International Commercial Arbitration

Law and Recent Developments in India

May 2019
International Commercial Arbitration

Law and Recent Developments in India

With inputs from - Singapore International Arbitration Centre (SIAC)

May 2019
About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium 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.

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

NDA has been the proud recipient of the RSG - FT award for 2019, 2017, 2016, 2015, 2014 as the 'Most Innovative Indian Law Firm' and in 2016 we were awarded the ‘Most Innovative Law Firm - Asia Pacific,’ by Financial Times (London).

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

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

- **FT Innovative Lawyers Asia Pacific 2019 Awards**: NDA was ranked second in the Most Innovative Law Firm category (Asia-Pacific)
- **Benchmark Litigation Asia-Pacific**: Top tier for Government & Regulatory and Tax 2019, 2018
- **AsiaLaw 2019**: Ranked ‘Outstanding’ for Technology, Labour & Employment, Private Equity, Regulatory and Tax
- **Who's Who Legal 2019**: Vikram Shroff, HR and Employment Law- Global Thought Leader; Nishith Desai, Corporate Tax and Private Funds and Vaibhav Parikh, Data Practiceas Thought Leaders- India
- **Merger Market 2018**: Fastest growing M&A Law Firm
- **Asia Mena Counsel’s In-House Community Firms Survey 2018**: Only Indian Firm for Life Science Practice Sector
- **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”
International Commercial Arbitration

Law and Recent Developments in India

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

Disclaimer

This report is a copy right of Nishith Desai Associates. No reader should act on the basis of any statement contained herein without seeking professional advice. The authors and the firm expressly disclaim all and any liability to any person who has read this report, or otherwise, in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this report.

Contact

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

1. INTRODUCTION 01

2. INDIAN ARBITRATION REGIME 02
   I. History of Arbitration in India 02
   II. Background to the Arbitration and Conciliation Act, 1996 02
   III. Scheme of the Act 02
   IV. Arbitration and Conciliation Amendment Act, 2015 03

3. INTERNATIONAL COMMERCIAL ARBITRATION – MEANING 05

4. ARBITRABILITY UNDER INDIAN LAW 06

5. INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN INDIA 08
   I. Notice of arbitration 08
   II. Referral to arbitration 08
   III. Interim reliefs 09
   IV. Appointment of arbitrators 10
   V. Challenge to appointment of arbitrator 11
   VI. Mandate of the arbitrator 12
   VII. Challenge to jurisdiction 12
   VIII. Conduct of arbitral proceedings 12
   IX. Hearings and written proceedings 13
   X. Fast track procedure 14
   XI. Settlement during arbitration 14
   XII. Law of limitation applicable 15
   XIII. Arbitral award 15
   XIV. Interest and cost of arbitration 15
   XV. Challenge to an award 16
   XVI. Appeals 19
   XVII. Enforcement and execution of the award 19
   XVIII. Representation by Arbitral Tribunal for contempt 21

6. INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN A RECIPROCATING COUNTRY 22
   I. Referring parties to arbitration under part II 23
   II. Enforcement and execution of foreign awards 24
   III. Appealable orders 26
7. EMERGING ISSUES IN INDIAN ARBITRATION LAWS

I. Prospective applicability of the Amendment Act
II. Conundrum surrounding two Indian parties having a foreign seat of arbitration
III. Arbitrability of oppression and mismanagement cases
IV. Arbitrability of consumer disputes

8. CONCLUSION

ANNEXURES

India Continues its March towards a Model Dispute Resolution Regime (Analysis of the Arbitration And Conciliation Bill 2018) 31

Referring Parties to Arbitration? Oral Consent between Counsels not Enough, Holds Supreme Court of India (Kerala State Electricity Board and Anr Vs. Kurien E. Kathilal and Anr) 34

Supreme Court’s Dictum on Reference of Non-Signatories to Arbitration in Domestic Arbitrations (Ameet Lalchand Shah and Others v. Rishabh Enterprises and Another) 36

Delhi HC: No Bar on two Indian Parties in Choosing a Foreign Seat of Arbitration? (GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors) 39

Ineligibility of Arbitrators - Arbitration Amendment Act Applies Prospectively (SP Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh) 43

Supreme Court Upholds Arbitral Clause Providing for an Employee Arbitrator (Aravalli Power Company Ltd. v. Era Infra Engineering Ltd.) 47

Supreme Court Makes Execution Of Arbitral Awards Easy And Expedient (Cheran Properties Limited v. Kasturi and Sons Limited) 50

Time to Enforce Your Arbitral Award! Supreme Court Sheds Light on the Applicability of the Amendments to the Arbitration Law (Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.) 54

India—Supreme Court Rules on Jurisdiction of Courts in Execution of Arbitral Awards (Sundaram Finance Ltd v Abdul Samad and Anor) 57
Public Policy: The Double Edged Sword in Enforcement Proceedings 60

(Hardy Exploration & Production (India))

India: Rewinding To The Era Of ‘Public Policy’ Mandates In Foreign-Seated Arbitrations 65

(Venture Global Engineering LLC v Tech Mahindra)

Caution: Disobeying orders of an arbitral tribunal may land you in jail! 69

(Alka Chandewar v Shamshul Ishrar Khan)

India—No Statutory Appeal if Party fails to Resist Enforcement of a Foreign Award 72

(Kandla Export Corporation & Anr v M/s OCI Corporation & Anor)

The Antrix-Devas Saga 2.0: Delhi High Court Rules in Favour of Antrix 75

(Antrix Corporation Ltd v. Devas Multimedia Pvt. Ltd.)

Delhi HC allows Devas to seek orders for securing the USD 562.5 million Award against Antrix 79

(Devas Multimedia v. Antrix Corporation)

ABOUT SIAC 85

SIAC INFORMATION KIT 90
1. Introduction

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

Due to certain controversial decisions by the Indian judiciary in the last two decades, particularly in cases involving a foreign party, the international community has kept a close watch on the development of arbitration laws in India. The Indian judiciary has often been criticized for its interference in international arbitrations and extra territorial application of domestic laws in foreign seated arbitrations. However, the latest developments in the arbitration jurisprudence through recent court decisions clearly reflect the support of the judiciary in enabling India to adopt the best international practices. Courts have adopted a pro-arbitration approach and a series of pro-arbitration rulings by the Supreme Court of India (“Supreme Court”) and High Courts have attempted to change the arbitration landscape completely for India. From 2012 to 2018, the Supreme Court delivered various landmark rulings taking a much needed pro-arbitration approach such as declaring the Indian arbitration law as seat-centric; removing the Indian judiciary’s power to interfere with arbitrations seated outside India; referring non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy both in domestic and foreign-seated arbitration; and determining that even fraud is arbitrable.

In furtherance of this approach, measures have been taken by the Indian government in support of the ‘ease of doing business in India’, and after two aborted attempts in 2001 and 2010 to amend the arbitration law, on October 23, 2015, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 (“Ordinance”). The Ordinance incorporated the essence of major rulings passed in the last two decades and most of the recommendations of 246th Law Commission Report, and have clarified major controversies that arose in recent years.

Thereafter, on December 17, 2015 and December 23, 2015 respectively, the Arbitration and Conciliation (Amendment) Bill, 2015 was passed by the Lok Sabha and Rajya Sabha respectively, with minor additions to the amendments introduced by the Ordinance. On December 31, 2015, the President of India signed the 2015 Bill and, thereafter, the gazette notification was published on January 1, 2016. Accordingly, the Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”) came into effect, from October 23, 2015. The Amendment Act is applicable prospectively to the arbitral proceedings commenced after October 23, 2015. Further, recently, the Arbitration and Conciliation (Amendment) Bill 2018 has been introduced in the Parliament and new amendments are expected in the next few months. This paper aims to summarize the position of the Indian law on international commercial arbitration (“ICA”), seated within and outside India, and discusses the recent judicial decisions in this field.
2. Indian Arbitration Regime

I. History of Arbitration in India

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


ii. The Indian Arbitration Act, 1940 (“1940 Act”) and

iii. The Foreign Awards (Recognition and Enforcement) Act, 1961 (“1961 Act”)

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

II. Background to the Arbitration and Conciliation Act, 1996

To address the rising concerns and with a primary purpose to encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international spheres, India, in 1996, adopted a new legislation modeled on the “Model Law” in the form of the Arbitration and Conciliation Act, 1996 (“Act”). The Act also aimed to provide a speedy and efficacious dispute resolution mechanism in the existing judicial system which was marred by inordinate delays and a backlog of cases.

III. Scheme of the Act

The Act has three significant parts. Part I of the Act deals with domestic arbitrations and ICA when the arbitration is seated in India. Thus, an arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated akin to a domestic arbitration.


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

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

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

The objective of the Act is to provide a speedy and cost-effective dispute resolution mechanism which would give parties finality in their disputes. A number of decisions from the courts slowly but steadily ensured that the preferred seat in any cross-border contract was always

1. A foreign award is award delivered in an arbitration seated outside India.
a heavily negotiated point and, more often than not, ended up being either Singapore, New York, or London (the established global arbitration centers). Foreign investors and corporates doing business in India were just not ready to take risks with the Indian legal system.

IV. Arbitration and Conciliation Amendment Act, 2015

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

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

Below are the snapshots to the major amendments introduced by the Amendment Act:

A. Pre-arbitral Proceedings

i. Independence and impartiality

- Applications for appointment of an arbitrator should be endeavored to be disposed of within a period of (60) sixty days from date of service of notice on the opposite party.

- Detailed schedule on ineligibility of arbitrators have been put in place.

ii. Interim reliefs

- Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitrations.

- Section 9 applications to be made directly before the High Courts in case of international commercial arbitrations seated in India as well as outside.

- Interim reliefs granted by arbitral tribunals seated in India are deemed to be the orders of courts and are, thus, enforceable in the new regime.

- Post grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

B. Arbitral Proceedings

i. Expeditious disposal

- A twelve-month timeline for completion of arbitrations seated in India has been prescribed.

- Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, appointment of arbitrators, and challenge petitions.

- Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

ii. Costs

- “Costs follow the event” regime has been introduced.

- Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India.
C. Post-arbitral proceedings

i. Challenge and enforcement

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

V. Arbitration And Conciliation (Amendment) Bill, 2018

The Arbitration and Conciliation (Amendment) Bill, 2018 ("Bill") was introduced to further amend the Arbitration and Conciliation Act, 1996. It was approved on 7 March 2018 by Cabinet of Ministers for introduction in the ongoing session of the Parliament, and passed by the Lok Sabha, on August 10, 2018.

Some of the key features of the Bill are: (a) formation of the Arbitration Council of India (ACI), an independent body corporate for grading and accreditation of arbitral institutions, and to promote and encourage arbitration and other alternate dispute resolution mechanisms; (b) arbitral appointments would be made by the arbitral institutions (as recognized by the ACI) designated by the Supreme Court (for international commercial arbitrations) or the High Court (in other cases), thereby eliminating the requirement to approach the court for arbitral appointments; (c) amendments have been proposed to the timelines involved in the conduct of arbitration. The Bill proposes exclusion of international commercial arbitrations from the twelve-month timeline (for completion of the entire arbitration) specified in the Amendment Act. It further extends the timeline by stating that the timeline would start from the date of completion of pleadings as opposed to the date of constitution of the tribunal; (d) new provisions are also being introduced with respect to confidentiality of the arbitral proceedings and immunity to the arbitrators; (e) the Bill has also introduced a new provision with regard to the immunity granted to the arbitrators who do any act or omission in good faith or in pursuance of the arbitral laws of India. (f) the Bill has introduced the Eighth Schedule to the Act, wherein certain qualifications, based on experience, and the accreditation norms for arbitrators have been enumerated. There are certain qualifications which effectively prevent any foreign professional from acting as an arbitrator, thereby making the Indian regime less arbitration friendly and causing unnecessary restraint on the choice before the parties; (g) The Bill has inserted a new provision to determine the proceedings to which the amendments introduced on 23 October, 2015, i.e. the 2015 Amendment, will apply. In doing so, it seeks to overturn the recent decision of the Supreme Court in BCCI v. Kochi Cricket Pvt. Ltd., which settled this very issue after significant debate.

---

3. International Commercial Arbitration – Meaning

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

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

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

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

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

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


4. Arbitrability Under Indian Law

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

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

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

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

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

---

11. 2011 (5) SCC 532.
12. 2010 (1) SCC 72.
Further, in *Sudhir Gopi v. Indira Gandhi National Open University,* the Delhi High Court ("Delhi HC") held that the principle of alter ego is not arbitrable. However, in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.*, the Delhi HC observed that the decision in *Sudhir Gopi* is per incuriam as it was passed without taking into consideration the decision of Supreme Court in *A Ayyasamy* wherein the Supreme Court had carved out instances which cannot be referred to arbitration.

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

---

18. 2017 SCC Online Del 11625.
5. International Commercial Arbitration With Seat In India

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

I. Notice of arbitration

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

Applicability of Amendment Act

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

II. Referral to arbitration

Under Part I, the courts can refer the parties to arbitration if the subject matter of the dispute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is the subject-matter of an arbitration agreement, upon an application by a party, the judicial authority is bound to refer the dispute to arbitration.

Recently, the Supreme Court has opined that invoking party may invoke an arbitration even when the dispute settlement clause in the contract grants an option of getting the dispute adjudicated by arbitration or by court. It is important to note that the above application must be made by the party either before or at the time of making his first statement on the substance of the dispute, and be accompanied by a duly certified or original copy of the arbitration agreement, and such an agreement need not be signed nor stamped for it to be considered valid.

However, it has been recently held that there is no requirement of filing a formal application seeking a specific prayer for reference, as long as the party raised an objection on the maintainability of the suit in light of the arbitration clause.

Applicability of Amendment Act

The Amendment Act narrows the scope of the judicial authority’s power to examine the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court for an arbitration for purposes of arbitrations commenced on or after October 23, 2015. In this regard, an arbitration agreement has been considered to be valid if there is merely the incorporation of another document/clause (relating to arbitration) by reference, or even if there is a general reference to a standard form of the contract of one party. In such situations,

---

intention of the parties\textsuperscript{26} and consensus ad idem of the parties is critical, even if the same is apparent from their conduct.\textsuperscript{27}

More importantly, taking heed from the judgment of the Supreme Court in \textit{Chloro Controls},\textsuperscript{28} which effectively applied only to foreign-seated arbitrations, the definition of the word ‘party’ to an arbitration agreement has been expanded under the Amendment Act to also include persons claiming through or under such party, especially when there is a clear intention of the parties to bind both the signatory as well as the non-signatory parties.\textsuperscript{29}

Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or India-seated ICA, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement,\textsuperscript{30} depending on the nature of reliefs claimed by or against such a party.\textsuperscript{31} In case a judicial authority refuses to refer a matter to arbitration, the parties can file an appeal against such refusal in the court on which the statute creating the authority confers jurisdiction to hear such appeals.\textsuperscript{32}

\section*{III. Interim reliefs}

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

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

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

\subsection*{Applicability of Amendment Act}

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

\subsection*{A. Interim reliefs under Section 9}

\begin{itemize}
  \item If an arbitral tribunal has been constituted, an application for interim protection under Section 9 of the Act will not be entertained by the court unless the court finds that circumstances exist which may render the remedy provided under Section 17 inefficacious.
  \item Post the grant of interim protection under Section 9 of the Act, the arbitral proceedings must commence within a period of 90 (ninety) days from the date of the interim protection order or within such time as the court may determine.
\end{itemize}

\subsection*{B. Interim reliefs under Section 17}

Section 17 has been amended to provide the Arbitral Tribunal the same powers as a ‘civil court’ in relation to the grant of interim measures. Notably, the Arbitral Tribunal will also have powers to grant interim relief post the award but prior to its execution. Further, the order passed by an Arbitral Tribunal in arbitrations seated in India will be deemed to be an order of the court and will be enforceable under the Code of Civil Procedure, 1908.

\begin{thebibliography}{9}
\bibitem{27} OK Play Auto Pvt. Ltd. v. Indian Commerce and Industries, 2018 SCC OnLine Del 8525.
\bibitem{28} Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
\end{thebibliography}
The intention appears to be to vest significant powers with the Arbitral Tribunal and reduce the burden and backlog before the courts. There has been extensive confusion on the extent and scope of arbitrator’s powers to grant interim relief, and enforceability of such orders has proven difficult. This issue has been aptly addressed by making the enforceability of orders issued under Sections 9 and 17 of the Act identical in case of domestic and ICAs seated in India. However, in certain situations, a party will be required to obtain an order of interim relief from a court only (e.g. injunctive relief against encashment of a bank guarantee).

IV. Appointment of arbitrators

The parties are free to agree on a procedure for appointing the arbitrator(s). The agreement can provide for a tribunal consisting of three arbitrators and each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. If one of the parties does not appoint an arbitrator within 30 days, or if the two appointed arbitrators do not appoint the third arbitrator within 30 days, the party can request Chief Justice of India (“CJI”) to appoint an Arbitrator in case of international commercial arbitrations. The CJI can authorize any person or institution to appoint an Arbitrator. In case of domestic arbitrations, application has to be made to Chief Justice of respective High Court within whose jurisdiction the parties are situated.

Applicability of Amendment Act

If one of the parties does not appoint an arbitrator within 30 days, or if the two appointed arbitrators do not appoint the third arbitrator within 30 days, the party can request the Supreme Court or relevant High Court (as applicable) to appoint an arbitrator.

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

The Amendment Act also empowers the Supreme Court in an India-seated ICA and the High Courts in domestic arbitration to examine the existence of an arbitration agreement at the time of making such appointment.

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

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

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

33. Section 11(3) of the Act.
34. Section 11(4) of the Act.
35. Section 11(6) of the Act.
36. Section 11(6)(b) of the Act.
37. Section 11(6)(a) of the Act.
procedure of appointment to be an exercise of administrative power by the courts.

V. Challenge to appointment of arbitrator

Independence and impartiality of an arbitrator are the hallmarks of any arbitration proceedings. If there are circumstances due to which his independence and impartiality can be challenged, he/she must disclose the circumstances before his/her appointment.39

Appointment of an arbitrator can be challenged only if –

- a. Circumstances exist that give rise to justifiable doubts as to his/her independence or impartiality; or
- b. He/she does not possess the qualifications agreed upon by the parties.40

The Amendment Act provides a form for disclosure in the new Fifth Schedule. Such disclosure is in accordance with the internationally accepted practices to be made applicable for arbitration proceedings commenced on or after October 23, 2015. Non-disclosure can lead to serious consequences for the arbitrator, including termination of his/her mandate, even if he/she has not been assigned work or given remuneration by the concerned party.41

The challenge to the appointment has to be decided by the arbitrator himself. If he/she does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award.

The Supreme Court, in a recent judgment, TRF Ltd. v Energo Engineering Projects Ltd.,42 ruled that a court can be approached to plead the statutory disqualification of an arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 and that it is not necessary to approach the arbitrator for obtaining such a relief. Further, the Court held that when the designated arbitrator nominated under a contract is also responsible for appointment of an alternate arbitrator, he/she would lose his/her authority to preside and/or nominate an arbitrator if he/she stands disqualified under the amended provisions of the Act.

In HRD Corporation v. GAIL (India) Limited,43 the Supreme Court propounded certain important principles of law, such as: (i) if the arbitrator has passed as award in an earlier arbitration between the same parties about the same dispute, that does not mean that there are justifiable grounds for challenging his impartiality under Clause 16 of Fifth Schedule; (ii) while a challenge based on the Fifth Schedule can be decided only on the basis of the facts of the case and can be brought before the court post-award, one based on the Seventh Schedule renders the arbitrator ineligible ipso facto and can be brought pre-award.

However, in such cases, the application for setting aside the arbitral award can be made to the court under Section 34 of the Act. If the court agrees to the challenge, the arbitral award can be set aside.44 Thus, even if the arbitrator does not accept the challenge to his/her appointment, the other party cannot stall further arbitration proceedings by rushing to the court. The arbitration can continue and challenge can be made in court only after the arbitral award is made.

In Aravalli Power Company Ltd. v. Era Infra Engineering Ltd.,45 the Supreme Court held that the employee named as an arbitrator in the arbitration clause should be given effect to, in the absence of any justifiable apprehension of independence and impartiality. However, the appointment of an employee as an arbitrator is not invalid and unenforceable in arbitrations invoked prior to October 23, 2015. Further, the Delhi HC, in Afcons Infrastructure Ltd. v. Rail

39. Section 12(1) of the Act.
40. Section 12(3)(b) of the Act.
42. (2017) 8 SCC 377.
43. 2017 (10) SCALE 371.
44. Section 13(5) of the Act.
45. AIR 2017 SC 4450.
Vikas Nigam Limited, interpreted Section 12(5) read with Entry 12 Schedule Seven of the Arbitration and Conciliation Act to hold that former employees of parties are not precluded from being appointed as arbitrators. However, this decision is subject to certain qualifications, and has been upheld in the case of The Government of Haryana, PWD Haryana (B and R) Branch v. M’s G.F. Toll Road Pvt. Ltd & Ors.

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

VI. Mandate of the arbitrator

An encouraging position of Indian arbitration law is the jurisprudence relating to the mandate of an arbitrator. The Supreme Court in its decision in NBCC Ltd. v. J.G. Engineering Pvt. Ltd has laid down that the mandate of the arbitrator expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement.

Applicability of Amendment Act

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

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

VII. Challenge to jurisdiction

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

VIII. Conduct of arbitral proceedings

A. Flexibility in Respect of Procedure, Place and Language

The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present its case. The Arbitral Tribunal is not bound by the CPC or the Indian Evidence Act, 1872. The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not

---

47. C.A. 27/2019, arising out of SLP(C) 20201/2018, dated 03/01/2019.
50. 2005 (8) SCC 618.
51. Section 18 of the Act.
52. Section 19(1) of the Act.
agree to the procedure, the procedure will be as determined by the Arbitral Tribunal.

The Arbitral Tribunal has complete powers to decide the procedure to be followed, unless parties have otherwise agreed upon the procedure to be followed.\(^{53}\) The Arbitral Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.\(^{54}\) Place of arbitration will be decided by mutual agreement. However, if the parties do not agree to the place, the same will be decided by the tribunal.\(^{55}\) Similarly, the language to be used in arbitral proceedings can be mutually agreed. Otherwise, the Arbitral Tribunal can decide on the same.\(^{56}\)

The Delhi HC, in the case of *Devas Multimedia Pvt. Ltd v. Antrix Corporation Ltd.*,\(^{57}\) held that Section 42 did not bar the jurisdiction of subsequent courts when the court initially approached had not ruled on its own jurisdiction and the initial prayers sought are incapable of being entertained/ granted.

The Supreme Court in the case *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*\(^{58}\) held that designation of seat is akin to an exclusive jurisdiction clause with relation to the courts exercising supervisory jurisdiction over the proceedings.

The Supreme Court in the case of *Roger Shashoua v. Mukesh Sharma*\(^{59}\) has upheld the 2009 decision of the Commercial Court in London and held that the designation of seat is the same as an exclusive jurisdiction clause. However, in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*,\(^{60}\) the Delhi High Court held that only if the parties confer exclusive jurisdiction as well as the seat of the arbitration to a designated place, the territorial court of that designated place would have exclusive jurisdiction; otherwise, the jurisdiction will have to be determined on the basis of the subject matter and the seat of arbitration.

The Supreme Court recently in *Union of India v. Hardy Exploration and Production*,\(^{61}\) has held that: (a) when only the term ‘place’ is stated or mentioned and no other condition is postulated, it is equivalent to ‘seat’ and that finalizes the facet of jurisdiction. But if a condition precedent is attached to the term ‘place’, the said condition has to be satisfied so that the place can become equivalent to seat; (b) a venue can become a seat if something else is added to it as a concomitant.

### B. Submission of Statement of Claim and Defense

The Claimant should submit the statement of claims, points of issue and the relief or remedy sought. The Respondent should state his defense in respect of these particulars. All relevant documents must be submitted. Such claim or defense can be amended or supplemented at any time.\(^{62}\)

### Applicability of Amendment Act

The Amendment Act now provides for an application for counterclaim/set-off to be adjudicated upon in the same arbitration proceeding without requiring a fresh one.\(^{63}\) The Arbitral Tribunal, under the amended Section 25 of the Act, can also exercise its discretion in treating the right of defendant to file the statement of defence as forfeited under specified circumstances.\(^{64}\)

### IX. Hearings and written proceedings

After submission of pleadings, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be an oral hearing
or whether proceedings can be conducted on
the basis of documents and other materials.
However, if one of the parties\textsuperscript{65} requests the
Arbitral Tribunal for a hearing, sufficient
advance notice of hearing should be given to
both the parties. Thus, unless one party requests,
oral hearing is not mandatory.

**Applicability of Amendment Act**

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

By the Amendment Act, the time limit for conduct
of the arbitral proceedings have been streamlined
and arbitrators are mandated to complete the
entire arbitration proceedings within a span of
12 (twelve) months from the date the Arbitral
Tribunal enters upon the reference.\textsuperscript{66} However,
a 6 (six) months extension may be granted to
the arbitrator by mutual consent of the parties.\textsuperscript{67}
Beyond 6 (six) months, any further extension
may be granted to the arbitrator at the discretion
of the court\textsuperscript{68} or else the proceedings shall stand
terminated.\textsuperscript{69} An application for extension of time
towards completion of arbitral proceedings has
to be disposed of expeditiously.\textsuperscript{70} There is also
a provision made for awarding additional fees, as
consented upon by the parties, to them for passing
the award within the time span of 6 months.\textsuperscript{71}

**X. Fast track procedure**

The Amendment Act has inserted new
provisions to facilitate an expedited settlement
of disputes based solely on documents subject
to the agreement of the parties. The tribunal, for
this purpose, consists only of a sole arbitrator,
who shall be chosen by the parties.\textsuperscript{72}

For the stated purpose the time limit for making
an award under this section has been capped at
6 months from the date the Arbitral Tribunal
enters upon the reference.\textsuperscript{73}

Parties can, before the constitution of the
Arbitral Tribunal, agree in writing to conduct
arbitration under a fast track procedure.\textsuperscript{74} Under
the fast track procedure, unless the parties
otherwise make a request for oral hearing, or the
arbitral tribunal considers it necessary to have
oral hearing, the Arbitral Tribunal shall decide
the dispute on the basis of written pleadings,
documents and submissions filed by the parties
without any oral hearing.\textsuperscript{75}

**XI. Settlement during
arbitration**

It is permissible for parties to arrive at a mutual
settlement even when the arbitration proceedings
are going on. In fact, even the tribunal can make
efforts to encourage mutual settlement. If parties
settle the dispute by mutual agreement, the
arbitration shall be terminated. However, if
both parties and the Arbitral Tribunal agree, the
settlement can be recorded in the form of an
arbitral award on agreed terms, which is called
a consent award. Such an arbitral award shall have
the same force as any other arbitral award.\textsuperscript{76}

\textsuperscript{65} Section 24 of the Act.
\textsuperscript{66} Section 29A(1) of the Act.
\textsuperscript{67} Section 29A(3) of the Act.
\textsuperscript{68} Section 29A(5) of the Act.
\textsuperscript{69} Section 29A(4) of the Act.
\textsuperscript{70} Section 29A(9) – the section endeavors the application to be
disposed of within a period of 60 days.
\textsuperscript{71} Section 29A(2) of the Act.
\textsuperscript{72} Section 29B(2) of the Act.
\textsuperscript{73} Section 29B(4) of the Act.
\textsuperscript{74} Section 29B(1) of the Act.
\textsuperscript{75} Section 29B(3) of the Act.
\textsuperscript{76} Section 30 of the Act.
Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

XII. Law of limitation applicable

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

XIII. Arbitral award

A decision of an Arbitral Tribunal is termed as an ‘Arbitral Award’. An arbitral award includes interim awards. But it does not include interim orders passed by arbitral tribunals under Section 17. An arbitrator can decide the dispute only if both the parties expressly authorize him to do so. The decision of the Arbitral Tribunal will be by majority. The Arbitral Award shall be in writing and signed by all the members of the tribunal. It must state the reasons for the award, unless the parties have agreed that no reason for the award is to be given. The Award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration). A copy of the award should be given to each party. Arbitral Tribunals can also make interim awards.

XIV. Interest and cost of arbitration

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

Applicability of Amendment Act

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

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

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

Cost of arbitration means reasonable cost relating to fees and expenses of Arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party. If the parties refuse to pay the costs, the

77. Section 43(2) of the Act.
78. Section 28(2) of the Act.
79. Section 29 of the Act.
80. Section 31(1) of the Act.
81. Section 31(7)(b) of the Act.
82. Section 31(6) of the Act.
86. Section 31(8) of the Act.
Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach the court. The court will ask for a deposit from the parties and on such deposit, the award will be delivered by the tribunal. Then court will decide the cost of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party.  

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

XV. Challenge to an award

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

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

1. the parties to the agreement are under some incapacity;
2. the agreement is void;
3. the award contains decisions on matters beyond the scope of the arbitration agreement;
4. the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
5. the award has been set aside or suspended by a competent authority of the country in which it was made;
6. the subject matter of dispute cannot be settled by arbitration under Indian law; or
7. the enforcement of the award would be contrary to Indian public policy.

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

Applicability of Amendment Act

The Amendment Act has added an explanation to Section 34 of the Act. In the explanation, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice.

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

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

Process for Challenge & enforcement

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

Recently, the Supreme Court, in the case of Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. has held that law as amended by the Amendment Act will apply to those arbitral proceedings which commenced on or after October 23, 2015, and will apply to those court proceedings (which relate to arbitration) which commenced on or after October 23, 2015. The judgment particularly provided that the Section 36 as amended would apply to even pending applications under Section 34 of the Act for setting aside the awards.

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

---

93. Section 34(2A) of the Act.
94. Section 34(3) of the Act.
96. Section 34(6) of the Act.
A. Grounds For Challenge

Domestic Award/ICA seated in India

<table>
<thead>
<tr>
<th>Pre-amendment</th>
<th>Post-amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Party was under some incapacity;</td>
<td>a. In the explanation to Section 34 of the Act, public policy of India has been clarified to mean only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81; or (b) it is in contravention with the fundamental policy of Indian law; or (c) it is in contravention with the most basic notions of the morality or justice;</td>
</tr>
<tr>
<td>b. Arbitration agreement not valid under the governing law of the agreement;</td>
<td></td>
</tr>
<tr>
<td>c. Applicant not given proper notice and not able to present its case;</td>
<td>b. A new section has been inserted providing that the award may be set aside if the court finds it vitiated by patent illegality which appears on the face of the award. For international commercial arbitrations seated in India, ‘patent illegality’ has been keep outside the purview of the arbitral challenge;</td>
</tr>
<tr>
<td>d. Award deals with a dispute not contemplated by terms of the submission to arbitration, or beyond the scope of the submission to arbitration;</td>
<td>c. An award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence;</td>
</tr>
<tr>
<td>e. Composition of Arbitral Tribunal or the arbitral procedure not in accordance with the agreement or not in accordance with Part I of the Act;</td>
<td>d. A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law.</td>
</tr>
<tr>
<td>f. Subject-matter of the dispute not capable of settlement by arbitration under the law;</td>
<td></td>
</tr>
<tr>
<td>a. Award in conflict with the public policy of India (if induced or affected by fraud or corruption or was in violation of confidentiality requirements of a conciliation or where a confidential settlement proposal in a conciliation is introduced in an arbitration)</td>
<td></td>
</tr>
</tbody>
</table>

B. Time-Lines For Challenge

<table>
<thead>
<tr>
<th>Pre-amendment</th>
<th>Post-amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>NA</td>
<td>Challenge can be filed only after providing prior notice to the opposite party and has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice.</td>
</tr>
</tbody>
</table>
XVI. Appeals

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

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

i. granting or refusing to grant any measure under Section 9;

ii. setting aside or refusing to set aside an Arbitral Award under Section 34

However, a three judge Bench of the Supreme Court has recently held, in *Centrotrade Minerals & Metal v. Hindustan Copper,*\(^\text{103}\) that the parties may provide for an appeal to lie from the award to an appellate arbitral tribunal. Such a clause was held not to be contrary to the laws of the country and, thus, enforceable. It appears that the scope of appeal in such cases is far wider than an appeal to a court.

**Applicability of Amendment Act**

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

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

i. accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or

ii. granting or refusing to grant an interim measure under Section 17.

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

XVII. Enforcement and execution of the award

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

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

When the period for filing objections has expired or objections have been rejected, the award can be enforced under the CPC in the same manner as if it were a decree passed by a court of law.\(^\text{104}\) An ex parte award passed by an Arbitral Tribunal under Section 28 of the Act is also enforceable under Section 36. Even a settlement reached by the parties under Section 30 of the Act can be enforced under Section 36 of the Act as if it were a decree of the court.

**A. Institution of Execution Petition**

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

---

102. Section 37 of the Act.
103. 2016 (12) SCALE 1015.
WHERE AN ENFORCEMENT OF AN ARBITRAL AWARD IS
Sought UNDER ORDER XXI CPC BY A DECREE-HOLDER,
THE LEGAL POSITION AS TO OBJECTIONS TO IT IS CLEAR. AT
THE STAGE OF EXECUTION OF THE ARBITRAL AWARD, THERE
CAN BE NO CHALLENGE AS TO ITS VALIDITY.∗

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

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

i. Attachment of property; and

ii. Sale of property of the judgment debtor

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

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

B. Attachment of Property

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

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

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

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

C. Sale of attached property

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

---

* Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rahman,
  1970 (1) SCC 670; Bhawarlal Bhandari v. Universal Heavy
  Mechanical Lifting Enterprises, 1999 (1) SCC 558.
‡ Rule 10 of the CPC.
§ Section 36(1) of the Act.
|| Proviso to Section 36(3) of the Act.
||| O.XXI R.54 of the CPC.
||| Section 64 of the CPC.
||| O.XXI R. 55 of the CPC.
||| O.XXI R. 64 of the CPC.
||| O.XXI R.76 of the CPC.
XVIII. Representation by Arbitral Tribunal for contempt

The Bombay High Court, in the case of Alka Chandewar v. Shamshul Ishrar Khan,\(^{115}\) ruled that Section 27(5) of Act does not empower the Tribunal to make representation to the Court for contempt. However, the Supreme Court overruled the judgment and held that under Section 27(5) of the Arbitration and Conciliation Act, 1996, any non-compliance of an arbitral tribunal’s order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971. The entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal were toothless. It was to give teeth to such orders that an express provision was made in Section 27(5) of the Act.

---

6. International Commercial Arbitration with Seat in a Reciprocating Country

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

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

In IMAX Corporation v. E-City Entertainment Pvt. Ltd, the Supreme Court has upheld the choice of foreign seat by an arbitral institution as an exclusion of Part I of Arbitration & Conciliation Act, 1996, under the pre-BALCO regime.

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

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

---

120. 2017 SCC OnLine Bom 8480.
121. 2017 SCC OnLine Cal 13287.
122. As mostly all parties signatory to the Geneva Convention are now members of the New York Convention, Chapter 2 of Part II remains primarily academic.
A foreign award under Part II is defined as (i) an arbitral award (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as commercial under the law in force in India, (iv) made on or after 11th day of October, 1960 (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies and (vi) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

Thus, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. In the case of Bhatia International v. Bulk Trading,123 (“Bhatia International”) the Supreme Court expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award.

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

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied- 124

i. the award passed should be an arbitral award,

ii. it should be arising out of differences between the parties;

iii. the difference should be arising out of a legal relationship;

iv. the legal relationship should be considered as commercial;

v. it should be in pursuance of a written agreement to which the New York Convention applies; and,

vi. the foreign award should be made in one of the aforementioned 48 countries.

I. Referring parties to arbitration under part II

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who, under Section 44125 of the Act have entered into an arbitration agreement. The Section is based on Article II(3) of the New York Convention and, with an in-depth reading of the Section 45 of the Act, it can be clearly understood that it is mandatory for the judicial authority to refer parties to the arbitration.

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

But as an essential pre-condition to specifically enforcing the arbitration agreement, the court has to be satisfied that the agreement is valid, operative and capable of being performed. A party may not be entitled to a stay of legal proceedings initiated in contravention to the arbitration agreement, under Section 45, in the absence of a review by the court to determine the validity of the arbitral agreement. The review is to be on a prima facie basis.126

---

123. AIR 2002 SC 1432.
125. Section 44 of the Act.
A. Distinction between Section 8 and Section 45

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

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

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

Further, Section 45 can only be applied when the matter is the subject of a New York Convention arbitration agreement, whereas Section 8 applies in general to all arbitration clauses falling under Part I of the Act. In Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors. (“Chloro Controls”), the Supreme Court has held that the expression ‘person claiming through or under’, as provided under Section 45 of the Act, would mean and include within its ambit multiple and multi-party agreements. Hence, even non-signatory parties to some of the agreements can pray and be referred to arbitration.

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

The Delhi HC, recently, in GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors., relying on Chloro Controls, upheld the impleadment of a non-signatory to the arbitration agreement in an SIAC arbitration.

II. Enforcement and execution of foreign awards

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

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

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

A. Commercial transaction

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

129. 2013 (1) SCC 641.
131. AIR 1994 SC 1136.
B. Written agreement
The Geneva Convention and the New York Convention provide that a foreign arbitral agreement must be made in writing, although it does not have to be worded formally or be in accordance with a particular format.

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

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

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

i. the parties to the agreement are under some incapacity;

ii. the agreement is void;

iii. the award contains decisions on matters beyond the scope of the arbitration agreement;

iv. the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;

v. the award has been set aside or suspended by a competent authority of the country in which it was made;

vi. the subject matter of dispute cannot be settled by arbitration under Indian law; or

vii. the enforcement of the award would be contrary to Indian public policy.

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

i. fundamental policy of India; or

ii. the interest of India; or

iii. justice or morality.

Thus, by the above decisions, the courts in India have laid down certain thresholds which define “public policy” for enforcing foreign awards in India. The courts, after the landmark judgment, have further narrowed down the meaning of the words “public policy” in order to give effect to the Act.

In *Penn Racquet Sport v. Mayor International Ltd.*, the petitioner, a company based in Arizona, sought to enforce in India an International Chamber of Commerce (“ICC”) award passed in its favor. The respondent, an Indian company, challenged the execution of the award on grounds, inter alia, that the award was contrary to the public policy of India. In a well-reasoned decision, the Delhi HC rejected the objections raised by the Indian company and held that the foreign award passed in favor of the American company was enforceable in India. It held that because the award went against the interest of an Indian company was not enough to qualify as working against the “public policy of India”.

---

132. AIR 1962 SC 1810.
134. AIR 1989 SC 2198.
136. 2011 (1) Arb LR 244 (Delhi).
However, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,137 ("Lal Mahal"), it was held that enforcement of a foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The wider meaning given to the expression "public policy of India", occurring in Section 34(2)(b)(ii), in *Saw Pipes*138 is not applicable where objection is raised as to the enforcement of the foreign award under Section 48(2)(b). The Supreme Court further discussed *Phulchand Exports Limited v. O.O.O. Patriot*139 ("Phulchand"), wherein it was accepted that the meaning given to the expression "public policy of India" in Section 34 in *Saw Pipes*, must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. The Supreme Court concluded that "public policy of India" used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside if it is "patently illegal" does not lay down correct law, and has hence overruled the earlier decisions on this point.

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

The Supreme Court has held that no separate application needs to be filed for the execution of the award. A single application for the enforcement of award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention grounds) would be determined. Foreign arbitration awards, if valid, are treated at par with a decree passed by an Indian civil court and they are enforceable by Indian courts having jurisdiction as if the decree had been passed by such courts.140

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

The Amendment Act seems to have taken into account the findings of the court in pro-arbitration judgments such as *Lal Mahal* by specifically providing an explanation to Section 48, for the avoidance of all doubts on the point that an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention of the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

III. Appealable orders

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

The Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*,141 held that

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

Out of several issues raised in *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*,142 one was whether a letters patent appeal would lie against an order under Section 50 of the Act wherein a petition

137. 2013 (8) SCALE 480.
139. 2011 (10) SCC 300.
140. Section 49 of the Act.
142. (2011) 8 SCC 333.
seeking execution of an award was dismissed and no appeal was maintainable under the Act. Further, the single judge, under Section 45, had refused to refer the parties to arbitration. A letters patent appeal was filed against the impugned order. The matter was later referred to the Supreme Court to clarify whether the appeal was maintainable.

The Supreme Court in its decision held –

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

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

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

---

143 (2018) 14 SCC 715.
7. Emerging Issues In Indian Arbitration Laws

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

I. Prospective applicability of the Amendment Act

There are conflicting decisions of various High Courts. The Madras High Court, in *New Tripur Area Development Corporation Limited v. M/s. Hindustan Construction Co. Ltd. & Ors.*, 144 had ruled that the language used in the Section 26 of the Amendment Act only refers to arbitral proceedings and not court proceedings due to deletion of the language “in relation to”. Thus, Section 26 of the Amendment Act is not applicable to the stage post arbitral proceedings. This view has been supported by the division bench of Calcutta High Court in *Tufan Chatterjee v. Rangan Dhar* AIR 2016 Cal 213.

However, the division bench of Delhi HC in *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia* has held that the amended provisions would not be applicable to ‘court proceedings’ initiated post-amendments, unless they were merely ‘procedural’ and did not affect any ‘accrued right’. Therefore, if a challenge petition is filed post amendment, it would be governed by the un-amended Section 34 of the Act so long as arbitration was invoked in the pre-amendment era. 146

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

Even though this issue has been addressed by a number of High Courts in the past, there is still no clarity on ability of two Indian parties to choose a foreign seat of arbitration. In *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, 148 the Bombay High Court expressed a view that two Indian parties choosing a foreign seat and a foreign law governing the arbitration agreement could be considered to be opposed to the public policy of the country.

Recently, in the case of *Sasan Power Ltd. v. North America Coal Corporation India Pvt. Ltd.*, 149 the Madhya Pradesh High Court opined that two Indian parties may conduct arbitration in a foreign seat under the English law.

The Madhya Pradesh High Court primarily relied on the ruling in the case of *Atlas Exports Industries v. Kotak & Company* 150 (“Atlas Exports”), wherein the Supreme Court ruled that two Indian parties could contract to have

---

145. Section 26 of the 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 all arbitral proceedings commenced on or after the date of commencement of this Act.
a foreign-seated arbitration; although, the judgment was in context of the 1940 Arbitration Act. Under appeal, although expected, the Supreme Court did not opine on this issue.

Recently, the Delhi HC, in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.*, after relying on the decision of the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation (India) (P) Ltd Sasan Power*, and *Atlas Exports* ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration.

The Delhi HC decision to re-affirm that two Indian parties can seat their arbitration outside India is yet another testament to pro-arbitration approach of Indian courts, with the Delhi HC leading the charge.

However, one must be wary of the ruling in *TDM Infrastructure*, wherein the court ruled that two Indian parties could not derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign law. But as *TDM Infrastructure* was a judgment under Section 11 of the Act, there are questions on its precedential value.

III. Arbitrability of oppression and mismanagement cases

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

The Bombay High Court opined that a petition under Sections 397 and 398 of the Companies Act, 1953 may comprise of conduct of clandestine non-contractual actions that result in the mismanagement of the company’s affairs or in the oppression of the minority shareholders, or both.

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

IV. Arbitrability of consumer disputes

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

---

8. Conclusion

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

Despite India being one of the original signatories to the New York Convention, arbitration in India has not always kept up with the international best practices. However, the last five years have seen a significant positive change in approach. Courts and legislators have acted with a view to bringing Indian arbitration law in line with the international best practices.

With the pro-arbitration approach of the courts and the Amendment Act in place, there is cause to look forward to these best practices being adopted in the Indian arbitration law in the near future.

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

India Continues its March towards a Model Dispute Resolution Regime

The Union Cabinet recently cleared bills proposing to amend the arbitration law and the jurisdiction of commercial courts in India. Both the bills are in line with India’s aim of becoming a model arbitration friendly jurisdiction and improving the enforceability of contracts in India. The consistency in the steps taken by the Government of India - ranging from the Arbitration and Conciliation (Amendment) Act 2015 (“2015 Amendment”), establishment of commercial courts and constitution of the Srikrishna Committee followed by incorporation of the same in the Bill within a span of just three years, reflects the political will to rapidly reform the dispute resolution landscape of India. We herein discuss the key amendments as reflected in the recent press release.

I. Arbitration and Conciliation (Amendment) Bill, 2018

With the 2015 Amendment being the harbinger in transforming India into a hub of arbitration, the Government of India (“GoI”) has rightfully identified the need to further the pro-arbitration landscape in India. The amendments are principally based on the recommendations of the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (“Srikrishna Committee Report”). Principally the report has made positive recommendations for reforming the arbitration ecosystem. However, caution should be exercised as some suggestions under the Srikrishna Committee Report may merit further consideration.

r. Arbitration Council of India (“ACI”)

In line with the recommendations made by the Srikrishna Committee Report, the Bill proposes creation of ACI, an independent body corporate for grading and accreditation of arbitral institutions and to promote and encourage arbitration and other alternate dispute resolution mechanisms. Regarding the nature of the institution ACI - reference may be made to the Srikrishna Committee Report which clarifies that it is not intended to be a regulator and that any act of regulating arbitral institutions would adverse to party autonomy.

However, some scepticism is reserved with respect to the constitution of the ACI. The press release indicates that “the Chairperson of ACI shall be a person who has been a Judge of the Supreme Court or Chief Justice or Judge of any High Court or any eminent person. Further, the other Members would include an eminent academician etc. besides other Government nominees.” It may only be hoped that there is a limited involvement of the government considering that this may create a situation of conflict given that the government is one of the biggest litigators.

2. Amendments to provisions pertaining to court-appointed arbitrators

To facilitate speedy appointment of arbitrators and to improve institutional arbitration, it is proposed that arbitral appointments would be made by the arbitral institutions (as recognised by the ACI) designated by the Supreme Court

156. Press Release available here.
(for international commercial arbitrations) or the High Court (in other cases), thereby eliminating the requirement to approach the court for arbitral appointments. This is akin to the practice in other leading jurisdictions such as Singapore and Hong Kong, where the designated institutions are Singapore International Arbitration Centre and Hong Kong International Arbitration Centre, respectively.

3. Amendments to the time limit for making of an arbitral award

Through the 2015 Amendment, a 12-month timeline was imposed on arbitrations seated in India. The Bill proposes exclusion of international commercial arbitrations from this timeline. It further extends the timeline by saying that it would start from the date of completion of pleadings as opposed to the date of constitution of the tribunal. While the idea behind extending the timeline may be valid, ‘completion of pleadings’ is not a definite enough marker for calculation of timelines. As pleadings could be amended or filed at different stages, it would create another bone of contention between the parties and could eventually also defeat the purpose of setting a timeline. At this stage, it may be hoped that that Bill provides for a more concrete and objective criterion for determination of the timeline.

Additionally, considering the main objective of the Sri Krishna Report was to promote institutional arbitration, the concerns on the timeline can be addressed by simply not amending the 12 month timeline but stating that such timeline will be applicable to adhoc arbitrations to ensure timely adjudication and may not be applicable to institutional arbitration or give powers to institution to extend, if parties apply for the same.

4. Amendments to ensure confidentiality by insertion of a new section 42A

This amendment is proposed to ensure that the arbitrator and the arbitral institutions maintain keep confidentiality of all arbitral proceedings except award (keeping in mind the enforcement of awards, and possible challenges to it). This would place India on the same pedestal with jurisdictions such as Hong Kong, France and New Zealand, which have express legislative provisions mandating confidentiality of arbitration proceedings.

5. Amendments to incorporate arbitral immunity

Further, a new section 42B protects an arbitrator from suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings.

Such arbitral immunity would provide safeguards to arbitrators against proceedings attacking their conduct in the course of the arbitral proceedings. Nevertheless, it may trigger frivolous proceedings by resentful parties, under the garb of ‘bad faith’, disrupting the arbitration.

6. Clarifications to applicability of the 2015 Amendment

A new section 87 is proposed to be inserted to clarify that the 2015 Amendment would be prospective i.e. it would apply only to the arbitral proceedings commenced on or after the commencement of the 2015 Amendment (i.e. 23 October 2015) and to court proceedings arising out of or in relation to such arbitral proceedings.

However, pursuant to the conflicting views of various High Courts on the interpretation of the applicability of the 2015 Amendment, the matter is currently pending before the Supreme Court of India and a judgment on the issue is also awaited.

---

158. (Singapore) International Arbitration Act § S. 8(2): “The Chairman of the Singapore International Arbitration Centre shall be taken to have been specified as the authority competent to perform the functions under Article 11(3) and (4) of the Model Law.”

159. Arbitration and Conciliation Act 1996, s 29A: “(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference. . . . (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.”
While the Srikrishna Committee Report has largely made positive suggestions, certain amendments made thereunder deserve further evaluation e.g. amendments proposed to Section 34 of the Arbitration and Conciliation Act 1996.\textsuperscript{160} Considering that the Bill is based on the Srikrishna Committee Report, it is hoped that further consideration is given to such aspects.

**II. Commercial Courts, Commercial Division And Commercial Division Of High Courts (Amendment) Bill, 2018:**

The Union Cabinet has also approved the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 for introduction in the Parliament which seeks to amend the pecuniary limit under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (“Commercial Courts Act”), amongst other changes.\textsuperscript{161} It is proposed to extend the applicability of the Commercial Courts Act, by reducing the specified value of a commercial dispute to INR 3 lakhs from the present limit of INR one crore. This change is backed up by the intention to provide efficient dispute resolution mechanisms even to commercial disputes of lesser value. This is in consonance with the parameters for resolution of commercial disputes as indicated in the Doing Business measures of the World Bank.\textsuperscript{162} The World Bank in determining the ease of doing business ranking of a country takes into account the enforceability of contracts. To ascertain the level of contract enforcement, it measures (in case of India) cases of value of USD 5,000 or higher. It is from here that the value of INR 3 lakhs is adopted.

The Bill also calls for establishment of Commercial Courts at district Judge level in the cities of Chennai, Delhi, Kolkata, Mumbai and State of Himachal Pradesh (where the High Courts have ordinary original civil jurisdiction), thereby extending the benefits of the Commercial Courts Act to commercial disputes even at the district court level. Pecuniary limits for such commercial court is INR 3 lakhs and above, but not more than the usual pecuniary jurisdiction of the district court in the jurisdiction. Further, with the prospective effect given to the amendments, the present adjudicatory mechanism pertaining to commercial disputes, would remain undisturbed.


\textsuperscript{161} Press release available here.

\textsuperscript{162} Available here.
Referring Parties to Arbitration? Oral Consent between Counsels not Enough, Holds Supreme Court of India

I. Introduction

The Supreme Court (“Court”) in the case of Kerala State Electricity Board and Anr. (“State Board”) vs. Kurien E. Kathilal and Anr. (“Contractor”) had occasion to rule on whether parties could be referred to arbitration based on mere oral consent given by the counsels representing parties - without there being any written instructions to that effect.

Hearing an appeal against an order of the Kerala High Court (“High Court”) which had referred the parties to arbitration merely on the counsels' oral consent, the Court set aside the said order, inter alia holding that when there was no arbitration agreement between the parties, the High Court ought not to have referred the parties to arbitration without a joint memo or a joint application between the parties.

II. Back-Ground

The State Board entered into an agreement in 1981 with the Contractor for construction of a dam in the state of Kerala. After commencement of work, the Government of Kerala issued a notification in 1983 by which the minimum wages payable to certain categories of workers were revised upwards with effect from the date of the notification. The Contractor accordingly claimed labour escalation charges from 1983 to 1984 as well as certain claims for additional work done. What followed was lengthy and protracted litigation in the High Court of Kerala.

So far as the claim on additional work was concerned, with the consent of the counsel for both parties, and without existence of an arbitration agreement or written instructions provided by the parties, the High Court referred the parties to arbitration. Pursuant to such reference, an arbitral award came to be passed in favour of the Contractor.

The State Board preferred an appeal against the decisions of the High Court before this Court.

III. Issue

Whether the High Court was correct in referring the parties to arbitration upon the oral consent of the parties' counsels, in the absence of any written instructions thereto?
IV. Judgment

The Court, in exercise of its powers under Article 136 of the Constitution of India (“Article 136”), chose to re-appreciate all facts and materials on record considering that public money was involved and that the findings of the High Court would otherwise result in excessive hardship to the State Board. On the High Court’s decision to refer the parties to arbitration (for the Contractor’s claim on additional work done), the Court observed that the jurisdictional precondition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”) is that parties should seek a reference to arbitration. So far as reference of a dispute under Section 89 of the Code of Civil Procedure, 1908 (“CPC”) is concerned, the Court considered that the same can be done only when parties agree for settlement of their dispute through arbitration - in contradistinction to other methods of alternative dispute resolution stipulated under Section 89 of the CPC.

In light of the above, the Court held that in so far as reference of the parties to arbitration is concerned, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 of the CPC. Placing reliance on the judgments of the Supreme Court in Afcons Infrastructure Ltd. & Anr. V. Cherian Varkey Construction Co. (P) Ltd. & Ors163 and Shailesh Dhairyawan v. Mohan Balkrishna Lulla,164 it held that in the absence of an arbitration agreement, the court can refer parties to arbitration only with written consent of parties either by way of a joint memo or a joint application.

The Court also observed that the impugned order of the High Court referring parties to arbitration could not be sustained on other grounds as well as the impugned order contained adverse observations on the State Board, causing prejudice to the rights of the State Board in pursuing the matter before the arbitral tribunal. The Court thus proceeded to set aside the Judgment of the High Court as well as the arbitral award passed pursuant to its directions.

V. Analysis

A ruling that recognizes express written instructions or memo by both parties to refer disputes to arbitration goes a long way in upholding party autonomy, which is the essence of alternative dispute resolution. By holding that in the absence of an arbitration agreement, only express written instructions would allow the counsels to give consent to reference to arbitration, the Court has given teeth to Section 7 of the Arbitration Act, requiring that an arbitration agreement must be in writing in order to be valid. This also substantiates requirements of Section 8 where parties are required to file the arbitration agreement in court while seeking reference to arbitration. The Court has rightly considered that referring parties to arbitration has serious consequences as once parties are so referred, proceedings fall outside the stream of civil courts and will not be bound by the CPC or the Indian Evidence Act. Also, once the award is passed, it would be set aside only on limited grounds.

This case is also a demonstration of the extent to which the Supreme Court may exercise its jurisdiction under Article 136 under which normally it would not re-appreciate the evidence and findings of fact. However, where findings of the High Court are perverse or likely to result in excessive hardship, the Supreme Court would not decline to interfere merely on the ground that the findings in question are findings of fact. Given the fact that a dispute was referred to arbitration without any written instructions by the parties - leading to an adverse arbitral award against one party - the Court in exercise of its powers under Article 136 even proceeded with setting aside the arbitral award. This judgment should do away with the practice of High Court Judges referring parties to arbitration based merely on oral consent provided by the Counsels.

---

163. (2010) 8 SCC 24
164. (2016) 3 SCC 619
Supreme Court’s Dictum on Reference of Non-Signatories to Arbitration in Domestic Arbitrations

Agreements that are inter-connected, with a similar underlying commercial purpose, would bind all the parties to the agreements, even though one of them might be lacking an arbitration clause, or an entity is not party to all such agreements.

Principles laid down in the Chloro Controls case applied in context of Section 8 of the Act

Reiterating the principles of the Ayyaswamy case, Supreme Court rules that mere allegations of fraud would per se not make a dispute non-arbitrable.

I. Introduction

With the expanding dimensions of arbitration in India, Indian courts have maintained their stance in referring parties to arbitration, besides ensuring minimal interference in the same. Recently, the Supreme Court of India (“Supreme Court”), in the case of Ameet Lalchand Shah and Others (“Appellants”) v. Rishabh Enterprises and Another (“Respondents”),165 had the opportunity to interpret Section 8166 of the Arbitration and Conciliation Act 1996 (“Act”), as amended by the Arbitration and Conciliation (Amendment) Act 2015 (“Amendment Act”). The Supreme Court applied the principles laid down in Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and others167 (“Chloro Controls”) in relation to domestic arbitrations. It ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. Further, on examining the facts of the case, the Supreme Court followed the principles laid down in A. Ayyasamy v. A. Paramasivam168 (“Ayyasamy”) in concluding that mere allegations of fraud would not prevent arbitration.

II. Facts of the Case

Rishabh Enterprises (“Rishabh”), entered into four agreements for the commissioning of the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh:


2. Engineering, Installation and Commissioning Contract (dated 01.02.2012) between Rishabh and Juwi India;


---

165. Civil Appeal No. 4690 of 2018 arising out of SLP(C) No. 16789 of 2017, decided on May 3, 2018

166. “Power to refer parties to arbitration where there is an arbitration agreement.—

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

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

167. (2013) 1 SCC 641, para 107: “reference of even non-signatory parties to an arbitration agreement can be made...”

168. (2016) 10 SCC 386. See here (our hotline)
3. Sale and Purchase Agreement (dated 05.03.2012) between Rishabh and Astonfield Renewable Pvt. Ltd (“Astonfield”); and


Of the above, only the third agreement dated 05.03.2012, was without an arbitration clause.

Disputes arose between the parties when Rishabh raised allegations of fraud and misrepresentation against Astonfield – that it had induced Rishabh to purchase the Photovoltaic products for a huge amount.

Rishabh preferred a civil suit against the Appellants before the Delhi High Court levelling various allegations including fraud and misrepresentation. There was a further claim that the four agreements concluded with the Appellants be declared null and void as had been vitiating Rishabh to purchase the Photovoltaic products for a huge amount.

The Supreme Court discusses the amendments made to Section 8 and what had been proposed in the 246th Report of the Law Commission. Further while, not stated expressly, the Supreme Court applies the Chloro Controls case and analyses the facts in the context of principals laid down in the said case. It found that though there were different agreements involving several parties, it was for a single commercial project, i.e. the commissioning of the Photovoltaic Solar Plant project. The averments made in the underlying plaint gave prima facie indication that all the four agreements are inter-connected. After going through the clauses of different agreements, it held that the Equipment Lease Agreement was the principal/main agreement and the remaining three agreements were ancillary agreements. So even though the Sale and Purchase Agreement between Rishabh and Astonfield did not contain arbitration clause, it was integrally connected with the commissioning of the solar plant.

Thus, the Supreme Court referred to “the facts and intention of the parties” which was “to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy, and concluded that all the parties could be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement. The Supreme Court ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration. This would hold true even where one of the agreements does not contain an arbitral clause or a party to one agreement is a third party to another agreement.
The Supreme Court also referred to the recommendations of the 246th Law Commission Report that a prima facie existence of an arbitration agreement was sufficient to refer the parties to arbitration unless it was null and void.

**B. Allegations of fraud and arbitrability of disputes**

Relying on the Ayyaswamy case which stated that serious allegations of fraud were non-arbitrable, while mere allegations of fraud would be arbitrable, and on assessment of the facts of the case, the SC concluded that the allegations in this case cannot be said to be so serious to refuse reference of the parties to arbitration. In arriving at this conclusion, the SC considered that the parties had consciously proceeded with the commercial transactions to commission the solar plant. Only in serious and complicated cases which warrant a case of criminal offence, requiring appreciation of evidence, would such complex issues be decided by the civil court. The SC recognized that it is the duty of the court to impart the commercial understanding with a sense of business efficacy and not by mere averments made in the plaint.

**IV. Analysis**

The SC has interpreted Section 8 in the light of the Amendment Act, in allowing any party, “claiming through or under” a party who was party to an arbitration agreement, to refer the dispute to arbitration. With such an interpretation, the SC has preferred to follow the principles laid down in Chloro Controls case. Further, in conjunction with the language of Section 8(1) that “notwithstanding any judgment, decree or order of the Supreme Court or any Court”, it may be considered that the SC has restricted the applicability of the Sukanya case to the amended Section 8. While not stated expressly, SC’s reference to the 246th Report of Law Commission also reflects, that the Sukanya case may no longer be applied to proceedings under Section 8 of the Act. Law Commission had recommended incorporation of principles laid down in the Sukanya case within the statute. However, this was not accepted and instead language like that of Section 45 was introduced in Section 8 of the Act. Accordingly, parties may now be referred to arbitration even if only the principal agreement contained an arbitration clause and ancillary agreements did not. If the parties’ intention is to not resolve disputes through arbitration, then it may be advisable for the parties to exclude arbitral clauses from all agreements forming part of the same transaction.

Further, while quoting the Ayyaswamy case, the SC has also strived towards curbing instances where recalcitrant parties resort to allegations of fraud etc. to merely disable or obstruct an arbitration.
Delhi HC: No Bar on two Indian Parties in Choosing a Foreign Seat of Arbitration?

I. Background:

The Delhi High Court (“Delhi HC”) in GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors,170 after relying on the decision of the Madhya Pradesh High Court in Sasan Power Limited v. North American Coal Corporation (India) (P) Ltd171 (“Sasan Power”), and Atlas Exports Industries v. Kotak & Co172 (“Atlas Exports”) has ruled that here is no prohibition in two Indian parties opting for a foreign seat of arbitration, and such an arrangement would attract Part II of the Arbitration and Conciliation Act, 1996 (“Act”). The Delhi HC also relied on Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc & Ors173 (“Chloro Control”) and upheld the impalement of a non-signatory to the arbitration agreement in SIAC arbitration reference no Arb. 316/16/ACU (“Arbitration Proceedings”). In addition, the Delhi HC has also opined that the decision in Sudhir Gopi v. Indira Gandhi National Open University174 (“Sudhir Gopi”) that the principle of alter ego is non-arbitrable, is per incuriam.

Recently, the Delhi High Court (“Delhi HC”) entered into three agreements with Doosan Power Systems India Private Limited (“Doosan India”), all dated 22 January 2010 (“EPC Agreements”). A separate corporate guarantee was also executed between GCEL, GMR Infrastructure Ltd (“GIL”), and Doosan India on 17 December 2013 (“Corporate Guarantee”). Thereafter, two Memoranda of Understanding were executed between Doosan India and GMR Energy Limited (“GMR Energy”) dated 1 July 2015 and 30 October 2015 (“MOUs”). The EPC Agreements, Corporate Guarantee, and the MOUs became the subject matter of a dispute and Doosan India invoked Arbitration Proceedings against GIL, GMR Energy and GCEL seeking enforcement of certain liabilities.

GMR Energy filed a civil suit before the Delhi HC to restrain Doosan India from instituting or continuing or proceeding with the Arbitration Proceedings. In the Arbitration Proceedings, GMR Energy was impleaded even though it was not a signatory to the three EPC Agreements, the Corporate Guarantee, by virtue of two MOUs, family governance, transfer of shareholding and being alter ego of GCEL and GIL. This was challenged by GMR Energy in the civil suit which objected to being arrayed as a party and sought discharge of GMR Energy as a party, respondent and termination of reference of the Arbitration Proceedings.

An ad interim ex parte order was passed on 4 July 2017 wherein the Delhi HC directed that no arbitrator be appointed on behalf of GMR Energy until the next date of hearing.

---

170. 2017 SCC OnLine Del 11625
171. 2015 SCC OnLine M.P. 7417
172. 1999 (7) SCC 61
173. 2013 (1) SCC 641
174. 2017 SCC OnLine Del 8345
GMR Energy also filed an urgent interim application under Order 39, Rule 1 and 2 of the Code of Civil Procedure, 1908 (“CPC”). Doosan India filed two applications (a) application under Order 39, Rule 4 to vacate the operation of the 4 July 2017 order; and (b) application under Section 45 of the Act, inviting the Delhi HC to refer the parties to arbitration.

II. Contentions on Behalf of Doosan India

The primary contentions have been summarized below:

A. Impleading GMR Energy in the Arbitration Proceedings

1. There exists a valid and binding arbitration agreement between Doosan India, GCEL, GIL and GMR Energy being alter ego and a guarantor of GCEL has been rightly impleaded in the Arbitration Proceedings.

2. The fact that: (a) GMR Energy is a holding company of GCEL and has taken over GCEL liabilities towards Doosan India; (b) GMR Energy guaranteed to make payments and made certain payments on behalf of GCEL in partial discharge of the liability of GCEL, and at that relevant time GMR Energy owned 100% stakes in GCEL, co-mingled funds, run by the same family, had the same Directors and officers; (c) the EPC Agreements, the Corporate Guarantee all contain arbitration clause with the intention to resolve any dispute through arbitration under the SIAC Rules and additionally the two MOUs are also governed by the same agreements, the payment obligation being undertaken by GMR Energy for assuring proper execution of three EPC Agreements between Doosan India and GCEL, the arbitration clause would also extend to GMR Energy.

3. It was also contended that invocation of arbitration against the alter ego of a signatory is a well-recognized principle not only in India, but also in Singapore.176

4. The Arbitral Tribunal is the appropriate forum to adjudicate the issue of alter ego and the same being determinable by the Arbitral Tribunal, this Court cannot proceed with the present suit to determine whether GMR Energy is liable to be proceeded in the Arbitration Proceedings.177

5. The decision of the Delhi HC in Sudhir Gopi is not applicable in the present case, since in Sudhir Gopi the dispute did not pertain to international arbitration but under Part I of the Act, hence the said decision has no application to the present case.

B. Applicability of Part II of the Act to the Arbitration Proceedings

1. Relying on the decisions of the Supreme Court in Sasan Power and Atlas Exports, it was argued that two Indian parties can choose a foreign seat of arbitration, and such an arrangement would not be in contravention with Section 28 of the Indian Contract Act, 1872 (“Contract Act”).

2. GMR Energy’s reliance on TDM Infrastructure was improper since the ruling in TDM Infrastructure being a decision under Section 11 of the Act cannot be treated as a binding precedent, as was held in Associate Builders v. Delhi Development Authority178.

175. Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc & Ors 2013 (1) SCC 641
177. Integrated Sales Services Aloe Vera of America, Inc v. Asianic Food (S) Pte. Ltd & Anr 2006 (3) SGHC 78; M/s Sai Soft Securities Ltd v. Manju Ahluwalia FAO (OS) No. 65/2016
178. 2015 (3) SCC 49
III. Contentions on behalf of GMR Energy

A. Impleading GMR Energy in the Arbitration Proceedings

1. GMR Energy being a non-signatory to any of the arbitration agreements, it cannot be roped into an international arbitration by applying the principle of *alter ego* or "it being a guarantor" without there being a written guarantee.

2. The principle of alter ego does not entitle Doosan India to invoke arbitration against GMR Energy as each company is a separate and distinct legal entity, and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies a single entity.\(^{179}\)

3. The basis of impleading GMR Energy on the basis of the MOUs is incorrect, as admittedly, the two MOUs stood terminated by a letter dated 3 November 2016, and which letter was not made part of the Arbitration Proceedings.

4. Despite the fact that GMR Energy is not a party to the arbitration agreement, Doosan India has imposed the Arbitration Proceedings on GMR Energy, which is oppressive, vexatious apart from being illegal.

B. Applicability of Part II of the Act to the Arbitration Proceedings

1. The EPC Agreements as well as the Corporate Guarantee prescribe: (a) governing law of the contract as Indian law; (b) arbitration shall be conducted in Singapore; and (c) arbitration shall be as per SIAC Rules. It was contended that since the relationship between GCEL, GIL and Doosan India is domestic in nature, and hence all parties being Indian, Part I of the Act would apply in view of the recent amendment to Section 2 (1) (f) (iii) of the Act.\(^{180}\)

2. As the arbitration is between two Indian parties, it cannot be termed as international commercial arbitration and Indian substantive law cannot be derogated from by and between two Indian parties as held in *Bharat Aluminium Company and Ors v. Kaiser Aluminium Technical Service, Inc and Ors.*\(^{181}\)

3. Since two Indians cannot contract out of the law of India and the Act is a substantive law, exclusion of Part I of the Act which Doosan India seeks to do would be hit by Section 28 of the Contract Act.

4. Part II of the Act would not apply merely because the place of arbitration is out of India. Once the arbitration is between two Indian parties, it ceases to be an “international commercial arbitration”, and therefore automatically ceases to be “considered as commercial under the law enforced in India” which is the principle condition for defining "a foreign award" under Section 44 of the Act. Accordingly, the Section 45 Application is not maintainable.

IV. Judgment

A. Delhi HC held that the Arbitration Proceedings would fall under Part II of the Act

The Delhi HC affirmed the finding of the Supreme Court of India ("Supreme Court") in Atlas Exports, wherein the Supreme Court had to determine whether the fact of two Indian parties having a foreign seated arbitration would be opposed to public policy under Section 23 read with Section 28 of the Contract Act. The Supreme Court answered in affirmative, meaning that

\(^{179}\) *Indexwind Energy Ltd v. Wescare (India) Ltd*, 2010 (5) SCC 306, *Sudir Gopi, Balvant Rai Sahuya & Anr v. Air India Ltd & Ors*, 2014 (g) SCC 467

\(^{180}\) *Reliance was also placed on TDM Infrastructure Private Limited v. UE Development India Private Limited 2008 (14) SCC 271; Seven Islands Shipping Ltd v. Sath Petroleum Ltd 2012 MhLJ 822 ("Seven Islands"); Aadhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Ltd. 2015 SCC OnLine Bom 2752*

\(^{181}\) *2012 (9) SCC 552*
there is no prohibition for two Indian parties to opt for a foreign seat of arbitration. The Madhya Pradesh High Court also affirmed the ruling in Sasan Power which had relied on Atlas Exports to reach the same conclusion.

The Delhi HC also dismissed GMR Energy’s contention that the decision in Atlas Exports is under the 1940 Arbitration Act, hence not applicable under the Act. On this issue, reliance was placed on the Supreme Court’s decision in Fuerst Day Lawson v. Jindal Exports Ltd, wherein it was held that the new statute is more favourable to international arbitration than its previous incarnation.

The Delhi HC also held that the decision in Seven Islands Shipping and Aadhar Merchantile are per incuriam as they had not considered Atlas Exports.

B. Delhi HC held that GMR Energy was correctly impleaded in the Arbitration Proceedings

The Delhi HC observed that in view of the fact that: (a) GCEL was a joint venture of GMR Group, and the group company did not observe separate corporate formalities and comingled corporate funds; (b) GMR Energy relied on the MOUs signed and discharged liability by making part payment; and (c) at the time of entering into the MOUs, GMR Energy had acquired GCEL, Doosan India has made out a case for proceeding against GMR Energy.

Before arriving at its decision, the Delhi HC considered the decision of the Supreme Court in Chloro Control wherein it was held that the legal bases to bind alter ego to an arbitration agreement are implied consent, third party beneficiary, guarantors, assignment or other transfer mechanism of control rights, apparent authority, piercing of corporate veil, agent principle relationship etc.

Interestingly, the Delhi HC while discussing the principle of alter ego held that the decision of Delhi HC in Sudhir Gopi is per incuriam, in so far as it failed to consider the issue of arbitrability of alter ego and the decision was passed without taking into consideration the decision of Supreme Court in A Ayyasamy v. A Paramasivam (“Ayyasamy”), wherein the Supreme Court carved out instances which cannot be referred to arbitration.

V. Analysis

This decision, re-affirming that two Indian parties can seat their arbitration outside India and setting a non-signatory to arbitration, is yet another testament to pro-arbitration approach of Indian courts with the Delhi HC leading the charge.

---

182. “The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute’s adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement”

183. 2011 (8) SCC 333

184. (2016) 10 SCC 386
Ineligibility of Arbitrators - Arbitration Amendment Act Applies Prospectively

- The Arbitration and Conciliation (Amendment) Act, 2015 does not apply retrospectively to arbitration proceedings commenced prior to it coming into force, unless the parties otherwise agree.

- Parties cannot approach the Court for the appointment of an independent arbitrator when an arbitrator has already been appointed pursuant to the arbitration agreement.

I. Introduction

In SP Singla Constructions Pvt. Ltd. v. State of Himachal Pradesh, the Supreme Court clarified that if an employee arbitrator has been appointed pursuant to the terms of an arbitration agreement prior to the Amendment Act of 2015, a party cannot approach the Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (“Act”) to seek the appointment of an independent arbitrator. Any challenge to the arbitrator appointed ought to have been raised before the arbitrator himself in the first instance.

However, possibly the Hon’ble Supreme Court has missed the opportunity to interpret a proviso in the arbitration clause of the Contract (defined below) which stated that any statutory modification or re-enactment of the A&C Act shall apply to the arbitration proceeding. This proviso, if held to be applicable, would have the effect of barring the employee arbitrator from continuing with arbitral proceedings by virtue of Section 12(5). However, without assessing the proviso, the Supreme Court held that Section 12(5) would not be invoked since arbitral proceedings had commenced before the enactment of the Amendment Act.

II. Facts

S.P Singla Construction Pvt. Ltd. (“Appellant”) entered a construction work contract (“Contract”) with the State of Himachal Pradesh on December 19, 2006. Work was to be completed by January 4, 2009; extended until June 30, 2010. However, the work was completed only by June 4, 2011. The Appellant raised a dispute regarding payment for the work tendered by it through a letter on October 18, 2013 and invoked arbitration clause in the Contract, which is extracted below:

“Clause 65 of the General Conditions of Contract—Except where otherwise provided in the contract all questions and disputes relating to inter alia concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Engineer-in-Chief/Chief Engineer, Himachal Pradesh Public Works Department. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that he had to deal with the matters to which the contract relates, and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or different. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason that (sic) the Chief Engineer, HPPWD at the time of such transfer vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be..."
entitled to proceed with the reference from the stage at which it was left by his predecessor, it is also a terms of this contract that no person other than a person appointed by the Chief Engineer, HPPWD, should act as arbitrator and if for any reason that is not possible the matter is not be claim in dispute is Rs.50,000/- (Rupees Fifty Thousand) and above, the arbitrator shall give reasons for the award. Subject as aforesaid the provision of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause.” (emphasis supplied).

Pursuant to Clause 65 above, the Chief Engineer, HPPWD appointed the “Superintendent Engineer, Arbitration Circle, HPPWD, Solan” as the arbitrator on October 30, 2013. However, the Appellant either remained absent from the proceedings or sought adjournments stating that it intended to challenge the appointment of arbitrator before the Chief Justice. Even after a hearing, no statement of claim was filed by the Appellant, due to which, arbitration proceedings were terminated under Section 25(a) of the Act on August 6, 2014. 187

The Appellant filed a petition before the High Court under Section 11(6), 14 and 15 of the Act praying for the appointment of an independent arbitrator. The High Court rejected the application, and the Appellant appealed the same before the Supreme Court.

III. Issues Before The Supreme Court

1. Whether the appointment of an arbitrator in arbitration proceedings commenced prior to the Amendment Act would attract the disqualification prescribed in Section 12(5) of the Act?

2. Whether a party can apply to appoint an arbitrator under Section 11(6) of the

IV. Judgment

A. The Amendment Act applies prospectively in relation to arbitral proceedings

The Appellant argued that the arbitrator appointed under Clause 65 of the Contract was ineligible pursuant to Section 12(5), which was inserted by way of the Amendment Act.

The Supreme Court first considered if the Amendment Act would be applicable to the arbitral proceedings between the parties. The Court noted that the proceedings in this case commenced back in 2013, much prior to the commencement of the Amendment Act on October 23, 2015. The Supreme Court relied on its judgment in Board of Control for Cricket in India v. Kochi Cricket Private Limited188 wherein it held that provisions of the Act cannot have retrospective operation in the arbitral proceedings already commenced unless the parties otherwise agree. Thereby, the Supreme Court held that Section 12(5) of the Act does not apply to the present proceedings unless the parties agree otherwise.

In light of this observation, the Supreme Court then examined Clause 65 to determine if the parties had agreed that the Amendment Act is applicable. In this regard, the Appellant placed reliance on Clause 65 of the Contract which stated that “the agreement is subject to any statutory modification or re-enactment thereof and the rules made thereunder and for the time being shall apply to the arbitration proceeding under this clause.” It also relied on the exact clause in the case of Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Private Limited189 (“Ratna Infrastructure”), wherein the Delhi High Court held that the wording “any statutory

187. Under Section 25(a) of the Act, the arbitral tribunal may terminate proceedings if a claimant fails to communicate her statement of claim.

189. (2017) SCC Online Del 7808

© Nishith Desai Associates 2019
B. Appointment of arbitrator cannot be challenged under Section 11(6)

The Appellant submitted that it can directly approach the High Court for appointment of an independent arbitrator under Section 11(6) of the Act. The Supreme Court placed reliance on its judgment in *Antrix Corporation Limited v. Devas Multimedia Private Limited*\(^{192}\) wherein it was held that, if a party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement by other party/parties, her remedy would be by way of petition under Section 13 of the Act,\(^{193}\) and, thereafter by challenging the award to be set aside under Section 34 of the Act. The Supreme Court upheld this view and stated that in the present case, the arbitrator had been appointed pursuant to Clause 65 of the Contract and the provisions of law. Therefore, the arbitration agreement could not be invoked again under Section 11(6) of the Act.

Going a step further, the Supreme Court stated that the arbitrator in the present case had terminated the proceedings under Section 25(a) of the Act without issuing a notice of warning to the Appellant. Therefore, the Supreme Court directed that the order of termination of the arbitrator be set aside and that, pursuant to Clause 65 of the Contract, the Chief Engineer, HPPWD should appoint an arbitrator and proceed with the matter in accordance with law.

V. Analysis

The Supreme Court has reinstated the settled procedure that must be followed by parties to challenge the appointment of the arbitrator. A party must file an application with the arbitral tribunal under Section 13, and if such application is rejected, the party can challenge

---

190. 26. 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.”

191. (2009) 8 SCC 520


193. Under Section 13, parties may challenge an arbitrator by sending a written statement with reasons for challenge to the arbitral tribunal. If the challenge is unsuccessful, the arbitral tribunal may continue with the proceedings and make an arbitral award. It is open to the party to make an application for setting aside such arbitral award under Section 34 of the Act.
the resultant arbitral award under Section 34. It has been made amply clear that a party may not flout this route by directly approaching the court under Section 11(6) of the Act to appoint a fresh arbitrator.

However, with regard to the applicability of Section 12(5) to arbitral proceedings commenced prior to, but pending at the time of enforcement of, the Amendment Act, the Supreme Court has not provided sufficient clarity as to what constitutes an agreement between parties to apply the amendments to A&C Act, in order to invoke the condition in Section 26 stating unless the parties otherwise agree”. In the case of Ratna Infrastructure, the Delhi High Court had dealt with an identical clause but recorded a diametrically opposite finding. It had held that the phrase “any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration...” was sufficient to show an agreement by the parties to apply the provisions of the Amendment Act.

The Supreme Court did not sufficiently justify why Clause 65 of the Contract did not meet the test of agreement between the parties, despite having drawn attention to an identical clause and the corresponding ruling of the Delhi High Court. It did not delve into the situations which could be considered as an agreement between parties to apply the Amendment Act. It simpliciter considered the date of commencement of the arbitral proceedings, to rule that Section 12(5) of the Amendment Act did not apply in the present case rendering the employee arbitrator ineligible. In this regard, it would not be incorrect to state that the Supreme Court has missed an opportunity to further clarify the nuances of applicability of the Amendment Act where parties agree to subject arbitral proceedings to a statutory modification or reenactment of the A&C Act.
Supreme Court Upholds Arbitral Clause Providing for an Employee Arbitrator

- Appointment of employee as an Arbitrator is not invalid and unenforceable in arbitrations invoked prior to October 23, 2015;
- The terms of the arbitration agreement ought to be adhered to and/or given effect to as closely as possible;
- No automatic intervention by the Chief Justice of High Court for appointment of an arbitrator, without establishing cause.

II. Brief Facts

The parties entered an agreement in 2009 for construction of permanent township for a thermal power project in Haryana. Due to certain delays in completion of work, the Appellant cancelled remaining works by their several letters issued in 2014-15. The Respondent refuted the claims and invoked arbitration under Clause 56 of the General Conditions of Contract (“GCC”) under the agreement. The relevant portion of the arbitration clause is reproduced below:

“......There will be no objections, if the Arbitrator so appointed is an employee of NTPC Limited (Formerly National Thermal Power Corporation Ltd) and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in disputes or difference...........”

### Date | Sequence of Events
---|---
July 29, 2015 | The Respondent invoked arbitration and sought appointment of a retired High Court judge as the Sole Arbitrator for conducting arbitration proceedings. The Respondent in their letter requested a panel of independent arbitrators be made available to them for appointing the Sole Arbitrator or in the alternative were agreeable to constitution of an Arbitral Tribunal comprising of nominee of each party and they together appointing the Presiding Arbitrator.
August 19, 2015 | The Appellant rejected the request of the Respondent and appointed its Chief Executive Officer (“CEO”) as the Sole Arbitrator in terms of Clause 56, which envisaged the appointment of certain designated officers by the Appellant as the Arbitrator.
October 7, 2015 | Procedural hearing was conducted and parties were directed to complete pleadings and next hearing was scheduled for April 9, 2016. From the records, it appears that the Respondent did not raise any objection regarding continuation of the Arbitral proceedings.

194. Civil Appeal No. 12627-12628 OF 2017 (SPECIAL LEAVE PETITION (CIVIL) NOS.25206-25207 OF 2016)
The Respondent approached the Delhi High Court (“Delhi HC”) seeking termination of the Arbitrator’s mandate under Section 14 of the Arbitration & Conciliation Act, 1996 (“Act”) and appointment of a Sole Arbitrator by the Chief Justice under Section 11(6) of the Act.

Keeping in mind the legislative intent contained in the Amendment Act, as the current Arbitrator was the CEO of the Appellant and was previously involved in cases/contract works similar to the present case, the Delhi HC allowed both petitions and asked the Appellant to furnish names of three panel arbitrators from different departments for selection by the Respondent. The Delhi HC also stated that in the event of failure by the Appellant, it would be open to the Respondent to revive the petitions in which case the Delhi HC would appoint a Sole Arbitrator from the list maintained by Delhi International Arbitration Centre.

The Appellant challenged the decision leading to the present appeal.

III. Issue

The Delhi HC had wrongly exercised jurisdiction and erred in applying the provisions of the Amendment Act, given that the arbitral proceedings were initiated prior to the amendments.

IV. Judgment

The Court clarified that since arbitration was invoked prior to October 23, 2015, the statutory provisions in force prior to the amendments would be applicable in the present case.

The named Arbitrator, being an employee of one of the parties, ipso facto would not render the appointment invalid and unenforceable under the erstwhile provisions of the Act. The Supreme Court held that doubts could arise if such person was the controlling or dealing authority with respect to the subject contract or if he is a direct subordinate to the officer whose decision is the subject matter of the dispute. Relying on Indian Oil Corporation Ltd. and Others v. Raja Transport Private Ltd. the Court held that the disputes should be referred to the named Arbitrator as a rule unless there exist justifiable apprehensions on his independence and impartiality.

The Court emphasized on the significance of

---

195. The Arbitration and Conciliation (Amendment) Ordinance was promulgated on October 23, 2015. Thereafter, on January 01, 2016, the Arbitration and Conciliation (Amendment) Act was gazetted and according to Section 1(2) therein, the Amendment Act was deemed to have come into force on October 23, 2015.

196. (2009) 8 SCC 520
giving effect to the terms of the agreement to the closest extent possible reiterating the law laid down in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd*[^97] with respect to pre-amendment cases.

On arbitral appointment, the Supreme Court held that there could not be any automatic invocation of powers under Section 11(6) by the Chief Justice of High Court, without establishing that (i) a party fails to act as required under the appointment procedure; or (ii) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (iii) a person, including an institution, fails to perform any function entrusted to him or it under the appointment procedure.

The Court specifically clarified that in case of arbitrations initiated post-amendments, if the arbitration clause is not in consonance with the amended provisions, the appointment of the Arbitrator even if apparently in conformity with the arbitration clause in the agreement, would be illegal and courts can exercise its powers under Section 11(6) to appoint arbitrators.

The Court went on to set aside the order of the Delhi HC and held that the arbitral proceedings under the CEO would continue in accordance with law.

### V. Analysis

Post the Amendment Act, several rulings have been passed by various High Courts applying the amended provisions retrospectively on a selective basis. This has created a lot of chaos and confusion on the interpretation of the provisions and its applicability to court proceedings emanating out of arbitrations.

The Court has clarified that the provisions of the Amendment Act insofar as they relate to the appointment of arbitrators, would not be applicable for arbitrations invoked prior to October 23, 2015. Moreover, the intervention of the courts in such arbitrations could only be sought on limited grounds i.e. by demonstrating justifiable doubts on independence or impartiality.

The Court has adopted a straight-jacket formula and demarcated pre-amendment and post-amendment application of provisions of the Act, not allowing parties to take advantage of the new provisions and derail ongoing proceedings. The Court chose to disregard the fact that the Sole Arbitrator in this case was, in fact, the CEO of the Appellant. It may be argued that in doing so, the Court lost an opportunity to once and for all put to rest the much criticized practice of appointment of employee-arbitrators. This is a practice that the Court itself has frowned upon several times and which was, in fact, severely criticized in the 246th Law Commission Report.

[^97]: (2008) 10 SCC 240
Supreme Court Makes Execution Of Arbitral Awards Easy And Expedient

I. Introduction

In Cheran Properties Limited v. Kasturi and Sons Limited,\(^\text{198}\) the Supreme Court interpreted provisions regarding execution of awards under the Arbitration and Conciliation Act, 1996 (“A&C Act”) vis-à-vis the power of fora other than civil courts to execute particular remedies under arbitral awards. The Supreme Court has confirmed that an arbitral award for transmission of shares can be executed before the NCLT rather than the civil court by seeking rectification of register of members of a company to effectuate the transmission. The Supreme Court has further clarified that an arbitral award can be enforced against a party who was not originally a signatory to the arbitration agreement but constituted a person/entity claiming through or under a party, for the purpose of execution of a decree.

II. Facts

An agreement was entered on July 19, 2004 between Sporting Pastime India Limited (“SPIL”), Kasturi Sons and Limited (“KSL”), KC Palanisamy (“KCP”) and Hindcorp Resorts Private Limited (“Hindcorp”). Under the agreement, SPIL was to allot 240 lakh equity shares to KSL against the book debts due by it to KSL. KSL offered to sell 243 lakh equity shares to KCP. KCP agreed to take over the business, shares and liabilities of SPIL as per the Shareholders Agreement (“SHA”).

Clause 14 of the SHA provided:

“KSL hereby recognizes the right of KCP and/or his nominees to sell or transfer their holding in SPIL to any other person of their choice, provided the proposed transferees accept the terms and conditions mentioned in this agreement for the management of SPIL and related financial aspects covered by this agreement”.

The SHA also contained a provision for dispute resolution by arbitration.

On 17 August 2004, a letter was sent from KCP, acting as the authorized signatory of Cheran Properties Limited (“Cheran”), to KSL stating as under (“Letter”):

“Re: SHARE PURCHASE AGREEMENT DT. 19. 7. 04

In pursuance of the above Agreement, you have agreed to sell and our Group Companies, by themselves and/or by their nominees have agreed to purchase shares in Sporting Pastime India Limited of a face value of Rs. 2,430 lakhs, for a sum of Rs. 243.00 lakhs.

Accordingly, we send herewith seven Share Transfer Deeds duly executed by us and we request you to execute the same and lodge them with Sporting Pastime India Limited together with relevant Share Certificates for registering the transfers in the following names... [including Cheran Properties Limited]”.

---

KCP failed to comply with its obligations under the Agreement. KSL and Hindcorp initiated arbitration proceedings against KCP and SPIL. On December 19, 2009, the arbitral tribunal made its award directing KCP and SPIL to return the share certificates of SPIL to KSL and Hindcorp. Contemporaneously, KSL was directed to pay an amount of INR 3,58,11,000 together with interest at 12% p.a. on a sum of INR 2,55,00,000.

KCP challenged this award under Section 34 of the A&C Act. The challenge was dismissed by the High Court of Madras and subsequently by the Supreme Court. The award attained finality.

Since the award attained finality, KSL initiated proceedings against Cheran (on the basis that Cheran is a nominee of KCP) to execute the award which directed transmission of shares. KSL approached the NCLT to seek rectification of the register of SPIL under Section 111 of the Companies Act, 1956 to effectuate the transmission of shares. The NCLT held that that Cheran is a nominee of KCP and holds shares on its behalf. As such, NCLT had jurisdiction to entertain the proceedings against Cheran for rectification of the register in order to effectuate the transmission of shares from Cheran to KSL. This position was upheld by the NCLAT and the Madras High Court on appeal. The present decision of the Supreme Court was rendered in an appeal filed by Cheran (“Appellant” / “Cheran”) against the decision of the High Court of Madras.

III. Issues Before The Supreme Court

1. Whether an arbitral award is binding on a third party (i.e. Cheran) who is not a signatory to the arbitration agreement?
2. Whether an arbitral award relating to transmission of shares can be enforced by the NCLT through the remedy of rectification of register of members under Section 111 of the Companies Act, 1956?

IV. Contention Of The Parties

A. Appellant’s Contentions

- The appellant, Cheran, contended that it is not a signatory to the SHA, and hence, not a party to the arbitration agreement under the SHA. Therefore, an arbitral award issued under the terms of the SHA did not bind it.

- An arbitral award must be enforced as a decree of a civil court and therefore, it could not have been enforced by pursuing proceedings before the NCLT.

B. Respondent’s Contentions

- The SHA clearly provides that the nominees of KCP would have to accept the terms and conditions to the SHA. As such, the SHA and the arbitration agreement were binding on Cheran.

- It was necessary to approach the NCLT as it is the only forum to effectuate matters relating to the transfer of shares.

V. Judgment

An Arbitral Award is Binding on the Persons Claiming Under It

The Supreme Court explained that Section 35 of the A&C Act\textsuperscript{199} states that an arbitral award is “binding on the parties and persons claiming under them”. The expression “persons claiming under them” is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. This expression was held to widen the net to include those who claim under the award, irrespective of whether such person was a party to the arbitration agreement or the arbitral proceedings. Hence, the pertinent question remained as to when can a party, a non-signatory to an arbitration agreement, be considered to claim under a party.

\textsuperscript{199}Section 35. Finality of arbitral awards. — Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.
The Court placed heavy reliance on the case of Chloro Controls (200) to expound on the principles and categories of relationships which would qualify a non-signatory to be a person claiming under a party. The first category involved relationships entailing third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. The legal basis to connect these relationships is implied consent and good faith. The second category involves agent and principal, apparent authority, piercing of veil, joint venture relations, succession and estoppel; the legal basis being force of the applicable law. The third category involves group of companies. The legal basis to connect an arbitration agreement entered by a company within a group of companies with its non-signatory affiliates is mutual intention i.e. if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. 

Relying on these principles, the Supreme Court conducted a scrutiny of the facts to determine whether Cheran would qualify as a party under KCP, so as to bind Cheran with the SHA entered into between KCP and KSL.

The Court considered that the parent agreement i.e. the SHA dated July 19, 2004 envisaged the allotment of equity shares of KSL to KCP with the intent that KCP would take over the business, assets and liabilities of SPIL. While KCP was entitled to transfer his shareholding, this was expressly subject to the condition of the acceptance by the transferee of the terms and conditions of the agreement. As such, Cheran being KCP’s transferee had accepted the terms of the SHA. Further, KCP’s letter dated 17 August 2004 to KSL contained a specific reference to the SHA. It was in pursuance of that agreement that KCP indicated, as authorized signatory of the appellant, that his group of companies had agreed to purchase the shares in SPIL. Quoting its holding in Chloro Controls, the Supreme Court held that the facts in this case display a mutual intention of the parties to be bound by the arbitral award.

NCLT can effectuate transmission of shares

The Court dealt with the issue of execution of an arbitral award through the NCLT. The arbitral award envisaged that KSL was entitled to the return of documents of title and the certificates pertaining to the shares of SPIL, contemporaneously with the payment or tendering of a sum of INR 3.58 crores together with interest. Thus, KSL was entitled to the share certificates in terms of the arbitral award. That necessarily meant transfer of the share certificates.

The Court resorted to Section 35 of the A&C Act on finality of arbitral awards. It held that the central facet of Section 35 is that an arbitral award shall be final and binding on the parties and persons claiming under them. The mere fact that Cheran was not a party to the arbitral proceedings did not conclude the question as to whether the award can be enforced against it. Hence, the arbitral award could be executed against Cheran on the ground that it claimed under a party i.e. KCP.

The arbitral award has the character of a decree of a civil court under Section 36 and is capable of being enforced as if it were a decree. To effectuate the transfer of shares awarded in the arbitration proceedings, recourse to the remedy of the rectification of the register under Section 111 was appropriate and necessary. Thus, armed with that decree, KSL was entitled to seek rectification before the NCLT by invoking the provisions of Section 111 of the Companies Act, 1956.

Therefore, the remedy to approach the NCLT to effectuate the transfer of shares through rectification in register was held to be competent.

VI. Analysis

The judgment of the Supreme Court is exemplary of its approach to facilitate expedient execution of arbitral awards by identifying and tapping powers of competent fora, other than solely civil courts, to execute awarded remedies. In the instant case, the Court identified and recognized the power of NCLT to execute an award that directed transmission of shares. It is pertinent to note that this power would only be confined to specific instances under the Companies Act that make it quintessential to approach the NCLT for execution.

Through this judgment, the Court has ruled out a potential added layer of execution of arbitral award as a decree of the court i.e., by way of first approaching the court that has jurisdiction over the arbitral proceedings, followed by the court within whose territory the assets are located or the appropriate remedy (as in the instance case) can be sought.

The Court has thus adopted a dynamic view by ruling that the NCLT can enforce arbitral awards, relating to transmission of shares. However, it remains to be seen as to how courts will address situations where an arbitral award grants remedies that can be executed by several different competent fora. Nevertheless, this is a welcome change, following another recent decision of the Supreme Court which affirmed that execution proceedings can be initiated anywhere in the country without having to obtain a transfer decree from the court which had jurisdiction over the arbitral proceedings. The enforcement-friendly approach of the Supreme Court will certainly increase the ease of execution of arbitral awards in India and foster an environment of speedy execution.

Time to Enforce Your Arbitral Award! Supreme Court Sheds Light on the Applicability of the Amendments to the Arbitration Law

- Stay on enforcement of arbitral awards lifted.
- Law as amended by the Arbitration & Conciliation (Amendment) Act, 2015 will apply to those arbitral proceedings which commenced on or after October 23, 2015 and will apply to those court proceedings (which relate to arbitration) which commenced on or after October 23, 2015.
- Amended Section 36 to apply even in cases where application for setting aside the award was filed prior to October 23, 2015 i.e. date of commencement of the Amendment Act.

I. Introduction

Do you have an arbitral award in your favour which you have been unable to enforce? Well you may now. On October 23, 2015, amendments were made to the Arbitration & Conciliation Act, 1996 (“Principal Act”). These amendments introduced much needed changes in the law and have been instrumental in robust growth of arbitration in India over the last couple of years. However, there remained ambiguity surrounding applicability of these amendments to court proceedings particularly those arising out of an arbitration which commenced before October 23, 2015.

One particular issue which arose in a number of cases was in context of enforceability of the domestic awards. Prior to the amendment, filing and pendency of an application for setting aside of an award, operated as an automatic stay against its enforcement. The amendment made to Section 36 of the Act lifted this automatic stay. Instead the award debtor is now required to make an application seeking stay. Further the grant of such stay by court may be conditional upon furnishing of security. Accordingly, various execution petitions were filed in courts around the country even though a setting aside application was pending. In all such cases, the issue that arose was, whether the parties could take advantage of the amended provisions even though the arbitration was under the old regime.

The Supreme Court (“Court”) in the case of Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd. (which was tagged along with several other appeals) has upheld the applicability of Section 36 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (“Amendment Act”). Judgment debtors can no longer enjoy an automatic stay on the execution of the arbitral award irrespective of whether their challenge against the award was filed prior to or post the commencement of the Amendment Act.

II. Judgment

A. Interpretation of Section 26

The instant case revolved around interpretation of Section 26 of the Amendment Act, which reads as follows:

“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.” [Emphasis supplied]

202. To read about the amendments, please click here

203. Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016)
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.

B. No substantive vested right in a judgment debtor to resist execution

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.

C. Legislative intent and removal of the mischief in the law

The Court considered an earlier judgment in National Aluminium Company Ltd. v. Pressteel & Fabrikations (P) Ltd. and Anr. This was also referred to in the 246th Law Commission Report “Law Commission Report” wherein it had been recommended that the erstwhile Section 36 be substituted, as the automatic suspension of the execution of the award, the moment an application challenging the award is filed, leaving no discretion in the court to put the parties on terms, defeated the objective of the alternate dispute resolution system.

In light of the same, the Court held that looking at the practical aspects, past recommendations of this Court, the Law Commission Report, the nature of rights involved, and the sheer unfairness of the un-amended provision granting an automatic stay, it is clear that Section 36 as amended should also apply in circumstances where application under Section 34 was filed before the commencement of the Amendment Act.

204. (2004) 1 SCC 540
D. On the proposed Arbitration & Conciliation (Amendment) Bill, 2018

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 (“Amendment Bill”). 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 as the very object of the enactment of the Amendment Act would otherwise be defeated.

III. Analysis

Arbitration is considered a good alternative and a better method to resolve commercial disputes in terms of flexibility, speed and cost-effectiveness. However, arbitration in India is anything but this and is often criticized for being slow, expensive and ineffective. In an attempt to remedy such issues and to encourage parties to choose India as a preferred seat of arbitration, the Amendment Act was introduced. However, due to certain lack of clarity in the drafting of the Amendment Act, the provisions therein were yet to see the effectiveness that was envisaged. This decision of the Court was eagerly awaited because of the complete lack of certainty on a critically important aspect of the legislation.

This decision of the Court should impact a lot of pending court proceedings and also increase voluntary compliance by parties of the arbitral award, even in respect of arbitrations initiated prior to the commencement of the Amendment Act. If a party is anyway required to deposit the value of the award in court, then the motivation to delay enforcement of an award by filing a challenge, in all but such cases where the award debtor genuinely believes that there are valid reasons to set aside the award, is done away with to a large extent.

Interestingly, the Court has not directly commented on the applicability of the amended provisions to court proceedings under sections 9 and 11 of the Act. However, the interpretation of section 26 provided by the Court suggests that in the event such proceedings are initiated on or after October 23, 2015, it would be governed by the Amended Act. It should be noted that in context of Section 34, the Court has noted that in circumstances where such a Section 34 has been filed post October 23, 2015, it shall be governed by the amended provisions.

Through this judgment, the judiciary has clearly signaled its commitment to take a pro-arbitration and pro-enforcement approach. However, if the Government refuses to accept the recommendations of the Court and goes on to enact the proposed Section 87, then there may be a plethora of permutations and combinations of laws that would apply, depending on the date of commencement of arbitration, leading to a lot of confusion and further delay in the effectiveness of the Amendment Act.
India—Supreme Court Rules on Jurisdiction of Courts in Execution of Arbitral Awards

This article was originally published in the 12th March 2018 edition of Arbitration Analysis: The Indian Supreme Court in Sundaram Finance Ltd v Abdul Samad and Anor (Civil Appeal No 1650 of 2018, 15 February 2018), has put an end to the decade long debate and differing views taken by High Courts on the jurisdiction of courts when executing arbitral awards. Moazzam Khan, Head of the Global Litigation Team, Payel Chatterjee, a senior member of the International Litigation and Dispute Resolution team and Shweta Sahu, a member of the same team at Nishith Desai Associates examine the decision.

I. Original News

Sundaram Finance Ltd v Abdul Samad and Anor
Civil Appeal No 1650 of 2018 (not reported by LexisNexis® UK)

II. What Are The Practical Implications Of The Case?

This 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.

III. What Was the Background to This Decision?

Sundaram Finance Ltd, the appellant, granted the first respondent, Abdul Samad, a loan in accordance with the terms and conditions provided in the loan agreement dated 18 August 2005. The second respondent executed a separate guarantee letter on the same day and stood as the guarantor for repayment of the loan amount. The loan was repayable in installments by 3 January 2009.

Due to a default in the payment of installments, arbitration proceedings were initiated by the appellant, as per the arbitration clause in the Loan Agreement. Due to the non-participation of the respondents in the arbitration proceedings, an ex parte arbitral award was granted on 22 October 2011.

The appellant initiated execution proceedings under s 47 read with s 151 and Order XXI Rule 21 of the Code of Civil Procedure (CPC) before the courts at Morena, Madhya Pradesh (where assets of the respondent were located) as the ex parte award was enforceable as a decree under Section 36 of the Arbitration and Conciliation Act 1996 (ACA 1996) (the Act).

The District Courts at Morena refused to entertain the application due to lack of jurisdiction and directed the claimant to file before the court of a competent jurisdiction. The District Court following the approach adopted by Madhya Pradesh and Karnataka High Courts directed the claimant to file an execution
application before the court of a competent jurisdiction (having jurisdiction over the arbitral proceedings) and then seek a transfer of the decree. Being aggrieved by the District Court order and the differing views of various High Courts and the position taken by the Madhya Pradesh High Court on this issue, the claimant directly approached the Supreme Court of India.

IV. What Did the Supreme Court Decide?

The Supreme Court analysed the differing views adopted by the Indian High Courts on the process followed for execution of arbitral awards. The views of the High Courts on this issue are:

To execute an award, a transfer decree should be obtained from the court of competent jurisdiction (having jurisdiction over the arbitral proceedings) before filing in the court where the assets are located

This approach takes into consideration the process of execution laid down in s 36 of the Act read with the provisions of CPC on ‘court’ which passes a decree (ie CPC, s 37), and s 39, laying down the procedure for transfer of decree, to conclude that transfer of the decree is mandatory for execution of an award.

The Madhya Pradesh High Court (Computer Sciences Corporation India Pvt. Ltd. v. Harishchandra Lodwal & Anr AIR 2006 MP 34 (not reported by LexisNexis® UK)) has been consistent in following this approach.

Similarly, the Himachal Pradesh High Court, following the path of the Madhya Pradesh High Court took a similar view in Jasvinder Kaur & Anr. v. Tata Motor Finance Limited CMPMO No.56/2013 decided on 17 September 2013 (not reported by LexisNexis® UK), that the court having jurisdiction over the arbitral proceedings, would be the competent court for the purposes of enforcement and parties would have to obtain a transfer decree to court where assets are located.

An award can be directly filed for execution before the court where the assets of judgment debtor are located.

As per the second limb of interpretation to the issue under consideration, an award is enforced in accordance with the provisions of the CPC in the same manner as if it were a decree of the Court as per s 36 of the Act. It does not imply that the award is a decree of a particular court but only a fiction since, in case of an award, no court passes a decree, but it is the arbitral tribunal, ‘execution proceedings’ that are distinct from ‘arbitral proceedings’.

Thus, ss 38 and 39 of the CPC have no applicability to the execution of awards and execution can be initiated before any court where the judgment debtor resides or carries on business or has properties within the jurisdiction of the said court.

The following Indian High Courts are the pioneers of this approach (case not reported by LexisNexis® UK):

- Delhi in Daelim Industrial Co Ltd v Numaligarh Refinery Ltd [2009] 159 DLT 579
- Punjab & Haryana in Indusind Bank Ltd v Bhullar Transport Company [2013] 2 RCR (Civil) 550
- Madras in Kotak Mahindra Bank Ltd v Sivakama Sundari & Ors [2011]4 LW 745
- Karnataka in Sri Chandrashekhar v Tata Motor finance Ltd & Ors [2015] 1 AIR Kant R 261
- Allahabad in GE Money Financial Services Ltd v Mohd. Azaz & Anr [2013] 100 ALR 766
- Kerala in Maharashtra Apex Corporation Limited v. Balaji G. & Anr [2011] (4) KLJ 408, and

Appreciating the second limb of interpretation, the Supreme Court distinguished a decree of a court from an award passed by the arbitral tribunal, which is only treated as a ‘decree’ for the purposes of execution. For the purposes of execution of a decree, the award is to be enforced in the same manner as if it was a decree under the CPC.

Regarding the nature of execution proceedings as being distinct from arbitral proceedings, the Supreme Court referred to s 32 of the Act to
assert that once an award is made, the arbitral proceedings stand terminated. Thus, the jurisdiction of courts stipulated under s 42 of the Act would not have any relevance in case of execution proceedings.

Further, there is no deeming fiction anywhere in the Actor the provisions of CPC that the court within whose jurisdiction the award was passed should be considered the court which passed the decree. The Supreme Court considering both views held that execution proceedings can be initiated before any court in India and there is no requirement to obtain a transfer from court having jurisdiction over arbitral proceedings.

The Supreme Court decision not only clears the conundrum of views on execution proceedings but is yet another step to simplify the court procedures post arbitration and making enforcement and execution easier for the award holder.

V. Case Details

- Court: Supreme Court of India, Civil Appellate Jurisdiction
- Judge: Sanjay Kishan Kaul
- Date of judgment: 15 February 2018

*The views expressed are not necessarily those of the proprietor.*
Public Policy: The Double Edged Sword in Enforcement Proceedings

I. Factual Background

Contractual relationship between the parties, HEPI and Union of India ("UOI") was governed through a production sharing contract ("PSC") entered in November, 1996 for the extraction, development and production of hydrocarbons in a geographic block in India ("Block").

Disputes arose between the parties, which were subsequently referred to arbitration pursuant to the clauses in PSC. The arbitration clause in the PSC recorded the venue of arbitration as Kuala Lumpur, unless otherwise agreed. Hydrocarbons discovered by HEPI was natural gas and not crude oil. HEPI was denied the contractual period prescribed under the PSC to determine the commerciality of the discovery;

UOI's relinquishment of HEPI's rights to the Block was null and void. The parties were to be put in the position they stood prior to the termination of rights, granting HEPI three more years to ascertain the commerciality of the natural gas;

UOI to pay interest on HEPI's investment of INR. 500 crore at the rate of 9% per year until the date of the award and 18% per year until the final payment after the award as damages.

II. Court Proceedings in India

A. Proceedings before the High Court of Delhi

UOI filed an application for setting aside of the Award and HEPI filed application for enforcement before the Delhi High Court ("Delhi HC") in 2013. HEPI opposed the setting aside proceedings on two grounds:

- Award was a ‘foreign award’, therefore an application for setting aside under Section 34 of Part-I of the Arbitration and Conciliation Act, 1996 (“Act”) would not be maintainable; and
- Assuming the application was maintainable, it would not lie within the territorial jurisdiction of the Delhi HC.

The Delhi HC held:

- The PSC did not specifically mention the place or seat of arbitration; therefore, it was necessary to ascertain the place of arbitration to decide on the maintainability of the application.

205. United States District for the District of Columbia, Civil Action No. 16-140 (RC)

206. The UNCITRAL Model Law on International Commercial Arbitration, 1985.”3.12. The venue of conciliation or arbitration proceedings pursuant to this Article unless the parties otherwise agree, shall be Kuala Lumpur and shall be conducted in English language. Insofar as practicable the parties shall continue to implement the terms of this contract notwithstanding the initiation of arbitration proceedings and any pending claim or dispute.”

207. Union of India v. Hardy Exploration & Production (India) Inc. FAO (OS) 59/2016 and CM Nos. 7062-63/2016 and 7066/2016
Relying on Article 31.3 of the Model Law, as the award was pronounced and signed at Kuala Lumpur, the ‘place’ of making the award, was Kuala Lumpur.

The arbitration agreement was entered prior to September 6, 2012. Relying on Reliance Industries, since seat of arbitration is outside India, Part I of the A&C Act will not apply and Section 34 application is not maintainable.

B. Proceedings before the Supreme Court of India

UOI appealed before the Supreme Court of India (“Supreme Court”). The Supreme Court referred the appeal to a larger bench before the Chief Justice of India to decide the law applicable to post arbitral award proceedings when the ‘seat’ is not expressly specified. The appeal is pending.

III. Proceedings before the United States District Court of Columbia

During the pendency of proceedings in India, HEPI approached the District of Columbia (“US Court”) in January 2016 seeking confirmation of the arbitral award under the Federal Arbitration Act.

Based on objections raised by UOI, the issues before US Court were:

- Whether confirmation of Award seeking specific performance and interest would violate US public policy;
- In the alternative, if the Award is confirmed, whether the US Court should stay the enforcement of the Award in the US considering that the challenge and enforcement proceedings are pending in India.

IV. Decision

A. Stay on Enforcement Proceedings in the US

UOI sought a stay on the proceedings in the US, pending the challenge to the Award before Indian courts. UOI relied upon Article V and VI of the New York Convention and the doctrine of forum non conveniens and international comity.

HEPI argued that conditions under Article VI of the New York Convention were not met as the Award was not challenged before the competent authority (Malaysian court).

It is well settled that a district court has the inherent authority to issue a stay but such authority should be used judiciously. Even in circumstances where the Indian courts do have the jurisdiction to set aside the award, the US Court noted that a stay on confirmation should not be lightly granted, defeating the purpose of arbitration.

The US Court relied on the six criteria set out in Europcar Italia, S.p.A v. Maiellano Tours, Inc to ascertain if a stay should be granted.

208. Article 31. Form and contents of award(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.


211. Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (“New York Convention”) states “if an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.” Article V(1)(e) of the New York Convention states that a competent authority is one “of the country in which, or under the law of which, that award was made.”


213. 156 F.3d 310, 317 (2d Cir. 1998).

214. (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay
Considering the factors laid down in *Europcar*, the US Court acknowledged that the proceedings before Indian courts have suffered inordinate delays. The US Court held that there is no clarity on timelines for completion of the setting aside and enforcement proceedings, considering it has been pending for more than five years. Therefore, the first two criteria laid down in *Europcar* do not favour a stay.

With respect to the third factor, UOI submitted that the Award will be subjected to higher scrutiny in India due to the existence of a broader scope of ‘public policy’ as compared to the US. The US Court ruled that this factor favored a stay, as Indian courts can evaluate if an arbitral award complies with Indian law even during enforcement proceedings, a power that US courts do not possess.

In the US, public policy is defined narrowly and the only ground for refusal for enforcement of arbitral awards is under Article V(2)(b) of the New York Convention. In the US, the defense is available when the arbitral award clearly tends to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property, whereas in India, public policy has a much wider umbrella.

Further, considering UOI had contributed to the delays in the proceedings, the US Court noted that the fourth criterion did not favour a stay. The US Court keeping in mind the fifth and sixth criterion with respect to balancing hardship amongst parties, held that HEPI had already suffered severe hardships given the fact that the contract was breached nine years ago and the Award was rendered five years back. Any further delay would burden HEPI. Based on the above findings, the US Court concluded that a stay on the proceedings was not warranted.

**B. Public Policy Concerns**

HEPI urged that two portions of the arbitral award should be confirmed, i.e., specific performance allowing HEPI to re-enter the Block for a period of three years and UOI’s payment of interest on HEPI’s original investment.

**Specific Performance**

UOI argued that an order of specific performance should not be granted:

- Specific performance would be against the US public policy of respecting the sovereignty of foreign nations, including their right to be in possession and control of their own land and national resources.
- Specific performance of the Award would violate Indian law, which permits such specific performance only in limited circumstances.
- Confirming the arbitral award would be difficult to enforce and supervise and would go against international comity.

HEPI’s arguments:

- UOI has overstated the implication of the enforcement of Award on its sovereignty and the US hesitancy to hold foreign governments accountable when they harm private parties.
- UOI attempted to re-argue the merits of the case by raising grounds of public policy;
- Courts in the US have, in the past, enforced arbitral awards for specific performance and such extra-territorial performance does not violate public policy.

The US Court discussed the concepts of sovereignty, independence, and dignity of each...
foreign State which includes respect for territorial integrity. Despite the Foreign Sovereign Immunities Act, 1976 (“FSIA”) not granting immunity to states from US courts in case of confirmation of foreign arbitral awards,218 nothing in the statute suggests that US Court's jurisdiction extends to awarding extra-territorial specific performance against a foreign State.

HEPI relied on Chabad v. Russian Federation219 and NML Capital v. Argentina,220 where US courts had granted specific performance against sovereign nations, though outside the scope of international arbitration. The US Court differentiated both cases and held that an order for enforcement in the present case had far more serious implications and would deprive a foreign nation of the ability to decide who will be able to extract and utilize its natural resources. Confirmation of the Award would encroach upon the territorial integrity of India, which is against the US public policy. The US Court held:

- Confirmation of the Award would be invasive in nature and that forced interference with India’s complete control over its territorial waters violate public policy. Separately, the US Court disagreed that the enforcement was too complicated for it to oversee.
- While the US Court has jurisdiction over the case, ordering specific performance may not be in the spirit of the US policy preference against specific performance as is clear from the exclusion from the statutory text of the FSIA.
- Given that the US has not waived its sovereign immunity in its own courts against specific performance in contract cases, the US Court noted that it would be against US public policy to create a situation in which a foreign court could order the US to specifically perform its portion of a contract.

C. Awarding Interest

UOI submitted that awarding interests would be both coercive and punitive in nature and against the public policy of US. HEPI argued that interest was compensatory in nature. The US Court held that since the primary component of the award is not being enforced, i.e, return of the Block to HEPI, allowing payment of interests would in effect coerce a foreign state into complying with an order the US Court cannot issue. The payment of interest is inextricably linked to the specific performance of the Award, thus confirmation of the interest portion of the Award would also violate the US public policy. India may ultimately need to pay HEPI millions once the award attains finality, but only when a competent authority permits specific performance of the award.

V. Analysis

This judgment has dealt with certain critical concepts in the realm of international commercial arbitration. It raises a larger issue on the sanctity of arbitral awards and eventual enforcement in disputes involving States. The New York Convention, as well as Model Law,221 are silent on whether the defense of sovereign immunity can be raised by States during enforcement proceedings.

However, there is a school of thought which believes that the since sovereign immunity has not been listed as a specific ground of defense to recognition and enforcement, States have implicitly consented to not raising such a defense in international commercial arbitration.222 The United Nations Convention on Jurisdictional Immunities of States and their Property223 draws the distinction with respect to commercial and non-commercial transactions entered by

220. 699 F.3d 246, 261–65 (2d Cir. 2012).
states. Therefore, if a State enters an arbitration agreement pursuant to a commercial transaction, immunity cannot be invoked at the stage of confirmation or setting aside of the award.224

The US Supreme Court has interpreted the phrase “commercial” in the context of S. 1611 of the FSIA (which discusses the commercial activity exception to sovereign immunity). Commercial functions rendered by the State are deemed to be non-sovereign. There is no provision on sovereign immunity under Indian arbitration regime and follows the distinction laid down by US.

It is interesting to note that the US Court did not even delve into whether the nature of the relationship between the parties or the ultimate specific performance was commercial or non-commercial in nature. The US Court held that the mere fact that granting specific performance would impact the natural resources of the country was sufficient to invoke the public policy defence and refuse confirmation of the Award.

While the ruling of the US Court is beneficial for UOI at this stage, given the delays in court processes in the Indian legal system, it is possible that UOI will be mandated to pay enormous sums to HEPI as interest at the colossal rate of 18% in the event of failure of challenge to the execution of arbitral award.

With this recent ruling, it remains to be seen how concepts of sovereignty, read into the defence of public policy, will be interpreted and impact it would have for future cases of enforcement of arbitral awards against States. Undoubtedly, interest of States will need to be balanced with commercial rights that accrue to private enterprises. It is hoped that with the passage of time, a balance will be struck between these two competing interests.

224. Article 17, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004. While India has signed this Convention, it has not ratified it yet. The United States is not a signatory to this Convention.
India: Rewinding To The Era Of ‘Public Policy’ Mandates In Foreign-Seated Arbitrations

This article was originally published in the 17th January 2018 edition of LexisNexis.

Arbitration analysis: Moazzam Khan, Head of Global Litigation Practice and Shweta Sahu, Member at Nishith Desai consider the Indian Supreme Court’s decision in Venture Global Engineering LLC v Tech Mahindra, on the challenge to a foreign award India under Part I of the Arbitration and Conciliation Act, 1996.

I. Original News

Venture Global Engineering LLC v Tech Mahindra, formerly Satyam Computer Services, 2017 SCC Online SC 1272 (not reported by LexisNexis® UK)

II. What is the Background to this Decision?

Amidst all the criticism hovering over enforcement of arbitral awards in India, courts have begun to maintain a consistent approach in liberalising enforcement of such awards with an equivalent sternness in not giving way to objections such as ‘the award is in violation of public policy of India’. This case note briefs upon the case of Venture Global Engineering LLC v Tech Mahindra, formerly Satyam Computer Services 2017 SCC Online SC 1272 (Venture III), wherein the Supreme Court (SC) has sought to re-visit the dimensions of ‘public policy’ to set aside a foreign award. This analysis does not discuss the cases pending against or by either party in USA.

Venture Global Engineering LLC (the Appellant), a US-registered company and Tech Mahindra, formerly Satyam Computer Services (the Respondent), an Indian company, entered into a Joint Venture and Shareholder Agreement (the Agreement) for incorporating the joint venture (the JV) (also a party to the proceedings). Per the terms of the Agreement, in case of an ‘event of default’, the non-defaulting shareholder would have an option to either purchase the defaulting shareholder’s shares at book value or cause the immediate dissolution and liquidation of the JV. The Agreement stipulated laws of Michigan, USA as the law governing the Agreement, and in case of unsettled disputes, the same would be referred to arbitration to the London Court of Arbitration. The Agreement also ensured compliance with the laws in force in India including the Companies Act.

Pursuant to a dispute arising out of the Agreement, arbitral proceedings were invoked by the Respondent and an award was passed in favour of the Respondent on 3 April 2006. Per the terms of the Agreement, the award recognized the breach by the Appellant, rendering it liable to transfer its interest in the JV to the Respondent (i.e. 50% of shareholding in the JV would be transferred by the defaulting shareholder to the non-defaulting shareholder pursuant to the bankruptcy of the Appellant, which was an event of default under the Agreement).
III. Post-Arbitral Litigation

Subsequent to a civil suit being filed by the Appellant in Secunderabad on 28 April 2006, the Respondent was restrained from enforcing the award in India. On an appeal made against this order, the High Court of Andhra Pradesh (the High Court) remitted the matter for fresh adjudication. However, as prayed by the Respondent, the plaint for injunction, filed by the Respondent was rejected by the trial court. Challenging this order, the Appellant appealed before the High Court, which was later dismissed. This led to the judgment of the SC in Venture Global Engineering v Satyam Computer Services Ltd. and Anr (2008) 4 SCC 190 (Venture I) (not reported by LexisNexis® UK), wherein it was held inter alia that the foreign award may be challenged in India under Part I of the Arbitration and Conciliation Act 1996 (‘Act’) (following Bhatia International v Bulk Trading S.A. and Anr. (2002) 4 SCC 105) (not reported by LexisNexis® UK). The matter was, thereafter, brought before the trial court for adjudication on merits.

On 7 January 2009, the Chairman and founder of the Respondent, Mr Ramalinga Raju made a disclosure and confessed in writing that the balance sheets of the Respondent had been manipulated, inflating the profits to INR 7080 crores. The auditors were compelled to declare that the Respondent’s financial statements could no longer be considered accurate or reliable.

To bring this fact on record, the trial court allowed the application filed by the Appellant for amending the pleadings challenging the award. However, the High Court set aside the order owing to the application being time-barred (new grounds for attacking an award could not be taken up after the lapse of the time period stipulated under s 34 of the Act, ie after 3 months extendable by 30 days).

However, on an appeal being preferred against the High Court’s order, the Supreme Court allowed the new grounds of challenge to the award, as pleaded by the Appellant (in Venture Global Engineering v Satyam Computer Services Ltd. and Anr (2010) 8 SCC 660 (Venture II) (not reported by LexisNexis® UK)).

In the challenge proceedings before the trial court, the Respondent objected to the additional grounds of fraud by Mr Raju for setting aside the award, since there was no causative link between the said events and the award. However, the trial court allowed the challenge application filed by the Appellant and observed that—the transfer of 50% of shareholding in the JV by the Appellant to the Respondent would be against foreign exchange laws of India (ie FEMA), thus, against the public policy of India, and the fraud or misrepresentation by the Respondent had a causative link with the facts forming basis of the award. Allowing the appeal made before the High Court, it inter alia held that the award is not contrary to the public policy of India and the allegations of fraud and misrepresentation neither satisfy legal requirements nor were they proved by evidence.

IV. What did the Supreme Court Decide in Venture iii?

Aggrieved by the High Court’s judgment, the Appellant sought restoration of the trial court’s order which set aside the award. The Respondent also appealed against the impugned judgment wherein the High Court had upheld the jurisdiction of the trial court to decide the application filed to challenge the award.

The Honourable judges in the Supreme Court pronounced separate dissenting judgments, as below:

Justice J Chelameswar
V. Whether the Award is Contrary to Public Policy of India Since Compliance with the Award Would Amount to Violation of the Provisions of the Fema?

As provided in section 34(2)(b)(ii) of the Act, an award which is in conflict with the public policy of India, is liable to be set aside, which includes instances where the award was induced or affected by fraud. However, in the given case, the trial court had failed to sustain its conclusion that the transfer of shares at book value results in violation of FEMA in India. More importantly, even the relevant provision of FEMA had not been identified.

The appeals would, accordingly, be set aside.

VI. Whether the Award is Required to be Set Aside Because of the Fraudulent Acts of the Chairman and Founder of the Respondent, as Disclosed Subsequently?

As provided in s 34(2)(b)(ii) of the Act, an award which is in conflict with the public policy of India, is liable to be set aside, which includes instances where the award was induced or affected by fraud. However, in the given case, the trial court had failed to sustain its conclusion that the transfer of shares at book value results in violation of FEMA in India. More importantly, even the relevant provision of FEMA had not been identified.

Whether the award is required to be set aside because of the fraudulent acts of the Chairman and founder of the Respondent, as disclosed subsequently?

Section 34(2) of the Act provides that an award is liable to be set aside if it is either ‘induced or affected by fraud’. Since Mr Raju’s letter did not specify the exact period when the Respondent’s accounts had been fudged, it was not conclusive if such fraud would amount either to (a) to ‘inducing’ the making of the award; or (b) the award made by virtue of non-disclosure of those facts by the Respondent would be an ‘award affected by fraud’. Even the trial court did not record any reason to justify that the concealed facts are material to the arbitration, apart from relying on the SC’s observations in Venture (II) that the facts concealed by Mr Raju are relevant.

The appeals would, accordingly, be set aside.

VII. Whether the Acts of Mr Raju Amount to Misrepresentation/Suppression of Material Facts and, if so, Whether they could be Made Basis to Seek Quashing of an Award?

The learned Judge opined that the letter in question was rightly received in evidence, without requiring any further corroboration, especially because the existence of the confessional letter, its contents, author or his signature had never been doubted. In establishing ‘notorious and widely known facts’, the letter was superior to formal means of proof (following, Onkar Nath & Ors v Delhi Administration (1977) 2 SCC 611 (not reported by LexisNexis® UK)). Thus, the acts stated therein were prima facie acts of misrepresentation and suppression of material facts and in breach of section 209 and 211 of the Companies Act 1956 (CA 1956) and related statutes.
VIII. Whether such Acts have any Causative Link to the Arbitral Proceedings, and Constitute an ‘Event of Default’ Under the Agreement? Would this Nullify the Award?

Following, the above conclusion, Sapre J appreciated that the Agreement was wide enough to include the acts of Mr Raju, which were sufficient for its termination attracting the remedies provided therein. These acts as contained in the confessional letter were prior in point of time as compared to the breach committed by the Appellant (i.e. its bankruptcy). Since, the Agreement required compliance with the Indian laws, such acts which were in grave violation of the provisions of the Companies Act 1956, triggered an ‘event of default’ of the Agreement with the recourse to the remedies under the Agreement.

Considering the nature of the arrangement between the parties, the affairs of the Respondent had a direct bearing over the rights of the parties, since the affairs of both the companies and the JV were intrinsically connected. Had Mr Raju brought his fraudulent acts to the notice of the JV or the Appellant, the latter too would have been able to get first right to terminate the Agreement and claim appropriate reliefs against the Respondent because, as stated above, such breach by the Respondent was prior in point of time.

Further, as is the settled law of the land, existence of fraud/misrepresentation/suppression of material facts, which continued during the pendency of arbitral proceedings but without any knowledge to the Appellant and the learned Arbitrator, would render such proceedings void ab initio. Thus, in the given case where the award had been obtained by misrepresentation and suppression of material facts having bearing over the proceedings, involving acts in violation of Indian law (i.e. Indian Penal Code, Companies Act and FEMA), the award is liable to be set aside for being in violation the public policy of India under s 34(2)(b)(ii) read with Explanation 1 of the Act.

IX. What Are The Practical Implications?

In light of the dissenting views of the Division Bench, this matter has now been referred to a larger Bench and awaits the final verdict of the Supreme Court. Nonetheless, this case belongs to an era when foreign awards could be challenged under Part I of the Act. Thus, with the Supreme Court’s judgment in Bharat Aluminium Co Ltd v Kaiser Aluminium Technical Service Inc (2012) 9 SCC 649 (‘BALCO’) and the subsequent amendments to the Act in 2015, Part I of the Act (including s 34 of the Act) would not be applicable to arbitrations seated outside India.

Thus, the judgment would have a limited application going further, and would gain relevance only in case of arbitration agreements executed in the pre-BALCO era, considering its prospective applicability.

The views expressed are not necessarily those of the proprietor.
Caution: Disobeying orders of an arbitral tribunal may land you in jail!

- Supreme Court clarifies that parties can be punished for contempt for any action/default in complying with Tribunal’s order or during the conduct of the proceedings and not merely restricted to taking evidence

I. Introduction

The Supreme Court (“Court”), in Alka Chandewar (“Appellant”) v Shamshul Ishrar Khan (“Respondent”) recently held that under Section 27(5) of the Arbitration and Conciliation Act, 1996 (“Act”) any non-compliance of an arbitral tribunal’s order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971.

II. Facts

The Sole Arbitrator passed an interim order dated October 7, 2010 (“Order”) under Section 17 of the Act directing the Respondent not to dispose any further flats without the leave of the Arbitral Tribunal. The Respondent allegedly was in breach of the said Order. The Arbitral Tribunal by an order dated May 5, 2014 referred the aforesaid contempt of the Order to the High Court to pass necessary orders under Section 27(5) of the Act. The High Court held that Section 27(5) of the Act does not empower an Arbitral Tribunal to make a representation to the Court for contempt of interim orders unless it relates to taking of evidence.

III. Issue

The Supreme Court in the present case dealt with the scope and ambit of Section 27(5) of the Act, specifically whether non-compliance with any order/direction of an Arbitral Tribunal would fall within its scope.

IV. Arguments

The Appellant argued that Sections 9 and 17 being alternative remedies available to the parties during the conduct of arbitration proceedings, if orders made under Section 17 were deemed unenforceable or unactionable then the same would be rendered otiose. They also argued that Section 27 of the Act does not leave any doubt as to the scope and ambit of the Court’s power to punish for contempt of orders made by the Arbitral Tribunal.

The Respondent contented that the marginal note of Section 27 made it clear that Section 27(5) would only apply to assistance in taking evidence and not to any other contempt that may be committed. It was further highlighted that this lacuna in the law has now been filled pursuant to the 246th Law Commission Report, inserting Section 17(2) by the Amendment Act of 2015.

V. Judgment

The Court held that:

1. A literal interpretation of Section 27(5) would show that there are different categories of actions which can be referred to a court by a tribunal for contempt proceedings. One of those categories is the general and wide category of “any other default”. Further, the Section is not confined to a person being guilty of contempt only when failing to attend in accordance with the process of taking evidence as the Section specifically states that persons guilty “of any contempt to the Arbitral Tribunal during the conduct of the Arbitral proceedings” shall be subject to contempt proceedings.
2. It is well settled that a marginal note in a statute was used to understand the general drift of the section only when the plain meaning of the words of the statute were ambiguous. This was not the case in the present situation and therefore the marginal note in section 27 would not alter the purport of the section.

3. Per the modern rule of interpretation of statutes, the object of providing a party with the right to approach an Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such a Tribunal are deemed toothless. It is to give teeth to such orders that an express provision has been made in Section 27(5) of the Act.

4. The Court observed that the Supreme Court in M/s Ambalal Sarabhai Enterprises vs. M/s Amrit Lal & Co. & Anr. had held that parties to arbitration proceedings had to choose between applying for interim relief before the Tribunal under Section 17 or before the Court under Section 9. Such an election would be meaningless if interim orders passed by the Arbitral Tribunal were held to be unactionable, as all parties would then go only to the Court, which would render Section 17 a dead letter.

5. However, since an order passed by an arbitral tribunal was unenforceable therefore sub-section (2) to Section 17 was added by the Amendment Act of 2015, so that the cumbersome procedure of an Arbitral Tribunal having to apply every time to the High Court for contempt of its orders would no longer be necessary. Such orders would now be deemed to be orders of the Court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the Court.

VI. Analysis

One of the major lacunae existing in the Act prior to the commencement of the Amendment Act of 2015 was the unenforceability of order/directions passed by a tribunal. Under section 17, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9. Despite the arbitral tribunal’s power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process. Therefore parties chose to approach the courts rather than continue with the arbitration proceedings. The Amendment Act has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted.

The Delhi High Court had attempted to find a suitable legislative basis for enforcing the orders of an arbitral tribunal under section 17 of the Act. In the judgment of Sri Krishan v. Anand, (followed in Indiabulls Financial Services v. Jubilee Plots and upheld by the Court in the present judgment) the Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be “making any other default” or “guilty of any contempt to the arbitral tribunal during the conduct of the proceedings” under section 27(5) of Act, being the only mechanism for enforcing its orders.
The Supreme Court has through the present judgment confirmed the above position of law (in relation to arbitrations being conducted under the regime as applicable prior to 2015 amendment).

It is pertinent to note that under Section 12 of the Contempt of Courts Act, 1971, any person found guilty of contempt would be liable to be punished with imprisonment upto 6 months along with fine.\textsuperscript{229}

\textsuperscript{229}Section 12 - Punishment for contempt of court
(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation.—An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.
India—No Statutory Appeal if Party fails to Resist Enforcement of a Foreign Award

Arbitration analysis: The Supreme Court of India decided that a party that fails to resist the enforcement of a foreign award does not have access to any statutory appeal against an order enforcing the award. Moazzam Khan, Head of the Global Litigation Team and Payel Chatterjee, a senior member of the International Litigation and Dispute Resolution team at Nishith Desai Associates examine the decision.

Kandla Export Corporation & Anr v M/s OCI Corporation & Anor Civil Appeal No. 1661-1163 of 2018, judgment dated 7 February 2018 (not reported by LexisNexis® UK)

I. What are the Practical Implications of this Judgment?

Section 50 of the Arbitration and Conciliation Act 1996 (the Act) allows parties to appeal against two types of orders only:

- an order refusing to refer parties to arbitration, and
- an order refusing to enforce a foreign award

Under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (the Commercial Courts Act), all applications arising out of arbitration are to be heard by the Commercial Courts.

Section 13(1) of the Commercial Courts Act, if read in isolation, could be interpreted to mean, and was contended by Kandla Export in this case, that a decision of the Commercial Court, even in matters not covered by section 50 of the Act, could be appealed against.

The Supreme Court re-affirmed its commitment to the enforcement of foreign awards by removing this confusion and reiterating that an appeal in cases of foreign awards would only apply on the grounds set out in section 50 of the Act and specifically no appeal will proceed to the Commercial Appellate Division if it is against an order rejecting the objections to enforcement.

An excerpt from the judgment speaks to a pro-enforcement stance taken by the Indian judiciary this past decade: ‘Enforcement of foreign awards should take place as soon as possible if India is to remain as an equal partner, commercially speaking, in the international community.’

The only remedy would be to approach the Supreme Court by virtue of a special leave to appeal.

Conversely, parties seeking enforcement have access to a two-stage appeal process. If the court of first instance refuses to enforce a foreign arbitral award for whatever reason, it can appeal first—before Commercial Appellate Division and failing there it also has the option to approach the Supreme Court.

II. What Is the Background to this Decision?

The parties, M/s. OCI Corporation (OCI/Buyers) and Kandla Export Corporation (Kandla Export/Sellers), had referred their disputes to be resolved by way of arbitration under the Grain and Feed Trade Association (GAFTA) Rules.
An arbitral award was made on 28 April 2014 directing Kandla Export to pay a sum of $US 846,750 together with compound interest at the rate of 4% calculated on a quarterly basis to OCI. The award was appealed to the Appellate Tribunal, which directed Kandla Exports to pay a sum of $US 815,000 at an interest rate of 4% on a quarterly basis to OCI by order dated 16 April 2015.

Subsequently, Kandla Export filed series of appeals challenging the award passed by the Appellate Tribunal, before the Queen’s Bench in the Queen’s Bench Division of the Commercial Court. Kandla Export were faced with dismissal in both the appeals in 2015. However, in their continuing urge to have the award set aside Kandla Export filed another appeal before the English Court of Appeal. Leave to appeal was not granted.

Meanwhile in India, OCI initiated execution proceedings on 29 June 2015, under section 48 of the Act, before the District Court of Gandhidham, Kutch. Kandla Export filed their objection to the petition. Thereafter, OCI filed an application before the Gujarat High Court (Gujarat HC) seeking transfer of the execution proceedings, with the Commercial Courts Act and amendments to the Act coming into effect from October 2015. The Gujarat HC allowed the application and execution proceedings that were transferred before the Commercial Division, Gujarat HC on November 11, 2016. Kandla Export filed a special leave petition (SLP) before the Supreme Court challenging the order, which was also dismissed.

With the SLP being dismissed, Kandla Export filed their objections in the execution proceedings. Dismissing their objections, the Gujarat HC recognised the foreign award as enforceable. Kandla Export challenged the decision of the Single Bench and filed an appeal under section 13(1) of the Commercial Courts Act before the Commercial Appellate Division. This appeal was dismissed by the Commercial Appellate Division on the ground of maintainability, ruling that against an order rejecting objections to enforcement, there would be no appeal to the Commercial Appellate Division.

The decision of the Commercial Appellate Division was then challenged before the Supreme Court of India—which is the subject matter of this article.

The contentions of Kandla Export are the following:

- section 13(1) of the Commercial Courts Act provides a right to file an appeal against any decision, judgment and order passed by the Commercial Division of the High Court—and thus an order rejecting the objections to enforcement would also be appealable under section 13(1) of the Commercial Court’s Act
- section 50 of the Act does not prohibit appeals which are not expressly listed in section 50 of the Act. Since section 50 (which deals with enforcement of foreign awards in India) did not have the restricting language of section 37 (which deals with domestic arbitrations), appeals which were not expressly provided for in section 50, should anyway be allowed under section 13 of the Commercial Courts Act

On the other hand, OCI contended:

- the Act is a self-contained code which provides a substantive as well as procedural law regarding arbitrations and should exclude the application of general law, including provisions of section 13 of the Commercial Courts Act
- section 50 of the Act creates a specific bar against appeals from any orders which are not mentioned under the said provision. An appeal can only be made against an order refusing to enforce an award under section 48 of the Act and not against other orders
- section 13 of the Commercial Courts Act cannot be read in isolation and must be read harmoniously with the provisions of the Act to give effect to both the legislations
- the object of both legislations is to determine arbitration and commercial matters speedily and allowing an extra appeal under the Commercial Courts Act 2015 would defeat the objective of both acts
III. What did the Supreme Court Decide?

The Supreme Court affirmed the Commercial Appellate Division’s findings and ruled that section 13(1) of the Commercial Courts Act being a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes, would not apply to cases unless they are expressly covered under section 50 of the Act.

The Supreme Court relied on its earlier decision in *Fuerst Day Lawson Limited v Jindal Exports Limited* [2011] 8 SCC 333 which dealt with the issue as to whether an order though not appealable under section 50 of the Act would be subject to appeal under the letters patent of the High Court. The Supreme Court in *Fuerst Day* had laid down certain broad principles clarifying that in case a special statute is a self-contained code, the applicability of the general law procedure would be impliedly excluded. Appeals only under section 50 of the Act are maintainable in relation to foreign awards and not under letters patent.

Section 13(1) of the Commercial Courts Act states that an appeal will lie from orders passed by the Commercial Courts under section 37 (applicable only in case of India seated arbitration) of the Act. It was silent with respect to any appeals under section 50 of the Act (applicable in cases of enforcement of foreign awards).

The Supreme Court in its earlier decision in *Arun Dev Upadhaya v Integrated Sales Services* (not reported by LexisNexis® UK) had widened the scope of section 13 of the Commercial Courts Act to include appeals under section 50 of the Act too.

IV. Case Details

- Court: Supreme Court of India
- Judge: Justice Rohinton Fali Narim and Lordship Mr. Justice Navin Sinha
- Date of judgment: 7 February 2018

*The views expressed are not necessarily those of the proprietor.*
The Antrix-Devas Saga 2.0: Delhi High Court Rules in Favour of Antrix

The Division Bench of the Delhi High Court has:

- Set aside an order of the single judge which had allowed Devas to seek interim measures for securing the ICC arbitral award before Delhi HC;
- Held that an appeal under Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court’s Act, 2015 is only restricted to appealable orders under Order XLIII of the Code of Civil Procedure, 1908 and Section 37 of the Arbitration and Conciliation Act, 1996 and a wider import is not permissible;
- Held that only if the parties confer exclusive jurisdiction as well as the seat of the arbitration to a designated place, the territorial court of that designated place would have exclusive jurisdiction. Else, the jurisdiction will have to be determined basis the subject matter and the seat of the arbitration;
- Held that a vexatious or mala-fide petition cannot attract the bar under Section 42 of the Arbitration and Conciliation Act, 1996, and the court which hears the dispute first has to decide whether such a petition is indeed vexatious and an abuse of the process of law.

I. Brief Background:

A Division Bench of the Delhi High Court ("Delhi HC") in Antrix Corporation Ltd. ("Antrix") v. Devas Multimedia Pvt. Ltd. ("Devas")\(^ {230}\) has set aside the decision passed by the single judge. In particular, the single Judge of the Delhi HC had allowed Devas, a Bangalore based media company to secure USD 562.5 million awarded in an ICC arbitration against Antrix, the commercial arm of the Indian Space Research Organization ("ISRO"). This is despite the fact that Antrix had already filed a petition under Section 9\(^ {231}\) of the Arbitration & Conciliation Act, 1996 ("Act") before the Bangalore City Civil Court ("Bangalore Court") seeking interim protection. The single judge adopted a purposive interpretation of Section 42\(^ {232}\) of the Act, and held that the petition must be ‘valid’ and the court which is approached in the first instance must be ‘competent’ to entertain and grant the reliefs prayed for in order to become the ‘one stop’ court for all the subsequent proceedings.\(^ {233}\) The Single judge allowed interim protection to Devas on the premise that the Section 9 petition filed by Devas was not maintainable.

Antrix appealed against the decision of the single judge before the Division Bench of the Delhi HC under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's Act, 2015 ("CC Act").

II. Issues before the Court:

The Delhi HC had to consider the following issues:

1. Maintainability of Antrix’s appeal under of Section 13 of the CC Act\(^ {234}\);

---

\(^ {230}\) FAO (OS) (COMM) 67/2017, C.M. APPL.11214 & 17730/2017

\(^ {231}\) Section 9 of the Act pertains to interim measures etc. by Court.

\(^ {232}\) Section 42-Jurisdiction — “…Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court…”

\(^ {233}\) For a more detailed background and in-depth analysis of the order of the single judge, please refer to our previous hotline [here](http://example.com).

\(^ {234}\) Section 13 of CC Act: “…Section 13 – Appeals from decrees of Commercial Courts and Commercial Divisions (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be: Provided that an appeal shall be from such orders passed by a Commercial Division...”
2. If the appeal is maintainable, whether Delhi HC had the exclusive jurisdiction to adjudicate any applications arising out of the arbitration agreement between Antrix and Devas;

3. If the above is in the negative, whether the bar under Section 42 precludes Devas’ interim relief application under Section 9 of the Act in view of Antrix’s previous Section 9 petition before the Bangalore Court.

III. Contentions and Judgment:

A. Maintainability of the appeal under Section 13 of the CC Act:

The Delhi HC had to deal with the interpretation of Section 13 of the CC Act, which provides for the right of appeal from decisions of the Commercial Courts or Commercial Divisions of High Court.

Antrix contended that the proviso to Section 13 does not restrict the right of appeal to only those orders specified therein and instead was exhaustive and intended to include appeals against orders such as the one passed by the single judge which, although not a final decision on the Section 9 petition, was adversarial to Antrix as it inter alia directed Antrix to furnish particulars of assets. Antrix also relied on the fact that while the draft Section 14 (1) of the 253rd Report used the words “only” and “and from no other orders”, such words were absent in Section 13 of the CC Act. Antrix contended that this was purposefully omitted and hence Section 13 of the CC Act has to be given a wider meaning.

Devas contended that the purport of the proviso was to include only appealable orders within the purview of Section 13 of the CC Act, and more specifically those mentioned in Order XLIII of the Code of Civil Procedure, 1908 ("CPC") and Section 37 of the Act. In view of the fact that the single judge’s order is not a final order, the sequence of events have not been completed, and more particularly, Antrix has not faced any adverse order under Section 9 of the Act, Antrix’s appeal under Section 13 of the CC Act is not maintainable.

The Delhi HC Court relied on their own decision in Harmanprit Singh Sidhu\(^{235}\) and HPL (India) Limited\(^ {236}\) and took a strict view that the appealable orders under Section 13 of the CC Act are only those that are referred to in the proviso to Section 13 (1) of the CC Act. Consequently, the Delhi HC opined that the only appealable orders in the context of arbitration are those mentioned in Section 37 of the Act. The Delhi HC was not impressed with the submission on difference in wording between the draft provision in the Law Commission Report and the final Section 13 of the CC Act, and opined that the expression “from no other orders” occurring in Section 104 of the CPC would be applicable and Section 13 would have to be interpreted likewise.

Delhi HC thereafter relied on Samson Maritime Limited v. Hardy Exploration\(^ {237}\), and observed that an application seeking furnishing of details of assets would also amount to an interim measure under Section 9, because the reason that those details are sought are only to seek consequential or follow up relief in the event of the respondent’s failure to furnish securities. Accordingly, it was held that an order mandating a party to disclose assets would be an interim measure within the meaning of Section 9 and consequently, Antrix’s appeal under Section 13 of the CC Act is maintainable.

---

235. Harmanprit Singh Sidhu v. Arcadia Shares & Stock Brokers Pvt. Ltd., 2016 (159) DRJ 514
236. HPL (India) Limited v. QRG Enterprises, 2017 (166) DRJ 671
237. 2016 SCC Online Mad 9122
B. Whether Delhi HC has Exclusive Jurisdiction:

Delhi HC has to opine on whether they had the exclusive jurisdiction over the dispute between Antrix and Devas. Antrix contended that the Bangalore Court had concurrent jurisdiction because the cause of action arose there and its registered office was in Bangalore. In view of the same, the Bangalore Court was approached first for seeking interim protection under Section 9 of the Act. Devas relied on Section 42 of the Act to contend that once Bangalore Court had been approached all consequential recourse to any court had to be in Bangalore.

Devas argued that Section 42 would not apply to this case as parties had designated New Delhi as the seat of the arbitration, and by virtue of such designation, they conferred exclusive jurisdiction on the Courts at New Delhi. Devas placed reliance on the case of Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.238, contending that the mere designation of the seat would confer exclusive jurisdiction to the courts therein.

The Delhi HC relied on the decision of the Supreme Court in Bharat Aluminium Company v. Kaiser Aluminium Technical Service239 (“Balco”) to note that Section 2(1)(e) of the Act confers jurisdiction upon two courts over the arbitral process i.e., the courts having subject matter jurisdiction and the courts of the seat. It distinguished the judgment in Datawind as in that case the parties had particularly mentioned that a particular court was to have exclusive jurisdiction in addition to the designation of the seat. Delhi HC, therefore, went on to hold that, if the findings in Datawind are to be seen in the background of the larger bench decision in Balco, then only if the parties had designated the seat as New Delhi and also provided an exclusive forum selection clause in favour of the courts at New Delhi, then only could it be said that Delhi HC would have exclusive jurisdiction. Holding otherwise would in effect render Section 42 of the Act ineffective and useless, it held.

C. Whether the bar under Section 42 of the Act applies to this case:

Once Delhi HC held that the Bangalore Court had the jurisdiction to entertain the arbitration application, it had to then examine whether the interim application under Section 9 filed before the Bangalore Court would constitute an “application” to attract the mandate of Section 42. Devas had argued (and which argument was upheld by the Single Judge) that since the reliefs claimed by Antrix in the Section 9 application were not maintainable, the same would not constitute a valid petition and therefore, not attract the bar under Section 42 of the Act.

The Delhi HC, however, took a different view and observed that there is a difference between the existence of jurisdiction and the exercise of it. It held that while a vexatious or mala-fide petition cannot attract the bar under Section 42, yet, the mandate of the law and principle of comity of courts would require that the other court which is seized of the dispute first, has to first decide whether such a petition is indeed vexatious and an abuse of the process of law. Allowing parties to approach the Delhi HC, in spite of the pending petition in the Bangalore Court and without waiting for its decision on the maintainability of it would amount to giving a go-bye to the mandate of Section 42 and run afoul of the principle of comity of courts.

Accordingly, the Delhi HC concluded that the bar under Section 42 would indeed apply to the present case and consequently, the Delhi HC would be barred from entertaining the present petition. Consequently, the appeal was allowed and the order passed by the single judge was set aside.

---

238. (2017) 7 SCC 678
239. (2012) 9 SCC 552
IV. Analysis

While the Single Judge of the Delhi HC had adopted a purposive interpretation of Section 42 in order to avoid wastage of time on technicalities, the division bench has chosen to take a more technical stance in an attempt to uphold the sanctity and purpose of Section 42. It is now certain that the Antrix-Devas saga is far from over and that Devas will have to wait even longer before it is able to secure the arbitral award in its favour. Parties can take an important lesson out of this and make sure that while drafting the dispute resolution clauses, apart from designating the seat, they also particularly confer exclusive jurisdiction on a particular court if they wish to avoid such a situation. Careful drafting of the dispute resolution clause and specifically conferring exclusive jurisdiction would also ensure that there is no scope for forum shopping and filing of petitions that have no validity, only for delaying proceedings.
Delhi HC allows Devas to seek orders for securing the USD 562.5 million Award against Antrix

The Delhi High Court ("Court") in Devas Multimedia Pvt. Ltd. ("Devas") vs. Antrix Corporation Ltd. ("Antrix")

- Allows Devas to seek interim measures for the purposes of securing the arbitral award despite Antrix having previously filed an arbitration petition in another court of concurrent jurisdiction
- Adopts a purposive interpretation to give effect to the legislative intent behind Section 42 of the Arbitration and Conciliation Act, 1996 ("Act")
- Holds that petitions must be 'valid' and the court which is approached in the first instance must be 'competent' to entertain and grant the reliefs prayed for in order to become the 'one stop' court for all subsequent proceedings

I. Brief Background

An agreement was entered into in 2005 between Devas, a Bangalore based media company, and Antrix, the commercial arm of the Indian Space Research Organization ("ISRO"), both having their registered offices in Bangalore, for the lease of certain space segment capacity ("Agreement"). Article 20 contained an arbitration clause providing for, inter alia, New Delhi as the "seat" and the rules of the International Chamber of Commerce ("ICC") as the procedural law. Disputes arose in 2011 leading to invocation of arbitration and subsequent award in favor of Devas of USD 562.5 million ("Award") in September of 2015 (for further details on the Antrix-Devas saga, access our hotline here).

The present case deals with the decision of the Delhi High Court in allowing a petition brought before it by Devas ("the Devas Petition"), inter alia, seeking attachment of Antrix's assets to secure the Award. The present petition is one amongst a few others emanating from the same arbitration, filed both prior and subsequent to the passage of the Award, as set out below.

---

(a) In the event of there being any dispute or difference between the Parties hereto as to any clause or provision of this Agreement or as to the interpretation thereof or as to any account or valuation or as to the rights, liabilities, acts, omissions of any Party hereto arising under or by virtue of these presents or otherwise in any way relating to this Agreement such dispute or difference shall be referred to the senior management of both Parties to resolve within three (3) weeks failing which it will be referred to an Arbitral Tribunal comprising of three arbitrators, one to be appointed by each party (i.e. Devas and Antrix) and the arbitrators so appointed will appoint the third arbitrator.
(b) The seat of Arbitration shall be at New Delhi in India.
(c) The Arbitration proceedings shall be held in accordance with the rules and procedures of the ICC (International Chamber of Commerce) or UNCITRAL.
(d) The Arbitration Tribunal shall reach and render a decision or award in writing (concurred in by a majority of the members of the Arbitral Tribunal with respect to the appropriate award to be rendered or remedy to be granted pursuant to the dispute, (including the amount that any indemnifying Party is required to pay to the indemnified Party in respect of a claim filed by the indemnified Party).
(e) To the extent practicable all decisions of the board of Arbitration shall be rendered no more than 30 (thirty) days following commencement of proceedings with respect thereto. The Arbitral Tribunal shall realize its decision on award into writing and cause the same to be delivered to the Parties.
(f) Each Party to any Arbitration shall bear its own costs or expenses in relation thereto, including but not limited to such Party's attorneys' fees, if any, and the expenses and fees of the member of the Arbitral Tribunal appointed by such party, provided, however, that the expenses and fees of the third member of the Arbitral Tribunal and any other expenses of the Arbitral Tribunal not capable of being attributed to any one member shall be borne in equal parts by the Parties.
### Petitions filed prior to the passing of the Award

<table>
<thead>
<tr>
<th>Date of filing</th>
<th>Particulars</th>
<th>Court</th>
<th>Status prior to the present decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>5th August, 2011</td>
<td>Antrix filed a Section 11 petition seeking a direction to constitute the arbitral tribunal along with an application seeking a stay on the arbitral proceedings and invocation of ICC rules</td>
<td>The Supreme Court of India</td>
<td>Dismissed on 10th May, 2013 (invitation of the ICC rules by Devas upheld)</td>
</tr>
<tr>
<td>5th December, 2011</td>
<td>Antrix filed a Section 9 petition seeking, inter alia, a direction to restrain Devas from proceeding with the ICC arbitration and restraining the constitution of the Tribunal as per the ICC rules (“Antrix Petition”)</td>
<td>Bangalore City Civil Court</td>
<td>Jurisdiction</td>
</tr>
</tbody>
</table>

### Petitions filed subsequent to the Award

<table>
<thead>
<tr>
<th>Date</th>
<th>Particulars</th>
<th>Court</th>
<th>Status prior to the present decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>9th October, 2015</td>
<td>Devas filed the present Section 9 petition seeking directions to secure the Award in its favor</td>
<td>Delhi High Court</td>
<td>The Delhi High Court had to decide whether it had jurisdiction to entertain the present petition given Antrix’s previously pending petition in Bangalore</td>
</tr>
<tr>
<td>19th November, 2015</td>
<td>Antrix filed a petition under Section 34 of the Act challenging the Award</td>
<td>Bangalore City Civil Court</td>
<td>Pending</td>
</tr>
</tbody>
</table>
II. Issue before the Court

The present Court thus had to decide whether it was barred from entertaining the Devas Petition as provided for under Section 42 of the Act given that Antrix’s had a previously pending petition before the Bangalore City Civil Court.

III. Arguments objecting to Delhi High Court’s jurisdiction

Antrix argued that the subject matter of the dispute viz. termination of the agreement having been conveyed in Bangalore, made it clear that a substantial part of the cause of action arose in Bangalore. Also, since both parties had their registered offices in Bangalore, and with Devas having failed to raise any jurisdictional objections, the Bangalore City Civil Court would have subject matter, territorial and pecuniary jurisdiction.

In light of the above, and since it had filed its petition much prior to the filing of the Devas Petition, Antrix argued that the Devas Petition as well as the Delhi High Court’s jurisdiction to entertain the same ought to be barred under Section 42 of the Act, as a consequence of which, any further petitions should be instituted by Devas only before the Bangalore City Civil Court.

IV. Arguments supporting Delhi High Court’s jurisdiction

Devas on the other hand, argued that the Antrix Petition is not maintainable in law and was ex-facie incompetent as it sought a stay of the ICC arbitration proceedings. Even assuming that the Bangalore City Civil Court assumes jurisdiction that it doesn’t have, any order passed by it would be a nullity as the proceedings before it are coram non judice, given that the arbitral proceedings whose stay was sought had already achieved completion. Also, the principle of comity of jurisdiction had no application in the present case since the Bangalore Court had not even assumed jurisdiction or upheld that it had jurisdiction.

Devas further argued that the “seat” was analogous to an exclusive jurisdiction clause. Since parties had chosen Delhi, the Delhi High Court would have exclusive jurisdiction to entertain all matters arising from the arbitration proceedings, and not the Bangalore City Civil Court, irrespective of whether it was approached in the first instance.

V. Judgment

The Delhi High Court noted that in cases where the other court had already assumed jurisdiction, the principle of comity would normally entail acceptance of such a determination. However, if the other court was yet to decide on its jurisdiction, a subsequent court could not shirk its duty to decide on the objections raised under Section 42 of the Act. Therefore, since the Bangalore City Civil Court was yet to decide on its jurisdiction, the Delhi High Court decided to look into the merits of the objections raised under Section 42, starting off by analyzing the language of the said section, reproduced herein below;

“42. Jurisdiction - Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.” (Emphasis supplied)

On a plain reading of the above language, it observed that the word ‘Court’ isn't qualified by the word ‘competent’ and that the word ‘application’ isn’t qualified by the word ‘valid’. However, the Court wasn’t inclined to accept such a simplistic reading, choosing to adopt a purposive interpretation instead. In doing so, it first laid out three possible scenarios to be considered;
Where the court is ‘competent’ and the petition is ‘valid’ since the reliefs prayed for are capable of being granted. In such a scenario, it is clear that the requirement of Section 42 stands satisfied

Where the court is ‘competent’, however the petition is ‘invalid’ as the prayers sought are incapable of being entertained or granted.

Where the petition itself is ‘valid’, however it is filed in an ‘incompetent’ court that has no jurisdiction to entertain such a petition.

The Court then went on to analyze the object and purpose of Section 42 of the Act, which is to avoid multiplicity of proceedings and to ensure that the first court which is approached by either party to the agreement, becomes the ‘one stop’ court for all subsequent proceedings. It therefore considered it essential that such a petition must satisfy both criterion i.e. of being a ‘valid’ petition capable of being entertained and granted, and also filed in a court of ‘competent’ jurisdiction.

In the present case, the Delhi High Court found that the Bangalore Civil Court's did indeed have territorial jurisdiction thereby disagreeing with Devas’ argument that the ‘seat’ conferred exclusive jurisdiction to the Delhi High Court. It however found that the prayers sought for under Antrix’s petition were incapable of being granted since (i) seeking a stay of arbitration had become purely academic with the passage of time; and that (ii) Section 9 of the Act did not permit “any or all applications” and only interim measures specifically provided for therein. It therefore held that waiting for the decision of the Bangalore City Civil Court, which in all likely would be that it does not have jurisdiction, would be a mission in futility and defeat the purpose behind Section 42 of the Act.

In light of the above determinations, and having held that the Antrix Petition was an ‘invalid’ one, albeit filed in a ‘competent’ court, it overruled the objections raised by Antrix and upheld the maintainability of the present petition. As a sequitur, the Court held that even the Section 34 filed by Antrix in Bangalore would no longer be maintainable by virtue of Section 42, and that therefore the same would have to be accordingly withdrawn and filed in Delhi.

VI. Analysis

The present case is yet another demonstration of Indian courts increasingly giving effect to the legislative intent behind statutory provisions and adopting a purposive interpretation, while avoiding wastage of time on technicalities. In this case, the Court recognized the futility of a court’s time in deciding mere academic questions, and chose to adopt an approach which would uphold the spirit of the Act rather than defeat its purpose. Such a judgment should discourage parties from indulging in mere forum shopping and filing petitions which have no validity, only for the purpose of delaying proceedings.
With Institutional Inputs from SIAC
About SIAC

Established in 1991 as an independent, not-for-profit organisation, the Singapore International Arbitration Centre (SIAC) has a proven track record in providing neutral arbitration services to the global business community. SIAC arbitration awards have been enforced in many countries including Australia, China, Hong Kong, India, Indonesia, UK, USA and Vietnam, amongst other New York Convention countries. In 2015, SIAC received a record number of 271 fresh cases and issued a total of 116 SIAC awards. These included 3 awards/orders issued by emergency arbitrators for urgent interim relief.

Integrity, fair rules and procedures, efficiency and competence are key to SIAC’s success. SIAC’s case management services are supervised by a ‘Court of Arbitration’ that comprises of 18 of the most eminent, experienced and diverse international arbitration practitioners. The Court of Arbitration is headed by its President, and offers a wealth of experience and specialist knowledge in international dispute resolution from all major jurisdictions, including Australia, Belgium, China, France, India, Japan, Korea, UK, USA and Singapore.

SIAC’s operations, business strategy and development, as well as corporate governance matters are overseen by the ‘Board of Directors’ comprising of senior members of the legal and business communities. SIAC’s Board of Directors consists of well-respected lawyers and corporate leaders from China, India, Korea, UK, Hong Kong and Singapore.

SIAC’s multinational and multi-lingual Secretariat comprises of dual qualified and experienced arbitration lawyers from both civil and common-law jurisdictions including Belgium, Canada, China, India, Korea, Philippines, Singapore and the USA. Headed by the Registrar, SIAC’s Secretariat supervises and monitors the progress of each case and also scrutinises draft awards to enhance the enforceability of awards and minimise the risk of challenges.

Recognising the need for dedicated expertise in cases dealing with intellectual property (IP) rights, SIAC set up an exclusive panel of IP arbitrators in early 2014 (the SIAC IP panel). The SIAC IP Panel complements SIAC’s existing multi-jurisdictional panel of over 400 leading arbitrators from across 40 jurisdictions.

In 2015, SIAC consolidated its position as one of the world’s leading arbitral centres. For the last three years, SIAC consistently received over 200 new cases each year. Over the last 10 years new case filings at SIAC grew by almost 200%, thereby reinforcing its position as one of the fastest growing arbitral institutions in the world.

SIAC established its first overseas liaison office in Mumbai, India in 2013 (the Indian office) in recognition of the significant role played by India towards SIAC’s success over the years as an international arbitral institution. This was followed later that year with the opening of a second overseas liaison office at the International Dispute Resolution Centre in Seoul, South Korea. Recently, SIAC has opened an office in the Free Trade zone in Shanghai, China and has also entered into an MoA with GIFT, Gujarat to open a presence in GIFT City. The Indian office is the embodiment of SIAC’s commitment to develop a greater awareness and consciousness of international arbitration in India. The Head of South Asia at SIAC is based and operates out of the Indian office and leads its business development initiatives in the region as well as oversees operations.

The primary objectives of the liaison offices are the dissemination of practical information on arbitration at SIAC and in Singapore; to promote the use of institutional arbitration; to create a line of communication for SIAC and the community in Singapore with key players in international arbitration in India and South Korea; to obtain feedback on SIAC’s services as an arbitral institution; and to exchange ideas on local “hot topics” and issues in international arbitration.
The physical presence of SIAC in India, South Korea and China has proved immensely beneficial over the past couple of years, with users and the legal community reaching out to further understand the benefits of arbitration under the SIAC Rules. As a result, SIAC interacts closely with companies and the legal community in India and South Korea, thereby strengthening ties with its current and potential users.
I. SIAC Facilitates the Efficient Resolution of Your Dispute

- We provide the certainty of established and tested Rules, so there is less risk of tactical delay or obstruction of the process
- We appoint arbitrators where parties are unable to agree under the SIAC Rules, UNCITRAL Rules and ad hoc cases. Appointments are made on the basis of our specialist knowledge of an arbitrator's expertise, experience and track record
- There are strict standards of admission for SIAC’s Panel of Arbitrators, thus minimising the risk of challenges and delays
- Our full-time staff manage all the financial aspects of the arbitration, including: Regular rendering of accounts; Collecting deposits towards the costs of the arbitration; and Processing the Tribunal’s fees and expenses
- Transparent financial management of the case according to published guidelines allows legal representatives to provide accurate cost projections, timelines and costs for each stage of the arbitration process to their clients
- We supervise and monitor the progress of the case. We conduct a scrutiny of the arbitral award, thus minimizing the likelihood of challenges to enforcement
- SIAC’s administration fees are competitive in comparison with all the major international arbitral institutions and are based on an ad valorem model

II. Special Procedures at SIAC

A. Emergency Arbitrator (EA)

- 1st international arbitral institution in Asia to introduce EA provisions in July 2010
- EA deals with requests for urgent interim relief before a Tribunal is constituted
- SIAC is an international leader in terms of the number of EA cases handled

B. Why the need?

- Challenges with seeking interim relief from courts
- Lack of confidence in national courts
- Desire for confidentiality

C. How to apply?

- Application in writing to the Registrar: - Concurrent with or following filing of Notice of Arbitration - Prior to constitution of Tribunal
- Notify Registrar and all other parties in writing of: - Nature of relief sought - Why party is entitled to such relief - Reasons why such relief is required on emergency basis
- Application has to be accompanied by payment of any deposits set by Registrar

D. Who decides?

- President of SIAC Court of Arbitration

E. Who will be the EA and what powers does EA have?

- SIAC Panel of Arbitrators with * by an arbitrator's name indicates willingness to act as EA
- EA has: - Same powers as Tribunal - Power to order or award any form of interim relief - To give reasons in writing for decision - No power to act after the Tribunal is constituted
- Tribunal may reconsider, modify or vacate the interim award by EA
- If Tribunal is not constituted within 90 days, EA’s order or award ceases to have effect
F. How long does it take?

<table>
<thead>
<tr>
<th>Action</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment of EA</td>
<td>Within 1 day of receipt by Registrar of application and payment of fee</td>
</tr>
<tr>
<td>Challenge to appointment of EA</td>
<td>Within 2 days of communication by Registrar of appointment and circumstances disclosed</td>
</tr>
<tr>
<td>Schedule for consideration of application by EA</td>
<td>Within 2 days of appointment</td>
</tr>
</tbody>
</table>

G. When will EA’s award or order be issued?
- Average time for issuance of EA order or award is 8.5 to 10 days after appointment of EA, but can be faster

H. Is EA’s order or award enforceable?
- EA’s orders and awards are enforceable in both Singapore-seated and foreign-seated arbitrations under the International Arbitration Act
- In practice, high rate of voluntary compliance

I. Common types of relief sought?
- Preservation orders
- Freezing orders
- General injunctive relief

III. Expedited Procedure
- Fast-track 6-month procedure introduced in July 2010
- Popular procedure for lower value, less complex disputes

A. When to use it?
- If sum in dispute does not exceed SGD 6,000,000
- If parties agree
- In cases of exceptional urgency

B. Who decides?
- President of SIAC Court of Arbitration

C. What is the procedure?
- Dispute will be referred to sole arbitrator
- Award will be made within 6 months from date of constitution of Tribunal

- Singapore … “The most preferred seat of Arbitration in Asia”

Global market survey on international arbitration by Queen Mary University of London

IV. The SIAC Growth Story
- Active case load of over 600 cases
- 84% of new cases filed with SIAC in 2015 were international in nature
- About half of our new cases involve foreign parties with no connection whatsoever to Singapore
- Average sum in dispute for Indian cases in 2015 was SGD 8 million with highest sum in dispute of SGD 85.1 million
V. Singapore and SIAC offer

- Over 400 arbitrators from across 40 jurisdictions
- UNCITRAL Model Law and a judiciary that provides maximum support & minimum intervention in arbitrations
- Freedom of choice of counsel in arbitration proceedings regardless of nationality.
- No restriction on foreign law firms engaging in and advising on arbitration in Singapore.
- Competitive cost structure
- SIAC arbitration awards enforced in over 150 countries
- Unmatched connectivity to India with over 360 flights a week

Influence your business outcome with the SIAC Model Clause

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

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

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

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

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

The language of the arbitration shall be _____.

Applicable Law

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

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

** State the country or jurisdiction

Contacts

Pranav Mago
Head (South Asia)
e: pranav@siac.org.sg
m: +91 9811335519
SIAC Information Kit

I. Why SIAC?

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

- SIAC’s case management services are supervised by the **Court of Arbitration** comprising eminent arbitration practitioners from around the world, including Australia, Belgium, China, France, India, Japan, Korea, Singapore, UK and USA.

- SIAC’s **Board of Directors** consists of well-respected lawyers and corporate leaders from China, Hong Kong SAR, India and Singapore. The Board is responsible for overseeing SIAC’s operations, business strategy and development, as well as corporate governance matters.

- The Centre has an experienced international **panel** of over 400 expert arbitrators from over 40 jurisdictions.

- SIAC’s multinational **Secretariat** comprises experienced lawyers qualified in civil and common law jurisdictions.

- Arbitrators’ fees are subject to a **maximum cap** in accordance with the SIAC Schedule of Fees. Arbitrations at SIAC operate on an ad valorem system, in which the costs of the arbitration are generally based on the value of the claim. SIAC will estimate the maximum costs of the arbitration based on the total value of the claim(s) and counterclaim(s) in the arbitration proceedings in accordance with the SIAC Schedule of Fees.

- SIAC **controls timelines** of cases. According to SIAC’s Costs and Duration Study released in October 2016, the mean duration of cases is 13.0 months for sole arbitrator tribunals and 15.3 months for three-member tribunals. In the event that parties would like a ‘fast-track’ arbitration, the SIAC Expedited Procedure requires the final award to be issued within 6 months of the constitution of the Tribunal, unless the Registrar extends the time for making the final award.

- SIAC conducts **scrutiny** of the arbitral award, thus enforcement issues are less likely. SIAC arbitration awards have been enforced in many jurisdictions including Australia, China, Hong Kong SAR, India, Indonesia, Jordan, Thailand, UK, USA and Vietnam, amongst other New York Convention signatories.

- The SIAC Arbitration Rules 2016, which came into effect on 1 August 2016, introduced a number of market-leading innovations, as well as new procedures to save time and costs, including:

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

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

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

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

  a. Trade and services / dispute resolution hub, excellent connectivity and popular destination for companies, businesses and investors

  b. Singapore’s international arbitration framework: trusted legal system / leading arbitral seat / supportive judiciary / arbitration-friendly legislation / no work visa requirements / foreign counsel can conduct arbitrations / world class hearing facilities at Maxwell Chambers

  c. SIAC People: World’s best arbitration practitioners on SIAC Court of Arbitration and SIAC Panel of Arbitrators. Multinational Secretariat administering the cases filed at SIAC
d. SIAC Rules: Innovative, progressive, user-friendly, time and cost-saving provisions
   i. SIAC Rules 2016: Commercial arbitration rules
   ii. SIAC Investment Arbitration Rules 2017: 1st commercial arbitral institution to release a specialised set of rules for States, State-controlled entities and intergovernmental organisations to use in the conduct of international investment arbitration

II. Statistics

SIAC’s Annual Report for 2017, which is available on SIAC’s website provides details of the number and value of cases handled by SIAC in 2017. Some important facts are as follows:

i. SIAC has seen new case filings increase by a factor of 5 in the last decade. In 2017, SIAC received 452 new cases from users from 6 continents and encompassing 58 jurisdictions. 83% of these new cases filed with SIAC were international in nature. For new cases filed in 2017, the total sum in dispute amounted to USD4.07 billion (SGD5.44 billion).

ii. Parties filed claims involving disputes spanning a host of sectors such as trade, commercial, maritime/shipping, corporate, construction/engineering, banking and financial services, insurance/reinsurance, IP/IT, aviation, employment, energy and property leasing.

iii. In 2017, Indian parties were the top foreign user of SIAC, followed by parties from China and Switzerland. Parties from India and China have remained strong contributors of cases to SIAC over the past 6 years. SIAC’s top 10 foreign users in 2017 were also spread across both common and civil law jurisdictions, a testament to the appeal of SIAC to both legal traditions. There was a significant increase in the number of parties from Germany, Japan, Switzerland, the United Arab Emirates and the United States of America compared to 2016.

iv. The average value for new case filings was USD14.47 million (SGD19.34 million), and the highest sum in dispute for a single administered case was USD601.03 million (SGD803.50 million).

v. The average sum in dispute at SIAC for cases involving Indian parties in 2017 was USD19.02 million (SGD25.43 million).

vi. The highest sum in dispute for cases involving Indian parties in 2017 was USD601.03 million (SGD803.50 million).

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

III. Costs at SIAC

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

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

a. filing fees for a claim or counterclaim
b. administration fees and expenses
c. arbitrators’ fees and expenses

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


©Nishith Desai Associates 2019
a. arbitrators’ fees and SIAC’s fees are
determined on an ad valorem rate
b. the fees have caps (or ceilings) that are
applicable to the administration fees
and arbitrators’ fees

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

a. SIAC’s administration fees and expenses
b. the Tribunal’s fees and expenses and the
Emergency Arbitrator’s fees and expenses,
where applicable

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

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

IV. Costs and Duration of an
Arbitration at SIAC

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

Key takeaways from the Study are as follows:

1. The mean total costs of arbitration
   is USD 80,337 (SGD 109,729), and
   the median total costs of arbitration
   is USD 29,567 (SGD 40,416).
2. The mean duration of cases is 13.8 months,
   and the median duration is 11.7 months.

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

<table>
<thead>
<tr>
<th>Month</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIAC writes to parties on commencement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Calculation of estimated costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Response to Notice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitution of Tribunal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary meeting</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Claim</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Defence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Replies</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request to produce documents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
V. Innovations in Reducing Time and Costs in International Arbitrations at SIAC

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

A. Expedited Procedure

Parties may agree to SIAC’s Expedited Procedure under Rule 5 of the SIAC Rules (i) in their contract by using the SIAC Expedited Procedure Model Clause (which is available on SIAC’s website);\(^4\) or (ii) post-dispute by agreement between parties.

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

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

As of 31 December 2017, SIAC has received 414 requests for the application of the Expedited Procedure, of which 236 requests were accepted.

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

---

<table>
<thead>
<tr>
<th>Month</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIAC writes to parties on commencement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Calculation of estimated costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Response to Notice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination of Expedited Procedure Application</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitution of Tribunal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary meeting</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Claim</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Defence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Replies, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request to produce documents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ruling on requests</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reply witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expert reports, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written opening submissions for hearing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing tranche (1-5 days)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written closing submissions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Submissions on Costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draft award sent to SIAC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination of costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed award issued to parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
B. Emergency Arbitrator

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

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

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

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

Singapore's International Arbitration Act was amended in 2012 to provide for the enforceability of awards and orders issued by Emergency Arbitrators in Singapore. This makes Singapore the first jurisdiction globally to adopt legislation for the enforceability of such awards and orders. Most orders and awards issued by emergency arbitrators have been voluntarily complied with.
The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

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