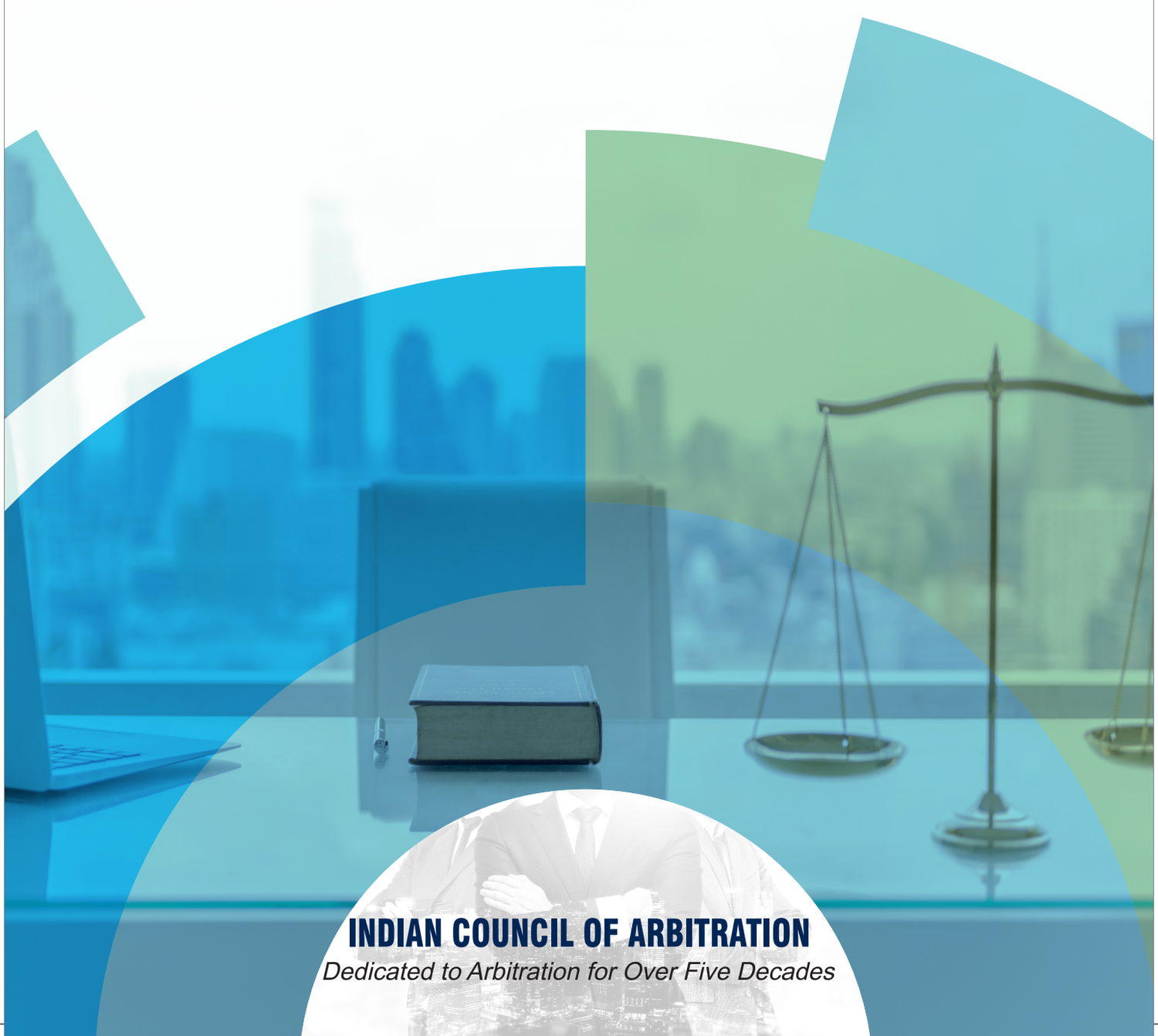
ICA
INDIAN COUNCIL OF ARBITRATION

ICA ARBITRATION QUARTERLY

Vol. 207 | October-December, 2020



INDIAN COUNCIL OF ARBITRATION

Dedicated to Arbitration for Over Five Decades

STATEMENT OF PURPOSE

The ICA Arbitration Quarterly, published by the Indian Council of Arbitration, aims to be a scholarly journal to provide independent platform and ensure in-depth studies of the most important current issues in Domestic and International Arbitration, giving it even more urgency as a forum for original thinking, threadbare analysis and reporting on regional and global trends in order to contribute to the promotion and development of arbitration practices.

ICA, as such, welcomes the contribution from the intending writers on issues relating to domestic, maritime and international commercial arbitration. Intending writers are requested to read and understand "Guidelines for Authors" given on the inner side of the Back Cover of this Journal. The persons, intending to contribute in the Quarterly, may send article to:

The Editor

ICA Arbitration Quarterly
Indian Council of Arbitration
Federation House,
Tansen Marg, New Delhi- 110001

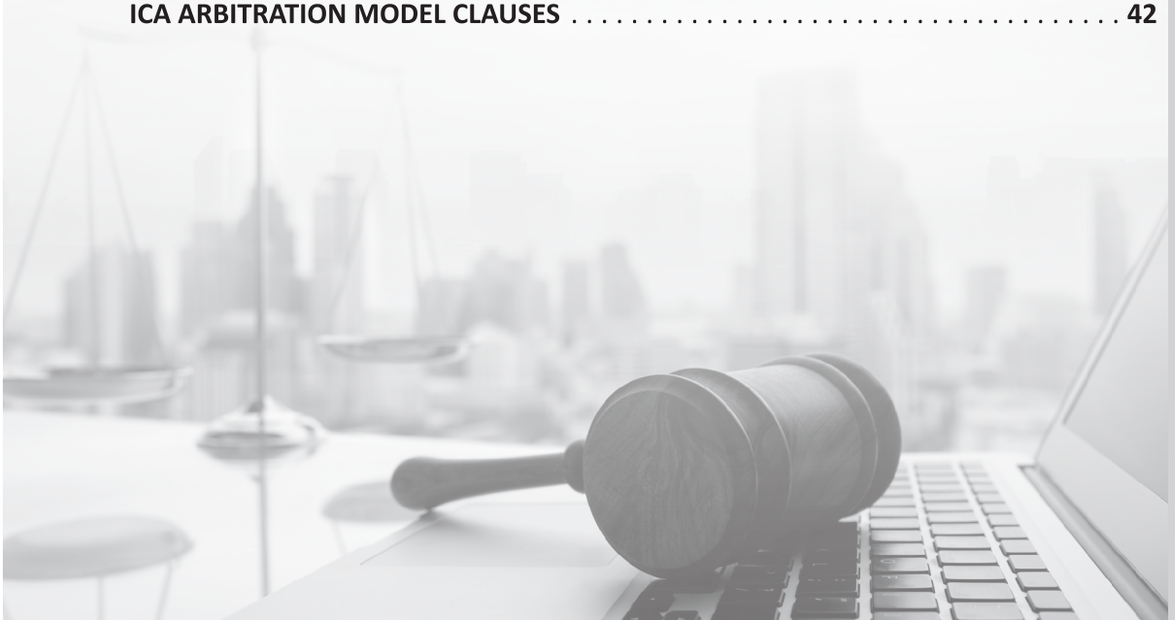
Email: editor.ica@ficci.com; ica@ficci.com

Note:

Publisher:

INDIAN COUNCIL OF ARBITRATION
Federation House, Tansen Marg,
New Delhi- 110001

Contents



FROM THE
PRESIDENT'S DESK

The impact of COVID-19 has been a roller-coaster ride for the entire economy as well as all those involved in Arbitration practice. However, given the fact that arbitration is a flexible and consensual process, it has well-positioned itself to respond swiftly to challenges which had come across in the arbitration proceedings. We have seen in since the inception of COVID that arbitration has taken a virtual mode and has now become an indispensable process of dispute resolution.

Indeed, in a short space of time, there has been a significant and collaborative response from the Arbitrators, the parties and the team of Indian Council of Arbitration (ICA) has successfully found innovative pathways to maintain access to justice in a timely and efficient manner. ICA largely remained fully operational since July 2020, while implementing remote working practices and virtual hearings for arbitration proceedings. This reality has prompted ICA to provide handhold support to litigating parties and tribunals, grappling with how to convert physical in-person hearings into a virtual environment or hybrid model.

The ambition to provide continuous and well-organized mode of arbitration has led to completion of arbitration well before the one year timeline provided by the Act.

As normalcy might take some more time, the present situation should not deter us towards our aim of establishing an efficient and effective ecosystem for arbitration in India, equivalent to the Arbitral Institutes across the globe. Our relentless efforts in doing the same, along with your support and cooperation during this period shall help ICA go long way in achieving its mission!

N G Khaitan

N. G. KHAITAN
President ICA

2020 IN RECAP: AN EVENTFUL YEAR FOR THE INDIAN ARBITRATION ENVIRONMENT

Mr. Ashutosh Ray
Partner, Peter & Kim

The "2019 in Review for Arbitration in India" started with a quote from Jeff Bezos that "the 21st century belongs to India". Little did we know then that, one year later, Jeff Bezos' Amazon would be fighting tooth and nail in an arbitration and related litigation in the Indian courts to claim a share of the growing Indian market.

Despite the Covid-19 pandemic, 2020 (like 2019) has been an eventful year for the Indian arbitration landscape. This post considers some major recent developments on key topics. The three branches: the judiciary, executive, and legislature continued taking significant measures to reform the domestic and international arbitration landscape in India. While important judgments were delivered by courts across India, institutional arbitration continued making inroads in India. Similarly, the government continued its spree to amend the arbitration law. Overall, the developments paint a positive picture of India's consistent efforts to ground itself as a pro-arbitration jurisdiction. Of course, there is a scope for improvement and the journey continues.

NEW INDIA-BRAZIL BIT

As covered in a prior post, India and Brazil signed a BIT at the dawn of the new decade to usher in a new era of BITs. The BIT is noteworthy for its departure from the widely used investor-state arbitration mechanism in favor of state-state arbitration with a focus on dispute prevention.

> A noticeable feature of this BIT is the restriction on an arbitration tribunal in awarding compensation, which resembles shades of the WTO dispute settlement mechanism.

THE INVALIDITY OF UNILATERAL APPOINTMENT OF A SOLE ARBITRATOR

Historically, the unilateral appointment of a sole arbitrator was rife in the Indian arbitration ecosystem, especially in domestic arbitrations. This gave unreasonable power to one party and created a power imbalance between the parties in an arbitration. However, the Indian Supreme Court ("Supreme Court"), in Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd. made unilateral sole arbitrator appointments invalid under the 2015 amendments to the Indian Arbitration and Conciliation Act, 1996 ("Act"). The judgment was delivered towards the end of 2019 and continued to influence several arbitration proceedings in 2020 (and in 2021) such as the Delhi High Court's judgment in Proddatur Cable TV Digi Services v. Siti Cable Network Limited (2020) and City Lifeline Travels Private Ltd v. Delhi Jal Board (2021).

There is still a need for further clarity on other aspects of the appointment of an arbitrator. The exercise is underway as the Supreme Court in Union of India v Tantia Construction (2021) has referred the issue to a larger bench while opining that once the appointing authority itself is incapacitated from referring the matter to arbitration, it may not appoint an arbitrator.

CHOICE OF SEAT OR VENUE

The choice of a seat or place of arbitration is critical. Arbitration-related disputes often land in courts when the choice of seat or venue is debatable. The Hon'ble Supreme Court's decision in Union of India v. Hardy Exploration and Production (India) Inc., (2019) ("Hardy Exploration") was criticized for failing to delineate the concepts of place, seat, and venue.

The Supreme Court in BGS SGS Soma JV v. NHPC Ltd., (2019) ("BGS SGS") provided the much-needed clarity. It laid down a test for determining the venue and seat of arbitrations. It went on hold Hardy Exploration as per-incurium for failing to follow the Supreme Court's seminal decision in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services. The BGS SGS decision was expected to put a lid on this issue.

However, subsequently, in Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.(2020), when the rival contentions were based on the findings of Hardy Exploration on one hand and BGS SGS on the other, the Supreme Court chose to rely on neither of these decisions to come to its conclusion. This lack of clarity is likely to lead to further litigations in India.

ANTI-ARBITRATION INJUNCTIONS

The Delhi High Court has taken divergent views on the issue of a civil court's jurisdiction to grant anti-arbitration injunctions. In Mcdonald's India Private Limited v. Vikram Bakshi and Ors. (2016) ("Mcdonald's"), a division bench of the Delhi High Court held that civil courts had jurisdiction to grant anti-arbitration injunctions where it was proved that the arbitration agreement was null, void, inoperative, or incapable of being performed. However, in Bina Modi and Ors. v. Lalit Modi and Ors (2020), a single judge of the Delhi High Court concluded that a civil court did not have the jurisdiction to entertain suits to declare the invalidity of an arbitration agreement or injunct arbitral proceedings.

In an appeal against the single judge's decision, the division bench, relying on Mcdonald's, set aside the single judge's judgment. This judgment

conforms to the previous Supreme Court judgements which have held that a civil court in India has inherent jurisdiction to grant injunctions in restraint of arbitration.

THE NEGATIVE EFFECT OF KOMPETENZ-KOMPETENZ

The arbitration between Devas v Antrix has been in the news for various reasons, the latest being the stay granted by the Supreme Court on the execution of the award in November 2020. The doctrine of Kompetenz-Kompetenz grants power to arbitrators to decide upon their own jurisdiction. However, the negative effect of Kompetenz-Kompetenz allows the courts to consider a jurisdictional challenge only on a prima facie basis while allowing for a complete review only by an arbitral tribunal. In the context of this arbitration, argues for a positive Kompetenz- Kompetenz with concurrent jurisdiction between national courts and the arbitral tribunal (with a condition of issuing a partial award on jurisdiction before considering issues of merits).NAFED v. Alimenta S.A.: Opening a Pandora's Box on Enforcement of Foreign Awards?

In 2020, the Supreme Court issued two significant judgments relating to the enforcement of foreign awards in India. While these judgments analysed the same legal provision regarding enforcement, they adopted contrary approaches and not surprisingly, reached diametrically opposite conclusions. Earlier judgment in Vijay Karia v. Prysmian Cavi E Sistemi Srl (delivered in February 2020) eschewed reviewing the merits of the award in enforcement proceedings. However, just two months later in National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A., the Supreme Court extensively reviewed the merits of the award and held it to be unenforceable. The fate of future enforcement proceedings could hinge on which precedent is relied upon by the enforcing court.

CLEARING THE MIST ON ARBITRABILITY OF FRAUD

Raising allegations of fraud had become a frequently used shield for respondents in Indian arbitrations. Unfortunately, various cases over the years did not provide much succor for the claimants, for whom the battleground would shift from tribunals to courts, where the recalcitrant respondent would argue on the basis of the (alleged) fraud that the dispute is no longer arbitrable.

Ultimately, the Supreme Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings ("Avitel") laid down what would exactly constitute the "serious allegations of fraud" exemption to the arbitrability of disputes. Let view the pros and cons of Avitel.

CLARITY ON THE LIMITATION PERIOD FOR ENFORCEMENT OF FOREIGN AWARDS

The Supreme Court, in the case of Government of India v Vedanta settled the debate on the applicable limitation period for enforcement of a foreign award in India. The Supreme Court held that the enforcement of a foreign award under Part II of the Act would be covered by Article 137 of the Limitation Act, which provides a period of three years, starting from when the right to apply accrues. The Supreme Court also made a passing remark and reaffirmed in this case that the courts should stay away from reviewing the merits of a case in enforcement proceedings.

It echoed that the courts should only look at such cases from the narrow prism of Section 48 of the Act, which enumerates the limited grounds of refusal for enforcement of a foreign award.

INDIAN PARTIES CHOOSING A FOREIGN SEAT OF ARBITRATION

In the absence of any authoritative ruling by the Supreme Court on the issue of Indian parties choosing a foreign seat of arbitration, various High Courts have taken inconsistent positions over the years. In the latest decision dealing with this issue, the Gujarat High Court in GE Power Conversion India Private Limited v. PASL Wind Solutions Private Limited held that two Indian parties can choose a foreign seat of arbitration. The award in such arbitrations would be a foreign award underthe Act. Significantly, the remedy of seeking interim measures from Indian courts in such a scenario would not be available.

TRANSITIONING INTO 2021

2020 kept the domestic and the international arbitration community involved in India engaged. As 2020 came to an end, a few developments that started taking shape last year will define how 2021 proves for India to position itself as an arbitration hub. Following are a few arbitration developments in India that are already attracting eyeballs of the international and domestic arbitration community alike.

THE 2021 AMENDMENTS

The 2021 amendments to the Act (passed by the Lower House of the Indian Parliament on 12 February 2021) came on the heels of the 2019 amendments. The amendments were earlier promulgated by way of an ordinance in November 2020, the highlights include:

- ·amendment to Section 36(3) of the Act that allows a court to unconditionally stay a domestic award where it is prima-facie satisfied that the underlying arbitration agreement or contract which is the basis of the award or the making of the award was induced by fraud or corruption.
- the deletion of the controversial eighth schedule (that had onerous qualification requirements to be appointed as an arbitrator) to the Act that was introduced in 2019 but was never entered into force. In this regard, the amendment provides that norms for accreditation of arbitrators will be specified by the Arbitration Council of India

Bid to make its legal regime international arbitration-friendly, India has repeatedly amended its principal legislation, i.e. the Arbitration and Conciliation Act, 1996 (the 'Act'), over the last five years. The most recent one, the Arbitration and Conciliation (Amendment) Ordinance, 2020 (the '2020 Amendment'), came into force on 4 November 2020 seeking *"to address the concerns raised by stakeholders after the enactment of the Arbitration & Conciliation (Amendment) Act, 2019 [the '2019 Amendment']"*. I had earlier discussed on this blog the concerns raised by the 2019 Amendment from the standpoint of international arbitration. This post aims to serve as an update by analysing the two changes introduced by the 2020 Amendment.Amendment to Section 36(3): Additional grounds for an unconditional stay on enforcement

Section 36 falls under Part I of the Act and deals with the enforcement of domestic arbitral awards. Part I of the Act applies where the place of arbitration is in India (Section 2(2) of the Act). If the seat of arbitration is outside India, Section 36 of the Act would not be relevant – the

enforcement of that award would be subject to conditions set out in Section 48 in Part II of the Act. No amendments have been made to Section 48 of the Act. Nonetheless, from an international arbitration practitioner's standpoint, the amendment to Section 36(3) of the Act carries relevance from two aspects – substantive and procedural.

The Substantive Aspect

The 2020 Amendment adds a new Proviso to Section 36(3) of the Act. It reads as follows:

Provided further that where the Court is satisfied that a prima facie case is made out:

(a) that the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

While the new Proviso is a positive step, there are four key issues here that may require attention. First, for a court to make an order under Section 36(3) (or the new Proviso) of the Act, there must be an application under Section 36(2) of the Act. That application is further dependent on the pendency of an application challenging the award under Section 34 of the Act. Interestingly, Section 34 does not contain any express provision for setting aside an award or refusing its enforcement if "*the arbitration agreement or contract which is the basis of the award*" was induced or effected by fraud or corruption. As per Section 34(2)(b)(ii) of the Act, the only ground (in cases involving allegations of fraud or corruption) to refuse enforcement is where "t*he making of the award*" was induced or affected by fraud or corruption. Therefore, one might argue that if a ground is not available for setting aside an award, how can it be available to an applicant seeking a stay of its enforcement. Secondly, whether an arbitration agreement or a contract is affected by fraud or corruption is a matter of fact and ought to have been debated by the parties during the arbitration proceedings. In most cases, it would have been inquired in detail by the tribunal. To second-guess the tribunal's reasoning and reappreciate the evidence would be contrary to the Proviso to Section 34(2A) of the Act, which states that "*an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence*." Thirdly, a possible counter-argument may be that Section 34(2)(a)(ii) provides for setting aside an award where "*the arbitration agreement is not valid under the law to which the parties have subjected it*" and therefore, an arbitration agreement induced by fraud or corruption will be void under Indian law. But that again begs thefollowing question: given that Section 34(2A) prevents the court from setting aside an award in an international commercial arbitration even when the award is vitiated by patent illegality on the face of it, how could the enforcement of the same award be stayed for an illegality based on fraud or corruption? Moreover, to identify such illegality may not be a straightforward exercise. While corruption in the "making of an award" may be identified by evaluating the tribunal's conduct and is more a matter of procedure, corruption in procuring the underlying contract is a matter of merits and would, thus, require more than just prima facie evaluation of evidence. Lastly, the mandate to unconditionally stay the enforcement in cases of corruption seems to lack logic or reasoning, especially when, in other situations, the court can exercise its discretion to put any applicant to such terms, as it deems fit, before granting any stay order.

The Procedural Aspect

The temporal scope of Section 36 of the Act was the subject-matter of some controversy in the past after it was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (the '2015 Amendment'). It took some back and forth between the Indian government and the Supreme Court of India to conclusively resolve

that issue. With the 2020 Amendment, it seems that judicial intervention in revisiting the same issue would not be needed. The Explanation to the new Proviso to Section 36(3) of the Act makes it abundantly clear that the said Proviso shall have retrospective effect and shall be deemed to have been inserted with effect from 23 October 2015 (i.e., the date on which the 2015 Amendment came into force). This is also in conformity with the decisions in BCCI v Kochi Cricket Pvt. Ltd. and Hindustan Construction Co. v Union of India where Section 36 of the Act was held to be retrospective in its applicability. The 2020 Amendment further states that the new Proviso would apply to all court proceedings, irrespective of whether the court or underlying arbitral proceedings commenced before or after 23 October 2015. The 2020 Amendment, therefore, settles the debate from a procedural aspect by formally acknowledging the maintainability of an application for stay of enforcement on the grounds mentioned in the newly added Proviso to Section 36(3) of the Act, irrespective of when that application was filed.

Although the 2020 Amendment brings clarity to the temporal scope of the newly added Proviso to Section 36(3) of the Act, it raises two potential concerns.

- First, in cases where an application under Section 36(2) of the Act is pending adjudication before a court, the applicants will now have to make fresh applications based on the grounds listed in the new Proviso. This is likely to involve delays and increased costs unless the courts can sua sponte take notice of this new Proviso and dispense with the filing of fresh submissions. Secondly, in cases where applications under section 36(2) already stand dismissed, the applicants would claim to have a fresh cause of action to file a new application based on a legal ground that is deemed to have existed since 23 October 2015 in the statute but could not be relied upon earlier.

Given the tendency to take one's chances in an already lost cause, especially in Indian courts,it would not be surprising to see some applicants trying to take a second shot at the same pie. Since it is not difficult to rule out such abusive behaviour, the revival of already decided cases using the new Proviso may be cautiously handled by the courts.

AMENDMENT TO SECTION 43J OF THE ACT

The 2019 Amendment outrightly disqualified foreigners (such as a foreign scholar, or a foreign-registered lawyer, or a retired foreign officer) from being an accredited arbitrator under the Act. This was because of the limitations imposed by the Eighth Schedule to the Act, that was introduced by the 2019 Amendment.

The Eighth Schedule specified the qualifications, experience, and norms for accreditation of arbitrators and these norms were largely biased in favour of Indian lawyers, cost accountants, government officers, etc. The 2020 Amendment directly addresses that concern by removing the Eighth Schedule altogether from the Act and replacing it with "the regulations." It means that the accreditation of arbitrators will now be governed by the criteria laid down in these "regulations.

However, what these "regulations" might be, who would make them, by when they would be released, are some of the questions that have been left unanswered. It is only hoped that scholars, practitioners, and key stakeholders will be consulted in finalizing these regulations to prevent any further controversy on this issue. It is likely, in my view, that these regulations will ensure inclusivity through diversity rather than fall prey to the same limitations in the Eighth Schedule.

CONCLUSION

What is evident is the intent of the Indian government in streamlining its arbitration regime through a flurry of amendments in the last few years, particularly after a stalemate of 19 years since the Act was enacted in 1996. On a positive note, it confirms that the concerns of the international arbitration community are reaching the ears of Indian policy-makers, who are not only taking them into account but are keeping an open-minded approach in rectifying past errors when needed. Until the next amendment, we can keep our fingers crossed.

***

CONSTRUCTION ARBITRATION – CLAIM MAKING IS A CRITICAL REQUIREMENT FOR AWARD

1. THE CLAIM IN A CONSTRUCTION PROJECT:

❖ **What is a construction claim?**

A claim is a demand for "something supposed to be due". The definition of claim in the dictionary is an assertion of something true. Claims in construction projects, involving contractors and employers making demands to each other are known as construction claims. Contractor requests the employer for either time extension or reimbursement of additional cost, or sometimes both. Such requests by the contractor are the "Claim of the Contractor on the Employer" in the project. Contrary to this, a counter-claimcan be put by the employer on the contractors.

The claims of the contractors on employers are becoming inevitable and unavoidable in the present era of large projects involving new technologies, specifications and competing business requirements.

Types of claims are:

I. Time Claims

II. Cost Claims

1.1 Types of cost claims:

The following can cost claims:

- Loss / expenses (damages)
- Additional payment under specific provisions of the contract of the project
- Additional payment under specific provisions of the contract Act, 1872
- Variations
- Disruptions
- Prolongations

❖ **The objective of time claims:**

- To extend the contract completion time
- To waive the LD, liable to be paid to the employer
- To prepare the claim record document for the cost claims

❖ **The objective of cost claims:**

- To reimburse the loss and expenses incurred in the project.

- To compensate the extra preliminaries due to delay in the project by faults of employer and consultants.

1.2 Basis of construction claims:

Claims emerge on the following three bases:

I. **From the Contractual Provisions:** as per the contract, such claims are made keeping the contract conditions in mind.

II. **From the Statutory/Common Law/law of the land of the country:** Such claims are generated as the contractor's remedy against the damaged calculations according to the law of the land/Common Law principles.

III. **Negligence (Tort) claims:** Such claims are generally liabilities for some particular acts or omissions, acted in breach of a legal duty imposed by law, causing the contractor some foreseeable damage. Such claims are the award of money damages as compensation for the damage done.

1.3 Why are construction claims made by contractors?

- For entitlement to get an extension of time. It makes the contractor eligible to get compensation for the delayed part of the project schedule. Also, LDs and penalties relating to the schedule are waived off.
- Entitlement to recover costs relating to price variations as per the contractual terms.
- Entitlement to additional payments relating to all the activities added to the project during the delayed period.
- Successful claim settlement in amicable manners keeps the thread of business relationship between the contractor and employer intact.

❖ **How do construction claims arise?**

Construction claim can arise due to many reasons/situations/factors/delays during the execution of the contract. All these reasons have been covered in detail encompassing all aspects, in the previous chapter of delay analysis report (DAR). There cannot be a standard list of such reasons, and basis for claims by contractors as these may vary from one project to the other and from contractor to contractor.

However, the following could be some common reasons generally resulting in construction claims arising in projects:

- Delays in engineering, procurement, construction and commissioning phases of the project, already covered in the preceding chapter of Delay Analysis.
- The employer requests changes/additional jobs/scope and does not consider the impacts on the main project costs. Generally, the employer calculates additional payment but not for the time, which does not work for the contractors. Therefore the contractors raise claims.
- Different site conditions than mentioned in the contract. Contractors have to incur additional costs and devote extra time for taking care of changed site condition. Examples of such site conditions have been given in the DAR chapter.
- Failure of the employer to share the information, data and documents as per the contract. The contractor cannot proceed without necessary data from the employer, and non-receipt of such data has a financial consequence in the project that needs to be compensated by the employer.
- Failure of the employer to ensure the supply/availability of the employer part of the equipment at particular stages of the project.
- Different kinds of unpredicted disputes between the employer & contractor that has financial consequences on the contractors.
- Termination of contract by the employer or contractor.

- Force majeure situations faced in the project.
- Acceleration of the work as demanded by the employer.
- Failure of any stakeholder of the project to complete his part of the job as specified in the contract. Such situations impact other stakeholders in generating claims among different stakeholders.
- Failure of various stakeholders of the project to cooperate in the performance of the contract.
- Delay due to different unforeseen reasons which are not under the control of the contractors.
- The slowdown in the project due to various reasons as covered in details in DAR and reasons for delay in the project.
- Work becomes impossible to perform. This situation generates the possibility of claims.
- Different type of disruptions created by the employer to the contractor.
- In-efficiency and mismanagement by the contractors during the execution of the project which delays the project.
- Delay in payment/no payment/unnecessary deductions from the bills of the contractors, disputes in the taxes of the duties.
- A dispute among contractors partners themselves, and the contractors and sub-contractors.

1.4 Construction claim process:

Construction claim process generally consists of following main four steps:

- Step 1- To identify the problem/reason for the claim and raise the claim.
- Step2- Registering the claim and reaching a settlement or disagreement between the contractor and employer.
- Step 3- In case of a disagreement, a dispute is created between the contractor and employer.
- Step 4- Dispute referred for resolution through ADR/litigation.

1.5 Claim avoidance:

Claims in projects are a routine activity. However, it is desirable to avoid the claims in a project, by executing it to the satisfaction of all stakeholders. The claims might land the employer, contractor & sub-contractors in an arbitration and legal suits which is not an ideal situation for successful completion of the project. Therefore, the following are some of the suggestions to avoid the claims in the project:

I. Employers should hire the contractors & consultants with a good reputation and good past track record of performance.

II. The employer should appropriately compensate the contractor for his standard/quality of work.

III. A good and clear contractual document is a basic need to implement the contract with clarity which reduces the possibility of delays and claims.

IV. Employers should have some say in the selection of the right sub-contractors and sub-vendors of the contractors based on past experiences and observed performance.

V. The employer should minimize the change orders and frequently giving extra jobs, which has a major role to play in delays and disputes.

VI. The employer should clear/approve all the required documents/drawings and clearances as per the schedule specified in the contracts.

VII. The employer should provide autonomy to the contractors to decide their issues relating to technology as per the technology provider.

VIII. The employer should avoid taking responsibility for approving/clearing drawings and documents in a large amount which becomes out of control for the employer/consultants and creates slow down and disputes.

IX. Employers and contractors to ensure proper project management and administration of the contract.

X. Employer and contractors to maintain proper and adequate documentation during the execution of the projects to discuss and settle day-to-day conflicts based on such records.

XI. The employer must make sure to accept the justified claims of the contractors across the table without letting them go on to become a dispute/conflict. It is always beneficial to encourage dispute settlement among the employer and contractors directly.

XII. The employer should understand and appreciate the real difficulties/disruptions/hindrances of the contractors and facilitate and support the contractor from all angles, including such financial support as is the need.

XIII. The employer and the contractor should work to achieve a win-win situation in the project by creating mutual trust and confidence in each other.

It should be understood by the employer and the contractor that settlements of the claims between them without involving any third party, is the best solution not only for closing the project successfully, but also maintain future business relationships In case the claims become a dispute, the employer and contractor should settle the same through negotiation having constituted a Dispute Review Board (DRB) comprising of the persons drawn from the contractors and employer sides at the senior management level, followed by mediation, conciliation failing which, should resort to Arbitration.

XV. To draw up contracts with a professional mindset and a fair distribution of risk between contractor and employer is much needed.

XVI. A unilateral and one-sided contract from employers should be avoided. This kind of contract generates huge amounts of conflicts leading to claims.

XVII. Contractors should not try unethical means to earn extra money in the projects.

XVIII. The contractor must ensure all the contractual requirements relating to the scope, quality, time and other provisions are being complied with, for handing over a successful project to the employer.

1.6 Notice for registering the claim:

As soon as a claim arises, the notice of claim is served by the claimant to the respondent as per the protocol. Timelines for submission of claims are to be adhered to as per the contract. Acknowledgement is required if the employer is not trustworthy. The claim can be registered as per the limitation act, which is 3 years while FIDIC contracts specify a very small period if it is implemented in India. However, if the FIDIC system of the contract, is being challenged in India, then Indian limitation act will prevail and should be applied.

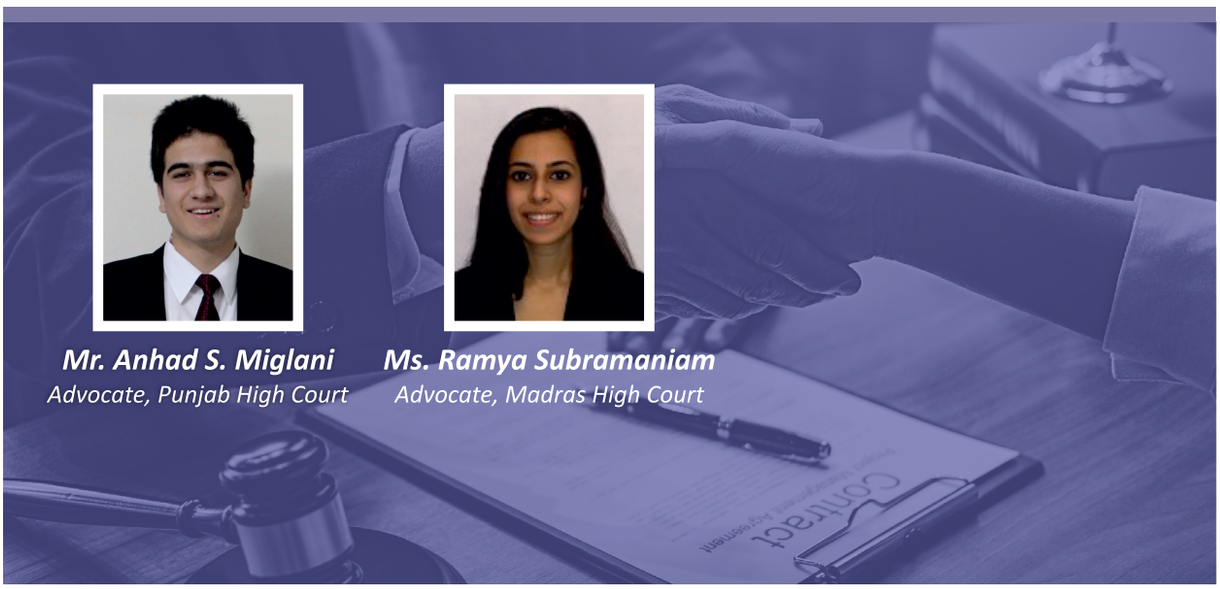
1.7 Claim substantiation:

"What can be asserted without evidence can also be dismissed without evidence" *- Christopher Hitchens*

- Contractor/claimant is required to substantiate their claims with facts, figures, and references from the contract in the claim.
- The onus lies on the claimant to prove the claim.
- Contractors are required to furnish the claim in a self-explanatory manner with all supporting calculations.
- All backup documents like correspondence, emails, letters, invoices, minutes of meetings, photos, drawings, all the evidence are to be attached to the claims.

***

RETHINKING ARBITRATION IN A UNIQUELY INDIAN CONTEXT



Mr. Anhad S. Miglani
Advocate, Punjab High Court

Ms. Ramya Subramaniam
Advocate, Madras High Court

ABSTRACT

As arbitration emerges as the preferred modeof settling commercial disputes, India presents a unique case to study its impact. Unlike other major jurisdictions, the State in India is the country's biggest litigant and a major player in the commercial arena, both domestic and international. Consequently, with an increasing number of public-private and public-public disputes also being subjected to arbitration, the Stateand its instrumentalities have become important stakeholders in the arbitral process. In contracting away their right to avail judicial remedies in favour of a private adjudicatory forum, parties choosing to arbitrate inevitably accept the risks and returns associated with such a trade-off. However, whether a Welfare State should be compelled to make such a choice and subject its claims at par with private interests is debatable, but is a question rarely examined. While Indian law and judicial precedent surrounding arbitrationis largely seen as following internationally accepted principles and jurisprudence based on the Model Law,it has not accounted for its application to the State as a party. An assessment of the arbitral process from such a standpoint reveals that the law and global jurisprudence on international commercial arbitration may not be a completely perfect

** The authors are practising advocates with independent law practice atthe Punjab and Haryana and Madras High Courts, respectively. They have received B.A., LL.B. (Hons.) degrees from the National Law School of India University, Bangalore and regularly write for legal journals, blogs and other media outlets. They can be reached at asmiglani.adv@gmail.com and ramya@astrislegal.com.*

Deepika Kinhal and others, 'Government Litigation: An Introduction' (Vidhi Centre for Legal Policy, 16 February 2018) <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/GovernmentLitigationFinal.pdf> accessed 17 November 2020. As per the Ministry of Law and Justice, the government is party to approximately 46 per cent of all pending court cases. The figure presumably accounts for Central and State Governments, as well as public sector undertakings (PSUs), statutory corporations and other autonomous bodies.

fit in the Indian context, but can suitably be adapted to ensure that public interest is not compromised while keeping the core of arbitration intact.

INTRODUCTION

Official estimates suggest that the government and its agencies, in various capacities, are party to almost half of all pending cases in India's courts. Any serious conversation about judicial reform must, therefore, inevitably deal with the role of the State as the country's largest litigant. Consequently, the same must also apply to an analysis of India's arbitration law and policy, given the pervasive recourse to arbitration agreements in government contracts and treaties[2].

The extant law on arbitration is codified in India as the Arbitration and Conciliation Act, 1996 ("the Act") enacted with an aim to, inter alia, facilitate expeditious resolution of disputes in India with minimal judicial intervention.[3] Since then, as a matter of categorical government policy, arbitration has been acknowledged and promoted as a preferred mode of dispute resolution, presumably in light of global commercial standards as also an effective alternative to litigating before India's courts.[4] The apparent merits of the arbitral process are all too well known,

and in fact, have also come to be recognised by the Supreme Court itself, which, with its overt pro-enforcement bias, has in recent years been steadfast in its support of arbitration claims.[5]

However, such an unequivocal endorsement of the arbitral process by the government and the courts must inevitably be examined on the basis of tangible results delivered in reality. It remains to be seen whether arbitration in India has actually delivered on its promise of a fair and efficient alternative dispute resolution mechanism. Like any other policy decision, the decision to arbitrate must also be objectively assessed and evaluated, especially if matters involving the State continue to be decided through the arbitral process.

A Right to Information request filed by the authors revealed that no data is maintained in order to evaluate the efficiency of the process or of the quality of its outcomes, even in cases where the State is a party. It would thus appear that a seemingly exaggerated emphasis laid on the virtues of arbitration has obscured the necessity to dispassionately assess its real impact. An attempt is, therefore, required to be made to critically study the arbitration landscape in India, especially from the standpoint of State interest.[6] There is also a need to examine whether disputes involving public interest or public money should be taken away from the constitutionally established judicial branch in favour of an undeniably private form of dispute resolution.

---

[2] Report of the High Level Committee To Review The Institutionalisation of Arbitration Mechanism in India (2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed 10March 2021 (Srikrishna Report); A mere perusal of the case titles of major reported arbitration decisions from Indian courts illustratively reveals that most, if not all, are cases to which government agencies are a party.

[3] The Arbitration and Conciliation Act 1996, Statement of Objects and Reasons.

[4] Srikrishna Report (n 2) 3.

[5] Ranbir Krishan and others, 'Sanctity of Arbitral Awards in India' (October - December 2010) India Law Journal<https://www.indialawjournal.org/archives/volume3/issue_4/article_by_ranbir_krishan_namit.html#:~:text=India%20Law%20Journal&text=Ranbir%20Krishan%2C%20Krishan%20Singhania%2C%20and,Act%20on%20very%20limited%20grounds> accessed 25 November 2020; Mcdermott International v Burn Standard Co Ltd (2006) 11 SCC 181; Vijay Karia v PrsymianCavi E Sistemi SRL2020 SCC OnLine SC 177.

[6] The Constitution of India envisages the country as a welfare state, and all state action is required to conform to the constitutional standards of equality, fairness and reasonability, in accordance with public interest. See Ramana Dayaram Shetty v International Airport Authority of India (1979) 3 SCC 489.

JUSTICE DELIVERY OR DISPUTE SETTLEMENT

The economic liberalization reforms of 1991 gave an historic impetus to industrial growth and commercial enterprise in India. A consequence of increasing business activity was also felt by the legal system, which now faced a rising number of commercial disputes from a highly competitive market. Resultantly, a need was felt to look for efficient alternatives to enable the judicial system to keep pace with economic growth and modernization.[7] The Act, based primarily on the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), was passed against this backdrop, with an express recognition of the fact that "our economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune with such reforms."[8] Interestingly, it was passed in some haste, having initially been introduced as a Presidential Ordinance before being enacted as an Act of Parliament. Moreover, the same was done without following the standard practice of referring the bill to a Parliamentary Committee.[9] It is unsurprising then, that aspects of commercial and legal relationships uniquely specific to India, including the pervasive role of the State, and the potential for arbitration in that context, were not even considered.

Nevertheless, with the Act having expressly restricted judicial recourse in cases referred to arbitration,[10] it also begged the question whether the law envisaged arbitration merely as a private mode of settling disputes or as a substitute for the justice delivery system i.e. the courts itself. The dichotomy between these two views, classified by some as the 'legalistic' and 'realistic view' respectively,[11] may not be addressed strictly legally, but is critical to any inquiry about the efficacy and fairness of the arbitral process. The answer, however, is not as elusive as it may appear.

PROCEDURAL RIGOUR AND JUDICIAL REVIEW

Unlike public courts, arbitral tribunals are relatively free from the rigours of procedural laws including those relating to evidence.[12] In fact, this kind of procedural flexibility and informality is touted as one of arbitration's biggest attractions and a primary reason for its efficiency. There is only a general requirement for the tribunal to act fairly, in accordance with principles of natural justice.[13] However, it is entirely myopic to view procedure in isolation from the substance of a dispute, to which it is inextricably linked. Recourse to the arbitral process not only allows flexibility to parties in terms of technical requirements of procedure, but inevitably affects their substantive rights as well.[14] Additionally, special procedures such as section 80 of the

[7] Krishna Sarma and others, 'Development and Practice of Arbitration in India: Has it Evolved as an Effective Legal Institution' (2009)CDDRL Working Paper No. 103 (Stanford Report).

[8] The Arbitration and Conciliation Act 1996, Statement of Objects and Reasons.

[9] S K Dholakia, 'Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003' (2004) 39 ICA'sArbitration Quarterly.

[10] The Arbitration and Conciliation Act 1996, s 5 ("Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.")

[11] Nathan Isaacs, 'Two Views of Commercial Arbitration', (1927) 40(7) Harvard Law Review.

[12] The Arbitration and Conciliation Act 1996, s 19(1) ("The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).")

[13] J CBudh Raja v Chairman Orissa Mining Corporation Ltd 2008 (2) SCC 444.

[14] Isaacs (n 11).

> Code of Civil Procedure,[15] provided for as additional safeguards to the government against such civil litigation, are also unavailable in arbitral proceedings.

The significance of procedural rigours or a lack thereof is especially more pronounced in light of the stringent standard of judicial review adopted by the Supreme Court in dealing with arbitral awards. In line with international practice, even mistakes of fact and mistakes of law have been held to not warrant interference with awards rendered by arbitral tribunals.[16] Courts have refused to reassess or re-appreciate evidence in challenges to arbitral awards, holding that a review on merits would be impermissible.[17] Consequently, in submitting their disputes to arbitration, parties must be conscious of its impact on their substantive rights and, inescapably, on the ultimate outcome of the dispute itself. The degree of approximation to court results may vary,[18] but for the government to subject disputes involving taxpayer money to a process lacking procedural safeguards otherwise duly provided by law must be based on a careful, conscious and considered assessment of all factors and not just on the perceived efficiency of the arbitral process.

TRANSPARENCY AND PRECEDENT

In stark contrast to the civil courts, the arbitral process also suffers from an inherent lack of transparency. Only a small number of awards are actually published, and most decisions do not come to light, unless the same are challenged before the higher courts. According to Redfern and Hunter, studying the practice of arbitration is therefore akin to peering in the dark.[19] Under Indian law, section 42-A of the Act allows for disclosure of information about arbitral proceedings only for the purposes of implementation and enforcement of an award. The same is not obtainable even through a statutory request for information under the Right to Information Act, 2005.[20] Resultantly, such confidentiality requirements associated with arbitration proceedings make it difficult for interested parties like shareholders, creditors or in case of public-private arbitrations, the taxpayers, to be apprised of the same.[21] As opposed to countries like Australia, France and the United States, in India, such information cannot be disclosed even when public interest is involved.[22]

> Confidentiality of proceedings and secrecy of records does indeed foster flexibility and may very well be in the interest of some parties, but whether cases to which the government of a Welfare State is a party should be allowed to be conducted in such a manner is suspect. Public access to and transparency of the judicial process have been flagged as important constitutional goals by the courts.[23]

In fact, a nine-judge bench of the Supreme Court in Naresh Shridhar Mirajkar v. State of Maharashtra[24] has held as under:

---

[15] As per s80 of the Code of Civil Procedure 1908, a prospective petitioner/claimant is required to give the government two months' notice for civil actions before approaching court.

[16] Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India(2019) 15 SCC 131; Sumitomo Heavy Industries v ONGC Ltd (2010) 11 SCC 296.

[17] ibid.

[18] Isaacs (n 11).

[19] Walter Mattli, 'Private Justice in a Global Economy: From Litigation to Arbitration' (2001) 55(4) International Organization.

[20] R. S. Sravan Kumar v Department of Legal Affairs, Second Appeal No. CIC/DOLAF/A/2018/619134 (Central Information Commission).

[21] Richard S Bayer and Harlan S Abrahams, 'The Trouble with Arbitration' (Winter 1985) 11(2) Litigation.

[22] Rose Maria Sebi and Sandeep Golani, 'Does the Confidentiality Provision Pose a Stumbling Block in Arbitration?' (IndiaCorpLaw, 17 October 2019) <https://indiacorplaw.in/2019/10/confidentiality-provision-pose-stumbling-block-arbitration.html>accessed 20 January 2021.

[23] Swapnil Tripathi v Supreme Court of India (2018) 10 SCC 628 ("Sunlight is the best disinfectant").

[24] (1966) 3 SCC 744.

"It is well-settled that in general, all cases brought before the Courts, whether civil, criminal, or others, must be heard in open Court. Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice. Trial held subject to the public scrutiny and gaze naturally acts as a check against judicial caprice or vagaries, and serves as a powerful instrument for creating confidence of the public in the fairness, objectivity, and impartiality of the administration of justice. Public confidence in the administration of justice is of such great significance that there can be no two opinions on the broad proposition that in discharging their functions as judicial tribunals, courts must generally hear causes in open and must permit the public admission to the court-room. As Bentham has observed: 'In the darkness of secrecy sinister interest, and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the Judge himself while trying under trial (in the sense that) the security of securities is publicity.'"

Further more, the confidentiality surrounding arbitration proceedings also strips arbitral awards of any precedential value, and parties submitting to arbitration therefore renounce the benefits of stare decisis as well. The impact is especially pronounced in cases arising out of government contracts insofar as the government executes identical agreements with different parties, often giving rise to very similar disputes across contracts. Without access to decisions in similar cases, it is not uncommon for vastly distinct awards to be passed against the government in identical disputes by different arbitral tribunals.[25] Uniformity and consistency, which have been held to be at the core of the judicial discipline,[26] are thus lost in search of expediency and informality. Resultantly, arbitrariness, the antithesis of fairness and justice, may potentially creep into arbitral awards as well.

NATURE OF ARBITRATORS' FUNCTION

Since arbitrators are creatures of contract, unlike judicial functionaries, they ought to be viewed as agents of the parties appointing them (especially where the arbitration agreement provides for a multi-member tribunal).[27] There is no mandatory requirement for an arbitrator to have a judicial background or training, irrespective of the nature of the dispute in question.

The relationship between the arbitrators and parties is governed not by civil procedure, but by the terms of the arbitration agreement. The fact that parties retain the power to appoint and remove arbitrators, fix arbitral fees and retain control over procedure and applicable law undoubtedly evidences the contractual underpinnings of arbitrators' relationship with the parties and the dispute. The prevailing view with respect to international commercial arbitrations also seems to be that parties and arbitrators are bound by a sui generis contract overlaid with an adjudicatory public function,[28] but one in which obligations are owed to the parties individually, and not to the public in general.

[25] *The authors, in their capacity as government counsel, have experienced such scenarios first hand.*

[26] *State of Uttar Pradesh v Synthetics and Chemicals Ltd (1991) 4 SCC 139. The doctrine of stare decisis is central to the justice system.*

[27] *Matthew Gearing, 'The Relationship Between Arbitrators and Parties: Is the Pure Status Theory Dead and Buried?' (Kluwer Arbitration Blog, 17 June 2011) <http://arbitrationblog.kluwerarbitration.com/2011/06/17/the-relationship-between-arbitrators-and-parties-is-the-pure-status-theory-dead-and-buried/> accessed 20January 2021.*

[28] *ibid.*

Given such contractual underpinnings, it is highly unlikely for an arbitrat or who owes obligations only to a contracting party to consider public interest in cases where it may be involved, the only exception being the government's nominee in case of a multi-member tribunal.[29] Consequently, an award so rendered is in escapably a product of contract, and not of purely judicial adjudication,[30] and must, hence, be seen as such.

FAIRNESS AND EFFICIENCY

It would not, therefore, be unreasonable to conclude that the arbitral process, whether as a substitute of or as a supplement to the judicial organ entails certain trade-offs to be made by parties which may have a substantial bearing on their rights and liabilities. Although the degree of such an impact of the choice of arbitration vis-à-vis litigation may not be capable of objective assessment or even always be entirely conceivable, the underlying assumption that perhaps justifies the same is that parties voluntarily enter into agreements to arbitrate, and as such are presumed to have made a considered decision to submit their disputes to a private process, fully aware of its consequences.

However, it is difficult to appreciate the basis on which governments across the country appear to have taken such a decision without any objective assessment or examination of its outcomes. Such a policy is even more questionable in light of the fact that a majority of arbitrations in India continue to be conducted ad hoc, in the absence of various safeguards that institutional arbitrations may otherwise provide[31]. It appears that the overwhelming determinant in favour of arbitration continues to be its promise of speed and flexibility, not with standing the integrity of the process as a judicial substitute, or a lack thereof.

TIME AND COST EFFECTIVENESS

Arbitration proceedings are, in many respects, free from the shackles of ordinary litigation. Party autonomy, the underlying essence of arbitration, is believed to inevitably translate into flexibility, speed and simplified costs.[32] Even under the Act, in India-seated arbitrations, parties are free to decide on matters of procedure, notwithstanding laws governing evidence or civil procedure.[33] Judicial interference is also limited by statute,[34] and the newly added Section 29A prescribes a one-year mandated time limit to pass an award.[35] Yet, such normative statutory prescriptions do not always achieve the desired results, and may in some cases even prove to be self-defeating.

TIME

In practice, arbitrators, who in India are mostly retired judges, habitually treat arbitral proceedings the same way as traditional court processes, generous with adjournments but often inflexible about procedure.[36] The newly insertedone year time-limit for making the award can also be mutually extended by parties for six additional months, and then by court for any further period on being shown 'sufficient cause' for the same. Ironically, such a provision paves way for unnecessary judicial intervention in the arbitral process, which, contrary to legislative intent, results in delaying the proceedings instead, notwithstanding the parties' agreement to continue. Interestingly, insofar as it takes away from the parties, the right to continue arbitration after a certain time, and the right to fix their own timeframe, such a provision appears to be contrary to party autonomy and thus to established arbitration jurisprudence itself. Procedural autonomy has also been curtailed by Indian courts to mean that 'though Code of

[29] *KláraDrličková, 'Arbitrability and Public Interest in International Commercial Arbitration' (2017) 17(2) ICLR.*

[30] *Isaacs (n 11). Even a decision otherwise coram non judice, may be ratified by parties to an arbitration.*

[31] *Stanford Report (n 7) 7.*

[32] *Sunday A Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6 Journal of Sustainable Development, Law and Policy 222.*

[33] *The Arbitration and Conciliation Act 1996, s 19.*

[34] *The Arbitration and Conciliation Act 1996, s 5.*

[35] *The Arbitration and Conciliation Act 1996, s 29-A.*

[36] *Indu Malhotra, 'Fast Track Arbitration' (2006) XLI (1) ICA's Arbitration Quarterly.*

Civil Procedure and the Evidence Act are not applicable strictly, but the settled principles do apply.'[37] Consequently, even parties invariably approach arbitration with a similar mind-set, and delays are therefore not uncommon.

> Moreover, despite the general proscription under section 5 of the Act, as a matter of common practice as well as statutory recourse, judicial intervention in arbitration proceedings continues to be a major hindrance in the timely resolution of disputes. Arbitrations in India beg judicial interference at every other stage, and this need is more pronounced given that ad hocarbitrations continue to be the norm.[38] For instance, in the absence of an agreement or consensus (which is fairly common,[39] especially where a state entity is a party), parties are constrained to approach a High Court under section 11 of the Act for the appointment of an arbitrator.[40]

A party seeking termination of a tribunal's mandate on the ground of a de jureor de factofailure or impossibility to act is also entitled to approach a court under section 14. Besides, technically, any order passed by an arbitral tribunal against which no recourse is provided under the Act can potentially be challenged before a High Court under article 227 of the Constitution of India.[41] Furthermore, awards once passed, are subject to challenge in setting aside proceedings before a civil court, followed by a statutory appeal under section 37 before the High Court, which may further be appealed before the Supreme Court. Notably, no mandatory timeline is provided for any of such proceedings before the courts, not even for execution or enforcement.[42] As noted above, although the courts are unlikely to interfere with the arbitral process or awards, such decisions are inevitably given only after long, drawn out judicial proceedings. It is only after passing these multiple and dilatory hurdles, not very different from the course of an ordinary civil suit, that an award can finally be realised in its true sense.

COST

Even in terms of costs, it does not appear as if arbitration is necessarily a cheaper alternative. Contrary to prevailing opinion, ad valorem court fee otherwise payable in civil suits is, in a large number of cases, less than the fee payable to arbitrators in accordance with the Fourth Schedule to the Act, especially in high value disputes.[43] Moreover, in any case, a lot of additional costs peculiar to arbitration are incurred by parties including administrative expenses, clerical charges, reading fees, the cost of conducting hearings (often at expensive venues), arbitrators' travel and lodging, stamp duty on awards etc.[44] Unlike ordinary civil suits, where only the claiming party is liable to affix court fee, the payment structure under the Act compels both parties to equally contribute to such arbitral fees and costs.[45] Critically, this is unfavourable for government entities in particular,

---

[37] Sahyadri Earthmovers v L&T Finance Limited (2011) 4 MhLJ 200.

[38] Srikrishna Report (n 2) 14.

[39] Aditya Sondhi, 'Arbitration in India – Some Myths Dispelled' (2007) 19(2) Student Bar Review.

[40] Although the 2019 amendment to the Act has conferred the power to appoint arbitrators upon designated arbitral institutions, but the same is yet to be notified.

[41] The Constitution vests with the High Courts, the power of superintendence over all courts and tribunals in their jurisdiction. Although in Deep Industries Ltd v ONGC (2019) SCC Online SC 1602, the said power has been held to have extremely restricted application in arbitration cases, being an overarching constitutional remedy, it continues to be invoked nonetheless.

[42] The timeframe of one year provided under section 34 of the Act has also been held to be merely directory and not mandatory. See State of Bihar v Bihar Rajya Bhumi Vikas Bank Samiti (2018) 9 SCC 472.

[43] Palash Taing and Moonmoon Nanda, 'India: Commercial Courts Or Arbitration: An Unpopular Opinion On Why Opt For Commercial Civil Courts Over Domestic Arbitrations In India' (Mondaq, 01 July 2020) <https://www.mondaq.com/india/arbitration-dispute-resolution/959930/commercial-courts-or-arbitration-an-unpopular-opinion-on-why-opt-for-commercial-civil-courts-over-domestic-arbitrations-in-india> accessed 15 December 2020.

[44] Sondhi (n 39).

[45] The Arbitration and Conciliation Act 1996, s38.

who are compelled to share the costs by paying exorbitant amounts of public money even as respondents and even when frivolous claims are lodged against them. Such a system serves to further encourage contracting parties to raise unreasonably inflated claims and counter-claims, against which a higher proportionate fee then becomes payable. Intriguingly, the Act provides for no effective mechanism of refund or return of such fees should an arbitrator retire or resign for whatever reason. The fact that such expenses are spent by the state on a parallel, private alternative, in addition to what it already expends on maintaining the court system, is also a factor to be kept in mind while considering the costs associated with the arbitral process.

ARBITRATOR ACCOUNTABILITY AND BAD AWARDS

Issues of Accountability and Fairness

Public confidence in courts rests largely on the legitimacy of the judicial process. The general reposition of this trust is based on an expectation of impersonal application of certain objective principles to resolving disputes, as against a system subject to variable predilections or prejudices.[46] Judges' perceived adherence to such ethical standards along with a scope for review and mechanisms for accountability are central to the effective functioning of a legal system.[47] Hence, the means for maintaining such standards i.e.,procedure, rules and regulations, assume great significance. Yet, ironically, these are the very elements, the lack of which is a core feature of the arbitral process, which has come to be characterised by a kind of forced informality.[48] The apparent absence of such conventional checks and balances does arguably belie claims about the reliability of the arbitral process, at least in comparison with the constitutionally established judicial system. In fact, the same is also viewed as a possible reason for excessive judicial intervention by Indian courts whose inclination to interfere in arbitration matters has been attributed toa lack of trust or comfort with an outsourced adjudicatory mechanism.[49]

Albeit, the Act does enjoinarbitral tribunals to ensure procedural fairness,[50] the provisions are relatively inadequate and devoid of a comprehensive basis to ensure compliance and foster arbitrator accountability or a just standard of review. More importantly, the law does not provide any effective recourse to a party who might be treated unfairly. A challenge to an arbitrator on grounds of impartiality or lack of independence is required to be heard by the tribunal itself, but sans an immediate remedy of appeal to the aggrieved party.[51] Even on the preliminary question of jurisdiction, a tribunal's decision rejecting a jurisdictional challenge can not be appealed or reviewed except in setting aside proceedings after the final award is passed.[52]

[46] Nixon M. Joseph v Union of India AIR 1998 Ker 385.

[47] Judicial Conference of the United States, Strategic Plan for the Federal Judiciary (September 2020) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf> accessed 18 January 2021.

[48] Richard H Weise, Representing the Corporation: Strategies for Legal Counsel (2nd edn, 1st vol, Wolters Kluwer 2007) 8-Ex-47; Sleepwell Industries Co Ltd v LMJ International Ltd 2017(4) CHN (CAL) 621. The informality attached to arbitration proceedings also has other consequences, and an award is not subject to the same standard of scrutiny as a decree.

[49] Promod Nair, 'Quo Vadis Arbitration in India' The Hindu Business Line (19 October 2006); Stanford Report (n 7) 25. Between 1996 and 2007, the Indian Supreme Court modified or set aside half of the arbitral awards challenged before it.

[50] The Arbitration and Conciliation Act 1996, s 18 ("The parties shall be treated with equality and each party shall be given a full opportunity to present his case").

[51] The Arbitration and Conciliation Act 1996, s 13.

[52] The Arbitration and Conciliation Act 1996, s16.

As a result, even parties with valid objections regarding the independence or impartiality of arbitrators or about the composition or competence of the tribunal are unduly prejudiced. They are left to the whims of such arbitrators and are forced to spend considerable time, money and resources till the passing of the final award notwithstanding that the same may never have been valid in the first instance.[53] Critically, these are significant departures from the Model Law, which provides for immediate appeals to aggrieved parties in such situations, noting that the *kompetenzkompetenz* principle must be subject to court control.[54] However, when faced with this issue in India, the Law Commission refused to recommend any change in the statute despite acknowledging the sound basis for such a proposal. Echoing the ostensible legislative preference of speed over fairness, it cited the potential for dilatory tactics and a scope for abuse of appellate provisions as paramount considerations.[55]

> The law in India also does not explicitly deal with arbitrator misconduct or corruption, leaving parties to raise the same only as grounds in setting aside proceedings and appeals against bad awards. Rather thana provision for holding arbitrators personally accountable, the Act, instead, has given them a general and widely worded immunity from prosecution for acts done in good faith,[56] irrespective of the repercussions of such acts on the parties' rights.[57]

It is also troubling to note that a party complaining of arbitrator bias or incompetence is none the less forced to bear the costs of the proceedings. While technically, tribunals are required to render detailed accounts and return any unexpended balance of fees and costs,[58] the same is rarely adhered to, especially in ad hocarbitrations. The Act provides no recourse for recovery in such situations, and parties are left having spent exorbitant amounts even in cases where a challenge against the arbitrator is successful, or when arbitrators resign for any reason. Such instances are not unheard of, especially in arbitrations where claims are sought against government entities, who have no choice but to spend considerable sums of public money without any chance for recovering the same.[59]

RECOURSE AGAINST BAD AWARDS

In modern procedural systems, the right to challenge or appeal verdicts is a fundamental due process safeguard and is critical to ensuring institutional legitimacy, accuracy and predictability.[60] It is, in a sense, an acknowledgment that judges or decision makers are not infallible, and hence serves to provide accountability to litigants and a means to correct mistakes, enhance public confidence and facilitate certainty in judicial processes.[61] However, for international commercial disputes, the

[53] *Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (2nd edn, 2004 Sweet and Maxwell) 4.65.*

[54] *The UNCITRAL Model Law on International Commercial Arbitration 1985, Part Two, para 25.*

[55] *Law Commission of India, Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (Report No 176, 2001) 102.*

[56] *The Arbitration and Conciliation Act 1996, s 42-B.*

[57] *Although in Rajesh Batra v Ranbir Singh Ahlawat 2011 (5) RAJ 692, the Delhi High Court imposed a token penalty on the arbitrator for misconduct and acting beyond his jurisdiction, such cases are few and far between. Note that even in such an egregious case of gross misconduct, the Petitioner had to wait for the entire proceedings to conclude and the award to be passed, and was only able to challenge the same thereafter. Moreover, the imposition of penalty was also not based on a statutory provision, but a rare exercise of judicial discretion.*

[58] *The Arbitration and Conciliation Act 1996, s38.*

[59] *Deepak K Dash, '18 Months Later, Haryana e-way Project Stuck in Arbitration' Times of India (14 January 2018) <https://timesofindia.indiatimes.com/india/18-months-later-haryana-eway-project-stuck-in-arbitration/articleshow/62492763.cms> accessed 20 November 2020; The authors have also been witness to more than one such proceedings, in their capacity as counsel.*

[60] *Cassandra Burke Robertson, 'The Right to Appeal' (2013) 91 NCL Review 1219*

[61] *Courts and Tribunals Judiciary, The Right to Appeal <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/right-2-appeal/> accessed 22 November 2020.*

Model Law ushered in a framework which seemingly discarded these values in favour of speed, economy and finality.[62] Ever since, its promise as an internationally accepted framework with an appeal to global businesses, and an urge to be recognised as arbitration-friendly jurisdictions prompted governments across jurisdictions to accept the Model Law as the basis of their arbitration statutes.[63]

Consequently, the law in India hasalso largely followed the same trend of minimal judicial interference with arbitral awards, which is an avowed object of the Act and subsequent amendments to it. India seated awards or those to which the Act applies can only be set aside on the limited grounds explicitly provided for under section 34 of the Act.

As the provision stands today, such grounds[64] are broadly limited to (a) scope and validity of the arbitration agreement, (b) violation of natural justice principles, (c) arbitrability of claims, (d) public policy,[65] and (e) patent illegality[66] appearing on the face of the award. Enforcement of foreign awards under the Act is also subject to similar but restrictive criteria.[67] This legislative intent has further been buttressed by the Supreme Court, which has, especially lately, consciously embraced a pro-arbitration approach and postulated extremely restrictive tests in applying these provisions. It has been categorically laid down that courts do not sit in appeal against arbitral awards, a review on the merits of which is impermissible.[68] Mistakes of fact or of law are not liable to be interfered with and interpretations given by arbitrators cannot be challenged unless found to be wholly arbitrary or capricious.[69] Patent illegality and public policy have also been narrowly defined, and have been held to exclude contravention of substantive Indian laws not directly linked to public interest.[70] Furthermore, strict and inflexible timelines have now been judicially read into appeal provisions on the ground that expediency is a core aim of the Act.[71]

Such an approach is evidently seen to encourage the growth of arbitration as an alternative dispute resolution mechanism and promote India as a centre for the same. However, in the same vein, if arbitration is now being resorted to more, and in increasingly complex cases, the potential for erroneous decisions with greater unfair repercussions has also grown.[72] Even in purely commercial disputes, to suggest that finality is a virtue that should prevail over all other considerations all the

[62] *Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) 30(4) U Pa J Int'l L (30).*

[63] *Singapore Academy of Law Reform Committee, Report on the Right of Appeal against International Arbitration Awards on Questions of Law (February 2020) para 2.12. (Singapore Report)*

[64] *The Arbitration and Conciliation Act 1996, s34.*

[65] *Conflict with public policy has been defined exclusively to include only fraud or corruption, contravention of fundamental policy of Indian law or conflict with the most basic notions of morality or justice.*

[66] *An award on this ground can not be set aside on the ground of erroneous application of the law or through re-appreciation of evidence. The patent illegality test is applicable only to domestic awards.*

[67] *The Arbitration and Conciliation Act 1996, s48.*

[68] *MMTC Ltdv Vedanta Ltd(2019) 4 SCC 163.*

[69] *Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India(2019) 15 SCC 131; Interestingly, English law provides for appeals on questions of law arising out of arbitral awards. See Arbitration Act 1996, s 69.*

[70] *ibid.*

[71] *M/s NV International v State of Assam (2020) 2 SCC 109.*

[72] *Tonderai Nyandoro, 'Why the English Right to Appeal an Arbitral Award on a Point of Law is not Anachronistic?' (Kluwer Arbitration Blog, 30 May 2016) <http://arbitrationblog.kluwerarbitration.com/2016/05/30/english-right-appeal-arbitral-award-point-law-not-anachronistic/> accessed 29January 2021.*

time, does not seem very logical. In cases where public money is involved and the stakes are high, the desire for speed and finality must be outweighed by the need to protect against the risks of erroneous awards.[73] Moreover, a preference for judicial review helps to develop laws, foster debate and set precedents in public view, which is of fundamental importance even to market actors.[74] Interestingly, empirical data suggests that provisions for appeal or review have little correlation with parties' preference of jurisdiction. Instead, confidence in the legal system is the primary consideration in the choice of seat.[75] What is required, therefore, is not to circumvent established systems, but to re-examine and strengthen them, so that the arbitral process can grow as a fair, effective and equal complement to India's courts.[76]

CONCLUSION

There is no escaping the growing importance and universality of arbitration as the preferred choice for dispute resolution. Despite its perceived drawbacks, businesses and people across the world are resorting to arbitration for reasons including convenience, efficiency and flexibility.[77] Across sectors and national borders, arbitration agreements have become almost ubiquitous in commercial contracts. Resultantly, the State and its instrumentalities have also come to be involved with the arbitral process. However, as the preference for arbitration has grown, whether disputes are being adjudicated in a fair and just manner can have significant ramifications for the economy and society.[78]

Although in the commercial sphere, transactions and relationships are thought to be based on market considerations, State actions are inevitably characterised by the nature of its personality as a Welfare State and not by the nature of the function it performs.[79] In countries like India, every State action potentially impacts public interest. Therefore, just as the right to a speedy trial does not preclude the broader rights of public justice,[80] considerations of public interest must also be given their due in the resolution of commercial disputes through arbitration.

Viewed from that lens, however, everything does not appear to be perfect with arbitration and the law governing it. Issues of fairness and accountability coupled with an extremely limited scope for judicial review may be acceptable to private parties, but cannot be embraced by the government of a Welfare State by contracting away expected standards of policy and conduct.[81] It is perhaps this conflict between the role of the State as a commercial entity and as a custodian of public trust that also causes the state to be seen as the biggest offender against the finality of arbitral awards. It is often accused of treating virtually every award as subject to appeal and seldom complies with any till all remedies are finally exhausted.[82]

It is, therefore, vital to recognise that arbitration of public-private disputes in India cannot be subjected to the same standards as international commercial arbitrations envisaged by the Model Law and thus, by the Act. However, it is equally fallacious to view ideals of public interest and the virtues of arbitration as being

---

[73] Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' (2013) 30(5) J Int'l Arb 531.

[74] Lord Thomas, 'Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration' (The Bailii Lecture, 9 March 2016) <http://www.bailii.org/bailii/lecture/04.pdf> accessed 11 December 2020.

[75] Singapore Report (n 63) para 2.23.

[76] Lord Thomas (n 74).

[77] Kimberley Chen Nobles, 'Emerging Issues and Trends in International Arbitration' (2012) 43(1) California Western International Law Journal.

[78] Nico Gurian, 'Rethinking Judicial Review of Arbitration' (2017) 50 (4) Columbia Journal of Law and Science Problems.

[79] Kumari Shrilekha Vidyarthi vState of Uttar Pradesh (1991) 1 SCC 212.

[80] Mohd Hussain@ Julfikar Ali vState (Government of NCT of Delhi) (2012) 9 SCC 408.

[81] The state's power of dealing with public resources has to be discharged like a trust, keeping in view the interest of the cesti que trust. See Law Commission of India, Report on Government and Public Sector Undertakings Litigation Policy and Strategies (Report No 126, 1988) para 2.5.

[82] Interview with K Kannan J (retd), Former Judge, Madras High Court and Punjab and Haryana High Court (13 October 2020).

mutually exclusive.[83] Instead of simply transplanting international instruments and legal principles, the law in India needs to be contextualised and on the basis of empirical data, consider the possibility of incorporating certain safeguards to harmoniously balance State interest with the core of the arbitration process. Allowing disclosures based on public interest requirements, for instance, may go a long way in bringing about transparency and instilling confidence in the arbitration process. Introducing institutional arbitration to mandatorily replace agreements for ad hoc arbitrations in government contracts may also be an effective tool in streamlining procedures, saving costs and improving standards.[84]

***

[83] The provisions of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 are a good example of how the need for expediency can be balanced with procedural safeguards.

[84] The Arbitration and Conciliation (Amendment) Act 2019 has provided for the constitution of an Arbitration Council of India, which is a step forward in this direction. However, the provisions are yet to be notified.

ARBITRATION & ADR ROUNDUPS

1. Brazil: Bankruptcy or judicial reorganization of a party does not suspend arbitration

On December 24, 2020 Brazilian Bankruptcy Law was amended by Law 14.112, to make the process of bankruptcy and judicial recuperation (Brazilian equivalent to US Chapter 11) more efficient, in view of the final distress triggered by the COVID-19 pandemia.

The declaration of bankruptcy or the granting of judicial recuperation automatically stays certain types of lawsuits, such as execution lawsuits, for a period of 180 days, renewable on an exceptional basis for additional 180 days. However, the amendment to the Brazilian Bankruptcy Law made clear that the declaration of bankruptcy or the granting of judicial recuperation does not suspend arbitral proceedings, nor justifies the party bankrupt or under recuperation to deny enforceability of the arbitration clause (art. 6, paragraph 9, of Brazilian Bankruptcy Law).

This provision is in line with the Brazilian case law, which used to deny requests to suspend or avoid arbitral proceedings against parties bankrupt or under recuperation (eg, please see the decision of the Superior Court of Justice in REsp 1.355.831 – SP, 3rd Chamber, reporting justice Minª. Nancy Andrighi, judge on March 19, 2013). Nonetheless, the existence of express legal provision in this sense is welcome, since it grants more legal security, especially considering that the insolvent debtor sometimes claims its impecuniosity trying to bypass arbitral proceedings.

One of the most relevant points of the amendment to the Brazilian Bankruptcy Law is that it acknowledged the possibility to recognize in Brazil the effects of an insolvency proceedings which is taking place abroad. The recognition of such proceeding however will not curb the creditor's right to file an arbitration in Brazil against the debtor to acknowledge or sentence the debtor to pay a certain credit (art. 167-M, § 2nd, of the Brazilian Bankruptcy Law). This is another provision which grants legal security to arbitration, especially in cross-border transactions.

Source: As reported in Global Arbitration News by Joaquim de Paiva Munizdated 29 December, 2020 from website https://globalarbitrationnews.com/bankruptcy-or-judicial-reorganization-of-a-party-does-not-suspend-arbitration-in-brazil-20201229/

2. Bina Modi's plea against son Lalit's Singapore arbitration move is maintainable: Delhi HC

Mumbai: In a relief for Bina Modi, the widow of industrialist KK Modi, a division bench of the Delhi High Court has clarified that the court has jurisdiction to decide on her plea to challenge her son Lalit Modi's move to initiate arbitration proceedings in Singapore over the family's assets.

In March, a single-judge bench had dismissed her plea saying that the Delhi HC did not have jurisdiction to restrain Lalit Modi on his decision to initiate arbitration proceedings in Singapore for settling the estate of her late husband. Her two other children, Charu Bharti and Samir Modi, had also joined her in the petition.

"The subject dispute ought to have been prima facie adjudicated by the single judge, who had to exercise the jurisdiction vested in the court," said the division bench comprising Justices Siddharth Mridul and Talwant Singh.

"(a) all parties are Indian citizens, (b) situs of immovable assets of the Trust is in India and (c) in the restated trust deed itself, it is categorically stipulated that the same will be governed in accordance with the laws in India," it said.

"We are of the considered view that the learned single judge gravely erred by failing to exercise the jurisdiction vested in the court, which statutorily required him to adjudicate, whether the disputes between the parties, in relation to the trust deed, were per se referable to arbitration," the court said in its 103-page order.

The division bench has directed the single-judge bench to hear the case and directed the court registry to list the matter before the judge for January 8.

The bone of contention between the two factions in the high court was over the legal forum for the family to settle the issue of the sale of the estate and distribution of proceeds.

Bina Modi and her two children, Charu Bharti and Samir Modi, argued that there was a trust deed between the family members and that the trust matters cannot be settled through arbitration in a foreign country as per Indian laws.

"It is well settled in India, that any dispute which arises inter se between the trustees or the trustees on the one hand and the beneficiaries on the other or between beneficiaries inter se is not arbitrable," argued lawyers for Bina Modi. ""The reason provided for non-arbitrability is that such disputes are subject to the exclusive jurisdiction of "courts" under the Trusts Act, which is a complete code for the purpose of the said disputes."

"Lawyers for Lalit Modi had argued that the restated trust deed was executed in the UK, and at the time of its execution Singapore was opted as the seat of arbitration. The question of arbitrability would be governed by Singaporean law and not Indian law and any limitations on arbitration of such disputes in Indian law would thus be irrelevant, he had claimed.

Lalit Modi, now based in London, is opposing his mother and siblings' argument and appears keen to sell family stakes in group companies including flagship Godfrey Phillips, and distribute the proceeds among the heirs and their family.

Lalit Modi's lawyers also argued that the family trust deed had been signed by all family members. If the family members failed to reach a settlement within the mandatory 30 days from the demise of KK Modi, a clause in the trust deed allowed the assets to be sold and the proceeds to be distributed as per the trust agreement. According to the trust deed, the beneficiaries will get one year to complete the sale process.

The dispute emerged among the trustees after the demise of KK Modi in November 2019.

The family controls Modi Enterprises and owns a substantial stake in tobacco firm Godfrey Philip India, speciality chemical company Indofil Industries and convenience store chain 24 seven among other assets.

enior counsels Mukul Rohatgi and Kapil Sibal, along with law firm Cyril AmarchandMangaldas, represented Bina Modi and her two children in the court, while Lalit Modi was represented by senior counsel Harish Salve along with law firm DMD Advocates.

Source: As reported by Maulik Vyas, in The Economic Timesdated 28 December, 2020 from website https://www.thehindubusinessline.com/economy/logistics/arbitration-tribunal-regulatory-body-proposed-in-draft-ports-bill/article33307428.ece

3. Arbitration Now Will Also Settle Many Landlord-Tenant Issues

Due to time-consuming and expensive litigation, many of the tenant-landlord disputes will be settled and resolved through arbitration under the Transfer of Property acts from now onwards, Supreme court announced. Under The Transfer of Property act, 1882, the Supreme Court believes that arbitral tribunals should be given power and authority to decide the fate of such disputes. Although, such disputes are currently covered and governed by state rent control laws and that's what makes them non-arbitrable and hence, the designated forums and courts

will be allowed to take any decision regarding such disputes under the legislation. There was a verdict which was announced in the case of Vidhya Drolla and others versus Durga Trading Corporation, that overruled the SC's own judgement of 2017. This verdict was given by the jury headed by Justice NV Ramanna, Justice Sanjeev Khanna and Justice Krishna Murari on December 14.

Abhilash Pillai who is also the partner at the law firm Cyril Amarchand Mangaldas also spoke in the favour of apex Court's decision and said that he has immense faith in the arbitration practices and he believes that it is the fairest, responsive and most efficient dispute resolution mechanism and it wonderfully caters to all the contemporary requirements of the leasing industry. He thinks that now the speedy resolution of so many pending cases of tenant-landlord dispute can be taken care of and this will certainly help in de-stressing the courts.

This verdict also holds extreme importance because the government is also striving hard to promote rental housing schemes across the country which is supposed to provide more flexibility to the tenants in terms of legal soups.

Also, for more effective resolution through arbitration, a clause of arbitration has to be there, if the parties have mutually consented to solve their disputes through arbitration, said HuzefaNasikwala, founding partner of Nasikwala Law Office.

He also pointed out clearly all the Supreme Court guidelines regarding the disputes that are not arbitrable, objections to be raised against arbitrability of the disputes and which court or forum holds the authority to decide on arbitrability and other relevant aspects.

This ruling is quite essential for big metropolitans such as Mumbai. However, the court has already clarified that such disputes fall under state rent control laws and only special courts and forums set up for this will be authorised to deal with such cases. The Transfer of Property Act is assumed to serve the special public purpose to regulate landlord-tenant relationships and the arbitrator is expected to adhere to all the provisions, including the ones that are made for the protection of tenants as per the order of 243 pages.

Source: As reported in The Economic Timesdated 17 December, 2020 from website https://economictimes.indiatimes.com/industry/services/property-/-cstruction/many-landlord-tenant-issues-can-be-settled-under-arbitration-now/articleshow/79770519.cms

4. Arbitration Tribunal, regulatory body proposed in Draft Ports Bill

Constituting a Maritime Port Regulatory Authority, forming specialised tribunals to curb anti-competitive practices and providing speedy and affordable grievance redressal mechanism are some of the proposals in the draft Indian Ports Bill 2020.

According to a release, the draft Bill seeks to enable the structured growth and sustainable development of ports to attract investments in the port sector for optimum utilisation of the coastline by effective administration and management of ports.

The up-to-date provisions of the proposed Bill will ensure safety, security, pollution control, performance standards and sustainability of ports.

Safety and security

The Bill ensures that all up-to-date conventions or protocols to which India is a party, are also suitably incorporated. This will promote marine safety and security in the true sense.

The proposed Bill will provide measures to facilitate conservation of ports taking into account the prevalent situation with respect to the high number of non-operational ports, it added.

It shall further ensure greater investment in the maritime and ports sector through the creation of improved, comprehensive regulatory frameworks for the creation of new ports and management of existing ports, the release said.

A game-changer

Minister of State, Ministry of Ports, Shipping and Waterways, Mansukh Mandaviya, said, "We are working on creation of a National Port Grid. This Bill will be a game-changer in the Indian maritime sector specially for bringing more investments. The Bill will bolster structured growth and sustained development of ports and ensure achieving this objective on a fasttrack basis. Consequently, it will result into revolutionary maritime reforms transmuting the Indian maritime set-up entirely in the times to come."

Source: As reported in The Hindu dated 11 December, 2020 from website https://www.thehindubusinessline.com/economy/logistics/arbitration-tribunal-regulatory-body-proposed-in-draft-ports-bill/article33307428.ece

5. Needed, arbitration body for financial disputes

Internationally, this is now the preferred option because, unlike litigation, it is easier to enforce. India must have a set-up for it

Financial institutions and banks have traditionally opted for litigation instead of arbitration for dispute resolution. Litigation, as opposed to arbitration, allows judges to exercise multiple powers vested in them such as interim measures, summary judgments, warrants for non-appearance, etc., which are not available in arbitration. In addition, the public nature of disputes in courts allows the banks to create pressure on the defaulters.

However, the paradigm of dispute resolution for financial disputes has changed in the recent years, owing to the highly complex nature of financial transactions and a need for confidentiality. Banks and financial institutions are increasingly opting for arbitration instead of litigation. Remarkably, in 2019, 32 per cent of all arbitrations at the London Court of International Arbitration (LCIA) and 58 per cent of arbitrations at the American Arbitration Association (AAA) involved financial institutions.

Litigation, traditionally, offered a more potent forum for recovery of money and resolving financial disputes as the judges are vested with stronger powers than an arbitrator. In addition, the public nature of disputes in courts allowed financial institutions to create pressure on the defaulters to discharge their debts as public disclosure hinders their future investment prospects. As a result of these, financial institutions traditionally preferred litigating. These litigations were mostly brought to the courts in New York or London considering that the judges in these jurisdictions are adept at understanding complex transactions and financial instruments.

The traditional view of litigating in financial disputes changed following the 2008-09 financial crisis. The financial institutes felt a need for adjudicators who possess a deep knowledge of finance and an understanding of complex transactions.

In addition to these, the institutions opted for a private forum for adjudications considering that financial disputes of large quantum often lead to public distress, resulting in negative variations in listed stocks which could consequently lead to collapse of economies, if big financial institutions are involved. Thus, the parties moved to a private mode of dispute resolution i.e., arbitration, thereby maintaining privacy of proceedings and ensuring that the adjudicator is a person with expertise in finance. Another reason why arbitration was preferred over litigation is that it is easier to enforce an arbitral award as opposed to a court judgment which can be appealed multiple times.

Gaining ground

According to statistics published by leading arbitral institutions, banking and finance arbitrations accounted for 32 per cent of all arbitrations at LCIA, and 58 per cent at the American Arbitration Association (AAA)

These statistics portray the demand for financial arbitrations throughout the world. As a result, many arbitral institutions have created panels of arbitrators specialising in banking and finance. The Panel of

Recognised Market Experts in Finance (P.R.I.M.E. Finance) was set up in The Hague, Netherlands, in 2012 for providing a panel of arbitrators specialising in banking and finance, offering arbitration rules tailor-made for financial arbitrations and providing financial experts for assistance during such arbitrations.

Similarly, the International Swaps and Derivatives Association (ISDA) has created its own model arbitration clauses for resolution of financial disputes. In America, the Financial Industry Regulatory Authority (FINRA) provides assistance and advice for dispute resolution involving securities. In addition to these, the arbitral institutions have themselves altered their rules to accommodate the peculiar needs of financial disputes.

The position in India is, however, substantially different. Considering the rise of financial disputes in India, including defaults by some of the biggest Indian corporations such as Anil Ambani's Reliance Group, Vijay Mallya's Kingfisher and Nirav Modi's Firestar Diamonds, there is a need for providing a specialised institution to deal with financial arbitrations or in the alternative a body such a P.R.I.M.E. Finance rendering assistance to financial arbitrations. Leading financial institutions prefer arbitrating against such defaults instead of submission to courts which result in huge coverage by the media leading to adverse consequences for all parties involved.

Presently, no such body for financial arbitration exists in India and such arbitrations continue to be adjudicated by retired judges, who are generalists and do not possess a specialised knowledge of finance and financial markets. The Institute of Chartered Accountants of India (ICAI) is one such institution which possesses a body of some of the most prominent financial experts in India. Perhaps, the government should create a panel in consultation with the ICAI for facilitation of financial arbitrations. Considering that the Government has been making strides towards establishing India as an arbitration friendly jurisdiction, such a move would attract arbitrations in India fromother countries as well.

Source: As reported by Siddharth Srivastava in The Hindu Business Line dated 04 December, 2020 from website https://www.thehindubusinessline.com/opinion/needed-arbitration-body-for-financial-disputes/article33252511.ece

6. Foreign practitioners allowed in India-seated arbitrations

India has amended the Arbitration and Conciliation Act to permit foreign practitioners in India-seated arbitrations, and enable unconditional stay of enforcement of arbitral awards that are induced by fraud or corruption.

President Ram Nath Kovind promulgated an ordinance to amend Section 36 of the Arbitration and Conciliation Act retrospectively from October 23, 2015 in order to "address concerns raised by stakeholders", a notification issued on Wednesday said.

The amendment will pave the way for courts to unconditionally grant a stay if it is satisfied that the arbitration agreement or contract that is the basis of the award "was induced or effected by fraud or corruption" until the challenge is disposed under Section 34 to the award.

Legal experts are divided on the move. Some said the move will cause unwarranted delays in dispute resolution while others said it is in line with Supreme Court judgments on arbitrability of fraud.

"This amendment has the potential of opening floodgates of seeking unconditional stay of awards, which would delay the enforcement of award," said Sushmita Gandhi, partner at IndusLaw. "It shall be interesting to see how the courts will apply this amendment."

Anuradha Dutt, managing partner at DMD Advocates, said, "In my view it is a retrograde step... The whole idea of arbitration is expeditious disposal of disputes, which has been undone by the amendment."

Dutt who represented Vodafone International Holdings BV in arbitration against India, said that by including fraud in the contract or award, "it will now require even evidence to be led at enforcement stage".

VishrovMukerjee, partner at J Sagar Associates, echoed similar views: "The ordinance introduces specific grounds for unconditional stay premised on a prima facie view. Fraud and corruption are difficult to prove, especially prima facie."

The move could undo to a certain extent the enforcement-centric approach introduced by the 2015 amendment to the Arbitration and Conciliation Act, he said.

Section 36 of the Act was amended in 2015 to ensure that mere filing of application under Section 34 does not stay the enforcement of the award and that it can be stayed only subject to conditions imposed by the court. Applications can be filed under Section 34 for setting aside arbitral awards.

The new ordinance, which applies retrospectively, could further delay enforcement of awards, a situation which has repeatedly been deprecated by the Supreme Court, Mukerjee said.

Shaneen Parikh, partner at Cyril AmarchandMangaldas, however, termed it a welcome step for India's arbitration regime.

"The deletion of the Eighth Schedule confirms that foreign practitioners can now act as arbitrators in India-seated arbitrations - something that was criticised by the global legal community for prescribing a narrow and exhaustive (rather than inclusive) list of qualifications for arbitrators, which compromised party autonomy and fell at odds with the goal of putting India on the global arbitration map," she said.

Source: As reported in The Economic Times dated 09 November, 2020 from websitehttps://economictimes.indiatimes.com/news/politics-and-nation/foreign-practitioners-allowed-in-india-seated-arbitrations/articleshow/79053184.cms

7. Indian Parties can choose a foreign seat of arbitration: Gujarat HC

Such an agreement does not violate public policy of India, the court maintains

Indian entities/parties are entitled to choose a seat of arbitration outside India as a foreign or neutral seat. Such an agreement is not in violation of public policy of India, the Gujarat High Court stated in a landmark judgement on 3rd November 2020.

The order brings an end to a contentious issue of foreign seat and enforcement of its award for a number of contracts.

GE Power vs PASL Wind Solutions

Hearing the arbitration petitions filed by GE Power Conversion India Pvt Ltd against Ahmedabad-based PASL Wind Solutions Pvt Ltd regarding a dispute on the purchase of power converters, the High Court observed that the applications are in context of a foreign award dated 18.04.2019 passed by the Arbitral Tribunal seated in Zurich, Switzerland.

In a dispute resolution clause of the settlement agreement, the two parties had mentioned that if no settlement can be reached through negotiations, all disputes, controversies or differences shall be referred to and finally resolved by Arbitration in Zurich in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

The foreign arbitrator had granted the petitioner i.e. GE Power Conversion India Pvt Ltd, $40,000 or ?2.97 crore in legal costs and expenses with accumulated interests from the respondent.

Objecting the award, the counsel appearing for respondents had argued that under the Indian Contract Act, two Indian parties cannot designate a seat outside India. "Two Indian parties cannot be allowed to gain advantage simply by designating a seat abroad in an arbitration that otherwise has no other foreign element. If the parties are allowed to do so, the purpose of the Arbitration Act will be completely defeated," the respondent's counsel had argued.

Foreign award

The petitioner had filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that since the two parties were Indian parties,

they cannot have a foreign seat of arbitration. The move was opposed by the respondent i.e. PASL Wind Solutions.

Justice Biren Vaishnav held that an award that is passed in a foreign seat is a foreign award and may be enforced under Part II of the Arbitration and Conciliation Act.

Passing an order on whether the foreign award is enforceable in India, Justice Vaishnav stated that to determine the enforceability of the foreign award under the Part II of the Arbitration and Conciliation Act, the nationality of the parties is not relevant.

The counsel appearing for the respondent had raised a public policy defence questioning the legality of such a contract and argued it to be against the public policy of India.

But the court held that the foreign award in question is not against the policy of India, hence, enforceable in India. The court also held that a party holding a foreign award is not entitled to apply for interim relief under Section 9 (as Part I of the Act does not apply).

Giving a perspective on the High Court judgement, Shaneen Parikh, Partner, Cyril AmarchandMangaldas, welcomed the order and termed it a far-reaching decision.

"The Gujarat High Court issued a pro-arbitration ruling by holding that two Indian parties are entitled to choose a foreign seat of arbitration - a vexatious issue that has plagued a number of contracts and the freedom of party autonomy that is the fundamental basis of arbitration."

Source: As reported in The Hindu dated 04 November, 2020 from website https://www.thehindu businessline.com/economy/indian-parties-can-choose-a-foreign-seat-of-arbitration-gujarat-hc/article33020848.ece

8. How Antrix lost $1.2-b arbitration award to Devas at Washington court

Decision of ISRO arm to not appoint arbitrator at 2011 ICC proceedings comes back to haunt it

Antrix's decision not to appoint an arbitrator at the proceedings held at the International Chamber of Commerce (ICC) in 2011 has come back to haunt the commercial arm of the Indian Space Research Organization (ISRO) in its ten-year-old battle with Devas Multimedia.

The US federal court for the Western District of Washington, which has now asked Antrix Corporation to pay $1.2 billion to Devas Multimedia as per the arbitration award of the ICC, relied on the proceedings at the ICC to uphold the arbitration award.

"The ICC gave respondent (Antrix) at least three opportunities to appoint its own arbitrator in accordance with the agreement and the ICC rules, and respondent never did so. The court also notes that although respondent challenged the ICC's jurisdiction to arbitrate the dispute, it never specifically challenged the ICC's appointment of former Supreme Court Chief Justice Dr AS Anand on its behalf," the US federal court for the Western District of Washington observed in its order on October 27.

Satellite building agreement

The arbitration award was given in 2015 after Antrix cancelled an agreement to build, launch, and operate two satellites and make available 70 MHz of S-band spectrum. Devas had challenged Antrix's decision to cancel a 2005 contract for building two satellites for Devas, citing alleged irregularities in the deal. The decision was backed by the then UPA government.

The US court, however, said Antrix "does not argue, let alone cite any facts showing, that the agreement was the product of corruption or that the respondent (Antrix) annulled the agreement on that basis."

In July 2011, after Devas had commenced the arbitration in the ICC Court, Antrix did not respond to the ICC's request to nominate an arbitrator and instead challenged its jurisdiction to arbitrate the parties' dispute. In August 2011, the ICC informed the parties that the "arbitration shall proceed" pursuant to the ICC rules, and the ICC again requested that Antrix appoint an arbitrator within 21 days. On October 13, 2011, the ICC appointed former Supreme Court Chief Justice AS Anand on Antrix's behalf.

In May 2013, the Supreme Court held that the proceedings initiated under ICC could not be interfered with. Antrix kept arguing that the ICC lacked jurisdiction to arbitrate the dispute. It adopted the same tactic in the US court.

US court ruling

However, Judge Thomas S Zilly, US District Judge, Western District of Washington, Seattle, said: " Respondent (Antrix) has not met its substantial burden to show that the ICC's appointment of an arbitrator on its behalf is a ground for refusing to confirm the award. While the parties' agreement provides that "one [arbitrator is] to be appointed by each party," it does not address what follows when a party altogether refuses to appoint an arbitrator. The court concludes that respondent's repeated refusal to appoint an arbitrator with respect to the ICC arbitration essentially operated as a forfeiture of its right to do so."

Devas had filed a plea in the US court seeking enforcement of the arbitration award given by the ICC. Antrix once again questioned the jurisdiction of the US court in the case. The US court rejected Antrix's objection stating that while foreign entities are generally "immune from the jurisdiction of the courts of the US," there is an exception when a party seeks to confirm an arbitral award against the foreign state that is "governed by a treaty or other international agreement in force for the US calling for the recognition and enforcement of arbitral awards."

Absence of key officials

Experts said that the defence put up by Antrix could have been stronger had it produced key officials who dealt with the case, including K Radhakrishnan, who was the Chairman of the Space Commission between 2009 and 2011, G Balachandran, then Additional Secretary, Department of Space, or Geeta Varadhan, Director of Special Projects at the Department of Space.

The Permanent Court of Arbitration (PCA) tribunal based in The Hague had also made this observation while ruling against Antrix in 2016. Balachandran had in fact suggested to contest the suit by Devas by questioning the ownership of IPR on the technology to be used by the company under the 2005 agreement with Antrix.

Antrix could have also taken cover of national security to explain the anulment of the deal but a press release issued after the Cabinet meeting in February 2011 stated that the deal was being cancelled due to "the needs of defence, para-military forces and other public utility services as well as for societal needs, and having regard to the needs of the country's strategic requirements..."

The tribunal at Hague, in its ruling of July 25, 2016, held that the expressions "strategic needs" or "strategic requirements" covered a range of activities that went far beyond the military or paramilitary sectors or the "essential security interests" of India.

Timeline of case

January 2005 Devas Multimedia signed agreement with Antrix Corp, under which the latter agreed to build, launch, and operate two satellites and make available 70 MHz of S-band spectrum

February 2011 Antrix scrapped the deal after allegations of irregularities in the process followed

June 2011 Devas commenced arbitration proceedings in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC)

August 2011 Antrix filed a petition with the Supreme Court of India seeking to proceed under the rules and procedures of UNCITRAL

May 2013 The Supreme Court held that the proceedings initiated under ICC could not be interfered with

September 2015 A three-member ICC panel concluded that Antrix wrongfully scrapped deal and awarded Devas $562.5 million plus interest

September 2015 Devas filed plea in Delhi High Court to enforce the award

October 2016 Antrix challenged ICC award in Bengaluru court

September 2018 Devas filed plea in US court seeking enforcement of the award

October 2020 US court asked Antrix to pay the arbitration award to Devas

Source: As reported in Business Line, The Hindu dated 30 October, 2020 from website https://www.thehindubusinessline.com/news/science/how-antrix-lost-12-b-arbitration-award-to-devas-at-washington-court/article32979230.ece

9. Armed with new legal counter, Centre ready to challenge Vodafone arbitral award

Synopsis

Tushar Mehta said India should explore a competent forum in Singapore and advised against approaching the Delhi HC or the SC. "From the award, it appears that the seat of arbitration is Singapore and prime facie the challenge may lie in the said arbitration before the municipal courts of Singapore," the SG suggested.

Armed with an opinion from solicitor general Tushar Mehta that an arbitral tribunal cannot render a law passed by a sovereign Parliament ineffective, the Centre will soon challenge the Permanent Court of Arbitration award, which quashed the income tax department's demand of Rs 22,000 crore as tax, penalty and interest on Vodafone on the ground that India violated the bilateral investment treaty with the Netherlands by retrospectively amending the law.

"The question of law — the power of an arbitral tribunal to virtually and substantially declare a parliamentary legislation of a competent Parliament of a sovereign nation to be non-est and unenforceable — itself is an issue which needs to be challenged. I therefore, opine that the Union of India must challenge the said award and must file all available proceedings to challenge the award and/or to protect the interest of Union of India," Mehta said in his opinion.

Mehta said India should explore a competent forum in Singapore and advised against approaching the Delhi high court or the Supreme Court. "From the award, it appears that the seat of arbitration is Singapore and prime facie the challenge may lie in the said arbitration before the municipal courts of Singapore," the SG suggested.

Two months after Vodafone won the taxation dispute in the SC in January 2012, the Centre had amended the tax laws retrospectively and, in 2013, it slapped the telecom giant with a tax demand of Rs 13,000 crore.

Sources said India has to move fast to challenge the award in an appropriate forum keeping in mind the period of limitation that would be attached to the award. The SG suggested that the future course of action be charted in consultation with attorney general K K Venugopal.

When the law ministry referred the SG's opinion to the AG and sought his view, Venugopal recused from the process saying he was "prohibited from advising the government in this case by the rules of conflict of interest".

The AG, in his letter to the law ministry, said, "I was consulted by Vodafone International Holdings BV in regard to the same dispute much before I was appointed to the office of attorney general for India. My office records reveal that I had received a special retainer from the said company in April 2012 in relation to the very dispute."

He said he had also advised the company through three more conferences for which he was paid additionally. "In the circumstances, therefore, I must express my inability to be involved in the case in any manner," the AG said.

Source: As reported in The Economic Times dated 27 October, 2020 from website https://economictimes.indiatimes.com/news/economy/policy/armed-with-new-legal-counter-centre-ready-to-challenge-vodafone-arbitral-award/articleshow/78883542.cms

***

10. Amazon case: Future questions jurisdiction of Singapore arbitration court

Says deal with Reliance Retail is covered under Indian law - Future Retail has questioned the jurisdiction of the

Singapore International Arbitration Court (SIAC) in the emergency arbitration case filed by Amazon. On Sunday, SIAC passed an interim stay order on the Future Retail-Reliance deal.

In a statement, Future Retail said that all relevant agreements are governed by Indian law and the provisions of the Indian Arbitration Act for all intents and purposes, and "this matter raises several fundamental jurisdictional issues which go to the root of the matter. Accordingly, this order will have to be tested under the provisions of the Indian Arbitration Act in an appropriate forum."

It further explained that while Future Retail is examining the interim order, "FRL is not a party to the agreement under which Amazon has invoked arbitration proceedings."

BusinessLine had reported that while Amazon had made Future Retail, Future Coupons, and the Reliance group respondents, Future Retail had built its argument on the basis that the latest ₹25,000-crore deal was struck between Future Retail and the Reliance Group. Whereas, the 2019 agreement was between Amazon and Future Coupons.

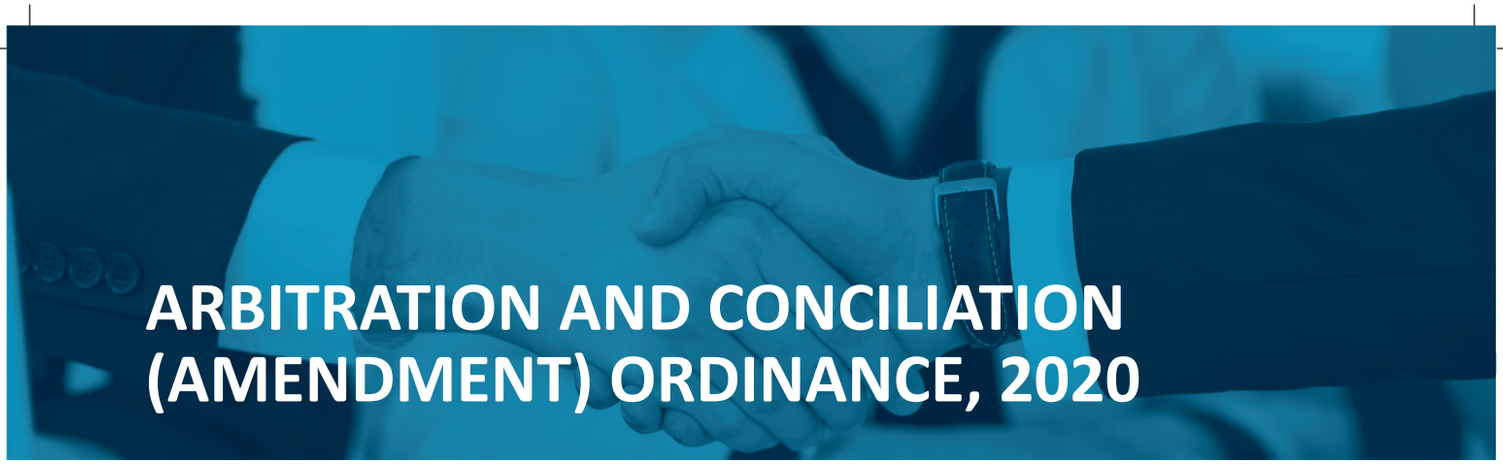
"It may be noted that FRL is not a party to the agreement under which Amazon has invoked arbitration proceedings," said a spokesperson at the Kishore Biyani led Future Retail.

"FRL has been legally advised that actions taken by FRL/its board, which are in full compliance of the relevant agreements and eminently in the interest of all stakeholders, cannot be held back in arbitration proceedings initiated under an agreement to which FRL is not a party," the spokesperson added.

Future Retail has further said that in any enforcement proceedings, FRL will take appropriate steps to ensure that the proposed transaction proceeds unhindered without any delay.

Source: As reported in Business Line, The Hindu dated 26 October, 2020 from website https://www.thehindubusinessline.com/companies/amazon-case-future-questions-jurisdiction-of-singapore-arbitration-court/article32941630.ece

***



ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2020

On 4th November, 2020, the President had promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 (Ordinance) further amending the Arbitration Act, so as to ensure that all the stakeholders get an opportunity to seek an unconditional stay against the enforcement of the arbitral awards induced by fraud or corruption. This is an attempt to make India's principal legislation an international arbitration-friendly legislation.

We are hopeful that the Ordinance will prove quite effective in cases in enforcement of the award where there is a 'prima-facie' fraud and corruption.

The following changes are made in the Act:

1) To Section 36- Part I of the Act and deals with the enforcement of domestic arbitral

Provided further that where the Court is satisfied that a prima facie case is made out,-—

(a) that the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

The section gives out an unconditional stay on an award if the agreement or award is challenged and proved to be induced by fraud or corruption and will be to all arbitration proceedings, irrespective of whether arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

2) To section Section 43J

Substituted the above section the Ordinance states that 'the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.'and omitted the Eighth Schedule of the Act, which deals with qualifications and experience of an arbitrator.

***

रजिस्ट्री सं॰ डी॰ एल॰—(एन)04/0007/2003—20 REGISTERED NO. DL—(N)04/0007/2003—20

भारत का राजपत्र
The Gazette of India

सी.जी.-डी.एल.-अ.-04112020-222941
CG-DL-E-04112020-222941

असाधारण
EXTRAORDINARY
भाग II — खण्ड 1
PART II — Section 1
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

सं॰ 67] नई दिल्ली, बुधवार, नवम्बर 4, 2020/कार्तिक 13, 1942 (शक)
No. 67] NEW DELHI, WEDNESDAY, NOVEMBER 4, 2020/KARTIKA 13, 1942 (SAKA)

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह अलग संकलन के रूप में रखा जा सके।
Separate paging is given to this Part in order that it may be filed as a separate compilation.

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 4th November, 2020/*Kartika* 13, 1942 (*Saka*)

THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2020

No. 14 OF 2020

Promulgated by the President in the Seventy-first Year of the Republic of India.

An Ordinance further to amend the Arbitration and Conciliation Act, 1996.

WHEREAS to address the concerns raised by stakeholders after the enactment of the Arbitration and Conciliation (Amendment) Act, 2019 and to ensure that all the stakeholder parties get an opportunity to seek unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award are induced by fraud or corruption, it has become necessary to make further amendments to the Arbitration and Conciliation Act, 1996;

WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:--

1. (*1*) This Ordinance may be called the Arbitration and Conciliation (Amendment) Ordinance, 2020. Short title and commencement.

(*2*) Save as otherwise provided in this Ordinance, it shall come into force at once.

Amendment of section 36.

2. In section 36 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in sub-section (3), after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from 23rd day of October, 2015, namely:—

"Provided further that where the Court is satisfied that a prima facie case is made out,-—

(*a*) that the arbitration agreement or contract which is the basis of the award; or

(*b*) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.".

Explanation.— For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Subsitution of new section for section 43J.

3. For section 43J of the principal Act, the following section shall be substituted, namely:—

Norms for accreditation of arbitrators.

"43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.".

Omission of Eighth Schedule.

4. The Eighth Schedule to the principal Act shall be omitted.

RAM NATH KOVIND,

President

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

UPLOADED BY THE MANAGER, GOVERNMENT OF INDIA PRESS, MINTO ROAD, NEW DELHI–110002
AND PUBLISHED BY THE CONTROLLER OF PUBLICATIONS, DELHI–110054.

MGIPMRND—953GI—04-11-2020.

MEMBERSHIP DATABASE UPDATION FORM

(Your membership no.....)

PLEASE FILL THE FORM IN BLOCK LETTERS

Full Name: Mr./Ms. . . . . .

. . . . . .

*Date of Birth . . . . . .

Address: . . . . . .

. . . . . .

. . . . . .

City . . . . . Pin . . . . . State . . . . . .

Occupation: . . . . . .

*Phone/s: (Office) . . . . . (Residence) . . . . . .

Mobile: . . . . . .

*Email: . . . . . .

*PAN Card No.: . . . . . .

***Mandatory under the Rules**

Kindly fill the ICA Membership Database Updation Form and send the same at **membership.ica@ficci.com** or to the **Indian Council of Arbitration**, Federation House, Tansen Marg, New Delhi 110001

ICA MODEL CLAUSES FOR ARBITRATION

ICA DOMESTIC COMMERCIAL ARBITRATION CLAUSE

The Indian Council of Arbitration recommends to all parties, desirous of making reference to arbitration by the Indian Council of Arbitration, the use of the following arbitration clause in writing in their contracts:

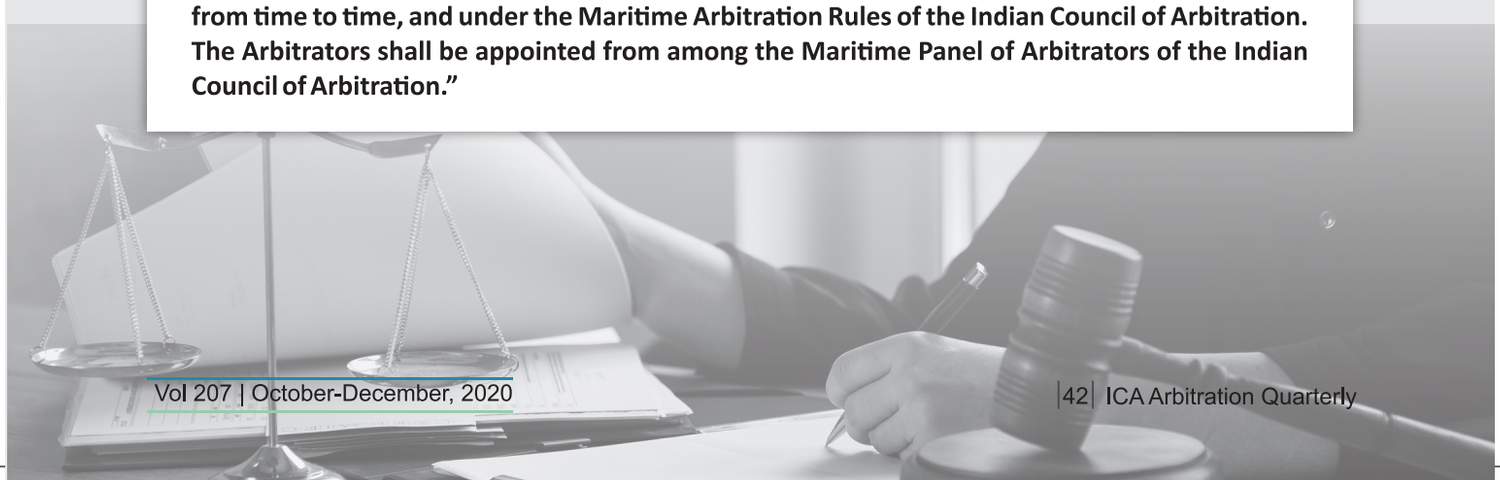
"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Domestic Commercial Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

ICA INTERNATIONAL ARBITRATION CLAUSE

"Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this agreement or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of International Commercial Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties."

ICA MARITIME ARBITRATION CLAUSE

"All disputes arising under this charter party shall be settled in India in accordance with the provisions of the Arbitration & Conciliation Act, 1996 (No. 26 of 1996), as amended and in force from time to time, and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The Arbitrators shall be appointed from among the Maritime Panel of Arbitrators of the Indian Council of Arbitration."



Articles Invited for

ICA ARBITRATION QUARTERLY JOURNAL

Guidelines for Authors

1. Articles on the issues and areas of concern in the field of arbitration, including issues relating to domestic, maritime and international commercial arbitration are published in the Journal.
2. The article must be original contribution of the author.
3. The article must be an exclusive contribution for the Journal.
4. The article must not have been published elsewhere, and must not have been or must not be sent elsewhere for publication, in the same or substantially the same form.
5. The copyright of the articles, if published in the Journal, shall vest with the Indian Council of Arbitration.
6. Articles go through a review process and Indian Council of Arbitration/the Editor of the Journal has the sole discretion to accept/reject an article for publication in the Journal or to publish it with modification and editing, as it considers appropriate.
7. The article shall be sent to the Editor, ICA Arbitration Quarterly Journal, Indian Council of Arbitration, Federation House, Tansen Marg, New Delhi-10001 and mailed to editor.ica@ficci.com
8. The article shall be accompanied by a 'Declaration-cum-Undertaking' from the author(s) as under:

Declaration-cum-Undertaking

1. I, Mr./Ms./Dr./Prof....., declare that I have read and understood the Guidelines for Authors.
2. I affirm that:
   a. the article titled "....." is my original contribution and no portion of it has been adopted from any other source;
   b. this article is an exclusive contribution for ICA Arbitration Quarterly Journal and has not been / nor would be sent elsewhere for publication;
   c. the copyright in respect of this article, if published in ICA Arbitration Quarterly Journal, shall vest with the Indian Council of Arbitration;
   d. the views expressed in this article are not necessarily those of the Indian Council of Arbitration or the Editor of the Journal.
3. I undertake that I:
   a. comply with the guidelines for authors;
   b. shall abide by the decision of the Indian Council of Arbitration, i.e., whether this article will be published and / or will be published with modification / editing;
   c. shall be liable for any breach of this 'Declaration-cum-Undertaking'.

(Signature)

ISSN: 2456-9801

Indian Council of Arbitration

Federation House, Tansen Marg, New Delhi – 110 001

Ph.: 91-11-23738760-70, 23319849, 23319760, Fax: 23320714, 23721504

E: ica@ficci.com; **W:** www.icaindia.co.in