ANNUAL ALTERNATIVE DISPUTE RESOLUTION ROUND-UP 2020

JANUARY

1. Bombay High Court clarifies the limitation period for seeking enforcement of foreign arbitration awards.

In *Imax Corporation v E-City,*[1] the Bombay High Court reiterated the limitation period for enforcing a foreign award as twelve years from the date of the award, which will remain the same for foreign awards for the execution of a foreign decree. The tribunal issued a liability award on 9 February 2006, a quantum and jurisdiction award on 24 August 2007 and a final award on 27 March 2008 in favour of Imax Corporation. In March 2017, E-City Entertainment's challenge under Section 34 was dismissed by the Supreme Court, which followed a petition for enforcement in the Bombay High Court in April 2018. E-City argued that the enforcement action in the Bombay High Court was time-barred by the three-year time limit provided under Article 137 of the Limitation Act, 1963. In response, Imax mentioned, Article 136's applicability following a 12-year limitation period as enforcement and execution proceedings for foreign awards were synonymous. Imax alternatively argued that the period July 2008 to March 2017 would not be considered while calculating the expiry of the limitation period as the challenge under S 34 of the Act was pending. The Court noted and agreed with the same.

2. Supreme Court decides on the validity of a party unilaterally appointing arbitrators.

The Supreme Court considered the validity of the unilateral appointment of arbitrators. The Court held in *Perkins Eastman Architects v HSCC*[2] that such a procedure where an employee of one party has the right to appoint a sole arbitrator is invalid. For the Court, it did not make a difference that the appointing authority was the party itself and not an employee of that. Siti Cable and/or the board of directors through which Siti Cable would act are parties interested in the outcome of the dispute in a manner that makes them ineligible to appoint the sole arbitrator. The decisions in *Perkins* and *Proddatur v Siti Cable* provide clarity regarding the validity of appointment procedures and invalidate a procedure where one party has the unilateral right to appoint the sole arbitrator.

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[1] *Imax Corporation v E-City Entertainment and Ors.* [2017] AIR 1372 (SC).
[2] *Perkins Eastman Architects v HSCC* [2020] AIR 59 SC.

FEBRUARY

3. Section 11 of the Arbitration and Conciliation Act, 1996- The Unenforceability of Insufficiently Stamped Arbitration documents.

In *M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram. v M/s Bhaskar Raju & Brothers,*[3] the Supreme Court set aside the High Court of Karnataka order which had appointed an arbitrator based on an insufficiently stamped lease deed allowing a Section 11 petition. The Bench observed that if a lease deed, or any other such instrument, containing the arbitration clause is not duly stamped upon, it should be impounded, and the Court cannot act upon the document or the clause contained therein since it is a well-settled principle of law under Part-I of the Arbitration and Conciliation Act, 1996.

4. Section 8 of the Arbitration and Conciliation Act, 1996- Limitation Period.

The applicability of the limitation period in matters of arbitration has long been debated. In *SSIPL Lifestyle Private Limited v Vama Apparels (India) Private Limited & Anr.*[4] the Delhi High Court held that the provision for filing an application under Section 8 of the Arbitration and Conciliation Act, 1996 is governed by the Law of Limitation, with the written statement being governed under Civil Procedure Code, 1908 and the Commercial Courts Act, 2015.

The Court observed that under dual circumstances, the arbitration clause could be waived by a party. Firstly, by filing a statement of defence or by submitting it to the jurisdiction, and secondly, by unduly delaying the filing of the application under Section 8, i.e. by not filing it till the date by which the statement of defence could have been filed.

5. Section 29A and Section 23 of the Arbitration & Conciliation (Amendment) Act, 2019- Amended Timelines.

In *MBL Infrastructures Ltd. v Rites Limited,*[5] a petition before the Delhi High Court sought an extension of time for completion of arbitral proceedings and passing of the award. The Court opined that it is evident from a bare perusal of the Act that the amended Section 29A(5) and Section 23(4) brought by the Arbitration & Conciliation (Amendment) Act, 2019 do not have a retrospective operation and, thus, will not be applicable on pending arbitrations as on the date of the amendment since the parties through an un-amended Section 29A application which deals

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[3] *M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v M/s Bhaskar Raju & Brothers* 2020 SCC OnLine SC 183.

[4] *SSIPL Lifestyle Private Limited v Vama Apparels (India) Private Limited & Anr* CS (COMM) 735/2018.

[5] *MBL Infrastructures Ltd v Rites Limited* OMP(MISC)(COMM) 358/201.

with the time limit for passing an arbitral award had already approached the Court on an earlier occasion. Currently, after the pleadings are complete, a 12-month time limit is provided to complete the proceedings and pass an arbitral award.

6. Section 34 of the Arbitration & Conciliation Act, 1996- Arbitration Clause to be printed in a Legible Font.

The Delhi High Court in *Parmeet Singh Chatwal & Ors. v Ashwani Sahani,*[6] for proceedings under Section 34 of the Arbitration & Conciliation Act, 1996, observed that based on how the signature of the petitioner was affixed upon the invoice containing an arbitration clause, it is doubtful whether the parties intended to resort to Arbitration to settle their disputes. The clause was included in a small font at the bottom of the invoice, making it impossible to conclude whether the parties were *ad idem*. Moreover, it is observed that the clause in itself is vague. The arbitration clause in an invoice should be presented in a legible font so that it reduces ambiguity and allows the person reading the terms and conditions to give effect to them. This follows the legal principle that it is the intention of the parties that must be ascertained in case of any arising dispute. Thus, they must be spelt out expressly or impliedly to refer the dispute or difference to Arbitration.

7. Enforcement of a foreign seated Arbitral Award not barred by limitation, can be enforced until 12 years under Article 136 of the Limitation Act.

On 19 February 2020, the Delhi High Court in *Cairn India Ltd. & Ors. v Government of India,*[7] opined that the provision of Article 136 of the Limitation Act applies to an enforcement petition, but the concerned enforcement petition was not barred by limitation. The matter was regarding the enforcement of a foreign award, which was objected to by the Government of India under Section 48 of the Arbitration Act. It was further held that once the arbitral tribunal is vested with jurisdiction by the parties to adjudicate their *inter se* disputes, it has the right to make both wrong and right decisions as it falls within their jurisdiction. The Court also observed that a "pragmatic" read of the Limitation Act and the perusal of the Arbitration Act shows that the ground of objections available to the opposite party does not pertain to the merits of the dispute.

8. Settling the scope of challenges to awards passed in International Commercial Arbitration. The Supreme Court Lays down caution in interference of awards.

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[6] *Parmeet Singh Chatwal & Ors v Ashwani Sahani* MANU/DE/0442/2020.
[7] *Cairn India Ltd & Ors v Government of India* OMP (EFA) (COMM.) 15/201.

In *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors.*[8] the Supreme Court gave a decision that impacted the challenges to awards passed in International Commercial Arbitrations that are conducted in India. The Court opined that if a foreign award fails to determine a material issue which deals with the root of the matter, the award may be set aside as it can shock the conscience of the Court. It was further opined that a foreign award must be read without any nit-picking. Therefore, If the award addresses the integral issues, then the enforcement of such award must follow.

9. Singapore and Fiji ratified the Singapore Convention on Mediated Settlement Agreements.

Singapore and Fiji became the first two countries to ratify the Singapore Convention, formerly known as the United Nations Convention on International Settlements Agreements Resulting from Mediation.[9] This serves as a step closer to enforcing the Convention, as it will only commence its operation six months after three signatory states ratify it into their domestic law. The Singapore Convention was first declared on 7 August 2019 at a signing ceremony and conference held in Singapore. It serves as an answer to the Global Pound Conference series, which took into consideration thousands of dispute resolution stakeholders' views to improve commercial dispute resolutions.

10. The English Court of Appeal upholds the decision that a Disclosed Principal is entitled to enforce an Arbitration Agreement despite being a Non-Signatory.

In *Filatona Trading v Navigator Equities,*[10] the English Court of Appeal upheld the High Court's decision that despite being non-signatory, a disclosed principal is entitled to enforce an arbitration agreement. The Court observed that with respect to the circumstances of the case, the principal should be able to enforce the agreement and that it was validly commenced. The case arose from a dispute over a shareholders agreement, of which two parties were signatories and one was not, nor was his name included. However, the non-signatory party argued that one of the parties entered the agreement on his behalf. The important issue was whether there were "clear and unambiguous" words or indications of intent by the principal party. The judgement noted that in commercial cases, there exists a "beneficial assumption" that an undisclosed principal is entitled

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[8] *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors*. 2020 SCC OnLine SC 177.
[9] *Singapore And Fiji Ratify The Singapore Convention On Mediated Settlement Agreements Taking A Significant Step Towards Its Entry Into Force,* Singapore Mediation Centre (2021) <https://www.mediation.com.sg/news/singapore-and-fiji-ratify-the-singapore-convention-on-mediated-settlement-agreements-taking-a-significant-step-towards-its-entry-into-force/> accessed on 14 January 2021.
[10] *Filatona Trading v Navigator Equities* [2020] EWCA Civ 109.

to enforce the contact in their name, noting that the same must be applied where the principal is disclosed.

11. Yukos awards revived against Russia.

After the ruling by a Dutch appeal court, the former majority shareholders of Yukos are celebrating a "victory for the rule of law." The Court in Hague[11] reversed the lower Court's decision annulling the awards rendered against the Russian Federation. It reinstated the three Energy Charter Treaty (ECT) awards against Russia, worth the US $50 billion. It adds to the league of the largest arbitral award granted by a tribunal. The Court's approach was fundamentally legal, with a close analysis of the Dutch Code of Civil Procedure, Article 1065 and the Energy Charter Treaty. The Court also dealt with a detailed analysis of the Vienna Convention on the Law of Treaties. The District Court had annulled the awards based on The Russian Federation signing the ECT but not ratifying it. The Appellate Court acknowledged a signature as a means for consent to being bound as it serves as an act of self-interest to attract investment. The case serves as an example of treaty protection that the States create in order to attract FDI.

12. ICSID Tribunal dismisses claim against Mauritius in the dispute about UNESCO World Heritage site.

In *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v Republic of Mauritius,*[12] an ICSID tribunal dismissed a €70 million claim brought by UK real estate investors who sought to build a luxury hotel on Mauritius' first UNESCO-designated World Heritage site. The claim was brought against Mauritius after they prevented this from happening as they deemed it inappropriate and incompatible with the designation process by UNESCO. The investors took it upon the ICSID tribunal as it breached the UK-Mauritius Bilateral Investment Treaty. This ruling serves to be significant while considering economic development versus the need to protect areas of cultural significance.

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[11] *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (UNCITRAL) PCA Case No. 2005-05/AA228, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, (UNCITRAL) PCA Case No. 2005-04/AA227, *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, (UNCITRAL) PCA Case No. 2005-03/AA226.

[12] *Thomas Gosling, Property Partnerships Development Managers (UK), Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd and TG Investments Ltd v Republic of Mauritius* (ICSID) Case No. ARB/16/32.

MARCH

13. Section 44A of the 1996 Act: Limitation for Execution of Foreign Decrees in India.

In *Bank of Baroda v. Kotak Mahindra Bank Ltd,*[13] the Supreme Court deliberated on the law of limitation for filing an application for execution of a foreign decree of a reciprocating country in India. The Bench, while taking note of the substantial aspects of the law of limitations, held that the limitation period prescribed by the country where the decree was rendered would apply rather than the forum/ country executing the decree. It clarified that Sec. 44A of the Indian Arbitration Act is merely an enabling provision for enforcement of foreign decrees in India and does not imply application of India's limitation Act. The law of limitation of the reciprocating country shall operate, commencing from the date of the decree being passed.

14. Amendment to Section 8 does not change the bar to the jurisdiction of the Court as provided under Section 5 of the Act.

It was held by the Court in *Dr. Bina Modi v. Lalit Modi & Ors.*[14], that the amendment to Section 8 does not change the bar to the jurisdiction of the Court as provided under Section 5 of the Act. Further, if there exists no valid existing arbitration agreement then no window has been opened for judicial authority to intervene wherein it could injunct Arbitration. It is only when a substantive action is brought before the Court along with an application under Section 8 that the Courts have been granted the permission by the legislature to delve into the question of the existence of a valid arbitration agreement before referring the parties to Arbitration.

15. Micula Case: UK's obligations under the ICSID Convention are not affected by the EU Duty of Sincere Co-Operation.

In *Ioan Micula and Ors. v Romania,*[15] the UK Supreme Court unanimously observed that the UK's international obligations under the ICSID Convention are not affected by the EU Duty of Sincere Co-operation. The Court noted that there could be no success in disputing the existence of the UK's obligation to EU's non-member states. This decision is likely to encourage investors who are willing to enforce the intra-EU ICSID awards in the UK. This decision was upheld on the question of whether the award obtained by the Micula brothers against Romania constituting state aid which is prohibited under EU law, is pending before the Court of Justice of the European

[13] *Bank of Baroda v Kotak Mahindra Bank Ltd* 2020 SCC OnLine SC 324.
[14] *Dr. Bina Modi v Lalit Modi & Ors* [2020] SCC OnLine Del 1678.
[15] *Micula and Ors v Romania* [2020] ICSID Case No ARB/05/20.

Union. The decision of the Court was in light of the fact that the UK's ratification of the ICSID Convention preceded its accession to the EU. Thus, the Court's observation is based upon a clear risk of conflicting decisions which is considered both "contingent and remote."

APRIL

16. Foreign arbitral award against the public policy unenforceable in India.

The Supreme Court in *National Agricultural Co-operative Marketing Federation of India v. AlimentaS.A,*[16] broadened the ground of "public policy" for refusing the enforcement of a foreign arbitral award. The Court held that the foreign arbitral award could not be enforced on being opposed to the public policy of India in view of Section 7 (1) (b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, a provision parallel to Section 34 and 48 of the Act, 1996. The Court referred to the case *of Renusagar Power Co. Ltd. v. General Electric Co. Ltd*, where tests were laid down to determine the grounds to refuse the enforcement of the foreign arbitral award. Relying on the judgment, the Court, in the present case concluded that the prohibition imposed by the Government was sufficient to render the foreign arbitral award unenforceable and the performance of the same would violate the fundamental policy of Indian law and the basic concept of justice.

17. Arbitral award fixing only price of the land could not be executed by directing execution of the sale deed.

The Supreme Court in the case of *Fire Rajasthan & Ors. v. Hindustan Engineering & Industries Ltd,* [17] held that the arbitral award in the present case was merely for the declaration of the price of the land and did not involve the right, tide, or interest in the land. It held that the price determined by the Arbitrator is not binding upon the Respondent for the execution of the sale deed and it is dependent on the agreement between the parties. Therefore, only the agreement was executable and not the arbitral award.

In this case, the sole arbitrator determined the price of land which was to be paid by the appellant to the respondent in accordance with the agreement On defaulting on the payment, the appellant filed a suit against the respondent. The court held that the arbitral award cannot be enforced. The arbitral tribunal only determined the price of the land but did not create or confer any title on the respondent. Moreover, neither the underlying agreement not the arbitral award were registered. Thus, the award was enforceable in the absence of a prayer to execute the agreement.

18. Failure to Challenge the jurisdiction within the prescribed time would result in waiver of right to objection.

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[16] *National Agricultural Cooperative Marketing Federation of India v Alimenta SA* [2020] SCC OnLine SC 381.
[17] *Firm Rajasthan Udyog and others v Hindustan Engineering and Industries Ltd* [2020] SCC OnLine SC 389.

The Supreme Court in the case of *Quippo construction v. Janardhan Nirman,*[18] took the major step to reduce the intervention of the Courts in arbitration proceedings. In the present case, the Respondent had failed to participate in the arbitral proceedings and thereby raise any jurisdictional objection or challenge the scope of authority of the arbitrator during the proceedings. The Apex Court held that the Respondent is precluded from raising any objection as to the venue of arbitration as it would be assumed to have waived all such objections under Section 4 of the Act, 1996. To arrive at this conclusion, the Court relied on the case of *Narayan Prasad Lohia b. Nikunj Kumar Lohia and Ors.* In this case, it was held that a combined reading of Section 10 and Section 16 of the Act depicts that an objection to the composition of the Arbitral Tribunal is a derogable matter. This is because a party is free to not raise any objection within the time period prescribed under Section 16(2), i.e., before filing the statement of defence. However, the same would result in a deemed waiver of the right to objection.

19. The Force Majeure clause could not be invoked taking advantage of the lockdown.

The Bombay High Court in the case of *Standard Retail v. GS Global Corp Distribution*[19] has refused to entertain an application under Section 9 of the Act, 1996 to invoke force majeure clause. The Court held that the force majeure clause included in the agreement is only applicable on the Respondents and it could not be used as an excuse to back off from the contractual duties by the petitioners. It stated that inability of the buyer to perform its obligations for its own purchasers or the fact that it would suffer damages is irrelevant for invoking the force majeure clause. The Court while considering the distribution of steel an essential service especially during the lockdown held that a force majeure clause, encompassed under a contract, explicitly and categorically providing for termination of the agreement by one party, could not be invoked by the other party and could not be imposed against a third party to the agreement.

20. Lockdown was prima facie in the nature of force majeure event.

The Delhi High Court in the case *of M/s Halliburton Offshore Services Inc. Vedanta Limited*[20] while allowing an application under Section 9 of the Act, 1996 held that lockdown was prima facie congruous with the force majeure clause. In the present case, the Petitioner had asked for an ad-interim injunction order against the Respondent, limiting it from invocating and encashing bank guarantees implemented by the Petitioner. The High Court while rejecting the Respondent's

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[18] *Quippo construction v Janardhan Nirman* [2020] SCC OnLine SC 419.
[19] *Standard Retail v GS Global Corp Distribution* [2020] SCC OnLine Del 542.
[20] *M/s Halliburton Offshore Serivces Inc v Vedanta Limited* [2020] SCC OnLine Del 542.

arguments held that it is not correct that judicial intervention is only possible in cases of egregious fraud. Relying on the case of *U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers Pvt. Ltd, Svenska Handelsbanken v. Indian Charge Chrome and Standard Chartered Bank Ltd. v. Heary Engineering Corporation,* it listed two circumstances in which judicial intervention was possible, one, in the event of egregious fraud and two, in the event where the encashment of the bank guarantees would lead to irretrievable injury to any party to the agreement. The Court stated that the lockdown imposed in the entire country was an unprecedented action and was beyond prediction of either of the parties. Therefore, the same would be considered to provide for special equities.

21. The Seat Can be Determined based on the Conduct of the Parties.

The Bombay High Court in the case of *Omprakash and Others v. Vijay Dwarkada Varma*[21] has attempted to clarify the position regarding the use of terms "place", "venue" and "seat" of the arbitration. The Court considered Section 2(1)(c), Section 20, Section 31 and Section 42 of the Act, 1996 together with various landmark Supreme Court verdicts. It held that the seat may not be expressly specified in the agreement and the same can be deduced from the conduct of the parties. For instance, in the present case, the arbitration proceedings were admittedly conducted in Nagpur, rendering it the place of arbitration. The Court held that since neither of the parties challenged the place of the arbitration originally, it would be concluded that the parties ascertained the same as the place of arbitration. The Court relied on the *Bharat Aluminum Co v. Kaiser Aluminium Technical Services Inc.*, which concluded that once the place of arbitration was ascertained, the Courts of the place would have exclusive jurisdiction to exercise regulatory powers as well as entertain applications regarding the arbitration proceedings.

22. Scope of the ground of Public policy in setting aside foreign awards.

The Bombay High Court in the case of B*anyan Tree Growth Capital LLC v Ascom Cordages Ltd,*[22] analysed the scope of the ground of public policy in refusing to enforce foreign arbitral awards. It was held that the objections raised by the Respondents do not belong to any of the categories specified in the *Renusagar* case rendering the award against the public policy of India. The Court further relied on the case of *Vijay Karia v. Prysmian Cavi E Sistem Srl* to categorically conclude that a foreign arbitral award could not be said to be invalid or contrary to the public policy of India merely on violating the FEMA and SCRA regulations. The Court distinguished between two landmark Apex Court verdicts in *SMS Tea Estates Prt. Ltd v. Chandmari Tea Co. Pvt. Ltd* .and *Garware*

[21] *Omprakash and Others v Vijay Dwarkada Varma* [2020] SCC OnLine Bom 796.
[22] *Banyan Tree Growth Capital LLC v Axiom Cordages* [2020] SCC OnLine Bom 781.

Wall Ropes Ltd v. Coastal Marine Constructions and Engineering Ltd. It held that a Court cannot exercise jurisdiction under Section 47 and 48 to adjudicate on the factual dispute of a case. In these circumstances, it was observed that accepting the plea would amount to reopening of the trial and therefore, the Court did not have jurisdiction under Section 47 to 49 of the Act.

23. New governing law in the case of an arbitration agreement in England.

The English Court of Appeals in the case of *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*[23] held that the law applicable to the arbitration agreement would be the curial law except if potent reasons are provided to follow the contrary. The Court did away with the well-recognized three-stage test laid down in the case of *Sulamerica Cia Nacional De Seguros S.A. v. Enesa Enganbaria S.A.*, which stated that the applicable law would be determined by: (1) express choice, (2) implied choice, (3) closest and most real connection. In the present case, the seat of the arbitration was London, England and the applicable law of the contract was Russian law. The Court held that there is no principled basis for the law governing the arbitration agreement to prevail in events of having an arbitration clause with a different curial law. The Court held that the choice of seat is an implied choice of the applicable law governing the arbitration proceedings.

[23] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574.

MAY

24. Order of an Arbitral Tribunal cannot be challenged by way of Writ Petition.

In the case of *GTPL Hathway Ltd v. Strategic Marketing Pvt Ltd*,[24] the Gujarat High Court faced the question of whether any order passed during pendency of arbitration proceedings under the Act of 1996 can be challenged by a writ of certiorari under Articles 226 and 227 of the Constitution of India. To answer the same, the court relied on the 2005 Supreme Court decision in *SBP & Co. v. Patel Engineering* where it was held that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court and that such intervention is impermissible. Reference was also made to the 2019 verdict *of Deep Industries v. ONGC* where the Apex Court reiterated that the object of the Act is to minimise judicial intervention which should be kept at the forefront when disposing off a petition under Article 227 against proceedings that are decided under the Act, that the policy of the Act is speedy disposal of arbitration cases, and that the Act is a self-contained code for dealing with all such cases.

25. Determination of the relationship between a client and a foreign law firm for the purposes of Sections 45 and 46 of the Act.

In the case of *Spentex Industries Ltd v. Quinn Emanuel Urquhart and Sullivan LLP,*[25] the Delhi High Court held that the relationship between a client and a foreign law firm was commercial in nature in terms of Sections 45 and 46 of the Act. The court highlighted that the defendant was a law firm which was advising its client in exchange for monetary returns for the service provided by it. Therefore, it cannot be urged that such an agreement was completely bereft of elements of commerce. The claim of the law firm was that the plaintiff had defaulted in paying its professional charges and other services. The claim does not relate to professional issues. As the proceedings are substantially for recovery of money, the same would be tantamount to a commercial relationship as per Section 45 of the Act.

26. Merits of Interpretation provided in an Award need not be examined if such interpretation was reasonably possible.

[24] *GTPL Hathway Ltd v Strategic Marketing Prt Ltd* [2020] 4 GLR 2906.
[25] *Spentex Industries Ltd v Quinn Emanuel Urqhart and Sullivan LLP* CS (OS) 568/2017.

The Supreme Court in the case of *South East Asia Marine Engineering and Constructions Ltd v. Oil India Ltd*[26] faced the question as to whether the interpretation provided to the contract in the award of the Tribunal was reasonable and fair, so that the same passes the muster under Section 34 of the Act. Thereafter, referring to the submissions by the parties, the court opined that the interpretation by the Arbitral Tribunal to expand the meaning of Clause 23 (of the contract between the parties) to include change in rate of High-Speed Diesel was not a possible interpretation of the contract. Therefore, the court set aside the award stating that courts can examine the merits of the interpretation provided in the award if they were of the view that such an interpretation was reasonably not possible.

27. Domestic Awards made after 2015 can be set aside on the ground of 'Patent Illegality.'

In the case of *Patel Engineering Ltd v. North Eastern Electric Power Corporation Ltd,*[27] the Supreme Court reaffirmed its previous decision and held that an award can be set aside under Section 34 of the Act if it is found to be patently illegal or perverse. An award is said to be patently illegal when the decision of the arbitrator is so perverse, or, so irrational that no reasonable person would have arrived at the same, or the construction of the contract is such that no fair or reasonable person would take, or that the view of the arbitrator is not even a possible view. Furthermore, the ground of "patent illegality" for setting aside a domestic award has been given statutory force in Section 34(2A), which was inserted as per the 2015 Amendment to the Act. Moreover, in Board of Control for Cricket in India. Kochi Cricket Private Limited and Others, the SC noted that the ground of "patent illegality" would only apply to applications under Section 34 made on or after 23.10.2015 (the date on which the 2015 amendment came into force). Therefore, the Court reaffirmed its previous position.

[26] *South East Asia Marine Engineering and Constructions v Oil India Ltd* [2020] AIR 2323 (SC).
[27] *Patel Engineering Ltd v North Eastern Electric Power Corporation Ltd* [2020] AIR 2488 (SC).

JUNE

28. Power of Court to issue interim directions against the third party.

In the case of *Blue Coast Infrastructure Development Pvt Ltd v. Blue Coat Hotels Ltd,*[28] a petition was filed under Section 9 of the Act seeking interim directions for securing the money lying with Respondent No. 2 from the sale proceeds: of an auction of a hotel, earlier owned by Respondent No. 1, in favour of the Petitioner. The Delhi High Court held that the scope of power of a court under the provision is not limited to the parties to an arbitration agreement, and the court can issue interim directions even against a third-party.

29. Fees chargeable by the arbitrator is subject to the statutory limits stipulated in the Fourth Schedule of the Act.

In the case of *Entertainment City Limited v. Aspek Media Private Limited,*[29] the main contention of the petitioner under Section 14 read with Section 12(4) of the Act was that the fees charged by the Arbitrator is in violation of the provisions of the Act. The precise issue arising for consideration, was whether the fees chargeable by the Arbitrator were subject to the statutory limits, stipulated in the Fourth Schedule to the Act. The Court held that till dare, no rules have been framed under Section 11(14) of the Act as per which fees of arbitrators directly appointed by the court could be governed. Thus, the rates of fees fixed in the Fourth Schedule to the Act, were not necessarily binding on the arbitrator.

30. Respondent will waive its right to appoint a substitute arbitrator if no notice was ever issued by the petitioner to appoint one.

In the case of *Dsc Ventures Pet Ltd. v. Ministry Of Road Transport Corp*,[30] on reading Section 15(2), along with Section 11(4) of the Act, the time of thirty days with the Respondent, for appointing a substitute arbitrator had expired, the petitioner moved the present petition under Section 116) of the Act praying that the Court should appoint substitute arbitrator. The Court held that the contract specifically required the issuance of a notice to the respondent by the petitioner for the appointment of an arbitrator. The same will have to be complied with for appointment of substitute arbitrator. Since no notice was issued by the petitioner, it cannot be said that the Respondent waived its right to appoint a substitute arbitrator.

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[28] *Blue Coast Infrastructure Development Pvt Ltd v Blue Coast Hotels Ltd* [2020] OMP (I) (COMM) No. 25.
[29] *Entertainment City v Aspek Media Private Ltd* [2020] OMP (T) (COMM) 24.
[30] *Dsc Ventures Pvt Ltd v Ministry Of Road Transport Corp* [2020] SCC OnLine Del 669.

31. Whether the findings of an award can be relied on to argue that another award ought to be set aside?

In *Gammon India Ltd. & Anr. v. NHAI,*[31] the Court held that in proceedings under Section 34 of the Act, it would be inappropriate to hold that findings in a subsequent award(s) would render the previous one to be illegal or contrary to the legal position. The Court held that an award would have to be tested as on the date when it was pronounced, on its own merits, and not on the basis of subsequent findings which may have been rendered by a later Arbitral Tribunal.

[31] *Gammon India Ltd & Anr v NHAI* [2020] AIR 2020 Del 132.

JULY

32. Madhya Pradesh High Court Inaugurates the Madhya Pradesh Domestic and International Arbitration Centre.

The Madhya Pradesh High Court inaugurated the "Madhya Pradesh Domestic and International Arbitration Centre" on 4th July 2020.[32] Its main function is to provide speedy and timely justice and to enhance the ease of doing business in the state. Its functioning is to be governed by the Madhya Pradesh Arbitration Centre (Domestic and International) Rules, 2019. It is to be supervised by a Board of Governors comprising five senior High Court Judges and there is also a directorate of the Centre, headed by a director who is the Senior Judicial Officer.

33. Formal application under Section 8 of the Act is not necessary.

The Delhi High Court in *Dharamvir Khosla v. Asian Hotels (North) Ltd*[33] held that if the plea for seeking reference of parties to arbitration has been raised by the Defendant before, either orally or in the written statement, filing of a formal application under Section 8 of the Act is not necessary.

The court also held that Section 8 of the Act requires the court to examine whether the issue is covered by the arbitration clause unlike Section 11 applications wherein arbitrability of an issue is not examined.

34. Can the court entertain a Section 9 application arising out of a foreign seated arbitration proceeding where both parties to the disputes were Indian entities?

In the case of *Barminco Indian Underground Mining Services LLP v. Hindustan Zinc Ltd S.B*,[34] the question was which court could entertain a Section 9 application arising out of a foreign seated arbitration proceeding where both parties to the disputes Indian entities were. Relying on UNCITRAL Model Law of International Commercial Arbitration and definitions of "Court" and "International Commercial Arbitration" under the Act, the Rajasthan High Court held that for an arbitration to be treated as an international commercial arbitration, it has to have at least one foreign party. Thus, in this scenario, since both the companies were Indian, the arbitration would not be considered as an international commercial arbitration even though the award may be a

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[32] International arbitration centre inaugurated inaugurated in Jabalpur (2021). <https://www.outlookindia.com/newsscroll/international-arbitration-centre-inaugurated-in-jabalpur/1886007>. Accessed on 16th January 2021.

[33] *Dharamvir Khosla v Asian Hotels (North) Ltd* [2020] SCC OnLine Del 762.

[34] *Barminco Indian Underground Mining Services LLP v Hindustan Zinc Ltd SB* [2020] SCC OnLine Raj 1190.

foreign award. This award would still be executable under Part II of the Act, even though it cannot be termed as an International Commercial Arbitration.'

35. The remedy of approaching the court for the interim measures with respect to disputes arising from the set of agreements or same agreements is not barred by Section 9(3) of the Act.

In the case of *Hero Wind Energy Private Limited v. INOX Renewables Limited*,[35] the Delhi High Court dealt with a scenario where an arbitral tribunal had already been constituted to adjudicate the dispute arising from an agreement containing an arbitration clause, to decide whether the remedy of approaching the court for interim measures with regards to disputes subsequently arising from the same agreement is barred by Section 9(3) of the Act. The Court concluded that the use of the words 'arbitral proceedings in respect of a particular dispute of Section 21 of the Act, clearly indicated that there could be separate arbitral tribunals for successive disputes that might arise between the same parties out of the same agreement or set of agreements. But the tribunal that has been constituted for adjudication of disputes arising from an earlier cause of action cannot be the arbitral tribunal constituted for the disputes arising from a subsequent cause of action qua which interim measures are being sought. Thus, as per the Delhi High Court, the petition was not barred under Section 9(3) of the Act.

36. Autonomy of Parties with respect to Section 9 of the Act.

A dispute arose between the parties regarding an agreement executed between the Appellant and Respondent No. 1 in the case of *State Trading Corporation of India Ltd. v. Jindal Steel and Power Limited & Ors.* [36]Respondent No. 1 approached the Delhi HC under Section 9 of the Act where an order was passed against the Respondent. When the Respondent appealed against the order and a division bench of the HC suo motu appointed an arbitrator.

The impugned order was challenged before the Supreme Court contending that the suo motu appointment under Section 9 of the Act is contrary to the agreed Clause 19 of the Agreement which provided both the parties a mechanism to settle the dispute arising between the parties by arbitrations in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Striking down the High Court's order, the Apex Court held that the parties have the autonomy to decide the mechanisms adopted by them to resolve disputes and the procedure adopted by the

[35] *Hero Wind Energy Private Limited v INOX Renewable Limited* [2020] SCC OnLine Del 720.
[36] *State Trading Corporation of India Ltd v Jindal Steel and Power Limited & Ors* [2020] AIR 2020 Del 105.

parties must be adhered to without interference by the Court in the mechanism other than in cases of violation of the law.

37. Enrica Lexie Case: International Maritime Tribunal Reject's India's claim of exclusive jurisdiction over mariners.

This case involved the Republic of India and the Republic of Italy in a maritime dispute. In February 2012, a tanker flying the Italian flag opened fire on an Indian fishing boat, mistaking it for a pirate boat. This resulted in the death of two fishermen. Criminal proceedings began, however, the republic of Italy challenged the initiation of proceedings against the marines in the Supreme Court of India. The court held that the Union of India was entitled to prosecute the two marines under the criminal justice system prevalent in the country. This is because the incident occurred within the contiguous zone. In 2015, the Republic of Italy took the matter to the International Tribunal of Law of the Sea (ITLOS). It referred the matter to the Permanent Court of Arbitration, based in the Netherlands. In July 2020, the court unanimously held that India is entitled to compensation from Italy. In a 3:2 majority, it also held that the marines were entitled to immunity for the acts that they committed on 15th February 2012. Thus, India was precluded from exercising its jurisdiction over the Marines.[37] It further held that India must take necessary steps to cease to exercise its criminal jurisdiction over the marines.

[37] *The Enrica Lexie Incident (Italy v India)* PCA Case No. 2015-28.

AUGUST

38. Guidelines and affidavits prescribed by the High Court of Delhi to prevent the frustration of execution of awards by Judgment Debtors.

The Delhi High Court's decision in the case of *M/s. Bhandari Engineers & Builders P. Ltd. v. M/s. Maharia Raj Joint Venture and Ors.*[38] has served to be instrumental as the court laid down guidelines and directions to be followed by courts during execution proceedings under the Act, while also making these guidelines applicable to proceedings under various other statutes. The Court held that the execution of decrees/awards deserve special attention considering that inordinate delay in execution proceedings would frustrate decree holders from reaping the benefits of the decrees/award. In this regard, it passed detailed directions and guidelines with regards to the conduct of execution proceedings, kinds of affidavits required to be filed by the judgment debtor, and their format and contents. Emphasis was made on the fact that the judgment debtors do not frustrate the execution of an award by the claim of lack of funds.

The court has also crafted and framed affidavits that have to be filed by individuals or firms in order to determine and evaluate assets, income, liabilities, etc., to make sure if, by ill-will, the judgment debtor has purposefully sold or disposed properties to avoid complying with the award/decree. This is done to ensure such frustration of award does. not take place.

39. Consent cannot be presumed to be implied by a party as to the appointment of an arbitrator under Section 11 of the Act from his mere attendance in the arbitral proceedings.

In the case of *Manish Chibber v. Anil Sharma and Anr*,[39] it was agreed upon by the parties that an arbitrator would be appointed with their consent. However, before the Delhi High Court it was alleged that because after the Respondents chose the arbitrator, the Petitioner never consented to the same. It was argued that the petition before the Court was not maintainable since the Petitioner consented to the appointment of the arbitrator through attending and participating in all the hearings that took place. Just because the Petitioner attended the proceedings and took adjournments, it does not constitute giving consent to the appointment of the arbitrator. Therefore, the court appointed an independent arbitrator to adjudicate the dispute.

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[38] *M/s. Bhandari Engineers & Builders P Ltd v M/s Maharia Raj Joint Venture and Ors* [2019] SCC OnLine Del 11897.
[39] *Manish Chibber v Anil Sharma and Anr* ARB P 249/2020.

40. A clause cannot be invalidated simply because it provides for an even number of arbitrators.

In *M/s. JMC Projects (India) Ltd. v. South Delhi Municipal Corporation*[40] a petition was filed under Section 11(6) of the Act. The Petitioner submitted that the intention of both the parties to resolve their disputes had been through arbitration since the beginning and further provided that the absence of word "each" between Clause 46 and 44 of contract in question is not material and referred to *MMTC Ltd. v. Sterlite Industries (India) Ltd.* for this purpose. The Respondent argued that Clause 46 provides for a two-member committee and Section 10(1) of the Act of 1996 provides that the number of arbitrators cannot be even. This invalidates the arbitration clause. They contended that the Petitioner proceeded on the basis that there was no arbitration agreement. The Court provided that the clause cannot be invalidated on the mere fact that it provides for an even number of arbitrators contrary to Section 10(1) of the Act. Section 10(2) provides that in such a situation, the parties can appoint a sole arbitrator.

41. The west of Emergent Necessity for the grant of relief under Section 9 of the Act.

Before the High Court of Delhi in the case of *Arantha Holdings Limited v. Vistra ITCL India Limited*[41], an issue arose as to whether a court can assume the role of an arbitral tribunal at a pre-arbitration stage under Section 9 of the Act. The prerequisites required for passing such an order under Section 9 were also questioned. In order to address these issues, the Court laid down the Test of Emergent Necessity for the grant of relief under Section 9. It observed that before the court passes an order under Section 9, it has to satisfy itself with 3 stipulations:

- That before the passing of such order, the applicant intends to initiate arbitral proceedings.
- The requisites required to be fulfilled under Order 39 of the CPC for the grant of interim injunction are satisfied.
- The circumstances render the requirement of an interim order necessary and cannot proceed before the arbitrator of the tribunal.
- The court has to be conscious and careful of the power that has been vested with the arbitrator and the tribunal while making sure it does not usurp their jurisdiction under the guise of Section 17 of the Act.

[40] *M/s JMC Projects (India) Ltd v South Delhi Municipal Corporation* ARB P 632/2017.
[41] *Avantha Holdings Limited v Vistra ITCL India Limited* OMP(I) (COMM) 177/2020.

- The court is also required to make sure that Section 9 is not used as a means to forum shop by obtaining interim relief from courts instead of arbitration tribunals.

42. Scope of Arbitration proceedings is wider in scope to include other legal proceedings.

In *Josephine Ancilda v. HDFC Bank Ltd. & Ors*[42], the Petitioner asked for a permanent injunction restraining HDFC bank (Respondent No. 1) from making payments to Respondent No. 2. The Petitioner contended that the jurisdiction of the Sub-Court, Tambaram is valid as parties cannot restrict the jurisdiction of a court through agreement. The Respondents disagreed and contended that since there was an arbitration clause in the agreement, this suit cannot be proceeded with. The Court held that the mere mention of exclusive jurisdiction combined with an arbitration clause together appearing under the head "Arbitration" will not restrict its scope and applicability only to arbitration proceedings. It further held that the words "in connection with any matters, which might arise out of this agreement..." are wider in scope so as to include other legal proceedings as well.

43. Situations or circumstances in which fraud renders a dispute to become non arbitrable?

The Supreme Court in the case of *Avitel Post Studio Limited and Ors. v. HSBC PI Holdings (Mauritius) Limited*[43] held that when an allegation of fraud is of a nature which jeopardises not only the contract but also the arbitration agreement vested within, in such cases fraud attacks the very validity of the entire contract containing the arbitration clause and therefore questioning the validity of the arbitration clause as well. The court also opined that with respect to Section 8 of the Act, which deals with the power to refer parties to arbitration in presence of an arbitration agreement between them, the court has to question whether the allegations of fraud have led to the jurisdiction of the court been ousted instead of focusing on whether the court had jurisdiction or not.

The court finally laid down 2 situations in which a dispute can be non-arbitrable due to fraud:

1. If it can be inferred and is of a nature so as to make the arbitration clause does not exist or void.
2. If allegations are made against the state or its instrumentalities for fraudulent, arbitrary, or mala-fide conduct requiring the hearing of the case by a writ court.

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[42] *Josephine Ancilda v HDFC Bank Ltd & Ors* 33 CRP No 1536/2018.
[43] *LifeCell International P. Ltd v. Vinay Katrela* OA Nos 599 & 600 of 2018.

44. Special Scenarios with regards to the enforcement of a negative covenant in the form of a non-compete clause.

In *LifeCell International P. Ltd v. Vinay Katrela*[44], Court was faced with the issue which sought an injunction with regards to enforcement of a negative covenant in the form of a non-compete clause contained in a franchise agreement post-termination of the said agreement. While deciding upon the matter, the Court illustrated two scenarios. In the first one, the acquired knowledge by a person due to his intelligence and efficacy during employment as an agent cannot be considered the property of the principal and also cannot be restrained to use individual skills after the termination of the relationship. The second scenario is where a specialised training is imparted through a special cost by the company for a particular reason. In this situation, it is a special knowledge imparted in the confidence of the employer to its agent and shall not be divulged to rival parties as it can be detrimental to the future prospects of the principal.

The Court finally held that while deciding interim injunction in terms of the negative covenant on the prima facie basis, the questions as to whether the restraint is reasonable or not and whether there is breach of an agreement or not, would be decided in arbitration.

45. Validity of an arbitration clause if such clause present in the original partnership deed but not in the deed/agreement signed after a new partner is introduced into the firm which is devoid of such a clause.

In the case of *Aarti Razee v. S. Sivagurunathan and Ors*[45], before the High Court of Madras, the petitioner and the first respondent entered into a partnership agreement that contained an arbitration clause in case a dispute arises between them. However, over the years there were induction of new partners and retirement of some as well. One of the incoming partners was the second respondent. When the petitioner appointed an arbitrator, the second respondent challenged the same claiming that the agreement signed by him did not contain any arbitration clause. This case is instrumental since it ruled on what the consequence would be on the arbitration clause present in the original partnership deed in case a partner is inducted by a new agreement devoid of such a clause.

The High Court of Madras however ruled in the favour of the petitioner wherein it held that only because the second respondent has signed only in the deed of the amendment does not mean that

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[44] *LifeCell* (n 13).
[45] *Aarti Razee v S Sivagurunathan and Ors* OP No 1162/2018.

he is not governed by the clauses of the original partnership deed. He is bound by the same and acquires all rights and liabilities of the partner in the partnership business.

SEPTEMBER

46. Rethinking Anti-Arbitral Injunctions.

In the case of *Balasore Alloys Ltd v. M/s. Medima LLC*[46], both the parties had signed two Arbitration agreements with different clauses providing for different seats for arbitration. Following a dispute, both the parties-initiated proceedings at the different seats. In addition to this, Balasore Alloys questioned the validity of the 2018 arbitration clause and thus brought an injunction against it before the High Court of Calcutta. The High Court held that it was empowered to grant an order against a foreign-seated arbitration, and to restrict such power to the circumstances specified in *Modi Entertainment Network v. WSG Cricket PTE Ltd*. However, in the Balasore scenario, it refused to issue an injunction. Through a ruling that a civil court has the authority to issue an anti-arbitration order in a foreign arbitration, Calcutta HC held that this power must be exercised sparingly and only in the circumstances set out in the Modi Entertainment case.

47. Vodafone won the tax dispute against India regarding the Investment Treaty Arbitration Award.

In *Vodafone International Holdings BV v. The Republic of India*[47], Vodafone Group Plc won a $2 billion retrospective tax dispute against India in an international arbitration before the Permanent Court of Arbitration in The Hague. The Court held that levying of the retrospective tax on Vodafone by the Government of India violates the Investment Treaty Agreement between India and the Netherlands. Vodafone Group Plc won against the Indian Government's international arbitration, ending one of the nation's biggest disputes involving a tax claim of $2 billion. The International Arbitration Court in The Hague determined that India was breaching an investment contract arrangement between India and the Netherlands, both with direct understanding of the matter, by placing a tax obligation upon Vodafone charging excessive interests and penalties. The Court held that the demand of the government violates "equal and equitable treatment and that it must avoid pursuing Vodafone's dues. According to some sources, it also ordered India to provide coverage for legal expenses by paying 4.3 million pounds ($5.47 million) to the company.

48. Voluntary recusal of the Presiding Arbitrator in another arbitration proceedings is not a ground for terminating their mandate under A&C Act.

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[46] *Balsore Alloys Ltd v M/s Medima LLC* [2020] AIR 5172 (SC).
[47] *Vodafone International Holdings BV v The Republic of India* PCA Case No 2016-35.

In *Hindustan Construction Co. Ltd. v. National Hydro-Electric Power Corporation Ltd*[48], a single-judge of the Delhi High Court, in compliance with Section 9 of the Act, denied the contested application requesting an order restricting the respondent to invoke any or all Bank Guarantees (BGs) of a total value of 21,436 Crore Rupees. It observed that the law on granting injunctions has been well-developed. The Court ruled that as a rule, such injunction to limit BGs cannot be granted, although two exceptions to this rule were made by different precedents. First, if fraud was created of an egregious nature and, second, if the stock losses caused to the claimant amounts to irretrievable damage or injustice if such an encashment was authorized. The High Court ruled, in the instant case, that the requirements for pleading fraud have not been developed. On the front of the claim of special equities, the High Court noted that the appellant was obliged to show an extraordinary circumstance which prevented the guarantor from being reimbursed if he eventually succeeded in making use of the exclusion. It was not enough to apprehend that the other party cannot pay.

49. The Singapore Convention on Mediation came into force on 12th September, in a major development in international commercial dispute resolution.

The Singapore Convention on Mediation is a game-changer in the practice of cross-border appropriate dispute resolution of commercial disputes. The advent of the Singapore Convention is likely to reduce the uncertainty when mediating a cross-border commercial dispute. This is because the Singapore Convention offers a system for the expedited recognition and enforcement of commercial international mediated settlement agreements. The Singapore Convention is tipped to provide a significant influence on cross-border dispute resolution practices, as well as on trade and investment flows. It will enhance the appeal of mediation processes within regional initiatives, such as the Belt and Road Initiative. Furthermore, it lays the foundations for regulatory robustness of cross border online dispute resolution initiatives. The Convention will, in tum, potentially provide an enhancement to the efficacy of dispute resolution for cross border users. From a user perspective, the Singapore Convention offers an attractive risk management mechanism which is accessible to disputing parties, in terms of its flexibility and affordability to cross-border business players, whether they are States, multinational corporations, publicly listed corporations, traditional incorporated limited entities, sole traders, or start-ups.

50. The Supreme Court cleared the air on the Limitation Period to enforce a foreign award.

[48] *Hindustan Construction Co Ltd v National Hydro-Electric Power Corporation Ltd* [2020] SCC OnLine Del 1214.

The limitation period for the filing of a petition requesting the compliance of a foreign award under the Act, was largely unsettled. In turn, this enabled foreign award holders to take time to consider the viability of implementing enforcement action in India against award debtors, while allowing award debtors to object, on account of restrictions to enforcing foreign awards. The Supreme Court of India in *Government of India v. Vedanta Limited & Ors*[49] on 16 September 2020 set aside the time of limitation to impose a foreign award by conflating the provisions of the Act, which conflicted with the provisions of Indian Limitation Act, 1963.

51. Power of the Court to stay arbitration must be impliedly read into the 1996 Act.

The High Court of Calcutta in *Lindsay International P. Ltd. & Ors. v. Laxmi Niwas Mittal & Ors*[50] held that Defendant had waived the Arbitration agreement by not moving arbitration within three full years and has, therefore, submitted to the jurisdiction of the Court and the Arbitration agreement was rendered inoperative by the waiver. Further, it held that an averment in the Written Statement of defence that it is being filed "Without Prejudice to the Arbitration agreement" does not constitute it as an application under S. 8 of the Act. Rather an independent, stand-alone application was required to be made. It held that while the Defendant has not prayed or pleaded that it seeks reference of the disputes to arbitration. The Court further held that the power of the Court to stay arbitration must be impliedly read into the 1996 Act and to allow an arbitration to proceed even after the Defendant has waived the arbitration agreement shall render the arbitration null and void or inoperative as the same would be a travesty of justice.

[49] *Government of India v Vedanta Ltd and Ors* 2020 SCC OnLine SC 749.
[50] *Lindsay International P Ltd & Ors v Laxmi Niwas Mittal & Ors* [2018] 1 CALLT 254 (HC).

OCTOBER

52. New Collection of Arbitration laws issued by ICC to come in force from January 1, 2021.

ICC co-arbitrators cannot share the nationality of any of the parties in treaty-based cases

A new subparagraph was added to Article 13 of the ICC Rules. Article 13(6) now specifies that whenever the arbitration agreement upon which the arbitration is based emerges from a treaty, and unless otherwise agreed by the parties, no arbitrator shall be of the same nationality as any party to the arbitration.'

Emergency arbitration out of reach for treaty-based arbitration

In the 2012 edition of its Arbitration Rules, the ICC added guidelines for emergency arbitration (EA) proceedings. In Article 29(6)(c), the 2021 Rules now specifically specify that the terms of emergency arbitration cannot be extended when the arbitration agreement on which the application 1s based arises trom a treaty.

Third-party funding disclosure mandated to strengthen impartiality and independence

Finally, Article 11(7) of the new general provision specifies that in all cases referred to in the new regulations, 'each party shall promptly inform the Secretariat, the arbitral tribunal and the other parties of the presence and identity of any non-party which has entered into a financing agreement for claims or defenses and has an economic interest in the outcome of the arbitration. This new duty is intended to ensure that arbitrators are able to promptly report any relation that could impair their impartiality or independence with a third-party funder.

53. Ruling under Section 34 to be overturned only on it being implausible and irrational.

In the case of *Reliable Spaces Put. Lid v. Evonik India Pvt. Ltd*[51], it was pleaded before the court to change an award given by the arbitrator under section 34 of the Act. The petitioner claimed that the arbitrator's interpretation of the *force majeure* clause was extremely perverse, and that the arbitrator ignored important evidence. The court's said that a ruling under Section 34 can only be overturned if it is so implausible, that no reasonable person can come to any conclusion of that sort. The Court concluded that the ruling by the arbitrator was not so implausible and irrational, therefore dismissing the plea.

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[51] *Reliable Spaces Pvt Ltd v Evonik India Pvt Ltd* 2020 SCC OnLine Bom 1601.

54. Special Leave to appeal would lie only on 'extremely narrow ground' against a High Court Judgement recognizing and enforcing a foreign award.

In an SLP initiated by the Responsive Industries Limited arising out of a judgement of the Bombay High Court in the case *Responsive Industries Limited v. Banyan Tree Growth*[52], the Supreme Court has observed that an appeal under Article 136 of the Constitution of India against a High Court judgment that recognises and enforces a foreign award would lie only on an extremely narrow ground.

'Blatant disregard of Section 48 in very exceptional cases' is not a mantra to be used indiscriminately, the court observed while dismissing the special leave to appeal filed by the petitioners. While considering the contentions, the bench noted the observations made in *Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL*. The Court stated that it is clear beyond any doubt that Article 136 cannot be used to circumvent the statutory scheme which is contained in Section 50 of the Act. If an Award is enforced under Section 48 by a learned Single Judge of the High Court, no appeal against such judgment shall lie. Obviously, the statutory scheme indicates that even if there is an incorrect judgment by a learned Single Judge on facts or law, such judgment is not appealable. This being the case, the court held that an appeal under Article 136 would lie on an extremely narrow ground, i.e., only if some new or unique point is raised as to the interpretation of the Act which has not been answered by the Supreme Court.

55. If the intention to arbitrate is not contained in the main document, the parties are not mandated to be referred to arbitration.

The High Court of Bombay in *BVM Finance Private Limited v. Vistra ITCL (India) Ltd. and Ors*[53], held that all efforts must be made to encourage and facilitate the resolution of disputes through arbitration when the parties have agreed to get their disputes resolved through arbitration. The arbitration agreement between the parties must, however, exist for that purpose, and the intention of the parties to arbitrate must be discernible. The Court held that the subjective intention of the parties is first of all what is to be seen, and if it is not clear then the court must look into the existence of a mutually shared common intention. The Court rejected the Respondent's argument that the suit/dispute was based on a composite transaction with interconnected documents and that the parties had to be referred to arbitration because one such document contained an arbitration clause. The Court agreed with the complainant that the suit/ dispute was premised

[52] *Responsive Industries Limited v Banyan Tree Growth* SLP No 11404-11405/2020.
[53] *BVM Finance Private Limited v Vistra ITCL (India) Ltd. and Ors* OMP(I) (COMM) 177/2020.

primarily on one document i.e., Debenture Trust Deed, which was the final document, and superseded all previous documents by virtue of a clause contained in that document which stated that it constituted the entire agreement between the parties, and since no arbitration clause was contained in that Trust Deed, the parties' intention was not to arbitrate.

56. Assessment of Jurisdiction for a section 9 application is different from a civil suit.

High Court of Calcutta in the case *Srei Equipment Finance Limited v. Serra Infraventure Private Limited*[54], held that in the context of an arbitration agreement between the parties, an application pursuant to section 9 for interim relief is time-sensitive if the court has to decide on a prima face assessment of the materials available before it and, therefore such applications are antithetical to leading evidence to decide the issue of jurisdiction. In order to decide the question of jurisdiction, the Court must proceed to a joint reading of the averments, the documents, and the strength of the rebuttal by the party which claims that the petition must be taken elsewhere and that in such cases the first principles of the burden of proof under the Indian Evidence Act, 1872, would also come into play; namely that whoever asserts the existence of certain facts to a legal right, must prove that those facts exist. In addition, the High Court held that an application under section 9 can be filed where a part of the cause of action has arisen or where the parties have chosen the seat of arbitration with the definitive caveat that the court has determined or otherwise has the jurisdiction to receive and adjudicate the disputes between the parties.

57. An "agreement to the contrary' as mentioned in the proviso to section 2(2) would have to expressly stipulate that S. 9 would not apply.

The Delhi High Court in the case *Big Charter Private Limited v Ezen Aviation Pty Ltd and Ors*[55], held that any "agreement to the contrary" as referred to in S. 2(2) would be required to stipulate expressly that S. 9 of the Act would not be applicable in that particular case and in the absence of such a specific provision, it is not possible to exclude the beneficial dispensation provided for in the proviso. The Court held that a provision providing that the parties are submit to the exclusive jurisdiction of the courts of Singapore' would not constitute an agreement to the contrary as provided for in S. 2(2) as the Singapore courts are unable to grant pre-arbitration interim relief of the nature envisaged by S. 9 of the Act. It further held that mere submission by the parties to the jurisdiction of the courts of Singapore, under the provisions of the Governing Law clause, could not be sufficient to function as an agreement to the contrary, excluding S. 9 of the Act. The Court

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[54] *Srei Equipment Finance Limited v Seirra Infraventure Private Limited* 2020 SCC OnLine Cal 1790.
[55] *Big Charter Private Limited v Ezen Aviation Pty Ltd and Ors* OMP(I) (COMM) 112/2020.

held that the Section 9 court has to circumspect and not entrench on the jurisdiction vested in the arbitrator by S. 17 and held that the degree of satisfaction, of the S. 9 court, at the pre-arbitral stage, is not the same as the degree of satisfaction of the arbitrator, while exercising jurisdiction under S. 17. However, once a dispute is found to exist the Section 9 court can grant "interim measures of protection."

58. A party against whom an award can be enforced as per the contractual agreement is a proper party to an arbitration.

The Delhi High Court in the case of *Odeon Builders v. Engineers India Ltd.*[56], rejected the argument that ElL, would not be a party to the arbitration and arbitration proceedings would lie solely against the principal, since EIL had executed the agreement as an agent of the main party/client. The High Court took note of a clause in the agreement which provided that any award passed by the Arbitral Tribunal 'would be enforced against ElL, only albeit with the rider 'on receipt of the amount so awarded by the Arbitral Tribunal from the Client.' The Court held that the Act did not provide for the enforcement of an award against an outsider in the arbitral proceedings and a holistic appreciation of all the documents makes it clear that the Principal had conferred on EIL, the power to act independently, even if EIL would be its constituent attorney and therefore the proper party to the arbitration.

59. The court can appoint the arbitrator suggested by the Respondent, even in cases where the Respondent defaults and loses its right to appoint its nominee arbitrator, provided that the arbitrator suggested by the respondent is suitable and qualified.

The High Court of Delhi held in *Tata Projects Ltd. v. Oil & Natural Gas Corporation Ltd*[57] that in the exercise of the powers conferred on the Court under Section 11(6) of the 1996 Act, there was no prohibition, directly or indirectly, on the court for appointing as an arbitrator, a person whose name had been suggested by the defaulting defendant. It held that there was no doubt that once the respondent had failed to fulfil its obligation under the arbitration clause contained in the agreement and the petitioner had approached the Court in accordance with Section 11(6), the respondent would have lost its right to appoint an arbitrator of its choice, the only consequence would be that if the respondent were to indicate the name of a person to act as its arbitrator, the Court could override the request and appoint another arbitrator, in place of the person whose name has been so suggested. Further, it held that, although there is no mandate in the law, there

[56] *Odeon Builders v Engineers India Ltd* ARBP 247/2020.
[57] *Tata Projects Ltd v Oil & Natural Gas Corporation Ltd* ARBP 302/2020.

is no embargo imposed by the law, either explicit or implied, on the court appointing the person, whose name has been suggested by the respondent, as its arbitrator, if the court is convinced that a person whose name has been suggested is suitable and qualified in that regard.

60. In order to incorporate the arbitration clause upon assignment, specific reference to the same is necessary.

The High Court of Bombay in *Vishranti CHSL v. Tattva Mittal Corporation Pvt. Ltd.*[58] held that an arbitration clause is an agreement within an agreement and is a mechanism chosen by the parties to resolve disputes. It held that if, therefore an arbitration clause is to be carried forward to a later agreement establishing a new contracting party, then it is necessary to manifest the arbitral intent between the original party and the other party's assignor, which can be done by having a separate arbitration agreement or by incorporating the previous arbitration agreement by specific reference. It held that without specific reference, the assignee cannot be 'assumed' to have consented to the arbitration agreement, and a generalized reference to the previous contract (all terms and conditions', etc does not satisfy the requirement of Section 7 of the Act that, subject to the exceptions recognized in *M R Engineers & Contractors (P) Ltd. v. SomDatt Builders Ltd*, an arbitration agreement must be in writing.

61. The court can look at the plea of novation of contract in order to determine the existence of an arbitration agreement at the stage of section 11.

The question raised by the High Court of Delhi in *Sanjiv Parkash v. Seema Kukreja & Ors*[59] was whether, at the stage of considering the petitioner's request for the appointment of an arbitrator, it was only the existence of an Arbitration Agreement that had to be considered, leaving it to the Arbitrator to decide the question of the validity of the agreement, including the plea of the novelty of the agreement containing the arbitration clause. The Court held that by agreement, an arbitration agreement may be destroyed, and if the contract is superseded by another, the arbitration clause, which is a component/part of the previous contract, falls with it, or if the original contract is put to an end in its entirety, the arbitration clause, which forms part of it also dies with it. On the basis of the facts, the Court concluded that the agreement containing the arbitration clause relied on by the petitioner was novated and superseded and that the arbitration clause was therefore not survivable.

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[58] *Vishranti CHSL v Tattva Mittal Corporation Pvt Ltd* ARB APP (L) 3311/2020.
[59] *Sanjiv Parkash v Seema Kukreja & Ors* ARBP 4/2020.

62. An arbitration award has to be made within the time period specified in the arbitration clause unless the time period has been mutually extended.

High Court of Bombay held in the case of *Supreme Cylinders Ltd. v. S.P. Donadkar & Ors*[60] that where the arbitration clause provided a time period for passing an award, in an arbitration commenced prior to the 2015 amendment, then the Arbitrator was bound to make and publish his Award within the time mutually agreed, whether in the contract or a later extension by consent and held that without consent to any extension, the arbitral authority ends and thus allowed the application for termination of the mandate of the Arbitrator.

63. Under section 17(2), the court can only enforce an interim order of the arbitrator, it cannot determine the validity of the same.

The High Court of Kerala in the case of *Manoj v. Shriram Transport Finance Company Limited*[61] held that under S. 17(2) of the Act, the Court also has no power to determine the validity or otherwise of the interim order passed by the arbitral tribunal pursuant to S. 17(1) of the Act and has no power whatsoever to alter or vary the interim order passed by the arbitral tribunal. What is contemplated under S. 17(2) of the Act is only the enforcement of the arbitral tribunal's interim orders pursuant to S. 17(1) of the Act and while exercising jurisdiction pursuant to S. 17(2) of the Act, the court shall not appeal against the accuracy or otherwise of the interim order of the arbitral tribunal.

64. A party cannot make a plea which is contrary to their stance taken before an arbitrator in order to challenge an award.

In the case of *Aran Kumar Kamal Kumar & Ors. v. Selected Marble Home & Ors*[62], the Supreme Court while dealing with a challenge to an arbitral award on the ground that the statement filed by Appellant themselves and relied on by the Arbitrator contained certain errors, held that that the Appellants cannot be permitted to withdraw their own statement made before the Arbitrator, the same not being disputed by the Respondents and accepted by the Arbitrator as correct. The Court also held that the Appellants are not justified in raising a contrary plea other than what was their defence and statement of counter-claim in the arbitral proceedings.

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[60] *Supreme Cylinders Ltd v SP Donadkar& Ors* Arbitration Petition-E Case No 2432 of 2020.
[61] *Manoj v Shriram Transport Finance Company Limited* OP (C) No 312 of 2020.
[62] *Arun Kumar Kamal Kumar & Ors v Selected Marble Home & Ors* [2020] AIR 4629 SC.

65. Arbitration clause forming part of the main agreement under which the disputes arose would prevail over jurisdictional clauses mentioned in the latter agreements.

In this case of *Finnish Fund for Industrial Corporation Lad. v. VME Precast Pvt. Ltd. and Ors*[63], the High Court of Madras dealt with objections to enforcement of a foreign award on the ground that arbitral tribunal based in Finland had no jurisdiction to pass the award in view of the fact that arbitration clause providing for arbitration in Finland contained in the loan agreement between parties was followed by certain other agreements, being security trustee agreement, between the parties providing for jurisdiction in courts at Chennai. The Court rejected those objections and held that the master agreement from which the disputes arise is a loan agreement and that in the loan agreement, the parties specifically agreed to the jurisdiction of Finland to resolve their dispute through an arbitrator, and in that regard, it cannot be said that merely because some security agreement have been executed later by the lender to enforce security in respect of their obligations and rights, the clause governing the dispute in the latter agreement can be imported to principal agreement of loan and the said clause in the latter agreement would only be attracted when the dispute arises in respect of the enforcement of the security, which was not the dispute at hand.

[63] *Finnish Fund for Industrial Corporation Ltd v VME Precast Pvt Ltd and Ors* [2020] 8 MLJ.

NOVEMBER

66. Consequence of absence of "for the time being in force" in the arbitration agreement.

In *ABB India Ltd. v. Bharat Heavy Electricals Ltd*[64], the petitioner had moved the court seeking disqualification of the appointed arbitrator (Managing Director of the Respondent) under Section 12(5) of the 1996 Act. The Respondent contended that the said provision would not be applicable to the parties since the arbitration had commenced prior to the 2015 Amendment, which had brought about the said provision and there was an absence of the words *"for the time being in force"*, to make subsequent rules and amendments applicable to the said arbitration.

The Delhi High Court held that there is no major difference between a provision which makes the Act, with its statutory modifications and enactments, applicable, and a provision which makes the Act, with its statutory modifications and enactment, for the time being in force, applicable. It was observed that the expression *"with its statutory modifications and enactments"*, itself glances towards the future, and the usage of the words *"for the time being in force"* is done as an abundant caution.

67. Foreign Seated Arbitration between Indian parties.

In *GE Power Conversion Pvt Ltd v. PASL Wind Solutions Pvt Ltd*[65], the HC found that the award in question was a "foreign award", under Section 44 (Part II) of the Act, which exhaustively sets out requirements for an award to qualify as a foreign award. The definition of "international commercial arbitration" in Section 2() (Part I), which requires at least one of the parties to the arbitration to be a foreign national/entity, is not relevant for determining the applicability of Part Il of the Act. However, the award must be made in a New York Convention Member State, which was Zurich in the present case. The judgment thereby opened doors for domestic parties to choose a foreign seat.

However, the HC found that while two Indian parties can choose a foreign seat of arbitration, they would not be entitled to seek interim measures from Indian courts under Section 9 of the Act. Section 2(2) of the Act provides that Part I applies where the place of arbitration is in India, and Section 9, subject to an agreement to the contrary, also applies to international commercial arbitrations seated outside India. Since a foreign seated arbitration between two Indian parties

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[64] *ABB India Ltd v Bharat Heavy Electricals Ltd* [2020] 275 DLT 418.
[65] *GE Power Conversion Pvt Ltd v PASL Wind Solutions Pvt Ltd* R/Petition under Arbitration Act No. 131 of 2019 and 134 of 2019.

does not fall within the definition of "international commercial arbitration" section 9 is not available to the parties.

68. Binding arbitration clause in the agreement.

The Delhi HC in *Royal Orchid Associated Hotels Private Ltd. v. Kesho Lal Goya*[66] by relying on Supreme Court's decision in *INDTEL. Technical Services Pvt. Ltd. v. W.S. Atkins PLC*[67] held that the option of dispute resolution exercised by the petitioner is indicative of the intention of parties. The language of the clause shows that the petitioner clearly had an option either to get the disputes adjudicated through the Court or by way of arbitration. Since the petitioner filed a Section 9 petition, the HC held that the petitioner intends to get the disputes settled through the process of arbitration, and thus, the arbitration clause is binding.

69. Unconditional Stay of an Award: Arbitration and Conciliation (Amendment) Ordinance 2020.

The Ordinance brings forth the following changes to the Act:

Section 36

- A Proviso to Section 36 of the Act has been added which states that a Court must grant an unconditional stay where a prima-facie case of fraud or corruption has been made out.
- An unconditional stay would be granted on an award if the agreement or award is challenged and proved to be induced by fraud or corruption. The opportunity to exercise such unconditional stay will be available to all the stakeholders.
- It will apply to all arbitration proceedings, irrespective of whether arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Section 43J

- The Ordinance substitutes Section 43] of the Act to state that *"the qualifications, experience, and norms for accreditation of arbitrators shall be such as may be specified by the regulations."*
- The eighth Schedule of the Act, which deals with the qualifications and experience of an arbitrator, has been omitted.

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[66] *Royal Orchid Associated Hotels Private Ltd v Kesho Lal Goyal* OMP(I)(COMM) 247/2020.
[67] *INDTEL Technical Services Pvt Ltd v WS Atkins PLC* [2008] 10 SCC 308.

- The Ordinance is, however, silent on the name of the regulations which would regulate the qualifications, norms for accreditation of arbitrators.

70. Modification of Directions of Arbitral Tribunal u/s 37.

In *Edelweiss Asset Reconstruction Company Ltd. v. GTL Infrastructure Ltd*[68], Edelweiss Asset Reconstruction Company Ltd. invoked Section 37 of the Act to challenge an order passed by the Arbitral Tribunal. Although Edelweiss was not a party to the arbitration, it claimed to be affected by the impugned directions and that GIL and GTL. in collusion, misled the Arbitral Tribunal into passing the impugned Order, suppressing the fact that Edelweiss had a first charge over the monies which GIL. has been directed to pay to GTL, or to deposit in the Escrow account. An Arbitral Tribunal cannot pass an order, which affects the rights and remedies of the third party secured creditors, while determining the disputes pending before it, as was held in the case of *SBI v. Ericsson*. The Delhi HC relied on the case and held that Edelweiss is a secured creditor of GL, and the direction contained in the impugned order, affects the assets of GIL, secured with Edelweiss and other secured creditors. Therefore, the direction, ex face, cannot be sustained. The Court also held that once a case for interference is found to exist, the appellate jurisdiction of the Court under Section 37would also extend to modifying the order of the learned Arbitral Tribunal, in view of the inalienable indicia of appellate jurisdiction as identified in *Tirupati Balaji Developers (P) Ltd. v. the State of Bihar*. In the present case interference, in order to protect the legitimate interests of the appellant, was found to be justified and the order of the tribunal was modified invoking Section 37(2) of the Act.

71. Challenge to Pre-BALCO Foreign Award.

The disputes in *Noy Vallesina Engineering Spa v. Jindal Drugs Ltd*[69], was between two Indian parties and consequent arbitration proceedings were conducted under the auspices of the International Court of Arbitration in Paris. A partial award was given and challenged by the Defendant under **Section 34** of the Act before the Bombay HC, which held that a foreign award could not be challenged under Section 34. The Defendant appealed to a larger bench of the Bombay HC, which held that the Defendant's challenge could proceed because the award was passed pre-BALCO. This decision was appealed to the Supreme Court. The SC held that the seat of the arbitration proceedings is crucial to determining whether the Indian courts had jurisdiction to hear a challenge to an award. Since the seat, in this case, was London, the Indian courts did not have jurisdiction.

[68] *Edelweiss Asset Reconstruction Company Ltd v GTL Infrastructure Ltd* ARB A (COMM) 13/2020.
[69] *NOY Vallesina Engineering Spa v Jindal Drugs Ltd* [2006] 5 BomCR 155.

The SC set aside the larger bench ruling of the Bombay HC. The SC ruled that even under the pre-*BALCO* regime, if parties have agreed that the seat of arbitration will be outside India, then Part - I of the Act will not be applicable. The judgment re-affirms the position that a substantive challenge to a foreign award can only be adjudicated upon by the foreign court at the seat of the arbitration, regardless of when the contract was executed.

DECEMBER

72. The Lease/Tenancy matters which are not governed under the special statutes but under the transfer of property act are arbitrable.

In *Suresh Shah v. Hipad Technology India Pvt. Ltd.*[70], A Bench comprising the Chief Justice SA Bobde, Justices A.S. Bopanna, and V. Ramasubramanian held that if the special statutes do not apply to the premises/property and the lease/tenancy created as on the date when the cause of action arises to seek for eviction or such other relief and in such transaction if the parties are governed by an Arbitration Clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the Arbitration Clause. The Bench also held that eviction or tenancy relating to matters governed by special statutes where the tenant enjoys statutory protection against eviction whereunder the Court/Forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters and, in such cases, the dispute is non-arbitrable.

73. The expression 'Existence of Arbitration Agreement' in Section 11 of the Act includes aspects of validity of the agreement.

In the case of *Vidya Drolia and Ors. v. Durga Trading Corporation*[71], The Supreme Court has held that the expression 'existence of arbitration agreement' in Section 11 of the Act would include the aspect of the validity of arbitration agreement. A three-judge bench of the Court also explained that at the stages of Sections 8 and 11 of the Act, the Courts should undertake a prima face examination of the validity of the arbitration agreement.

74. Whether it is binding on the Court to follow the precepts governing the stay of a money decree under CPC while dealing with an Award u/s 36 of the Arbitration & Conciliation Act?

In *NHPC Ltd. v. Hindustan Construction Company Ltd.*, the Court held that a comparison of the Code of Civil Procedure, 1908 and the Act, 1996 shows that the both can be equated on certain basic principles, but at the same time they are vastly different. Further, the language of the provision under S. 36(3) of the Act does not make it binding for Courts to follow rules governing the stay of money decree, but only guiding principles.

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[70] *Suresh Shah v Hipad Technology India Pvt Ltd* [2020] SCC OnLine SC 1038.
[71] *Vidya Drolia and Ors v Durga Trading Corporation* [2020] SCC OnLine SC 1018.

75. Whether an 'Emergency Arbitrator' is outside the scope of Section 2(1) (d) of the Arbitration & Conciliation Act?

In *Future Retail Ltd. v. Amazon.com Investment Holdings LLC*[72], the Court relied on the decision in Airtel Post and held that an Emergency Arbitrator is outside the scope of Section 2 (1) (d) because the Parliament did not accept the recommendation of the Law Commission to amend Section 2 (1) (d) to include an 'Emergency Arbitrator'.

[72] *Future Retail Ltd v Amazon.com Investment Holdings LLC* [2020] SCC OnLine Del 1636.