act 2005 and the introduction of Section 19H clarify the status of an emergency arbitrator and the orders that they grant. Emergency arbitrators are necessary where parties may not have time to appoint a tribunal, let alone to apply for a decision of the court. In such instances, parties can now appoint an emergency arbitrator using the AIAC Arbitration Rules 2018. These emergency orders will also be recognised and enforced in courts.

Parties can now also choose any representative of their liking to represent them in the arbitration proceeding (see Section 3A of the Arbitration Act 2005). This highlights the principle of party autonomy since parties are not restricted to only choosing lawyers as their representatives. However, for arbitrations based in Sabah and Sarawak, if a party seeks to...
appoint a legal representative in the arbitration, that representative will need to be registered as a practitioner in Sabah or Sarawak – West Malaysian and/or foreign practitioners are not permitted to represent parties to arbitrations based in Sabah or Sarawak.

Section 9 of the Arbitration Act 2005 now clarifies that arbitration agreements will be ‘in writing’ if they are concluded by email, fax and/or any other electronic communications. This amendment modernises the Arbitration Act 2005 by taking into account economic realities as well as the increase in the use of technology in trade and the formation of contracts.

The Amendment Act also made changes to Sections 11 and 19 of the Arbitration Act 2005 and added the new Sections 19A to 19J to the Arbitration Act 2005. These amendments will ensure that the provisions relating to interim measures in the Arbitration Act 2005 are in line with international standards. This is because the arbitral tribunal now has predominately the same powers as the High Court to award interim measures.

The Amendment Act also reinstates the parties’ rights to choose the law or the rules of law applicable to the substance of a dispute (see Section 30 of the Arbitration Act 2005). The tribunal may now also decide the dispute according to the principles of equity and conscience, if the parties should agree to same.

The Amendment Act has also clarified that the arbitral tribunal is empowered to grant both pre- and post-award interest in addition to any sums that are in dispute. This amendment overturns a recent Federal Court decision which determined that pre-award interest was not permissible under the Arbitration Act 2005.

Confidentiality is a hallmark of arbitration but this is not included in many institutional rules or in national arbitration laws. The Amendment Act introduces specific provisions relating to confidentiality which means that the Arbitration Act 2005 is no longer silent on the issue of confidentiality (see Sections 41A and 41B).

The Amendment Act has also repealed Sections 42 and 43 of the Arbitration Act 2005 which previously had enabled parties to refer a question of law arising from the arbitration to the High Court after an award has been made.

Malaysia is in an advantageous position to service the dispute resolution needs of the region due to its strategic position in the heart of the Asia-Pacific. The amendments to the Arbitration Act 2005 have three distinct purposes – they improve the clarity of the Arbitration Act 2005 for its end users, they increase party autonomy, and they harmonise the powers of the High Court and arbitral tribunal to award interim measures. These amendments have the combined effect of enhancing Malaysia as a safe seat for arbitration.

C. AIAC Arbitration Rules 2018

The AIAC Arbitration Rules 2018 stand as a calculated response to the recent trends of costs and length optimization of arbitration proceedings. The AIAC Arbitration Rules 2018 have been streamlined, taking into account the need for clarity, ease of users and the exigencies in the
resolution of disputes. The AIAC Arbitration Rules 2018 introduce more sophisticated provisions as to the arbitral tribunal's power to award interest on any sums that are in dispute, that now include the express power to determine the applicable rate and method of calculation, be it simple or compound. Furthermore, in view of new emerging economies and particularly in view of the increasing number of cross-border transactions which do not opt to apply the US dollar, the AIAC Arbitration Rules 2018 allow parties to an international arbitration to pay arbitral tribunal's fees and administrative fees in currencies other than USD. This move also reflects on the AIAC standing as a truly global arbitral institution.

The AIAC Arbitration Rules 2018 incorporate certain standard definitions that were previously implicit or expressed in different parts of the structure of the old rules, thus becoming a clearer set. For instance, international arbitration has now been defined in the preliminary part. It is thus clearer in being applicable to the entirety of the rules, as opposed to its earlier location within the provisions for appointment of arbitrators in international arbitration.

Complex arbitral proceedings may involve multiple parties. Addressing this step away from conventional two-party arbitrations, the AIAC Arbitration Rules 2018 allow for the joinder of third parties to the arbitration proceedings. This may be requested either with the consent of all parties to the dispute (including the third party) or by establishing that the third party is prima facie bound by the arbitration agreement. An application for joinder will either be decided upon by the arbitral tribunal or, prior to the constitution of the arbitral tribunal, by the Director of the AIAC.

The AIAC Arbitration Rules 2018 provide clear guidelines for the consolidation of different arbitral proceedings to account for particular concerns resulting from consolidation, such as the pre-requisites for consolidation, the constitution of the arbitral tribunal & possible challenges to enforcement.

In furtherance of the 'light touch approach' being taken by the AIAC, the AIAC Arbitration Rules 2018 also seek to avoid errors in form & calculations made in the award by providing for a technical review of awards. This will reduce the scope for difficulties in compliance and enforcement and help maintain a legible and clear standard for awards made pursuant to AIAC administered arbitrations. In doing so however, the AIAC takes the approach of non-interference and therefore limits scrutiny to a mere technical review.

The AIAC Arbitration Rules 2018 create a self-contained code in relation to emergency arbitrators (Part III, Schedule III). This caters to the growing importance of emergency proceedings and the various concerns that they may raise, without affecting the working of the normal arbitral procedures as provided for in Parts I & II.

The AIAC Arbitration Rules is available on the AIAC's website at: https://www.aiac.world/Arbitration-Arbitration

D. AIAC i-Arbitration Rules 2018
According to the World Bank Group, Islamic finance has emerged as an effective tool for financing development worldwide, including in non-Muslim countries, and has already been mainstreamed within the global financial system.

Recognizing the market demand for a flexible, yet Shariah-compliant dispute resolution mechanism, the AIAC introduced its award-winning i-Arbitration Rules in 2012. Since then, the AIAC i-Arbitration Rules have undergone several revisions in line with the AIAC efforts to accommodate its products to the fast-changing dispute resolution landscape.

However, throughout these years, the AIAC has maintained the unique feature of its i-Arbitration Rules, namely, the arbitral tribunal’s right to refer issues of Shariah law to the Shariah Advisory Council or a Shariah expert for determination. The reference procedure enables parties to arbitrate their dispute based on the Shariah principles yet reinforcing parties’ autonomy to nominate the arbitral tribunal. Although traditionally, enforcing arbitral awards comprising determinations on Shariah principles was oftentimes problematic, awards under the AIAC i-Arbitration Rules are internationally recognised and are enforceable in all States that have ratified the New York Convention, 1958.

In addition to the above advantages, parties arbitrating their dispute under the AIAC i-Arbitration Rules enjoy the administrative services and assistance of the AIAC. The AIAC i-Arbitration Rules are also offered in multiple languages to accommodate international parties, including English, Bahasa Malay, Bahasa Indonesia, Arabic and Mandarin. The latest revision of the AIAC i-Arbitration Rules was released on the 9th March 2018 and incorporated the latest amendments made to the AIAC Arbitration Rules to ensure consistency of interpretation and ease of reference.

The latest revision of the AIAC i-Arbitration Rules is available on the AIAC’s website at: https://www.aiac.world/Arbitration-i-Arbitration

**E. AIAC Fast Track Arbitration Rules 2018**

Disputes dragging on for years mean long periods of uncertainty as well as internal and external costs for companies. In case of highly complex disputes or when the amount in dispute is hundreds of millions of dollars, such long duration may be justified. However, for very straightforward matters, such as the non-payment for delivered goods, or when the amount in dispute is small, expedited proceedings are often more suitable.

The AIAC has a separate set of arbitration rules, the Fast Track Arbitration Rules (the “Fast Track Rules”). On 9th March 2018, the AIAC released its new Fast Track Rules that have been re-designed to meet international standards and tailored specifically to straightforward and rather small matters. The Fast Track Rules provide for shorter time limits to ensure the speedy
resolution of disputes: arbitration proceedings under the Fast Track Rules are designed to last no longer than 180 days. The arbitral tribunal in principle has only 90 days from the start of the arbitration until the conclusion of the oral hearing. Thereafter, the arbitral tribunal has another 90 days to draft the award. This 90 days’ time limit guarantees that the arbitral tribunal has the necessary time to deliberate and draft an arbitral award of the highest quality.

The Fast Track Rules should be flexible and adjustable to the circumstances of each case. As such, the unique feature of the earlier revision of the Fast Track Rule, namely a procedure where the entire proceedings are based on documents, has been retained in the new set of Rules. This procedure is suitable for the least complex arbitrations or where no witness testimony is required. Under the documents only procedure, the arbitral tribunal will render the award even faster as there will not be any oral hearing.

The AIAC takes the approach that an arbitral institution should not heavily interfere with arbitration proceedings. As such, the AIAC does not apply the Fast Track Rules automatically, but only when the parties have explicitly agreed upon their application. Furthermore, the AIAC fully respects the parties’ decision regarding the number of arbitrators (one or three) and does not impose a sole arbitrator in Fast Track Rules arbitrations by default. This is in stark contrast to other arbitral institutions, many of which apply a higher level of interference. This practice has already resulted in problems related to the enforcement of arbitral awards.

The Fast Track Arbitration Rules are available on the AIAC’s website at https://www.aiac.world/Arbitration-Fast-Track-Arbitration

F. AIAC Mediation Rules 2018

Mediation, as an alternative or a supplement to arbitration, has been gaining momentum over the course of past years both globally and in the region. Indeed, not all disputes or differences are suitable for arbitration, some require less formal dispute resolution techniques such as mediation. The mediation provides

Alternative dispute resolution mechanisms, such arbitration and mediation, have become increasingly common way of settling disputes, both globally in in the region. The mediation, provides an alternative avenue to amicable settlement in a way that preserves business relations.

On 9th March 2018 the AIAC introduced its fully revamped Mediation Rules. The AIAC Mediation Rules 2018 provide a flexible framework for the conduct of mediation, yet effectively deal with particularly complex situations that may arise (e.g. confidentiality concerns, non-cooperation by one of the parties, etc.), thus ensuring time and cost-efficient settlement.

Pursuant to the AIAC Mediation Rules 2018, the parties are now free to commence mediation either where there is prior agreement to mediate or in the absence of such prior agreement thought the model submission agreement or by making a proposal to mediate.

The mediator or mediators (as the case may be) are now confirmed or appointed by the Director of the AIAC and in so doing, the Director takes into account the parties’ agreement as to the qualifications and attributes of potential mediator. The mediator or mediators appointed shall at all times remain independent and impartial to assist parties in reaching a balanced, ‘win-win’ settlement.

The med-arb procedure incorporated in the AIAC Mediation Rules 2018 allows parties to convert their settlement agreement into a consent award rendered pursuant to the AIAC Arbitration Rules 2018.

In its continued quest for innovation and excellence, the AIAC catered the Arbitration Rules 2018 to most types of disputes or differences, including investor-State disputes, being the first institution in the region and globally to model its rules after the IBA Rules for Investor-State Mediation.

The AIAC Mediation Rules 2018 are available on the AIAC’s website at https://www.aiac.world/Mediation-Mediation
AIAC’s Standard Form of Contract (SFC) is a suite of standard form contracts inspired by the prevalent issues plaguing the construction industry, aimed at filling the gaps of existing standard form building contracts in governing relationships, rights and duties of parties to a building construction project.

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

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

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

**Design & Build SFC**

On 3rd July 2018, the AIAC introduced an addition to its SFC suite – the Design & Build SFC. By launching the Design & Build SFC, the AIAC reacts to the increasing popularity of design and build contracts. Successful coordination of construction projects significantly depends on the effective and efficient administration of the contractual chain, including the design and build contracts entered into by the Contractors and Sub-Contractors. The Design and Build Contracts are designed to complement the initial set of the SFC and provide smooth administration of contractual relationships.

The Design & Build SFC addresses the problems in the construction industry from its grassroots. It incorporates the principles of contractual predictability as well as time and cost-efficiency. This will prevent deadlocks in construction projects and encourage the continuity of works and working relationships in spite of any differences arising during a construction project. In other words, at every phase of the contract, the focus remains on the project itself – not ancillary disputes that may arise.

Some of the key features of the Design & Build SFC include:-

- the possibility to maintain “Single-Point Responsibility” on the D&B Contractor;
- the Contractor’s responsibility for all aspects of the works, such as quality of materials, quality of workmanship and standard of design, etc.;
- the Employer’s responsibility for the general contract administration and auditing of the Contractor’s works;
- the finalisation of the Account on an elemental basis; and
- compliance with the Construction Industry Payment and Adjudication Act and, applicable GST provisions.

**2019 SFC**

On 28th November 2018, the AIAC launched its 2019 suite of the Standard Form of Building Contract and Sub-Contract (AIAC 2019 SFC).

The AIAC 2019 SFC is a comprehensive unified contract that does away with the distinction between With and Without Quantities. Users can now customise the contract to meet their specific needs. Further, the AIAC 2019 SFC provides an option for the Parties to select...
a Contract Administrator (CA). If no CA is appointed, then the Architect will be the CA. The dispute resolution sections of the AIAC 2019 SFC incorporates the AIAC Arbitration Rules 2018 and the 2005 Arbitration Act (as amended in 2011 & 2018) and provides for adaptability to the latest tax regime.

The AIAC 2019 SFC will be up and running for customisation on the AIAC Standard Form Contracts (SFC) web portal (http://sfc.aiac.world). Through the AIAC SFC web portal, users will have the ability to customise, save, store and share completed contracts. Registered users may also save incomplete contracts for later completion. The website is being improved to include a tutorial video to provide the users with a step-by-step walkthrough of customising the contract.

Since the inception of the Standard Form Contracts, there have been 19,000 visitors to the AIAC SFC web portal. Also, a total of 46,000 AIAC SFC forms have been downloaded with 250 contracts customised. Further, there has been 3,500 roadshow delegates with over 15,000 copies disseminated and 6 in-house company trainings.

H. Sports arbitration

Asian passion for sports has played a pivotal role in removing the Eurocentric lens through which much of sports history has been viewed. Today, Asia is quite notably a huge market for sports with a dominating fan base, and stands as preferred venue for many sports activities as seen with the 2018 Winter Olympics in PyeongChang, the 2020 Summer Olympics to be held in Tokyo, 2022 World Cup to be held in Qatar and the 2022 Winter Olympics to be held in Beijing. Considering this wide landscape of sports activities in Asia, a marked increase in sports disputes is foreseeable in the near future.

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

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

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

Having received international acclaim and recognition, in September 2017, AIAC conducted the second edition of its Certificate Programme in Sports Arbitration. The third edition of this event was held in September 2018. Both sessions were well attended by candidates from all over the world including UK, China, Jamaica, Bangladesh, India, Kenya, Trinidad & Tobago, Indonesia, Singapore and Malaysia, and they both proved to be a success with candidates who successfully completed the course, going to play significant roles in the resolution of sporting disputes in their respective countries.

In September 2018, the AIAC launched its very first “Sports Month”, a month dedicated to the promotion and development of sports law and sports dispute resolution which includes sports arbitration through the hosting of various interactive sports-related events and talks. The AIAC’s Sports Month kicked off with the inaugural action-packed AIAC Futsal Tournament which witnessed __ teams
registering and participating for a chance to win the coveted AIAC Futsal Tournament Trophy. This was followed by a viewing session of the independent documentary “The War on Doping” – a film about the use of performance-enhancing drugs as chemical shortcuts to victory, fame and glory. The AIAC was delighted to have The War on Doping film producer, Bjorn Bertoft be present at the AIAC to introduce the documentary and speak on the matter of doping. Bjorn also shared a recorded greeting by Professor Arne Ljungqvist, Honorary Member of the IOC and Vice-Chairman of the World Anti-Doping Agency (WADA) who was featured in the documentary. On 21st September 2018, the AIAC hosted “The Great Sports Debate” – a sports arbitration moot presided by a three-member panel of prominent arbitrators including sports arbitrator, Dato’ Ambiga Sreenevasan and Mr Anangga W. Roosdiono, CAS Arbitrator and Senior Partner at Roosdiono & Partners (a member of ZICO Law). The moot problem was premised upon a doping violation upon which an infringement notice had been issued by a sports federation to a futsal athlete, in what ended up being an entertaining evening!

On 28th September 2018, the AIAC held its International Sports Law Conference 2018 (SLAC 2018) themed - Sports Disputes: Block & Tackle, officiated by Malaysian Minister of Youth & Sports, Y.B. Syed Saddiq and IOC Member, H.R.H. Tunku Tan Sri Imran. SLAC 2018 featured innovators and visionaries in the world of sports law and touched upon the various nuances of sports law and resolution of sports disputes. From a distinctly Asian lens, the SLAC 2018 provided a contemporary and futuristic outlook on the world of sports law. The conference had five interactive and diverse sessions discussed by leading experts, engaging in topics ranging from Malaysia’s role as a sporting nation to the global harmonisation of doping rules and regulations as set forth in the World Anti Doping Code (WADC). The AIAC was particularly honoured to include a recorded special address by Professor Richard McLaren OC, the Canadian author of the famed 2016 “McLaren Report” presented to WADA.

For 2019, the AIAC will continue undertaking initiatives to promote sports arbitration across Asia including amongst others, its hosting of the AIAC Sports Month 2019.

IV. Concluding Remarks

For the second year in a row, the AIAC will be hosting its highlight event, the ASIA ADR Week between 27th June 2019 and 29th June 2019 titled, “The Kintsukuroi Perspective: The Asian ADR Revolution”. Drawing inspiration from the Japanese philosophical art of Kintsukuroi - with the ‘cracks’ and imperfections of pottery denoting costly and harmful commercial disputes, this year’s ASIA ADR WEEK 2019 has been designed to highlight the multi-faceted global order and the constant evolution of international commerce in the context of ADR. Spanning across three days and tapping from a diverse and mixed culture of expertise and specializations from all over Asia, the ASIA ADR WEEK 2019 is set to showcase the versatility of ADR in responding to the ever-changing demands of globalization and will explore and highlight the various ways in which ADR can be used as a tool to mend the imperfections of the global economy i.e. ‘to repair with gold’. Recognizing also that the construction industry represents a huge demographic of investments in infrastructure development and dispute resolution across the world, the ASIA ADR WEEK 2019 includes an entire day dedicated to the construction industry at the CIPAA Conference, dealing specifically with statutory adjudication under the Construction Industry Payment and Adjudication Act 2012, developments arising from judicial pronouncements in respect thereof and the newly launched suite of Standard Form Contracts 2019.

The history of global commerce is one that is marked by epochal changes. It is only in acknowledging these changes and adapting accordingly to 21st century practices that global commerce can advance uninhibited by avoidable conflict and struggle. The AIAC is very proud to be spearheading the growth and development of arbitration in the region from the ground up.
India has shown to be one of the driving forces for this growth and development, and there is little doubt that the existing collaboration between India and the AIAC will continue to thrive in the coming years. We certainly look forward to an exciting period ahead in the short, medium and long term, and we welcome any and all inquiries and expressions of interest.

To learn more about the AIAC, please visit our website at http://www.aiac.world, or feel free to contact us at:

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T: +603 2271 1000
F: +603 2271 1010
E: enquiry@aiac.world

If you are a journalist or a researcher with an enquiry, please contact the AIAC communications team at communications@aiac.world.
Our Expertise

Our International Dispute Resolution & Investigations Practice

In the contemporary business and legal world, commerce has transcended national boundaries to enter into a realm of globalization. Interestingly, it also stands at an intersection of technology and artificial intelligence, contributing to greater ease of doing business. However, this is accompanied by a surge in disputes of complex natures, high stakes, innumerable stakeholders, multiple areas of impact, interplay of different remedies and distinct fora.

At Nishith Desai Associates (“NDA”), the Dispute Resolution Team (“Team”) believes that navigating the cross-border complex dispute resolution landscape demands high level of professional expertise along with sound business acumen. The goal is to have a vision to resolve, and a mission to achieve long-term gain for clients, with minimum setback. The members spread across Mumbai and New Delhi form a power-packed team of highly motivated individuals with capabilities of dealing with matters single-handedly from start to finish. The Team specializes in anticipating, preparing and delivering solutions that help the commercial world arrive at effective, efficient and expeditious resolution of disputes. Known to be at the helm of upcoming and niche technologies, the Team rides on legal disruptions and resolves a wide range of new-age disputes frequently noticed in Technology Media Telecom clientele. For its passion and innovation, the Team has earned an indomitable reputation of being Tier 1 in Dispute Resolution by renowned legal directories.

The Team is most sought after by clients for its internal advocacy skills - to frequently represent in courts / tribunals / adjudicatory fora / arbitral tribunals among others. The Team is adept at drafting pleadings, leading interim and final hearings, has special focus on examination and cross-examination of witnesses in commercial litigation and arbitration proceedings. Various matters listed in this Statement have witnessed active and frequent representation of the members at several stages of dispute resolution. In addition to advocacy skills, the Team handles a wide array of pre-litigation advisory mandates involving an exhaustive understanding of the interplay between international and national laws, potential risks, and range of impact. We are also consulted regularly to provide expert opinion on Indian law in international courts.

International Commercial Arbitration remains our forte. We primarily represent foreign clients who invest in India, work in India, or work with Indian players, in contentious situations. We are consistently engaged to appear before foreign and domestic seated arbitral tribunals, often administered by globally renowned international arbitral institutions including London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), and International Centre for Dispute Resolution (ICDR-AAA) amongst others. Our clientele spans various industries such as energy, mining, infrastructure, aviation, machinery & equipment manufacturing, telecom, media, technology, entertainment, pharma and life sciences, franchising, funds, financial services and fast-moving consumer goods among others.

The Bilateral Investment Treaty Arbitration (BIT) Group has a strong focus on international investment treaty arbitration. The BIT Group comprises of internationally experienced individuals with expertise in international investment law and public-private international law. It regularly advises foreign investors on issues surrounding bilateral investment treaty claims and regulatory policies of Indian government. It also specializes in assessing claims and advising clients on third-party funding, whilst regularly interacting with third-party funders for arbitration financing.
Our Investigations Group has developed strong focus and expertise in a wide variety of white collar, internal investigations and enforcement actions, concerning various kinds of civil and criminal matters across various industries. We have strong expertise in handling corporate frauds, white collar crimes/economic offences in various matters related to, amongst other things, violation of foreign exchange laws, securities law, data theft, intellectual property theft, insider trading, breach of fiduciary responsibilities, corporate defamation, corporate law non-compliance, money laundering and corporate corruption. We have advised and assisted clients including international corporations and their senior employees, in several investigations including under Foreign Corrupt Practices Act and U.K. Bribery Act. We are often involved at the initial stages of an inquiry or investigation to get to the bottom of what transpired and ensure that the interests of the clients are protected.

The Corporate Litigation Group has developed a strong focus on law relating to corporate securities, companies, re-structuring, insider-trading and the Insolvency & Bankruptcy Code. The Team has in the erstwhile regime, successfully advised secured and unsecured creditors, large corporations, investment and commercial banks, international hedge funds etc., in relation to winding up and debt recovery proceedings. India has seen a large influx of foreign investments particularly by Foreign Portfolio Investors ("FPI") through secured and unsecured debt in the form of Non-Convertible Debentures ("NCD"). With strong background and prior experience of the erstwhile regime, the Team has successfully managed to obtain orders from various Courts, Debt Recovery Tribunals ("DRT"), and National Company Law Tribunals ("NCLT") across India for its clients. Such proceedings handled by NDA provided much needed relief to investors who had infused funds in Indian companies by way of debt. The Corporate Litigation Group strives to provide clients with creative and pragmatic solutions and effective strategies to deal with cases of debt defaults and enforcement of security.

The Team also provides Litigation Project Management services and provide strategic and legal assistance to clients involved in outbound (from India) litigation and also manage global litigations of clients by applying latest project management techniques. It has advised and assisted on several global litigation and outbound litigations for clients involved in media, entertainment, infrastructure, franchising, machinery and equipment manufacturing, outsourcing, art funds and financial services in respect of disputes in United States, Belgium, Singapore, United Kingdom, Germany, Switzerland, among others.
The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

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Research @ NDA

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

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

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

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

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to Intellectual Property.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular “Hotlines”, which go out to our clients and fraternity. These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our Lab Reports dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

Although we invest heavily in terms of time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45 minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. Imaginarium AliGunjan is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire ‘blue sky’ thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at research@nishithdesai.com
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Dispute Resolution in India