

WITH INPUTS FROM -



# International Commercial Arbitration

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Law and Recent Developments in India

February 2020

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February 2020

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# 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 2019, the Supreme Court delivered various landmark rulings taking a much needed pro-arbitration approach such as declaring the Indian arbitration law as seat-centric; 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 simple allegations of fraud are 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 December 17, 2015 and December 23, 2015 respectively, the Arbitration and Conciliation (Amendment) Bill, 2015 ("**2015 Bill**") was passed by the Lok Sabha and Rajya Sabha respectively, with minor additions to the amendments introduced by the Arbitration and Conciliation (Amendment) Ordinance, 2015. 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 ("**2015 Amendment Act**") came into effect, from October 23, 2015. The 2015 Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings which have commenced on or after October 23, 2015. However, the amendment to Section 36 of the Act, which pertains to removing the implied automatic stay on the execution of arbitral awards, applies retrospectively as it is procedural in nature.

The 2015 Amendment Act was well received and significantly improved the efficiency of arbitration in India.

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

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



Rajya Sabha. However, the 2018 Bill lapsed and did not see the light of the day.

Subsequently, Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and successfully enacted as the Arbitration and Conciliation (Amendment) Act on August 9, 2019 (**“2019 Amendment Act”**). The 2019

Amendment Act was passed with a view to make India a hub of institutional arbitration for both domestic and international arbitration. On August 30, 2019, the Central Government notified Sections 1, 4 –9, 11–13,15 of the Arbitration Amendment Act 2019.

## 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:

- i. The Arbitration (Protocol and Convention) Act, 1937 (“**1937 Act**”)
- ii. The Indian Arbitration Act, 1940 (“**1940 Act**”) and
- iii. The Foreign Awards (Recognition and Enforcement) Act, 1961 (“**1961 Act**”)

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

### 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. 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. Part

II of the Act deals only with foreign awards<sup>1</sup> and their enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”) and Convention on the Execution of Foreign Arbitral Awards, 1927 (“**Geneva Convention**”). Part III of the Act is a statutory embodiment of conciliation provisions.

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.<sup>2</sup>

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,<sup>3</sup> 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.<sup>4</sup>

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 a

1. A foreign award is award delivered in an arbitration seated outside India.

2. A foreign award is award delivered in an arbitration seated outside India.

3. Anita Garg v. M/s. Glencore Grain Rotterdam B.V., 2011 (4) ARBLR 59 (Delhi).

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

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 2015 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 2015 Amendment Act provides strict timelines for completion of the arbitral proceedings along with the scope for resolving disputes by a fast track mechanism. The 2015 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 2015 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 2015 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.

arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations but the same has not yet been notified.

- Further, 2019 Amendment Act amends the 2015 Amendment Act by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the Arbitration Council of India with the power to appoint arbitrators but the same has not yet been notified.
- The 2015 Amendment Act had introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. The 2019 Amendment Act amends the start date of this time limit by six months before which statement of claim and defence are to be filed.
- The 2019 Amendment Act also excludes ‘international commercial arbitration’ from this time-limit to complete arbitration proceedings.
- The 2019 Amendment Act introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators.
- The 2019 Amendment Act further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule.
- Importantly, the 2019 Amendment Act also clarifies the scope of applicability of the 2015 Amendment Act. The 2019 Amendment Act provides that 2015 Amendment Act, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. This particular provision, Section 87 of the Act, has now been struck down by the Supreme Court, and have been discussed later in the paper.

## V. Arbitration and Conciliation (Amendment) Act, 2019

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

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

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

- The Amendment Act 2019 seeks to establish the Arbitration Council of India, which would exercise powers such as grading arbitral institutions, recognising professional institutes that provide accreditation to

On August 30, 2019, the Central Government notified Sections 1, 4–9, 11–13, 15 of the 2019

Amendment Act. The notified amendments include amendments relating to the timeline for arbitration, confidentiality and applicability of the 2015 Amendment Act. However, it must be noted that the provisions pertaining to the Arbitration Council of India have not been notified yet.

In 2018, the Supreme Court of India dealt with the issue of retrospectivity of the 2015 Amendment Act. The text of the 2015 Amendment Act contains Section 26 which states that:

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

In the case of *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.*,<sup>5</sup> (“BCCI”) the Supreme Court made a clear distinction between the two limbs of Section 26 of the 2015 Amendment Act and explained the applicability of the 2015 Amendment Act. The Court held that the first part of Section 26 deals with arbitral proceedings before the Arbitral tribunal alone. The Court held that the second part only deals

with court proceedings which relate to the arbitral proceedings. It then concluded that the 2015 Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after October 23, 2015; and (ii) to court proceedings which have commenced on or after October 23, 2015. The Supreme Court further held that the amendment to Section 36 of the Act, which pertains to removing the implied automatic stay on the execution of arbitral awards, applies retrospectively as it is procedural in nature.

Peculiarly, the Amendment Act 2019 introduced Section 87, which provides that Amendment Act 2015, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings. This was in clear contrast to the Supreme Court’s ruling in *BCCI*.

However, Section 87 has been struck down by the Supreme Court as being unconstitutional in the case of *Hindustan Construction Company Limited v. Union of India*.<sup>6</sup> Consequently, the position laid down by the Supreme Court in *BCCI* has been reinstated.

5. (2018) 6 SCC 287

6. Writ Petition (Civil) No. 1074 Of 2019.

### 3. International Commercial Arbitration – Meaning

Section 2(1)(f) of the Act defines an ICA as a legal relationship which must be considered commercial,<sup>7</sup> 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.*,<sup>8</sup> 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.<sup>9</sup>

7. ‘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).

8. 2008 (14) SCC 271.

9. M/s. Larsen and Toubro Ltd. SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority, 2018 SCC OnLine SC 1910.

## 4. Arbitrability Under Indian Law

Arbitrability is one of the issues where the contractual and jurisdictional facets of 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.*,<sup>10</sup> 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*<sup>11</sup> 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*<sup>12</sup> and *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,<sup>13</sup> 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.*<sup>14</sup> 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.<sup>15</sup>

10. 2011 (5) SCC 532.

11. 2010 (1) SCC 72.

12. 2014 (6) SCC 677.

13. AIR 2014 SC 968.

14. (2016) 10 SCC 386.

15. Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr., 2018 SCC OnLine SC 487

Further, in *Sudhir Gopi v. Indira Gandhi National Open University*,<sup>16</sup> 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.*,<sup>17</sup> 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.

Recently, in the case of *Rashid Raza vs. Sadaf Akhtar*,<sup>18</sup> the Supreme Court relied upon its judgment in *A Ayyasamy* and set out the working tests for determining whether an allegation of fraud is arbitrable while appointing an arbitrator under Section 11 of the Act. It culled out two working tests from *A Ayyasamy* to determine this distinction between a simple allegation of fraud or otherwise, as follows:

*“(1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or*

*(2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain”<sup>19</sup>*

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.<sup>20</sup>

In the case of *The Oriental Insurance Co. Ltd. & Anr. v. Dicitex Furnishing Ltd.*,<sup>21</sup> the Supreme Court has held that at the Section 11 stage “..the court<sup>6</sup> which is required to ensure that an arbitrable dispute exists, has to be prima facie convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive (read: arbitration) proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding (about the finality of the discharge and its effect as satisfaction) final, thus, precluding the applicant of its right event to approach a civil court.”

16. 2017 SCC OnLine Del 8345.

17. 2017 SCC Online Del 11625.

18. Civil Appeal no. 7005 of 2019

19. Page 4, Civil Appeal no. 7005 of 2019

20. (2016) 8 SCC 788.

21. CIVIL APPEAL No. 8550 OF 2019



## 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 2015 Amendment Act. In the event, the date of commencement is after October 23, 2015, the provisions of the 2015 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.<sup>22</sup> 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<sup>23</sup> 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.<sup>24</sup>

The Bombay High Court The Supreme Court, in the case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*,<sup>25</sup> has recently held that unless the agreement which prescribes the arbitration clause is sufficiently stamped, the court cannot appoint an arbitrator. Following this judgment, the Bombay High Court, in the case of *S. Satyanarayana v. West Quay Multiport Pvt. Ltd.*<sup>26</sup> held that the agreement containing the arbitration clause must be stamped in the local State where the arbitration takes place.

#### ***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. In this regard, an arbitration

22. Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator, (2018) 9 SCC 774.

23. M/s. Caravel Shipping Services Pvt. Ltd. v. M/s. Premier Sea Foods Exim Pvt. Ltd., 2018 SCC OnLine SC 2417.

24. Parasramka Holding Pvt. Ltd. & Ors. v. Ambience Pvt. Ltd. & Anr., 2018 SCC OnLine Del 6573.

25. Civil Appeal No. 3631 of 2019 arising out of SLP(C) No. 9213 of 2018.

26. Arb Application No. 261 of 2018

agreement has been considered to be valid if there is merely the incorporation of another document/clause (relating to arbitration) by reference,<sup>27</sup> or even if there is a general reference to a standard form of the contract of one party.<sup>28</sup> In such situations, intention of the parties<sup>29</sup> and consensus *ad idem* of the parties is critical, even if the same is apparent from their conduct.<sup>30</sup>

More importantly, taking heed from the judgment of the Supreme Court in *Chloro Controls*,<sup>31</sup> which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded under the 2015 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.<sup>32</sup> 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,<sup>33</sup> depending on the nature of reliefs claimed by or against such a party.<sup>34</sup> 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.<sup>35</sup>

27. *Elite Engineering v. Techtrans Construction India*, (2018) 4 SCC 281.

28. *M/s Inox Wind Ltd. v. M/S. Thermocables Ltd.*, (2018) 2 SCC 519.

29. *Elite Engineering v. Techtrans Construction India*, (2018) 4 SCC 281.

30. *OK Play Auto Pvt. Ltd. v. Indian Commerce and Industries*, 2018 SCC OnLine Del 8525.

31. *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641.

32. *M/s SEI Adhavan Power Private Limited v. M/s Jinneng Clean Energy Technology Limited*, OA. Nos. 642, 643 & 644 of 2017, 6 & 7 of 2018 & A. Nos. 6461, 6462 & 6463 of 2017 & 477, 478 & 479 of 2018 in CS. Nos. 502 of 2017 & 12 of 2018, dated 24/04/2018.

33. *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531.

34. *Suman Baburao Thapa v. Jigar K. Mehta and Ors.*, (2018) 3 AIR Bom R 215.

35. *Emaar MGF Land Limited & Anr. v. Aftab Singh*, 2017 SCC OnLine Del 11437.

### 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.

#### *Applicability of Amendment Acts*

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

#### A. Interim reliefs under Section 9

- a. 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.
- b. 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.

#### 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 (“CPC”) as if it were an order of the court, which provides clarity on its enforceability. The intention appears to be to vest significant powers with the Arbitral Tribunal and reduce the burden and backlog before the courts.

There was confusion on the extent and scope of 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).

The 2015 Amendment Act, gave the tribunal the power to grant interim relief “*during the arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced in accordance with section 36*”. This had created some ambiguity as the tribunal becomes *functus officio* once the final award has been rendered. However, the 2019 Amendment Act resolved this issue by omitting the words “*or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36*” from Section 17 of the Act.

## 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.<sup>36</sup> 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.<sup>37</sup>

The Supreme Court/High Court can authorize any person or institution to appoint an arbitrator.<sup>38</sup> 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 2015 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.<sup>39</sup>

This should be noted against the threshold contained in a Section 11 application for referring a dispute to arbitration, which empowers a court only to examine the *prima facie* existence of an arbitration agreement. The Delhi High Court<sup>40</sup> 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 Supreme Court, while interpreting Section 11 of the Act as amended by the 2015 Amendment Act, has held that as per the law prior to the 2015 Amendment Act, courts could go into whether there was accord and satisfaction of there being arbitrable dispute between the parties. However, this is now legislatively overruled. Section 11(6A) of the Act is now confined to the examination of only the existence of an arbitration agreement and is to be understood in the narrow sense.<sup>41</sup>

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

36. Section 11(6) of the Act.

37. Section 11(6) of the Act.

38. Section 11(6)(b) of the Act.

39. Section 11 (6)(a) of the Act.

40. Picasso Digital Media Pvt. Ltd. v. Pick-A-Cent Consultancy Service Pvt. Ltd., 2016 SCC Online Del 5581.

41. Mayavti Trading Pvt. Ltd. v. Pradyat Deb Burman, Civil Appeal No. 7023 of 2019 arising out of SLP (Civil) No. 8519 of 2019.

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 procedure of appointment to be an exercise of administrative power by the courts.

The 2019 Amendment Act amends Section 11 of the Act by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the Arbitration Council of India with the power to appoint arbitrators. However, this provision has not been notified yet.

The Supreme Court, in the case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*,<sup>42</sup> has recently held that unless the agreement which prescribes the arbitration clause is sufficiently stamped, the court cannot appoint an arbitrator. The court must impound the agreement on which adequate stamp duty has not been paid and hand it over to the relevant stamp authority for rectification. The stamp authorities should resolve the issues relating to stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the agreement.

The Supreme Court of India in *National Highways Authority of India v Sayedabad Tea Company*<sup>43</sup> dealt with arbitral appointments under section 11 of the Act, vis-a-vis Section 3G(5) of the National Highways Act 1956 (the Highways Act), which provides for appointment of an arbitrator by the central government in special situations. The Supreme Court held that the Highways Act,

being a special law, would have overriding effect on a general law such as Act.

## 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.<sup>44</sup>

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.<sup>45</sup>

The Supreme Court in the case of *Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Pty.*<sup>46</sup> interpreted the Arbitration and Conciliation Act 1996 (as the present case applied the law as it stood prior to the 2015 Amendment Act) to determine the arbitral award rendered by the appointed arbitrator should be set aside as the Appellants had a reasonable basis to doubt the arbitrator's ability to be independent and impartial in pronouncing the arbitral award.

The 2015 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.<sup>47</sup>

44. Section 12(1) of the Act.

45. Section 12(3)(b) of the Act.

46. Civil Appeal No.6960 of 2011

47. C & C Construction Ltd. v. Ircon International Ltd., 2018 SCC OnLine Del 9240.

42. Civil Appeal No. 3631 of 2019 arising out of SLP(C) No. 9213 of 2018.

43. Civil Appeal No(s). 69586959 OF 2009

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 *TRF Ltd. v Energo Engineering Projects Ltd.*,<sup>48</sup> 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*,<sup>49</sup> the Supreme Court propounded certain important principles of law, such as: (i) if the arbitrator has passed an award in an earlier arbitration between the same parties about the same dispute, that does not mean that there are justifiable grounds for challenging his impartiality under Clause 16 of Fifth Schedule; (ii) while a challenge based on the Fifth Schedule can be decided only on the basis of the facts of the case and can 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.<sup>50</sup> 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.

48. (2017) 8 SCC 377.

49. 2017 (10) SCALE 371.

50. Section 13(5) of the Act.

In *Aravalli Power Company Ltd. v. Era Infra Engineering Ltd.*,<sup>51</sup> 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 Vikas Nigam Limited*,<sup>52</sup> 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.*<sup>53</sup> The Delhi High Court, in the case of *Kadimi International Pvt. Ltd. v. Emaar MGF Land Ltd.*<sup>54</sup>, held that the 2015 Amendment Act has not done away with the unilateral right of a party to appoint an arbitrator. The Court further emphasized that the appointment of a person who is ineligible to be an arbitrator under Section 12(5) read with Schedule VII of the Act is void.

The Supreme Court in the case of *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.*<sup>55</sup> 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*

51. AIR 2017 SC 4450.

52. 2017 SCC OnLine Del 8675.

53. C.A. 27/2019, arising out of SLP(C) 20201/2018, dated 03/01/2019.

54. 2019 (4) ArbLR 233 (Delhi)

55. (2017) 4 SCC 665.

*Pvt. Ltd.*<sup>56</sup> 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 2015 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.*,<sup>57</sup> 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.

56. (2010) 2 SCC 385.

57. 2005 (8) SCC 618.

## 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.<sup>58</sup> The Arbitral Tribunal is not bound by the CPC or the Indian Evidence Act, 1872.<sup>59</sup> The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the Arbitral Tribunal.

The Arbitral Tribunal has complete powers to decide the procedure to be followed, unless parties have otherwise agreed upon the procedure to be followed.<sup>60</sup> The Arbitral Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.<sup>61</sup> 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.<sup>62</sup> Similarly, the language to be used in arbitral proceedings can be mutually agreed. Otherwise, the Arbitral Tribunal can decide on the same.<sup>63</sup>

The Supreme Court in the case *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*<sup>64</sup> 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*<sup>65</sup> 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.

58. Section 18 of the Act.

59. Section 19(1) of the Act.

60. Section 19(3) of the Act.

61. Section 19(4) of the Act.

62. Section 20 of the Act.

63. Section 22 of the Act.

64. (2017) 7 SCC 678.

65. 2017 SCC OnLine SC 697.

Recently, the Supreme Court, in the case of *Brahmani River Pellets v. Kamachi*<sup>66</sup> held where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter to the exclusion of all other courts. In this case, the contract specified that the venue of arbitration shall be Bhubaneswar, and the Supreme Court held that the intention of the parties is to exclude all courts except the Orissa High Court.

The Supreme Court in *BGS Soma JV v. NHPC*<sup>67</sup> (“**BGS Soma**”) recently held that:

*“...whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an International context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996*

*as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.”*

However, in *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*,<sup>68</sup> (“**Antrix**”) the division bench of 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 Delhi High Court also held that one of the ratios of the Supreme Court in paragraph 96 of *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc.*<sup>69</sup> is that courts would have concurrent jurisdiction, notwithstanding the designation of seat of arbitration by the agreement of the parties. On appeal, the Supreme Court has stayed the operation of this judgment and the final judgment is expected later in the year 2020.

However, the Supreme Court in the case of *BGS Soma* has declared that the Delhi High Court’s judgment in *Antrix Corporation* is incorrect and overruled as the finding of the Delhi High Court runs contrary to the correct interpretation of Section 42 of the Act. Section 42 of the Act states: *“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 sequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.”*

The Supreme Court held that the Delhi High Court in *Antrix* has incorrectly interpreted the ratio of *BALCO*. It held that *BALCO* does not hold that two Courts have concurrent jurisdiction, i.e., the seat Court and the Court within whose jurisdiction the cause of action arises. Such an interpretation would be contrary to the language in Section 42 of the Act, which is

66. CIVIL APPEAL NO. 5850 2019

67. CIVIL APPEAL NO. 9307 OF 2019

68. 2018 SCC Online Del 9338

69. (2012)9 SCC 552

meant to avoid conflicts in jurisdiction of Courts by placing the supervisory jurisdiction over all arbitral proceedings in connection with the arbitration in one Court exclusively.

The Supreme Court recently in *Union of India v. Hardy Exploration and Production*,<sup>70</sup> 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. However, the Supreme Court in the aforementioned case of BGS Soma has held that the Supreme Court’s judgment *Union of India v. Hardy Exploration and Production* is not good law as it is contrary to the five judge bench decision in *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Service, Inc.*<sup>71</sup>

Recently, in the case of *L&T Finance Ltd. v. Manoj Pathak & Ors.*,<sup>72</sup> the Delhi High Court identified the tests applicable to identify a seat of arbitration:

“29. *There emerges the following trifecta of propositions in regard to a domestic arbitration:*

- a. *A stated venue is the seat of the arbitration unless there are clear indicators that the place named is a mere venue, a meeting place of convenience, and not the seat;*
- b. *Where there is an unqualified nomination of a seat (i.e. without specifying the place as a mere venue), it is courts where that seat is situated that would have exclusive jurisdiction; and*
- c. *It is only where no venue/seat is named (or where it is clear that the named place is merely a place of convenience for meetings) that any other consideration of jurisdiction may arise, such as cause of action.”*

## 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.<sup>73</sup>

### *Applicability of Amendment Acts*

The 2015 Amendment Act provides for an application for counterclaim/set-off to be adjudicated upon in the same arbitration proceeding without requiring a fresh one.<sup>74</sup> 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.<sup>75</sup>

The 2019 Amendment Act has now introduced a six-month time frame for completion of statement of claim and defence. However, a provision of a six-month time frame may result in the creation of more issues. For instance, it is very common in arbitration proceedings for parties to bifurcate the issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing of statement of claim and defence would deprive parties of such flexibility and would effectively require them to file their complete pleadings at the very outset of the arbitration proceedings. Further, it is difficult to ascertain at what stage filing the statement of claim and defence be considered as completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defence, or where a counter-claim is filed.

70. AIR 2018 SC 4871

71. (2012) 9 SCC 552

72. Com. Arb. Petition No. 1315 of 2019.

73. Section 23 of the Act.

74. Section 23(2A) of the Act.

75. Section 25(b) of the Act.



## 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 requests the Arbitral Tribunal for a hearing, sufficient advance notice of hearing should be given to both the parties.<sup>76</sup> 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 2015 Amendment Act, the time limit for conduct of the arbitral proceedings was streamlined and arbitrators were mandated to complete the entire arbitration proceedings within a span of 12 (twelve) months from the date the Arbitral Tribunal enters upon the reference.<sup>77</sup> However, a 6 (six) months extension may be granted to the arbitrator by mutual consent of the parties.<sup>78</sup> Beyond 6 (six) months, any further extension may be granted to the arbitrator at the discretion of the court<sup>79</sup> or else the proceedings shall stand terminated.<sup>80</sup> An application for extension of time towards completion of arbitral proceedings has to be disposed of expeditiously.<sup>81</sup> There is also a provision made for awarding additional fees, as consented upon by the parties,

76. Section 24 of the Act.

77. Section 29A(1) of the Act.

78. Section 29A(3) of the Act.

79. Section 29A(5) of the Act.

80. Section 29A(4) of the Act.

81. Section 29A(9) – the section endeavors the application to be disposed of within a period of 60 days.

to them for passing the award within the time span of 6 months.<sup>82</sup>

The 2019 Amendment Act has modified the start date of the 12 (twelve) month period to the date on which statement of claim and defence are completed. As discussed earlier, the 2019 Amendment Act has also provided that pleadings must be completed within 6 months from the appointment of arbitrator(s).

The 2019 Amendment Act has also exempted international commercial arbitration from these time-limits. The 2019 Amendment Act has introduced a non-binding proviso to this exemption stating that the award in an international commercial arbitration may be made as expeditiously as possible and an endeavour may be made to dispose off the matter within 12 months from the date of completion of pleadings. While this provision does not contain a mandatory language, it may act as a guidance to parties and arbitrators to ensure the arbitral award is rendered within a period of 12 months from the date of completion of pleadings.

## 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.<sup>83</sup>

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.<sup>84</sup>

Parties can, before the constitution of the Arbitral Tribunal, agree in writing to conduct arbitration under a fast track procedure.<sup>85</sup> Under the fast track procedure, unless the parties otherwise make a request for oral hearing, or the

82. Section 29A(2) of the Act.

83. Section 29B(2) of the Act.

84. Section 29B(4) of the Act.

85. Section 29B(1) of the Act.

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.<sup>86</sup>

## 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.<sup>87</sup>

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.<sup>88</sup> 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.

86. Section 29B(3) of the Act.

87. Section 30 of the Act.

88. Section 43(2) of the Act.

## 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.<sup>89</sup> The decision of the Arbitral Tribunal will be by majority.<sup>90</sup> The Arbitral Award shall be in writing and signed by all the members of the tribunal.<sup>91</sup> It must state the reasons for the award, unless the parties have agreed that no reason for the award is to be given.<sup>92</sup> 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.<sup>93</sup>

## 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 2015 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.<sup>94</sup>

In *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*,<sup>95</sup> 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

89. Section 28(2) of the Act.

90. Section 29 of the Act.

91. Section 31(1) of the Act.

92. Section 31(3) of the Act.

93. Section 31(6) of the Act.

94. Section 31(7)(b) of the Act.

95. 2018 SCC OnLine SC 1922.

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,<sup>96</sup> 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.<sup>97</sup>

### A. Regime for Costs (Introduced by the 2015 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.<sup>98</sup> If the parties refuse to pay the costs, the 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.<sup>99</sup>

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-

- 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 Supreme Court, in *Kinnari Mullick v. Ghanshyam Das Damani*,<sup>100</sup> 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.

96. *Raveechee and Co. v. Union of India*, 2018 SCC OnLine SC 654.

97. *Union of India v. Susaka (P) Ltd.*, (2018) 2 SCC 182.

98. Section 31(8) of the Act.

99. Section 39 of the Act.

100. AIR 2017 SC 2785.

**Public Policy under the Act :**

There has been significant debate on the scope of ‘public policy’ under the Act. Following a series of judgments on the interpretation of ‘public policy’, the 2015 Amendment Act 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 2015 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.<sup>101</sup> 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,<sup>102</sup> and unless absolutely necessary, the courts should not go beyond the record before the arbitrator in deciding an application for setting aside an award.<sup>103</sup>

The principles laid down by the Supreme Court in the case of *Associate Builders v. Delhi Development Authority*<sup>104</sup> (“**Associate Builders**”), provides guidance as to what constitutes ‘public policy’ under the Act. In *Associate Builders*, this Hon’ble Supreme Court has held that:

- a. a decision which is based on no evidence or which ignores vital evidence would be *perverse* and contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48(2)(b) - (para 29 to 31).
- b. if an arbitral award is without any *acceptable reason* or *justification* it would *shock the judicial conscience* and would consequently be contrary to Justice and as such refused enforcement (para 36).

- c. a decision which was passed in contravention of “judicial approach” would be contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48(2)(b) – (para 29)

Further, in *Associate Builders*, this Hon’ble Court set out the contours of what constitutes a “*judicial approach*” that is a prerequisite for an award being found to conform to the fundamental policy of Indian law (para 29 - 31):

- a. Decision is to be fair, reasonable and objective;
- b. Arbitrator must apply his mind;
- c. Principle of *audi alteram partem* was to be observed;
- d. Decision cannot be perverse or so irrational that no reasonable person would have arrived at the same. Where,
  - i. a finding is based on no evidence;
  - ii. irrelevant considerations are taken into account while arriving at a decision or
  - iii. a decision ignores vital evidence,
  - iv. such a decision would be perverse and contrary to the fundamental policy of Indian law.

The 2015 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.<sup>105</sup> A challenge under this section can be filed only after providing prior notice to the opposite party,<sup>106</sup> but this procedural provision has been held to be directory, and not mandatory, in nature.<sup>107</sup> A challenge has to be disposed of expeditiously, and, in any event, within a period of one year from the date of the prior

<sup>101</sup> Proviso to section 34(2A) of the Act.

<sup>102</sup> Explanation 2 to section 48 of the Act.

<sup>103</sup> *Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49.

<sup>104</sup>. (2015) 3 SCC 49

<sup>105</sup>. Section 34(2A) of the Act.

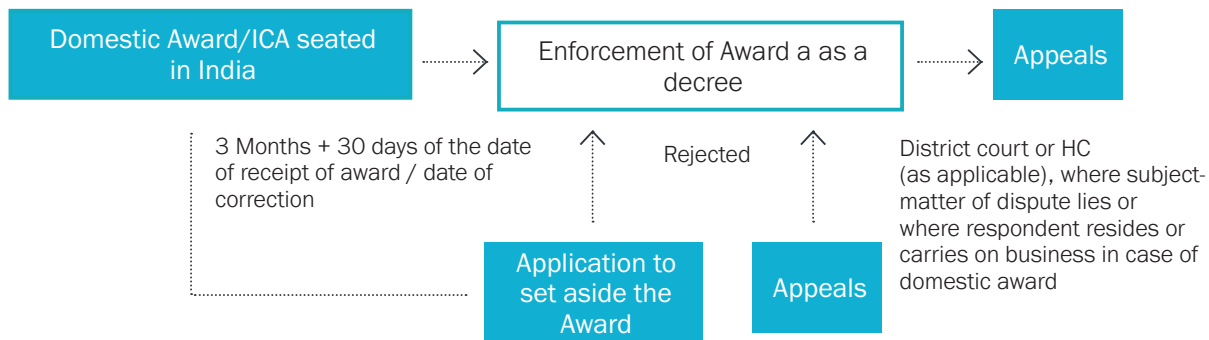
<sup>106</sup>. Section 34(5) of the Act.

<sup>107</sup>. *State of Bihar v. Bihar Rajya Bhumi Vikas Bank*, (2018) 9 SCC 472.

notice referred above.<sup>108</sup> 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.

- iv. When a decision is perverse, based on no evidence or ignores vital evidence in arriving at the decision.

**Process for Challenge & enforcement**



The Supreme Court, in the case of *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*,<sup>109</sup> interpreted the post-2015 Amendment Act grounds for challenge of an arbitral award under Section 34 of the Act and the grounds for refusal of enforcement of an arbitral award under Section 48 of the Act. The Supreme Court has held that the ground of “patent illegality” is available only for challenge of domestic arbitral awards under Section 34 of the Act. Inter alia, patent illegality would include the following:

- i. Patent illegality appearing on the face of the award, which goes into the root of the matter, and is not a merely an erroneous application of law. Contravention of a statute not lined to public policy or public interest cannot be brought in by the backdoor for setting aside an award on the ground of patent illegality.
- ii. If the arbitrator fails to give reasons for an award.
- iii. If the arbitrator construes the contract in a manner no fair minded or reasonable person would.

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.<sup>110</sup> 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.<sup>111</sup>

Recently, the Supreme Court, in the case of *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. (“BCCI”)*,<sup>112</sup> 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

108. Section 34(6) of the Act.  
109. Civil Appeal No. 4779 OF 2019

110. *Ecopack India Paper Cup Pvt. Ltd. v. Sphere International*, 2018 SCC OnLine Bom 540.  
111. *New Tirupur Area Development Corporation Ltd. v. M/s. Hindustan Construction Co. Ltd.*, A. NO. 7674 of 2015 in O.P. No. 931 of 2015; *Tufan Chatterjee v. Rangan Dhar*, AIR 2016 Cal 213; *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia*, 2017 SCC Online Del 6402.  
112. (2018) 6 SCC 287.

aside the awards. Although the 2019 Amendment Act introduced Section 87 to the Act which modifies the interpretation of the applicability of the 2015 Amendment Act, the Supreme Court in the case of *Hindustan Construction Company Limited v. Union of India*,<sup>113</sup> has struck down Section 87 of the Act as being unconstitutional. Consequently, the position laid down by the Supreme Court in *BCCI* continues to prevail.

Further, the Supreme Court has clarified that 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.<sup>114</sup>

## XVI. Grounds For Challenge

### A. Domestic Award/ICA seated in India

Pre-amendment	Post-amendment
<ul style="list-style-type: none"> <li>a. Party was under some incapacity;</li> <li>b. Arbitration agreement not valid under the governing law of the agreement;</li> <li>c. Applicant not given proper notice and not able to present its case;</li> <li>d. Award deals with a dispute not contemplated by terms of the submission to arbitration, or beyond the scope of the submission to arbitration;</li> <li>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;</li> <li>f. Subject-matter of the dispute not capable of settlement by arbitration under the law;</li> <li>g. 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)</li> </ul>	<p>Ground (a) – (f) in the pre-amendment era has been retained with the addition of the following:</p> <ul style="list-style-type: none"> <li>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;</li> <li>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. <b>For international commercial arbitrations seated in India, ‘patent illegality’ has been kept outside the purview of the arbitral challenge;</b></li> <li>c. An award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence;</li> <li>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.</li> </ul>

### B. Time-Lines For Challenge

Pre-amendment	Post-amendment
NA	Challenge can be filed only after providing prior notice to the opposite party and has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice.

<sup>113</sup>. Writ Petition (Civil) No. 1074 Of 2019.

<sup>114</sup>. K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd., 2018 SCC OnLine SC 1013.

## XVII. 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.<sup>115</sup> 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:<sup>116</sup>

- 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*,<sup>117</sup> 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.*

<sup>115</sup>. Prabhat Steel Traders v. Excel Metal Processors, 2018 SCC OnLine Bom 2347

<sup>116</sup>. Section 37 of the Act.

<sup>117</sup>. 2016 (12) SCALE 1015.

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.

## XVIII. 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.<sup>118</sup> 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.

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

<sup>118</sup>. N. Poongodi v. Tata Finance Ltd., 2005 (3) Arb LR 423 (Madras).

the stage of execution of the arbitral award, there can be no challenge as to its validity.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup>

## 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.<sup>124</sup>

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.<sup>125</sup>

If during the pendency of the attachment, the judgment debtor satisfies the decree through the court, the attachment will be deemed to be withdrawn.<sup>126</sup> Otherwise, the court will order the property to be sold.<sup>127</sup>

## C. Sale of attached property

Order XXI lays down a detailed procedure for sale of attached property whether movable or immovable. If the property attached is a moveable property, which is subject to speedy and natural decay, it may be sold at once under Rule 43. Every sale in execution of a decree should be conducted by an officer of the court except where the property to be sold is a negotiable instrument or a share in a corporation which the court may order to be sold through a broker.<sup>128</sup>

## XIX. Representation by Arbitral Tribunal for Contempt

The Bombay High Court, in the case of *Alka Chandewar v. Shamsul Ishrar Khan*,<sup>129</sup> ruled that Section 27(5) of Act does not empower the Tribunal to make representation to the Court for contempt. However, the Supreme Court

119. Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rahman, 1970 (1) SCC 670; Bhawarlal Bhandari v. Universal Heavy Mechanical Lifting Enterprises, 1999 (1) SCC 558.

120. Sundaram Finance Ltd. v. Abdul Samad, (2018) 3 SCC 622.

121. Rule 10 of the CPC.

122. Section 36(1) of the Act.

123. Proviso to Section 36(3) of the Act.

124. O.XXI R.54 of the CPC.

125. Section 64 of the CPC.

126. O.XXI R. 55 of the CPC.

127. O.XXI R. 64 of the CPC.

128. O.XXI R.76 of the CPC.

129. (2017) 16 SCC 119.



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*,<sup>130</sup> 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.

the Calcutta High Court, in *Government of West Bengal v Chatterjee Petrochem*,<sup>135</sup> 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

Pre-Balco (Bhatia Regime)	Post-Balco	Amendment Act
Unless impliedly or expressly excluded by the parties, Part I of the Act will apply even to a foreign seated arbitration.	Part I of the Act will not apply in case of foreign seated arbitration. The decision was given prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. If the arbitration agreement was executed prior to September 6, 2012, necessary modifications would have to be made in the arbitration agreement in order to be governed by the ruling in <i>BALCO</i> . <sup>131</sup>	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). <sup>132</sup>

In *IMAX Corporation v. E-City Entertainment Pvt. Ltd.*,<sup>133</sup> 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.*,<sup>134</sup> 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

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.<sup>136</sup>

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)

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

131. *Harmony Innovation Shipping Ltd v. Gupta Coal India Ltd. & Anr.*, (2015) 9 SCC 172 (for our analysis please see: [http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/have-you-amended-your-arbitration-agreement-post-balco.html?no\\_cache=1&cHash=05954678cd27f35dbcb4ce62517c1fc3](http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/have-you-amended-your-arbitration-agreement-post-balco.html?no_cache=1&cHash=05954678cd27f35dbcb4ce62517c1fc3)).

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

133. 2017 SCC OnLine SC 239.

134. 2017 SCC OnLine Bom 8480.

135. 2017 SCC OnLine Cal 13267.

136. 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.

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*,<sup>137</sup> (“**Bhatia International**”) the Supreme Court expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award.

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

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied.<sup>138</sup>

- i. *the award passed should be an arbitral award,*
- ii. *it should be arising out of differences between the parties;*

- iii. *the difference should be arising out of a legal relationship;*
- iv. *the legal relationship should be considered as commercial;*
- v. *it should be in pursuance of a written agreement to which the New York Convention applies; and,*
- vi. *the foreign award should be made in one of the aforementioned 48 countries.*

## I. Referring parties to arbitration under part II

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who, under Section 44<sup>139</sup> 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.<sup>140</sup>

<sup>137</sup>.AIR 2002 SC 1432.

<sup>138</sup>.National Ability S.A. v. Tinn Oil Chemicals Ltd., 2008 (3) ARBLR 37.

<sup>139</sup>.Section 44 of the Act.

<sup>140</sup>.Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre, (2005) 7 SCC 234; Korp Gems (India) Pvt. Ltd. v. Precious Diamond Ltd., 2007 (3) ArbLR 32.

## A. Distinction between Section 8 and Section 45

Section 8 and Section 45 of the Act, both pertaining to the court referring disputes to arbitration, vary with regards to the threshold of discretion granted to the courts. The primary distinction appears to be that Section 8 of the Act leaves no discretion with the court in the matter of referring parties to arbitration, whereas Section 45 grants the court the power to refuse a reference to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>141</sup>

The Supreme Court, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*,<sup>142</sup> 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.*<sup>143</sup> ("**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.*,<sup>144</sup> relying on *Chloro Controls*, upheld the impleadment of a non-signatory to the arbitration agreement in an SIAC arbitration.

The Supreme Court, in the case of *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited & Anr*<sup>145</sup> had occasion to revisit the principles expounded in *Chloro Controls*. The Supreme Court has held that it is upon the party seeking to implead a non-signatory to show its intention to consent to the arbitration agreement. Further, it held that a non-signatory without any causal connection with the process of negotiations preceding the arbitration agreement cannot be made party to the arbitration. Importantly, it has also ruled that circumstances and correspondence post execution of an arbitration agreement cannot bind a non-signatory to the arbitration agreement.

## 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.*

<sup>141</sup>I. (2005) 7 SCC 234.

<sup>142</sup>Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi, 2014 (6) SCC 677.

<sup>143</sup>2013 (1) SCC 641.

<sup>144</sup>2017 SCC OnLine Del 11625.

<sup>145</sup>Petition for Arbitration (Civil) No. 65 of 2016; Also see Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., CIVIL APPEAL NOS. 6202-6205 OF 2019.

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*,<sup>146</sup> 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.

### 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)*,<sup>147</sup> 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*,<sup>148</sup> 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.*,<sup>149</sup> the Supreme Court held that courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

<sup>146</sup>.AIR 1994 SC 1136.

<sup>147</sup>.AIR 1962 SC 1810.

<sup>148</sup>.2016 SCC OnLine Del 6203.

<sup>149</sup>.AIR 1989 SC 2198.

## E. Grounds for Refusing the Enforcement of a Foreign Arbitral Award

Under Section 48 of the Act, in case of a New York Convention award, an Indian court can refuse to enforce a foreign arbitral award if it falls within the scope of the following statutory 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.*,<sup>150</sup> (“**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.*

In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*,<sup>151</sup> (“**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.

<sup>150</sup>. (1994) 2 Arb LR 405.

<sup>151</sup>.2013 (8) SCALE 480.

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.<sup>152</sup>

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

The 2015 Amendment Act specifically provides an explanation to Section 48 of the Act, for the avoidance of all doubts on the point that an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention of the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

The 2015 Amendment Act, in the amendment to Section 34 of the Act (which deals with challenge of an arbitral award with a seat in India) also specifies that the ground of ‘patent illegality’ is not available as a ground for setting aside an arbitral award in international commercial arbitrations. The language and grounds for setting aside and refusing arbitral awards under Sections 34 and 48 are similar, except for the ground of ‘patent illegality’ which is available only for domestic arbitrations.

Recently, the Delhi High Court recognized and enforced a foreign award, while recognizing that the procedure followed under the SIAC rules (which the party hadn’t agreed to) hadn’t caused any prejudice to the judgement debtor.<sup>153</sup>

In the case of *Vijay Karia & Ors v. Prysmian Cavi E Sistemi S.r.l & Ors*.<sup>154</sup> the Supreme Court recently held that Courts should refuse the enforcement of foreign arbitral awards only in exceptional cases of a blatant disregard of Section 48 of the Act. The Supreme Court further held that a violation of Rule 21 of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 would not constitute a violation of the fundamental policy of Indian law under Section 48(2)(b)(ii). The Supreme Court held that the fundamental policy refers to refers to the core values of India’s public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts.

### 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.*,<sup>155</sup> 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*

152. Section 49 of the Act.

153. *Glencore International AG v. Indian Potash Limited & Anr.* (Ex. P. 99/2015)

154. Civil Appeal No. 1544 and 1545 of 2020

155. (2005) 7 SCC 234.

*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. Furst Day Lawson Ltd.*,<sup>156</sup> one was whether a letters patent appeal would lie against an order under Section 50 of the Act wherein a petition seeking execution of an award was dismissed and no appeal was maintainable under the Act. Further, the single judge, under Section 45, had refused to refer the parties to 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.*,<sup>157</sup> 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.

<sup>156</sup>. (2011) 8 SCC 333.

<sup>157</sup>.(2018) 14 SCC 715.

## 7. Emerging Issues in Indian Arbitration Laws

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

### I. Issues in the 2019 Amendment Act

While the 2019 Amendment Act aims to provide certification to arbitral institutions and arbitrators through grading and accreditation by the Arbitration Council of India, the constitution of the Arbitration Council of India itself is largely government-dominated, which may risk the independence of arbitration in India. However, it must be noted that provisions pertaining to the Arbitration Council of India in the 2019 Amendment Act have not been notified yet.

The 2019 Amendment Act also may have missed the opportunity to provide adequate exceptions to the obligation of confidentiality. The inadequacy of exceptions to the confidentiality obligation may give rise to multiple issues. For instance, the following circumstances would require disclosure and would not strictly fall within the scope of the exception proposed in the 2019 Amendment Act:

1. proceedings under Section 9, 11, 14, 27 and 34 of the Act;
2. where one party wishes to initiate criminal proceedings along with the arbitration;
3. where a party files for an anti-arbitration injunction before the civil court;
4. where a party approaches a government regulator on facts which also gives rise to a contractual dispute;
5. where information is proposed to be shared with third party experts (such as forensic, accounting, delay or quantum experts); or
6. where information is required to be shared with a third-party funder to obtain funding for a claim.

Further, due to an inconsistency in the statute, the Eighth Schedule to 2019 Amendment Act could be interpreted to indicate that foreign legal professionals cannot act as arbitrators in India. The Eighth Schedule, commences with the phrase “*a person shall not be qualified to be an arbitrator unless..*”. Thus, although the provision pertains to accreditation of arbitrators, the Eighth Schedule appears to be specifying minimum qualifications for a person to act as an arbitrator.

This amendment is ambiguous, and may be interpreted to imply that no foreign legal professional could act as an arbitrator in India, as one of the requirements under the Eighth Schedule is for the person to be an advocate within the meaning of the Indian Advocates Act, 1961. However, it must be noted that this provision has not been notified yet.

Further, the introduction of an additional six-month period for completion of pleadings is owing to the High-Level Committee Report issued on 30 July 2017 under the chairmanship of Justice B.N. Srikrishna (“**Committee Report**”), which noted that arbitrators felt that 12-month timeline should take effect post completion of pleadings. The Committee Report did not discuss the reason why arbitrators had given this suggestion. However, it can be understood that due to *due process* concerns, arbitrators are constrained from taking strong procedural decisions in relation to completion of pleadings. Time taken by the parties in completing pleadings therefore takes up most part of the 12-month time-frame, leaving a very short period for completion of rest of the process.

However, the resolution of this concern by providing a six-month time frame for completion of statement of claim and defence may result



in the creation of more issues. For instance, it is very common in arbitration proceedings for parties to bifurcate the issues. Certain issues such as jurisdictional or liability related issues could be heard first. Mandating a fixed timeline for filing of statement of claim and defense may deprive parties of such flexibility and would effectively require them to file their complete pleadings at the very outset of the arbitration proceedings. Further, it is difficult to ascertain at what stage filing the statement claim and defense be considered as completed. For instance, there may be circumstances where parties wish to amend their statement of claim or defense, or where a counter-claim is filed.

## 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.*,<sup>158</sup> 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.*,<sup>159</sup> 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*<sup>160</sup> (“**Atlas Exports**”), wherein the Supreme Court ruled that two Indian parties could contract to have 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.*,<sup>161</sup> 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*,<sup>162</sup> 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.<sup>163</sup>

## 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*,<sup>164</sup> 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.

158. 2015 SCC OnLine Bom 7752.

159. (2016) 10 SCC 813.

160. (1999) 7 SCC 61.

161. 2017 SCC OnLine Del 11625.

162. TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.

163. West Bengal v. Associated Contractors, (2015) 1 SCC 32.

164. (2015) 2 Comp LJ 288 (Bom).

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*,<sup>165</sup> 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.

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<sup>165</sup>. Consumer Case No. 701/2015.

## 8. Conclusion

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

Despite India being one of the original signatories to the New York Convention, arbitration in India has not always kept up with the international best practices. However, the last five years have seen a significant positive

change in approach. Courts and legislators have acted with a view to bringing Indian arbitration law in line with the international best practices. With the pro-arbitration approach of the courts and the 2015 and 2019 Amendment Acts 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 2015 and 2019 Amendment Acts.

## Appendix

### In Line With Vodafone, Delhi High Court Refuses Another Anti-Bit Arbitration Injunction

The Delhi High Court held that:

- Indian courts have jurisdiction to grant anti-BIT arbitration injunctions
- Anti-BIT arbitration injunctions are to be granted in rare and compelling circumstances
- Arbitral tribunal appointed under a BIT has competence to rule on its own jurisdiction
- Arbitration & Conciliation Act, 1996 applies only to commercial arbitration

### Introduction

Recently, the Delhi High Court (“**Court**”) in the case of *Union of India v. Khaitan Holdings (Mauritius) Limited & Ors.*<sup>166</sup>, refused to grant anti-arbitration injunction (i.e. stay on arbitration proceedings) to Union of India in a dispute under India-Mauritius Bilateral Investment Treaty (“**BIT**”). It held that interference by domestic courts in arbitral proceedings under BIT is permissible only in “compelling circumstances” in “rare cases”. The Court reaffirmed that issues as to the jurisdiction of the arbitral tribunal should be decided by the arbitral tribunal itself.

### Factual Matrix

*Khaitan Holdings (Mauritius) Limited* (“**Khaitan Holdings**”), a Mauritian entity, had investments into *Loop Telecom and Trading Limited* (“**Loop**”),

an Indian entity. In 2008, Loop was awarded a license of 21 Unified Access Services (“**UAS / 2G License**”) by the Government of India. However, in 2012, the 2G License was cancelled by the Supreme Court in the case of *Centre for Public Interest Litigation v. Union of India*<sup>167</sup> (“**CPIL Judgment**”) owing to irregularities in the license granting process. Loop approached TDSAT for refund of license fees. Its request was dismissed.

Owing to the license cancellation, one Kaif Investments Limited (“**Kaif Investments**”) and Capital Global Limited (“**CGL**”) that held substantial interest in Loop issued a notice to India under Article 8.1<sup>168</sup> of the BIT seeking settlement of disputes. Thereafter, Kaif Investments merged with Khaitan Holdings. In 2013, Khaitan Holdings issued a notice of arbitration under Article 8.2<sup>169</sup> of the BIT on the ground that it held 26.95% equity in Loop and is entitled to claim compensation in relation to the cancellation of the 2G License. Subsequently, both sides nominated their arbitrators in 2013.

Mr. Ishwari Prasad Khaitan (“**Ishwari Prasad Khaitan**”) and Ms. Kiran Khaitan (“**Kiran Khaitan**”), Indian citizens, were alleged to be beneficial shareholders of Khaitan Holdings. Loop and the Khaitans were charged with cheating and criminal conspiracy to secure licenses. Further, the Khaitans were alleged to be fronts for Mr. Ravikant Ruia (“**Ruia**”), promoter of the Essar Group of Companies. However, in December 2017, the

<sup>167</sup>. (2012) 3 SCC 1

<sup>168</sup>. 3 “Any dispute between the investor of One Contracting Party and other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.”

<sup>169</sup>. If dispute cannot be settled amicably, investor has the following options:

- i. Invoking arbitration under Indian Law;
- ii. If the countries are parties to the Convention on the Settlement of Investment Disputes, the disputes can be referred to ICSID;
- iii. To seek conciliation of the disputes under the UNCITRAL Conciliation Rules;
- iv. To seek adjudication of the disputes by an ad-hoc Tribunal in accordance with the UNCITRAL arbitration rules

<sup>166</sup>. CS (OS) 46/2019 I.As. 1235/2019 & 1238/2019 dated January 29, 2019

*Special Judge – Central Bureau of Investigation acquitted the accused of all charges. After acquittal, Loop made a second request to TDSAT for refund of license fees. This was also dismissed.*

*Post the decision of CBI Judge in 2017, the Permanent Court of Arbitration (“PCA”) scheduled the first arbitration meeting on January 28, 2019. On January 27, Union of India filed a suit against Loop, Khaitan Holdings, the Khaitans and Ruia seeking various declaratory reliefs, with an interim application to urgently restrain the arbitral proceedings. The present judgment is on the said interim application.*

## Key Arguments By Parties

*Union of India argued that Khaitan Holdings was controlled by Indian shareholders. Therefore, it was not a genuine Mauritian investor to invoke the India-Mauritius BIT against Union of India. Further, Loop was barred from invoking BIT since it had approached TDSAT and had accepted its jurisdiction. Khaitan Holdings argued that the issue of whether Khaitan Holdings was a genuine investor is to be considered by the arbitral tribunal under the BIT, and not by the court. Further, the basis of claims before TDSAT were distinct from expropriation claims made by Khaitan Holdings under the BIT.*

## Judgment

*The Court acknowledged that under public international law even judgments of courts could trigger investment dispute under BIT.<sup>170</sup>*

*Supreme Court judgment can trigger a BIT claim*

*At the outset, the Court assessed if a judgment of the Supreme Court of India could trigger a BIT claim. Relying on the ILC Draft Articles on State Responsibility, it held that judiciary is an organ of the State. Its conduct could therefore be attributable to the State and constitute treaty violation. The Court recognized that this was theoretically true, even when the judiciary in India was separate*

*from the other organs such as the Legislature and the Executive. However, while the judgment of the Supreme Court appeared to be the trigger of the BIT claim, the Court delved deeper into the findings in the judgment and held that the Supreme Court had in fact called the executive action to question.<sup>171</sup>*

*Loop was not barred from invoking BIT*

*The Court first considered whether Loop Telecom by approaching TDSAT was barred from invoking arbitration under India-Mauritius BIT. While the Court noted that the 2G License and Khaitan Holdings’ investment into Loop Telecom were subject to Indian laws, it held that BIT is self-contained and is primarily governed by the principles of public international law. Applicability of BIT therefore, is not subject to applicability, interpretation and adjudication under domestic laws. Accordingly, interference with BIT dispute mechanism in the case of genuine investor dispute would defeat the purpose of BITs.*

*Court’s jurisdiction is not ousted*

*The Court recognized that arbitral proceedings under BIT is a separate specie of arbitration. It is outside the purview of Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) which only covers commercial arbitration. As such, the court held that jurisdiction of courts in relation to arbitral proceedings under BIT would be governed by Code of Civil Procedure, 1908 (“**CPC**”). The Court placed reliance upon *Union of India v. Vodafone Group*,<sup>172</sup> (“**Vodafone Judgment**”) where the Court had accepted jurisdiction in a similar matter involving an anti-BIT arbitration injunction. In the present case, the Khaitans were residents of Delhi. Loop was an entity registered in Delhi. Subject matter of dispute were the investments in Loop. Hence, the Court stated that it has jurisdiction to entertain the suit filed by Union of India.*

<sup>170</sup>. See Article 4 of Responsibility of States for Internationally Wrongful Acts, 2001

<sup>171</sup>. The Supreme Court ruled that the first-come-first serve policy for grant of licenses was flawed, and that the procedure adopted by the Government of India was not fair and transparent. Owing to these arbitrary allocations, the Supreme Court had cancelled the licenses.

<sup>172</sup>. CS(OS) 383/2017 – Delhi High Court

*Whether Khaitan Holdings is a “genuine investor” and arbitral proceedings ought to be stayed*

*In the present case, Khaitan Holdings, had opted for adjudication of disputes in accordance with Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (“UNCITRAL Rules”). As per Article 21<sup>173</sup> of UNCITRAL Rules, the arbitral tribunal has the power to rule on objections as to its own jurisdiction – an embodiment of the widely recognized doctrine of kompetenz-kompetenz in international arbitration. Thus, the question whether an entity is an investor under BIT has to be determined by the arbitral tribunal.<sup>174</sup> Accordingly, the Court decided not to interfere with the ongoing arbitral proceedings at this stage and ruled that anti-BIT arbitration injunctions should be granted only in rare and compelling circumstances.*

## Analysis

*The present judgment is commendable and in line with the evolved non-interventionist approach of Indian courts in relation to BIT arbitration proceedings.<sup>175</sup> BIT arbitration proceedings involve an interplay of private and public international law. As such, court intervention backed by respective domestic laws ought to be kept to minimum and in the Court’s words, restricted to ‘rare and compelling circumstances’. It is also interesting to note that while accepting jurisdiction, the Court relies on CPC as opposed to the Arbitration Act. The ouster of BIT arbitrations from the ambit of Arbitration Act may be problematic as it leaves this special specie of arbitrations high and dry, and devoid of a governing arbitration regime under Indian law. If not at the*

*preliminary stage of jurisdiction, the exclusion of BIT arbitrations from Arbitration Act assumes gravity at the stage of enforcement of a BIT award.*

*However, even while assuming jurisdiction to entertain an anti-arbitration injunction, the courts ought to exercise caution in treading into the merits of the dispute, and the validity or otherwise of impugned measures that trigger a BIT claim which may fall purely within the domain of the arbitral tribunal. In the instant case, the court opined that the cancellation of license by Supreme Court may qualify under exceptions to Article 6 of the BIT which deals with expropriation.<sup>176</sup> At another instance, the Court hinted that it is possible that the foreign investor is not a real investor but the Khaitans posing as one. However, the Court recognized that such questions are for the arbitral tribunal to decide after hearing both parties on merits.*

*The present judgment is a preliminary judgment in the interim application. It would be interesting to see if the court continues to hold the same view after hearing all the parties on merits. In the event the Court decides to grant the anti-BIT arbitration injunction, the arbitral proceedings may not be impacted and can continue. However, this can result in a conflict, ultimately posing a risk for enforcement of the BIT award in India.*

**– Kshama Loya Modani, Ashish Kabra & Mohammad Kamran**

*You can direct your queries or comments to the authors*

173. Article 21 - “1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement...”

174. Board of Trustees of the Port of Kolkata Vs. Louis Dreyfus Armatures SAS, G.A. 1997 of 2014 decision dated 29th September, 2014 – Calcutta High Court

175. Board of Trustees of the Port of Kolkata Vs. Louis Dreyfus Armatures SAS G.A. 1997 of 2014 decision dated 29th September, 2014 – Calcutta High Court; Union of India v. Vodafone Group, CS(OS) 383/2017 – Delhi High Court

176. “Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having effects equivalent to nationalisation or expropriation except for public purposes under due process of law, on a non-discriminatory basis and against fair and equitable condensation...”

## Arbitration Clause In An Unstamped Agreement? Supreme Court Lays Down The Law

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- Unless the agreement which prescribes the arbitration clause is sufficiently stamped, the court cannot appoint an arbitrator;
- The court must impound the agreement on which adequate stamp duty has not been paid and hand it over to the relevant stamp authority for rectification;
- The stamp authorities should resolve the issues relating to stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the agreement.

### Introduction

The Supreme Court of India in a recent judgment has considered the validity of an arbitration clause and the arbitral appointment made thereunder, when such arbitration clause formed part of an unstamped agreement. More specifically, in case of *Garware Wall Ropes v. Coastal Marine Constructions & Engineering Ltd.*,<sup>177</sup> the Supreme Court had to consider an appeal arising out of the decision of the Bombay High Court, wherein an arbitrator was appointed pursuant to an arbitration clause arising out of an unstamped agreement. The Supreme Court set aside the Bombay High Court decision and remitted the same for a fresh determination.

### Facts

Disputes arose out of a sub-contract between the Appellant and the Respondent (“**Contract**”), following which the Appellant terminated the

*Contract*. The Contract contained an arbitration clause for the resolution of the disputes. The Respondent invoked the arbitration clause and appointed an arbitrator. However, the Appellant disputed such appointment. Thereafter, the Respondent filed an application under Section 11 of the Arbitration and the Conciliation Act, 1996 (“**Act**”) before the Bombay High Court seeking the appointment of an arbitrator. The Bombay High Court allowed the application and appointed an arbitrator to adjudicate the disputes between the parties.

### Issue Before The Supreme Court

The Supreme Court had to consider the effect of an arbitration clause contained in an agreement which is not stamped.

### Judgment Of The Supreme Court

*Existence v. Validity of the Arbitration Agreement*

The Supreme Court referred to its earlier decision in *SMS Tea Estates v. Chandmari Tea Co. P. Ltd.*,<sup>178</sup> wherein it had held that if an arbitration clause is contained in an unstamped agreement, the Judge would be required to impound the agreement and ensure that stamp duty and penalty (if any) are paid before proceeding with the appointment of the arbitrator.

Subsequent to this judgment, in 2015, Section 11(6A) was introduced to the Act, which states that while appointing an arbitrator, courts should confine themselves to the examination of the existence of an arbitration agreement and no more. Relying on the introduction of Section 11(6A), it was contended that the judge appointing an arbitrator should not impound the agreement for being insufficiently stamped, rather the arbitrator appointed pursuant to Section 11 may do so if deemed necessary.

The Supreme Court observed that under the Maharashtra Stamp Act, 1958 (“**Stamp Act**”), an agreement becomes enforceable in law only when it is duly stamped. The Respondent attempted to

177. Civil Appeal No. 3631 of 2019 arising out of SLP(C) No. 9213 of 2018.

178. (2011) 14 SCC 66

draw a distinction between the “validity” and the “existence” of an arbitration agreement, and argued that the provisions of the Stamp Act are fiscal measures which will be covered under a determination of the “validity” of an arbitration clause and not its “existence”, and thereby, the court should be permitted to appoint arbitrators even in cases where the agreement is unstamped. However, the Supreme Court was not impressed with such submissions and observed that an arbitration clause cannot be bifurcated entirely from the agreement it is contained in, as the Stamp Act applies to the entire agreement. Consequently, an arbitration clause would not ‘exist’ when the underlying agreement is not enforceable under law. Accordingly, the Supreme Court held that under Section 11 of the Act, the court can impound an agreement if it is not stamped in accordance with the mandatory provisions of the Stamp Act.

Interestingly, a full-judge bench of the Bombay High Court had rendered a judgment just a few days prior to the Supreme Court’s finding in the present case on a similar question of law. In the case of *Gautam Landscapes Pvt. Ltd. v. Shailesh Shah*,<sup>179</sup> the Bombay High Court held that for appointment of arbitrators under Section 11 of the Act, it was not necessary for courts to await the adjudication of stamp duty by stamp authorities in cases where a document was not adequately stamped. After considering this judgment, the Supreme Court held that the Bombay High Court in the aforementioned case had incorrectly decided the question of law.

#### *Practicality of Impounding an Unstamped Agreement*

The Respondent further argued that impounding an unstamped agreement would not be practically feasible at the Section 11 stage as the amended Act prescribes strict timelines to courts for disposing applications for appointment of arbitrator(s). Under Section 11(13) of the Act, an application for appointment of an arbitrator must be disposed of as expeditiously as possible, and in any event within a period of 60 days from the date of service of notice on the other party.

However, the Supreme Court held that the doctrine of harmonious construction should be adopted to read Section 11(13) of the Act with Sections 33 and 34 of the Stamp Act (which provide for impounding of unstamped instruments). The Supreme Court took a step further to lay down a mechanism to be followed by courts and stamp authorities when the underlying agreement is unstamped:

1. The High Court must first impound the agreement which does not bear the requisite stamp duty;
2. The unstamped or insufficiently stamped agreement should be handed over to the relevant authority under the Stamp Act, which will decide the issues relating to stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the agreement;
3. Once the requisite stamp duty and penalty (if any) is paid by the parties, the parties can bring the instrument to the notice of the High Court. The High Court will then proceed to expeditiously hear and dispose of the Section 11 application.

## Analysis

Although the Supreme Court has balanced the dual objectives of expeditious disposal of cases and revenue collection by the authorities, it is unclear if such measures are sustainable. It remains to be seen how the judgment is practically implemented. In practice, the procedure to impound an agreement and payment of stamp duty is likely to take much longer than 45 days. Prescribing a 45-day timeline is ambitious, to say the least, but nevertheless, it remains to be seen whether the parties and the courts can meet this timeline.

One must also be cognizant of the fact that the present decision of the Supreme Court may not have any precedential value. The Supreme Court in *State of West Bengal v. Associated Contractor*,<sup>180</sup> had held that the decision of the Chief Justice or his designate in a Section 11 application, not being the

<sup>179</sup> Arb. Pet. No. 466 of 2017 (decided on 04.04.2019).

<sup>180</sup> Civil Appeal No. 6691 Of 2005; Civil Appeal No. 4808 Of 2013.



*decision of the Supreme Court or the High Court, has no precedential value, being a decision of a judicial authority, which is not a court of record. Therefore, there may be a confusion on the how*

*courts approached under the other sections of the Act would deal with arbitration clauses contained in unstamped agreements.*

**– Bhavana Sunder & Alipak Banerjee**

*You can direct your queries or comments to the authors.*

## Supreme Court: Non-Signatory Cannot Be Impleaded Without Establishing Its Intention To Be Bound To Arbitration

- 
- Burden is upon the party seeking to implead a non-signatory, to show its intention to consent to the arbitration agreement
- A non-signatory without any causal connection with the process of negotiations preceding the arbitration agreement cannot be made party to the arbitration
- Circumstances and correspondence post execution of an arbitration agreement cannot bind a non-signatory to the arbitration agreement

### Introduction

The Supreme Court of India (“**Court**”) in *Reckitt Benckiser (India) Private Limited (“**Reckitt India**”) vs Reynders Label Printing India Private Limited (“**Reynders India**”) & Anr<sup>181</sup>* had occasion to revisit the principles expounded in *Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Ors<sup>182</sup>*, on whether a non-signatory affiliate of a party to an arbitration agreement can be impleaded and subjected to arbitration proceedings.

### Factual Matrix

An application under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Act**”) was filed by Reckitt India for appointment of an arbitrator pursuant to an agreement between Reckitt India and Reynders India (“**Agreement**”). Reckitt India also impleaded a Belgian based affiliate of Reynders India (“**Reynders Belgium**”) despite it being a non-signatory to the Agreement. Both Reynders India and Reynders Belgium were constituents of

the same group of companies known as Reynders Label Printing Group (“**Reynders Group**”). The application was accordingly filed before the Supreme Court on the premise that Reynders Belgium was an entity incorporated in a country other than India and consequently, this was an International Commercial Arbitration.

In deciding the application, the Court had to, *inter alia*, consider whether it was manifest from the correspondence exchanged between the parties, culminating in the Agreement, that the relationship envisaged in the Agreement was between Reckitt India and the Reynders Group and whether it was a clear intention of the parties to bind both the signatory as well as non-signatory party i.e. Reynders Belgium.

### Arguments For Impleading The Non-Signatory

Reckitt India referred to a clause in the Agreement whereby Reynders Belgium agreed to indemnify Reckitt India in case of any loss or damage caused on accounts of acts and omissions by Reynders India, therefore arguing that Reynders Belgium formed an integral party to the Agreement which contained an arbitration clause. Reckitt India further argued that Reynders Belgium was a part of the exhaustive negotiations in relation to execution of the Agreement. To further this point, it pointed out correspondence between a Mr. Frederik Reynders, purportedly a promoter of Reynders Belgium, and who was allegedly acting for and on behalf of Reynders Belgium while the Agreement was being finalized; therefore, indicating Reynders Belgium’s consent to arbitration. Reckitt India argued that Reynders Belgium was the disclosed principal on whose behalf Reynders India had executed the Agreement.

### Arguments As To Why Non-Signatory Should Not Have Been Impleaded

Reynders Belgium submitted that it had no presence or operation in India and was not involved in the negotiation, execution and/or performance of the Agreement; neither was there any privity of contract between itself and Reckitt India. It further

<sup>181</sup>. Petition for Arbitration (Civil) No. 65 of 2016

<sup>182</sup>. (2013) 1 SCC 641

argued that Reynders India and Reynders Belgium were only part of the Reynders Group, which was an internationally operating group of seven printing companies each with their own separate legal entities operating from different offices. Both Reynders India and Reynders Belgium had a common holding company being Reynesco NV. Reckitt Belgium also clarified that Mr. Frederik Reynders wasn't the promoter of Reynders Belgium and was only an employee of Reynders India.

## Judgment

Having considered the submissions of both sides, the Court held that the burden was on Reckitt India to establish that Reynders Belgium had an intention to consent to the arbitration agreement and be a party thereto, even if it was for the limited purpose of its obligations to indemnify Reckitt India for damages and loss caused due to acts and omissions of Reynders India. This burden, the Court found, had not been successfully discharged by Reckitt India.

The Court found that Reynders Belgium was neither the signatory to the arbitration agreement nor did it have any causal connection with the process of negotiations preceding the Agreement or the execution thereof. From the facts placed before it, it found that Mr. Frederik Reynders was only an employee of Reynders India, who acted in that capacity during the negotiations preceding the Agreement, and was in no way associated with Reynders Belgium.

Having considered the facts on record, it therefore held that Reynders Belgium was neither a party

to the Agreement nor had it given its assent to the arbitration agreement and that the fact of Reynders Belgium and Reynders India belonging to the same group of companies made no difference.

## Analysis

Having held that Reynders Belgium could not be made party to the arbitration, technically, the Court could therefore no longer grant reliefs under the application filed on the premise of an international commercial arbitration. However, in the interest of justice and possibly by virtue of the consent of Reynders India, it went ahead and appointed an arbitrator to conduct domestic commercial arbitration between Reckitt India and Reynders India.

While it was important that the Supreme Court added further clarity to the principles that were expounded in *Chloro Controls*, going ahead and appointing the arbitrator to pursue domestic arbitration saves parties the cost and time in having to file a fresh Section 11 petition, in a court of appropriate jurisdiction. This is very much in keeping with the recent trend of Courts not allowing technicalities to get in the way of the larger picture of expediting arbitration. However, with this judgment in place, parties should take care while seeking to implead such non-signatory affiliates and must only do so if facts show a clear intention on their part to consent to arbitration..

– **Siddharth Ratho & Sahil Kanuga**

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## The Indian Arbitration And Conciliation (Amendment) Act 2019—A Reflection

*This article was originally published on Lexis@PSL Arbitration on 04th September 2019*

### Summary

*The Arbitration and Conciliation (Amendment) Act, 2019 brings about several key changes to the arbitration landscape in India. In this piece, Vyapak Desai, Ashish Kabra and Bhavana Sunder of the International Dispute Resolution and Investigations practice consider the key points of the Indian Arbitration and Conciliation (Amendment) Act 2019 and some of the main implications thereof.*

### Original news

India—Arbitration and Conciliation (Amendment) Act 2019 receives Presidential assent, LNB News 19/08/2019 13

*On 9 August 2019, the President of India gave his assent to AC(A)A 2019, which amends the Arbitration and Conciliation Act 1996. AC(A)A 2019 has also been published in the Official Gazette of India.*

### What's the background to AC(A)A 2019, including the motivations for reform?

AC(A)A 2019 was introduced after considering the recommendations of the Report of the High-Level Committee to Review the Institutionalizing of Arbitration Mechanism in India issued on 30 July 2017 under the chairmanship of retired Justice B.N. Srikrishna (the Committee Report). This Committee was established to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and prepare a roadmap for making India a robust centre for international and domestic arbitration.

AC(A)A 2019 was introduced with a view to make India a hub of institutional arbitration for both domestic and international arbitration (Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Bill 2019).

### What are the key changes introduced by AC(A)A 2019?

AC(A)A 2019 brings about several key changes to the arbitration landscape in India. AC(A)A 2019 seeks to establish the Arbitration Council of India (ACI), which would exercise powers such as grading arbitral institutions, recognising professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for arbitral institutions, and taking steps to make India a centre of domestic and international arbitrations. Further, AC(A)A 2019 amends the Arbitration and Conciliation (Amendment) Act 2015 (AC(A)A 2015) by providing the Supreme Court and the High Court with the ability to designate the arbitral institutions which have been accredited by the ACI with the power to appoint arbitrators.

AC(A)A 2015 had introduced a time-limit of 12 months (extendable to 18 months with the consent of parties) for the completion of arbitration proceedings from the date the arbitral tribunal enters upon reference. AC(A)A 2019 amends the start date of this time limit to the date on which statement of claim and defence are completed. AC(A)A 2019 also excludes 'international commercial arbitration' from this time-limit to complete arbitration proceedings.

AC(A)A 2019 also introduces express provisions on confidentiality of arbitration proceedings and immunity of arbitrators. AC(A)A 2019 further prescribes minimum qualifications for a person to be accredited/act as an arbitrator under the Eighth Schedule.

Importantly, AC(A)A 2019 also clarifies the scope of applicability of AC(A)A 2015. AC(A)A 2019 provides that AC(A)A 2015, which entered into force on 23 October 2015, is applicable only to arbitral proceedings which commenced on or after 23 October 2015 and to such court proceedings which emanate from such arbitral proceedings.

What are the implications (legally and practically) of AC(A)A 2019? Anything negative or missed opportunities?

The impact of AC(A)A 2019 on the arbitration landscape in India, positive or negative, is controversial. While AC(A)A 2019 aims to provide certification to arbitral institutions and arbitrators through grading and accreditation by the ACI, the constitution of the ACI itself is largely government-dominated, which may risk the independence of arbitration in India. Further, it would be critical for such a body to consist of genuine proactive experts in the field and not suffer from the typical government lethargy.

AC(A)A 2019 also overturns a recent decision of the Supreme Court in Board of Control for Cricket in *India v Kochi Cricket Pvt Ltd*, Civil Appeal Nos 2879-2880 of 2018 which settled the issue of the applicability of AC(A)A 2015 after significant debate. The Supreme Court had held that AC(A)A 2015 would apply to arbitrations and court proceedings commencing post October 23, 2015. It also provided that amended AC(A)A 2015, s 36 would apply to all proceedings, effectively removing the automatic stay on enforcement of awards pursuant to filing of a set aside application which had plagued arbitration in India. An attempt to change the law on applicability of AC(A)A 2015 runs the risk of creating chaos as thousands of proceedings across the country—several at a very advanced stage—and following the Supreme Court ruling, will be affected.

The Committee Report had also suggested certain positive amendments to AC(A)A 2015 which have not been implemented in AC(A)A 2019. For instance, the Committee Report had suggested including express provisions for the recognition of emergency arbitration and emergency awards.

AC(A)A 2019 also may have missed the opportunity to provide adequate exceptions to the obligation of confidentiality. Further, due to an inconsistency in the statute, the Eighth Schedule to AC(A)A 2019 could be interpreted to indicate that foreign legal professionals

cannot act as arbitrators in India. These issues and inconsistencies have been discussed in further detail in the below responses.

To which disputes with AC(A)A 2019 apply? When does it enter into force?

AC(A)A 2019 was passed on 9 August 2019. AC(A)A 2019 states that the Central Government may notify a date for the provisions of AC(A)A 2019 to enter into force.

AC(A)A 2019 does not expressly specify which disputes it is applicable to. The various amendments in AC(A)A 2019 would have to be individually interpreted to understand whether that amendment is substantive, procedural or clarificatory in nature. Judicial interpretation on this aspect should provide clarity on the applicability of the amendments.

On August 30, 2019, the Central Government notified AC(A)A, 2019, ss 1, 4 –9, 11–13, 15. The notified amendments include amendments relating to the timeline for arbitration, confidentiality and applicability of the 2015 Amendments. The provisions pertaining to the ACI have not been notified yet.

Are the changes positive for India as a seat of arbitration? Anything in particular that international arbitration practitioners should be aware of?

AC(A)A 2019 has brought about several positive changes which are in line with international practices. In an attempt to reduce judicial backlog, AC(A)A 2019 provides the Supreme Court and the High Court the ability to designate arbitral institutions for appointment of arbitrators. AC(A)A 2019 also provides immunity to arbitrators against suits or other legal proceedings for actions done in good faith.

AC(A)A 2019 also brings about certain clarificatory changes. AC(A)A 2019 amends AC(A)A 2015, s 17, which earlier authorised the arbitral tribunal to order interim measures

during the arbitral proceedings or after making the arbitral award. Since arbitral tribunals become *functus officio* after making the final award, AC(A)A 2019 now provides that interim measures can be ordered by an arbitral tribunal only during the arbitral proceedings. Further, there was an inconsistency between the AC(A)A 2015 and the Commercial Court Act 2015 as the latter statute provided a wider right of appeal to orders under AC(A)A 2015. This issue has been resolved as AC(A)A 2019 has inserted language to give primacy with regard to the appeal provisions.

However, international arbitration practitioners should be aware of certain inconsistencies in AC(A)A 2019 which may affect their India-seated arbitrations.

AC(A)A 2019 states that the qualifications, experiences and norms for accreditation of arbitrators are specified in the Eighth Schedule. The Eighth Schedule, however, commences with the phrase ‘a person shall not be qualified to be an arbitrator unless...’. Thus, although the provision pertains to accreditation of arbitrators, the Eighth Schedule appears to be specifying minimum qualifications for a person to act as an arbitrator. This amendment is ambiguous and may

be interpreted to imply that no foreign legal professional can act as an arbitrator in India, as one of the requirements under the Eighth Schedule is for the person to be an advocate within the meaning of the Indian Advocates Act 1961.

Further, AC(A)A 2019 provides a blanket provision of confidentiality of arbitration proceedings without considering adequate exceptions to the obligation of confidentiality. In this context, it remains to be seen how arbitration related court proceedings (such as seeking interim injunction) may be initiated, how criminal proceedings (along with the arbitration) may be initiated, how anti-arbitration injunction proceedings may be filed and how information may be shared with experts and third-party funders for conducting the claim.

Thus, there are some drawbacks in AC(A)A 2019 that should be addressed through judicial interpretation. This may cause foreign parties to await clarity on AC(A)A 2019 prior to seating their arbitrations in India.

– ***Bhavana Sunder, Ashish Kabra & Vyapak Desai***

*You can direct your queries or comments to the authors*

## Return Of The Jedi: Supreme Court Strikes Down Section 87 Of The Arbitration Act

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- No automatic stay on enforcement of arbitral award due to pendency of a set aside application.
- Section 87 of the Arbitration & Conciliation Act, 1996 violates Article 14 of the Constitution of India.
- Section 26 of the 2015 Amendment Act restored along with the BCCI Judgment.
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### Background

The Supreme Court (“**Court**”) in the recent case of *Hindustan Construction Company Limited & anr. v. Union of India*,<sup>183</sup> struck down Section 87 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) as unconstitutional. This judgment marks yet another turning point in the arbitration law in India.

At the beginning, the Arbitration Act was found to be suffering from the disease of automatic stay of award if a challenge to such award was filed under Section 34. This effectively led to all awards being challenged before the court as it automatically stayed any payment thereunder and consequently deprived the award holder of due amount. The problem was cured by the **Arbitration and Conciliation (Amendment) Act, 2015** (“**2015 Amendment Act**”). The 2015 Amendment Act provided that there shall be no automatic stay of the award merely upon filing of a challenge under Section 34.

However, the 2015 Amendment Act created another problem. It was unclear in what circumstances the Arbitration Act as amended by 2015 Amendment Act would apply. Particularly it was unclear if the amended provisions applied to court proceedings that arose from arbitrations which had commenced prior to the commencement date of the 2015 Amendment

Act i.e. October 23, 2015 (“**Commencement Date**”). Further, it was also uncertain if the automatic stay on enforcement of awards would continue where proceedings under Section 34 were pending at the Commencement Date.

Ultimately, the Court settled this controversy by its judgment in the case of **BCCI v. Kochi Cricket Private Limited**<sup>184</sup>. It held that Section 26<sup>185</sup> of the 2015 Amendment Act provides that unless the parties agreed otherwise, the amendments would be prospective i.e. it would apply to court proceedings which commenced on or after the Commencement Date irrespective of whether the connected arbitration had commenced prior to Commencement Date. Crucially, the court also held that there would be no automatic stay operating on the award even when the challenge application in court had been filed prior to the Commencement Date.

Interestingly, at the time arguments in the BCCI Case were ongoing, the government, approved the text of Arbitration & Conciliation (Amendment) Bill, 2018 (“**Bill**”). Clause 87 of the Bill provided that the 2015 Amendment Act shall apply only where the arbitration had commenced prior to the Commencement Date. With Clause 87 the automatic stay on enforcement of award upon a challenge being filed would apply for all awards arising out of an arbitration that commenced prior to October 23, 2015. Upon the Bill being brought to the notice of the Supreme Court, the Supreme Court in the BCCI Judgment advised the government to not enact Clause 87.

However, in 2019, the government enacted the said Clause 87 through the **Arbitration and Conciliation (Amendment) Act, 2019**. The 2019 Amendment Act further repealed Section 26 of the 2015 Amendment Act.

<sup>183</sup>. Writ Petition (Civil) No. 1074 of 2019

<sup>184</sup>. (2018) 6 SCC 287

<sup>185</sup>. **Section 26 - Act not to apply to pending arbitral proceedings:** Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

## Facts

The petitioners in the BCCI case challenged the constitutional validity of the newly inserted Section 87 of the Arbitration Act. The petitioners in the case were construction engineering companies. These companies were undertaking projects for government bodies and would typically have large claims on account of cost overruns, delays etc. They were facing a situation where large amounts of money were locked because of the automatic stay on awards which were passed in their favour. On the other hand, such companies were facing threat of insolvency proceedings for not having paid off the operational creditors.

With the BCCI Judgment, it was clear that there would not be an automatic stay on awards. However, due to the reversal of position by the 2019 Amendment Act, the petitioners challenged the constitutionality of Section 87.

## Judgment

*Automatic Stay was never inherent in Section 36*

The Court, at the outset, held that even prior to the 2015 Amendment Act the concept of automatic stay could not be inferred from Section 36 of the Arbitration Act. The Court referred to its judgment of *National Aluminium Company Ltd. v. Presstel & Fabrications (P) Ltd. & Anr.*<sup>186</sup> (“**NALCO Judgment**”) and *Fiza Developers and Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd.*<sup>187</sup> (“**Fiza Developers Judgment**”) and held that both of them have incorrectly interpreted Section 36. In both *NALCO Judgment* and *Fiza Developers Judgment*, the Court had held that an award shall be enforced as if it was a decree of court, but only on the expiry of the time for making an application to set aside the award under Section 34, or when such application having been made, has been refused. The Court, in *NALCO Judgment*, also held that the language 36, leaves no discretion with courts to pass any interlocutory order in regard to the awards, once an application for set aside has been made.

However, the Court in the present case held that both the *NALCO Judgment* and *Fiza Developers Judgment* are incorrect as they fail to consider Section 9 and Section 35 of the Arbitration Act. It observed that Section 9 also gives the courts the liberty to pass any interlocutory even after passing of the award prior to its enforcement. It also held that Section 36 has to be read with Section 35, which provides that arbitral award shall be final and binding on parties and persons claiming under them. Reading Section 36 in a manner that leads to automatic stay on award upon an application under Section 34 being filed, would amount to reading something into Section 36, which is incorrect. Thus, there is no implied concept of automatic stay merely because an application under Section 34 (challenge to award) is filed. It further observed that 2015 Amendment Act is clarificatory in nature and merely states that the unamended Section 36 does not stand in the way of law to grant a stay of a money decree under the provisions of the Civil Procedure Code (“**CPC**”).

*Constitutional Challenge to the 2019 Amendment Act*

The petitioners challenged the constitutional validity Section 87 in the Arbitration Act and removal of Section 26 from the 2015 Amendment Act as being violative of Article 14, 19(1)(g), 21 and 300-A of the Constitution of India.

The Court observed that the B N Srikrishna Committee in its Report dated July 30, 2017 (“**Srikrishna Report**”) recommended the introduction of Section 87 because there were conflicting views from different High Courts as to the applicability of 2015 Amendment Act. However, the Court in its *BCCI Judgment* had pointed out the pitfalls if such a Section 87 would be inserted into the Arbitration Act. In fact, whatever uncertainty that *Srikrishna Report* sought to clear by recommending insertion of Section 87 was already cleared by *BCCI Judgment*. Therefore, as 2019 Amendment Act failed to consider the observations of the Court in the *BCCI Judgment*, it rendered insertion of Section 87 and deletion of Section 26 from 2015 Amendment Act manifestly arbitrary, having been enacted, without adequate determining principle, and contrary to public interest sought to be achieved by Arbitration Act and 2015 Amendment Act.

<sup>186</sup>. (2004) 1 SCC 540

<sup>187</sup>. (2009) 17 SCC 796



The court noted that in a civil suit, the judgment of a court is not automatically stayed upon filing of the appeal. On the contrary, even though the scope of a challenge against an award is significantly narrower than an appeal, filing of a challenge leads to an automatic stay. This the court noted is arbitrary and goes against the enactment of Section 87.

Lastly, the court also noted that the Sri Krishna Committee failed to take into account the Insolvency Code. The court noted that on one hand the award holders are unable to recover their dues due to the automatic stay and on the other hand they are faced with insolvency proceedings under the new code. This also the court noted is arbitrary.

Accordingly, the court struck down Section 87 of the Arbitration Act as violative of Article 14 of the Constitution of India.

## Analysis and Conclusion

The 2019 Amendment Act has been subject of much debate and criticism. Insertion of Section 87, without even considering the judgment of the Hon'ble Supreme Court is one amongst the many issues that plague the 2019 Amendment Act. The BCCI Judgment had resolved certain issues around the applicability of 2015 Amendment Act. However,

despite the judgment, the government choose to amend the law in a manner that the identified shortcoming in the law was given a new lease of life. Such amendment has now been found to arbitrary. It can now be hoped that the government does not take any further action on this. Such swings in the applicable law does not bode well for Indian arbitration. The focus should now be on removing other issues that have come in due to the 2019 Amendment Act. At some point, not just Section 87, but the entire the 2019 Amendment Act would have to be reconsidered.

Lastly, the BCCI Judgment says that the 2015 Amendment Act applies prospectively i.e. to those arbitration proceedings and court proceedings which have commenced on or after the Commencement Date. However, there are some concerns about how it would play out in practice in context of areas like enforceability of orders under Section 17, interplay between Section 9 and Section 17 particularly where the arbitration commenced prior to the Commencement Date, law applicable to an application under Section 8 and appeal thereof under Section 37 etc.

– **Mohammad Kamran, Ashish Kabra & Vyapak Desai**

You can direct your queries or comments to the authors

## Arbitrability Of Fraud – ‘Simply’ Put By Supreme Court

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- Simple allegations of fraud which do not vitiate the underlying contract and arbitration clause are arbitrable.
- Allegations of fraud which do not have an implication in the public domain are arbitrable.

### Introduction

The Supreme Court in its judgment in the case of *Rashid Raza vs. Sadaf Akhtar*<sup>188</sup> clarified the scope of arbitrability of disputes involving allegations of fraud. Relying upon the Supreme Court’s landmark ruling in the case of *A. Ayyasamy vs. A. Paramasivam* (“**Ayyasamy**”),<sup>189</sup> Justice R. F. Nariman set out the working tests for determining whether an allegation of fraud is arbitrable. In the present case, the Supreme Court held that since the dispute pertains to a ‘simple allegation of fraud’, the same is arbitrable.

### Background

The dispute arose out of Partnership Deed dated January 30, 2015 (“**Partnership Deed**”) between the parties. An FIR was lodged by the Respondent alleging siphoning of funds and other business improprieties by the Appellant. On the other hand, the Appellant filed an arbitration petition before the High Court of Jharkhand at Ranchi (“**High Court**”) under Section 11 of the Arbitration and Conciliation Act, 1996 (“**Act**”) for appointment of an arbitrator pursuant to an arbitration clause in the Partnership Deed.

Before the High Court, the Respondent argued that the matter pertains to a serious case of fraud which is not fit to be decided in arbitration. Inter alia, the

Respondent argued that the Petitioner (Appellant) had utilized the assets of the partnership firm (S.R. Coating) in another firm run by his father; created proprietorship firm with a same name, S. R. Coating, and introduced it to one of the firm’s existing business partners, Reliance Industries Ltd.; opened a new bank account on the basis of a fake agreement; and transferred money into the Petitioner’s personal bank account and his father’s bank account.

Without commenting on the merits of the dispute, and relying on the principles laid down by the Supreme Court in *Ayyasamy*, the High Court held that the dispute included serious allegations of fraud of a complicated nature which are not fit to be decided in arbitration proceedings. The Court further held that the dispute may require voluminous evidence to be presented by the parties, and a finding on such evidence can be properly adjudicated only by a court. Consequently, the High Court dismissed the application for appointment of arbitrator.

Aggrieved by the High Court’s ruling, the Appellant approached the Supreme Court by way of a special leave petition.

### Judgment

The Supreme Court analyzed the law laid down on arbitrability of disputes involving fraud in the case of *Ayyasamy*. In *Ayyasamy*, the Supreme Court held that a simple allegation of fraud may not be a ground to nullify the effect of an arbitration agreement. However, when serious allegations of fraud are involved, the Supreme Court held that courts can dismiss an application to refer a dispute to arbitration under Section 8 of the Act. Serious allegations of fraud would involve:

- Allegations which would make a virtual case of criminal offence;
- Allegations of fraud so complicated that it becomes essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced;
- Serious allegations of forgery/fabrication of documents in support of the plea of fraud;
- Where fraud is alleged against the arbitration

<sup>188</sup>. Civil Appeal no. 7005 of 2019 (“**Order**”).

<sup>189</sup>. *A. Ayyasamy vs. A. Paramasivam*, (2016) 10 SCC 386

provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself.<sup>190</sup>

In *Ayyasamy*, the Supreme Court had further held that in the scenario where there are simple allegations of fraud touching upon the internal affairs of the parties inter se without any implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration.<sup>191</sup>

Applying the relevant principles from *Ayyasamy* to the instant allegations of siphoning and improprieties, the Supreme Court held that a distinction must be drawn between ‘serious allegations’ of forgery or fabrication supporting the plea of fraud, and ‘simple allegations’ - to determine arbitrability. It culled out two working tests from *Ayyasamy* to determine this distinction as follows:

1. “does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or
2. whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain”<sup>192</sup>

Applying the aforementioned tests to the facts of the present case, the Supreme Court held that:

1. There is no allegation of fraud which vitiates the Partnership Deed as a whole, including the arbitration clause:
2. The allegations pertain to the affairs of partnership and siphoning of funds, which do not pertain to matters in the public domain.

The Supreme Court held that the allegations are arbitrable as they fall within the ambit of ‘simple allegations’. It set aside the judgment of the High Court and proceeded to appoint an arbitrator under Section 11 of the Act to resolve the disputes between the parties.

## Analysis

Upon an examination of the principles laid down in *Ayyasamy* and the twin tests set out in the instant case, one could argue that the Supreme Court has potentially narrowed down the thresholds to identify ‘serious allegations of fraud’, when courts are approached with an application for appointment of an arbitrator under Section 11 of the Act.

However, it must be noted that *Ayyasamy* involved an application under Section 8 of the Act. Section 8 provides a wider ambit to the Court to evaluate allegations of fraud for the purpose of referring the matter or denying reference to arbitration.<sup>193</sup> In contrast, in an application under Section 11 of the Act, courts have a narrow purview to examine merely the existence of an arbitration agreement while appointing an arbitrator.<sup>194</sup> It is therefore debatable as to whether the working tests suggested by *Ayyasamy* to determine the arbitrability of the allegation in depth propel courts to go beyond merely examining the existence of an arbitration agreement and conduct an enquiry upon the seriousness or simplicity of the allegations of fraud.

One could suggest that the Supreme Court has indeed assessed the existence of the arbitration agreement while laying out the first working test i.e. whether the existence of the arbitration agreement

193. Section 8, Arbitration and Conciliation Act, 1996.

“(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.**” (emphasis supplied)

194. Section 11(6A), Arbitration and Conciliation Act, 1996.

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, **confine to the examination of the existence of an arbitration agreement.**” (emphasis supplied)

190. *A. Ayyasamy vs. A. Paramasivam*, (2016) 10 SCC 386 at Paragraph 25.

191. *Id.*

192. Page 4, Order.

*itself has not been vitiated by the allegation of fraud. However, the second working test hinges upon the effect of fraud either inter se the parties or in the public domain. A blanket application of this test to commercial disputes would always entail an effect inter se between the parties. However, since fraud by its very nature is both a civil action and a criminal offence, this enquiry would be a matter of fact in each case.*

*In any event, the Supreme Court's ruling does set a positive precedent ensuring cautioned and minimum interference by courts in matters involving arbitration and allegations of fraud. It also reposes faith in the arbitral tribunal to determine these allegations to fruition.*

**– Bhavana Sunder, Kshama Loya Modani & Vyapak Desai**

*You can direct your queries or comments to the authors*

## Mediated Settlements: The Way Ahead For India

### Sahil Kanuga and Raj Panchmatia

Dispute resolution in India has been the matter of much consternation. One is wary of approaching the courts, due to its lengthy and time-consuming process as well as the infamous delays. The usual alternative to courts, arbitration, has had mixed success. The fact that India remains a strong economy and that disputes are inevitable remains constant. In such a situation, whilst traditional resolution mechanisms are also being improved upon, alternative dispute resolution mechanisms are continuously being evolved and evaluated.

### What Is Mediation?

Mediation is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. Mediation is a “party-centered” and “consensual” process in that it is focused primarily upon the needs, rights, and interests of the parties. The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. Mediation is not an adversarial process like litigation or arbitration. A mediator is facilitative, in that she/he manages the interaction between parties and facilitates open communication. Mediation is voluntary and non-binding.

### Mediation In India

Informal mediation in India is prevalent since time immemorial. It was never unusual for disputes to be resolved before a trusted third-party mediator. Over time, the benefits of mediation have even attempted to be utilized for disputes pending in the courts, however, with mixed success. One of the potential ‘grouses’ that ails mediation is the lack of recognition accorded to a settlement

arrived at in mediation proceedings. Whilst it is true that the compliance rates of a mediated settlement may far exceed compliance rates with an arbitral award or a judicial decree, the fact remains that when a mediated settlement is arrived at, most parties prefer to have it recorded as a consent decree or award before the court or tribunal, as the case may be, so as to accord it the recognition and consequent sanction under law.

### The Singapore Convention: Move Aside New York And Geneva Conventions!

The United Nations Convention on International Settlement Agreements Resulting from Mediation (“**Singapore Convention**”) aims to herald a new world, where mediated settlements are recognized and enforced just as easily as possibly an arbitral award. The convention seeks to provide greater certainty to parties to international transactions who have reached a settlement of their disputes through mediation. After extensive discussions between member states, it will be signed in Singapore on August 01, 2019 and will come into effect six months after at least three states have ratified it.

It is expected that India will sign the Singapore Convention and roll out appropriate legislation to take it forward, whilst maintaining the spirit of mediation. This will usher in mediation as an effective dispute resolution process in India with the sanction of law and a designed framework that guarantees requisites such as confidentiality.

For international dispute resolution, it envisages a world where disputes can be resolved utilizing the power of mediation, at a fraction of the cost of traditional dispute resolution, with the same certainty and efficacy of enforcement, should the need ever arise; The Singapore Convention puts forth the framework for the enforcement of mediated settlement agreements and will facilitate in bypassing the need to first obtain an enforceable Arbitral Award or a Court Judgement by requiring the direct enforcement of mediation agreements, a very attractive proposition.

## Institutional Mediation

The power of mediation lies in the mediator. A professional, trained mediator has the ability to alleviate years of bad mouthing and baggage carried by the parties, and train their focus on their own interest and preferred solution. Such a mediator can, effectively, allow warring parties to see through the dust clouds of dispute and show them the route to the land of peace. There are numerous examples where years of litigation have been unsuccessful but just a few sessions of mediation, with an open mind, before a professional mediator, are enough to bring parties to an amicable settlement.

The authors of this article recently had the opportunity to participate in a two-day comprehensive Inaugural India Specialist Mediator Workshop, jointly organized by Singapore International Mediation Centre (“SIMC”) & CAMP Arbitration & Mediation Practice Pvt. Ltd. (“CAMP”). Participants were from all walks of life – practicing disputes lawyers, in-house counsel, corporate trainers, a sitting High Court Judge and even a recently retired Supreme Court Judge!

Over a tight two day schedule, professional mediators Joel Lee and Aloysius Goh of the SIMC, supported by the CAMP team, led the 24 participants into the world of mediation, where it was amply established that no dispute was impossible to amicably resolve. Role play was the order of the day and advanced mediation concepts were introduced and tested. The power of mediation to resolve any dispute, where personal, commercial or even state, was seen.

## The Way Forward

One of the significant advantages of arbitration as an effective dispute resolution mechanism for international disputes is the New York Convention, which permits cross border

enforceability. Enforceability for arbitral awards, culminating in the New York Convention, took decades from the time it was conceived and eventually rolled out. Similarly, the Singapore Convention is expected to take its own time to be adopted by member states and rolled out. The framework of international mediation will spread slowly, but surely and it will forge its own place in the world of international dispute resolution, over a period of time, and we hope that the Singapore Convention on mediation will become for mediation what New York Convention is for Arbitration.

Further, adoption of mediation will require creating and propagating a bank of awareness and ensuring that the court system recognizes and leverages the power of mediation; to bring about a peaceful and amicable resolution to a dispute. Perhaps one of the greatest strengths that mediation brings to the table is the ability to continue the relationship even after the settlement, which is, in most cases, unlike an adversarial dispute resolution system. It is not without reason that the highest court in the country, the Supreme Court of India, has chosen to refer one of the largest disputes in the country (the Ayodhya dispute), to mediation. We sincerely hope that even India comes up with a mechanism soon for enforcing domestic mediated agreement thereby giving a boost to mediation in domestic market. The ability to peacefully co-exist and move forward amicably will be the hallmark of mediated settlements.

### *About the authors*

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## India—Delhi High Court Enforces Siac Award And Directs Deposit Of Payment (Glencore International V Indian Potash)

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Arbitration analysis: While fostering its pro-enforcement regime, the Delhi High Court in *Glencore International AG v. Indian Potash Limited & Anr.* (Ex P 99/2015) recognised a foreign award by its judgment dated 9 August 2019. While upholding the legislative intent, the Delhi High Court also directed Indian Potash Limited (‘Judgment Debtor’) to deposit the sum underlying the final award and cost award within four weeks. Shweta Sahu and Moazzam Khan, head of the International Dispute Resolution Practice at Nishith Desai Associates (NDA) consider the decision.

### Glencore International Ag V Indian Potash Limited & Anr (Ex P 99/2015)

#### What was the background?

NDA represented Glencore International AG (‘Decree Holder’) before the Delhi High Court, seeking enforcement of a foreign award made under the Singapore International Arbitration Centre (SIAC) Rules.

However, the Judgment Debtor resisted the enforcement, setting out the following objections:

- the awards which include the final award and the costs award were not stamped
- the parties had not agreed to the arbitration proceedings being conducted under the SIAC Rules • the arbitrator failed to preliminarily decide its jurisdictional objections, thereby depriving the Judgment Debtor of the opportunity to file an appeal • that the awards were

vitiated for breach of principles of natural justice, since the Decree Holder was permitted to amend its pleadings during the final hearing without allowing the Judgment Debtor to contest the amendments

#### What did the court decide?

Honourable Mr Justice Rajiv Shakhder, the Single Judge who heard the submissions advanced by both the parties, was of the unmoved view that the objections raised against the enforcement lacked merit, and observed as below:

- foreign awards are not required to be stamped under the Stamp Act. Apart from relying on the decision of the Honourable Supreme Court in *M/s Shriram EPC Limited v. Rioglass Solar SA* (Civil Appeal No. 9515/2018), the court held that it could not be the legislative intent to insist on the stamping of a foreign award under the Indian stamp laws, as States in India have different rates of stamp duty, and it would be impossible for the enforcer to pay stamp duty in every state before seeking enforcement of a foreign award
- the arbitration agreement referred to the rules of a non-existent arbitral institution. Therefore, the arbitrator correctly adopted the interpretative route and construed the applicable rules as SIAC Rules. Further, the procedure followed under the SIAC Rules had not caused any prejudice to the Judgment Debtor. Nonetheless, procedural defects, which do not lead to failure of justice, would not render the award unenforceable
- there is no such fundamental policy in Indian law that adjudicating authorities should mandatorily render a decision on jurisdictional issues before hearing the matter on merits. The discretion in this behalf lies with the adjudicating authority, as is the case under the International Arbitration Act
- the arbitrator exercised his discretion to allow amendment of pleadings under the SIAC Rules after granting an opportunity to the Judgment Debtor

- while rejecting all opposition to the enforcement of the award, the Delhi High Court directed the Judgment Debtor to (i) deposit the final award and costs award amounts in court (ii) give detailed disclosures with respect to its assets – including its bank accounts and (iii) be restrained from alienating its assets

Directions for deposit of the award amount:

The Delhi High Court directed the Judgment Debtor to deposit the awarded amounts with the Registry of the Delhi High Court.

Vide the deposit directions, the High Court has given the Judgment Debtor an opportunity to make the payments under the award, without the High Court having to proceed with the attachment and sale of the Judgment Debtor's assets to recover the said moneys.

The court recognising and enforcing such foreign awards may direct for the deposits to be made directly to the award-holder or the court itself. Deposits made with the court are also aimed at defusing potential opposition which

a direction to pay directly to the award-holder may face, especially in a situation where the judgment debtor intends to appeal against the court's decision to enforce the award.

A foreign award (such as the SIAC award in the instant case) cannot be challenged in India (see *Bharat Aluminium Company v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552 (para 88, 89)). However, a judgment debtor may resist enforcement of such an award if the award does not satisfy the conditions under section 48 of the Arbitration and Conciliation Act 1996. In the event of dismissal of such objections to enforcement, the judgment debtor may prefer a special leave against such an order of the enforcing court (see *Fuerst Day Lawson v Jindal Exports* (2011) 8 SCC 333).

The NDA team was led by Moazzam Khan and Shweta Sahu, along with Nakul Dewan, Senior Advocate representing the Decree Holder.

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Further information can be found here



## Npac's Arbitration Review: A Convenient Argument Of Forum Non Conveniens Rejected By Delhi HC, Parties Referred To Arbitration Instead!

### *Mohammad Kamran And Alipak Banerjee*

Continuing the trend of arbitration-friendly rulings, the Delhi High Court, recently in *Jes & Ben Groupo Pvt Ltd & Ors v. Hell Energy Magyarorzag Kft (Hell Energy Hungary Ltd) & Anr* referred the parties to arbitration before the Hungarian Chamber of Commerce, Budapest and dismissed the civil suit filed to wriggle out of the arbitration.

### *Factual Background*

The Plaintiff No 1 and Defendant No 1 entered into an Exclusive Distribution Agreement (**Distribution Agreement**), granting exclusive distribution rights to Plaintiff No 1 in respect of the product Hell Energy (an Energy Drink). Due to failure to fulfill 75% of the annual order volume, Defendant No 1 terminated the Distribution Agreement. Aggrieved by the termination, the Plaintiffs filed a civil suit for injunction, cancellation, declaration, reconciliation/ rendition of accounts and damages. Relying on the arbitration clause in the Distribution Agreement, the Defendants filed an application under Section 45 of the Arbitration and Conciliation Act, 1996 (**Act**) objecting to the maintainability of the suit and sought a referral to arbitration. Section 45 of the Act confers powers on a judicial authority to refer parties to arbitration unless the agreement is found to be null and void, inoperative, or incapable of being performed.

### *Decision Of The Delhi High Court*

The Delhi High Court ruled that: (a) the scope of power under Section 45 of the Act requires

the Court to take a prima facie view of the matter on the basis of material and evidence produced by the parties on record. (b) forum non conveniens cannot make a subject matter nonarbitrable or incapable of being performed; (c) when both parties have the expertise and the contract is a commercial transaction, the plea of unequal bargaining power cannot be raised to avoid arbitration; (d) the parties cannot be allowed to wriggle out of an arbitration by cleverly drafting the plaint and impleading non-signatories to the arbitration agreement in the civil suit; (e) the allegations on malpractices and predatory practices are questions of disputed facts and within the scope of adjudication by the Arbitral Tribunal, and do not prima facie render the arbitration agreement null and void; (f) although allegations of fraud and malpractice was contended to confer jurisdiction on the civil court, and wriggle out of arbitration, but a review of the plaint does not disclose any allegations of fraud, much less serious fraud; (g) where the parties have expressly entered into an agreement referring any dispute to arbitration, the same cannot be held to be contrary to public policy.

### *Analysis*

This appears to be a well-reasoned ruling by the Delhi High Court. Some of the important aspects of the ruling have been discussed below: .

#### *Scope of enquiry under Section 45 of the Act:*

The Delhi High Court relied on the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd v. Aksh Optifibre Ltd and Anr* (2005) 7 SCC 234, where it was held that at the pre-reference stage, the court should draw a prima facie finding as to the validity of the arbitration agreement and refer the parties to arbitration. The Delhi High Court also referred to the ruling of the Supreme Court in *Sasan Power Ltd v. North American Coal Corpn (India) (P) Ltd.* (2016) 10 SCC 813, where it was observed that the scope of enquiry under Section 45 is only confined to whether the arbitration agreement is void, inoperative or incapable of being performed, but not the legality and validity of the substantive contract. Relying on the above decisions, the Delhi High Court upheld the

arbitration clause in the Distribution Agreement and directed the parties to arbitration.

*Forum Non Conveniens cannot bar arbitration:*

The Delhi High Court relied on the decision of the Supreme Court in *Harmony Innovations Shipping Ltd v. Gupta Coal Indian Ltd and Ors*, AIR 2015 SC 1504 and negated the objection of the Plaintiff. Indeed, forum non conveniens such as financial prejudice or geographical location cannot be contended to come out of a contractually agreed mechanism of dispute resolution. In fact, the Supreme Court in *Modi Entertainment Network & Anr vs W.S.G.Cricket Pte. Ltd*, while ruling on the jurisdiction of the court, had opined that a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens.

*Impleading Non-Signatories to the arbitration:*

Although the Delhi High Court held that the non-signatories impleaded in the civil suit are not necessary parties, as the dispute related to the termination of the Distribution Agreement, the law on impleadment of non-signatories to

the arbitration is well settled. It is not enough for a party to implead non-signatories and wriggle out of an arbitration. The Supreme Court in *Chloro Control* has held that the legal bases to bind alter ego to an arbitration agreement are implied consent, third party beneficiary, guarantors, assignment or another transfer mechanism of control rights, apparent authority, piercing of the corporate veil, agent principle relationship etc. Subsequently, in *Cherian Properties Limited v. Kasturi and Sons Limited and Ors*, the Supreme Court has held that the effort should be to find the true essence of the business arrangement and to unravel from a layered structure of commercial arrangements, an intent to bind someone which is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory. Similar findings have been arrived at by the Supreme Court in *Purple Medical Solutions Private Limited v. MIV Therapeutics Inc and Anr* and Delhi High Court in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors* as well.

***Mohammad Kamran, Senior Member, International Dispute Resolution and Investigations Practice, Nishith Desai Associates***

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## India: Supreme Court Rules On Apprehension Of Bias In Arbitration

Ashish Kabra

Bhavana Sunder

**Subject:** Arbitration . Other related subjects: Civil procedure.

**Keywords:** Arbitration awards; Arbitrators; Bias; Commercial arbitration; India; Setting aside;

### Legislation:

Arbitration and Conciliation Act 1996 (India)

### Case:

Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Pty Ltd unreported 24 July 2019 (Sup Ct (Ind))

*\*Int. A.L.R. 241*

### Introduction

The Supreme Court of India, in the case of Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Ptv Ltd,<sup>195</sup> was recently faced with the question of whether there existed a reasonable apprehension of bias such that an arbitral award be set aside. In this case, the arbitrator who rendered the final arbitral award in the arbitration had been engaged and was acting as counsel of one of the parties in another litigation.

The Supreme Court interpreted the Arbitration and Conciliation Act 1996 (A&C Act) (as the present case applied the law as it stood prior to the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act)) to determine the arbitral award rendered by the appointed arbitrator should be set aside as the Appellants had a reasonable basis to doubt the arbitrator's ability to be independent and impartial in pronouncing the arbitral award.

### Facts

The Respondent in the appeal had a cold storage facility in Nagpur. The Appellants had stored goods in the Respondent's facility in 2004. Disputes arose between the parties in 2006 as the Appellants claimed that the Respondent had failed to store its goods in an appropriate manner causing damage to the goods.

It was the Respondent's position that the parties were governed by an arbitration clause which was contained in the receipt issued for the storage of goods which required disputes to be referred to a particular arbitrator. Pursuant to the arbitration clause, the Respondent submitted its claims before the said arbitrator. The father of the Appellants and the Appellants issued letters to the arbitrator recording their objections to his appointment. The Appellants argued that the appointed arbitrator was the Respondent's counsel in another litigation. The arbitrator deemed the objections as inconsequential and passed the final award against the Appellants. *\*Int. A.L.R. 242*

The Appellants filed an application under s.34 of the A&C Act before the District Judge of Nagpur. The District Judge set aside the arbitral award noting that, inter alia, the arbitrator acted as the counsel for the Respondent in a previous case which was not disclosed by him as required under s.12 of the A&C Act. The Respondent appealed the decision of the District Judge before the Bombay High Court. The Bombay High Court recorded that the objections and legal notices to the appointment of the arbitrator were not raised by the Respondent, rather, they were raised by the Respondent's father. Thus, technically, this could not be considered an objection within the meaning of s.13 of the A&C Act.<sup>196</sup> The Bombay High Court further held that

“Even assuming that the objection raised by Bhaiyalalji Jain was an objection raised by a ‘party’, the objection/notice issued by Bhaiyalalji Jain to the arbitrator was extremely vague and the apprehension expressed therein could not

<sup>195</sup>. Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Ptv Ltd, Civil Appeal No.6960 of 2011 dated 24 July 2019.

<sup>196</sup>. Section 13 of the A&C Act provides the procedure for challenging an arbitrator by the parties.

have made any reasonable man believe that there was a likelihood of bias.”<sup>197</sup>

The Bombay High Court further added that it was not the case of the Appellants that they were unaware of the 11/12/2019 Delivery | Westlaw India Page 2 arbitrator’s engagement as a counsel of the Respondent in a mesne profits case prior to signing the arbitration agreement. The Court concluded that the “question whether non-disclosure of these circumstances were likely to give rise to a justifiable doubt about the integrity and impartiality of the respondent no.4, does not arise for consideration in the facts and circumstances of the case”.<sup>198</sup>

Aggrieved by the order of the Bombay High Court, the Appellants appealed it before the Supreme Court of India.

## Held

On the question of whether a challenge under s.13 of the A&C Act had been appropriately raised by the Appellants, the Supreme Court held that although the notice to the arbitrator was issued by the Appellants’ father, he is not a “a rank outsider” and further, the Appellants have not disowned the notice. The Supreme Court further held one of the Appellants had also addressed a communication to the arbitrator requesting him to stop the proceedings since a petition had been filed in the High Court for the appointment of an independent arbitrator. Considering this, the Supreme Court held that the Bombay High Court’s finding that these objections would not fall within the requirements of s.13 of the A&C Act was not justified.

The Supreme Court noted that the arbitrator had acted as a counsel for the Respondent in another dispute. Section 12(1) of the A&C Act, provides that “When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any

circumstances likely to give rise to justifiable doubts as to his independence or impartiality”. The Supreme Court held that this provision imposes an obligation of disclosure on the arbitrator. The Supreme Court held that: *\*Int. A.L.R. 243*

“Thus, as on 03.06.2006 when the claim was lodged before the learned Arbitrator both the events of, he being appointed as an Arbitrator and also as a counsel in another case had existed, which was well within the knowledge of Sri. S.T. Madnani and in that circumstance, it was the appropriate stage when he ought to have disclosed the same and refrained from entertaining the claim.”<sup>199</sup>

The Supreme Court concluded that: “What is to be seen is whether there is a reasonable basis for the Appellants to make a claim that ... the arbitrator would not be fair, even if not biased...”.<sup>200</sup> The Supreme Court emphasised that no room should be given for such an apprehension in the minds of the parties, particularly in arbitration, as the parties get to choose an arbitrator in whom they have trust and faith, unlike in litigation where they have no choice in this regard.

Overtaking the judgment of the Bombay High Court, the Supreme Court set aside the arbitral award and restored the judgment of the Principal District Judge dated 6 November 2006.

## Comments

Considering the factual circumstances, the Supreme Court set aside the arbitral award as (1) the arbitrator should have made a disclosure of his conflict to the parties as per s.12 of the A&C Act; and (2) the parties had a reasonable basis to make a claim that the arbitrator would not be unbiased in rendering the arbitral award. Through this judgment, the Supreme Court has re-emphasised that appointing an independent and impartial arbitrator is vital to a valid arbitration proceeding.

197.Paragraph 10 of the First Appeal No.187 of 2007 dated 30 and 31 August 2007.

198.Paragraph 13 of the First Appeal No.187 of 2007 dated 30 and 31 August 2007.

199. Vinod Bhaiyalal Jain v Wadhvani Parmeshwari Cold Storage Ptv Ltd, Civil Appeal No.6960 of 2011 dated 24 July 2019 at [8].

200. Vinod Bhaiyalal Jain, Civil Appeal No.6960 of 2011 dated 24 July 2019 at [9].

Prior to the Amendment Act, courts did not have statutory guidance as to what would constitute justifiable doubts as to the independence and impartiality of an arbitrator. The 246th Law Commission Report on the Amendments to the A&C Act acknowledged this lacuna and suggested a comprehensive reform to address the issue of neutrality of arbitrators. The recommendation was based on the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),<sup>201</sup> which would serve as a guide to determine whether circumstances exist which give rise to such justifiable doubts.

The IBA Guidelines were then incorporated by the Amendment Act into the A&C Act in the form of the Fifth and Seventh Schedules. The A&C Act as it stands today clearly specifies that an arbitrator must disclose “the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality”.<sup>202</sup>

The Fifth Schedule, supplementary to s.12(1) (b) of the A&C Act, contains an extensive list of grounds to guide parties and arbitrators as to circumstances which *\*Int. A.L.R.* 244 give rise to justifiable doubts to the independence and impartiality of arbitrators. The Seventh Schedule, read with s.12(5) of the A&C Act, provides instances which directly result in the ineligibility of a person from being appointed as an arbitrator unless the parties had expressly waived the applicability of the provision in writing after the agreement was entered. This position has also been upheld by the Supreme Court recently in the case of *Bharat Broadband Network Ltd v United Telecoms Ltd.*<sup>203</sup>

In factual scenarios similar to the present case before the Supreme Court, arbitrators can be guided by Entry 20 I1/I2/2019 Delivery | Westlaw India Page 3 of the Fifth Schedule (which is an adoption of Entry 3.1.1 in the Orange List of the IBA Guidelines) which clarifies that arbitrators should consider making a disclosure if, within the past three years, he or she has served as a counsel for one of the parties in an unrelated matter.

If the arbitrator continues to be engaged by one of the parties, he or she would automatically be ineligible by operation of Entry 2 of the Seventh Schedule unless the parties had expressly waived its applicability in writing after the agreement was entered. Entry 2 read with s.12(5) of the A&C Act provides that an arbitrator shall be ineligible if “[t]he arbitrator currently represents or advises one of the parties or an affiliate of one of the parties”. This entry is similar to Entry 1.1 of the Non-Waivable Red List of the IBA Guidelines which provides that: “[t]here is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration”.

Therefore, judicial precedent and statutory amendments in India have developed positively to ensure that the fairness, neutrality and impartiality of arbitrators are central and essential to each arbitration proceeding. The Supreme Court’s judgment in the present case will certainly provide a significant guidance for the arbitration-related court proceedings, also for those commenced prior to the Amendment Act.

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*Int. A.L.R.* 2019, 22(4), 241-244

201. IBA Guidelines on Conflicts of Interest in International Arbitration, Adopted by resolution of the IBA Council on 23 October 2014.

202. Section 12(1) of the Arbitration and Conciliation Act 1996.

203. *Bharat Broadband Network Ltd v United Telecoms Ltd*, Civil Appeal No.3972 of 2019 with Civil Appeal No.3973 of 2019 dated 16 April 2019.

## India—Supreme Court Rules On Jurisdiction Of Courts In Execution Of Arbitral Awards (Sundaram Finance V Samad)

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.** ■

### Original News

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

### 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.*

### 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.*

### 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
- - *Rajasthan Kotak Mahindra Bank Ltd v Ram Sharan Gurjar & Anr* [2012] 1 RLW 960.

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 Act 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.

### 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.*

*– Shweta Sahu, Payel Chatterjee & Moazzam Khan*

*You can direct your queries or comments to the authors*



## 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

### 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.<sup>204</sup> 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<sup>205</sup>. (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.

### Judgment

#### 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]

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

204. To read about the amendments, please click here

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

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.

#### **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.

#### **Legislative intent and removal of the mischief in the law**

The Court considered an earlier judgment in *National Aluminium Company Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr*<sup>206</sup>. 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.

#### **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

206. (2004) 1 SCC 540

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.

## 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.

– **Siddharth Ratho, Ashish Kabra & Vyapak Desai**

You can direct your queries or comments to the authors

## Delhi HC: No Bar On Two Indian Parties In Choosing A Foreign Seat Of Arbitration?

Delhi HC:

- opines that a foreign-seated arbitration between two Indian parties would attract Part II of the Act, and the resultant award would be a “foreign award”;
- impliedly holds that there is no prohibition in two Indian parties choosing a foreign seat of arbitration;
- holds that the decision of the Delhi HC in *Sudhir Gopi* is per incuriam

Recently, the Delhi High Court (“**Delhi HC**”) in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*,<sup>207</sup> after relying on the decision of the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation (India) (P) Ltd*<sup>208</sup> (“**Sasan Power**”), and *Atlas Exports Industries v. Kotak & Co*<sup>209</sup> (“**Atlas Exports**”) has ruled that there 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 & Ors*<sup>210</sup> (“**Chloro Control**”) and upheld the impleadment 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 University*<sup>211</sup> (“**Sudhir Gopi**”) that the principle of alter ego is non-arbitrable, is per incuriam.

## Background

*GMR Chattisgarh Energy Limited* (“**GCEL**”) 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.

*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.

207. 2017 SCC OnLine Del 11625

208. 2015 SCCOnline M.P. 7417

209. 1999 (7) SCC 61

210. 2013 (1) SCC 641

211. 2017 SCCOnline Del 8345

## Contentions On Behalf Of Doosan India

The primary contentions have been summarized below:

### **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<sup>212</sup>, but also in Singapore<sup>213</sup>.
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.<sup>214</sup>

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.

### **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 Authority*<sup>215</sup>.

## Contentions On Behalf Of Gmr Energy

### **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.<sup>216</sup>

212. *Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc & Ors* 2013 (1) SCC 641

213. *Jiang Haiying v. Tan Lim Hui and Anr*, [2009] SGHC 42

214. *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

215. 2015 (3) SCC 49

216. *Indowind Energy Ltd v. Wescare (India) Ltd.*, 2010 (5) SCC 306,

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.*

### **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.<sup>217</sup>*
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*.<sup>218</sup>*
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.*

### **Judgment**

#### ***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 there is no prohibition for two Indian parties to opt for a foreign seat of arbitration.<sup>219</sup> 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*<sup>220</sup>, 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*. ***Delhi HC held that GMR Energy was correctly impleaded in the Arbitration Proceedings****

*Sudir Gopi, Balwant Rai Saluja & Anr v. Air India Ltd & Ors. 2014 (9) SCC 407*

<sup>217</sup> *Reliance was also placed on *TDM Infrastructure Private Limited v. UE Development India Private Limited* 2008 (14) SCC 271; *Seven Islands Shipping Ltd v. Sah Petroleums Ltd* 2012 MhLJ 822 (“Seven Islands”); *Aadhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Private Ltd.* 2015 SCC OnLine Bom 7752*

<sup>218</sup> 2012 (9) SCC 552

<sup>219</sup> “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”

<sup>220</sup> 2011 (8) SCC 333

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 *Ayyasamy v. A Paramasivam*<sup>221</sup> (“**Ayyasamy**”), wherein the Supreme Court carved out instances which cannot be referred to arbitration.

## 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.

– **Shweta Sahu, Alipak Banerjee & Moazzam Khan**

You can direct your queries or comments to the authors

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221. (2016) 10 SCC 386

# 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, HongKong 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)

- 1<sup>st</sup> 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?

Action	Time
Appointment of EA	Within 1 day of receipt by Registrar of application and payment of fee
Challenge to appointment of EA	Within 2 days of communication by Registrar of appointment and circumstances disclosed
Schedule for consideration of application by EA	Within 2 days of appointment

## 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

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Singapore ... **“The most preferred seat of Arbitration in Asia”**

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

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## 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**
- Indian parties – **largest contingent of cases at SIAC in 2009, 2010, 2011, 2013 & 2015**
- 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

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# 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

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).

## II. Statistics

SIAC's Annual Report for 2017, which is available on SIAC's website<sup>1</sup> 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 the 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

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<sup>2</sup>

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,<sup>3</sup> it is possible to see that:

1. <http://www.siac.org.sg>

2. <http://www.siac.org.sg/component/siaccalculator/?Itemid=448>.

3. <http://www.siac.org.sg/estimate-your-fees/siac-schedule-of-fees>

- 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.

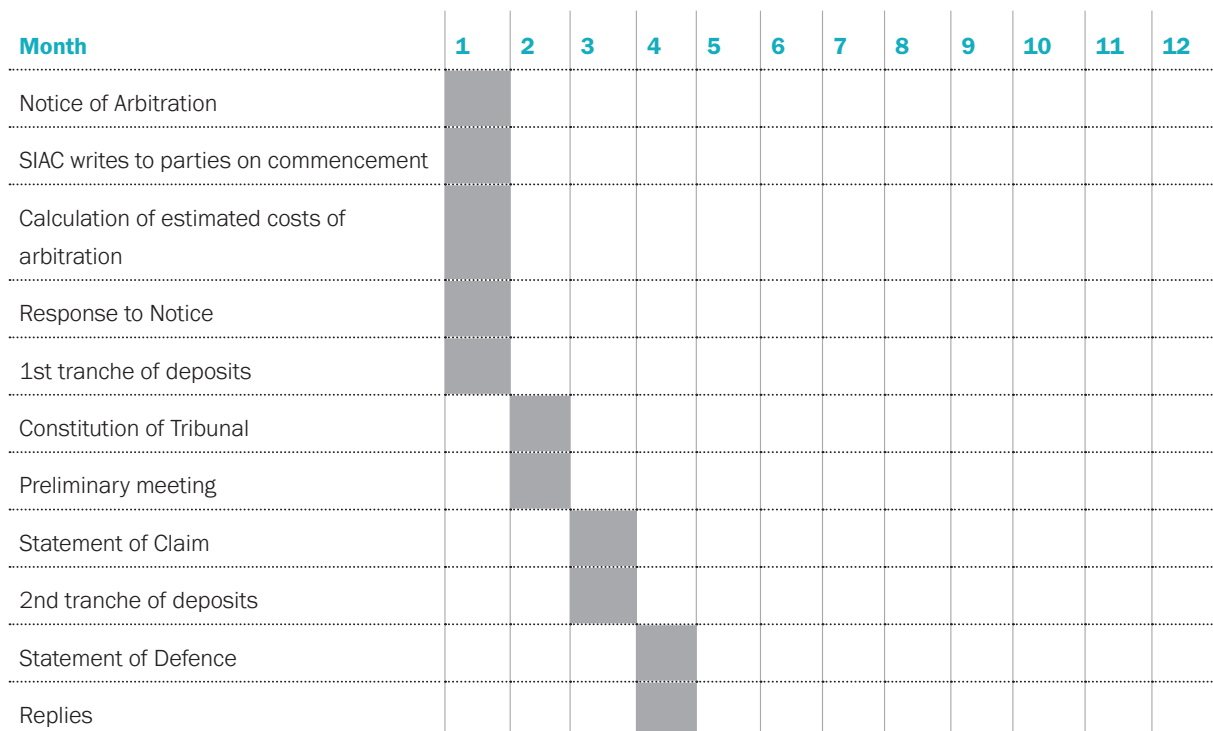
## IV. Costs and Duration of an Arbitration at SIAC

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.

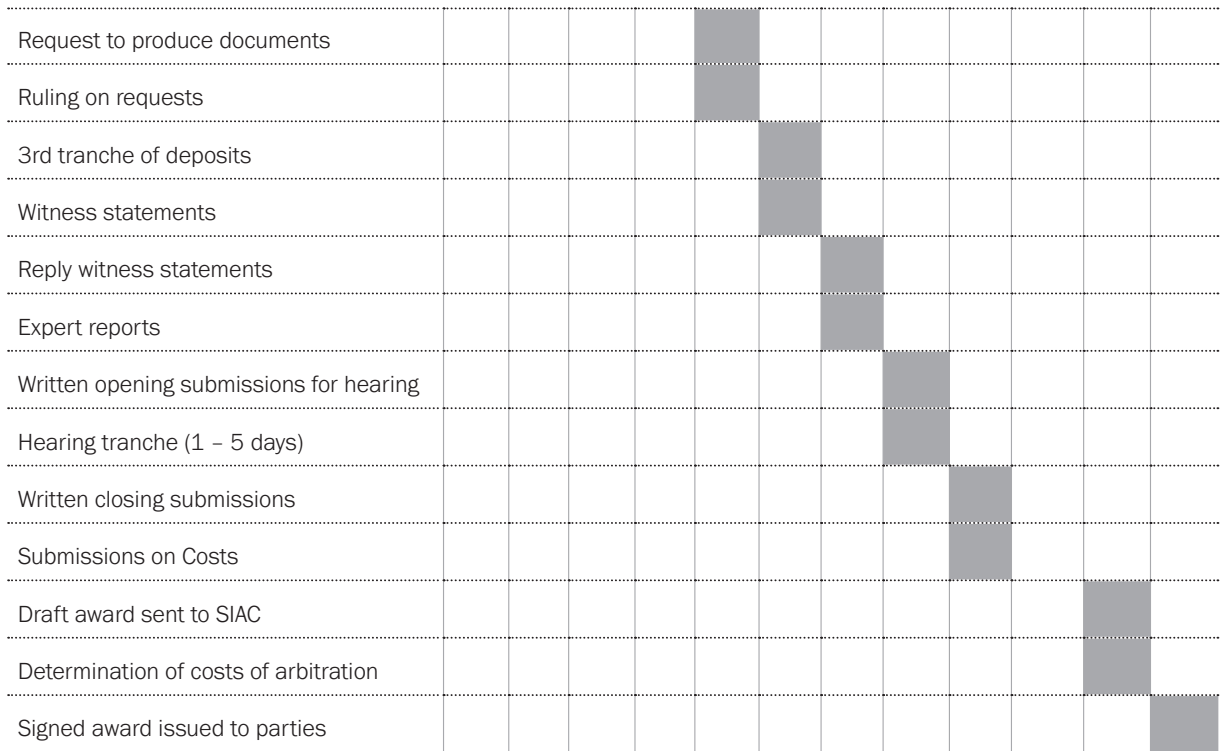
Key takeaways from the Study are as follows:

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:







## 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);<sup>4</sup> 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

4. <http://www.siac.org.sg/model-clauses/expedited-procedure-model-clause>

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

## B. Emergency Arbitrator

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

- a. the President of the SIAC Court of Arbitration will appoint an Emergency Arbitrator within 1 day of deciding to accept an application for emergency relief under these provisions
- b. any challenge to the appointment of the Emergency Arbitrator must be made within two days of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed

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

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

The following research papers and much more are available on our Knowledge Site: [www.nishithdesai.com](http://www.nishithdesai.com)

 <p>Private Equity and Private Debt Investments in India Strategic, Legal, Tax and Critical Issues May 2019</p>	<p><b>Private Equity and Private Debt Investments in India</b></p> <p>May 2019</p>	 <p>International Commercial Arbitration Law and Recent Developments in India February 2020</p>	<p><b>International Commercial Arbitration: Law and Recent Developments in India</b></p> <p>February 2020</p>	 <p>Are we ready for Designer Babies? Issues of law, ethics and genetic engineering June 2019</p>	<p><b>Are we ready for Designer Babies?</b></p> <p>June 2019</p>
 <p>India Opens Skies for Drones Strategic, Legal and Tax Analysis August 2019</p>	<p><b>India Opens Skies for Drones</b></p> <p>August 2019</p>	 <p>Digital Health in India Legal, Regulatory and Tax Overview November 2019</p>	<p><b>Digital Health in India</b></p> <p>November 2019</p>	 <p>Impact Investing Simplified A Guide to Identifying and Receiving Impact Investments in India July 2019</p>	<p><b>Impact Investing Simplified</b></p> <p>July 2019</p>
 <p>IP Centric Deals Key legal, tax and structuring considerations from Indian law perspective February 2019</p>	<p><b>IP Centric Deals: Key legal, tax and structuring considerations from Indian law perspective</b></p> <p>February 2019</p>	 <p>Fund Formation: Attracting Global Investors Global, Regulatory and Tax Environment impacting India focused funds February 2019</p>	<p><b>Fund Formation: Attracting Global Investors</b></p> <p>February 2019</p>	 <p>Building a Successful Blockchain Ecosystem for India Regulatory Approaches to Crypto Assets December 2018</p>	<p><b>Building a Successful Blockchain Ecosystem for India</b></p> <p>December 2018</p>

## NDA Insights

TITLE	TYPE	DATE
Delhi Tribunal: Hitachi Singapore's Liaison Office in India is a Permanent Establishment, Scope of Exclusion Under Singapore Treaty Restrictive	Tax	November 2019
CBDT issues clarification around availment of additional depreciation and MAT credit for companies availing lower rate of tax	Tax	October 2019
Bombay High Court quashes 197 order rejecting Mauritius tax treaty benefits	Tax	May 2019
Investment Arbitration & India – 2019 Year in review	Dispute	January 2020
Changing landscape of confidentiality in international arbitration	Dispute	January 2020
The Arbitration and Conciliation Amendment Act, 2019 – A new dawn or sinking into a morass?	Dispute	January 2020
Why, how, and to what extent AI could enter the decision-making boardroom?	TMT	January 2020
Privacy in India - Wheels in motion for an epic 2020	TMT	December 2019
Court orders Global Take Down of Content Uploaded from India	TMT	November 2019
Graveyard Shift in India: Employers in Bangalore / Karnataka Permitted to Engage Women Employees at Night in Factories	HR	December 2019
India's Provident Fund law: proposed amendments and new circular helps employers see light at the tunnel's end	HR	August 2019
Crèche Facility By Employers in India: Rules Notified for Bangalore	HR	August 2019
Pharma Year-End Wrap: Signs of exciting times ahead?	Pharma	December 2019
Medical Device Revamp: Regulatory Pathway or Regulatory Maze?	Pharma	November 2019
Prohibition of E-Cigarettes: End of ENDS?	Pharma	September 2019

## Research @ NDA

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

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

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

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

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

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

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

**We would love to hear your suggestions on our research reports. Please feel free to contact us at [research@nishithdesai.com](mailto:research@nishithdesai.com)**

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