FOREWORD

PROF. (DR.) S. SHANTHAKUMAR

Director, Gujarat National Law University

There is a saying that an ounce of mediation is worth a pound of arbitration and a ton of litigation. This is true in every respect possible. It is common knowledge that the average litigation period across countries is below any sense of reasonableness. ADR not only eliminates the vices of the traditional justice system but also combines the best of both worlds. It is confidential, speedy and personal. In this fast-paced commercial world, these aspects reign supreme. Multinational enterprises would prefer resorting to ADR to preserve their functioning. It, therefore, does not come as a surprise that ADR has gained immense traction in the past decades. One cannot deny the importance of keeping up with recent developments being made in the field of dispute resolution, a vibrant and multi-faceted legal endeavour, which varies in procedure and substance across jurisdictions and cultures, diversifying with the passage of time and increasing commercial activity. Nations around the world have acknowledged the need for specialisation and diversification of the practice of ADR in order to create a reliable and expeditious dispute resolution mechanism in the interests of a robust economy and reliability of various industry-players. The interplay of the tenets of law with custom, practices and technical aspects in every line of work, and even the interplay of ADR with other branches of law has led to the development of a rich jurisprudence and new avenues for career development. The impact is such that no nation can afford a restrictive legal and judicial framework at the cost of business and growth. Building such a framework entail facing complex questions of law and procedure that pertain to an effective regime of ADR in the country. In recent times, India has been a proponent of ADR and especially arbitration, bringing legislative changes to keep up with international standards. Creating a robust and effective arbitration regime requires confidential proceedings and institutionalisation of the whole realm. Multiple attempts have been made to make this a reality. These attempts are never without fault. At the same time, the faults are never exposed without academic discourse. As a result, there is an incessant need for academic debate and legal research to exact and streamline these attempts. The Magazine aims to revive the skill and art of legal research, an underrated yet crucial skill necessary for every student of law. At the core of the Magazine lies the recognition of the importance of interdisciplinary and holistic research aimed at the varying perspectives of the law and practice of ADR and identifying trends and conundrums. The GNLU SRDC-ADR

Magazine, under the able guidance of its faculty, advisors and benefactors, the support of the administration and the dedication of its members, has undertaken progressive measures to achieve the said ideal and live up to its essential function. I appreciate the brilliant editorial team and external peer reviewers whose efforts have culminated into the third issue of the SRDC-ADR Magazine. I hope that the Magazine achieves the intended object and accrues the approval of its readers for its content. I also hope that the support and guidance extended shall remain constant, pushing the Magazine to scale newer heights and achieve grander objectives in the years to come.

ABOUT SRDC

The Student Research Development Council ('SRDC') was established in 2014 as a platform for students to engage in collaborative academic research and to foster discussion around contemporary research questions in law and allied disciplines.

Our objective

The ADR Student Research Group, under the aegis of the Student Research Development Council, is proud to launch its flagship initiative, the GNLU SRDC-ADR Magazine, a publication inviting submissions from experts, working professionals and students interested in the field of Alternative Dispute Resolution. The aim of the Magazine is to keep pace with the recent developments, judicial decisions and practices being adopted in Indian and foreign jurisdictions. The aim is also to allow and promote a comparative and interdisciplinary understanding of various dynamics shaping this field of study.

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NOTE FROM EDITORS

At the outset, we express our immense gratitude to the readers, contributors and advisors for their initiative and support extended to our Magazine. Their unflinching faith in our objectives has been instrumental to the success of the inaugural issue of the Magazine. As the Magazine is making newer inroads, we hope that it obtains a wider readership and becomes a medium for catalysing the free exchange of thoughts amongst the section of students and professionals engaged in Alternative Dispute Resolution.

For the third edition of the Magazine, the editors are pleased to present the feature interview conducted on 27th January, 2020 with Ms. Jyoti A. Singh, founder of AJA Legal and associates and former partner at Phoenix legal. She was most solicitous in sharing her insights and advice with the editorial team. We take this opportunity to extend our gratitude to Ms. Singh for engaging with us.

The third edition features four articles written on the following topics:

Third Party Funding in Arbitration, Is India lagging behind? Comparative Analysis of Confidentiality in Arbitral Proceedings; Sovereign Immunity in International Commercial Arbitration: A Clampdown on the Enforcement of Foreign Awards and Ethical Concerns surrounding Third Party Funding in Indian Arbitration: The Need for Legislation.

Academic integrity and quality of research have always been the non-negotiable requirements of the GNLU Academia. The same has been dutifully incorporated in the context of the Magazine. We have carefully assembled four writings on contemporary issues of Arbitration which are both interesting and informative. We hope this attempt of ours is recognised by our readers and contributors, and they continue to extend their support to take our Magazine to new heights.

We hope our readers will enjoy reading the Magazine as much as we did putting it together for you.

THIRD-PARTY FUNDING IN ARBITRATION: IS INDIA LAGGING BEHIND THE WORLD?

by Aman Saraf

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Introduction

The increasing significance of international commercial transactions has brought arbitration to the forefront of alternate dispute resolution methods. With the emergence of this means of dispute settlement, the concept of "third-party funding in arbitration" has also generated interest among several countries. In the past few years, there has been an upsurge of cases with third-party funders around the globe. This begs an important question – why is India silent on this issue?

Before delving deeper into the issue, it would be apposite to put forth a basic outline of what constitutes third-party funding. While there has been no formal consensus on a composite definition, it can be largely defined as "*an agreement whereby a natural or legal entity provides financing resources to a party, in such terms that will allow or entail the extension to the funder of the arbitration clause, and having a retribution such as the repayment or a benefit (financial or otherwise) from or linked to an award rendered in the arbitration.*"[1] In essence, third-party funders are "*entities that invest in litigation and arbitration for profit*".[2] While technically being regular investors, they assume a position of far greater significance. In fact, even when compared to a bank, a third-party funder has a scope and approach that exceeds a banker.[3] In light of this, it is the author's opinion that the need of the hour is to effectively regulate third-party funding in Indian arbitration as well in order to prevent other countries from overtaking it.

Third-party funding across the world

i. United Kingdom

Nearly one and a half decades ago, the United Kingdom's ["**UK**"] Court of Appeal examined the bare concept of third-party funding concerning the litigation. The court opined that third-party funding is a means for people who cannot afford the costs of contending issues to receive justice.[4] This was a clear departure from the archaic 'Doctrine of Maintenance and Champerty', which was previously a criminal and tortious offence in the UK and other countries as well. Maintenance is defined as the "*intermeddling with a suit that does not belong to one, by assisting either party with money or otherwise to prosecute or defend*". Further, Champerty is "*a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds.*"[5] Section 13 of The Criminal Law Act, 1967 officially abolished the criminalisation of

[1] Duarte G Henriques, 'Third-party funding – In search of a definition' (2018) 28 ARIA 405.
[2] Victoria Shannon Sahani, 'Reshaping Third-Party Funding' (2017) 91 TUL L REV 405.
[3] Radek Goral, 'The Law of Interest Versus the Interest of Law, or on Lending to Law Firms' (2016) 29 Georgetown Journal of Legal Ethics 253.
[4] *Arkin v Bochard Lines & Ors* [2005] 3 All ER 613 (CA).
[5] Henry Campbell Black, *Black's Law Dictionary* (2nd edn, West Publishing Co. 1968).

Maintenance and Champerty in the United Kingdom. The doctrines, however, continued to apply to both litigation and arbitration[6] to reject third-party funding in cases which went against public policy. In *Essar v Norscot,*[7] the seat of arbitration was England. The Court enabled Norscot to avail of third-party funding on a non-recourse basis, granting the party recovery of both the costs of the arbitration as well as the third-party funding.

ii. Singapore

Singapore is a country that has recently attempted to regulate the implementation of third-party funding in arbitration. It was held in the case of *Lim Lie Hoa v Ong Jane Rebecca & Ors* that third-party funding would be permitted if the third-party had a genuine commercial interest in the dispute.[8] The Civil Law (Amendment) Act (Bill No. 38/2016), enacted in January 2017, brought about the radical change of abolishing Maintenance and Champerty in Singapore as well – paving the way for third-party funding in Arbitration. The act was enacted after the Ministry of Law, in its Public Consultation in 2016, took the view that allowing third-party rights would significantly boost international arbitration and business in Singapore. Further, in *Re Vanguard Energy Pvt. Ltd.*,[9] the Court recognised the validity of third-party funding in insolvency proceedings. These legislations and judicial pronouncements have paved the way for third-party funding to be introduced vigorously in the future. The key component is the "commercial interest" that permits third-party funding in an arbitration which has assumed vital importance.

iii. Hong Kong

Third-party funding is not completely barred under Hong Kong law. In *Unruh v. Seeberger,*[10] the Court laid down specific conditions in which such funding is permitted. Firstly, it is permitted when the third-party has a legitimate interest in the proceedings. Secondly, the funding is permitted in the interest of justice, where the third-party can persuade the Court that he is enabling access to justice for someone who may not be able to receive so. Finally, a miscellaneous category, which includes the scope of insolvency proceedings, permits the funding. In *Cannonway Consultants Ltd v Kenworth Engineering Ltd,*[11] the Court opined that access to justice and Maintenance and Champerty are two doctrines that must be considered conjointly while determining the benefit of third-party funding. Further, it was held that the prohibition of Maintenance and Champerty must not extend to private arbitration proceedings as they differ considerably from litigation proceedings in judicial forums. Importantly, the Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Bill 2016 was important legislation enacted in this regard. The very purpose of the Bill, as stated in Part 10A, is "…..*to—(a) ensure that third-party funding of arbitration is not prohibited by particular common law doctrines; and (b) provide for measures and safeguards in relation to third-party funding of arbitration."*

iv. Australia

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[6] *Bevan Ashford v Geoff Yeandle Ltd* [1998] 3 WLR 172 (Ch).
[7] *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] WLR(D) 576 (HC).
[8] *Lim Lie Hoa v Ong Jane Rebecca & Ors* [2005] 3 SLR 116 (SC).
[9] *Re Vanguard Energy Pvt Ltd* [2015] 4 SLR 597 (SC).
[10] *Unruh v Seeberger* [2007] 2 HKLRD 414 (CFA).
[11] *Cannonway Consultants Ltd v Kenworth Engineering Ltd* [1995] 1 HKC 179 (HC).

In *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd,*[12] the Highest Court of Australia demystified the confusion regarding third-party funding. It stated that in those states of Australia where Maintenance and Champerty were abolished, third-party funding could be freely considered legitimate. There would be no grounds to challenge the funding by the other party. It also held that it would not be an abuse of process if the third-party exercises a certain amount of influence or control over the interest of the funded party. While this judgment focused on litigation funding, in the author's opinion, there is no reason the same cannot be extended to arbitration proceedings. As held in *Bevan,*[13] what applies to litigation in this regard should apply to arbitration as well.

The above description of the various laws of countries clearly emphasises the pro third-party funding approach that most courts are beginning to take. Countries like Switzerland have also openly promoted third-party funding – the Swiss Apex Court directly struck down an effort to prevent it by the Cantonal Law of Zurich, terming it a violation of the 'freedom of commerce'. The importance of such third-party agreements has been recognised by most jurisdictions, with the courts attempting to pave the way to patronise it. There seems to be no further basis for using the archaic Doctrine of Maintenance and Champerty to strike down the concept of third-party funding, especially in arbitration.[14] In light of the entire world moving towards this relatively unexplored field, it is interesting to examine its application to India's arbitral and judicial landscape.

Brief history of third-party funding in India

In India presently, there is absolutely no statutory mechanism for regulation of third-party funding in arbitration or third-party funding itself. An oft-overlooked issue in this country, third-party funding has only recently been receiving some spotlight. The High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India analysed the numerous policies on third-party funding adopted by various jurisdictions. They observed – "*Similar measures, if adopted with suitable modifications for the Indian context, could give a boost to arbitration in India."*[15] They further mentioned that regulation of such funding would contribute significantly towards establishing the country enacting them as a vibrant hub of arbitration. This can be strongly connected to the goal of the Indian government to establish India as an important centre for arbitration, akin to the status that Singapore holds today.

The Code of Civil Procedure ["**CPC**"] through Order XXV statutorily recognises third-party litigation funding and financing in civil suits in India.[16] The judgment of the Supreme Court in *Re: Mr.' G', A Senior Advocate Of ... v Unknown,*[17] directly clarified the air of mystery around this issue. The Court held that there is *"there is nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals"* when it comes to third-party funding. The only caveat imposed by the Supreme Court was that the third-party funders must necessarily not be lawyers

[12] *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] 229 ALR 58 (HC).
[13] Bevan (n 6).
[14] Sai Ramani Garimella, 'Third-party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions' (2014) 3 AALCO Journal of International Law 45.
[15] Dept. Of Legal Affairs, *Report Of The High-Level Committee To Review The Institutionalisation Of Arbitration Mechanism In India*, < http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf > accessed 9 November 2020.
[16] The Code of Civil Procedure 1908.
[17] *Re: Mr. 'G' A Senior Advocate Of ... v Unknown* [1955] 1 SCR 490 (SC)

and that it mustn't be opposed to public policy. If such funding is permitted in litigation, there is no reason it should not be regulated in arbitration as well. Further, it has been established that this violation of public policy must be a clear violation, only then can it be used to prevent such transactions.[18] In two judgments of the Supreme Court, the Court struck down third-party financing transactions when they were conditioned on the receipt of a substantial portion of the final stake, declaring this as a violation of public policy.[19] These judgments can be considered as definitive examples of the type of consideration that is regarded as a contravention to public policy. It is impossible to lay down an exhaustive list of such possible violations, which must be examined on a case-to-case basis.

The way forward for India – An analysis

It is the author's opinion that third-party funding must be applied to Indian arbitration, albeit with some restrictions to prevent a violation of public policy. India has always maintained a rigorous pro-arbitration stance.[20] Regulating third-party funding in arbitration may provide an avenue for the common man to take recourse to arbitration, thus increasing its popularity and reliance. The immense backlog that the Indian judiciary faces has brought arbitration rapidly to the forefront. Third-party funding will capitalise on this momentum. Funding of dispute resolution serves as an effective redistributive tool between the haves and the have-nots, rather than being a guardian of the status quo in favour of the elite and wealthy.[21] This assumes vital significance in a country where the disparity is a pressing issue, and arbitration proceedings are known to have enormous costs. The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] has completely ignored the point of third-party funding – neither accepting nor barring it. It is the author's opinion that as arbitration is, in essence, a form of litigation[22], hence what is permitted for litigation under the CPC should apply to arbitration as well.

Firstly, it must be noted that the definition of a 'party', as per Section 2 (h) of the Arbitration Act, is a "*party to an arbitration agreement*". This may pose a hurdle. Thus, the application of third-party funding cannot simply be permitted by a judicial decision. It will need the legislature, executive and judiciary to work in tandem to achieve a common goal.

Secondly, India may take inspiration from the Law Commission Report of Hong Kong.[23] The Report suggests a phased approach to third-party funding – it proposes an initial stage of approximately five years to test and implement preliminary regulations that are non-binding in nature. Once these regulations are implemented, a complete review can be done in the next phase. Further, there needs to be a clear ethical standard established for such arbitration proceedings. This could occur by drafting a separate Code of Conduct for Arbitration proceedings

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[18] *Rattan Chand Hira Chand v Askar Nawab Jang* [1991] 1 SCR 327 (SC)
[19] *Raja VV Subhadrayamma v Poosapati Venkatapati* [1924] SCC OnLine PC 22 (PC); *Khaja Moinuddin v SP Ranga Rao* [1999] SCC OnLine AP 583 (SC).
[20] Prakash Pillai and Umer Chaudhary, 'Law Commissions Report Reinforces the Pro-Arbitration Trends in India' (Kluwer Arbitration, 9 October 2014) <http://arbitrationblog.kluwerarbitration.com/2014/10/09/law-commissions-report-reinforces-the-pro-arbitration-trends-in-india/> accessed 9 November, 2020.
[21] M Steinitz, 'Whose Claim Is This Anyway? Third-Party Litigation Funding' (2011) 95 Minnesota Law Review 1268.
[22] Bevan (n 7).
[23] The Law Reform Commission of Hong Kong, *Third-party Funding for Arbitration – Report*, (Law Reform Com 2016), <http://www.hkreform.gov.hk/en/docs/rthird-party_funding_e.pdf > accessed 9 November 2020.

that are third-party funded, as was done by the United Kingdom with respect to litigation.[24] It could also be effectively achieved by an amendment to the Arbitration Act, inserting a section that governs such disputes.

Thirdly, India needs to establish a definitive balance between the regulations to be imposed on third-party funding and the benefits that are expected to be extracted from it. The first step that India needs to take is to make a decision on the extent of the funding permitted in arbitration, primarily whether such funding would be allowed *stricto sensu* (restricted scope) or *lato sensu* (broad scope)[25]. The former relates to funding by completely unrelated parties in exchange for monetary return, while the latter is much more far-reaching and includes donations, loans, financing etc. It is suggested that India implements a *stricto sensu* approach due to it being the prevalent method in international commercial arbitration. Slowly, as time passes, an active effort can be made towards expanding the scope of funding in a *lato sensu* approach as well.[26] The *stricto sensu* approach can be seen in Singapore, while Hong Kong has applied the *lacto sensu* approach.

Fourthly, a way must be found to regulate third-party funding in and out of the country, i.e. cross-border transactions. This holds significance in those arbitrations which involve either foreign parties or when the funding is out-sourced from an international funder. Such transfers would come within the jurisdiction of the Foreign Exchange Management Act, 1999 ["**FEMA**"]. FEMA does not categorise third-party funding as either capital or current account, rendering it difficult to fit such transactions within the regulatory framework.[27] This causes a direct clash between the FEMA and the Arbitration Act regarding the admissibility of arbitration proceedings.

Fifthly, it must also be recognised that should India not permit third-party funding in arbitrations, it would be severely lagging behind international arbitral forums. This could cause grave complications for the enforcement of foreign awards. The ICSID Tribunal in *Giovanni Alemanni v. The Argentine Republic*[28] took the view regarding third-party funding that – "*the practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection.*" This shows that in international forums, the objections against third-party funding are barely maintainable. When such foreign awards need recognition and enforcement in India under Sections 47 to 49 of the Arbitration Act, it will cause an inherent conundrum. The Supreme Court, in *Government of India v Vedanta Ltd. & Ors*[29], has reinforced the pro-enforcement bias of Indian Courts, relying on India's obligations under the New York Convention. It limited the scope to deny enforcement of the foreign award, establishing that courts should not review the merits of the case while doing so. Therefore, these contrasting stands may cause a quandary for the courts, ultimately jeopardising Indian interests in international commercial arbitration.

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[24] Association of Litigation Funders, 'Code of Conduct for Litigation Funders' (2018) <https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> accessed 9 November 2020.
[25] Thibault De Boulle, 'Third-party Funding in International Commercial Arbitration' (LLM, Faculty of Law Ghent University 2014).
[26] Anish Wadia and Shivani Rawat, 'Third-party Funding In Arbitration – India's Readiness in a Global Context' (2018) 15(2) Transnational Dispute Management Journal 1.
[27] ibid.
[28] *Giovanni Alemanni v The Argentine Republic* [2014] ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility.
[29] *Government of India v Vedanta Ltd. And Ors* [2020] SCC Online SC 749 (SC).

Lastly, the Courts in India clearly have a 'minimum intervention' policy in arbitration.[30] Therefore, in the author's opinion, third-party funding in arbitration should be left freely to the parties involved. The consensual private nature of arbitration implies that the funding method of these proceedings should also be private. The private right to outsource funding must not be taken away but should be regulated. If a citizen were able to access justice by third-party funding, a bar on the same would be a denial of justice, constituting a violation of their fundamental rights.

Conclusion

The International trend shows that third-party funding will become a norm soon. A regulatory framework is essential for India. Guidelines need to be imposed to deal with problems of confidentiality that arise with third-party and unnecessary claims being filed. The culmination of such regulation could greatly benefit the arbitral landscape in India, bringing it at par with the rest of the world.

[30] *Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd* [2020] 2 SCC 455 (SC).

CONFIDENTIALITY IN ARBITRAL PROCEEDINGS: A COMPARATIVE ANALYSIS OF INVESTMENT ARBITRATION AND COMMERCIAL ARBITRATION

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Introduction

Confidentiality is one of the hallmark considerations among parties when choosing arbitration as their preferred dispute resolution mechanism. There are various reasons for this. Primarily disclosure of information such as trade secrets, pricing policies, technical know-how, production methods or profit margins could harm a party's standing among its competitors. It could also have an impact on the image of a company in front of the public at large. Additionally, it may expose the financial situation of a company, the existence of a defective product, situations or agreements that could compromise the image of a company in front of the public and competitors. While parties to an arbitral agreement are at liberty to enter into confidentiality agreements enforceable during the arbitral proceedings, however, often these agreements do not bind the agents, representatives, third parties, arbitrators or the administrative staff of the tribunal.[31] However, the scope of the duty of confidentiality as well as who is confined within the contours of such duty are points of contention in both International Commercial Arbitration ["**ICA**"] and International Investment Arbitration.

This article aims to compare ICA and International Investment Arbitration on the maintenance of confidentiality of proceedings. It further proceeds to analyze the scope of the duty or obligation of confidentiality, the stakeholders on whom such obligation lies and discuss the varying degrees of importance given to confidentiality between the two types of arbitration. The aforementioned elements shall be discussed with the help of applicable rules/conventions as well as landmark judicial decisions.

International Commercial Arbitration (ICA)

i. *Privacy v Confidentiality*

Confidentiality is considered an inherent and one of the most significant advantages and incentives of opting for ICA by parties.[32]

Theoretically, 'privacy' and 'confidentiality' are used interchangeably for one another. But practically, within ICA, they are two distinct concepts. Whereas 'privacy' is restricted to the active and live proceedings and concerns with

[31] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).

[32] Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' (*Kluwer Arbitration Blog*, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 4 January 2021.

who can be a party to the proceedings. Whereas confidentiality transfers responsibility to the parties and obligates them not to disclose any information regarding the proceedings.[33] While privacy is limited to the non-participation of certain groups of individuals during the proceedings, however, confidentiality is meant to ensure non-disclosure after the proceedings have culminated.

The distinction between the two is further contrasted by their impacts on a non-party in an arbitration agreement. Privacy calls for only the parties in conflict to attend the arbitral proceedings restricting the non-disputing parties from it. The same is done to prevent any external interferences from disturbing the proceedings.[34] Therefore, confidentiality only obligates the parties involved in the proceedings and not non-parties who are free to disclose information; however, this is subjected to public policy considerations and exceptions.[35]

ii. *Scope of confidentiality*

One of the contentious points in confidentiality is its scope which essentially refers to the extent of confidentiality and to whom the same is applied.

As common practice dictates, the duty and obligation of confidentiality lies upon the witnesses, experts, secretaries, staff, court reporters, translators and any other people involved or part of the proceedings.[36] The materials that are subject to confidentiality include memorials, pleadings, documents, reports, witness statements, awards, precedents or any other evidence presented in the proceedings.[37] This also includes any information presented in arbitration filings.

iii. *Legal instruments and rules on confidentiality in commercial arbitration.*

One of the most important legislations for ICA is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"]. Unfortunately, New York Convention does not provide any provision regarding confidentiality.[38] On the flip side, the International Chamber of Commerce Rules, 2021[39] ["**ICC Rules**"] under Article 22 do stipulate a duty of confidentiality, but only upon the arbitrators and the staff of the International Court of Arbitration and not the parties themselves. There are also instances where confidentiality is contingent upon the existence of a confidentiality agreement. Such can be seen in The UNICTRAL Arbitration Rules, 2010,[40] which provides for confidentiality under Article 34(5) in the publication

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[33] Alexis Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] 16(4) American University International Law Review.
[34] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?' (*Kluwer Arbitration Blog,* 21 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> accessed 5 January 2021.
[35] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2255.
[36] Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' (Kluwer Arbitration Blog, 23 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/> accessed 4 January 2021.
[37] Alexis Brown, 'Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration' [2001] 16(4) American University International Law Review.
[38] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (NYC).
[39] International Chamber of Commerce Rules of Arbitration (adopted 8 October 2020, entered into force 1 January, 2021) art. 22.
[40] The United Nations Commission on International Trade Law Arbitration Rules (adopted 1976, entered into force 15 August 2010) art 34(5).

of arbitral awards to protect parties' legal rights. However, this is subject to the agreement between the parties and restricts the obligation of confidentiality to certain specific aspects only.

The London Court of International Arbitration ["**LCIA**"][41] under Article 30 imposed an obligation of confidentiality on the parties enforcing the secrecy of proceedings. The Singapore International Arbitral Centre ["**SIAC**"][42] also provided for a general obligation of confidentiality. This confidentiality expanded to cover the parties' identities as well as the sealing of arbitration documents.[43] Domestic legislations such as The Indian Arbitration and Conciliation Act, 1996[44] also provide an express duty of confidentiality as incorporated through the 2019 amendment under Section 42A, where confidentiality of proceedings is imposed upon the arbitrators and the arbitral institution.

When the provisions embedded in the various rules, conventions and legislations are taken into consideration, it is evident that different and varying stances have been taken by them on confidentiality. They either recognize an implied and general duty among the parties or vest the duty on the arbitrators and staff only. However, there may also be a circumstance such as the New York Convention, which completely rejects the concept of confidentiality. There is no definite position on the matter of confidentiality. This leads to a doubt as to whether confidentiality practically is now a major advantage or benefit of ICA.

Therefore, in order to eradicate the dilemma over which arbitral rules the parties adopt for confidentiality issues, a simpler solution would be to address it within their arbitration agreement. The parties should negotiate and come to an agreement with a uniform, well-drafted confidentiality clause that also prescribes any consequences or remedies followed by such a breach of confidentiality. The parties can negotiate and agree upon a united stance on confidentiality that they choose to be governed by.

Although the parties would still have to approach a tribunal/court for a breach of the duty of confidentiality, such an agreement helps in making sure that the parties are on the equal footing over-interpreting the duty of confidentiality and on whom such duty is levied irrespective of the jurisdiction they opt, ensuring a predictable and stable outcome to the confidentiality dispute.

iv. *Judicial perspectives on confidentiality*

The jurisprudence of courts across the globe and tribunals have vastly differed in their interpretations of confidentiality. As a result, it may serve to be useful to address certain landmark cases which provide an insight into the developing jurisprudence.

Aita v Ojjeh[45]

[41] London Court of International Arbitration Rules (entered into force on 1 October 2014) art. 30.
[42] Singapore International Arbitration Centre Rules (entered into force 1 August 2016).
[43] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?' (*Kluwer Arbitration Blog*, 21 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/> accessed 5 January 2021.
[44] The Indian Arbitration and Conciliation Act 1996, s.42A.
[45] *Aita v Ojjeh,* Court of Appeal of Paris, Judgement of 18 February 1986, Revue de l'arbitrage, p. 583.

The Court of Appeal of Paris held that the annulment of arbitral proceedings violated the duty of confidentiality since it leads to public discussion and debate on the facts of the case, which should remain confidential.

The fallacy in this decision arises not from the actual *ratio decidendi* but from the failure on the court's part to mention either the grounds on which the obligation of confidentiality arises or its limits.

US v Panhandle Eastern Corp[46]

In this case, the US Government had sought the documents regarding an arbitral proceeding held under the ICC Rules. On the other hand, Panhandle Corp. sought a protective order to prevent the disclosure of the proceedings. The US District Court of Delaware provided access to such documents because the rules or the agreement did not provide for confidentiality between the parties but only to the members of the court.

It is important to note that this case was central in not considering whether the parties have a general understanding on confidentiality or not. If there exists no confidentiality agreement, there shall exist no duty to ensure the same either. However, this principle has to be looked at in the context of disputes which are in the public interest. The party then becomes obligated to show and establish a good cause for the maintenance of a protective order, and that denial of the same will lead to a serious injury to the party.

Dolling-Baker v Merrett[47]

In this case, the court was asked to adjudicate whether the duty of confidentiality is an implied obligation. The English Court of Appeal held that an implied obligation of confidentiality arises out of the nature of arbitration itself.

This case was path-breaking as it recognized an implied duty that the courts, until then, had refused to accept. However, the importance of arbitration proceedings as a precedent was also showcased in this case as the documents were sought to serve in a precedential capacity. The court, although it remained determined about the recognition of this implied duty, did not consider this duty to be applied rigidly when the documents are required for future proceedings. The existence of a fair trial also superseded the implied obligation of confidentiality.

This case is not only central in terms of recognition of an implied obligation but also a landmark in its considerations of the exceptions to such obligation.

Esso Australia Resources v Plowman[48]

In this case, the High Court of Australia drew a distinction between privacy and confidentiality wherein the court downplayed the importance of confidentiality and held it not to be an essential attribute of arbitral proceedings, unlike privacy.

[46] *The United States v Panhandle Corp* [1998] 118 F.R.D. 346 (D. Del.).
[47] *Dolling-Baker v Merrett* [1990] 1 WLR 1205 (CA).
[48] *Esso Australia Res v Plowman* [1995] HCA 19.

The implied obligation of confidentiality was declined and was considered to be fatal to arbitral proceedings, although this does not negate the fact that the proceedings are private. This case was the one that absolutely went against the previous landmark holdings, negating an implied obligation or general duty of confidentiality.

This opinion, however, is flawed because although the court considered privacy to be of utmost importance, it failed to recognize that privacy exists to maintain the confidentiality of proceedings. Confidentiality is the result of the privacy of proceedings.

International Investment Arbitration

i. *Transparency superseding confidentiality in investment arbitration*

Although the concept of confidentiality originated from ICA, it has been adopted and translated into the investment arbitration regime as well.[49] The general duty of confidentiality demands that the documents pertaining to a dispute are not disclosed to non-disputing parties. However, transparency is given a superseding effect to confidentiality in investor-state arbitration.

Transparency is highly interlinked with the concept of confidentiality while being a contrasting and competing element to that of confidentiality. Transparency is highly sought-after essentiality, especially in international investment arbitration.[50] This is due to the fact that investor-state disputes concern issues involving public service and public interest. Non-disputing parties, as well as the NGOs, contribute by compelling the tribunals to take into account the large-scale effects of the award outside the monetary considerations.[51]

Transparency acts as a public policing initiative against the parties, representatives, arbitrators as well as administrators of the arbitral institution, knowing that their acts are being analyzed and scrutinized by the public at large.[52]

ii. *Legal instruments on transparency and confidentiality in investment arbitration*

In addition to the existing tribunal rules and conventions, there are certain specific instruments peculiar to the investment regime which regulate confidentiality.

Under the ICSID Convention,[53] transparency and confidentiality are not vested under the Convention or the rules as a presumption which is dependent on the agreement between the parties based on their consent, the applicable treaty and the tribunal.

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[49] Cindy Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration' [2003] 14 AM. REV. INT'L ARB. 121.

[50] Rukia Baruiti Dames and Laurence Boisson, De Chazournes, 'Transparency in Investor-State Arbitration: An Incremental Approach' [2015] 2(1) BCDR International Arbitration Review.

[51] Natalie Limbasan and Loretta Malintoppi, 'Living in Glass Houses? The Debate on Transparency in International Investment Arbitration' [2015] 2(1) BCDR International Arbitration Review.

[52] Claudia Reith and Loretta Malintoppi, 'Enhancing Greater Transparency in the UNCITRAL Arbitration Rules - A Futile Attempt?' [2012] 2(2) Yearbook on International Arbitration.

[53] International Centre for Settlement of Investment Disputes Convention Arbitration Rules (adopted 12 May 2005, entered into force 10 April 2006).

Chapter 11 of North America Free Trade ["**NAFTA**"][54] also provides for provisions that advocate for transparency by sharing documents, evidence and arguments of the proceedings with the non-disputing parties. It allows the non-disputing parties to participate in these proceedings as the sharing of necessary documents is critical for such participation. It allows them to monitor and follow the proceedings to raise any concerns needed in time.

With regards to the resolution on transparency as well as participation by third parties, the UNICTRAL Arbitration Rules were insufficient until the incorporation and adoption of the UNICTRAL Rules on Transparency, 2013.[55] These rules are concerned with the question of what should be disclosed. They are aimed at increasing and encouraging transparency by providing public access to arbitral documents. These rules are aimed toward more openness in investment arbitration to secure public interest. However, confidential information still had a provision to be secured as an exception.[56]

iii. *Public interest as an exception to confidentiality and admission of amicus curiae briefs*

The central argument against confidentiality in investor-state arbitrations is that in such proceedings, issues raised before the tribunal have an impact on the legal, public policy and public interest implications. In such cases, the dispute, as well as the arbitral awards, are subjected to public scrutiny as the concerns, objections or recommendations of these groups have to be taken into consideration by the tribunal.

Public interest as an exception to the duty of confidentiality is usually portrayed through the admission of *amicus curiae* briefs prepared by non-disputing parties wherein their concerns, insight, objections as well as any implications the decision will have over their state are articulated and cited.

The first landmark case which allowed an *amicus curiae* brief was the case of *Methanex Corp v United States of America,*[57] which allowed such briefs by civil society groups. This was the first encouraging move by the judiciary towards enhancing transparency in investor-state disputes. This led to a progressing trend towards transparency in disputes concerning human rights or environmental concerns where the public interest is involved.

The amendments that were made to the ICSID Arbitration Rules in 2006[58] further moved towards greater transparency by inducing provisions that encouraged the acceptance of *amicus curiae* submissions and non-disputing party participation.

Rule 32(2) removed the mandatory requirement of the consent of the parties and allowed non-disputing parties during the testimony. Further, Rule 37(2) provided that the tribunal, after consulting with the disputing parties, may allow a non-disputing or third-party to file a written submission with the tribunal regarding the dispute.

iv. *Judicial perspective on transparency and confidentiality*

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[54] North America Free Trade Agreement (adopted 17 December 1992, entered into force 1 January, 1994) 19 U.S.C. 3301 (NAFTA).
[55] The United Nations Commission on International Trade Law Rules on Transparency (entered into force 11 July, 2013).
[56] Alexander Belohlavek and Loretta Malintoppi, 'Confidentiality and Publicity in Investment Arbitration, Public Interest and Scope of Powers Vested in Arbitral Tribunals' [2011] 2(1) Czech Yearbook of International Law.
[57] *Methanex Corp v United States of America* [2005] 44 ILM 1345.
[58] International Centre for Settlement of Investment Disputes Convention Arbitration Rules (adopted 12 May 2005, entered into force 10 April 2006).

Biwater Gauff Ltd v Tanzania[59]

The ICSID tribunal held that the general duty of confidentiality depends upon the nature of the proceedings and is not an absolute rule.

This case was also central in *amicus curiae* participation and acceptance of *amicus curiae* briefs submitted by NGOs with respect to environmental and human rights issues. This case sought to achieve a balance between confidentiality and transparency in disputes involving public interest. It was accepted that there exists a greater need for transparency in such disputes. However, this was a case where the harmful consequences of transparency were witnessed, leading to aggravation of disputes as well as prejudice to parties. Due to such possible consequences, disclosures were limited and restricted.

Abaclat and Ors v The Argentine Republic[60]

The tribunal, in this case, acknowledged and accepted the risk of incorrect public impressions that come up with disclosure to non-disputing parties. The tribunal also held that in the absence of a confidentiality obligation as per the investment arbitration, the party that insists upon maintaining such confidentiality must satisfy the tribunal that devoid of such confidentiality, the arbitration will face a risk of aggravation of dispute or that disclosure of such dispute will harmfully compromise the integrity of such proceedings.

This case is significant because it recognizes the public interest that is associated with investor-state disputes. Therefore, it holds transparency to a higher standard, thereby creating a greater threshold to prove the necessity for non-disclosure of arbitral proceedings. It also, however, does not downplay the importance of confidentiality and considers the same as an obligation unless maintaining confidentiality will do more harm than good to the state in dispute.

Critical Analysis

In the aforementioned discussion on confidentiality, it is very evident that confidentiality has far greater eminence and gravity within the commercial arbitration sphere due to good reason. Confidentiality, although an incentive for the disputing parties for choosing ICA, has its fair share of disadvantages as well. The loss of precedential value of awards is one of them. This loss is further facilitated by rulings such as *Ali Shipping Corporation v Shipyard Trogir,*[61] where the court of appeal applied confidentiality to any information, submissions, evidence and award passed in the proceedings. Such a ruling prevents the advancement of law through precedents by restricting the access to these awards and documents to the public at large. The use of awards as precedents can be encouraged by limiting the time to which the documents and the award of a proceeding have to be kept confidential. Confidentiality should be restricted by a time limit as decided by the tribunal, which in turn helps to fulfil both purposes.

[59] *Biwater Gauff Ltd v Tanzania* IIC 82 (2006).
[60] *Abaclat and Ors v The Argentine Republic* IIC 807 (2011).
[61] *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All E.R. 136.

Further, similar to international investment arbitration, there are disputes under ICA which pertain to and involve the public interest and welfare of a state and stringently applying the rule of confidentiality on the same does more harm than good. The tribunals have to make a choice between the need to maintain confidentiality and the public interest at risk or in question. Although International Investment Arbitration prioritizes transparency over confidentiality for the very reason of protecting public interest and welfare, there is a need for tribunals and courts to create certain thresholds/guidelines that regulate the participation of non-disputing parties and justify the breach of confidentiality in the proceedings. The non-disputing parties must add to the dispute and not participate just for the sake of it, as that leads to prolonging of dispute proceedings. Their interest in the dispute should be specific, which directly impacts their welfare. The tribunals should be cognizant of making sure that only after such thresholds are met the participation of non-disputing parties is involved. Due to the sole reason that a dispute involves issues of public interest, confidentiality should not be breached.

Conclusion

From the above discussion, it can be inferred that there is a varying degree of interest and importance that confidentiality plays in the two kinds of arbitral processes. Although the party's general inclination lies in securing the confidentiality of the arbitral processes and awards, the conventions/rules, as well as the courts, seek to impose this confidentiality, taking into account various factors involved during such proceedings and considering whether a general duty of confidentiality can be urged or not. Under International Investment Arbitration, these factors revolve around whether the arbitrable issue has an impact on public interest, health or property since these considerations open the proceedings to public participation and critique. Therefore, both kinds of arbitrations stand on a different footing, where the ICA is disputed over whether a general duty of confidentiality can be imposed and Investment arbitration questions confidentiality and rather advocates for greater transparency. However, due to the varying nature of conventions and rules on confidentiality, there is a budding need to create a uniform rule across the board on confidentiality for both ICA and Investment Arbitration.

SOVEREIGN IMMUNITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A CLAMPDOWN ON ENFORCEMENT OF FOREIGN AWARDS?

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Introduction

The *"Doctrine of Sovereign immunity/State immunity"* is a principle of international law which grants immunity to a State from the adjudication and enforcement of a claim in a foreign Court. This principle is founded on the concept that all states are equal and hence, the Courts of one State do not have the jurisdiction over another State. Regarding the extent of immunity enjoyed, the said doctrine has given way to two schools of thought namely – a) absolute immunity and b) restrictive immunity.

The absolute immunity approach holds that all acts of a State are completely immune from the adjudication and enforcement in a foreign Court. This approach hinges on the rule that a state's sovereignty cannot be violated by subjecting it to a foreign Court, unless it specifically consents to submit it to the latter's jurisdiction.

However, post-1950's, with increasing governmental involvement in trade and commerce, the international community felt the need to restrain immunity of States in commercial disputes. As a result, the 'restrictive immunity' approach which granted limited sovereign immunity came to the foreground. Under this principle, a State could only afford immunity from foreign Courts when it carries out a *"public act"* or in other words, a sovereign function. Since it is well-settled law that a commercial function is not entitled to a sovereign status, the restrictive immunity automatically deprives a State of immunity in cases of commercial claims.[62]

With numerous international conventions and domestic legislations adopting the framework of restrictive immunity,[63] the said approach has gained international consensus. Hence, with limited exceptions[64], the doctrine of absolute immunity has been largely replaced with that of restrictive immunity.

Sovereign immunity vis-a-vis international commercial arbitration

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[62] *Victory Transport Inc v Comisaria Genera* 336 F 2d 354 (2d Cir 1964)*; Trendtex v Bank of Nigeria* [1977] QB 529*; The Philippine Admiral* [1977] AC 373*; The I Congresso Del Partido* [1983] AC 245 (HL).

[63] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, English State Immunity Act 1978, c 33; The Foreign Sovereign Immunities Act of 1976, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *European Convention on State Immunity, 1972.*

[64] *FG Hemisphere Associates Limited v Democratic Republic of the Congo and Ors* [2011] 14 HKCFAR 226.

International arbitration is often seated at a country which may not be a direct party to the dispute. Ipso facto, the jurisdiction and enforcement of the arbitral award that involves a sovereign nation now rests with a foreign Court. Now, in an International Commercial Arbitration dispute, a State is bound by the principles of restrictive immunity since the said area of law deals with commercial disputes exclusively. Notwithstanding this, there have been numerous instances where States have claimed immunity to negate a foreign Court's jurisdiction and enforcement power in the arbitration process. States often claim immunity, citing that the assets sought to be attached is sovereign and non-commercial in nature[65] or in exceptional cases, that absolute immunity is attracted.[66]

In this article, the authors attempt to identify the issues involved and the contemporary position of law as regards sovereign immunity in International Commercial Arbitration. In addition to an analysis of the Indian scenario, the authors will analyse international legal instruments, with specific focus to the New York Convention, 1958 and various precedents which have contributed to this much relevant issue.

Sovereign immunity & enforcement of awards

When a dispute arises regarding the validity of an arbitration award against a State, an award holder has two major hurdles to cross. The preliminary hurdle is whether the State which is the seat of arbitration (foreign state/foreign court) has jurisdiction over the defendant State. With the support of numerous domestic legislations and international conventions, a State's consent to arbitration itself is considered a waiver of immunity from supervisory jurisdiction.[67] Hence, the foreign Court in most cases are able to deny the defendant's claim of jurisdictional immunity and can adjudicate the dispute.

The primary hurdle faced by the award-holder is the enforcement/execution stage. This is due to the absence of international consensus regarding the implied waiver of immunity in the enforcement stage of an award.[68] There are divergent opinions whether an arbitration agreement constitutes an implied waiver of sovereign immunity in the enforcement phase.

When we compare codified international law to that of domestic sovereign immunity legislations and precedents, a marked digression is observable. In international treaties such as the *United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004* (UNCSI) and the *European Convention on State Immunity, 1972* ["**ECSI**"], a waiver in terms of adjudication does not automatically translate to a waiver in terms of enforcement and execution. According to these treaties, a State's waiver of immunity from execution has to be express in nature.[69]

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[65] Lawrence A Collins, 'The Effectiveness of the Restrictive Theory of Sovereign Immunity' (1965) 4 Colum J Transnat'l L 119.
[66] *FG Hemisphere* (n 3).
[67] European Convention on State Immunity 1972, art12; Foreign Sovereign Immunities Act, 1977, s 1605 (a)(1); United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, art 17.
[68] Ylli Dautaj, 'Sovereign Immunity from Execution – Caveat Emptor' (Kluwer Arbitration, 4 June 2018) <http://arbitrationblog.kluwerarbitration.com/2018/06/04/sovereign-immunity-execution-caveatemptor/>accessed November 28, 2020.
[69] European Convention on State Immunity, 1972, art 12; United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, art 17.

Contrary to this approach, certain common law States follow the *"double-waiver principle"*, wherein the consent to arbitrate implies a waiver of immunity even from the enforcement and execution stage. These States argue that if the scope of the implied waiver fails to extend to these stages, it would render the arbitration otiose, as an unenforceable judgment would merely be a determination of the validity of an award devoid of enforceability.[70]

For instance, in *Svenska Petroleum Exploration AB v AB Geonafta and the Republic of Lithuania,* the England and Wales, Court of Appeal scrutinized the scope of Section 9 of the *State Immunity Act 1978*.[71]

Section 9 states that -

"Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

The Court observed that as per Section 9, the waiver of sovereign immunity extends to all proceedings which are necessary to render the arbitration effective. Hence, a State would not enjoy immunity from enforcement and execution of an arbitral award.

In another instance, the Swiss Federal Court held that since the powers of enforcement derive from powers of jurisdiction, immunity from enforcement should not be differentiated from that of jurisdiction.[72]

The implied waiver of immunity extends to execution of the award even under the rules of the *International Chamber of Commerce* ["**ICC**"]. According to the rules of the ICC, upon submission to arbitration, the parties undertake to carry out any Award without delay and are deemed to have waived their right to any form of recourse where such waiver can validly be made.[73] It is worth noting that the US Court of Appeals of the Fifth Circuit in held that submission to ICC rules is an explicit waiver of sovereign immunity rather than an implied one. [74]

Hence, by considerable state practice and national legislative support, it can be said that the major trading States are making a conscious effort to enforce the "double-waiver" principle. Further, with the reinforcement of the double waiver principle, there is a growing understanding that once a State agrees to commercial arbitration with a private party, it waives its sovereign immunity from jurisdiction and for enforcement of the award.[75]

Role of 'The New York convention' in the enforcement of awards

The New York Convention (1958) ["**The Convention**"] is one of the fundamental instruments in International Arbitration. With 166 contracting States, the primary aim of formulating an international framework to govern

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[70] Frederic Bachand, 'Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards' (2009) 26 (1) Journal of International Arbitration.
[71] *Svenska Petroleum Exploration AB v AB Geonafta and the Republic of Lithuania* [2007] QB 886.
[72] *United Arab Republic v Mrs X* [1960] 65 ILR 384, 392.
[73] ICC Rules 1998, art 28(6).
[74] *Walker International Holdings Ltd v Republic of Congo (ROC),* [2004] 395 F 3d 229, 234.
[75] Stephen J Toope, 'Mixed International Arbitration: Studies in Arbitration Between States and Private Persons' (Cambridge University Press, 1990); The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention 1958, art V.

arbitral awards was to relieve the parties from the defence of state immunities and the trouble of multiple post-judgment court actions. The Convention prevents States Parties from neutralising the sanctity of an arbitral award by invoking sovereign immunity. Further, it forces national Courts to recognise, enforce and execute arbitral awards uniformly. According to the Convention, there is a general obligation of contracting States to recognize arbitral awards from other signatory States as binding and enforce them under the rules of procedure of the territory where the award is being enforced.[76]

The obligation of contracting States is however not unconditional. Enforcement can be refused by submitting proof of satisfying any grounds which come under the exhaustive list laid by Article V (1). Invalidity of arbitration agreement,[77] failure to give proper notice of appointment of the arbitrator or of the arbitration,[78] award contrary to public policy,[79] are some of the grounds that can be raised by a contracting State for refusing the enforcement of the award.

The Convention through Article XVI follows the principle of reciprocal reservations.[80] In other words, States can only avail the Convention against a Contracting State to the extent that it is itself bound to apply the Convention. The Convention goes a step further in the pro-arbitration approach through Article VII, commonly referred to as the *more-favourable-right* provision. By virtue of Article VII, contracting states can base its request for enforcement on more liberal and arbitration friendly provisions than that of the Convention.[81] The Parties may invoke these provisions from the domestic law of the Country where the award is being enforced or from a bilateral/multilateral treaty in force in the said Country.[82]

Impact of the convention on the defence of sovereign immunity

The Convention has created a major impact on the viability of this defence. Courts have consistently held that a State party to the Convention waives its immunity regarding enforcement actions in a foreign signatory State. As recent as May 2019, the United States Court of Appeals in *Pao Tatneft v. Ukraine* held that by signing the Convention, the State must have contemplated arbitration-enforcement actions in other signatory States.[83] In the same vein, the Court found that signing the Convention is as an implied waiver of the sovereign immunity of the Contracting state against the enforcement of an arbitral award in another signatory state.[84]

Being party to the Convention, contracting states are bound to enforce a foreign arbitral award and cannot invoke the defence of sovereign immunity. However, if the defendant state is not a Contracting State, there is no presumption of an implicit waiver. This principle is clear from the case of *S Davis Int'l v. Republic of Yemen*, wherein

[76] The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art III.
[77] The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (i) (a).
[78] The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (i) (b).
[79] The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art V (2) (b).
[80] The Convention on The Recognition and Enforcement of Foreign Arbitral Awards/ The New York Convention, 1958, art XVI.
[81] United Nations Commission on International Trade Law, Thirty-ninth session (7 July 2006).
[82] ibid.
[83] *Pao Tatneft v Ukraine*, Fed R App P 36; DC Cir R 36(d).
[84] ibid *at 2*.

a Yemeni corporation consented to arbitration of a dispute in UK.[85] Although the award was enforceable under the Convention, it could not be enforced as Yemen could raise sovereign immunity since it was not a signatory to the Convention. Further, in *Creighton Limited, Appellant v. Government of the State of Qatar*, the D.C. Circuit Court held that a mere agreement to arbitrate a case in France (a signatory to the Convention) does not amount to a waiver of immunity against enforcement in the Unites States, as Qatar is a non-signatory to the Convention.[86]

In totality, there is no question whether the Convention constitutes a successful move towards a global pro-enforcement regime. Juxtaposing the defence of sovereign immunity with a State's obligation under the Convention, we can say that the latter overrides the former. However, with few States still abstaining from signing the Convention, the possibility of invocation of the sovereign immunity defence to deny enforcement of a foreign arbitral award remains.

Sovereign immunity in India

India does not have a separate legislation on state immunity. The Civil Procedure Code, Section 86[87] states that no foreign state may be sued in domestic courts without consent from the Central government. However, over the years, case law and practice depict a restrictive approach in issues relating to sovereign immunity.

The apex court in *Ethiopian Airlines v. Ganesh Narain Saboo*[88] dealt with the invocation of section 86. In the said case, the petitioner approached the Court on late delivery of reactive dyes resulting in damaged goods. The Court relying on a strict understanding of Section 86 had construed the phrase 'sued in any court' to not include arbitration proceedings. For arriving at the aforesaid decision, the Court considered *Nawab Usmanali Khan v. Sagarmal*[89] which deemed the nature of an arbitration award not in the nature of a plaint and therefore not under the ambit of a 'suit' under section 86. The Court further emphasized on the legislative intent in the formation of the Section 86 being a restriction, and limitation on sovereign immunity. It reiterated the restrictive immunity approach, holding that State-owned entities are not entitled to immunity for commercial transactions, as they are subject to market norms and rules.[90]

India is also a signatory to the UNCSI which indicates an inclination to adopt the principle of Restrictive Immunity. The above decisions have relied on foreign judgments that discuss and uphold said principle. Though there has not been an explicit state enactment or a legislation that would solemnize the position in India, the practice and general trends show a preference to move away from absolute immunity.

Enforcement of foreign awards in India

[85] 218 F3d 1292.
[86] 181 F3d 118 (DC Cir 1999).
[87] Code of Civil Procedure 1908, s 86.
[88] [2011] 8 SCC 539.
[89] 1965 AIR 1798.
[90] Appeal decision, [1977] QB 529.

The Indian arbitration regime has aptly recognised the need for a pro-enforcement approach for foreign awards. Prior to the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], there were two major statutes which governed the enforcement of foreign awards, the *Arbitration Act of 1940*[91]and the *1961 Foreign Awards Act.*[92] Currently, the law which governs enforcement of Foreign Awards is the Arbitration Act, 1996.

The Indian regime for the enforcement of foreign awards is heavily reliant on The Convention. Availing Article I (3) of The Convention, India has opted for only two reservations. The first reservation is concerned with the definition of the term 'commercial'. Under the Indian Act, awards should arise from disputes which are of 'commercial' nature. However, 'commercial' is based on the law in force in India.[93] Indian courts have interpreted 'commercial' in a very liberal sense. For example, in *Qatar Airways v. Shapoorji pallonji and Co.*, the Bombay High Court held that contractual relationships occasioned by an entity's business activities in India would be subject to the jurisdiction of a competent court in India.[94]

The second reservation is of the 'reciprocity' clause, which requires India to recognise and enforce awards made only in the territory of another signatory State.[95] Hence, if the award is made in a non-signatory country, the award will not fall within the meaning of a 'foreign award'.

Enforcement under the Arbitration and Conciliation Act, 1996

According to the Act, foreign awards once enforceable would be binding on the parties.[96] The conditions to enforcement of the foreign award are mentioned under Section 48 which comes under Part II of The Act.[97] The limited grounds on which Court can resist enforcement are provided under section 48(1) of The Act. Under the limited grounds or defences offered under section 48, the most debated one is the "public policy" defence.[98]

However, the expression 'public policy of India' has been given a very narrow construction by both the Act and the Indian Courts. Hence, it can invalidate awards only if they are in contravention of-

(a)fundamental policy of Indian law; or

(b)the interest of India; or

(c)justice or morality.[99]

[91] The Arbitration Act, 1940.
[92] The Foreign Awards (Recognition and Enforcement) Act, 1961.
[93] Arbitration and Conciliation Act 1996, s 44.
[94] [2013] 2 Bom CR 65.
[95] Arbitration and Conciliation Act 1996, s 44(b).
[96] Arbitration and Conciliation Act 1996, s 46.
[97] *Bharat Aluminium Company v Kaiser Aluminium Technical Service Inc (Balco)* [2012] 9 SCC 552.
[98] Arbitration and Conciliation Act 1996, s 48(2)(b).
[99] *Renusagar Power Co v General Electric Company*, [1994] AIR 860 1994 SCC Supl.

Another significant indicator of the pro-enforcement approach under The Act is the restriction of appeal under Section 50.[100] If a court allows enforcement of the foreign award, no appeal shall lie for the same except under Article 136, which itself has very limited grounds. Hence, the legislation ensures that once enforcement is allowed, it cannot be delayed with frivolous appeals before various courts.[101]

Besides the pre-emption of delaying tactics, Indian Courts have been liberal in the decision regarding the forum selection for enforcement. In the case of *Wireless Developers Inc. v. India Games Limited* [102] , the Bombay High Court held that if a party has a foreign award in its favour, it can seek to enforce the award anywhere in the country where it is sought to be enforced as long as suit to recover money can be filed.

Conclusion

From the above analysis, the authors conclude that in International Commercial Arbitration, the foothold of the sovereign immunity defence is weakening. Albeit the defence is still relevant and utilised, the pro-arbitration approach embraced by numerous international conventions, domestic legislations and judicial precedents have mitigated its negative impact on the effectiveness of arbitration process. This is evidenced by the emerging consensus with respect to the concept of implied waiver of sovereign immunity, in terms of jurisdiction and enforcement of foreign awards.

As regards the Indian perspective, Courts and the legislation alike have been progressing in the pro-enforcement trajectory. The Act, while being capable of meeting demands concerning the enforcement of foreign arbitral awards, is however silent regarding the aspect of sovereign immunity. Though case laws and the existing legislations do tangentially touch upon the topic, akin to State Immunity Acts of United States and UK, there is a present day need to enact a legislation that particularly addresses the same. Therefore, in the presence of a robust legal framework for regulating the sovereign immunity, the Indian arbitration regime can substantially grow in the field of International Commercial Arbitration.

[100] Arbitration and Conciliation Act 1996, s 50.
[101] *Kandla Export Corporation and Another v OCI Corporation and Another*, CA No 1661-1663 of 2018.
[102] [2012] 114 BOM LR 1276.

ETHICAL CONCERNS SURROUNDING THIRD-PARTY FUNDING IN INDIAN ARBITRATIONS: THE NEED FOR LEGISLATION

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Introduction

The concept of third-party funding ["**TPF**"] is unchartered territory in the Indian legal system. It is the financing of arbitration expenses by "strangers to the arbitration" which enables the claimants to access justice in meritorious cases, in exchange for a monetary share in the final award.[103] It proves to be an unconventional investment opportunity with almost concrete returns for the funder. Third-party funders act as enablers for cash-strapped parties to access justice, which would be unobtainable in other circumstances.[104] TPF is not alien to common law jurisdictions; it has been legalised by several countries such as the United Kingdom, United States of America, Australia and Singapore.[105]

In India, the Arbitration and Conciliation Act, 1996 ["**the Act**"] provides for termination of arbitral proceedings in the event of failure to deposit amounts fixed by the tribunal.[106] Without the financial support of a sponsor, a claimant may be deprived of the opportunity to pursue a meritorious claim.[107] Hence, TPF becomes especially relevant in a developing country like ours, where litigants come from diverse socio-economic backgrounds. Owners of cottage industries, small-scale businesses, traders and employees may lack the financial wherewithal to finance necessary, but long-drawn-out arbitration proceedings. Exorbitant arbitration expenses can cause them severe financial distress and interfere with their day-to-day operations.[108] TPF offers a panacea to such parties and enables them to stand toe to toe with corporate behemoths.

There is no express acceptance or prohibition of TPF under the Act. Even the Supreme Court of India in *Bar Council of India v. A.K. Balaji* ["**BCI**"] observed thus: *"There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation."*[109] Although there is no specific national legislation

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[103] Indu Malhotra, *Commentary on the Law of Arbitration* vol 1 (4th edn, Wolters Kluwer 2020) 1524.
[104] *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.
[105] Malhotra (n 1).
[106] Arbitration and Conciliation Act 1996, s 38(2).
[107] Chiranjivi Sharma, 'Third-party Funding needed in Arbitrations' (*India Law Business Journal*, 7 May 2020) <https://law.asia/third-party-funding-arbitrations/> accessed 1 November 2020.
[108] Gregory J Myers, 'When the Small Business Litigant cannot Afford to Lose (Or Win): Consequences for Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers' (2012) 39(1); William Mitchel L Rev <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1479&context=wmlr> accessed 4 November 2020.
[109] *Bar Council of India v A K Balaji and Ors*, AIR 2018 SC 1382 [35].

governing TPF in India, state amendments in Order XXV of the Code of Civil Procedure, 1908 have statutorily recognised TPF in some states.[110]

The keen attitude of the judiciary to incorporate TPF has already resulted in the opening of a new form of market for investors to plough funds into.[111] However, the transformation of the landscape of TPF in India will entirely depend upon the development of the legal and regulatory mechanisms. More importantly, TPF includes certain ethical concerns that legislators need to address to remove the ambiguities present in such arrangements. This article aims to analyse these ethical concerns associated with allowing TPF in Indian arbitrations, and further, to emphasize the need for legislation to address these concerns.

Ethical concerns associated with third-party funding

i. *May Transgress the Boundaries of Privilege and Violate the Opposing Party's Confidentiality*

Privilege has been defined as *"a legally recognized right, belonging to a client, to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information."*[112]

Ordinarily, only the claimant and his lawyer will have access to privileged documents and information. This information will be protected due to attorney-client privilege.[113] However, iff the claimant is being funded by a third party, privileged documents may be shared with the funder so that he can conduct "due diligence".[114] The problem with divulging such information to the sponsor is that it could result in a potential waiver of privilege.[115] Taking advantage of such a situation, an adroit respondent may, under Section 27 of the Act, take the approval of the arbitral tribunal and approach the courts to demand disclosure of privileged documents which are in possession of the funder.[116] In an arbitration petition under Section 27, the Bombay High Court directed a third party to produce documents and material to assist the arbitral tribunal in effective determination of the dispute.[117] Compromising the claimant's privilege in such a situation can be harmful to his interests.

Confidential communication with third-party sponsors could be protected under the common law doctrines of litigation privilege and the concept of common interest.[118] However, limited jurisprudence on the application of

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[110] Shreya Yadav, 'The A-Z of ADR: Third Party Funding in Arbitration' (*Bangalore International Mediation, Arbitration and Conciliation Centre BIMACC*, 11 September 2020) <http://www.bimacc.org/a-z-of-adr-third-party-funding-in-arbitration/> accessed 27 November 2020.
[111] Soham Banerjee, 'Third Party Funding of Disputes: Easing the Burden on Stressed Litigants' (*India Corp Law*, 18 June 2020) <https://indiacorplaw.in/2020/06/third-party-funding-of-disputes-easing-the-burden-on-stressed-litigants.html> accessed 2 November 2020.
[112] C F Dugan, 'Foreign Privileges in U.S. Litigation' (1996) 5 J Int'l L & Prac 33, 34.
[113] Malhotra (n 1) 1529.
[114] Andreas Frischknecht and Vera Schmidt, 'Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration' (2011) 4 TDM <https://www.transnational-dispute-management.com/article.asp?key=1746> accessed 6 November 2020.
[115] Nadia Hubbuck, 'Third party funding and the pitfalls of privilege' (*Practical Law Arbitration: Thomas Reuters*, 7 June 2017) <http://arbitrationblog.practicallaw.com/third-party-funding-and-the-pitfalls-of-privilege/> accessed 3 November 2020.
[116] Susanna Khouri, Kate Hurford and Clive Bowman, 'Third Party Funding in International Commercial and Arbitration – A Panacea or a Plague? A Discussion of the Risks and Benefits of Third-Party Funding' (2011) 4 TDM <www.transnational-dispute-management.com/article.asp?key=1747> accessed on 1 November 2020; Malhotra (n 1) 1529.
[117] *Nilesh Exim Pvt Ltd v PFS Shipping (India) Ltd* [2002] BHC 1340.
[118] Hubbuck (n 13).

either common law doctrine in relation to TPF prevents us from knowing whether these principles can apply in reality.[119]

In order to evaluate the merits of the claim and conduct due diligence, third party funders could circulate either party's cconfidential and privileged information among their own experts, accountants and financial advisors. While this may be acceptable to the claimant, absence of the respondent's express consent can render him vulnerable and compromised. Since such outsider parties are not bound to maintain secrecy, they may, wittingly or unwittingly, end up breaching the parties' confidentiality.

To preserve the sanctity and confidentiality of arbitration proceedings, it would be prudent for both parties to enter into a confidentiality agreement with the funder.[120] The Code of Conduct for Litigation Funders ["**Code of Conduct**"], applicable to England and Wales, states:

"A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Funded Party. For the avoidance of doubt, the Funder is responsible for the purposes of this Code for preserving confidentiality on behalf of any Funder's Subsidiary or Associated Entity."[121]

Alternatively, the respondent may approach the tribunal to prohibit the funder from viewing any evidentiary hearings.[122] Most international arbitration institutions are in unanimous agreement that hearings must remain private and outsiders not directly involved in the proceedings should not be admitted.[123] An amendment of the Act in 2019 has imposed an obligation on the arbitral tribunal, parties to the arbitration and arbitral institutions to maintain confidentiality of arbitration proceedings.[124] However, there is no mention of the responsibility of the funder to maintain confidentiality in this regard.

Drafting an Indian Code of Conduct for third party funders will provide sponsors, especially foreign sponsors, with clarity regarding the procedure to be followed while funding arbitration expenses in India. The Code of Conduct may be directory in nature, however it should have a strong disciplinary effect on funders. It should include a clause which asserts that the funder and claimant enter into a confidentiality agreement. Additionally, there must be a specific mention of liability or responsibility that may befall the funder if there is a breach of confidentiality of either party.

ii. *Potential Conflict of Interest between the Arbitrator and Third-Party Funder*

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[119] ibid.
[120] David St. John Sutton, Judith Gill and Matthew Gearing, *Russel on Arbitration* (24th edn, Sweet & Maxwell 2015) [1-049].
[121] ALF Code of Conduct for Litigation Funders 2014, cl 7.
[122] St John Sutton, Gill and Gearing (n 18) 17.
[123] Nigel Blackbay, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern & Hunter on International Arbitration* (5th edn, Oxford University Press, 2009) [2-147].
[124] Arbitration and Conciliation (Amendment) Act, 2019, s 42 (a).

Unless specifically instructed by the arbitral tribunal, there is no obligation for the claimant to reveal that TPF has taken place. If there is no voluntary disclosure of the existence of TPF, the respondent and arbitral tribunal will not have knowledge of this arrangement.[125] Funders, on most occasions, prefer to not disclose their identity. If it comes to light that the claimant's arbitration expenses are fully funded, the tribunal will have to take such information into account while adjudicating on an application for security of costs.[126]

Determining independence, transparency and impartiality of an arbitrator is simple: it involves ascertaining whether the arbitrator has a direct or indirect, past or present relationship with either arbitrating party, their attorneys, counsels or witnesses.[127] The grounds stated in the Fifth Schedule of the Act provide a benchmark for ascertaining whether circumstances exist which give rise to justifiable doubts regarding the independence or impartiality of an arbitrator.[128] If the funder's identity is disclosed after the commencement of arbitration and there is substantial proof that there is a close nexus between the arbitrator and funder, it would give rise to justifiable doubts regarding the arbitrator's independence and impartiality.

Mandatory disclosure is provided by the arbitrator at the time of commencement and during proceedings in accordance with the provisions of the Act.[129] If the arbitrator discloses his relation with the funder after the proceedings begin, the respondent may challenge his right to continue as an arbitrator. The non-disclosure of the third-party funder in the initial stages of the proceedings may eventually put the arbitrator in an invidious position where he may have to recuse himself from the arbitration. If he recuses himself according to a challenge under Section 13 of the Act,[130] the arbitral process would be disrupted and time and money would be squandered. In the alternative, if the challenge fails and an adverse award is passed against the respondent, he may, under Section 34 of the Act,[131] approach the courts and raise the plea that the independence and impartiality of the arbitrator was compromised. This could result in the consequential setting aside of the award.

In a survey conducted by the Queen Mary University of London and White & Case LLP, a staggering 76 per cent of arbitration practitioners showed support for compulsory disclosure of the use of TPF by a claimant. 63 per cent indicated that the identity of the financier should be revealed to ensure transparency in the proceedings.[132]

Article 24 of the Singapore Investment Arbitration Commission ["**SIAC**"] Rules empowers the tribunal to demand a disclosure of the funder's identity, along with details of the agreement.[133] However, this is a voluntary

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[125] St John Sutton, Gill and Gearing (n 18) 17.
[126] ibid.
[127] Grant Hanessian and Lawrence Newman, *'International Arbitration Checklist'* (JurisNet, LLC, United States, 2009) 41.
[128] Shweta Sahu, Moazzam Khan and Payel Chatterjee 'Legitimacy of Arbitral Appointments in India' (*Kluwer Arbitration Blog,* 3 November 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/03/legitimacy-arbitral-appointments-india/> accessed 30 November 2020.
[129] Arbitration and Conciliation Act 1996, s 12.
[130] ibid, s 13.
[131] ibid, s 34.
[132] Queen Mary University of London and White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 31 October 2020.
[133] Rachael Denae Thrasher, 'The Regulation of Third-Party Funding: Gathering Data for Future Analysis and Reform' (2018) 59 B.C.L. Rev <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1009&context=ljawps> accessed 27 November 2020.

disclosure.[134] On the other hand, Article 8.26 of the Comprehensive Economic and Trade Agreement ["**CETA**"] makes disclosure of TPF mandatory.[135]

Unless the problem of disclosure of identity is addressed, it will continue to plague the system of TPF in arbitrations. Hong Kong's Arbitration and Mediation (Third-party funding) (Amendment) Bill is a recently introduced legislation which requires parties to disclose to the arbitral tribunal and opposing parties if TPF has taken place, along with the identity of the funder.[136] The legislature should examine the provisions contained in the Hong Kong legislation, CETA and the SIAC Rules while drafting the proposed Indian law on TPF to deal with this predicament without compromising on the fairness of the arbitration proceedings.

iii. *Disadvantageous Position of the Funded Party*

The presence of a profit-driven sponsor may impede settlement discussions. A third-party funder may prevent the claimant from mending relations with the respondent and settling the dispute due to his overriding interest in the outcome.[137]

Balancing the interests of a funder who may wish to conclude the arbitration and accept a quick settlement with those of the claimant who may wish to continue with arbitration till the final hearing, is an extremely difficult process. This difficulty arises solely because the claimant is not financing the arbitration expenses. More often than not, a claimant may not only long for monetary damages but also the specific performance of contracts, restitution etc. In such situations, the claimant ends up compromising his interests for the third-party funder. All these conflicts become even more pronounced when an impecunious claimant is being funded.

Consequentially, the claimant may find itself in a disadvantageous position and may feel compelled to yield to the demands of the funder while negotiating the terms of the funding agreement.[138] An opportunistic funder may demand a larger share in the final award. Moreover, the funder may also coerce the party to adopt a more monetarily beneficial strategy during the arbitration proceedings, one which the party may not have wished to deploy initially.[139]

Additionally, a funder may wish to be actively involved in selecting his choice counsel, fixing a preferable fee structure with the lawyer and vet the legal course of action during the proceedings. In such a situation, the funder may hold the legal representatives of the claimant accountable for the outcome of the arbitration.[140] The lawyer

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[134] ibid.
[135] ibid.
[136] Norton Rose Fulbright, 'International Arbitration Report' (*Norton Rose Fullbright,* October 2017) 9 <https://www.nortonrosefulbright.com/en-in/knowledge/publications/4f5fb25c/emerging-approaches-to-the-regulation-of-third-party-funding> accessed 2 November 2020.
[137] Sri Ramani Garimella, 'Third Party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions' (2014) 3(1) AALCO J Int'l L 45, 52.
[138] Malhotra (n 1) 1531.
[139] Garimella (n 35).
[140] St John Sutton, Gill and Gearing (n 18) 17.

may struggle to prioritize his client's interests, as there is a lack of clarity as to which client's interests he represents: the funders or the funded party's.[141]

An active funder may wish to attend client meetings and provide strategic inputs on the matter.[142] In such a situation, deciding the level of control to be allocated to the funder will be key in determining how smoothly the relationship between the parties proceeds. To consolidate the claimant's bargaining position, the best course of action would be to prepare a watertight funding agreement at the outset. During the nascent stages of drafting the funding agreement, the funder and claimant should discuss the decision-making power and degree of control that the funder may exercise. Negotiating on these aspects beforehand will certainly help in reducing the chances of fallouts in later stages of the proceedings.

Another aspect which must be addressed is whether a funder can renege from the funding agreement if the claimant decides to pursue a different course of action during the arbitration proceedings. Section 73 of the Indian Contract Act, 1872 states the measure of damages payable as compensation for breach of contract.[143] The claimant may be entitled to damages under this Section if the funder withdraws from his funding agreement. This reinforces the need to draft a transparent and exhaustive funding agreement. Funding agreements must also provide unequivocally that the lawyer's duty, both professional and fiduciary, is solely owed to the claimant.[144] This will help in addressing the issue of divergent interests of the funder and the claimant.

Common law jurisdictions like England have allocated control in the hands of the litigant and its lawyers, with the funder's control being limited to an entitlement to be *"informed about the progress of the proceedings."*[145] England's Code of Conduct seeks to regulate the funder's control, namely by ensuring that the funder *"will not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder,"*[146] and by providing that the Litigation Funding Agreement shall state how the funder *"may provide input to the Funder Party's decisions in relation to settlements."*[147] Including a provision of a similar nature in the proposed Indian Code of Conduct shall preserve the balance of power between the funder and the claimant in India as well.

iv. *Fear of encouraging meritless claims*

Critics claim that TPF may lead to an increase in arbitrations based on meritless claims, thus creating a strain on institutionalised state arbitration.[148] Frivolous cases, too, are just as likely to receive funding depending upon the

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[141] Oscar Suárez Bohórquez and Lena Stoll, 'Third party Litigations funds and the lawyer's ethics' (*Leiden Law Blog: Universiteit Leiden*, 28 September 2018) <https://leidenlawblog.nl/articles/third-party-litigations-funds-and-the-lawyers-ethics> accessed 5 November 2020.
[142] International Council for Commercial Arbitration, 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration' (April 2018) 28 < https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf> accessed 31 October 2020.
[143] The Indian Contract Act, s 73.
[144] Khouri (n 14).
[145] *Re the Valetta Trust* [2012] 1 JLR 1 [8].
[146] ALF Code of Conduct for Litigation Funders 2014, cl 9.3.
[147] ibid, cl 11.1.
[148] Ylli Dautaj and Bruno Gustafsson, 'Access to Justice: Rebalancing the Third-Party Funding Equilibrium in Investment Treaty Arbitration' (*Kluwer Arbitration Blog*, 18 November 2017) <http://arbitrationblog.kluwerarbitration.com/2017/11/18/access-justice-rebalancing-third-party-funding-equilibrium-investment-treaty-arbitration-2/?print=print> accessed 1 November 2020.

potential of getting substantial returns on the risk undertaken.[149] However, no court or arbitral tribunal has found these criticisms to be true thus far.[150]

It is imperative to note that that TPF is an investment opportunity for funders, on which they expect considerable returns. Hence, they will never agree to fund a party whose claims are baseless. Careful due diligence itself can reveal if the party is capable of getting an award in its favour or not. This proves that, contrary to the criticism, TPF encourages meritorious claims.

Nonetheless, while legislating on a bill pertaining to TPF, the legislature could consider introducing provisions to impose exemplary costs on the claimant and the third party if claims made are frivolous. This will act as a deterrent for parties planning to engage in frivolous arbitration and make funders wary before they enter into funding arrangements.

Conclusion

With the law of arbitration constantly evolving, it is the need of the hour for the parliament to develop suitable legislative instruments to address the looming ethical concerns that surround TPF in Indian arbitrations. These legislative instruments may particularly include an amendment of the Act, along with any additional guidelines that can solidify the TPF system in India. Greater emphasis needs to be placed upon this in light of the financial strain during the current pandemic, which has increased the support for TPF considerably.[151] Given the economic slowdown, cash-constrained parties will be in need of external sponsorship to sustain their claims. Hence, TPF will prove to be a saviour for those in need.

It may even be beneficial for India to take a lesson from England's self-regulation model pertaining to TPF. There exists the Code of Conduct for Litigation Funders, and only those who join the Association of Litigation Funders are expressly bound by the Code.[152] Framing an Indian Code of Conduct along similar lines would provide claimants and funders with much-needed clarity when they enter into funding arrangements.

TPF is undoubtedly a constructive method for enhancing access to justice by having an outsider sponsor lengthy and expensive arbitration proceedings. However, unless the complications pertaining to the above-mentioned ethical concerns are focused upon, parties will always be wary of putting their faith in this system for fear of abuse of such "grey areas". Enacting a law to deal with these ethical concerns will go a long way in promoting the growth of TPF in Indian arbitrations.

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[149] Mark Kantor, 'Third-Party Funding in International Arbitration: An Essay About New Developments' (2009) 24(1) ICSID Review-Foreign Investment Law Journal 65, 74.
[150] Angus Fei Ni, 'Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?' (*Lexology*, 8 September) <https://www.lexology.com/library/detail.aspx?g=9a714d90-769c-4c4b-81f5-90bb4137f279> accessed 1 November 2020.
[151] Amita Katragadda, Shrey Srivastava and Priyal Modi, 'Cash constrained and need to litigate? Third-Party Funding may be the solution' (*India Corporate Law*, 22 June 2020) <https://corporate.cyrilamarchandblogs.com/2020/06/need-to-litigate-third-party-funding/> accessed 2 November 2020.
[152] Rachael Mulheron, 'England's Unique Approach to the Self-Regulation of Third-Party Funding: A Critical Analysis of Recent Developments' (2014) 73(3) CLJ 570, 571.

ENKA V. CHUBB – DEMYSTIFYING THE PERPLEXING ISSUE OF THE PROPER LAW OF ARBITRATION AGREEMENT

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Introduction

International arbitration is distinct from domestic arbitration basically because national arbitration is subject to a particular domestic law. In contrast, international arbitration is not subjected to one unless parties, by their agreement, choose a national law to govern different aspects of their disputes. The agreement of arbitration, generally a part of the main contract, is different in its nature from the main contract. This aspect has been recognised early enough, for example, in *Heyman v. Darwin Ltd.*[153] where the distinction was made solely to emphasise on the fact that a breach of the liabilities and obligations under the main contract may lead to the termination of the main contract, but cannot lead to the end of the arbitration agreement Indeed, the arbitration agreement, which is remedial in nature, would come into the picture when disputes arise under the main contract. So, an arbitration agreement does not create nights and obligations of its own but provides a means to settle the disputes which arise out of the rights and obligations provided in the main contract. Hence, the question arises as to what law shall govern the arbitration agreement to achieve the end result.

However, parties seldom choose the governing law of the arbitration agreement. This has frequently given use to complexities. The simplest and most obvious solution, but one that is not yet established for some reason, it for arbitration clauses to make an explicit choice of the law applicable to that particular clause itself rather than to the matrix contract of which the clause is one small element. The recent decision of the United Kingdom (UK) Supreme Court (SC) in *Enka Insaat Ve Sanayi AS v. 000 Insurance Company Chub*[154] (Enka v. Chubb) has been successful in providing some much-needed clarity regarding this. It has addressed the principles for ascertaining the proper law of an arbitration agreement.

Enka v. Chubb

In 2012, in relation to the construction of the Berezovskaya power plant in Russia, the claimant, Enka, agreed to provide certain services. A fire mishap occurred at the plant in February 2016. The defendant insurer, Chubb, claimed to have paid $ 400 million to the owner of the plant with respect to the damage caused due to the accident. In September 2019, Chubb commenced proceedings in the Moscow Arbitration Court against 11 parties, including

[153] *Heyman v. Darwin Ltd* [1942] A.G 356.
[154] *Enka Insaat Ve Sanayi AS v. 000 Insurance Company Chub* [2020] UKSC 38 (hereinafter 'SC Enka').

Enka, where it alleged that Enka and the rest caused the fire. The contract of Enka contained an arbitration agreement providing for arbitration at the International Chamber of Commerce (ICC) in London. Accordingly, Enka issued a claim in the commercial court for an anti-suit injunction in order to restrain Chubb from going ahead with the Russian proceedings. Chubb opposed this claim by arguing that the law governing the arbitration agreement is Russian law and that the Russian proceedings did not fall within the scope of it, although it was common ground that they did if English law was the proper law.

The claim was dismissed at trial on the ground that the English court is not the *forum conveniens* to address this. When appealed, the Court of Appeal[155] noted that there are two ways to approach the issue of the governing law of the arbitration agreement. On the one hand, there are those who say that the law that governs a contract should generally also govern an arbitration agreement which, though separable, forms part of that contract. This approach was previously taken by the court of appeal in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA*[156] (Sulamerica). On the other hand, there are those who say that the law of the chosen seat of the arbitration should also generally govern the arbitration agreement, as noted in *C v. D.*[157] The court of appeals found the decision of Sulamerica to be inconsistent with the decision in *C v. D* decision and upheld the decision as given in the latter case by observing that, "*until and unless there has been an express choice of the law that is to govern the arbitration agreement, the general rule should be that the arbitration agreement is governed by the law of the seat, as a matter of implied choice. subject only to any particular features of the case demonstrating powerful reasons to the contrary*".[158]

The decision of the Court of Appeals was appealed in the SC. The bone of contention of this appeal concerned what system of national law governs the validity and scope of the arbitration agreement when the law applicable to the arbitration seat differs from the law applicable to the contract.

Decision of the Supreme Court

Although the SC reached the same outcome as the Court of Appeals, it departed from the approach taken by the lower court. The SC decided that where there has been no choice of law to govern the arbitration agreement, but a choice has been made as to the law governing the contractual agreement, that choice will also generally apply to the arbitration agreement. However, when the parties have not chosen impliedly or explicitly any law to govern the contract, the proper law would be the one closely connected, and that being the law of the seat of arbitration. To come to this conclusion, the majority reasoned as follows.

Where a court of the UK or Wales has to decide the choice of law for a contract, Rome I regulations[159] are applied. However, as mentioned in Article 1(2)(e) of the Rome I regulation,[160] arbitration agreements are excluded from

[155] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574 (hereinafter EWCA Enka).
[156] *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 (hereinafter "Sulamerica").
[157] *C v D* [2007] EWCA Civ 1282.
[158] *EWCA* Enka (n 3) 90.

[159] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.
[160] Ibid Article 1(2)(e).

its scope. Hence to determine the proper law, the common law rules have to be applied. The common law rules entail a three-stage test to determine the governing law, where *firstly*, it is to be determined whether the parties have made an express choice of law for the arbitration agreement; *Secondly*, in the absence of an express choice, the court has to determine whether there is an implied choice of law; and *thirdly*, in the absence of both express and implied choice, the court has to find as to with which law is the contract "most closely connected".[161]

Express choice of law

The SC did not endorse the strict application of the doctrine of separability, which the Court of Appeals applied to hold otherwise. The doctrine of separability provides that an international arbitration agreement is separable from the underlying instrument with which it is associated.[162] The consequence of this principle is for the parties' arbitration agreement to be governed by a law different from the law governing their main contract.[163]

The majority observed that where there is no express choice of law applicable to the arbitration agreement, but a law has been chosen to govern the contract, such law governing the contract will also be the law which shall govern the arbitration agreement. The reason is the arbitration agreement being a part of the contract, would also be subjected to the law applicable to the contract as the governing law clause of the contract begins with the words "This agreement", which means that the chosen law to govern the contract shall also govern the arbitration agreement unless good reasons are provided to the contrary. Since the arbitration clause is only one of many clauses in a contract, it might seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause. In holding as such, the majority relied on similar reasoning as provided by many commentators on International Arbitration[164] and also upheld a recent decision of the Court of Appeals *in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*[165], where a similar choice of law clause of the contract was construed as to govern and determine the construction of all the clauses in the agreement which they signed including the arbitration agreement. The court further stated that it has to be construed in this manner as the law applicable to the underlying contract provides for a greater degree of consistency and legal certainty and also assists in avoiding the artificiality of such a strict application.[166]

Implied choice of law

The Court of Appeals held that there is a strong presumption that in the absence of an express choice of law, the procedural law of the seat is the implied choice to govern the arbitration agreement.[167] The court relied upon the

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[161] Dicey, Morris & Collins, *The Conflict of Laws*, (15th edn., Sweet & Maxwell 2012) rule 64(1) (hereinafter Dicey & Morris); *SC Enka* (n 1) 27.
[162] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 464 (hereinafter G Born).
[163] Sulamerica (n 4) 11.
[164] *G Born* (n 10) 592; Grover, Dilemma of the Proper Law of the Arbitration Agreement: An Approach Towards Unification of Applicable Laws' (2014) Sing. L. Rev. 227, 255; Choi, 'Choice of Law Rules Applicable for International Arbitration Agreements' (2015) Asian International Arbitration Journal 105, 108-109; Bantekas, The Proper Law of the Arbitration Clause: A Challenge to the Prevailing Orthodoxy' (2010) Journal of International Arbitration 1, 1-2.
[165] [2020] EWCA Civ 6.
[166] *SC Enka* (n 1) 53; *Dicey & Morris* (n 9) paras 12-103 and 12-109.
[167] *SC Enka* (n 1) 91.

"overlap principle" and observed that there exists a considerable overlap in the provisions of the Arbitration Act 1996[168] (1996 Act) and the arbitration agreement. It opined that in such situations, one generally expects the parties to intend the same law to govern both the procedural law of the seat and the substantive law of the arbitration agreement.

The SC overruled this position, noting that the governing law of the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement. The reason is almost all the provisions of the 1996 Act relied by the Court of Appeals to support the overlap argument are non-mandatory and, where the arbitration agreement is governed by a foreign law, by reason of section 4(5) of the 1996 Act,[169] the non-mandatory provisions of the Act which concern arbitration agreements do not apply to it.[170] The SC was right in observing that in such events, inferences cannot be drawn that, by choosing English law as the law of the seat, parties were also impliedly choosing English law to govern their arbitration agreement.

However, the majority did reaffirm the 'invalidity principle' as propounded in *Sulamerica*, as a choice of an arbitral seat may be considered as an implied choice of governing law of the arbitration agreement in situations where the arbitration agreement would be unenforceable or invalid under the per which law governing the underlying contract.[171] The ratio behind this principle, as the majority held, is that an interpretation that upholds a transaction's validity is to be preferred to one that would render it invalid or ineffective. Hence, the law of the seat can also govern the arbitration agreement where there exists any provision of the law of the seat which shows that, where an arbitration is subject to that law, the arbitration will also be treated as governed by that country's law.[172]

Closely connected law

In cases where it is impossible to ascertain the explicit or implicit choice of law, it becomes imperative that the law closely connected to the agreement be applied. In these circumstances, the closely connected law must determine objectively and irrespective of the parties' intention. The application of this rule is interesting as it is different in nature from the attempt to identify a choice (express or implied), as this involves the application of a Rule of law and not any process of contractual interpretation.

Based on this, the majority and one of the minority judges came to the conclusion that the law of the seat would be closely connected to the arbitration agreement.[173] The reasons were many. *Firstly*, t approach reflected the status of the seat as the place where the arbitration was to be performed legally and to which the parties submit themselves for the purpose of resolving any issue related to the validity or enforceability of their arbitration agreement[174]; *Secondly*, this approach is in consonance with what is followed and widely practised in international

[168] Arbitration Act 1996 (UK).
[169] Ibid s 4(5).
[170] *SC Enka* (n 1) 73.
[171] *SC Enka* (n 1) 109.
[172] *SC Enka* (n 1) 170 (vi).
[173] *SC Enka* (n 1) 118-120; *Sulamerica* (n 4) 32; *Dicey & Morris* (n 9) rule 64(1)(b) and para 16-016; David St. John Sutton, Francis Russell & Judith Gill, Russell on Arbitration, (24th edn., Sweet & Maxwell 2015) 2-121.
[174] *SC Enka* (n 1) 121-124; *Minister of Finance (Inc) v International Petroleum Investment Co* [2019] EWCA Civ 2080, 36-49; *Sulamerica* (n 4) 104.

law,[175] especially Article V(1)(a) of the New York Convention;[176] *Thirdly*, Such an application upholds the reasonable expectation of the contracting parties who without choosing the governing law of the arbitration agreement, choose a place of arbitration[177]; and *lastly*, this gives the required legal certainty by allowing the contracting parties to predict easily as to, in the absence of party choice, what would be the governing law.[178]

Applying these reasonings to the facts, the majority and a minority judge, out of the dissenting judges, concluded that neither an explicit nor an implicit choice of law existed to govern their arbitration agreement. Accordingly, applying the *closest and most real connection test*, it was found that the arbitration agreement was governed by English law, i.e., the law of the seat and not governed by Russian Law.

Conclusion

The SC, in this decision, has taken a major step in clearing the air around a much-debated issue of the governing law of the arbitration agreement. The court has been thoughtful in considering the commercial purpose of the party as one of the reasons while applying the close connection test to conclude that the law governing the seat shall be the proper law since, in the end, a party chooses a seat which is considerate and supportive of arbitration. As the distinguished jurist Gary Born puts it, in most jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a 'pro-arbitration' presumption.[179]

In essence, the court affirmed the previous choice of law approach of *Sulamerica*, clarifying the issue While doing so, it applied numerous international authorities to support its position, further strengthening this position and providing certainty of outcome. The court systematically interpreted the New York convention, which has already been signed by around 160 countries and aims at establishing a uniform set of international legal standards for recognising and enforcing arbitration agreements and awards. Its success is reflected by the implementation of the same by different domestic legislations and has gained support from some of the leading international arbitration jurists like Gary Born, *van den Berg*, etc. Hence, this stance of the court shall be considered a positive move towards achieving the goal of the international convention.

Considering that the majority decision will be the current binding law, much thought and diligence have to be given before drafting arbitration agreements, and the implications of not choosing a proper law to govern the same have to be well considered.

At the same time, since the SC was divided in its judgment, this may result in a continuation of the debate among arbitration professionals and commentators as to whether the majority's decision was right. There is enough scope for the law to develop as per what the minority has held - (i) that the law governing the main contact, even in the

[175] *SC Enka* (n 1) 125-141.
[176] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3, Article V(1)(a).
[177] *SC Enka* (n 1) 142-143.
[178] *SC Enka* (n 1) 144-145.
[179] *G Born* (n 10) 1403.

absence of a choice of law provision, should tentatively also apply to the arbitration agreement; or (ii) that in fact, an arbitration agreement is most closely connected with the governing law of the contact.

RESOLVING THE DISPUTE OF RETROSPECTIVE OR PROSPECTIVE EFFECT OF SECTION 29A OF THE ARBITRATION ACT

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Introduction

One of the pertinent purposes of arbitration is to resolve disputes in a timely manner. However, due to various scenarios of arbitration proceedings not being completed quickly, the Indian legislature introduced the 2015 Amendment section 29A to the Arbitration and Conciliation Act, 1996 ("**the Act**"). This new provision provided a time limit of 12 months for the completion of arbitration proceedings initiated under the Act from the date on which the tribunal enters reference. This provision underwent further amendment in 2019, by way of which the time period of 12 months has to be calculated from the date on which the pleadings are completed, as provided under section 23(4) of the Act. The issue arose as to whether this amendment is supposed to be applied retrospectively or prospectively. The Delhi High Court addressed this issue in the matter of *ONGC Perm Additions Limited v Ferns Construction Co. Inc.*[180]

In this case, conflicts emerged as a result of the agreement made between Ferns Construction Co. Inc., a corporation formed under Turkish law, and ONGC Petro Additions Limited, an Indian firm. FERNAS India Private Ltd is the Turkish company's Indian affiliate.

The arbitration provision was then used, and an arbitration tribunal was established to decide the case.

The petitioner sought to extend the deadline and went to the High Court of Delhi through Section 29A of the Act for the said purpose. As per the Act, the single judge in the High Court of Delhi issued an order. The said order gave a period of 18 months to settle the dispute by the tribunal and issue an award. However, during the course of the arbitral proceedings, the Act was amended in 2019. The amendment altered section 29A. In light of this amendment, the parties approached the Court for a clarification on its earlier order as to the wrapping up of the arbitration process and its applicability in the past and the future.

Case put forth by the parties

The petitioner's sought to distinguish between international commercial arbitrations seated in India and arbitrations in India with reference to the changes made to Section 29A of the Act in 2019. The attorney argued that prior to this amendment, all arbitrations that commenced after October 23 2015, would be treated the same, i.e., according to the deadlines given in Section 29A. The deadlines are calculated on the date of completion of

[180] *ONGC Perm Additions Limited. Ferns Construction Co. Inc*, OMP (MISC) (COMM) 256/2019.

pleadings. However, after the amendment, these statutory limitations would not apply only to international commercial arbitrations with a seat in India

The petitioner further argued on the grounds of categorising Section 29A as a procedural statute, that it was a provision that didn't give the parties to the arbitration any rights in its original form Therefore, the said provision only offered the option to the parties to extend the arbitration for six months if they consented to it. They might approach the Court for an extension if an award was not rendered after this period.

The SC did not give due regard to the procedural law and retrospective application of the Section 29A argument. This was based on the landmark judgement of *BCCI v. Kochi Cricket (P) Ltd.*[181] The said judgement stated that Section 29A is to be applied subsequently, i.e., prospectively based on Section 26 of the Amendment Act of 2015. The cases of *Rajendra Kumar v. Kalyan (D) by Lrs*[182] and *Thirumalai Chemicals Ltd. v. Union of India*[183] were also cited to distinguish between substantive and procedural legislation

On the other side, the respondent's attorney argued, citing the case of *State of Assam v. Ripa Sharma*[184], where it was determined that as a matter of law, a challenge to the dismissal of a review petition in a special leave petition filed without challenging the judgement against which review was sought should be maintainable considering previous decisions. It was made clear that the decision that was made subsequently and the judgement relied on by the petitioner was *per incuriam.*

Decision of the Delhi High Court

The Court considered the instances of *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited*[185] and *MBL Infrastructure Ltd. v. Rites Ltd.*[186] in order to reach a decision. The Court pointed out that the two rulings were at odds with one another and that the verdict in MBL Infrastructure was an order in *per incuriam* since it did not take into account its prior ruling in Shapoorji Pallonji.

The Cout also looked at the BCCI case[187], where it clarified that Section 26 of the 2015 Amendment to the Legislation applied to arbitration procedures and distinguished them from court proceedings.

Regardless of whether such Court proceedings result from arbitrations that were started before October 23, 2015, the apex Court held in the BCCI Judgment that the modification in 2015 shall be applicable to all continuing procedures and Court proceedings that began after that date.

Considering the aforementioned case, Section 87 of the Act, which was added via the 2019 amendment, tried to ignore the BCCI Judgment and limited the potential application of the 2015 Amendment to court and arbitration

[181] *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.
[182] *Rajendra Kumar v. Kalyan (D) by Lrs.* (2000) 8 SCC 99.
[183] *Thirumaal Chemicals Ltd. v. Union of India* (2011) 6 SCC 739.
[184] *State of Assam v. Ripa Sharma* (2013) 3 SCC 63.
[185] *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited* MANU/DE/0399/2020.
[186] *MBL Infrastructure Ltd. v. Rites Ltd* OMP (MISC) (COMMD 57/2020.
[187] *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.

processes that had started after October 23, 2015. However, Section 87 was disregarded in *Hindustan Construction Company Ltd. v. Union of India & Ors*[188]., which restored Section 26's application in accordance with the ruling in the BCCI case.

For the following reasons, the Court decided that Section 29A would apply to all ongoing arbitration procedures with India as the seat as on the date of August 30 2019, and as long as it was initiated after October 23, 2015:

1. The Court ruled on the lines that any change to the substantive law that deals with the liabilities and rights of any person/entity must be applied prospectively, and any change to the provision on procedural lines must be retrospective in nature, citing the apex Court's decision in the BCCI case on the ground that Section 29A is a procedural law.
2. The judgement of Shapoorji Pallonji is the precedent that is binding, but the judgement of MBL Infrastructure is not binding as it is *per incuriam.*

The amendment being procedural in nature, the Court came to the conclusion that it should be applied to existing arbitrations as of the amendment date, including the current arbitration procedures.

Analysis

Section 29A provided that the arbitral award should be made within 12 months from the date the arbitrators are appointed and if both parties agree, it can be extended by another 6 months. Even after these 18 months if the arbitral tribunal has not decided the matter, the mandate of the tribunal shall be terminated. The Court can extend the time limit if the parties show sufficient cause for the same. After the expiry of the given time limit, the arbitrators' mandate was terminated and the arbitration proceedings couldn't go any further.

The Act, was amended again in 2019 and two provisions affected the timeline for arbitral proceedings;

Time limit: The 2019 amendment to Section 29A provides that the arbitral award must be given within 12 months from the completion of pleadings; As per the 2019 amendment to Section 23(4), the arbitrator now has a deadline that extends to 6 months to complete the pleadings. This time begins from the date he/she receives the appointment as the arbitrator.

Effectively, the 2019 amendment provides an additional 6 months for the arbitral award to be delivered, the award must be given within 18 months from the date of appointment of the arbitrator, with an option to extend it further by 6 months, if both the parties are in agreement. Thereby, the arbitration must conclude within 2 years from the date of appointment of the arbitrator, or else, the mandate of the tribunal shall be terminated. If the parties require the arbitration to go beyond the 2-year mark, then they must show sufficient cause to the Court for the same.

[188] *Hindustan Construction Company Ltd. v. Union of India & Ors* WP (Civil) No. 1074 of 2019.

The mandate of the Arbitrator Pending Application for Extension in Court: The 2019 amendment also added a proviso to Section 29A, it provided that when an application is made to the Court for an extension of the arbitration beyond 2 years, the mandate of the arbitrator shall prevail until the application is disposed of

The retrospective/prospective application of the 2019 amendment to the Act with reference to, Section 29A quickly became a point of litigation with courts holding contrasting views:

In *G.N. Pandian. v. S. Vasudevan and Others.*[189] Madras High Court, the arbitration proceedings began in March 2018 and continued till September 7 2019, with an extension of 6 months. The parties now want a further extension of 6 months to be provided by the Court and have filed an application under Sub-section (5) read with sub-section (4) of Section 29-A of the Arbitration Act.

Further while deciding on the issue of whether the new provision should be applied retrospectively, the Court accepted that the amendment to Sub-section (1) of Section 29A by the 2019 amendment was to be applied prospectively. In this light, the Court held that the 2019 amendment Act would not apply to the present case and decided the matter on the position of law prior to 30.08.2019 i.e., the date the 2019 amendment came into force.

The Court further held, with regard to the sub-section (4) of Section 29-A (prior to the 2019 amendment) that

"*the language in which sub-section (4) of Section 29-A is couched makes it clear that if the award is not made within the period specified in sub-section (1) and the extended period, the mandate of the arbitrator will terminate and extension of time of said AT under sub-section (4) and (5) of Section 29-A can be made either before or after expiry of the extended period of six months post original 12 months. In the instant case, as this application bar been filed post extended period of 6 months, the termination stands saved by this extension order.*"

In *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited*[190], the Delhi High Court was approached because the time period to deliver the award under the Arbitration Act as per the 2015 amendment had expired; they sought further time to resolve the dispute. The Court held that Sections 23(4) and 29A (1) of the Arbitration and Conciliation Act were procedural laws and would apply retrospectively and hence, would apply to pending arbitrations as of the date of the amendment. The Court ruled in the present case that the time limit had not expired and hence, the arbitration proceedings could continue with the new timeline as per the 2019 amendment.

In *MBL Infrastructure Limited v. Rites Limited*[191], the arbitral tribunal entered upon reference on March 14 2018, and the statutory time limit of twelve months expired on March 13, 2019. Thereafter, the parties mutually agreed to extend the time to six months, which expired on September 13, 2019. After the expiry of said period, parties invoked Section 29A of the Arbitration Act seeking further extension of the period to conclusion of arbitration proceedings, and the Court, vide its order dated September 6, 2019, extended the time limit for twelve months

[189] *G.N. Pandian. v. S. Vasudevan and Others.* 2019 SCC OnLine Mad 9789.
[190] *Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited* MANU/DE/0399/2020.
[191] *MBL Infrastructure Limited v. Rites Limited* OMP (MISC) (COMMD 57/2020.

from September 13 2019, till September 12, 2020. On February 10, 2020, a petition was filed under Section 29A (5) of the Act on the ground that the Amendment Act of 2019 would apply to the existing arbitration proceedings. The Court ruled that from a base perusal, it is clear that Section 29A of the Act does not have to be applied retrospectively and, therefore, the amendment to Section 29A of the Arbitration Act would not apply to the proceedings existing as on the date of the amendment.

Conclusion

In light of the abovementioned contrasting opinions laid down by various High Couts on the issue of the retrospective/prospective application of Section 29A, *ONGC Petro Additions Limited v. Ferns Construction Co. Inc.*[192] observed the decision in MBL Infrastructure did not consider its earlier order in Shapoorji Pallonji and thus was an order in *per incuriam.*

On examination of the decision of *BCCI v. Kochi Cricket Pvt. Ltd.*[193], the Court held that Section 29A is a procedural law and as a result of which any changes to it that affect the liabilities and rights of a party must be prospective in nature and any amendment to the provisions dealing with the matter of procedure must be retrospective. The Court concluded that as the amendment in question is a matter of procedure the same should apply to all arbitrations that are currently running as of the date of amendment including the present arbitration proceedings.

This above-mentioned conclusion comes as a welcome relief to the parties who are grappling with the issue of the amended provisions' application. It goes without saying that the conclusion is consistent with the jurisprudence and court precedents that have been established through time that procedural law is retrospective in nature unless the legislation expressly states otherwise.

Furthermore, the modification and judgement of the High Court in the ONGC Case contribute to the reduction of judicial involvement, which is the driving force behind the Arbitration Act and its changes.

This ruling not only answered a crucial question about the application of the revised Section 29 A (1), it also clarified the vagueness of the altered provisions in the Act to a large degree. Nonetheless, assurance can only be attained through jurisprudence, as and when the judicial system is confronted with unusual situations, which are likely to happen in the future.

We think the Court correctly understood the BCCI's retrospectivity test by upholding Shapoorji Pallonji's conclusions over the MBL Infrastructures case. That However, it's worth noting that, aside from the BCCI case, the Supreme Court has made no substantive comment on the matter, so it's unclear how the Court would address the problem.

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[192] *ONGC Petro Additions Limited v. Ferns Construction Co. Inc.* OMP (MISC) (COMM) 256/2019.
[193] *BCCI v. Kochi Cricket Pvt. Ltd* (2018) 6 SCC 287.

ANTI-ARBITRATION INJUNCTIONS IN INTERNATIONAL ARBITRATIONS IN INDIA- A HINDERANCE TO DISPUTE RESOLUTION?

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Introduction to Anti-Arbitration Injunction

Alternative Dispute Resolution mechanisms, especially arbitration have become one of the most sought-after and steadily debated mechanisms of dispute resolution not only because it has added benefits but also because it is a new-to-be-explored field which jurists would like to travel to establish it as a successful method of dispute resolution.

This growing preference towards arbitration has been quite vividly visible in the Indian legal diaspora, and it is needlessly reiterated that it has become quite acclaimed that the main driving factor for this change of attitude was due to the BALCO judgment.[194] Besides, even the amendment to Section 12 of the Commercial Division and Commercial Appellate Division of High Courts Act, 2015[195] is indicative of this growing streak by introducing a pre-litigation mandatory ADR step for dispute resolution. The increase in the number of arbitration clauses in contracts, especially those of commercial nature nails down the assertion that arbitration is the new vogue of the century.

However, the popularity of the mechanism has also grown especially among jurists because it has opened Pandora's box of new and novel questions of law. It is especially so as it not only defies the age-old concepts of jurisdiction but also with the increasing amount of flexibility in the mechanism challenges the concepts of the finality of judgment (if any). A perfect example of these issues is the complex yet engrossing concept of the anti-arbitration injunction. It has challenged the very routes and mechanisms of the jurisdiction of any judicial tribunal or any tribunal with the powers of settling a dispute. The status of arbitration tribunals has been fluctuating between a judicial body and just a tribunal, according to jurisdictions. In most of the places they get the status of an administrative tribunal thereby being subordinate to the overview of courts of law[196], and in a few other places, they function as a judicial tribunal having the competence to rule on their jurisdiction.[197] It is this swinging status and the uncertainty with respect to the source of the jurisdiction of the tribunals that have arisen the jurisprudential dilemma concerning anti-arbitration injunctions (AAI).

This research paper intends to explore the complex and multidisciplinary approach towards decoding the status of granting AAIs in India against international arbitrations, both International Commercial Arbitration (ICA) and

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[194] *Bharat Aluminum Company Limited ("BALCO") v. Kaiser Aluminium Tebal Service Inc* [2012] 9 SCC 648

[195] Commercial Division and Commercial Appellate Division of High Courts Act 2015, s 12.

[196] UK, India, Singapore

[197] France, Kazakhstan, Sweden

International Investment Arbitration (IA). The analysis done in this paper focuses on the effect of AAI on the concerns about sources of the jurisdiction in an arbitration, the status of arbitration, the efficiency of dispute resolution in India internationally, and finally its tacit effect on the commercial market development of India in terms of its ease of doing business rank.

Status of an Arbitral Tribunal in India

(i) Legislative History

A perusal of the general provisions such as Sections 11, 12, 13 and specific ones such as s. 16 to s. 19 of the *Arbitration Act of 1940*[198] indicates that an arbitral tribunal is subordinate to a civil court in terms of judicial status. The independence of an arbitral proceeding has never been unlimited. Multiple examples are: the validity of an arbitral proceeding can be assessed by a court[199], the appointment of arbitrators by the Chief Justice or such appointed institution is final[200], the arbitral tribunal determining its jurisdiction or admissibility of issues, or the validity of a contract is not final.[201]

A bare reading of S.16 (1) with S. 42 of the Act would suggest that the jurisdiction of a court concerning its power over an arbitration agreement is inherent whereas that of an arbitral tribunal is not since the word used in S. 16(1) is "**may**".

Even the Apex court has shed light on this point distinguishing between the languages used in s. 16 of the 1996 Act and Article 21 of the *UNCITRAL Rules on Arbitration* which says that the "Arbitral Tribunal shall determine its jurisdiction".[202] The court clarified the stance that "S. 16 does not declare that except the Arbitral Tribunal, none else can determine such a question."[203] This shows the clear departure from the *kompetenz* principle by the Indian Legislative system.[204]

Further, the Apex court has acknowledged the legislative approach to prevent the granting of exclusive jurisdiction under the *kompetenz* principle to arbitral tribunals. The apex court in the SBP case[205] also reiterated that the finality of determination of an issue is given to a court in India and such issues cannot be reviewed or challenged or discussed before an arbitral tribunal. Therefore, one can easily conclude that the international principle of *kompetenz* is not exclusively or dominantly applicable.

(ii) Current Position of Law

198 Arbitration Act 1940, s 16-19.
199 ibid at s 31(2).
200 ibid at s 8(2).
201 ibid at s 16(6).
202 *Wellington Associates Ltd. v Kirit Mehta* [2000] 4 SCC 272.
203 ibid [15].
204 *Chloro Control India (P) India Ltd. V Severn Trust Water Purification Inc.* [2013] 1SCC 641.
205 *S.B.P. & Co v Patel Engineering Ltd. & Another* [2008] 5 SCC 681.

However, India has come a long way from the 1940 Act whereby the judicial intervention has been limited by the legislation and the s. 5 of the 1996 Act stands as clear testimony to that fact. The use of Anti-Arbitration Injunction however carves out an exception to this clause whereby among many other courts, the Calcutta High Court[206] while devising the grounds for granting AAI has formulated grounds going beyond the strict formulation of the Act. This is proved by including the third ground for granting AAI being that the arbitration proceeding is "*oppression or vexations or unconscionable*"[207] which are vague grounds not defined within the Act.

This paper seeks to analyze whether the same stance applies to international arbitrations taking place inside and outside of India or not.

The status of the arbitral tribunal in India is determined by Part 1 of the Arbitration Act, which as per s. 2(2) of the 1996 Act[208] applies to all international arbitrations with their *place of arbitration* in India. Further, this part applies to all arbitrations as long as it is not in contravention with any other foreign law, which is the *lex arbitri* or any international agreement.[209]

But the term "*place*" used in the aforementioned section has created confusion because the place of arbitration can be in multiple places and it is a broad term that can be decided by the parties apart from "*venue*" which is decided by the arbitration agreement and which determines the curial law. The confusion was clarified by the apex court in the landmark BALCO judgment[210], whereby it held that the Arbitration Act, especially Part I of it, will act as the curial law only when the venue of the arbitration is chosen to be India and not when the arbitration merely takes place in India.

But this judgment has had bigger ramifications in terms of the source of the jurisdiction of the arbitration. This is especially so when the source of judicial intervention is as broadly defined as under S. 42 of the 1996 Act as that will determine the status of an international arbitral tribunal with its venue in India. Further, this in turn will determine the viability and legality of an AAI being granted against such a tribunal by an Indian Court. In this background, there can be three possible scenarios:

1) The first case can be where the venue for international arbitration is outside India. In such a scenario, Part I of the Act is not applicable hence the foreign tribunal gains the status of a judicial tribunal, whose award is treated as a foreign award[211], like any other award given by a foreign court. Therefore, there is no distinction between the status of an arbitral tribunal and a court, and thus the normal comity obligations become applicable.
2) The second case can be one where the venue of the international arbitration is inside India. According to S. 2(2) of the Act, Part I of the 1996 Act becomes applicable making the award given by such a tribunal

[206] *Board of Trustees of the Port of Kolkata v Loius Dreyfus Armatures SAS* [2014] SCC Online Cal 17695.
[207] ibid
[208] Arbitration and Conciliation Act 1996, s 2(2).
[209] ibid at s 2(4), (5).
[210] *Bharat Aluminum Company Limited ("BALCO") v. Kaiser Aluminium Tebal Service Inc* [2012] 9 SCC 648.
[211] Arbitration and Conciliation Act 1996, s 44.

as a domestic award under S. 2(7) of the Act and subjected to the repeated judicial interventions as shown above.

This in turn shows the difference in the status of an arbitral tribunal which will be further explained in this article under two broad categories of international arbitration- International Commercial Arbitration (ICA) and International Investment Arbitration (IIA).

It is because of these differences in the two scenarios which not only, hampers the growth of international arbitration in India but also, the problem arising out of AAI. As it has been held that AAI can be given in the second scenario but not in the first.[212] This in turn raises the question as to what is the source for granting an AAI, the inherent jurisdiction of a civil court under the Civil Procedure Code[213] or under the S. 9 of the Arbitration Act, 1996? Herein the former allows the introduction of the *form non-conveniens* principle under private international law while the latter does not because of its strict construction and because of S. 42 of the 1996 Act.

International Commercial Arbitration in India

The Indian Arbitration Act as portrayed above lays down the law that in cases of the second scenario, with the venue or seat of the arbitration being an India, the Indian Law will be applicable as the arbitration law and the Indian Court will have jurisdiction the moment a party applies to the court for granting any interim measures, wherein we focus on AAI only.[214]

This proposition that the substantive law of arbitration is of the same nation as the one which has the seat of the arbitration, is taken as a customary practice.[215] Even international arbitral procedures like the Geneva Protocol states that "The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the **will of the parties and by the law of the country in whose territory the arbitration takes place**."[216] The Indian Apex Court[217] has also accepted this proposition based on prior Indian authorities that if the juridical seat of an arbitration is given to be in India by a consensus of the parties through the arbitration agreement, then automatically the *lex arbitri* applicable is the Indian arbitration law.[218] This practice in tun respects these two following basic principles of law.

1. The source of jurisdiction in an arbitration is the arbitration agreement and hence the consensus ad idem of the parties, which determines the *lex arbitri* and the curial law.

[212] *BALCO* (n17).
[213] Cicil Procedure Code 1908, s. 9.
[214] Arbitration and Conciliation Act 1996, s 42.
[215] Alan Redfern & Martin Hunter, et. al., *Redfern and Hunter on International Arbitration* (3rd ed, 2009) para 351.
[216] Geneva Protocol on Arbitration Clauses 1923 (League of Nations, Sept 24, 1923), art 2.
[217] *Sumitomo Heavy Industries Ltd. v ONGC Ltd. and Others* [2010] 11 SCC 296; *Union of India v Reliance Industries Limited and Others* [2015] 10 SCC 213.
[218] *Union of India v Hardy Exploration and Production Industries Inc.* [2018] 7 SCC 374.

2. Secondly that "*Ignorantia juris non-excunt or ignorantia legis neminem excusat"*. The moment the parties by consensus choose gave the seat of arbitration in India, it is expected that they will know what law will apply to them.[219]

Hence, the logical conclusion which follows and which has been reinstated by the BALCO judgment is that Part I of the Act is applicable only when the seat of arbitration is in India and otherwise not.

But this conclusion in tum raises questions as to the validity of an anti-arbitration injunction given by a domestic court in international commercial arbitration, with its seat in India. Though, at the outset, it is much required to appreciate that the Indian courts have been cautions enough to deny anti-arbitration injunctions in ICAs, the best example being the case of *McDonald's India Pvt Ltd v Mr. Vikram Bakshi*.[220] The Apex Court expressed the word of caution clearly as follows:

> "*While courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be. of the 1996 Act*."

This approach has been uniformly followed in other cases by the High Courts too.[221] This is due to the pro-arbitration approach taken by the Indian legislative and the judiciary. The shift from the 1940 Act to the 1996 Act and the approach in the Reliance Industries (II) case[222] and SBP Case[223], to the BALCO judgment[224], is testimony to that extent. However, despite this clarity of approach towards determining the source of the jurisdiction of an Indian Court in ICAs, the source of jurisdiction for AAIs in ICAs is still undetermined. It is this point that will be further elaborated henceforth.

An analysis of Indian Cases which have discussed the concept of AAIs in ICAs would reveal that there are broadly two grounds based on which the Indian courts assert their right to issue an AAI in an ICA with its seat in India:

- **Inherent Jurisdiction of the court under the CPC**

It has been a well-debated issue in Indian courts as to what is their source of jurisdiction in the case of ICAs. The prevalent view had been that the inherent jurisdiction of the court is invoked because the cause of action arose in India itself.[225] This cause of action can be any act substantive to arbitration or it can be the arbitration agreement

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[219] ibid [34].
[220] *McDonald's India Pvt Ltd v Mr. Vikram Bakshi*
[221] *The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS* [2014] SCC OnLine Cal 17695; *Enercon (India) Pvt. Ltd. v Enrecon (GmBH)* [2014] 5 SCC 1.
[222] *Union of India v Reliance Industries* [2015] 10 SCC 213.
[223] *SBP & Co. v Patel Engineering Ltd. & Anr.* [2005] 8 SCC 618.
[224] BALCO (n 17).
[225] *Oxygen Ltd. v National Oxygen Ltd.* [1990] (1) Calcutta Law Times 275; *Mikuni Corporation v UCAL Fuel Systems Limited, Carburettors Limited & Siemens VDO Automotive* [2008] (1) Arbitration Law Reporter 503 (Delhi); *Tractoroexport, Moscow v Tarapore & Company* [1969] 3 SCC 562; *Oil and National Gas Commission v Western Company of North America* [1987] 1 SCC 496; *Modi Entertainment Network v W.S.G. Cricket Pte Ltd.* [2003] 4 SCC 341.

itself. But this argument was finally overturned by the Apes Court[226] itself acknowledging the fact that such an argument would not apply when the agreement has been entered outside India and the performance of the contract was also outside India, but the seat of arbitration was chosen to be India. This is because the courts have had to abide by the thumb rule principle that the *lex arbitri* follows the seat. So, the moment the seat of arbitration is chosen to be India Part I of the 1996 Act becomes applicable *ipso jure*.

Hence, the question then arises, as to what do we mean by *lex arbitri*? Does it include the Arbitration Act of 1996 only? Or does it include the entire legal regime of India including the inherent powers of a civil court guaranteed under S. 9 and Order 39 of the Civil Procedure Code?

This, in turn, brings us back to the classic case of *Smith Ltd v H International*[227], where the English Court explained the content and nature of *lex arbitri*, which is "*a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration*."[228] Redfern and Hunter in their book further elaborate on this definition and list down what are the contents of *lex arbitri* according to general judicial conduct globally. In both situations, it has been agreed that issuing interim measures and determining the arbitrability of substantive issues in dispute are part of *lex arbitri*.[229] Further, Redfern and Hunter clearly distinguish that the *lex arbitri* may be and can be completely different from the law governing the substantive issues in arbitration.[230]

This discussion, therefore, clarifies the point that the Arbitration Act of 1996 falls within the definition of *lex arbitri*, and all other substantive laws including the CPC, 1908 fall under the definition of law governing the substantive issues in dispute. The parties to arbitrate have the liberty to decide the applicability of both of these laws. In the former case, this liberty is exercised by choosing the seat of arbitration and in the latter case by defining the Applicable Law in the arbitration agreement.[231] This proposition can also be substantiated by the "*real and closest connection*" test often applied by English Couts wherein, it makes more legal sense to abide by that law where the cause of action arose or where the performance of an act was carried out rather than a foreign *lex arbitri* which is determined only by a seat of the arbitration often because it is neutral.[232]

Therefore, if the Indian Courts are to deliver an anti-arbitration injunction, then the same has to be under the Arbitration Act, which is the *lex arbitri*. This position has in settled by the Apex Court[233] by clearly defining that the power to grant an AAI or any other interim measure cannot flow from 5. 9 of the CPC, 1908. Again, the Calcutta High Court[234] reiterated that in the case of an ICA, the inherent civil court jurisdiction can only determine the factual existence of an arbitration agreement, not any issues of legality and disputes contained in it.

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[226] *BALCO* (n 17) [95]; *Gujarat NRE Coke v Gregarious Estate* [2013] SCC OnLine Cal 1177.
[227] *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 [130].
[228] Alan Redfern (n 22) p 3.46.
[229] ibid; *Smith Ltd v H International* [1991] 2 Lloyd's Rep 127 [130].
[230] *Compagnie Tunisienne de Navigation SA v Compagnie d'Armament Maritime SA* [1971] AC 572, 604; Alan Redfern (n 22) P 3.38.
[231] Arbitration and Conciliation Act 1996, s 28(1)(b).
[232] [2012] EWCA Civ 638 at [52] per Lord Neuberger of Abbotsbury MR.
[233] *Antrix v Devas* [2018] SCC OnLine Del 9338.
[234] *Nicco Corporation Ltd. v Prysmian Cavie Systemi Energia* GA No. 678 of 2009, CS No. 69 of 2009 (Cal HC 2009).

Therefore, it is undeniably true that the source of AAI in an ICA is the Arbitration Act of 1996 and hence the consensus of the parties is that the venue of an ICA will be India. But then comes the question as to whether the 1996 Act provides such powers or defines the scope of such powers? Can the court determine the test and scope of an AAI under the Arbitration Act? All of these are sought to be answered in the following sub-topic.

- **Power to grant an AAI under the Arbitration Act, 1996**

A logical conclusion of the above discussion has been that the powers of an Indian Court in granting interim measures should be defined by the 1996 Act. But it has been the deviant approach of the Indian courts from this point that has raised issues as to the power of a court to determine the scope or test for granting an AAI. An example of the issue can be the following approach of the Calcutta High Court:[235]

"This Court should exercise its inherent jurisdiction to prevent abuse of process and grant an anti-arbitration injunction restraining Defendants from continuing with the arbitration proceedings."

This brings us back to the question that, does the 1996 Act grant the power to an Indian Court to grant an injunction?

The fact that the source of the power to grant an AAI has to be derived from the act itself, is further reinstated by the wording of S. 5 of the Act, which clearly states that " *no judicial authority shall intervene except where so provided in this Part (Part 1)".* The exclusivity of this section is guaranteed by the non-obstante clause used in the section, which in turn takes away the inherent powers under Sections 151 and 9 of CPC, 1908, which is often cited as the source of the jurisdiction of Indian Courts in cases involving foreign individuals.[236]

Here it must be clarified that such a statement may invoke questions as to how can a legislation take away the inherent jurisdiction of any civil court including the High Courts and Supreme Court. This can be answered in two ways.

Firstly S. 9 of CPC, itself provides that the jurisdiction of civil courts can be based expressly by law, which is done by S: 5 of the 1996 Act.

Secondly, the inherent constitutional powers under 151 can be barred when the court lacks jurisdiction, to begin with as it has been time and again reiterated that lack of jurisdiction strikes at the soot of the justice delivery system. A general private international law would say that *forum non-conveniens* principle is the gateway for Indian Couts to use S. 151 jurisdiction even in foreign cases with the seat being in India. But the *lex arbitri* approach restricts the application of laws only to the 1996 Act and since a special law prevails over the general law, it is better to find the jurisdiction of courts under the 1996 Act.

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[235] *The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures SAS* [2014] SCC OnLine Cal 17695.
[236] *World Sport Group (Mauritius) Limited v MSM Satellite (Singapore) Pte Limited* [2014] 11 SCC 639.

Hence, now one may refer to S. 9 of the 1996 Act which provides the power to courts to grant interim measures hike an AAL. A close look at S. 9(d) and especially S. 9(e) of the 1996 Act would suggest that the act itself provides wide powers to an Indian civil court to provide an anti-arbitration injunction based on justice and convenience. This in turn refutes the argument made in the case of *Board of Trustees of the Port of Kolkata Lanit Dreyfus Armatures* that: "*the Indian Arbitration Act does not confer any power on the Civil Court unlike the English Courts to interfere with foreign arbitration bypassing anti-arbitration injunction. It is submitted that Section 72 of the English Arbitration Act, 1996 empowers the Civil Court to decide whether an arbitration agreement is valid*".[237]

It is rather the Act itself that provides that the Indian Courts can provide any interim measure of protection that is just and convenient and for that matter make orders for any such proceeding before it. This subsection itself reinstates the S. 151 power residing with courts under CPC or the 5.9 for lower civil courts. But one has to also confer special attention towards the words power used in S. 9(e) of the 1996 Act, which says that such interim measures should be for the "*protection*" of the arbitration and therefore should be a decision that works favourably towards the arbitration keeping in mind its legality. This approach has been laid down in the Enrecon Case.[238]

> *"It is a well-recognized principle of arbitration jurisprudence in almost all the jurisdictions, especially those following the UNCITRAL Model Law that the courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the courts."*

However, it has been the third ground for issuing an injunction, which has been formulated by the Calcutta High Court[239] which calls for speculation of the term "interim measure of protection" used in S. 9(e) of the 1996 Act. The Court has stated that an AAI can be granted in an ICA if the proceeding is found to be "oppressive or vexatious or unconscionable". This ground stems from the public policy point of view, which is exerted by courts in an ICA. The fact that all of these must be considered in an ICA too with its venue in India, stems from the fact that such an ICA award is considered a domestic award for India[240] and it can be invalidated if it goes against the public policy of India.[241] However, in such cases, the Act defines the ambit of public policy which is not so in the case of an AAI. Hence, it may be argued that the determination of what is oppressive or unconscionable based on public policy is way beyond the scope entailed in 5.9 of the 1996 Act, but the justification of this approach is way beyond the 1996 Act itself.

This point has been explained by Redfern and Hunter in the following words: "*In practice, every state reserves for itself, as a matter of public policy, what might perhaps be called a state monopoly over certain types of disputes*."[242] Therefore, it is the inherent sovereignty of a state from which this state monopoly of assertion of public policy arises, which has to be given its due. This is also due to the inherent principle of sovereign equality which is ingrained in any

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[237] *The Board of Trustees* (n 42).
[238] *Enercon (India) Pvt. Ltd. v Enrecon (GmBH)* [2014] 5 SCC 1.
[239] *The Board of Trustees* (n 42).
[240] Arbitration and Conciliation Act 1996, s 2(7).
[241] Arbitration and Conciliation Act 1996, s 34(2)(b)(ii).
[242] Alan Redfern (n 22) p 3.47.

international transaction and is as well characterized as a basic principle of intonational law.[243] So, when parties choose India to be the seat of arbitration, it is expected that they submit to this sovereignty of the nation, which cannot be neglected or denied by the parties.

It is therefore only fitting that such an approach has been developed by the Indian Courts towards ICAs happening under Part 1 of the 1996 Act. However, the courts, as reiterated by the Apex Court time and again, have to be cautious while granting such AAIs in ICAs happening in India under Part I of the Act, and this caution should be exercised keeping in mind that the purpose of the supervisory jurisdiction of the courts over an arbitral tribunal is to protect the arbitration proceedings and ensure its smooth functioning.[244]

International Investment Arbitration in India

With India being within the top 10 countries for inbound FDI and amongst the first 20 for outbound flow of FDI[245], Indian courts are sure to face many cases on international investment arbitrations, and the case of *Union of India v. Vodafone Group Plc*[246] the tip of the iceberg. The dilemma concerning the source of jurisdiction arises from the difference between international investment and commercial arbitrations, wherein the former is based on the state's reassurances and guarantees to a foreign investor based on a BIT and not on commercial contracts.[247]

A combined reading of sections 44 and 45 of the Arbitration Act 1996, that a domestic count has the power to me a pre-arbitration injunction only if the dispute satisfies the definition of a commercial dispute[248] and the 'null-void-vexations' test.[249] The term commercial dispute is inclusively defined under the Commercial Couts Act 2015 and the Government is empowered to notify what is meant by a commercial dispute,[250] but it does not include an investment treaty that covers international obligations and protection of minimum standard of treatment of aliens over mere commercial arrangements

Then the query arises that if jurisdiction can neither be found under Part I nor Part II of the 1996 Act, then does equity hold the key to this answer?

An injunction has always been viewed as an equitable remedy against proceedings that are oppressive, vexatious, or like abuse of process, and from there the courts derive their inherent jurisdiction.[251] In this regard, as argued in the Vodafone Group case, the reliance can be found in section 9 read with section 20 of CPC, 1908[252] s. 9 places the power of equity in the hand of civil courts to try all such matters except those which are expressly barred.[253]

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[243] United Nations Charter, 1945, art 2.
[244] McDonald's (n 27).
[245] OECD, FDI in Figures (April 2020) <https://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf/>.
[246] *Union of India v. Vodafone Group Plc* [2017] SCC OnLine Del 9930.
[247] ibid [91].
[248] Commercial Courts Act 2015, s 2(1)(c).
[249] *Vidya Drolia v Durga Trading Corporation* [2021] 2 SCC 1.
[250] Commercial Courts Act 2015, s 2(1)(c).
[251] *British Carribean Bank Ltd v Attorney General of Belize* [2013] CCJ 4 (AJ).
[252] *Union of India v Vodafone Group Plc* [2017] SCC OnLine Del 9930 [66].
[253] Civil Procedure Code 1908, s 9.

This bar to civil court jurisdiction lies under 18 and 45 of the 1996 Act but with investment arbitration falling under neither of the parts, arguably the equity jurisdiction under CPC, 1908 is evoked

But another side to the question is the landmark case of *Saipem v Bangladesh*, which established that judicial hurdles to access international tribunals under a BIT can lead to violation of investment protection and can be reviewable by the tribunal.[254] The Indian Courts have to be mindful of this international obligation under the BITs. But the counter-argument lies that Investment Tribunals have to rely on domestic courts for enforcement of awards, which are not covered under the New York Convention[255] because of the reservation made by India under Art 1(3) that the Convention only applies to foreign commercial arbitrations. In such cases, Indian Couts can have leeway in granting injunctions indeed. But such leeway can be a double-edged sword as it will deter foreign investors from investing in India as well as invoke state responsibility claims by the investor-state against the host-state under diplomatic protection principles[256] as non-enforcement of such a foreign award can lead to strict violation of the BIT. Hence, as a whole, it is safe to conclude that the expanse of AAI in investment arbitrations based out of India is uncertain to date.

Conclusion

The concept and source of jurisdiction for issuing AAIs in India, to date remain an enigma among the High courts and various judgments of the Supreme Court. As long as this dilemma will remain the growth of India as a seat of arbitration will continue to be hindered. The development of law till the BALCO Judgment has helped in changing the approach towards a pro-arbitration approach wherein apart from extreme circumstances such injunctions should not be granted. Even though the expansive jurisdiction based on the power of equity is commonly observed in common law countries as against civil law countries, such power should be sparingly exercised to avoid frivolous litigation. The practice of filing for an injunction the moment a party issues a notice of arbitration should be discouraged by following the prima facie test wherein the balance of convenience test should be strictly followed. In this regard even if the court does not derive its power under s. 9 of the 1996 Act and the scheme of the 1996 Act then also once the tribunal is constituted the *kompetenz-kompetenz* principle should be observed and the powers under s. 17 of the 1996 Act should be respected. Accumulatively, a restrictive approach in granting AAI would favor the growth of India as a seat of international arbitration and even non-commercial arbitration.

[254] *Saipem S.p.A. v The People's Republic of Bangladesh* ICSID Case No. ARB/05/07.
[255] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art 1(3).
[256] International Law Commission, Draft Articles on Diplomatic Protection (UNGA, Supp No. 10 (A/61/10).

IN CONVERSATION WITH MS. JYOTI A. SINGH

Editor's Note: Ms Jyoti A Singh is an independent legal practitioner and appears before the High Court, Supreme Court and other tribunals. She has been engaged in the area of distressed space, dispute resolution and corporate advisory for two decades, and she appears before the courts and tribunals in and outside Mumbai for financial institutions, corporates and HNI clients from various business sectors.

Editorial Board (EB): ***How would you like to introduce yourself to our readers? Can you narrate, in brief, your journey as a lawyer following your graduation? How did you find your calling in this specific area of law in which you practice?***

Jyoti A Singh (JS): My name is Jyoti. I would introduce myself as a law enthusiast: The reason being I don't know what I would be doing if not for the law.

Following my graduation back in 2000, I started my career right from the bottom at the lower court. This strengthened my basics and was a great experience. Then I moved to law firm practice from 2005, where I was mainly focused on litigation and arbitration with a focus on distressed assets, white-collar crime and contractual disputes. In 2019, I decided to go independent and started my office. My father, who is also a practising lawyer, is an inspiration for me.

The journey, which started in 2000, has been a very enriching experience, and everyday has been a stepping stone to success and learning something new.

EB: ***How do you find the transition from practising at a firm to having your own independent chamber?***

JS: I cannot say that I have suddenly transitioned into an independent practitioner. I have been associated with law firms since 2005. Even there, I was independently running my practice area. It's only that I don't find other partners around me to brainstorm on various aspects of law,

However, the independent practice has been, in a way, enriching. Since it's my own office, I have the freedom to explore and reinvent myself.

EB: ***What are some key skills which are very pertinent and which every lawyer needs to hone in order to succeed in Dispute Resolution?***

JS: If I have to list them, the list would reach the sky. However, I feel some of the key skills would be:

a. Being sincere. It'll help you find your own path.
b. There does not exist any shortcut: Hard work is the only way in this field. When I say hard work, it means "smart" hard work. Spending 10 hours on a particular brief is not hard work but would imply lethargy and inefficiency.

c. Be humble in your approach: I always believe that learning is mutual in this field. For instance, the younger generation knows more about technology and how to use it to enhance legal research, whereas the older advocates have broad practical experience. Both should have an understanding and humility to learn from each other.
d. Be ready to do any work: No work is small or of less value. Every small work you do imbibes some learning point in you.
e. Be transparent when you're working: Even if it is a very simple question, it's important to know clearly what you are working on. If you don't know, then ask your seniors. It doesn't hurt to say you don't know something, and it really shows that you want to learn and excel.
f. Always do your own legal research and don't blindly follow what others are saying or doing.
g. Last but not least, something which I learnt was that never try to compete with others. We all have our own niche. Try to compete with yourself and try to be better than yourself every day. The sky is the limit.

EB: ***Given that arbitration is an important mechanism to resolve disputes, what is your opinion on the court's power to restrain arbitration proceedings in the form of an anti-arbitration injunction?***

JS: There have been a lot of judgments like *Dr. Bina Modi v. Lalit Kumar Modi & Ors*, and other similar cases which have dealt with this issue. In my view, the sanctity of the A&C Act should be respected by the court, and it can be seen that courts have indeed respected the sanctity of the tribunals. Everybody understands that the reasons why people resort to arbitration include speedy resolution, party autonomy, cost-effectiveness, etc.

I believe that one cannot oust the court's jurisdiction. However, in the spirit of arbitration, the courts should be very restrictive in interfering and should preferably leave it to the tribunal to decide the jurisdiction and arbitrability of the matters. Although when there are exceptional circumstances such as the agreement being null and void, the court should interfere. I have noticed that Indian courts have taken cognizance of this fact and are understanding and adapting to it. On a practical note, I am happy to observe that the courts in India haven't been misusing the power they get by granting unnecessary anti-arbitration injunctions.

EB: ***What do you feel about the value of concurring and dissenting opinions in arbitral proceedings?***

JS: At an international level, dissenting opinion is called 'opinion in a legal vacuum'. It doesn't have any value. Even in Indian jurisprudence, it is never considered an award. Recently, in *Ssangyong Engineering vs National Highways Authority of India* reported in AIR 2019 SC 5041, in order to do complete justice between the parties, the Hon'ble Supreme Court invoked Article 142 of the Constitution of India and upheld the minority award. However, as per the law under A&C Act, the minority decision cannot hold any legal sanctity. Thus, in the absence of any statutory power to uphold minority decision, Hon'ble Supreme Court would need to come to the aid of parties in exceptional circumstances by invoking Article 142.

EB: ***Today, there are too many technical and strategic arbitrator challenges. On one side, such challenges help to ensure the parties get a fair hearing, but on the other, it drags the proceeding. What is your***

perspective on arbitrator challenges the way they are made in the Indian context? Are there any pressing concerns upon which the statutes and courts are silent?

JS: Specifically on any contextual issue, I don't have any view. But the bigger challenge is that the matter gets lagged in courts because of such challenges. While a right to arbitrator challenge cannot be taken away from a party, there also needs to be a strict time frame prescribed when such challenges are put forth. If with such a mechanism, courts follow the sanctity of arbitration procedure, we can expect the courts to lay down consistent jurisprudence in this area. There are assignments given in courts where there is an arbitration judge who is also burdened with other assignments. Though the law is settled where the courts are clear that they should not interfere, some or other judgment comes that deviates from this position. It is important that a dedicated bench should be established to deal with such issues with speed, and the sanctity of arbitral procedure should be maintained.

EB: ***With the Arbitration and Conciliation (Amendment) Ordinance, 2020, parties can now seek an unconditional stay on the arbitral award when on prima facie determination, the award or the contract itself is induced by fraud or corruption. What is your view are the practical implications of this amendment, considering that such a prima facie determination ought to be made by the arbitral tribunal itself?***

JS: The pressing concern which I observe is how will you determine fraud or corruption 'prima facie'? You cannot. You need to go in-depth to prove the occurrence of such offences. The required burden for such offences is generally very high, hence cannot be established on a prima facie basis. So the practical challenge I see is, how would courts determine what 'prima facie' means in this regard at the stage of granting a stay? Not defining this term would lead to instances where the accused would get an opportunity to slip this word everywhere as a challenge under section 34 of the A&C Act. As per the 2015 amendment to the A&C Act, a stay has to be conditional. Practically, we will have to see how the courts will infer and interpret the word 'prima facie'. Another question is what will happen in case the party challenging award did not raise the questions of fraud or corruption before the arbitral tribunal. I hope this doesn't take years to settle, although it has been seen that Supreme Court is acting quickly and bringing clarity and finality to ambiguous laws.

EB: ***Many civil law countries have a remedy of adapting the contract, in the sense of revising certain terms in the face of extreme onus/ commercial hardship in fulfilling obligations by one party. In the wake of COVID-19 and its fallout on commerce, do you think that amending the Contract Act and providing for adaptation is a favourable path for India?***

JS: I feel that the Indian Contract Act is self-sufficient. There is no need to amend it. The concept of *force majeure,* which was highly debated when COVID-19 emerged, should have been included in contracts. I feel if parties are wise enough to agree on the occurrence of some exceptional circumstances while drafting the agreement *inter se* them, it'll take care of all such situations. Obviously, a pandemic cannot be foreseen, but it's not the situation where we are facing this for the first time. There have been instances where we were hit by such pandemics earlier.

The problem is, when we are drafting our contracts, we don't really take care of such clauses. These are the kind of clauses that are slipped into the contract at the last minute without much thought. So, proper drafting is the key here. The takeaway here is that not all change can or must be sought in statutes but must be made in the practice of drafting the contracts as and when possible.

EB: ***What do you think the future of arbitration in India looks like? And what changes or improvements have to be made in order for India to become a fore frontier in international arbitral proceedings?***

JS: I am very positive about the future of arbitration in India. Moving towards institutionalized arbitration is the key. The report of the High-Level Committee to Review the Institutionalization of the Arbitration Mechanism in India, chaired by Justice B. N. Srikrishna (Retd. Judge, Supreme Court of India), has key suggestions. Additionally, efforts can be made to have a separate Arbitration Bar. Foreign lawyers should be welcomed to jointly work on international arbitral proceedings.

It would be good if we could have a multi-tier dispute resolution process where every contract says that if any dispute arises, it shall go *firstly* through mediation; *secondly* through conciliation; *thirdly* through arbitration. This has to be incorporated in the contracts themselves.

EB*: Do you think the multi-tier dispute resolution clause has to be made compulsory?*

JS: Courts have often asked parties to first try resolving matters within themselves. And when these are made compulsory, it saves a lot of legal costs. So, according to me, this process has to be followed. Not all disputes have to be dragged directly to courts or arbitration. There can be informal deliberations, negotiations, conciliations, etc., and if things do not go well, then the matter can be taken to arbitration or court.

EB: ***For a person interested in pursuing arbitration/litigation as a career, what would be your suggestion as to how one should lay the groundwork to begin their career? What kind of groundwork did you do to set yourself up? Do you have any advice for the young graduates who are coming to the market in the post COVID Scenario?***

JS: So, in my first answer, when I said to be sincere, it should be observed in all aspects. You shouldn't just read the law but also follow the law. Further, you need to develop the habit of keeping yourself updated with legal developments. Reading is integral.

You can know your calling only when you work on the ground. So, intern in different areas, which will give you wide exposure and experience.

Don't be deterred by thinking that the job market is weak. Increasingly, lawyers are needed everywhere. So buck up and don't stay idle. Keep working and learning the ground. Keep in mind that no learning goes waste. I'll share a personal experience. One of my friends asked my help to research some law points. My team and I researched and sent the work to her. My team asked why we were doing this since it does not relate to our work. I just told them learning doesn't go waste. And surprisingly, we got a very similar work two months later wherein the research we did came to our rescue. So you never know when what might come in handy.

JANUARY

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

In *Imax Corporation v E-City,*[257] 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*[258] 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.

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,*[259] the Supreme Court set aside the High Court of Karnataka order which had appointed an arbitrator based on an

[257] *Imax Corporation v E-City Entertainment and Ors.* [2017] AIR 1372 (SC).
[258] *Perkins Eastman Architects v HSCC* [2020] AIR 59 SC.
[259] *M/s Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram v M/s Bhaskar Raju & Brothers* 2020 SCC OnLine SC 183.

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.*[260] 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,*[261] 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 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,*[262] 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

[260] *SSIPL Lifestyle Private Limited v Vama Apparels (India) Private Limited & Anr* CS (COMM) 735/2018.
[261] *MBL Infrastructures Ltd v Rites Limited* OMP(MISC)(COMM) 358/201.
[262] *Parmeet Singh Chatwal & Ors v Ashwani Sahani* MANU/DE/0442/2020.

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,*[263] 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 them *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.

In *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors.*[264] 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.[265] 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

[263] *Cairn India Ltd & Ors v Government of India* OMP (EFA) (COMM.) 15/201.
[264] *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors*. 2020 SCC OnLine SC 177.
[265] *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.

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,*[266] 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 shareholder's 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 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[267] 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,*[268] an ICSID tribunal dismissed a €70 million claim brought by UK real estate investors who sought to build a luxury hotel on Mauritius'

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[266] *Filatona Trading v Navigator Equities* [2020] EWCA Civ 109.
[267] *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.
[268] *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.

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.

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,*[269] 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.*[270], 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,*[271] 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

[269] *Bank of Baroda v Kotak Mahindra Bank Ltd* 2020 SCC OnLine SC 324.
[270] *Dr. Bina Modi v Lalit Modi & Ors* [2020] SCC OnLine Del 1678.
[271] *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*,[272] 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,* [273] 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 was 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.

The Supreme Court in the case of *Quippo construction v. Janardhan Nirman,*[274] 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

[272] *National Agricultural Cooperative Marketing Federation of India v Alimenta SA* [2020] SCC OnLine SC 381.
[273] *Firm Rajasthan Udyog and others v Hindustan Engineering and Industries Ltd* [2020] SCC OnLine SC 389.
[274] *Quippo construction v Janardhan Nirman* [2020] SCC OnLine SC 419.

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*[275] 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*[276] 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 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.

[275] *Standard Retail v GS Global Corp Distribution* [2020] SCC OnLine Del 542.
[276] *M/s Halliburton Offshore Serivces Inc v Vedanta Limited* [2020] SCC OnLine Del 542.

The Bombay High Court in the case of *Omprakash and Others v. Vijay Dwarkada Varma*[277] 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 Aluminium 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,*[278] 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 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*[279] 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.

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[277] *Omprakash and Others v Vijay Dwarkada Varma* [2020] SCC OnLine Bom 796.
[278] *Banyan Tree Growth Capital LLC v Axiom Cordages* [2020] SCC OnLine Bom 781.
[279] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] EWCA Civ 574.

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*,[280] 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,*[281] 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.

The Supreme Court in the case of *South East Asia Marine Engineering and Constructions Ltd v. Oil India Ltd*[282] 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

[280] *GTPL Hathway Ltd v Strategic Marketing Prt Ltd* [2020] 4 GLR 2906.
[281] *Spentex Industries Ltd v Quinn Emanuel Urqhart and Sullivan LLP* CS (OS) 568/2017.
[282] *South East Asia Marine Engineering and Constructions v Oil India Ltd* [2020] AIR 2323 (SC).

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,*[283] 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.

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,*[284] 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,*[285] 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.

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[283] *Patel Engineering Ltd v North Eastern Electric Power Corporation Ltd* [2020] AIR 2488 (SC).
[284] *Blue Coast Infrastructure Development Pvt Ltd v Blue Coast Hotels Ltd* [2020] OMP (I) (COMM) No. 25.
[285] *Entertainment City v Aspek Media Private Ltd* [2020] OMP (T) (COMM) 24.

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*,[286] 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.

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,*[287] 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.

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.[288] 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*[289] 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.

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[286] *Dsc Ventures Pvt Ltd v Ministry Of Road Transport Corp* [2020] SCC OnLine Del 669.
[287] *Gammon India Ltd & Anr v NHAI* [2020] AIR 2020 Del 132.
[288] 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.
[289] *Dharamvir Khosla v Asian Hotels (North) Ltd* [2020] SCC OnLine Del 762.

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*,[290] 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 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*,[291] 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.* [292]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.

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[290] *Barminco Indian Underground Mining Services LLP v Hindustan Zinc Ltd SB* [2020] SCC OnLine Raj 1190.
[291] *Hero Wind Energy Private Limited v INOX Renewable Limited* [2020] SCC OnLine Del 720.
[292] *State Trading Corporation of India Ltd v Jindal Steel and Power Limited & Ors* [2020] AIR 2020 Del 105.

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 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.[293] It further held that India must take necessary steps to cease to exercise its criminal jurisdiction over the marines.

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.*[294] 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.

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[293] *The Enrica Lexie Incident (Italy v India)* PCA Case No. 2015-28.
[294] *M/s. Bhandari Engineers & Builders P Ltd v M/s Maharia Raj Joint Venture and Ors* [2019] SCC OnLine Del 11897.

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*,[295] 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.

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*[296] 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*[297], 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.

[295] *Manish Chibber v Anil Sharma and Anr* ARB P 249/2020.
[296] *M/s JMC Projects (India) Ltd v South Delhi Municipal Corporation* ARB P 632/2017.
[297] *Avantha Holdings Limited v Vistra ITCL India Limited* OMP(I) (COMM) 177/2020.

- 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.
- 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*[298], 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*[299] 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.

[298] *Josephine Ancilda v HDFC Bank Ltd & Ors* 33 CRP No 1536/2018.
[299] *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*[300], 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*[301], 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 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.

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

In the case of *Balasore Alloys Ltd v. M/s. Medima LLC*[302], 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*[303], 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 are not a ground for terminating their mandate under A&C Act.

In *Hindustan Construction Co. Ltd. v. National Hydro-Electric Power Corporation Ltd*[304], 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

[302] *Balsore Alloys Ltd v M/s Medima LLC* [2020] AIR 5172 (SC).
[303] *Vodafone International Holdings BV v The Republic of India* PCA Case No 2016-35.
[304] *Hindustan Construction Co Ltd v National Hydro-Electric Power Corporation Ltd* [2020] SCC OnLine Del 1214.

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.

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*[305] 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*[306] 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

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

Defendant has waived the arbitration agreement shall render the arbitration null and void or inoperative as the same would be a travesty of justice.

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 from 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 defences 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*[307], 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.

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

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

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*[308], 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*[309], 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 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*[310], 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

[308] *Responsive Industries Limited v Banyan Tree Growth* SLP No 11404-11405/2020.
[309] *BVM Finance Private Limited v Vistra ITCL (India) Ltd. and Ors* OMP(I) (COMM) 177/2020.
[310] *Srei Equipment Finance Limited v Seirra Infraventure Private Limited* 2020 SCC OnLine Cal 1790.

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*[311], 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 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.*[312], rejected the argument that EIL, 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 EIL, 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

311 *Big Charter Private Limited v Ezen Aviation Pty Ltd and Ors* OMP(I) (COMM) 112/2020.
312 *Odeon Builders v Engineers India Ltd* ARBP 247/2020.

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*[313] 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 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.*[314] 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*[315] was whether, at the stage of considering the petitioner's request for the appointment of an arbitrator, it was only the existence of an

313 *Tata Projects Ltd v Oil & Natural Gas Corporation Ltd* ARBP 302/2020.
314 *Vishranti CHSL v Tattva Mittal Corporation Pvt Ltd* ARB APP (L) 3311/2020.
315 *Sanjiv Parkash v Seema Kukreja & Ors* ARBP 4/2020.

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.

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*[316] 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*[317] 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*[318], 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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316 *Supreme Cylinders Ltd v SP Donadkar& Ors* Arbitration Petition-E Case No 2432 of 2020.
317 *Manoj v Shriram Transport Finance Company Limited* OP (C) No 312 of 2020.
318 *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*[319], 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.

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*[320], 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*[321], 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

[319] *Finnish Fund for Industrial Corporation Ltd v VME Precast Pvt Ltd and Ors* [2020] 8 MLJ.
[320] *ABB India Ltd v Bharat Heavy Electricals Ltd* [2020] 275 DLT 418.
[321] *GE Power Conversion Pvt Ltd v PASL Wind Solutions Pvt Ltd* R/Petition under Arbitration Act No. 131 of 2019 and 134 of 2019.

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 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*[322] by relying on Supreme Court's decision in *INDTEL. Technical Services Pvt. Ltd. v. W.S. Atkins PLC*[323] 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

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

- 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.
- 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*[324], 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*[325], 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. 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-

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

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.

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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.*[326], 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*[327], 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.

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

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

In *Future Retail Ltd. v. Amazon.com Investment Holdings LLC*[328], 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'.

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