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International Commercial Arbitration

Law and Recent Developments in India

March 2018

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1. Introduction

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

Due to certain controversial decisions by the Indian judiciary in the last two decades, particularly in cases involving a foreign party; the international community has kept a close watch on the development of arbitration laws in India. The Indian judiciary has often been criticized for its interference in international arbitrations and extra territorial application of domestic laws in foreign seated arbitrations.

However, the latest developments in the arbitration jurisprudence through recent court decisions clearly reflect the support of the judiciary in enabling India to adopt best international practices. Courts have adopted a pro-arbitration approach and a series of pro-arbitration rulings by the Supreme Court of India (**"Supreme Court"**) and High Courts have attempted to change the arbitration landscape completely for India. From 2012 to 2018, the Supreme Court delivered various landmark rulings taking a much needed pro-arbitration approach such as declaring the Indian arbitration law to be seat-centric; removing the Indian judiciary's power to interfere with arbitrations seated outside India; referring non-signatories to an arbitration agreement to settle disputes through arbitration; defining the scope of public policy both in domestic and foreign-seated arbitration; and determining that even fraud is arbitrable.

In furtherance of measures taken by the Indian government in support of the *'ease of doing business in India'*, and after two aborted attempts in 2001 and 2010 to amend the arbitration law; on October 23, 2015, Recently, the Arbitration and Conciliation (Amendment) Bill 2018 has been introduced in the Parliament and new amendments are expected in next few months. the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2015 (**"Ordinance"**). The Ordinance incorporated the essence of major rulings passed in the last two decades and most of the recommendations of 246th Law Commission Report, and have clarified major controversies that arose in recent years.

Thereafter, on December 17, 2015 and December 23, 2015 respectively, the Arbitration and Conciliation (Amendment) Bill, 2015 (**"Bill"**) was passed by the Lok Sabha and Rajya Sabha respectively, with minor additions to the amendments introduced by the Ordinance. On December 31, 2015, the President of India signed the Bill and thereafter, gazette notification was made on January 1, 2016. Accordingly, the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**) came into effect, from October 23, 2015. The Amendment Act is applicable prospectively to the arbitral proceedings commenced after October 23, 2015. Recently, the Arbitration and Conciliation (Amendment) Bill 2018 has been introduced in the Parliament and new amendments are expected in next few months.

This paper aims to summarize the position on Indian law on international commercial arbitration **("ICA")**, seated within and outside India and discusses the recent judicial decisions in this field.

2. Indian Arbitration Regime

I. History of Arbitration in India

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

i. The Arbitration (Protocol and Convention) Act, 1937 (**"1937 Act"**)

ii. The Indian Arbitration Act, 1940 (**"1940 Act"**) and

iii. The Foreign Awards (Recognition and Enforcement) Act, 1961 (**"1961 Act"**)

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

II. Background to the Arbitration and Conciliation Act, 1996

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

III. Scheme of the Act

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

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

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

The courts have found that Chapters III to VI, specifically, Section 10 to 33 of Part 1 of the Act, contain curial or procedural law which parties would have autonomy to opt out from. The other Chapters of Part I of the Act form part of the proper law [3], thus making those provisions non-derogable by parties, subjected to Part I, even by contract.

Part II, on the other hand regulates arbitration only in respect to the commencement and recognition /enforcement of a foreign award and no provisions under the same can be derogated by a contract between two parties.[4]

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

1. A foreign award is award delivered in an arbitration seated outside India
2. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 2012 (9) SCC 552
3. Anita Garg v. M/S. Glencore Grain Rotterdam B.V., 2011(4) ARBLR 59 (Delhi)
4. Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 2012 (9) SCC 552

a heavily negotiated point and, more often than not, ended up being either Singapore, New York, or London (the established global arbitration centers). Foreign investors and corporates doing business in India were just not ready to risk with the Indian legal system.

IV. Arbitration and Conciliation Amendment Act, 2015

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

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

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

A. Pre-arbitral proceedings

i. Independence and impartiality

- Applications for appointment of an arbitrator should be endeavored to be disposed of within a period of (60) sixty days from date of service of notice on the opposite party.
- Detailed schedule on ineligibility of arbitrators have been put in place.

ii. Interim reliefs

- Flexibility has been granted to parties with foreign-seated arbitrations to approach Indian courts for aid in foreign seated arbitration;
- Section 9 applications to be made directly before High Court in case of international commercial arbitrations seated in India as well as outside.
- Interim reliefs granted by arbitral tribunals seated in India are deemed to be order of courts and are thus enforceable in the new regime.
- Post grant of interim relief, arbitration proceedings must commence within 90 days or any further time as determined by the court.

B. Arbitral proceedings

i. Expeditious disposal

- A twelve-month timeline for completion of arbitration seated in India has been prescribed.
- Expeditious disposal of applications along with indicative timelines for filing arbitration applications before courts in relation to interim reliefs, appointment of arbitrator, and challenge petitions;
- Incorporation of expedited/fast track arbitration procedure to resolve certain disputes within a period of six months.

ii. Costs

- "Costs follow the event" regime has been introduced;
- Detailed provisions have been inserted in relation to determination of costs by arbitral tribunals seated in India;

C. Post-arbitral proceedings

i. Challenge and enforcement

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

V. Arbitration And Conciliation (Amendment) Bill, 2018

The Union Cabinet has recently cleared a bill proposing to amend the arbitration law. This is in line with India's aim of becoming a model arbitration friendly jurisdiction. Some of the key features of the Bill are: (a) formation of Arbitration Council of India (ACI), an independent body corporate for grading and accreditation of arbitral institutions and to promote and encourage arbitration and other alternate dispute resolution mechanisms; (b) arbitral appointments would be made by the arbitral institutions (as recognized by the ACI), designated by the Supreme Court (for international commercial arbitrations), or the High Court (in other cases), thereby eliminating the requirement to approach the court for arbitral appointments; (c) amendments have been proposed to the timelines involved in the conduct of arbitration. The Bill proposes exclusion of international commercial arbitrations from the twelve-month timeline (for completion of the entire arbitration) specified in the Amendment Act. It further extends the timeline by stating that the timeline would start from the date of completion of pleadings as opposed to the date of constitution of the tribunal; (d) new provisions are also being introduced with respect to confidentiality of the arbitral proceedings and immunity to the arbitrators..."

3. International Commercial Arbitration – Meaning

Section 2(1)(f) of the Act defines an ICA as a legal relationship which must be considered commercial,[5] where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under Indian law, an arbitration with a seat in India, but involving a foreign party will also be regarded as an ICA, and hence subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act would have no applicability on the parties (save the stand alone provisions introduced by the Amendment Act unless excluded by the parties, as discussed later) but the parties would be subject to Part II of the Act.

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

The scope of this section was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*,[6] wherein, despite TDM Infrastructure Pvt. Ltd. having foreign control, it was concluded that, *"a company incorporated in India can only have Indian nationality for the purpose of the Act."*

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

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

6. 2008 (14) SCC 271

4. Arbitrability under Indian Law

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

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[7] the Supreme Court discussed the concept of arbitrability in detail and held that the term *'arbitrability'* had different meanings in different contexts: (a) disputes capable of being adjudicated through arbitration, (b) disputes covered by the arbitration agreement, and (c) disputes that parties have referred to arbitration. It stated that in principle, any dispute that can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand excluded from resolution by a private forum. Such non-arbitrable disputes include: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

Also, the Supreme Court has held in *N. Radhakrishnan v. M/S Maestro Engineers*[8] that, where fraud and serious malpractices are alleged, the matter can only be settled by the court and such a situation cannot be referred to an arbitrator. The Supreme Court also observed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has limited jurisdiction. The courts are more equipped to adjudicate serious and complex allegations and are competent in offering a wider range of reliefs to the parties in dispute.

But the Supreme Court in *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi*[9] and *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*[10] held that allegations of fraud are not a bar to refer parties to a foreign-seated arbitration and that the only exception to refer parties to foreign-seated arbitration are those which are specified in Sec tion 45 of Act. For example in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. Thus, it seemed that though allegations of fraud are not arbitrable in ICA's with a seat in India the same bar would not apply to ICA's with a foreign seat.

The decision of the Supreme Court in *A Ayyasamy v. A Paramasivam & Ors*,[11] has clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In *A Ayyasamy* , the Supreme Court held that: (a) allegations of fraud are arbitrable unless they are serious and complex in nature; (b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud; (c) the decision in Swiss Timing did not overrule Radhakrishnan. The judgment differentiates between 'simplicitor fraud' and 'serious fraud', and concludes while 'serious fraud' is best left to be determined by the court, 'simplicitor fraud' can be decided by the arbitral tribunal.

7. 2011 (5) SCC 532
8. 2010 (1) SCC 72
9. 2014 (6) SCC 677
10. AIR 2014 SC 968
11. (2016) 10 SCC 386

In *Sudhir Gopi v. Indira Gandhi National Open University*,[12] the Delhi High Court held that the principle of alter ego is not arbitrable. However, in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*[13] , the Delhi High Court observed that the decision in Sudhir Gopi is per incuriam as it was passed without taking into consideration the decision of Supreme Court in A Ayyasamy wherein the Supreme Court carved out instances which cannot be referred to arbitration.

In *Vimal Shah & Ors. v Jayesh Shah & Ors*, the Supreme Court has held that disputes arising out of Trust Deeds and the Indian Trusts Act, 1882 cannot be referred to arbitration.[14]

12. 2017(164)DRJ 227

13. 2017 SCC Online Del 11625

14. Civil Appeal No. 8164 of 2016 (Arising out of SLP (C) No. 13369 of 2013)].

5. International Commercial Arbitration with seat in India

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

I. Notice of arbitration

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

Applicability of Amendment Act

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

II. Referral to arbitration

Under Part I, the courts can refer the parties to arbitration if the subject matter of the dispute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is subject-matter of an arbitration, upon an application by a party, the judicial authority is bound to refer the dispute to arbitration. It is important to note that the above application must be made by the party either before or at the time of making his first statement on the substance of the dispute and the application shall be accompanied by a duly certified or original copy of the arbitration agreement.

Applicability of Amendment Act

The Amendment Act narrows the scope of the judicial authority's power to examine the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court for an arbitration for purposes of arbitrations commenced on or after October 23, 2015.

More importantly, taking heed from the judgment of the Supreme Court in *Chloro Controls*[15], which effectively applied only to foreign-seated arbitrations, the definition of the word 'party' to an arbitration agreement has been expanded under the Amendment Act to also include persons claiming through or under such party.

Thus, even non-signatories to an arbitration agreement, insofar as domestic arbitration or Indian seated ICA, may also participate in arbitration proceedings as long as they are proper and necessary parties to the agreement.[16]

III. Interim reliefs

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

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

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

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

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

Applicability of Amendment Act

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

A. Interim reliefs under Section 9

a. If an arbitral tribunal has been constituted, an application for interim protection under Section 9 of the Act will not be entertained by the court unless the court finds that circumstances exist which may render the remedy provided under Section 17 inefficacious.

b. Post the grant of interim protection under Section 9 of the Act, the arbitral proceedings must commence within a period of 90 (ninety) days from the date of the interim protection order or within such time as the court may determine.

B. Interim reliefs under Section 17

Section 17 has been amended to provide the Arbitral Tribunal the same powers as a 'civil court' in relation to the grant of interim measures. Notably, the Arbitral Tribunal would have powers to grant interim relief post award but prior to its execution. Further, the order passed by an Arbitral Tribunal in arbitrations seated in India will be deemed to be an order of the court and will be enforceable under the Code of Civil Procedure, 1908 (**"CPC"**) as if it were an order of the court, which provides clarity on its enforceability.

The intention appears to be to vest significant powers with the Arbitral Tribunal and reduce the burden and backlog before the courts.

There has been extensive confusion on the extent and scope of arbitrator's powers to grant interim relief, and enforceability of such orders has proven difficult. This issue has been aptly addressed by making the enforceability of orders issued under Section 9 and 17 of the Act identical in case of domestic and international commercial arbitrations seated in India. However, in certain situations, a party will be required to obtain an order of interim relief from a court only (e.g. injunctive relief against encashment of a bank guarantee).

IV. Appointment of arbitrators

The parties are free to agree on a procedure for appointing the arbitrator(s). The agreement can provide for a tribunal consisting of three arbitrators and each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator.[17] If one of the parties does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint third Arbitrator within 30 days, the party can request Chief Justice of India (**"CJI"**) to appoint an Arbitrator in case of international commercial arbitrations.[18] The CJI can authorize any person or institution to appoint an Arbitrator. In case of domestic arbitrations, application has to be made to Chief Justice of respective High Court within whose jurisdiction the parties are situated.

Applicability of Amendment Act

If one of the parties does not appoint an arbitrator within 30 days, or if its two appointed arbitrators do not appoint third arbitrator within 30 days, the party can request the Supreme Court or relevant High Court (as applicable) to appoint an arbitrator. [19]

17. Section 11(3) of the Act
18. Section 11(4) of the Act
19. Section 11 (6) of the Act

The Supreme Court/High Court can authorize any person or institution to appoint an arbitrator.[20] In case of an ICA, the application for appointment of arbitrator has to be made to the Supreme Court and in case of a domestic arbitration, the respective High Courts having territorial jurisdiction will appoint the Arbitrator.

The Amendment Act empowers the Supreme Court in an India-seated ICA and High Courts in domestic arbitration to examine the existence of an arbitration agreement at the time of making such appointment.[21]

This should be noted against the threshold contained in a Section 8 application for referring a dispute to arbitration which empowers a court only to merely examine the *prima facie* existence of an arbitration agreement. A recent Delhi High Court decision[22] has emphasized that the courts, while deciding an application for appointment of an arbitrator must confine their enquiry to the existence of an arbitration agreement. The question of arbitrability of the issue would be decided by the arbitral tribunal and not the courts.

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

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

V. Challenge to appointment of arbitrator

Independence and impartiality of an arbitrator are the hallmarks of any arbitration proceedings.

If there are circumstances due to which his independence and impartiality can be challenged, he must disclose the circumstances before his appointment. [23]

Appointment of an arbitrator can be challenged only if –

a. Circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or,

b. He does not possess the qualifications agreed upon by the parties. [24]

The Amendment Act provides a form for disclosure in the new Fifth Schedule. Such disclosure is in accordance with internationally accepted practices to be made applicable for arbitration proceedings commenced on or after October 23, 2015.

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

The Supreme Court in a recent judgment, *TRF Ltd v Energo Engineering Projects Ltd*,[25] ruled that a court can be approached to plead the statutory disqualification of an arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 and that it is not necessary to approach the arbitrator for obtaining such a relief. Further, the Court held that when the designated arbitrator nominated under a contract is also responsible for appointment of an alternate arbitrator, he/she would lose his/her authority to preside and/or nominate an arbitrator, if he/she stands disqualified under the amended provisions of the Act.

20. Section 11 (6) (b) of the Act
21. Section 11 (6) (a) of the Act
22. *Picasso Digital Media Pvt. Ltd. v. Pick-A-Cent Consultancy Service Pvt. Ltd.*, ARB.P. 635/2016.
23. Section 12(1) of the Act
24. Section 12(1) of the Act
25. Civil Appeal No. 5306 of 2017 decided on 3 July 2017

In *HRD Corporation vs. GAIL*[26] *(India) Limited*, the Supreme Court propounded certain important principles of law such as: (i) if the arbitrator has passed as award in an earlier arbitration between the same parties about the same dispute, does not mean that there are justifiable grounds for challenging his impartiality under Clause 16 of Fifth Schedule; (ii) the challenge to the appointment of arbitrators contained in the Fifth Schedule will be gone into only after the arbitral tribunal has given an award.[27]

However, in such cases, application for setting aside the arbitral award can be made to the court under Section 34 of the Act. If the court agrees to the challenge, the arbitral award can be set aside.[28] Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to the court. The arbitration can continue and challenge can be made in court only after the arbitral award is made.

In *Aravalli*[29] *Power Company Ltd. v. Era Infra Engineering Ltd.*, (AIR 2017 SC 4450) the Court held that the employee named as an arbitrator in the arbitration clause should be given effect to in the absence of any justifiable apprehension of independence and impartiality. However, Appointment of employee as an Arbitrator is not invalid and unenforceable in arbitrations invoked prior to October 23, 2015. Further the Delhi High Court in *Afcons Infrastructure Ltd. v. Rail Vikas Nigam Limited*, interpreted Section 12 (5) read with Entry 12 Schedule VII of the Arbitration and Conciliation Act to hold that former employees of parties are not precluded from being appointed as arbitrators. However, this decision is subject to certain qualifications. (2017 SCC OnLine Del 9607).

The Supreme Court in the case of *Voestalpine Schienen GmBH v. Delhi Metro Rail Corporation Ltd.*[30] held that the fact that the proposed arbitrators being government employees/ ex-government employees was not sufficient in itself to make them ineligible to act as arbitrators, especially since they were ex-employees of public bodies not related to the Respondent.

VI. Mandate of the arbitrator

An encouraging position of Indian arbitration law is the jurisprudence relating to the mandate of an arbitrator. The Supreme Court in its decision in *NBCC Ltd. v. J.G. Engineering Pvt. Ltd.* [31] has laid down that the mandate of the arbitrator expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement.

Applicability of Amendment Act

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

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

26. 2017 (10) SCALE 371
27. (2017 (10) SCALE 371)]
28. Section 12(3) of the Act
29. AIR 2017 SC 4450.
30. (2017) 4 SCC 665
31. 2010 (2) SCC 385

VII. Challenge to jurisdiction

Under Section 16 of the Act, an Arbitral Tribunal has competence to rule on its own jurisdiction, which includes ruling on any objections with respect to the existence or validity of the arbitration agreement. The doctrine of '*competence-competence*' confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*,[32] the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act.

VIII. Conduct of arbitral proceedings

A. Flexibility in Respect of Procedure, Place and Language

The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present its case.[33] The Arbitral Tribunal is not bound by the CPC or the Indian Evidence Act, 1872.[34] The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the Arbitral Tribunal.

The Arbitral Tribunal has complete powers to decide the procedure to be followed, unless parties have otherwise agreed upon the procedure to be followed.[35] The Arbitral Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.[36] Place of arbitration will be decided by mutual agreement. However, if the parties do not agree to the place, the same will be decided by the tribunal.[37] Similarly, the language to be used in arbitral proceedings can be mutually agreed. Otherwise, the Arbitral Tribunal can decide on the same.[38]

The Delhi High Court, in the case of *Devas Multimedia Pvt. Ltd v. Antrix Corporation Ltd.*[39], held that Section 42 did not bar the jurisdiction of subsequent courts when the court initially approached had not ruled on its own jurisdiction and the initial prayers sought are incapable of being entertained/ granted.

The Supreme Court in the case *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.*[40] held that designation of seat is akin to an exclusive jurisdiction clause with relation to the courts exercising supervisory jurisdiction over the proceedings.

The Supreme Court in the case of *Roger Shashoua v. Mukesh Sharma* [41] has upheld the 2009 decision of the Commercial Court in London and held that the designation of seat is the same as an exclusive jurisdiction clause.

B. Submission of Statement of Claim and Defense

The Claimant should submit the statement of claims, points of issue and the relief or remedy sought. The Respondent should state his defense in respect of these particulars. All relevant documents must be submitted. Such claim or defense can be amended or supplemented at any time.[42]

32. 2005 (8) SCC 618
33. Section 18 of the Act
34. Section 19(1) of the Act
35. Section 19(3) of the Act
36. Section 19(4) of the Act
37. Section 20 of the Act
38. Section 22 of the Act
39. 2017 SCC OnLine Del 7229
40. (2017) 7 SCC 678
41. 2017 SCC OnLine SC 697
42. Section 23 of the Act

Applicability of Amendment Act

The Amendment Act now provides for an application for counterclaim/set-off to be adjudicated upon in the same arbitration proceeding without requiring a fresh one.[43] The Arbitral Tribunal, under the amended Section 25 of the Act, can also exercise its discretion in treating the right of defendant to file the statement of defence as forfeited under specified circumstances. [44]

IX. Hearings and Written Proceedings

After submission of pleadings, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be an oral hearing or whether proceedings can be conducted on the basis of documents and other materials. However, if one of the parties requests the Arbitral Tribunal for a hearing, sufficient advance notice of hearing should be given to both the parties..[45] Thus, unless one party requests, oral hearing is not mandatory.

Applicability of Amendment Act

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

By the Amendment Act, the time limit for conduct of the arbitral proceedings have been streamlined and arbitrators are mandated to complete the entire arbitration proceedings within a span of 12 (twelve) months from the date the Arbitral Tribunal enters upon the reference.[46] However, a 6 (six) months extension may be granted to the arbitrator by mutual consent of the parties.[47] Beyond 6 (six) months, any further extension may be granted to the arbitrator at the discretion of the court [48] or else the proceedings shall stand terminated.[49] An application for extension of time towards completion of arbitral proceedings has to be disposed of expeditiously.[50] There is also a provision made for awarding additional fees, as consented upon by the parties, to them for passing the award within the time span of 6 months.[51]

X. Fast track procedure

The Amendment Act has inserted new provisions to facilitate an expedited settlement of disputes based solely on documents subject to the agreement of the parties. The tribunal for this purpose consists only of a sole arbitrator who shall be chosen by the parties.[52]

For the stated purpose the time limit for making an award under this section has been capped at 6 months from the date the Arbitral Tribunal enters upon the reference.[53]

Parties can before constitution of the Arbitral Tribunal, agree in writing to conduct arbitration under a fast track procedure.[54] Under the fast track procedure, unless the parties otherwise make a request for oral hearing or if the arbitral tribunal considers it necessary to have oral hearing, the Arbitral Tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing. [55]

43. Section 23(2-A) of the Act
44. Section 25(b) of the Act
45. Section 24 of the Act
46. Section 29A(1) of the Act
47. Section 29A(3) of the Act
48. Section 29A(5) of the Act
49. Section 29A(4) of the Act
50. Section 29A(9) – the section endeavours the application to be disposed of within a period of 60 days.
51. Section 29A(2) of the Act
52. Section 29B(2) of the Act
53. Section 29B(4) of the Act
54. Section 29B(1) of the Act
55. Section 29B(3) of the Act

XI. Settlement during arbitration

It is permissible for parties to arrive at a mutual settlement even when the arbitration proceedings are going on. In fact, even the tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration *shall* be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms, which is called consent award. Such arbitral award shall have the same force as any other arbitral award. [56]

Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

XII. Law of limitation applicable

The Limitation Act, 1963 is applicable to arbitrations under Part I. For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue.[57] If arbitration award is set aside by court, time spent in arbitration will be excluded for the purposes of Limitation Act. This enables a party to initiate a fresh action in court or fresh arbitration without being barred by limitation.

XIII. Arbitral award

A decision of an Arbitral Tribunal is termed as '*Arbitral Award*'. An arbitral award includes interim awards. But it does not include interim orders passed by arbitral tribunals under Section 17. Arbitrator can decide the dispute only if both the parties expressly authorize him to do so.[58] The decision of Arbitral Tribunal will be by majority.[59] The Arbitral Award shall be in writing and signed by all the members of the tribunal.[60] It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.[61] The Award should be dated and the place where it is made should be mentioned (i.e. the seat of arbitration). A copy of the award should be given to each party. Arbitral Tribunals can also make interim awards.[62]

XIV. Interest and cost of arbitration

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

Applicability of Amendment Act

The interest rate payable on damages and costs awarded, as per the Amendment Act shall, unless the arbitral award otherwise directs, shall be 2 percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. [63]

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

Cost of arbitration means reasonable cost relating to fees and expenses of Arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party.[64]
If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such

56. Section 30 of the Act
57. Section 43(2) of the Act
58. Section 28(2) of the Act
59. Section 29 of the Act
60. Section 31(1) of the Act
61. Section 31(3) of the Act
62. Section 31(6) of the Act
63. Section 31(7)(b) of the Act
64. Section 31(8) of the Act

case, any party can approach the court. The court will ask for a deposit from the parties and on such deposit, the award will be delivered by the tribunal. Then court will decide the cost of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party.[65]

The regime for costs has been established which has applicability to both arbitration proceedings as well as the litigations arising out of arbitration.

The explanation defining the term 'costs' for the purpose of this sub-section has been added. The circumstances which have to be taken into account while determining the costs have been laid down in the sub-section (3) of the freshly added section (Section 31 A). In a nutshell this provision is added to determine the costs incurred during the proceedings including the ones mentioned under Section 31(8) of the Act.

XV. Challenge to an award

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

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

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

ii. *the agreement is void;*

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

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

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

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

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

The Supreme Court in *Kinnari Mullick v. Ghanshyam Das Damani* has held that a court can relegate the parties to the arbitral tribunal, only if there is a specific written application from one party to this effect; and relegation has to happen before the arbitral award passed by the same arbitral tribunal is set aside by the court. Once the award is set aside, the dispute cannot be remanded back to the arbitral tribunal. (AIR 2017 SC 2785)

Applicability of Amendment Act

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

The Amendment Act clarifies that an award will not be set aside by the court merely on erroneous application of law or by re-appreciation of evidence. [66] A court will not review the merits of the dispute in deciding whether the award is in contravention with the fundamental policy of Indian law. [67]
The Amendment Act has also introduced a new section providing that the award may be set aside if the court finds that it is vitiated by patent illegality which appears on the face of the award in case of domestic arbitrations. For ICA seated in India, 'patent illegality' has been kept outside the purview of the arbitral challenge.[68]

65. Section 39 of the Act

66. Proviso to section 34(2A) of the Act

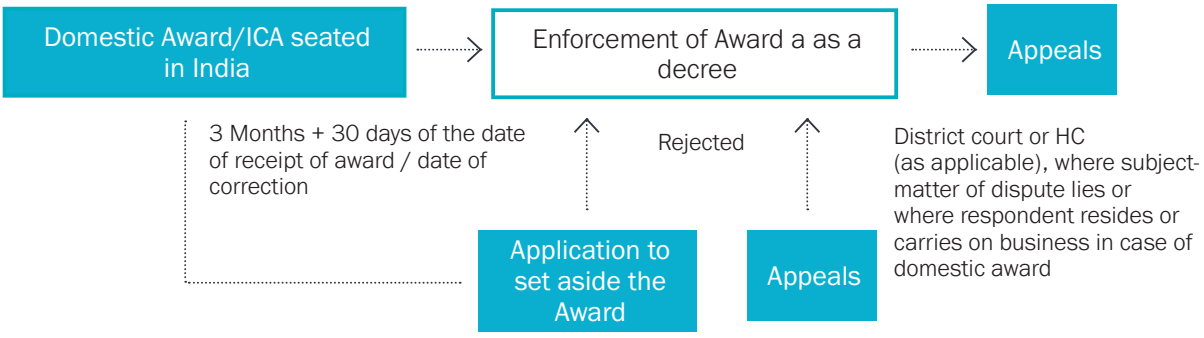
67. Explanation 2 to section 48 of the Act

68. Section 34(2A) of the Act

A challenge under this section can be filed only after providing prior notice to the opposite party.[69] A challenge has to be disposed of expeditiously and in any event within a period of one year from the date of the prior notice referred above. [70] The amended section also states that where the time for making an application under section 34 has expired, then subject to the provisions of the CPC, the award can be enforced.

Recently, the Supreme Court in the case of Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd[72] has held that law as amended by the Amendment Act will apply to those arbitral proceedings which commenced on or after October 23, 2015 and will apply to those court proceedings (which relate to arbitration) which commenced on or after October 23, 2015

Process for Challenge & enforcement



Under the Act, there was an automatic stay once an application to set aside the award under Section 34 of the Act was filed before the Indian courts. The Amendment Act now requires parties to file an additional application and specifically seek a stay by demonstrating the need for such stay to an Indian court. However, there is lack of clarity on whether a challenge initiated after 23 October 2015 to an arbitral award, passed prior to that date, would result in an automatic stay because of conflicting High Court decisions on the same.[71]

69. Section 34(5) of the Act

70. Section 34(6) of the Act

71. *New Tirupur Area Development Corporation Ltd. v. M/s. Hindustan Construction Co. Ltd* A. NO. 7674 of 2016 in O.P. No. 931 of 2015; *Tufan Chatterjee v. Rangan Dhar* AIR 2016 Cal 213; *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia 2017 SCC Online Del 6402*

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

GROUNDS FOR CHALLENGE

Domestic Award/ICA seated in India

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

TIME-LINES FOR CHALLENGE

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

XVI. Appeals

Only in exceptional circumstances, a court can be approached under the Act. The aggrieved party can approach the court only after arbitral award is made or in case of an order passed under Section 17 of the Act, after the order is passed. Appeal to court is now permissible only on certain restricted grounds.

An appeal lies from the following orders and from no others to the court authorized by law to hear appeals from original decrees of the court passing the order [73]-

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

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

However, a three judge Bench of the Supreme Court has recently held in Centrotrade Minerals & Metal v. Hindustan Copper [74] that parties may provide for an appeal to lie from the award to an appellate arbitral tribunal. Such a clause was held not to be contrary to the laws of the country and thus enforceable. It appears that the scope of appeal in such cases is far wider than an appeal to a court.

Applicability of Amendment Act

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

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

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

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

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

73. Section 37 of the Act

74. 2016 (12) SCALE 1015

XVII. Enforcement and execution of the award

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

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

When the period for filing objections has expired or objections have been rejected, the award can be enforced under the CPC in the same manner as if it were a decree passed by a court of law.[75]

An ex parte award passed by an Arbitral Tribunal under Section 28 of the Act is also enforceable under Section 36. Even a settlement reached by the parties under Section 30 of the Act can be enforced under Section 36 of the Act as if it were a decree of the court.

A. Institution of Execution Petition

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

Where an enforcement of an arbitral award is sought under Order XXI CPC by a decree- holder, the legal position as to objections to it is clear. At the stage of execution of the arbitral award, there can be no challenge as to its validity.[76]

75. N. Poongodi v. Tata Finance Ltd., 2005 (3) ARBLR 423 (Madras)

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

The court executing the decree cannot go beyond the decree and between the parties or their representatives. It ought to take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or in facts.

All proceedings in execution are commenced by an application for execution. [77] The execution of a decree against property of the judgment debtor can be effected in two ways –

i. *Attachment of property; and*

ii. *Sale of property of the judgment debtor*

The courts have been granted discretion to impose conditions prior to granting a stay, including a direction for deposit. The amended section also states that where the time for making an application under section 34 has expired, then subject to the provisions of the CPC, the award can be enforced.[78]

Also, the mere fact that an application for setting aside an arbitral award has been filed in the court does not itself render the award unenforceable unless the court grants a stay in accordance with the provisions of sub-section 3, in a separate application. It is the discretion of the court to impose such conditions as it deems fit while deciding the stay application. [79]

B. Attachment of Property

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

If the property is immoveable, the attachment is to be made by an order prohibiting the judgment debt or from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property and upon a conspicuous part of the courthouse.[80]

Where an attachment has been made, any private transfer of property attached, whether it be movable or immovable, is void as against all claims enforceable under the attachment. [81]

If during the pendency of the attachment, the judgment debtor satisfies the decree through the court the attachment will be deemed to be withdrawn.[82] Otherwise the court will order the property to be sold. [83]

C. Sale of attached property

Order XXI lays down a detailed procedure for sale of attached property whether movable or immovable. If the property attached is a moveable property, which is subject to speedy and natural decay, it may be sold at once under Rule 43. Every sale in execution of a decree should be conducted by an officer of the court except where the property to be sold is a negotiable instrument or a share in a corporation which the court may order to be sold through a broker.[84]

IX. Representation by Arbitral Tribunal for Contempt

The Bombay High Court in the case of *Alka Chandewar v. Shamshul Ishrar Khan*[85] ruled that Section 27(5) of Act does not empower the Tribunal to make representation to the Court for contempt. However, the Supreme Court overruled the judgment and held that

77. Rule 10 of the CPC
78. Section 36(1) of the Act
79. Proviso to Section 36(3) of the Act
80. O.XXI R.54 of the CPC
81. Section 64 of the CPC
82. o.XXI R. 55 of the CPC
83. o.21 R. 64 of the CPC
84. o.XXI R.76 of the CPC
85. 2016 (1) ARBLR 488 (Bom)

under Section 27(5) of the Arbitration and Conciliation Act, 1996, any non-compliance of an arbitral tribunal's order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971. The entire object of providing that a party may approach the Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such Tribunal were toothless. It was to give teeth to such orders that an express provision was made in Section 27(5) of the Act. [86]

86. Alka Chandewar vs. Shamshul Ishrar Khan (2017 (7) SCJ 15)

6. International Commercial Arbitration with seat in a reciprocating country

Post the decision of the Supreme Court in *BALCO*[87], Indian arbitration law has been made seat-centric. The Amendment Act clarifies that Part I of the Act will not be applicable in foreign seated arbitrations, save and except the standalone provisions discussed below in the table.

Pre-Balco (Bhatia Regime)	Post-Balco	Amendment Act
Unless impliedly or expressly excluded by the parties, Part I of the Act will apply even to a foreign seated arbitration.	Part I of the Act will not apply in case of foreign seated arbitration. The decision was given prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. If the arbitration agreement was executed prior to September 6, 2012, necessary modifications would have to be made in the arbitration agreement in order to be governed by the ruling in *BALCO*.[88]	Part I of the Act will not apply in case of foreign seated arbitration except Sections 9, 27 and 37 unless a contrary intention appears in the arbitration agreement. The Amendment Act is applicable prospectively with effect from October 23, 2015 (i.e. the commencement of the arbitral proceedings, or the court proceeding should be on or after October 23, 2015)[89]

In *IMAX Corporation v. E-City Entertainment Pvt. Ltd.*, the Supreme Court has upheld the choice of foreign seat by an arbitral institution as exclusion of Part I of Arbitration & Conciliation Act, 1996, under the pre-BALCO regime.[90]

Following the ratio laid down in BALCO, the Bombay High Court in *Katra Holdings v Corsair Investments LLC & Ors*,[91] held that Part I of the Act will not apply to arbitration proceedings where the parties have agreed to conduct the arbitration in New York in accordance with the Rules of American Arbitration Association and the Calcutta High Court, in *Government of West Bengal v Chatterjee Petrochem*[92] held that Part I of the Act will not apply to arbitration, where the parties agreed to conduct arbitration in Paris in accordance with the Rules of Arbitration of International Chamber of Commerce (the ICC Rules). These orders demonstrate a continued pro-arbitration approach and a positive wave of arbitration in India.

Part II of the Act is applicable to all foreign awards sought to be enforced in India and to refer parties to arbitration when the arbitration has a seat outside India. Part II is divided into two chapters, Chapter 1 being the most relevant one as it deals with foreign awards delivered by the signatory territories to the New York Convention which have reciprocity with India, while Chapter 2 is more academic in nature as it deals with foreign awards delivered under the Geneva Convention. [93]

A foreign award under Part II is defined as (i) an arbitral award (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as

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

88. Harmony Innovation Shipping Ltd v. Gupta Coal India Ltd.& Anr, 2015 (3) SCALE 295 (for our analysis please see: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/have-you-amended-your-arbitration-agreement-post-balco.html?no_cache=1&cHash=05954678cd27f35dbcb4ce62517c1fc3)

89. Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016.

90. 2017 SCC OnLine SC 239

91. 2017 (6) ABR 478

92. 2017 SCC OnLine Cal 13267

93. As mostly all parties signatory to the Geneva Convention as now members of the New York Convention, Chapter 2 of Part II remains primarily academic.

commercial under the law in force in India, (iv) made on or after 11th day of October, 1960 (v) in pursu ance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies; and (vi) in one of such territories as the Central Government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

Thus, even if a country is a signatory to the New York Convention, it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. In the case of *Bhatia International v Bulk Trading*, [94] (**"Bhatia International"**) the Supreme Court expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award.

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

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied - [95]

i. the award passed should be an arbitral award,

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

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

iv. the legal relationship should be considered as commercial;

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

vi. the foreign award should be made in one of the aforementioned 47 countries.

I. Referring parties to arbitration under part II

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who under Section 44 [96] of the Act have entered in an arbitration agreement. The Section is based on Article II (3) of New York Convention and with an in-depth reading of the Section 45 of the Act, it can be clearly understood that it is mandatory for the judicial authority to refer parties to the arbitration.

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

But as an essential pre-condition to specifically enforcing the arbitration agreement, the court has to be satisfied that the agreement is valid, operative and capable of being performed. A party may not be entitled to a stay of legal proceedings in contravention to the arbitration agreement under Section 45 in the absence of a review by the court to determine the validity of the arbitral agreement. The review is to be on a *prima facie* basis. [97]

94. AIR 2002 SC 1432

95. National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ARBLR 37

96. Section 44 of the Act

97. Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre, 2005 (3) ArbLR

A. Distinction between Section 8 and Section 45

Section 8 and Section 45 of the Act, both pertaining to court referring disputes to arbitration, vary with regards to the threshold of discretion granted to the courts. The primary distinction appears to be that Section 8 of the Act leaves no discretion with the court in the matter of referring parties to arbitration whereas Section 45 of the Act grants the court the power to refuse a reference to arbitration if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[98]

The Supreme Court in *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd.*[99] has opined that no formal application is necessary to request a court to refer the matter to arbitration under Section 45 of the Act. In case a party so requests even through affidavit, a court is obliged to refer the matter to arbitration with the only exception being cases where the arbitration agreement is null and void, inoperative and incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dispute to foreign seated arbitrations.

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

Further, Section 45 can only be applied when the matter is the subject of a New York Convention arbitration agreement, whereas Section 8 applies in general to all arbitration clauses falling under Part I of the Act. In *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.*,[100] the Supreme Court has held that the expression *'person claiming through or under'* as provided under Section 45 of the Act would mean and include within its ambit multiple and multi-party agreements. Hence even non-signatory parties to some of the agreements can pray and be referred to arbitration.

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

The Delhi HC recently in GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors,[1] relying on Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc & Ors[4] (**"Chloro Control"**) upheld the impleadment of a non-signatory to the arbitration agreement in SIAC arbitration.

II. Enforcement and execution of foreign awards

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

i. *The original/duly authenticated copy of the award;*

ii. *The original/duly authenticated copy of the agreement; and*

iii. *Such evidence as may be necessary to prove that the award is a foreign award.*

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

A. Commercial transaction

The award must be given in a convention country to resolve commercial disputes arising out of a legal relationship. In the case of *RM Invest- ment & Trading v. Boeing,*[101] the Supreme Court observed that the term *"commercial"*

1; Korp Gems (India) Pvt. Ltd. v. Precious Diamond Ltd., 2007 (3) ArbLR 32

98. 2005 (3) ArbLR 1

99. *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi, 2014 (6) SCC 677*

100. 2013 (1) SCC 641

101. AIR 1994 SC 1136

should be liberally construed as having regard to manifold activities which are an integral part of international trade.

B. Written agreement

The Geneva Convention and the New York Convention provide that a foreign arbitral agreement must be made in writing, although it does not have to be worded formally or be in accordance with a particular format.

C. Agreement must be valid

The foreign award must be valid and arise from an enforceable commercial agreement. In the case of *Khardah Company v. Raymon & Co. (India),* [102] the Supreme Court held that an arbitration clause cannot be enforceable when the agreement of which it forms an integral part is declared illegal. Recently, the Delhi High Court in *Virgoz Oils and Fats Pte. Ltd.v National Agricultural Marketing Federation of India* has held that a contract containing an arbitration agreement must be signed by all parties to the contract, in order to make the arbitration agreement valid and binding upon the parties.[103]

D. Award must be unambiguous

In the case of *Koch Navigation v. Hindustan Petroleum Corp.,* [104]the Supreme Court held that courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

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

i. *the parties to the agreement are under some incapacity;*
ii. *the agreement is void;*
iii. *the award contains decisions on matters beyond the scope of the arbitration agreement;*
iv. *the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;*
v. *the award has been set aside or suspended by a competent authority of the country in which it was made;*
vi. *the subject matter of dispute cannot be settled by arbitration under Indian law; or,*
vii. *the enforcement of the award would be contrary to Indian public policy.*

The term "public policy" as mentioned under Section 48 (2) (b) is one of the conditions to be satisfied before enforcing a foreign award. The Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.,* [105] ("**Renusagar**") held that the enforcement of foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to –

(i) fundamental policy of India; or

(ii) the interest of India; or

(iii) justice or morality.

Thus by the above decisions, the courts in India have laid down certain threshold which defines "public policy" for enforcing foreign awards in India. The courts, after the land mark judgment, have further narrowed down the meaning of the words "public policy" in order to give effect to the Act.

In *Penn Racquet Sport v. Mayor International Ltd.*[106]„ the petitioner, a company based in Arizona, sought to enforce in India an International Chamber of Commerce (**"ICC"**) award passed in its favor. The respondent, an Indian company, challenged the execution of the award on grounds, *inter alia*, that the award was contrary to the public policy of India. In a well-reasoned decision, the Delhi High Court, rejected the objections raised by the Indian company and held that the foreign award

102. AIR 1962 SC 1810

103. *Virgoz Oils and Fats Pte. Ltd.v National Agricultural Marketing Federation of India*, Ex. P. 149/2015 & EA (OS) No. 66/2016]

104. AIR 1989 SC 2198

105. (1994) 2 Arb LR 405

106. 2011 (1) ArbLR 244 (Delhi)

passed in favor of the American company was enforceable in India. It held that because the award went against the interest of an Indian company was not enough to qualify as working against the "*public policy of India*".

However, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[107] ***("Lal Mahal")***, it was held that enforcement of foreign award would be refused under Section 48(2) (b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The wider meaning given to the expression *"public policy of India"* occurring in Section 34(2)(b)(ii) in *Saw Pipes*[108] is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b). The Supreme Court further discussed *Phulchand Exports Limited v. O.O.O. Patriot*[109] ***("Phulchand")***, wherein it was accepted that the meaning given to the expression *"public policy of India"* in Section 34 in *Saw Pipes*, must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. The Supreme Court concluded that *"public policy of India* used in Section 48(2) (b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law, and has hence overruled the earlier decisions on this point.

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

The Supreme Court has held that no separate application needeeds to filed for execution of the award. A single application for enforcement of award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention grounds) would be determined. Foreign arbitration awards, if valid, are treated on par with a decree passed by an Indian civil court and they are enforceable by Indian courts having jurisdiction as if the decree had been passed by such courts.[110]

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

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

III. Appealable orders

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

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

107. 2013 (8) SCALE 489

108. Oil and Natural Gas Corporation Ltd. v. Saw Pipes, AIR 2003 SC 2629

109. 2011 (10) SCC 300

110. Section 49 of the Act

> *"While a second appeal is barred by Section 50, appeal under Article 136 of the Constitution of India to the Supreme Court has not been taken away. However, Article 136 does not provide a party a right to an appeal; it is a discretion which the Supreme Court may choose to exercise. Thus, where there existed an alternative remedy in the form of a revision under Section 115 of the Civil Procedure Code or under Article 227 of the Constitution before the High Court, the Supreme Court refused to hear an appeal under Article 136 even though special leave had initially been granted..."*[111]

Out of several issues raised in *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*,[112] one was whether a letters patent appeal would lie against an order under Section 50 of the Act wherein a petition seeking execution of an award was dismissed and no appeal was maintainable under the Act. Further, the single judge, under Section 45, refused to refer the parties to arbitration. A letters patent appeal was filed against the impugned order. The matter was later referred to the Supreme Court to clarify whether the appeal was maintainable.

The Supreme Court in its decision held –

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

Further, the Supreme Court recently in *Kandla Export Corporation & Anr. v. M/s. OCI Corporation & Anr.* clarified the law on appeals in case of enforcement of foreign awards. Interestingly, parties seeking enforcement have access to a two-stage appeal process for enforcing foreign awards- before Commercial Appellate Division and then Supreme Court. However, the only remedy left to parties resisting enforcement would be approaching the Supreme Court directly, if their objections to enforcement are rejected. No appeal can be filed by parties resisting enforcement before the Commercial Appellate Division, in the current legislative framework.[113]

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

111. 2005 (3) ArbLR 1

112. (2000) 4 RAJ 227

113. 2017 SCC OnLine SC 239

7. Emerging Issues in Indian Arbitration Laws

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

I. Prospective applicability of the amendment act

There are conflicting decisions of various High Courts. The Madras High Court in *New Tripur Area Development Corporation Limited v. M/s. Hindustan Construction Co. Ltd. & Ors.*, [114] had ruled that the language used in the Section 26[115] of the Amendment Act only refers to arbitral proceedings and not court proceedings due to deletion of the language "in relation to." Section 26 of the Amendment Act is not applicable to the stage post arbitral proceedings. This view has been supported by the division bench of Calcutta High Court in *Tufan Chatterjee v. Rangan Dhar AIR 2016 Cal 213;*

However, the division bench of Delhi High Court in *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia* has held that the amended provisions would not be applicable to 'court proceedings' initiated post-amendments, unless they were merely 'procedural' and did not affect any 'accrued right'. Therefore, if a challenge petition is filed post amendment, it would be governed by the un-amended Section 34 of the Act so long as arbitration was invoked in the preamendment era. [116]

The Supreme Court recently in the case of *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd* [117] has held that law as amended by the Amendment Act will apply to those arbitral proceedings which commenced on or after October 23, 2015 and will apply to those court proceedings (which relate to arbitration) which commenced on or after October 23, 2015. The Supreme Court also opined that the amended Section 36 will apply even in cases where application for setting aside the award was filed prior to and pending on October 23, 2015 i.e. date of commencement of the Amendment Act.

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

Even though this issue has been addressed by a number of High Courts in the past, there is still no clarity on ability of two Indian parties to choose a foreign seat of arbitration. In *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, [118] the Bombay High Court expressed a view that two Indian parties choosing a foreign seat and a foreign law governing the arbitration agreement could be considered to be opposed to public policy of the country.

Recently, in the case of *Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd.*,[119], the Madhya Pradesh High Court opined that two Indian parties may conduct arbitration in a foreign seat under English law.

The Madhya Pradesh High Court primarily relied on the ruling in the case of *Atlas Exports Industries v. Kotak & Company*[120] wherein the Supreme Court ruled that two Indian parties

114. Application No. 7674 of 2015 in O.P. No. 931 of 2015

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

116. *Ardee Infrastructure Pvt. Ltd. v. Anuradha Bhatia (1999) 7 SCC 61*

117. Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016.

118. 2015 (2) Compl J 288 (Bom)

119. Judgment in First Appeal No. 310/2015 dated September 11, 2015

120. (1999) 7 SCC 61.

could contract to have a foreign-seated arbitration; although, the judgment was in context of the 1940 Arbitration Act. Under appeal, although expected, the Supreme Court did not opine on this issue.

Recently the Delhi High Court (**"Delhi HC"**) in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*,[121] after relying on the decision of the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation (India) (P) Ltd* Sasan Power, and *Atlas Exports Industries v. Kotak &Co* Atlas Exports ruled that there is no prohibition in two Indian parties opting for a foreign seat of arbitration.

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

However, one must be wary of the ruling in *TDM Infrastructure*, [122] wherein the court ruled that two Indian parties could not derogate from Indian law by agreeing to conduct arbitration with a foreign seat and a foreign law. But as TDM Infrastructure was a judgment under Section 11 of the Act, there are questions on its precedential value. [123]

III. Arbitrability of oppression and mismanagement cases

A landmark judgment on this issue was delivered by the Bombay High Court in *Rakesh Malhotra v. Rajinder Kumar Malhotra*, [124] wherein the court held that disputes regarding oppression and mismanagement cannot be arbitrated, and must be adjudicated upon by the judicial authority itself. However, in case the judicial authority finds that the petition is *mala fide* or vexatious and is an attempt to avoid an arbitration clause, the dispute must be referred to arbitration. Arguably, this could have an unintended impact on the *prima facie* standard in section 8, as amended and introduced by the Amendment Act.

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

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

IV. Arbitrability of consumer disputes

The National Consumer Dispute Resolution Commission (**"NCDRC"**) in *Aftab Singh v. Emaar MGF Land Limited* [125] has held that an arbitration clause in an agreement between a builder and consumers cannot circumscribe the jurisdiction of the NCDRC notwithstanding the amendments made to Section 8 of the Act. It held that the non-obstante clause did not oust the jurisdiction of consumer fora, since they were specially designated authorities to deal with consumer issues.

121. 2017 SCC OnLine Del 11625

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

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

124. (2015)2CompLJ288(Bom)

125. Consumer Case No. 701 of 2015

8. Conclusion

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

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

With the pro-arbitration approach of the courts and the Amendment Act in place, there is cause to look forward to best practices being adopted in Indian arbitration law in the near future. Exciting times are ahead for Indian arbitration jurisprudence and our courts are ready to take on several matters dealing with the interpretation of the Amendment Act.

Annexure

India continues its march towards a model dispute resolution regime

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

I. Arbitration and Conciliation (Amendment) Bill, 2018[126]

With the 2015 Amendment being the harbinger in transforming India into a hub of arbitration, the Government of India (**"GoI"**) has rightfully identified the need to further the pro-arbitration landscape in India. The amendments are principally based on the recommendations of the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (**"Srikrishna Committee Report"**)[127]. Principally the report has made positive recommendations for reforming the arbitration ecosystem. However, caution should be exercised as some suggestions under the Srikrishna Committee Report may merit further consideration.

1. Arbitration Council of India (**"ACI"**)

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

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

2. Amendments to provisions pertaining to court-appointed arbitrators

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

126. Press Release available here.

127. For an analysis of the Srikrishna Committee Report, see, Kshama Loya, Ashish Kabra and Vyapak Desai, *'Arbitration in India: The Srikrishna Report – A Critique'* (2018) 20 (1) Asian Dispute Review 4–11

the High Court (in other cases), thereby eliminating the requirement to approach the court for arbitral appointments. This is akin to the practice in other leading jurisdictions such as Singapore and Hong Kong, where the designated institutions are Singapore International Arbitration Centre [128] and Hong Kong International Arbitration Centre, respectively.

3. Amendments to the time limit for making of an arbitral award[129]

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

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

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

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

5. Amendments to incorporate arbitral immunity

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

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

6. Clarifications to applicability of the 2015 Amendment

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

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

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

129. Arbitration and Conciliation Act 1996, s 29A: *"(1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference...(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months."*

While the Srikrishna Committee Report has largely made positive suggestions, certain amendments made thereunder deserve further evaluation e.g. amendments proposed to Section 34 of the Arbitration and Conciliation Act 1996.[130] Considering that the Bill is based on the Srikrishna Committee Report, it is hoped that further consideration is given to such aspects backed up by the intention to provide efficient dispute resolution mechanisms even to commercial disputes of lesser value. This is in consonance with the parameters for resolution of commercial disputes as indicated in the Doing Business measures of the World Bank.[132] The World Bank in determining the ease of doing business ranking of a country takes into account the enforceability of contracts. To ascertain the level of contract enforcement, it measures (in case of India) cases of value of USD 5,000 or higher. It is from here that the value of INR 3 lakhs is adopted.

II. Commercial Courts, Commercial Division and Commercial Division of High Courts (Amendment) Bill, 2018:

The Union Cabinet has also approved the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 for introduction in the Parliament which seeks to amend the pecuniary limit under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 (**"Commercial Courts Act"**), amongst other changes.[131] It is proposed to extend the applicability of the Commercial Courts Act, by reducing the specified value of a commercial dispute to INR 3 lakhs from the present limit of INR one crore. This change is backed up by the intention to provide efficient dispute resolution mechanisms even to commercial disputes of lesser value. This is in consonance with the parameters for resolution of commercial disputes as indicated in the Doing Business measures of the World Bank.[132] The World Bank in determining the ease of doing business ranking of a country takes into account the enforceability of contracts. To ascertain the level of contract enforcement, it measures (in case of India) cases of value of USD 5,000 or higher. It is from here that the value of INR 3 lakhs is adopted.

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

130. Kshama Loya, Ashish Kabra and Vyapak Desai, *'Arbitration in India: The Srikrishna Report – A Critique'* (2018) 20 (1) Asian Dispute Review 8

131. Press release available here.

132. Available here.

India: Rewinding to the era of 'public policy' mandates in foreign-seated arbitrations (Venture Global Engineering v Tech Mahindra)

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

I. Original news

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

II. What is the background to this decision?

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

This analysis does not discuss the cases pending against or by either party in USA.

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

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

III. Post-arbitral litigation

Subsequent to a civil suit being filed by the Appellant in Secunderabad on 28 April 2006, the Respondent was restrained from enforcing the award in India. On an appeal made against

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

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

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

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

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

IV. What did the Supreme Court decide in Venture III?

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

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

Justice J Chelameswar

V. Whether the award is contrary to public policy of India since compliance with the award would amount to violation of the provisions of the FEMA?

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

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

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

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

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

The appeals would, accordingly, be set aside.

The appeal made by the Respondent was dismissed considering that the law was settled on the aspect of applicability of Part I of the Act to an international commercial arbitration.

Justice Abhay Manohar Sapre

VII. Whether the acts of Mr Raju amount to misrepresentation/ suppression of material facts and, if so, whether they could be made basis to seek quashing of an award?

The learned Judge opined that the letter in question was rightly received in evidence, without requiring any further corroboration, especially because the existence of the confessional letter, its contents, author or his signature had never been doubted. In establishing 'notorious and widely known facts', the letter was superior to formal means of proof (following, *Onkar Nath & Ors v Delhi Administration* (1977) 2 SCC 611 (not reported by LexisNexis® UK)). Thus, the acts stated therein were prima facie acts of misrepresentation and suppression of material facts and in breach of section 209 and 211 of the Companies Act 1956 (CA 1956) and related statutes.

VIII. Whether such acts have any causative link to the arbitral proceedings, and constitute an 'event of default' under the Agreement? Would this nullify the award?

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

Act 1956, triggered an 'event of default' of the Agreement with the recourse to the remedies under the Agreement.

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

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

IX. What are the practical implications?

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

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

The views expressed are not necessarily those of the proprietor.

Delhi high court removes red tape in referring disputes to arbitration

The Delhi High Court has held that:

- Formal application under Section 8 is not required if defendant raises an objection on maintainability of suit due to existence of arbitration clause in written statement;
- Mere existence of an objection is sufficient and need not be coupled with a specific prayer for reference to arbitration.

I. Introduction

Recently, the Delhi High Court in Parasramka Holding Pvt. Ltd. (**"Parasramka"**) and Ors. vs. Ambience Pvt. Ltd and Anr. (**"Ambience"**)[133] referred the parties to arbitration without a formal application under Section 8 of the Arbitration and Conciliation Act[134] (**"A&C Act"**). In a pro-arbitration judgment, the court upheld the plea of the defendants that mere reference to the arbitration agreement in the written statement was sufficient to require the court to refer the parties to arbitration.

II. Facts

On October 27, 2009 Ambience executed an Apartment Buyer's Agreement (**"Agreement"**) with Parasramka. The parties agreed that all disputes and/or differences between any two or more of the Purchaser/s, Allottees, Apartment Owners, Association of Apartment Owners and/or the Company shall be referred to arbitration.

When disputes arose between the parties, Parasramka filed a suit in the Delhi High Court on March 15, 2017. Ambience first chose to file an application for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908, which application came to be dismissed. This application did not contain any reference as regards existence of the arbitration clause. On May 20, 2017, Ambience filed a written statement in which they objected to maintainability of the suit in light of the arbitration agreement. Thereafter, the Defendants filed a formal application under Section 8 of the A&C Act.

III. Issue

The questions posed to the Delhi High Court were:

- Whether or not the application under Section 8 was maintainable since it was filed after submission of the written statement?
- Whether or not a mere a mere averment as to the existence of an arbitration agreement without a specific prayer for reference would satisfy the requirements of an application under Section 8?

IV. Contentions of Plaintiffs:

The Plaintiff *inter alia* argued that an application under Section 8 cannot be filed subsequent to the submission of first statement on the substance of the dispute i.e. the written statement. By filing the written statement prior to filing of the present applications have submitted themselves to the jurisdiction of this Court and are now estopped from relying on the arbitration clause. Merely raising a plea in the written statement that there exists an arbitration agreement between the parties without any specific

133. CS(OS) 125/2017, dated January 15, 2018

134. Section 8: Power to refer parties to arbitration where there is an arbitration agreement - "(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

prayer for referring the dispute to arbitration is inconsequential.

V. Contentions of Defendants:

The Defendants *inter alia* argued that they had already pleaded as to existence of arbitration agreement in the written statement and had objected to jurisdiction of the court to adjudicate upon the suit. The Defendants had not submitted to the jurisdiction of the court. As long as a party draws the court's attention to the arbitration agreement no later than the first statement on the substance of the dispute, the jurisdiction of the court ceases and there is no requirement to seek specific reference to arbitration.

VI. Judgment

After hearing the parties, the Court ruled that the objection as to maintainability of the suit and averment of existence of an arbitration clause – in the written statement – could be treated as an application under Section 8 of the A&C Act. The Court held[135] that even when the written statement was filed, strings are attached by challenging the maintainability of the suit in view of the arbitration clause. In such circumstances, the preliminary objection of Ambience contained in the written statement can be treated as an application under Section 8 of the A&C Act.

Discussing the amendments to Section 8 of the A&C Act, the Court considered that Section 8(1) prior to amendment[136] required a party to only intimate to the Court that the action before the Court is the subject matter of an arbitration agreement. Thereafter, it was the duty of the judicial authority to refer the parties to arbitration. The Court assessed the amended Section 8(1) and found that there was no discussion by the Law Commission on this issue and the substitution of S. 8(1). Therefore, the Court ruled that there was no requirement of filing a formal application seeking specific prayer for reference, as long as the party raised an objection on maintainability of the suit in light of the arbitration clause.

The Court also alluded to the change in the language of Section 8 after the amendment to the A&C Act and held that the expression, *"so applies not later than the date of submitting"* means the outer limit for filing the written statement in a particular case. The amended Section 8 therefore sets out a limit to the period within which such application must be presented. In this case, the written statement was filed within the limitation period of 120 days after dismissal of the application under Order VII Rule 11. This written statement was therefore within the limitation period.

VII. Analysis

This judgment is another step forward by the judiciary in facilitating ease of reference to arbitration in cases where the plaintiff files a suit in breach of an arbitration agreement. The Court has effectively relaxed the requirement for filing of a separate application under Section 8 as well as a specific prayer and specifically permitted that the objection to jurisdiction of the court on the ground of the arbitration agreement contained in the written statement is sufficient.

In filing any application/ statement prior to an application under Section 8, a party must ensure that the pleadings cannot be construed to constitute an intention to submit to jurisdiction of court and a waiver of their right to refer disputes to arbitration.

This judgment may also help reduce the anomalies created due to strategy adopted by litigants when faced with a civil suit and the time lag between filing of applications under Order 7 Rule 11 of the Code of Civil Procedure and the objection to maintainability of a civil suit under Section 8 of the A&C Act.

135. Relying on Eastern Medikt vs. R.S. Sales Corporation & Anr. (2007) 137 DLT 626, High Court of Delhi

136. Relying on Sharad P. Jagtiani vs. Edelweiss Securities Limited FAO (OS) 188/2014, High Court of Delhi (DB)

Delhi HC: No bar on two Indian parties in choosing a foreign seat of arbitration?

Delhi HC:

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

Recently, the Delhi High Court (**"Delhi HC"**) in *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors*,[137] after relying on the decision of the Madhya Pradesh High Court in *Sasan Power Limited v. North American Coal Corporation (India) (P) Ltd*[138] (**"Sasan Power"**), and *Atlas Exports Industries v. Kotak &Co*[139] (**"Atlas Exports"**) has ruled that here is no prohibition in two Indian parties opting for a foreign seat of arbitration, and such an arrangement would attract Part II of the Arbitration and Conciliation Act, 1996 (**"Act"**). The Delhi HC also relied on *Chloro Controls India Pvt Ltd v. Severn Trent Water Purification Inc & Ors*[140] (**"Chloro Control"**) and upheld the impleadment of a non-signatory to the arbitration agreement in SIAC arbitration reference no Arb. 316/16/ACU (**"Arbitration Proceedings"**). In addition, the Delhi HC has also opined that the decision in *Sudhir Gopi v. Indira Gandhi National Open University*[141] (**"Sudhir Gopi"**) that the principle of alter ego is non-arbitrable, is *per incuriam.*

I. Background:

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

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

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

137. 2017 SCC OnLine Del 11625

138. 2015 SCCOnline M.P. 7417

139. 1999 (7) SCC 61

140. 2013 (1) SCC 641

141. 2017 SCCOnline Del 8345

GMR Energy also filed an urgent interim application under Order 39, Rule 1 and 2 of the Code of Civil Procedure, 1908 (**"CPC"**). Doosan India filed two applications (a) application under Order 39, Rule 4 to vacate the operation of the 4 July 2017 order; and (b) application under Section 45 of the Act, inviting the Delhi HC to refer the parties to arbitration.

II. Contentions on behalf of Doosan India

The primary contentions have been summarized below:

A. Impleading GMR Energy in the Arbitration Proceedings

1. there exists a valid and binding arbitration agreement between Doosan India, GCEL, GIL and GMR Energy being alter ego and a guarantor of GCEL has been rightly impleaded in the Arbitration Proceedings.
2. The fact that: (a) GMR Energy is a holding company of GCEL and has taken over GCEL liabilities towards Doosan India; (b) GMR Energy guaranteed to make payments and made certain payments on behalf of GCEL in partial discharge of the liability of GCEL, and at that relevant time GMR Energy owned 100% stakes in GCEL, co-mingled funds, run by the same family, had the same Directors and officers; (c) the EPC Agreements, the Corporate Guarantee all contain arbitration clause with the intention to resolve any dispute through arbitration under the SIAC Rules and additionally the two MOUs are also governed by the same agreements, the payment obligation being undertaken by GMR Energy for assuring proper execution of three EPC Agreements between Doosan India and GCEL, the arbitration clause would also extend to GMR Energy.
3. It was also contended that invocation of arbitration against the alter ego of a signatory is a well-recognized principle not only in India,[142] but also in Singapore.[143]
4. The Arbitral Tribunal is the appropriate forum to adjudicate the issue of alter ego and the same being determinable by the Arbitral Tribunal, this Court cannot proceed with the present suit to determine whether GMR Energy is liable to be proceeded in the Arbitration Proceedings.[144]
5. The decision of the Delhi HC in *Sudhir Gopi* is not applicable in the present case, since in *Sudhir Gopi* the dispute did not pertain to international arbitration but under Part I of the Act, hence the said decision has no application to the present case.

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

1. Relying on the decisions of the Supreme Court in Sasan Power and Atlas Exports, it was argued that two Indian parties can choose a foreign seat of arbitration, and such an arrangement would not be in contravention with Section 28 of the Indian Contract Act, 1872 (**"Contract Act"**).
2. GMR Energy's reliance on *TDM Infrastructure was improper since the ruling in TDM Infrastructure* being a decision under Section 11 of the Act cannot be treated as a binding precedent, as was held in *Associate Builders v. Delhi Development Authority*[145].

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

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

144. *Integrated Sales Services Aloe Vera of America, Inc v. Asianic Food (S) Pte. Ltd & Anr* 2006 (3) SGHC 78; *M/s Sai Soft Securities Ltd v. Manju Ahluwalia* FAO (OS) No. 65/2016

145. 2015 (3) SCC 49

III. Contentions on behalf of GMR Energy

A. Impleading GMR Energy in the Arbitration Proceedings

1. GMR Energy being a non-signatory to any of the arbitration agreements, it cannot be roped into an international arbitration by applying the principle of alter ego or *"it being a guarantor"* without there being a written guarantee.
2. The principle of alter ego does not entitle Doosan India to invoke arbitration against GMR Energy as each company is a separate and distinct legal entity, and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies a single entity.[146]
3. The basis of impleading GMR Energy on the basis of the MOUs is incorrect, as admittedly, the two MOUs stood terminated by a letter dated 3 November 2016, and which letter was not made part of the Arbitration Proceedings.
4. Despite the fact that GMR Energy is not a party to the arbitration agreement, Doosan India has imposed the Arbitration Proceedings on GMR Energy, which is oppressive, vexatious apart from being illegal.

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

1. The EPC Agreements as well as the Corporate Guarantee prescribe: (a) governing law of the contract as Indian law; (b) arbitration shall be conducted in Singapore; and (c) arbitration shall be as per SIAC Rules. It was contended that since the relationship between GCEL, GIL and Doosan India is domestic in nature, and hence all parties being Indian, Part I of the Act would apply in view of the recent amendment to Section 2 (1) (f) (iii) of the Act.[147]
2. As the arbitration is between two Indian parties, it cannot be termed as international commercial arbitration and Indian substantive law cannot be derogated from by and between two Indian parties as held in *Bharat Aluminium Company and Ors v. Kaiser Aluminium Technical Service, Inc and Ors.*[148]
3. Since two Indians cannot contract out of the law of India and the Act is a substantive law, exclusion of Part I of the Act which Doosan India seeks to do would be hit by Section 28 of the Contract Act.
4. Part II of the Act would not apply merely because the place of arbitration is out of India. Once the arbitration is between two Indian parties, it ceases to be an "international commercial arbitration", and therefore automatically ceases to be "considered as commercial under the law enforced in India" which is the principle condition for defining "a foreign award" under Section 44 of the Act. Accordingly, the Section 45 Application is not maintainable.

IV. Judgment

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

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

146. *Indowind Energy Ltd v. Wescare (India) Ltd.*, 2010 (5) SCC 306, *Sudir Gopi, Balwant Rai Saluja & Anr v. Air India Ltd & Ors.* 2014 (9) SCC 407

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

148. 2012 (9) SCC 552

Court answered in affirmative, meaning that there is no prohibition for two Indian parties to opt for a foreign seat of arbitration.[149] The Madhya Pradesh High Court also affirmed the ruling in *Sasan Power* which had relied on *Atlas Exports* to reach the same conclusion.

The Delhi HC also dismissed GMR Energy's contention that the decision in Atlas Exports is under the 1940 Arbitration Act, hence not applicable under the Act. On this issue, reliance was placed on the Supreme Court's decision in *Fuerst Day Lawson v. Jindal Exports Ltd*,[150] wherein it was held that the new statute is more favourable to international arbitration than its previous incarnation.

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

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

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

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

Interestingly, the Delhi HC while discussing the principle of alter ego held that the decision of Delhi HC in *Sudhir Gopi* is *per incuriam*, in so far as it failed to consider the issue of arbitrability of alter ego and the decision was passed without taking into consideration the decision of Supreme Court in *A Ayyasamy v. A Paramasivam*[151] (**"Ayyasamy"**), wherein the Supreme Court carved out instances which cannot be referred to arbitration.

V. Analysis:

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

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

150. 2011 (8) SCC 333

151. (2016) 10 SCC 386

Delhi High Court upholds clause conferring jurisdiction on foreign court (Bharat Heavy Electricals Ltd v Electricity Generation Incorporation)

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Dispute Resolution analysis: The High Court in Delhi has upheld a jurisdiction clause conferring jurisdiction on the Commercial Court in London. It held that where a jurisdiction clause refers to a specific forum and clearly follows the intention of the parties the court must give effect to that clause.Sahil Kanuga, co-head of the commercial disputes practice at Nishith Desai Associates and Sanjika Dang, an associate at the firm, consider the decision and its implications.

I. Original news

Bharat Heavy Electricals Ltd v Electricity Generation Incorporation (CS (Comm) 190/2017

II. What are the practical implications of this case?

This is an important Delhi High Court decision and gives rise to a number of practical implications:

- having expressly conferred jurisdiction upon a particular court, parties will ordinarily be required to approach only such court
- where a contract vests jurisdiction in a foreign court, the absence of the word 'only' will not mean that such jurisdiction is not exclusive
- a Bank Guarantee is an independent contract and jurisdiction arising from related contracts will be irrelevant for disputes pertaining to the guarantee itself
- the place where a Bank Guarantee is issued will not confer territorial jurisdiction on a court if the contract contains a jurisdiction clause

III. What was this case about?

The Delhi High Court recently dealt with questions regarding conferring of jurisdiction on foreign courts. In this situation, a counter bank guarantee was issued in India but the performance bank guarantee under a separate agreement was issued by a private Turkish Bank. Further, the underlying agreement between the parties provided for the Courts at Ankara, Turkey having jurisdiction. There were, consequently, three separate agreements containing three different dispute resolutions provisions.

IV. What were the facts?

Electricity Generation Incorporation (EGI), a state-owned company incorporated under the laws of Turkey, entered into a contract for the rehabilitation of a hydroelectric power plant, for which Bharat Heavy Electricals Ltd (BHEL) was engaged as a contractor (the Contract). The jurisdiction under the Contract was conferred upon the Courts at Ankara, Turkey.

A Performance Bank Guarantee had to be furnished under the Contract (PBG). BHEL procured a Counter Bank Guarantee through the Bank of Baroda (BoB) in favour of AKBank TAS

(AKBank), a privately-owned bank in Turkey (the Counter Guarantee). The Counter Guarantee was governed by English Law and jurisdiction was conferred upon the Commercial Court at London. On the basis of the Counter Guarantee, AKBank issued a PBG to EGI.

On March 9, 2017, BoB informed BHEL that EGI had terminated the Contract and invoked the PBG under the Contract. Claiming that EGI's breach was wrongful, BHEL filed a suit before the court seeking declaratory reliefs and a permanent injunction against encashment of the PBG.

V. What were the main legal arguments arising?

The issue was whether the court had territorial jurisdiction over the dispute.

BHEL's Contentions

The Counter Guarantee had been entered into in Delhi and a part of the cause of action arose in Delhi—equity thus demanded that jurisdiction must be conferred on the court.

The word 'only' was missing from the jurisdiction clause, and so the jurisdiction of the Commercial Court in London was not exclusive.

BHEL could not sue or enforce a decree against BoB either at Ankara or in London, since the same would be a meaningless exercise when both BHEL and BoB are situated at Delhi. Therefore, the court has territorial jurisdiction to entertain the present suit.

It was not possible for BHEL to approach the Commercial Court in London on such short notice, so the court must assume jurisdiction in light of the paucity of time.

Respondent's Contentions

The Counter Guarantee provided for exclusive jurisdiction of the Commercial Court in London.

AKBank neither resided in Delhi nor carried on its business or profession within the jurisdiction of the court. Mere issuance of the Counter Guarantee by BoB was not sufficient to confer jurisdiction on the court.

VI. What did the court decide?

After discussing several judgments, the court reached the conclusion that it did not have territorial jurisdiction over the dispute. It was held that:

The place of issuance of guarantee was irrelevant

The issuance of the Counter Guarantee in Delhi was not sufficient to vest territorial jurisdiction on the court. Furthermore, the Counter Guarantee was an independent contract and the existence or nonexistence of the underlying contract is irrelevant to it.

The absence of 'only' in the jurisdictional clause was irrelevant

The argument that the word 'only' being missing from the jurisdictional clause implied that the jurisdiction of the Commercial Court in London was not exclusive, must be rejected. Even in the absence of such a word, a court may be granted exclusive jurisdiction, as the specific reference to a court reflects the parties' intention to grant exclusive jurisdiction to it.

The paucity of time is not a valid ground to confer territorial jurisdiction

In the present case, both the applicable contracts clearly vest jurisdiction on courts outside India. Notwithstanding the same, BHEL had argued that the jurisdiction must be vested in the court due to paucity of time. The court held that this is not a valid justification to confer jurisdiction on a court. Furthermore, even if the court accepted that paucity of time was one of the grounds, time could be granted to BHEL to approach the court of competent jurisdiction. Accordingly, the court extended the ad-interim order in favour of BHEL for 45 days so that it could approach a court of appropriate jurisdiction.

Parties can choose a 'neutral forum'

If the cause of action has taken place in India and the Indian law applies, the parties cannot choose to vest territorial jurisdiction to try the suit in a court which does not have the jurisdiction. Parties may agree to vest exclusive jurisdiction in one of such courts having jurisdiction. However,

where one party is not subject to the law of India, the parties may vest jurisdiction outside the country in a neutral forum or a 'court of choice'.

VII. To what extent is the judgment helpful and what practical lessons are there to be learned?

Given the nature of cross-border business relations prevalent between parties which are, more often than not, contained in a number of separate and independent agreements, each possibly containing separate and distinct dispute resolution provisions, this judgment provides a critical insight into the scope of exclusive jurisdiction clauses in contracts that are ancillary to primary agreements.

By identifying the fact that (i) the Counter Guarantee and the PBG both vest jurisdiction in courts outside India; and (ii) the only averment made by BHEL to attempt to confer jurisdiction upon the court was that of paucity of time to approach the English court, .e, the agreed court; the court demonstrated that attempts to bypass contractual provisions on jurisdiction would require parties to meet a very high threshold. The court dealt with BHEL's averment regarding paucity of time by extending the ad-interim relief granted in their favour for a further period of 45 days, in order to enable them to approach the court having jurisdiction to entertain and try the dispute.

Where a party attempts to file proceedings before a court, which court does not ordinarily have jurisdiction to entertain and try the dispute, several factors will be looked into. These include:

- the country in which the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Indian and foreign courts
- whether the law of the foreign court applies and, if so, whether it differs from Indian law in any material respects
- whether either of the parties are closely connected to any jurisdiction, and if so, how closely
- whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages
- whether the plaintiffs would be prejudiced by having to sue in a foreign court because they would:
  - (i) be deprived of security for that claim
  - (ii) be unable to enforce any judgment obtained
  - (iii) be faced with a time-bar not applicable domestically
  - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial

While these factors may be helpful in determining territorial jurisdiction, it has been held that jurisdictional clauses that refer to a specific forum and clearly detain the intention of the parties, must ordinarily be given effect to.

VIII. Case details

- Court: High Court of Delhi at New Delhi
- Judge: The Honourable Ms Justice Mukta Gupta
- Date of judgment: 19 September 2017

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

Indian Arbitration Act: is this the end of the applicability debate? (Government of West Bengal v. Chatterjee Petrochem and Katra Holdings v. Corsair Investments LLC & Ors)

This article was originally published in the 31st October, 2017 edition of Lexis®PSL Arbitration

Arbitration analysis: On the fifth anniversary of the BALCO decision, Sahil Kanuga, co-head of international dispute resolution practice, Payel Chatterjee, a senior member and Mohammad Kamran, a member of the same team at Nishith Desai Associates, consider whether the dust is finally settling on the much-debated issue of the applicability of Part I of the Arbitration and Conciliation Act, 1996 (the Act) to foreign-seated awards. The issue has re-surfaced before various courts at different stages due to badly drafted arbitration clauses, prospective applicability of the Balco case and the newly enacted amendments to the Act in 2015.

I. Original news

Government of West Bengal v Chatterjee Petrochem AP No 1046 of 2016 and GA No 211 of 2017 (not reported by LexisNexis® UK)

Katra Holdings v Corsair Investments LLC & Ors Arbitration Petition No 436 of 2016 (not reported by LexisNexis® UK)

II. Pre-and-Post Balco Era

Bhatia International v Bulk Trading S.A. Bhatia International v Bulk Trading (2002) 4 SCC 105 (not reported by Lexis Nexis® UK), entailed that Part I of the Arbitration and Conciliation Act, 1996 will apply to all arbitrations (whether domestic or foreign-seated) unless the parties to a foreign-seated arbitration expressly or impliedly excluded the application of provisions of Part I of the Act.

The decision in *Bharat Aluminium Co v Kaiser Aluminium Technical Service* 2012 9 SCC 552 (Balco) (not reported by LexisNexis®), by a five-judge constitutional bench, laid down a blanket rule that Part I of the Act had no application to arbitrations that were seated outside India, irrespective of the fact whether parties chose to apply the Act or not.

However, it was to apply only prospectively ie to arbitration agreements entered into after 6 September 2012. The Supreme Court in *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd & Anr* 2015 (3) SCALE 295 (not reported by LexisNexis®) clarified that pre-Balco arbitration agreements (executed prior to 6 September 2012) must be considered based on the principles laid down in Bhatia International. This effectively led to two parallel streams of law being developed insofar as arbitration was concerned.

III. Amendments to Part I of the Indian Arbitration and Conciliation Act

Pursuant to the *Balco* decision, the Indian courts had no jurisdiction to intervene in arbitrations which were seated outside India and part I of the Act was not applicable to such arbitrations. Therefore, parties to a foreign seated arbitration were blocked out of the Indian courts in seeking interim relief under section 9, Part I of the Act. This posed significant concerns for foreign parties. To iron out such issues, some welcome changes were made for international arbitrations seated outside India, in amendments to the Act effective 23 October 2015. After the amendments, inter alia, sections 9, 27, and 37(1) and (3) in Part 1 of the Act became applicable to foreign seated arbitrations, unless an agreement exists to the contrary.

In addition to above, the amendments made several other changes including guidelines to determine ineligibility, independence, and impartiality of arbitrators, expeditious disposal with timelines for arbitration proceedings etc. They were aimed at taking drastic and reform oriented steps to bring Indian arbitration law at par with global standards and provide an effective mechanism for resolving disputes with minimum court interference. The task now rested with the judiciary to eliminate the remnants of the past and set the ball rolling for the new regime.

Recently, the Bombay High Court and the Calcutta High Court have refused to entertain a challenge to foreign arbitral awards, applying the above principles. The Bombay High Court in *Katra Holdings v Corsair Investments LLC & Ors Arbitration Petition* No 436 of 2016 (not reported by LexisNexis® UK) held that Part I of the Act will not apply to arbitration proceedings where the parties have agreed to conduct the arbitration in New York in accordance with the Rules of American Arbitration Association (the AAA Rules).

Soon thereafter, the Calcutta High Court, in Government of *West Bengal v Chatterjee Petrochem AP* No 1046 of 2016 and G.A. No. 211 of 2017 held that Part I of the Act will not apply to arbitration, where the parties agreed to conduct arbitration in Paris in accordance with the Rules of Arbitration of International Chamber of Commerce (the ICC Rules). These orders demonstrate a continued pro-arbitration approach and a positive wave of arbitration in India.

IV. Katra Holdings Case

The dispute in *Katra* Holdings arose in relation to several transactions under a Restated Escrow and Transaction Settlement Agreement dated 12 May 2007 (the RETS Agreement) between the parties. Clause 15 of the RETS Agreement entailed that the disputes, if not settled in good faith, shall be submitted to arbitration to be conducted in accordance with AAA Rules and *'the place of arbitration shall be New York, New York or such other place as may be agreed upon by the parties'*. Clause 16 provided that the RETS Agreement shall be governed by the laws of India except in relation to certain specified provisions, which shall be governed by New York law.

A three member arbitral tribunal passed the final award in New York, USA. The award was challenged under section 34(2)(ii)(b) of the Act before the Bombay High Court on the grounds of public policy. However, a preliminary objection was raised on the maintainability of the application as Part I of the Act stood excluded as the juridical seat of arbitration was outside India. The issue before Bombay High Court was to determine whether the seat of arbitration was in India or outside India.

It is well settled that the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. It would not be necessary to specify which law would apply to the arbitration proceedings, since the law of that particular country would apply *ipso jure (Eitzen Bulk SAv Ashapura Minechem Limited CA* No 5131-5133 of 2016; CA No. 5134-5135 of 2016; CA No 5136 of 2016)(not reported by LexisNexis® UK). The Bombay High Court relied on *Union of*

India v Reliance Industries & Ors (2014) 7 SCC 603 which further expounded *Bhatia International* to clarify that where the juridical seat is outside India or where the law other than Indian law governs the arbitration agreement, Part I of the Act would be excluded by necessary implication. The Bombay High Court noted that since the parties had agreed that arbitration proceedings would be conducted in New York in accordance with the AAA Rules, it could not contend that the proper law of the agreement, ie, Indian Law, would apply to the arbitration proceedings.

Further, the Bombay High Court also relied on *Yograj Infrastructure Limited v Ssang Yong Engineering and Construction Company Limited* (2011) 9 SCC 735 (not reported by LexisNexis® UK), which dealt with a similar arbitration clause and concluded that if the seat of arbitration is clearly laid down in the arbitration clause, the parties cannot rely on the proper law of the agreement. Since the arbitration was seated in New York, USA and the Federal Arbitration Act (USA) was the law governing the arbitration proceedings, application of Part I was by necessary implication excluded.

V. Chatterjee Petrochem Case

The dispute in Chatterjee Petrochem case emanated out of an agreement dated 12 January 2002 (Sale Agreement) for the sale of majority shareholding of Haldia Petrochemicals Limited to Chatterjee Petrochem (Mauritius) Co by the government of West Bengal. The relevant dispute resolution clause in the Sale Agreement provided that '*disputes and differences between the parties will be settled in accordance with the ICC Rules. The venue of arbitration will be in Paris and the law applicable to the contract will be Indian law*'.

The arbitral tribunal made the final award dated 9 September 2016 in Paris, which was challenged under section 34 of the Act. The issue before the Calcutta High Court was whether there was an express or implied agreement between the parties to exclude Part I of the Act.Shashoua and others v Sharma **[2009] EWHC 957 (Comm)**.

The Calcutta High Court observed that there is no difference between seat, venue and place of arbitration unless there is agreement between the parties that seat would be in one place and hearings would take place in other places (*Shashoua v Sharma*). This is in line with the issue dealt in the recent Indian Supreme Court decision of *Roger Shashoua v Sharma* [2017] (Civ Appeal No.2841–2843) adopting international best practices and a hands-off approach in case of foreign awards giving effect to the intention of the parties.

The Calcutta High Court relied on the same series of judgments which were considered in *Katra Holdings*. The ruling held that although parties have chosen Indian law, the seat or venue of the arbitration was chosen as Paris. Therefore, the law governing the agreement to arbitrate and enforcement of challenge to the award is the law of the place where the seat of arbitration is located or in other words, Paris. Thus, it was held that parties had agreed to exclude Part I of the Act and the application was dismissed. The Calcutta High Court clarified that the law in *Bhatia International* would apply, as the agreement was entered prior to the *Balco* decision.

VI. What are the practical implications?

These two judgments are excellent examples of a continued thrust towards a pro-arbitration environment in India. Party autonomy and a non-interference approach by the Indian courts have paved the way for international commercial arbitration. Interestingly, the Indian High Courts in both these cases have sought to adapt a rational interpretation and concluded that if the arbitration agreement provides for the venue of arbitration coupled with the curial law of the place, the term 'venue' would be construed to mean 'seat' of arbitration.

The Supreme Court in *Balco* and *Enercon* (Civil Appeal No.2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013), decided on February 14, 2014 (not reported by LexisNexis® UK) had distinguished the concept of seat and venue

and explained their significance in arbitration proceedings. The distinction between seat and venue of arbitration assumes significance when foreign seat is assigned. In such scenario, Part I would be inapplicable to the extent inconsistent with arbitration law of the seat.

Interestingly, both High Courts ignored the distinction created by the Supreme Court between seat and venue. The courts in both *Katra Holdings* and *Chatterjee Petrochem* relying on the principles of *Reliance Industries* and *Bhatia International*, have categorically held that once the parties choose to arbitrate in a foreign country in accordance with the rules of an international arbitration institution, they by necessary implication choose such foreign country as the seat and accordingly exclude the application of Part I of the Act.

The two rulings ensure that the picture of the arbitration regime in India, which over the years has suffered from judicial interference, has continued to evolve and change with courts continuing to adopt a more hands-off approach towards arbitration and specifically international commercial arbitrations seated outside India. It provides immense relief to the parties across the world and makes a point that the legislative mandate is for courts to aid, support and facilitate arbitration.

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Apex court rules on inherent power of arbitral tribunals for procedural review

Supreme Court holds that:

- An arbitral tribunal has inherent power to recall its order of termination in the event of default in filing statement of claim.
- Argument of tribunal being functus officio stands dealt with insofar as proceedings where termination is due to default in filing statement of claim.

I. Introduction

In a recent decision in Srei Infrastructure Finance Ltd. (**"Srei Infrastructure"**) vs. Tuff Drilling Private Limited (**"Tuff Drilling/ Claimant"**),[152] the Supreme Court (**"Court"**) has held that in the event an arbitral tribunal terminates the proceedings under Section 25(a) of the Arbitration & Conciliation Act, 1996 (**"A&C Act"**), it can recall its order if sufficient cause is shown by the claimant for committing default in filing its statement of claim. The Supreme Court held that if the arbitral tribunal is empowered to condone default on sufficient cause being shown, this can be done by the tribunal recalling its order after the proceedings are terminated.

II. Facts

As per the first preliminary meeting between the Sole Arbitrator and the parties on August 27, 2011, the Tuff Drilling was required to file its Statement of Claim by November 19, 2011. The Claimant failed to submit the SOC. The date for submission was extended to December 9, 2011. The Claimant failed again in making its submission. On December 12, 2011, the tribunal terminated the proceedings in view of Section 25(a) of the A&C Act.[153]

On January 20, 2012, the Claimant filed an application stating reasons for delay in detail, praying for condonation of delay in filing the SOC and recall of the order of termination. On April 26, 2012, the Tribunal rejected the Claimant's application on the ground that it had become *functus officio* and consequently could not recall its order of termination.

Aggrieved by the Tribunal's order, the Claimant filed a revision application under Art. 227 of the Constitution before the Calcutta High Court. The High Court held that tribunal has power to recall its own order. The High Court set aside the order of the arbitral tribunal and remitted the matter back to the arbitral tribunal to decide the Claimant's application on merits. Aggrieved by the Calcutta High Court judgment, the Original Respondent approached the Supreme Court in appeal.

III. Issues

- Whether arbitral tribunal, which has terminated the proceeding under Section 25(a) due to non-filing of claim by claimant, has jurisdiction to consider the application for recall of the order terminating the proceedings on sufficient cause being shown by the claimant?
- Whether the order passed by the arbitral tribunal under Section 25(a) terminating the proceeding is amenable to jurisdiction of High Court under Article 227 of the Constitution of India?

152. Civil Appeal No. 15036 of 2017, decided on September 20, 2017

153. Section 25(a): *"Default of a party—Unless otherwise agreed by the parties, where, without showing sufficient cause—*
(a) the claimant fails to communicate his statement of claim in accordance with sub-section (1) of section 23, the arbitral tribunal shall terminate the proceedings;"

IV. Judgment:

The Court upheld the decision of the Calcutta High Court and held that the arbitral tribunal can recall the order and re-commence the proceedings after termination of proceedings under **Section 25(a)** on sufficient cause being shown by the Claimant. It directed the tribunal to proceed to decide the Claimant's application expeditiously. The reasoning of the Court is encapsulated below.

A. The scheme of Section 25(a)

Section 25 empowers an arbitral tribunal to terminate the proceedings upon failure of the Claimant to communicate his SOC within the time as envisaged by **Section 23,** unless sufficient cause is shown by the Claimant. The Court considered that conjunction of the words *"where without showing sufficient cause"* and *"the claimant fails to communicate his statement of claim"* imposes a duty on the tribunal to inform the claimant to show-cause why the arbitral proceedings should not be terminated. The Tribunal had done so. However, the Court stated that the Scheme of **Section 25** of the Act clearly indicates that on sufficient cause being shown, the statement of claim can be permitted to be filed even after the time as fixed by **Section 23(1)** has expired. Hence, it did not matter if the cause was shown before or after termination of the proceedings under Section 25(a). The Court held[154] that an arbitral tribunal is not denuded from accepting the cause and allowing the submission of SOC after an order under Section 25(a).

B. Termination under Section 25(a) versus Section 32(2)(c)

The Court made a comparative analysis of termination under Sections 25(a) and under Section 32(2). Whilst Sections 32(2)(a) and 32(2)(c) were not applicable to the present case, the Court delved into Section 32(2)(c) – where a tribunal may terminate proceedings if it finds that the continuation of the proceedings has for any other reason become *'unnecessary'* or *'impossible'*. The Court held that these terms did not cover a situation of *'default'* as under Section 25(a). Further, Section 32(2) would come into play when a situation under Section 25(a) is absent i.e. the proceedings have continued. The Court also sought aid from Section 33(3) which reiterates termination of the *'mandate of the arbitral tribunal'*. The absence of these words in Section 25(a) further reinforces the legislative intent and purpose in making a distinction between the two provisions.

C. Ancillary powers of the arbitral tribunal: Power of Review

The Court drew a comparison between ancillary powers of an industrial tribunal to set aside its *ex-parte* award on being satisfied that there was sufficient cause, despite absence of an express provision under the Industrial Disputes Act, 1956. The Court held that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties, unless there is any indication in the statute to the contrary.

While recognizing that power of review has to be expressly conferred by a statute, the court held that power of review of merits is distinguishable to review of procedure. A quasi-judicial authority is vested with inherent powers to invoke procedural review. When a party establishes that the procedure followed by the quasi-judicial authority suffers from illegality vitiating the proceeding, the order passed is liable to be recalled and reviewed.

The Court also analyzed Section 19(2) of the A&C Act which permits the parties to agree on the procedure to be followed by the arbitral tribunal. The Court held that this provision permitted parties to agree upon a remedy of review/revival of arbitral proceedings in the arbitration agreement. Consequently, the Court

154. Relying on the decision of the Delhi High Court in *Awasthi Construction Co. vs. Govt. Of NCT of Delhi*, 2013 (1) Arb. LR 70 (Delhi)(DB).

opined that while parties could agree to such a review, there was no reason to denude a tribunal from reviving the arbitral proceedings already terminated – in the absence of such agreement.

D. Order IX Rule 9 of Code of Civil Procedure, 1908

The Court held that the tribunal could rely on Order IX Rule 9 of the Code of Civil Procedure, 1908[155] in setting aside an order of dismissal where sufficient cause is shown after the order. The Court held that under **Section 19** of the A&C Act,[156] the tribunal is not bound by the procedure laid down under the Code. However, it is not incapacitated from relying on the CPC. It can also travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. The Court held that principles of Order IX Rule 9 could therefore be invoked by the arbitrator.

E. Scheme of the A&C Act

Delving into the object and purpose of the A&C Act, the Court held that upon denuding the arbitral tribunal from recalling its termination order under Section 25(a), the parties would only be left with the remedy to approach the High Court under its writ jurisdiction. This would be contrary to the object and purpose of the A&C Act to provide effective dispute resolution. Going a step further, the Court held that if the tribunal was denuded from its power to recall its decision under Section 25(a), it would also be denuded from recalling or reviewing a decision under Section 25(b) where the respondent fails to communicate its Statement of defence and the tribunal continues with the proceedings – leaving the respondent to approach the High Court by way of a writ petition.

V. Analysis:

Shutting the door on the oft heard argument of the arbitral tribunal being *functus officio*, this judgment reiterates the purport of Section 5 of the A&C Act[157] which remains central to effectuating speedy and effective dispute resolution under the A&C Act. Courts in India are increasingly adopting the policy of minimal court intervention in arbitration proceedings, thereby leaving a lion's share of the proceedings emanating out of arbitration to be dealt with by the arbitral tribunals themselves, wherever appropriate.

The judgment recognizes the critical distinction between power of review on merits – a statutory power, as opposed to powers of a tribunal to review procedure – an inherent power. This distinction significantly cuts down the scope of court interference where procedural defects arise in matter. Being procedural in nature, these defects can be effectively cured by the forum involved and reduce the scope of court intervention. By extending the power of procedural review to arbitral tribunals and vesting an arbitral tribunal with ancillary inherent powers, the Supreme Court has taken a wide step towards empowerment of arbitral tribunals. This judgment also places arbitral tribunals at a pedestal equal to quasi-judicial authorities – entailing equal applicability of principles governing procedure.

155. Order IX Rule 9: *"(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."*

156. Section 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). (2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. (3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate. (4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."*

157. Section 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."*

Supreme Court upholds arbitral clause providing for an employee arbitrator

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

I. Introduction

The Supreme Court of India (**"Court"**) in its recent ruling, *Aravalli Power Company Ltd.* (**"Appellant"**) *v. Era Infra Engineering Ltd.*, (***"Respondent"***),[158] clarified that the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**) pertaining to arbitral appointments and challenge to such appointments would not be applicable to arbitrations invoked prior to October 23, 2015.

The Court held that the employee named as an arbitrator in the arbitration clause should be given effect to in the absence of any justifiable apprehension of independence and impartiality.

II. Brief Facts

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

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

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

158. Civil Appeal No. 12627-12628 OF 2017 (SPECIAL LEAVE PETITION (CIVIL) NOS.25206-25207 OF 2016)

October 23, 2015	The Ordinance[160] was promulgated and Fifth Schedule was inserted to the Act enumerating circumstances which give rise to justifiable doubts regarding the impartiality or independence of the arbitrator. Entry No.1 read as follows: if "The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party".
December 04, 2015	Letter addressed by the Respondent seeking extension of time to file their Statement of Claim.
January 01, 2016	Amendment Act was gazetted and was deemed to come into force from October 23, 2015;
January 12, 2016	The Respondent sought to challenge the mandate of the Arbitrator and objected to the constitution of the Tribunal. Respondent expressed their intention to approach the Hon'ble Delhi High Court for appointment of an independent arbitral tribunal and sought stay on the arbitral proceedings.
January 22, 2016	The Tribunal rejected the challenge as the Respondent participated in the Arbitral Proceedings.

The Respondent approached the Delhi High Court (**"Delhi HC"**) seeking termination of the Arbitrator's mandate under Section 14 of the Arbitration & Conciliation Act, 1996 (**"Act"**) and appointment of a Sole Arbitrator by the Chief Justice under Section 11(6) of the Act.

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

The Appellant challenged the decision leading to the present appeal.

III. Issue

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

IV. Judgment

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

The named Arbitrator, being an employee of one of the parties, *ipso facto* would not render the appointment invalid and unenforceable under the erstwhile provisions of the Act. The Supreme Court held that doubts could arise if such person was the controlling or dealing authority with respect to the subject contract or if he is a direct subordinate to the officer whose decision is the subject matter of the dispute. Relying on *Indian Oil Corporation Ltd. and Others v. Raja Transport Private Ltd.*[160] the Court held that the disputes should be referred to the named Arbitrator as a rule unless there exist justifiable apprehensions on his independence and impartiality.

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

160. (2009) 8 SCC 520

The Court emphasized on the significance of giving effect to the terms of the agreement to the closest extent possible reiterating the law laid down in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd*[161] with respect to pre-amendment cases.

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

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

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

V, Analysis

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

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

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

161.(2008) 10 SCC 240

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

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

I. Introduction

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

II. Facts

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

III. Issue

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

IV. Arguments

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

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

V. Judgment

The Court held that:

1. A literal interpretation of Section 27(5) would show that there are different categories of actions which can be referred to a court by a tribunal for contempt proceedings. One of those categories is the general and wide category of *"any other default"*. Further, the Section is not confined to a person being guilty of contempt only when failing to attend in accordance with the process of taking evidence as the Section specifically states that persons guilty *"of any contempt to the Arbitral Tribunal during the conduct of the Arbitral proceedings"* shall be subject to contempt proceedings.

2. It is well settled that a marginal note in a statute was used to understand the general drift of the section only when the plain meaning of the words of the statute were ambiguous. This was not the case in the present situation and therefore the marginal note in section 27 would not alter the purport of the section.

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

4. The Court observed that the Supreme Court in *M/s Ambalal Sarabhai Enterprises vs. M/s Amrit Lal & Co. & Anr.*[162] had held that parties to arbitration proceedings had to choose between applying for interim relief before the Tribunal under Section 17 or before the Court under Section 9. Such an election would be meaningless if interim orders passed by the Arbitral Tribunal were held to be unactionable, as all parties would then go only to the Court, which would render Section 17 a dead letter.

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

162.(2001) 8 SCC 397

VI. Analysis

One of the major lacunas existing in the Act prior to the commencement of the Amendment Act of 2015 was the unenforceability of order/directions passed by a tribunal. Under section 17, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection. However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9. Despite the arbitral tribunal's power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process.[163] Therefore parties chose to approach the courts rather than continue with the arbitration proceedings. The Amendment Act has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted.

The Delhi High Court had attempted to find a suitable legislative basis for enforcing the orders of an arbitral tribunal under section 17 of the Act. In the judgment of *Sri Krishan v. Anand*,[164] (followed in *Indiabulls Financial Services v. Jubilee Plots* and upheld by the Court in the present judgment)[165] the Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be *"making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings"* under section 27 (5) of Act, being the only mechanism for enforcing its orders.

163.M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619, Sri Krishan v. Anand (2009) 3 Arb LR 447 (Del)

164.(2009) 3 Arb LR 447 (Del)

165.OMP Nos 452-453/2009 (Order dated 18.08.2009).

The Supreme Court has through the present judgment confirmed the above position of law (in relation to arbitrations being conducted under the regime as applicable prior to 2015 amendment).

It is pertinent to note that under Section 12 of the Contempt of Courts Act, 1971, any person found guilty of contempt would be liable to be punished with imprisonment upto 6 months along with fine.[166]

166. 5Section 12 - Punishment for contempt of court
(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation.–An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.

Delhi High Court cautions Rail Vikas Nigam on appointment of former employees as arbitrators

- Former employees are not disqualified from being appointed as arbitrators, in a dispute involving the employer, but such appointment may give rise to apprehensions;
- It is paramount that all parties have full confidence in the arbitral process.
- Arbitrator may not be disqualified under Section 12 (5) read with 7th Schedule, yet his appointment can be challenged if there are reasons which give justifiable doubt as to his independence and impartiality;

Recently, the Delhi High Court (**"Court"**) in *Afcons Infrastructure Ltd.* (**"Afcons"**) *v. Rail Vikas Nigam Limited* (**"RVNL"**), interpreted Section 12 (5)[167] read with Entry 1[168] Schedule VII of the Arbitration and Conciliation Act (**"Act"**) to hold that former employees of parties are not precluded from being appointed as arbitrators. However, this decision is subject to certain qualifications as discussed below.

I. Brief Facts

Afcons and RVNL entered into a contract dated 12 December 2011 for construction of an infrastructure project (**"Agreement"**). A dispute arose between the parties and Afcons issued a notice of dissatisfaction and invoked arbitration, relying on the arbitration agreement. In the notice of dissatisfaction, Afcons nominated their arbitrator. RVNL disputed Afcons nomination terming it contrary to the arbitration agreement, and proposed a panel of five arbitrators, and called upon Afcons to select and nominate their nominee arbitrator from that list. Aggrieved by the same, Afcons preferred a petition under Section 11 of the Act before the Delhi High Court (**"Court"**) for appointment of the arbitral tribunal.

The question which the Court had to decide was whether employees and former employees are disqualified from being appointed as arbitrators under Section 12 (5) of the Act.

The arbitration clause has been reproduced below:

(i) ***Procedure for Appointment of Arbitrators:*** *The arbitrators shall be appointed as per following procedure:*

1. *Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.*
2. *Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned in Para (a) above.*
3. *The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.*

167. Section 12(5) of the Act– "Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

168. Entry 1, Schedule VII of the Act– "The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party"

(ii) Qualification and Experience of Arbitrators: The arbitrators to be appointed shall have minimum qualification and experience as under:

1. *One member of the tribunal shall be necessarily a working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service , having experience in financial matters related to construction contracts.*
2. *One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.*
3. *The Presiding Arbitrator shall necessarily be a serving railway/RVNL officer and he shall have same minimum qualification and experience as specified above for either of the two arbitrators.*
4. *Out of 3 Arbitrators not more than one shall be a retired officer.*

(iii) No person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.

(iv) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before."

II. Decision

The Court allowed the petition, and directed RVNL to appoint any former judge of the Supreme Court as an arbitrator within 2 weeks.

The Court opined that:

1. A person who is related to a party as an employee, consultant or an advisor, is disqualified to act as an arbitrator.
2. An arbitrator which has "other" past or present business relationship with the party is also dis-qualified.
3. The word "other" indicates a relationship other than that of an employee, consultant or an advisor. Therefore, the relationship of being a former employee would not come under the ambit of Section 12 (5) read with Entry 1 of the Seventh Schedule.
4. The Court further clarified that the expression *"business relationship"* as used in Entry 1 of Seventh Schedule cannot be understood to include an employer-employee relationship.

Further, the Court held that the fact that the arbitrator is not disqualified under Section 12 (5) read with Seventh Schedule does not conclude that his appointment cannot be challenged if there are grounds which give rise to justifiable doubts as to his independence or impartiality.

The court relying on the Supreme Court of India's (**"Supreme Court"**) judgment in *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*[169] (**"Voestalpine"**), and Punjab and Haryana High Court's decision in ***Reliance Infrastructure Ltd. v. Haryana Power Generation Corporation Ltd.***[170] deviated from the arbitration clause provided in the Agreement to appoint an independent person to avoid even notional apprehensions of lack of independence or impartiality.

The Court opined that in the interest of securing the independence and neutrality of the arbitral tribunal, the process contemplated under clause 17.3 (ii) of the Agreement must be disregarded primarily because:

1. The decision of the Supreme Court[171] that parties choice to select one out of five persons suggested by the other party has "adverse consequences";
2. RVNL suggested the names of former employees of Railways/RVNL for

169. AIR 2017 SC 939

170. 2016 (6) ArbLR 480 (P&H)

171. See *Voestalpine*

appointment of an arbitrator. All have part relationship with RVNL/Railways. Although this relationship may not fall within the prohibition stipulated under Section 12 (5) of the Act read with Seventh Schedule, it gives rise to apprehensions;

III. Analysis

The decision affirms the intention of the judiciary to ensure impartial and independent arbitration proceedings. Specifically considering the 'adverse consequences' of allowing an arbitration clause that severely restricts the autonomy of Afcons in appointing arbitrators, the Court goes a step further, in line with the recent Supreme Court judgment to direct the parties to broad base their appointment of arbitrators.

The Court also expressed caution in upholding the validity of the appointment of former employees as arbitrators, and adds a caveat that mere validity of the appointment and the exclusion of former employees from Entry 1 of Schedule VII does not render the appointment immune of potential challenges. It has unequivocally frowned upon the restrictive appointment procedure laid down by the arbitration clause and recognized that such clause would do little to instill confidence among the arbitration regime laid down in the country, especially in light of the changes brought about by the recent Amendment Act. Such arbitration clauses are a common phenomenon in Government contracts, construction contracts, etc. This would prompt the Government and Public Sector Undertakings to be more mindful of the procedure for appointment and qualification of arbitrators in future.

One may however, question the precedential value of this ruling, in view of the Supreme Court's decision in West Bengal vs Associated Contractors,[172] wherein it was held that the decision of the Chief Justice or his designate in a Section 11 application, not being the decision of the Supreme Court or the High Court, as the case may be, has no precedential value, being a decision of a judicial authority which is not a court of record.

172.(2015) 1 SCC 32

Once the Award is set aside – the dispute cannot be remanded back to the arbitral tribunal - Rules Supreme Court

- Once a court has set aside the arbitral award, it cannot relegate the parties back to arbitral tribunal.
- The power to relegate the parties back to the arbitral tribunal cannot be exercised *suo moto* by the court - a written application in that behalf by a party – a must.

I. Introduction

Recently, the Supreme Court of India (**"SC"**) in *Kinnari Mullick* (**"Appellants"**) *v. Ghanshyam Das Damani*[173] (**"Respondent"**) has ruled on the power of the court to relegate the parties to the arbitral tribunal, when award passed by the same arbitral tribunal has been set aside under Section 34 of the Arbitration and Conciliation Act 1996 (**"Act"**). The Supreme Court concluded that a court can relegate the parties to the arbitral tribunal, only if there is a specific written application from one party to this effect; and relegation has to happen before the arbitral award passed by the same arbitral tribunal is set aside by the court.

II. Facts and background

The Appellants and the Respondent entered into two developmental agreements for construction of a multistoried building. Subsequently, a dispute arose with respect to the distribution of the flats and its conveyancing deeds. Thereafter, the Respondent nominated their arbitrator, but notably did not specify that the Respondent's nomination was to appoint a sole member Tribunal. Moreover, the Respondent's notice to the Appellants did not call upon them to appoint their nominee arbitrator. On the basis such nomination by the Respondent, the sole arbitrator commenced the arbitral proceedings.

The Appellants subsequently preferred an application under Section 16 of the Act and challenged the jurisdiction[174] of the sole arbitrator on 10 May 2010. The sole arbitrator rejected the application on 27 August 2010 by way of an interim award.

Aggrieved by the interim award, the Appellants approached the Single Judge of the Calcutta High Court (**"Single Judge"**) under Section 14

173. Civil Appeal No. 5172 of 2017 arising out of SLP (Civil) No. 2370 of 2015

174. Arbitration and Conciliation Act 1996, section 16:

"Competence of arbitral tribunal to rule on its jurisdiction.—
1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

of the Act[175] alleging bias and for a declaration that the sole arbitrator had become incompetent to perform his functions. The Single Judge by judgment dated 17 September 2012 disposed of the Section 14 application by reserving the Appellants' right to challenge the award under Section 34 of the Act, if required.

The sole arbitrator issued the final award on 18 June 2013 in favour of the Respondent. Interestingly, the award was not reasoned. Aggrieved by the award, the Appellants filed a challenge petition under Section 34 of the Act for setting aside the award. Both the interim award as well as the final award formed the subject matter of the challenge under Section 34 of the Act. The Single Judge allowed the challenge petition on the premise that the award did not disclose any reason in its support. Accordingly, the award was set aside, and the parties were left to pursue their remedies in accordance with law.

Aggrieved by the finding of the Single Judge, the Respondent preferred an appeal before the Division Bench of the Calcutta High Court (**"Division Bench"**). The Division Bench affirmed the findings recorded by the Single Judge. However, the Division Bench *suo moto* decided to relegate the parties back to the arbitral tribunal with a direction to the arbitral tribunal to assign reasons in support of its award.

Aggrieved by the order of the Division Bench, the Appellants filed a special leave petition before the Supreme Court of India (**"Supreme Court"**). The Respondent did not challenge either the settling aside of the award, or the relegation of parties back to the Tribunal.

III. Issue

The primary issue assailed before the Supreme Court was whether a court, under Section 34(4) of the Act, is empowered to remand the parties back before the arbitral tribunal with a direction to assign reasons in support of the arbitral award, especially when the arbitral award has been set aside by the Single Judge, and the Division Bench has concurred with that finding.

IV. Decision of the SC

The Supreme Court:

1. examined Section 34(4)[176] of the Act and observed that the *quintessence for exercising the power under this provision is that the arbitral award has not been set aside.*
2. relied on *McDermott International Inc. v. Burn Standard Limited*,[177] and opined that the Parliament has not vested any power on courts to remand the parties to the Tribunal or defer the proceedings, except within the limited scope prescribed under Section 34(4) of the Act. The Supreme Court held that such power under Section 34(4) can be exercised only on a written application being made by a party and not *suo motu.*
3. referred to the Madras High Court judgment of *MMTC v. Vicnivass Agency*,[178] and affirmed the three procedural conditions for invoking Section 34 (4) namely: (i) there should be an application under Section 34(1) of the Act; (ii) a request should emanate from a party under Section 34(4); and (iii) the court considers it appropriate to invoke the power under Section 34(4) of the Act.

175. Arbitration and Conciliation Act 1996, section 14:

"Failure or impossibility to act.—
1) The mandate of an arbitrator shall terminate if—
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate.
2) If a controversy remains concerning any of the grounds referred to inclause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12."

176. Arbitration and Conciliation Act 1996, section 34(4):

"On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

177. (2006) 11 SCC 181

178. (2009) 1 MLJ 199

In the present facts and circumstances, since no written application filed was filed by the Respondent before the Single Judge or the Division Bench under Section 34(4), and the fact that the arbitral award had been set aside by the Single Judge and the setting aside confirmed even by the Division Bench, the Supreme Court held that the decision of the Division Bench to remit the award back the sole arbitrator suffered from jurisdictional error and was unsustainable.

V. Analysis

The Supreme Court's ruling that courts had no power to remand the parties back to the arbitral tribunal after the arbitral award has been set aside, is praise worthy. It would inevitably protect the parties from being obliged to knock the doors of errant Arbitral Tribunals which had already failed to render an award worthy of passing the muster of Section 34 of the Act.

Delhi High Court dismisses RBI's objections upholding Docomo award (Docomo v Tata)

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I. Practical implications

The Delhi High Court (**DHC**), in its decision on 28 April 2017 allowed the enforcement of an LCIA arbitral award obtained by Docomo against Tata (**Award**), for a total sum of US$1.7bn in damages. This award found Tata to be in breach of its obligations owed to Docomo regarding the sale of its shares in Tata Tele- services Ltd. **(TTSL)**. The primary issue in dispute before the DHC was the legitimacy of RBI's objections to the Award's enforcement.

In summary, the High Court of Delhi found:

- the London Court of International Arbitration (**LCIA**) arbitral award granting US$1.7bn as dam- ages in favour of NTT Docomo Inc (**Docomo**) against Tata Sons Ltd (**Tata**) does not violate FEMA Guidelines
- US$1.7bn was granted as damages and not purchase consideration for Docomo's Sale Shares; hence, pricing guidelines under FEMA for transfer of shares would not apply
- the RBI does not have any locus to intervene in an application seeking the enforcement of an arbitral award
- the consent terms jointly filed by Tata and Docomo, wherein Tata agreed to pay the entire award amount to Docomo, are legal and valid

The decision of the DHC is quite progressive since it stresses the importance of an Indian entity's ability to honour its commitment to a foreign entity in a commercial setting. The DHC recognized the delicate issue of a possible negative impact on Foreign Direct Investment and strategic international relations if the upkeep of such commitments is somehow prohibited. This sentiment also gives a nod towards India's international ob- ligation to treat foreign investment fairly, undertaken in most of its Bilateral Investment Treaties.

II. Background

TTSL is a company incorporated in India for the sole purpose of advancing the Tata Group's presence in the Indian telecommunications sector. Docomo is a company incorporated in Japan and is a market leader in the Japanese telecommunication sector.

In 2008, Tata promoted TTSL to Docomo and the latter agreed to invest in TTSL by purchasing equity shares from existing shareholders in return. Accordingly, Tata, TTSL and Docomo (the **Parties**) entered into a Share Subscription Agreement (**SSA**) on 25 March 2009. The SSA provided that if TTSL failed to satisfy certain 'Second Key Performance Indicators', Docomo could initiate its exit by demanding that Tata find a buyer for its shares in TTSL at the Sale Price. This Sale Price was specifically defined as the higher of either:

(a) the fair value of Docomo's shares as of 31 March 2014 or (b) 50% of the price at which Docomo pur- chased its shares.

TTSL was unable to demonstrate its compliance with the Second Key Performance Indicators and accord- ingly, a Trigger Notice initiating Docomo's exit from TTSL was served. Subsequently, Docomo issued a Sale Notice under the SSA to Tata and TTSL, requesting the former to find a buyer for its shares in TTSL within the stipulated period, i.e., by December 3, 2014. Tata was unable to find a suitable buyer and accordingly, a dispute arose between the

Parties. This dispute primarily concerned the extent of Tata's obligation to find a buyer for Docomo's shares at the Sale Price. This dispute was referred to an LCIA administered arbitral tribunal (**Tribunal**) for final determination.

The Tribunal found in favour of Docomo and awarded it a total sum of US$1.7bn in damages for Tata's breach of the SSA.

III. The tribunal's decision

The substance of the dispute referred to the Tribunal concerned the interpretation of Clause 5.7.2 of the SSA which stipulates the procedure for Docomo's exit from TTSL. The Tribunal found that Clause 5.7.2 primarily required Tata to find a 'buyer or buyers of the Sale Shares on the terms that Docomo receives the Sale Price' and that this obligation was unqualified and absolute. The Tribunal further determined that Clause 5.7.2 stip- ulated alternative methods of performance in the event that Tata was unable to find a buyer at the Sale Price, which included Tata's buy-back of Docomo's shares at the Sale Price. The Tribunal was satisfied from its interpretation of the SSA that both parties had agreed on an exit procedure which would mitigate losses to the greatest possible extent. In this regard, it held that:

- '... [Tata] bore the risk that at the time of performance it was unable to find a willing buyer at the Sale Price because the market value of the Sale Shares had fallen. In that event, Tata might have been able to avoid a breach of its primary obligation by availing itself of one of the alternative methods of performance ... but if it was not able to do so, it re- mained in breach and was liable to pay Docomo damages'

The Tribunal further recognized that Tata's performance of its obligations under clause 5.7.2 of the SSA may be affected by extant foreign exchange guidelines issued by the RBI under the Foreign Exchange Management Act, 1999 (**FEMA Guidelines**). In essence, FEMA Guidelines prevented the sale of shares between a resident and non-resident at an assured price and instead, required the sale price to be determined by a fair market valuation exercise. Further, under FEMA Guidelines, the RBI had special discretion to permit such a transaction.

On the facts, the Tribunal found that Tata was unable to find a third-party buyer at the Sale Price and there- fore, offered to buy-back Docomo's shares at the Sale Price. However, the RBI denied permission on Febru- ary 20, 2015 when Tata approached it to exercise its special discretionary powers. Accordingly, Tata's pri- mary argument before the Tribunal was that its obligation to buy back Docomo's shares was limited by law to a buy-back at the Fair Market Value (**FMV**). Therefore, in the event the FMV was lower than the Sale Price, Tata argued that it was legally bound to only pay the FMV.

The Tribunal rejected this argument. It found from the SSA's drafting history that the Parties were acutely aware of FEMA Guidelines' possible impact on Tata's performance of Clause 5.7.2, since Tata undertook an absolute obligation to ensure that Docomo's shares would be sold at the Sale Price. In this regard, the Tribunal found that the Parties never intended to subject Tata's performance of either its primary obligation to look for third-party buyers or alternative modes of its performance, to extant FEMA Guidelines. Rather, it characterized RBI's involvement as a *factual impediment* to Tata's performance of its obligations under Clause 5.7.2 of the SSA. This conclusion was supported by the fact that Tata had agreed to indemnify Docomo for any difference in the sale price of Docomo's shares in TTSL in the event that it was unable to buy them back at the assured rate. It was determined that this indemnity reflected a permitted transaction under FEMA Guidelines since any difference in the buy-price would be characterized as compensation paid by Tata for its inability to find a buyer at the Sale Price.

Accordingly, the Tribunal found Tata to be in breach of the SSA and ordered it to pay damages of US$1.7bn. This figure reflects the amount Docomo would have received (along with interest), had its shares been bought by Docomo at the Sale Price. This amount also reflected the original guarantee made by Tata, ie—the guarantee to mitigate Docomo's losses by 50%.

(**Award Amount**) for Tata's breach of the SSA. It is important to note that Docomo was *'itself not interested in retaining the share scrips'and volunteered to 're- turn the share scrips as they were of no particular use to it'.*

IV. The enforcement application before the DHC

Docomo approached the DHC under sections. 44, 46, 47 and 49 of the Arbitration and Conciliation Act, 1996 (the **Act**) for enforcement of the Award. In principle, Tata did not object to the Award's enforcement. In fact, it approached the RBI on 1 July 2016, requesting its permission to enforce the Award. Further, on 20 July 2016, Tata informed the DHC that it was ready to deposit the Award Amount through fixed deposit receipts. However, the RBI rejected Tata's request of 1 July 2016 and proceeded to try and implead itself into the en- forcement proceedings by filing an Intervention Application (the **Application**).

Subsequently, on 25 February 2017, Tata and Docomo jointly filed consent terms (the **Consent Terms**) under Order XXIII Rule 3 of the Code of Civil Procedure 1908 (**CPC**). Under these Consent Terms, Docomo agreed to withdraw the enforcement proceedings initiated in India, England and the US, while Tata agreed to pay the entire Award amount, subject to any decision of the DHC on the RBI's Application.

Therefore, the primary issue before the DHC was to determine the RBI's Application's merit and any conse- quent effect it may have on the enforceability of the Award.

A. The RBI's Arguments

The RBI acknowledged that it was not party to the arbitration agreement between Tata and Docomo and ar- gued that its locus to object to the Award's enforcement arises out of Order XXIII, Rules 3 and 4 of the CPC. According to the RBI, these provisions allow the relevant court to invalidate any consent terms which violate section. 23 of the Indian Contract Act (**ICA**). In essence, RBI argued that the consideration contemplated by the Consent Terms was unlawful since the Award violated extant FEMA Guidelines.

The RBI further argued that the Award's enforcement necessarily required the RBI's clearance (which was denied) and accordingly, its submissions on the enforceability of the Award ought to be heard by the DHC. Further, the RBI argued that the Consent Terms should not be effectuated since they involve an Award which violates Indian public policy, as it violates FEMA Guidelines.

B. Tata's and Docomo's Arguments

Docomo argued that RBI's Application had no locus, since only a party to an arbitration agreement could ob- ject to the enforcement of an award that arises out of the same.

Tata stated that it had no objection to the enforcement of the Award, and argued that FEMA Guidelines did not impact the award, as there was no *'blanket prohibition against the repatriation of monies to an entity out- side India at a price not exceeding the [FMV]' under the FEMA Guidelines.*

V. The DHC's decision

The DHC agreed with Docomo and found that the RBI cannot implead itself in an award enforcement appli- cation when it was not a party to the arbitration agreement. It did, however, observe a gap in legislative drafting as, there was a hypothetical possibility of the RBI intervening in the execution proceedings of the award, if at that stage the relevant court directed that the payment of damages awarded by an arbitral tribunal ought to be subject to RBI approval. However, since there was no express provision that allowed the RBI to intervene in such proceedings, it cannot intervene even in such hypothetical situation.

The DHC continued to examine the validity of the Award via FEMA Guidelines. The DHC took special note of the fact that the Award

directed Tata to pay *damages to Docomo*. The DHC examined the RBI's internal notes when it dealt with Tata's application for permission to enforce the award. It was evident that the RBI never considered Clause 5.7.2 of the SSA to have been invalidated by FEMA Guidelines. Rather, the RBI seemed to have conflated the payment of damages with the transfer of Docomo's shares to Tata at the Sale Price (the latter being hindered by FEMA Guidelines).

Accordingly, the DHC held that the RBI did not have the power to *'re-characterize'* the Award as one that in- volves an impermissible share transfer, when it was merely a direction to pay a specified amount of money as damages. The DHC found that there was no provision of the SSA or the Award which violated FEMA Guidelines, and consequently, found it to be enforceable. It dismissed the RBI's Application, gave effect to the Consent Terms and directed the transfer of the monies deposited by Tata.

Indian Supreme Court upholds choice of foreign seat by an arbitral institution (IMAX v E-City)

In the recent case of IMAX Corporation v. E-City Entertainment Pvt. Ltd., the Supreme Court has upheld choice of foreign seat by an arbitral institution as exclusion of Part I of Arbitration & Conciliation Act, 1996, under the pre-BALCO regime. In this regime, parties were required to expressly or impliedly exclude application of Part-I of the Act in their arbitration agreements in order to exclude jurisdiction of Indian courts. In absence of express exclusion, several other factors were considered by Courts to determine exclusion. The Supreme Court considered choice of ICC Rules by the parties, and the consequent choice of foreign seat by ICC in consultation with parties, to operate as a clear case of exclusion of Part-I of the Act. In doing so, the Supreme Court set aside the decision of the Bombay High Court.

Durga Manda – Member, Kshama Loya Modani - Senior Member, and Vyapak Desai - Head, International Litigation & Dispute Resolution have recently written an article which was first published in the Lexis-PSL Arbitration (March 20, 2017). The article can be accessed from the link provided below:

Indian Supreme Court upholds choice of foreign seat by an arbitral institution (IMAX v E-City)

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

The Delhi High Court (**"Court"**) in *Devas Multimedia Pvt. Ltd. (**"Devas"**) vs. Antrix Corporation Ltd. (**"Antrix"**)*[179]

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

I. Brief Background

An agreement was entered into in 2005 between Devas, a Bangalore based media company, and Antrix, the commercial arm of the Indian Space Research Organization (**"ISRO"**), both having their registered offices in Bangalore, for the lease of certain space segment capacity (**"Agreement"**). Article 20[180] in the Agreement contained an arbitration clause providing for, *inter alia*, New Delhi as the "seat" and the rules of the International Chamber of Commerce (**"ICC"**) as the procedural law. Disputes arose in 2011 leading to invocation of arbitration and subsequent award in favor of Devas of USD 562.5 million (**"Award"**) in September of 2015 (for further details on the Antrix-Devas saga, access our hotline **here**).

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

179. O.M.P. (I) 558/2015, In the High Court of Delhi At New Delhi, Available at: http://lobis.nic.in/ddir/dhc/SMD/judgement/28-02-2017/SMD28022017OI5582015.pdf

180. Article 20.
(a) In the event of there being any dispute or difference between the Parties hereto as to any clause or provision of this Agreement or as to the interpretation thereof or as to any account or valuation or as to the rights, liabilities, acts, omissions of any Party hereto arising under or by virtue of these presents or otherwise in any way relating to this Agreement such dispute or difference shall be referred to the senior management of both Parties to resolve within three (3) weeks failing which it will be referred to an Arbitral Tribunal comprising of three arbitrators, one to be appointed by each party (i.e. Devas and Antrix) and the arbitrators so appointed will appoint the third arbitrator.
(b) The seat of Arbitration shall be at New Delhi in India.
(c) The Arbitration proceedings shall be held in accordance with the rules and procedures of the ICC (International Chamber of Commerce) or UNCITRAL.
(d) The Arbitration Tribunal shall reach and render a decision or award in writing (concurred in by a majority of the members of the Arbitral Tribunal with respect to the appropriate award to be rendered or remedy to be granted pursuant to the dispute, (including the amount that any indemnifying Party is required to pay to the indemnified Party in respect of a claim filed by the indemnified Party).
(e) To the extent practicable all decisions of the board of Arbitration shall be rendered no more than 30 (thirty) days following commencement of proceedings with respect thereto. The Arbitral Tribunal shall realize its decision on award into writing and cause the same to be delivered to the Parties.
(f) Each Party to any Arbitration shall bear its own costs or expenses in relation thereto, including but not limited to such Party's attorneys' fees, if any, and the expenses and fees of the member of the Arbitral Tribunal appointed by such party, provided, however, that the expenses and fees of the third member of the Arbitral Tribunal and any other expenses of the Arbitral Tribunal not capable of being attributed to any one member shall be borne in equal parts by the Parties

Petitions filed prior to the passing of the Award

Date of filing	Particulars	Court	Status prior to the present decision
5th August, 2011	Antrix filed a Section 11 petition seeking a direction to constitute the arbitral tribunal along with an application seeking a stay on the arbitral proceedings and invocation of ICC rules	The Supreme Court of India	Dismissed on 10th May, 2013 (invocation of the ICC rules by Devas upheld)
5th December, 2011	Antrix filed a Section 9 petition seeking, inter alia, a direction to restrain Devas from proceeding with the ICC arbitration and restraining the constitution of the Tribunal as per the ICC rules ("Antrix Petition")	Bangalore City Civil Court Pending without any decision made on	jurisdiction

Petitions filed subsequent to the Award

Date	Particulars	Court	Status prior to the present decision
9th October, 2015	Devas filed the present Section 9 petition seeking directions to secure the Award in its favor	Delhi High Court	The Delhi High Court had to decide whether it had jurisdiction to entertain the present petition given Antrix's previously pending petition in Bangalore
19th November, 2015	Antrix filed a petition under Section 34 of the Act challenging the Award	Bangalore City Civil Court	Pending

II. Issue before the Court

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

III. Arguments objecting to Delhi High Court's jurisdiction

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

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

IV. Arguments supporting Delhi High Court's jurisdiction

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

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

V. Judgment

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

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

On a plain reading of the above language, it observed that the word 'Court' isn't qualified by the word 'competent' and that the word 'application' isn't qualified by the word 'valid'. However, the Court wasn't inclined to accept such a simplistic reading, choosing to adopt a purposive interpretation instead. In doing so, it first laid out three possible scenarios to be considered;

- Where the court is 'competent' and the petition is 'valid' since the reliefs prayed for are capable of being granted. In such a scenario, it is clear that the requirement of Section 42 stands satisfied
- Where the court is 'competent', however the petition is 'invalid' as the prayers sought are incapable of being entertained or granted.
- Where the petition itself is 'valid', however it is filed in an 'incompetent' court that has no jurisdiction to entertain such a petition.

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

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

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

VI. Analysis

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

Supreme Court upholds government employees/ex-employees as arbitrators

The Supreme Court of India:

1. Acknowledges that retired/existing government employees may be appointed as arbitrators;
2. Directs public sector undertaking to broad base the panel of arbitrators to incorporate legal, accounting and technical expertise;
3. Partially strikes down procedure to appoint arbitral tribunal and ensures parties have access to full panel of potential arbitrators;

A two-judge bench of the Supreme Court of India (**"Court"**) in *Voestalpine Schienen GmbH* (**"Petitioner"**) *v. Delhi Metro Rail Corporation Ltd.* (**"Respondent"**)[181] upheld an arbitration agreement which required the Petitioner to choose from a panel of arbitrators maintained by the Respondent, consisting of serving or retired engineers either of the Government Department or Public Sector Undertakings.

However, in a step having far-reaching consequences, the Court, *inter alia*, went on to delete portions of the procedure for appointment of the arbitral tribunal and further, directed the Respondent to amend its existing panel and prepare a broad based panel consisting of (i) engineers of prominence and high repute from the private sector; (ii) persons with a legal background i.e. judges and lawyers; and (iii) persons having expertise in accountancy.

I. Brief factual background

The Petitioner is an Austrian company engaged in the business of steel production *inter alia* manufacture, production and supply of rails and related products. The Respondent (**"Purchaser"**), a government owned corporation,[182] which floated tenders for production and supply of steel rails. This contract was awarded to the Petitioner and the two parties entered into an agreement dated August 12, 2013 (**"Agreement"**).

Disputes arose under the Agreement when the Respondent (i) withheld Euro 531,276 on the Petitioner's invoices; (ii) encashed performance bank guarantees amounting to Euro 783,200; (iii) imposed liquidated damages of Euro 400,129.39; and (iv) invoked the price variation clause to claim a deposit of Euro 487,830. There were claims and counter-claims between the parties arising out of the Agreement and on June 14, 2016, after attempts to amicably resolve the disputes were not successful, the Petitioner invoked arbitration under the Agreement.

The relevant portions of this arbitration agreement are reproduced below:

> *"ARBITRATION & RESOLUTION OF DISPUTES.*
>
> *The Arbitration & Conciliation Act, 1996 of India shall be applicable. Purchaser and the supplier shall make every necessary effort to resolve amicably by direct and informal negotiation any disagreement or dispute arising between them under or in connection with contract.*
>
> *Arbitration: If the efforts to resolve all if or any of the disputes through conciliation fails, then such disputes or differences whatsoever arising between the parties, arising out of or touching .....shall be referred to Arbitration in accordance with the following provisions:*
>
> 1. *Matters to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed Rs. 1.5 million. Beyond the claim limit of Rs. 1.5 million. Beyond the claim limit of Rs. 1.5*

181. Arbitration Petition (Civil) No. 50 of 2016;

182. Joint Venture between the Government of India and the Government of NCT, Delhi;

million, there shall be three Arbitrators. ***For this purpose the Purchaser will make out a panel of engineers with the requisite qualifications and professional experience. This panel will be of serving or retired engineers "Government Departments or of Public Sector Undertakings;***

2. *For the disputes to be decided by a sole Arbitrator, a 'list of three engineers taken the aforesaid panel will be sent to the supplier by the Purchaser from which the supplier will choose one;*

3. ***For the disputes to be decided by three Arbitrators, the Purchaser will make out a list of five engineers from the aforesaid panel. The supplier and Purchaser shall choose one Arbitrator each, and the two so chosen shall choose the third Arbitrator from the said list, who shall act as the presiding Arbitrator.*** ....."

(emphasis supplied)

In their letter invoking arbitration, the Petitioner took the stand that appointment of the arbitral tribunal under the procedure specified in the Agreement would lead to the appointment of *"ineligible persons"* as arbitrators, in light of the requirements imposed by Section 12(5) read with Schedule 7 of the amended Arbitration & Conciliation Act, 1996 (**"Act"**). The Petitioner therefore nominated a retired Supreme Court judge as sole arbitrator and sought the consent of the Respondent. The Respondent replied on July 8, 2016, stating that the procedure in the arbitration agreement be followed and circulated a list of five potential arbitrators from the panel. The Respondent nominated a retired officer of the Indian Railway Services as its nominee arbitrator and called upon the Petitioner to appoint its nominee from the remaining four options.

The Petitioner proceeded to file a petition before the Court under Section 11 of the Act, for appointment of an independent and impartial tribunal.

II. Arguments advanced

The Petitioner argued that any arbitrator that it nominates from within a list circulated by the Respondent would not qualify as an independent or impartial arbitrator in accordance with recently amended Section 12 of the Act read with Schedule 7 of the Act, which incorporates the IBA Guidelines on Conflict of Interest in International Arbitration. The Respondent is a public sector undertaking having all the trappings of the Government and therefore appointing an any person who was a serving or retired engineer of Government departments or public sector undertaking would defy the neutrality aspect as they had direct or indirect nexus/privity with the Respondent and the Petitioner had reasonable apprehension of bias against such persons.

The Respondent argued that the persons on the proposed list were neither serving nor ex-employees of the Respondent. They were ex-officers of other public bodies. The Respondent had also sent a fresh list containing thirty one names for the Petitioner to consider and appoint its nominee. The other names on the list were retired officers from the Indian Railways who retired from high positions and had a high degree of technical qualifications and experience. Merely because these persons may have served in railways or other government departments would not, by itself, impinge on their impartiality.

III. Decision

The Supreme Court held that this was not a fit case for them to exercise jurisdiction and constitute the arbitral tribunal.

The Court referred to the Law Commission's recommendations in its 246th Report proposing amendments to the Arbitration & Conciliation Act, 1996 and stated that the focus of Section 12 read with Schedule 7 lay in determining the neutrality of arbitrators viz. their independence and impartiality, which was critical to the entire process. The Law Commission had reiterated that the test in question was not whether there

was any actual bias but, in fact, whether the circumstances in question give rise to any justifiable apprehension of bias.

The Court went on to hold that merely because the persons proposed were government employees or ex-government employees (and in no way connected to the Respondent), that by itself would not make them ineligible to act as arbitrators. Had it been the intention of legislature to cover such persons, it would have been provided for in the Seventh Schedule. The Court also stated that bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central government or public sector undertakings, where they had no connection with the Respondent. Pursuant to the amendment, there is an embargo on a person to act as an arbitrator if he has been either an employee or consultant or advisor or had any past or present business relations with the parties, which was not the case.

In an interesting step, the Court analyzed the procedure for appointment of the tribunal and noted that there existed two adverse consequences arising from the fact that the discretion lay with the Respondent to choose and propose options for arbitrators to the counterparty. The first being that the choice given to the counterparty was limited to the names proposed by the Respondent (as against the entire panel of the Respondent) and the second being that with the discretion that was given to the Respondent, room for suspicion was created that the Respondent may have picked its own favorites. This situation was countenanced and the Court stated that this part of the procedure required to be deleted and instead, parties should have the choice to nominate any person from the entire panel.

The Court also went on to express the need and direct the Respondent to amend its panel in a time bound manner to include (i) engineers of prominence and high repute from the private sector; (ii) persons with a legal background i.e. judges and lawyers; and (iii) persons having expertise in accountancy.

The Court also stated that it was time to send positive signals to the international business community in order to create a healthy arbitration environment and conducive culture in India. There should be no misapprehension that the principle of impartiality and independence would be discarded at any stage of the proceedings. This duty was only more onerous in contracts where the state was party.

IV. Analysis

The Court's observation on the limited expertise demonstrated on the panel and the consequent direction to broad base the panel maintained by the Respondent takes into account the numerous kinds of disputes that may arise out of a given contract and is a welcome step. This step will enable parties to appoint a tribunal to having necessary expertise to deal with the subject matter of the dispute.

On the ever-controversial practice of government employees being appointed as arbitrators, the Court chose to uphold the practice (subject to the checks and balances built into the Act) and appreciate that the reasons for empaneling such highly qualified and experienced persons was to ensure the technical aspects of the dispute are suitably resolved. It may be felt in certain corridors that the Court lost an opportunity to once and for all strike down this practice insofar as it related to public sector undertakings.

Upholding party autonomy and the intention to arbitrate, the Court chose to limit the use of its discretion and instead, struck down parts of the agreed procedure which it felt required correction in the interest of removing adverse consequences. It thereby permitted access of parties to the entire, broad-based panel of potential arbitrators, which will be set up in due course.

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

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