FOREWORD

MR. NITIN G. THAKKER

Senior Advocate at Bombay High Court and President of Bombay Bar Association

"Not only did the British establish the framework for the modern Indian judicial system, but they were also instrumental in the creation of the myth that dispute resolution and justice, require black coats and gowns and elaborate arguments. It is time to dispel such myths and notions. The reality is most of the litigants in India suffer from many social and economic constraints. What they need is a quick, inexpensive and convenient method of dispute resolution."

~ N.V. Ramana, Chief Justice of India

In today's world, alternative forms of dispute resolution provide for a cost-effective, time-saving and convenient medium to resolve disputes for parties. These alternative methods of dispute resolution reject the traditional "winner-takes-all" approach that is usually followed in our adversarial court systems. Instead, these mechanisms tend to differentiate themselves by offering parties the autonomy and the freedom to work together to find a middle ground. These principles of party autonomy and the freedom of the parties to select an appropriate process for their dispute are the heart and soul of Alternative Dispute Resolution (ADR). In recent years, a concerted effort has been undertaken by the Judiciary, the Legislature and the Arbitral institutions to streamline the ADR mechanisms to offer parties an effective and efficient mode of dispute resolution. The development of the jurisprudence shows the materialization of the pro-arbitration paradigm, as evidenced by recent key rulings in the cases of PASL Wind Solutions Pvt. Ltd. case and the Amazon v. Future Retail Ltd. case. In these cases, the Supreme Court has taken a liberal view which has allowed parties to opt for a foreign seated arbitration and has also recognized the powers of emergency arbitrators to pass awards under the purview of the Arbitration Act. Further the Indian Parliament heralded a critical change by way of the Arbitration & Conciliation (Amendment) Act, 2021 by way of introducing an automatic stay on arbitral awards on the sole grounds of prima facie evidence of fraud and corruption. Further, the amendment widened the scope of qualification of the Arbitrators by deletion of the Eighth Schedule. While the ramifications of the amendment remain to be observed, these developments warrant a closer

scrutiny to ensure consistency with the wider policy objectives of the Indian Government in establishing a pro-arbitration regime.

Additionally, with the changing times, new and unprecedented challenges such as the COVID-19 pandemic forces us to rethink the workings of the institutions, hence prompting parties to place a greater reliance on ADR. The responsibility falls primarily on the professionals to deliver effective services which can satisfy the requirements of the industry within the set of constraints imposed.

The trend in the international agreements is to resort to Mediation before embarking upon the Arbitration which is not only very expensive but sometimes it is not conducive to the sensitive nature of the product/process/services involved in the agreement and the reputed companies do not wish the disputes to be discussed in litigating forum. While in India some commercial contracts do have such pre arbitration mediation clause, the mediation in India was largely restricted to disputes in matrimonial and family matters.

There is a legislative recognition to mediation in all matters in the sense, Section 89 of the Code of Civil Procedure, 1908 was introduced with effect from 1st July 2002. Accordingly, the Court in a civil suit is empowered to formulate terms of possible settlement and refer the parties to arbitration or conciliation or Lok Adalat or mediation. Moreover, by virtue of Section 12A of the Commercial Courts Act it is mandatory in commercial suits which do not involve urgent interim relief to go for pre- institution mediation. Thus, Mediation is also uppermost in the minds of the legislature, courts and arbitrators. It is for us, the future generation, to understand nuances of each mode of ADR and advise accordingly.

In light of the aforementioned discussion, it is evident that attaining updated information about the developments in ADR and understanding the academic discourse on the subject becomes all the more important for students, academicians and professionals who wish to engage in this field. The GNLU SRDC-ADR magazine would thus serve as a great companion to all the aforementioned individuals.

The magazine promotes interdisciplinary research and identifies the evolving trends in the practice of ADR. Moreover, it employs high publication and editorial standards in order to deliver articles of high caliber and insight. The Magazine, under the able guidance of the University faculty, its advisors, peers and benefactors along with the support of the administration and dedication of its members, has undertaken progressive measures to live up to its essential function of imparting

knowledge of ADR to its readers. It is sincerely hoped that the readers will take advantage of the research material presented in this issue.

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 THE EDITORS

We ensue this note by expressing our immense gratitude to the readers, advisors, contributors and everyone associated with this magazine and the unconditional support that has been extended to the magazine. Their impervious faith in our objectives has been instrumental and enlivening to the success of the inaugural issue of the Magazine. With the magazine making new inroads and gaining recognition, we hope that it obtains a wider readership and becomes a medium for catalysing free exchange of thoughts and a credible platform for learning amongst the section of students and professionals engaged in Alternative Dispute Resolution.

For the fifth edition of the Magazine, the editors are pleased to present the feature interview conducted on 28th August, 2021 with Mr. Gourab Banerji, Senior Advocate in the Supreme Court of India and one of the leading experts in the field of Arbitration in India. He was most solicitous in sharing his insights and advice with the editorial team. We take this opportunity to extend our gratitude to Mr. Banerji for engaging with us.

Volume II Issue II of the ADR Magazine features six submissions bearing the following titles: *Whose arbitration is it anyway? Non-signatories?; Emergency Arbitrator Orders: a re-look at enforcement in India; Identifying E-Arbitration Issues in the Digital Labyrinth; Clearing the Fog: A Perspective Towards the Enforcement of Pre-Arbitral Clauses; The Unsolved Conundrum: Post-award interim measures granted by courts under Section 9 of the Arbitration and Conciliation Act, 1996; Revisiting the principles of Party Autonomy, Public Policy, Foreign Awards & Interim Reliefs w.r.t foreign seated arbitration of Indian parties.*

Academic integrity and quality of research have always been the non-negotiable requirements of the GNLU Academia. The same have 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 recognized by our readers and contributors and they continue to extend their support 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.

WHOSE ARBITRATION IS IT ANYWAY? NON-SIGNATORIES?

- **Vijayendra Pratap Singh, Senior Partner, Abhijnan Jha,**
Senior Associate and Abhisar Vidyarthi, Associate
Litigation Team, AZB & Partners, New Delhi

Introduction

Arbitration is a consensual mechanism for dispute resolution, and therefore, the consent to arbitrate is a fundamental and indispensable prerequisite to an arbitration agreement.[1] Ordinarily, parties manifest their intent to be bound by an arbitration agreement by being signatories to the contract containing such an agreement. However, the formal execution or the signature of parties is not a pre-condition for a valid arbitration agreement,[2] and courts and tribunals across various jurisdictions have developed theories to bind non-signatories if circumstances exist to demonstrate their intent to be a party to the arbitration agreement.[3] These theories include both purely consensual theories (e.g., agency, implied consent, assumption, assignment, third party beneficiary) and non-consensual theories (e.g. estoppel, alter-ego).[4] The underlying objective of these theories is to stay true to the commercial realities of modern business transactions, which commonly involve multi-party and multi-agreement arrangements.

Given the increasing number and complexity of commercial transactions between national and international groups of companies, courts and tribunals have been constantly confronted with issues pertaining to binding non-signatories to arbitration, particularly in India.[5] The reason being that for financial, regulatory, taxation and/or other commercial reasons, there is an increasing lack of a clear identity of the companies that sign the agreement and the companies that perform it.[6] Binding non-signatories to arbitration, when the circumstances warrant so, is a reasonable and pragmatic approach as it brings together all the parties that are closely connected and relevant to a disputed transaction or breach before a single forum. Moreover, it also allows affiliated entities or intimately connected parties, who have been materially involved in negotiations and

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[1] Gary Born, *International Commercial Arbitration* (3rd edn, Wolters Kluwer 2020) 280–81.
[2] Charlie Caher, Dharshini Prasad and Shanelle Irani, 'The Group of Companies Doctrine - Assessing the Indian Approach' (2021) 9(2) IJAL 33, 34 <http://www.ijal.in/sites/default/files/Vol9Issue2/3_Group_of_Compaies_Doctrine_Assessing_the_Indian_Approach-CharlieCaher_DharshiniPrasad_ShanelleIrani.pdf> accessed 5 July 2021.
[3] cf Born (n 1).
[4] cf Born (n 1).
[5] Bernard Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A comparative Study* (2nd edn, Kluwer Law International 2020) 95, 96.
[6] ibid.

performance of the concerned contract, to be subjected to and/or benefit from the presence of the arbitration agreement entered into by another affiliated entity. This approach not only ensures cost and time efficiency but also limits parallel litigations in multiple forums and the consequential risk of conflicting decisions.[7] Even from a commercial efficiency or business common sense standpoint, binding non-signatories to arbitration allows related or overlapping disputes arising out of a single integrated transaction between related commercial parties to be resolved in a single forum.

Nevertheless, binding non-signatories to arbitration acts as an exception to the strict principles of 'separate legal personality of a company' and 'privity of contract,' and therefore, it remains a prominent and constantly disputed phenomenon in arbitration law and practice.[8] India is one jurisdiction that has strongly embraced the principles underlying binding non-signatories to arbitration. Indian courts have regularly dealt with this issue and have largely portrayed a general consensus that non-signatories may be bound by an arbitration agreement if the circumstances demonstrate that it was the mutual intention of all parties to bind signatories as well as non-signatories.[9] This article discusses the prevailing position in India with respect to binding non-signatories to arbitration and analyses certain essential questions arising out of the same.

India's tryst with non-signatories

In India, the seminal case with respect to binding non-signatories to arbitration is *Chloro Controls India Pvt. Ltd. v Severn Trent Water Purification Inc.* ["**Chloro Controls**"].[10] In this case, the Supreme Court of India ["**Supreme Court**"] opined that various legal bases arising out of implied/specific consent or judicial determination may be applied to bind a non-signatory to arbitration.[11] The Supreme Court recognised two distinct theories to bind non-signatories to arbitration. The first theory, which includes 'implied consent,' 'third party beneficiaries,' 'guarantors,' 'assignment', and other transfer mechanisms of contractual rights, relies on the discernible intentions of the parties and, to a large extent, on the good-faith principle.[12] This theory applies to both private and public legal entities.[13] The second theory, which includes the legal doctrines of agent-principal relations,

[7] *Ayyasamy v A Paramasivam* (2016) 10 SCC 386 [48]-[50].
[8] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (1st edn, OUP 2005) 162; Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (1st edn, OUP 2010) 149.
[9] *Chloro Controls v Severn Trent* (2013) 1 SCC 641 [71]-[72].
[10] ibid.
[11] ibid [103], [107].
[12] ibid [103.1].
[13] *Chloro Controls* (n 9) [103.2].

apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel, does not rely on the parties' intention but rather on the force of the applicable law.[14]

Notably, in *Chloro Controls*, the Supreme Court also adopted the group of companies doctrine, wherein it held that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns if the circumstances demonstrate that the mutual intention of all the parties was to bind both, signatories as well as non-signatory affiliates.[15] The Supreme Court highlighted that such circumstances could include (i) direct relationship with the party signatory to the arbitration agreement; (ii) direct commonality of the subject matter; (iii) the agreement between the parties being a composite transaction; and (iv) parties, especially the non-signatory, engaging in conduct that demonstrates its consent to be bound by the arbitration agreement.[16] The applicability of the group of companies doctrine was recognised to be premised on gauging the common intention of the parties and examining whether the performance of the agreements in question is intrinsically intermingled or interdependent on each other for achieving a common object.[17]

Chloro Controls was rendered under Section 45 of the Arbitration and Conciliation Act, 1996 ["**Act**"] (Part II),[18] i.e. in respect of foreign seated arbitrations.[19] Subsequent to *Chloro Controls*, the Supreme Court has further developed the principles underlying binding non-signatories to arbitration in several other cases. In *Ameet Lalchand Shah v Rishabh Enterprises* ["**Ameet Lalchand**"], the Supreme Court extended the principles expounded in *Chloro Controls* to an application under Section 8 of the Act (Part I), i.e. in respect of India seated arbitrations.[20] In this case, the Supreme Court ruled that when the agreements are inter-connected, and several parties are involved in a single commercial project, i.e. executed through different agreements, all the parties can be subjected to arbitration.[21] In doing so, the Supreme Court highlighted that courts and tribunals should impart a sense of business efficacy to the commercial understanding of the parties, i.e. reflected in such interconnected agreements.[22]

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[14] *Cheran Properties v Kasturi and Sons* (2018) 16 SCC 413 [28].
[15] *Chloro Controls* (n 9) [71]-[74].
[16] *Chloro Controls* (n 9) [73], [74], [76], [108]; *Cheran Properties* (n 15) [20], [21], [23]-[28].
[17] *Chloro Controls* (n 9) [74].
[18] The Arbitration & Conciliation Act 1996, s 45.
[19] *Chloro Controls* (n 9) [95]-[96].
[20] (2018) 15 SCC 678 [13], [16]-[18], [24]-[35].
[21] ibid [25].
[22] ibid [35]; See also *Ayyaswami* (n 7) [25]; *Cheran Properties* (n 14) [23].

In *Cheran Properties v Kasturi and Sons* ["**Cheran Properties**"], the Supreme Court applied the group of companies doctrine to enforce an award against a non-signatory.[23] In this case, it was opined that the application of the group of companies doctrine requires unravelling, from a layered structure of commercial arrangements, the true essence of the business arrangement and also the intent to bind someone who is not formally a signatory but has assumed the obligation to be bound by the actions of a signatory.[24] The Supreme Court noted that under the group of companies doctrine, a non-signatory may be bound by an arbitration agreement where a group of companies exists and the parties have engaged in conduct (such as negotiation or performance of the relevant contract) or made statements indicating the intention assessed objectively and in good faith, that the non-signatory be bound and benefitted by the relevant contracts.[25]

Another important case in this regard is *MTNL v Canara Bank* ("**MTNL**").[26] In *MTNL*, the Supreme Court succinctly summarised the principles applicable in the application of the group of companies doctrine. [27] The Supreme Court affirmed that the intention of parties to bind non-signatories needs to be inferred from the terms of the contract, [28] the conduct of the parties and the correspondence exchanged. [29]

In light of these cases, it can be concluded that the different theories to bind non-signatories to arbitration, particularly the group of companies doctrine, are firmly established in the arbitration jurisprudence of India.[30] Incidentally, though in *Chloro Controls,* the Supreme Court had recognised several contractual and non-contractual means to bind non-signatories to arbitration, as evident from the above, the group of companies doctrine has been the foremost route adopted by parties/courts/tribunals in India. Since the adoption of the doctrine in *Chloro Controls*, in most cases concerning non-signatories, the doctrine has either been applied exclusively or in conjunction with other principles such as alter ego and piercing of the corporate veil. For instance, in cases such as *Shapoorji Pallonji and Co Pvt Ltd. v Rattan India Power Ltd* ["**Rattan India**"] and *GMR Energy v Doosan Power* ["**Doosan Power**"],[31] the Delhi High Court applied the group of companies

[23] *Cheran Properties* (n 14).
[24] *Cheran Properties* (n 14) [23].
[25] ibid [28]; Gary Born, *International Commercial Arbitration*, (2nd edn, Wolters Kluwer 2014) 1448-49.
[26] (2020) 12 SCC 767.
[27] ibid [9.4]-[10.5].
[28] ibid [9.4]-[10.5].
[29] ibid [10.5]. See also *KKR India Private Financial Services Ltd v Williamson Magor* OMP (I) (Comm) 459/2019 (Judgment dated 23 November 2020) [45].
[30] *Purple Medical Solutions Private Limited v MIV Therapeutics Inc & Another* (2015) 15 SCC 622.
[31] *GMR Energy v Doosan Power* (2017) SCC Online Del 11625; *Shapoorji Pallonji & Co v Rattan India Power Ltd* ARB P 716/2019 (Judgment dated April 7, 2021).

doctrine along with the theory of alter-ego. [32] In fact, the application of the group of companies doctrine carries with itself the underlying principles of purely contractual theories such as 'implied consent' and 'third party beneficiary'. However, it remains to be seen how Indian courts and tribunals exclusively apply the other possible theories recognised in *Chloro Controls* to bind non-signatories.[33] In this regard, the Supreme Court may consider clarifying that the application of these theories to bind non-signatories is not contingent on the phrase '*claiming through or under*' under Sections 8 and 45 of the Act, respectively.[34] This proposition causes unwarranted confusion. The reason being that not only do tribunals exercise this power under Section 16 of the Act, but even courts exercise the same under sections other than 8 and 45.[35]

Therefore, the theories to bind non-signatories to arbitration may apply to bind a non-signatory, in its own right, regardless of whether a party is '*claiming through or under*' a party to the arbitration agreement.

Binding non-signatories to arbitration is in consonance with the Act

The Act supports the position of non-signatories being bound by arbitration agreements. A 'party' is defined under Section 2(1)(h) of the Act as a 'party to the arbitration agreement' and, crucially, not as a 'signatory' to the arbitration agreement.[36] This position is further evident from the plain language of Section 7(4) of the Act, which provides that only one of the modes of forming an arbitration agreement is through a document signed by the parties. Section 7 of the Act recognises that an arbitration agreement may also be formulated by an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or by acquiescence, wherein an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.[37] The Supreme Court in *Cheran Propertie*s affirmed this position and opined that the requirement under Section 7 of the Act for the agreement to be in writing does not exclude the possibility of binding third parties who may not be signatories to an agreement between two contracting entities.[38] Therefore, the requirement of

[32] See ibid, *Rattan India* [27].

[33] See *Anheuser Busch Inbev India Limited v East Godavari Breweries* Civil Miscellaneous Petition No 304/2019 (Judgment dated March 31, 2021) [20]-[31], [34]; *Scarpe Marketing Private Limited & Others v Anheuser Busch InBev India Limited & Others* SLP (C) No 6908 of 2021 (Judgment dated June 29, 2021).

[34] *Gemini Bay Transcription Pvt Ltd v Integrated Sales Service Ltd and Another* 2021 SCC OnLine SC 572 [39].

[35] *MTNL* (n 26); *Doosan Power* (n 27); *Purple Medical Solution* (n 30).

[36] The Arbitration and Conciliation Act 1996 Act, s 2; *MTNL* (n 26) [9.2]-[9.4], [10.3], [10.10], [20]-[28]. See also *Govind Rubber v Louis Dreyfus* (2015) 13 SCC 477 [15], [16], [21], [23].

[37] The Arbitration and Conciliation Act 1996 Act, s 7.

[38] *Cheran Properties* (n 14) [25].

Section 7 is that the arbitration agreement should be in writing and not that it should be signed by the parties.[39]

Pertinently, the issue as to the existence of a valid arbitration agreement in writing under Section 7 is distinct from a determination as to which parties are bound by the arbitration agreement. The same has been explained by the Supreme Court in *Chloro Controls*, wherein it has highlighted "*[o]nce it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it [and that] The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope*."[40] In other words, the ambit of Section 7 does not concern the *ratione personae* jurisdiction of a tribunal, which includes the issue of whether or not non-signatories can be subjected to arbitration. Therefore, there is no restriction in the Act for Indian courts or tribunals to bind non-signatories to arbitration.

Conclusion

The Supreme Court has evidently been at the forefront of an increasing international consensus on the manner in which courts and tribunals can bind intimately related non-signatory parties to arbitrations. In this regard, the Supreme Court has adopted a business sense and commercial lens while dealing with composite and integrated transactions and agreements. The approach taken with respect to the *ratione personae* jurisdiction of a tribunal is pragmatic, wherein the factual circumstances are considered to examine if there is a composite transaction involving affiliated entities who are not only intimately involved in the same transaction but also have a collective bearing on the dispute.

However, while the theories to bind non-signatories to arbitration are well established in India, their application on the particular facts of each case remains a contentious issue. The reason is that courts and tribunals are expected to conduct a consent-based factual enquiry to ascertain whether a non-signatory ought to be brought within the scope of an arbitration clause it has not expressly acceded to. There cannot be a straightjacket formula for this enquiry because the specific factual matrix of each case needs to be considered to ascertain the existence and degree of relational intimacy as well as the presence of an indivisible common intention of the parties to resolve their disputes before a single forum. Therefore, courts and tribunals should be cautious while dealing with such situations. For instance, the mere existence of a group/affiliate companies arrangement

[39] *MTNL* (n 26) [9.3]; *Carvel Shipping Services Private Limited v Premier Sea Foods Exim Private Limited* (2019) 11 SCC 461 [8]; *Babaji Automotive v Indian Oil Corporation Limited* (2005) SCC Online Cal 291 [10]-[11].
[40] *Chloro Controls* (n 9) [106].

will not in itself warrant the application of the group of companies doctrine. There needs to exist an intimacy between the parties as well as an indivisibility of the transactions in question to warrant the inclusion of a non-signatory in arbitration.

EMERGENCY ARBITRATOR ORDERS: A RE-LOOK AT ENFORCEMENT IN INDIA

- *Rajendra Barot, Senior Partner,*

Prabhav Shroff, Senior Associate,

Neeraja Balakrishnan, Senior Associate

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Introduction

Resolution of disputes through arbitration is now commonplace in contracts around the world. It was common to have *ad hoc* arbitrations, i.e., where the arbitration tribunal decides the procedure. However, for the last two decades, parties are choosing to incorporate institutional rules as part of their arbitration agreements, in large part on account of the clear procedural mechanisms and streamlined processes tailored into these rules. A peculiarity found in several rules, which is not provided for in the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], is the appointment of an emergency arbitrator ["**EA**"].

Who is an EA?

Simply stated, an EA is appointed at the instance of one party to provide interim relief of conservatory measure, which is so urgent that it cannot await the constitution of the arbitral tribunal in accordance with the arbitration agreement. Most major institutional rules contain provisions for the appointment of an EA.[41] Even homegrown institutions such as the Mumbai Centre for International Arbitration Rules, 2016[42] and the Delhi International Arbitration Centre Rules, 2018,[43] have adopted rules containing EA provisions.

Our attempt

[41] International Chamber of Commerce Rules, 2021, r 29; Singapore International Arbitration Centre Rules, 2016 Rules, r 30.2 r/w Schedule 1; London Court of International Arbitration Rules, 2020, art 9B; International Centre for Dispute Resolution Rules, 2021, art 7; Hong Kong International Arbitration Centre Rules, 2018, art 23.1 r/w Schedule 4.
[42] Mumbai Centre for International Arbitration Rules, 2016, Rule 14.
[43] Delhi International Arbitration Centre Rules, 2018, Rule 14.

In this article, we analyse the following aspects of EA provisions in the Indian arbitration landscape:

(i) First, is an EA (not being the tribunal appointed by the parties) inherently incompatible with the arbitration, which is necessarily a creature of contract?
(ii) Second, once armed with an EA's order, what recourse is available to a successful party against the counterparty, to ensure compliance with the order?

Effect of an EA order

Answering the first question in the negative, a Single Judge of the Delhi High Court held that the definition of "*arbitral tribunal*" under Section 2(1)(d) of the Arbitration Act is wide enough to include an EA, who was for all intents and purposes an arbitrator under the Arbitration Act.[44] An appeal was preferred to the Division Bench against the above order, pursuant to which the above order was stayed.[45]

The Single Judge's decision stands to reason. Section 2(8) of the Arbitration Act mandates the inclusion of arbitral rules referred to in the arbitration agreement when referring to the arbitration agreement. Therefore, where parties have chosen a set of institutional rules which contains EA provisions, they should not be allowed to disavow these very rules. Singapore, for instance, amended its international arbitration statute in 2012 to include an EA in the definition of "arbitral tribunal".[46] India's Law Commission, in its 246th Report, pursuant to which the Arbitration Act was amended in 2015, also recommended the amendment of Section 2(1)(d) of the Arbitration Act to include an EA.[47] However, this suggestion did not find its way into the amendment.

A Special Leave Petition was filed in the Supreme Court which was disposed of on August 6, 2021, resolving the above issue. A Bench of Justices Nariman and Gavai unequivocally held that "tribunal" as used in Part I of the Arbitration Act, would include an EA and that an EA's order is an order under Section 17(1) of the Arbitration Act.[48] The Court also held that there was "*nothing inconsistent*" between the Arbitration Rules of the Singapore International Arbitration Centre, 2016 (being the institutional

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[44] *Amazon.com NV Investment Holdings LLC v Future Coupons Private Limited & Ors* 2021 SCC OnLine Del 1279 [144].
[45] *Future Coupons Pvt Ltd & Ors v Amazon.com NV Investment Holdings LLC & Ors* 2021 SCC OnLine Del 4101.
[46] International Arbitration Act, s 2(1) (c 143A).
[47] Law Commission of India, *Report No 246: Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No 20, 2014) 8, 37.
[48] *Amazon.com* (n 4) [19]-[20].

rules chosen by the parties, which includes the EA provision) on the one hand, and the Arbitration Act, on the other.[49] The Court also gave credence to the Law Commission's 246th Report noting that merely because a recommendation of a Law Commission Report is not followed by Parliament, it would not necessarily lead to a conclusion that such recommendation cannot form part of the statute.[50]

Enforcement of an EA order

The second aspect is decidedly more vexed than the first, and there are varying decisions depending on whether the arbitration is India-seated or seated outside India. Insofar as India-seated arbitrations are concerned, the *Amazon* series of judgements continue to be the guiding authorities. The Single Judge held that the EA's order was an order under Section 17(1) of the Arbitration Act and was capable of being enforced under Section 17(2) thereof.

The Supreme Court's decision affirmed the Single Judge's ruling on this aspect also and made it clear that an EA's order, being an order under Section 17(1) of the Arbitration Act is capable of being enforced as an order of the count, under Section 17(2) of the Arbitration Act.[51] The Supreme Court also considered the maintainability of an appeal against an order directing enforcement (under Section 17(2) of the Arbitration Act) of an EA's order. In doing so, the Court considered the question of appealability under Section 37 of the Arbitration Act, and under Order XLIII of the Code of Civil Procedure, 1908 ["**CPC**"].

As regards an appeal under the Arbitration Act, the Supreme Court confirmed that an order declining or granting interim relief by an EA (i.e., an order under Section 17(1) of the Arbitration Act) would be maintainable under Section 17(2) thereof.[52] However, no appeal is available under Section 37 against an order under enforcing the EA's order under Section 17(2).[53]

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[49] *Amazon.com* (n 4) [22].
[50] *Amazon.com* (n 4) [27].
[51] *Amazon.com* (n 4) [40].
[52] *Amazon.com* (n 4) [74].
[53] *Amazon.com* (n 4) [76].

As regards an appeal under the CPC, the Court held that no such appeal would be maintainable. The Court based its decision on the well-established principles that the Arbitration Act is a self-contained code, and that the general law (CPC) must yield to the special law (Arbitration Act).[54]

With respect to foreign-seated arbitrations, these are governed by Part II of the Arbitration Act. Part II contains no provision analogous to Section 17 of the Arbitration Act, which provides for the enforcement of an EA's order and is limited to the enforcement of "foreign awards".[55]

Therefore, strictly speaking, the only mechanism for the enforcement of an EA would be by filing a suit.[56] This is less than desirable for a number of reasons. First, the purpose of an EA's order is, above all else, expediency. Suits in India are notoriously slow to progress, with courts on account of their slow disposal rate and overburdened systems – an article by The Hindu in September 2015, asserted that nearly thirty percent of cases filed remained pending for two to five years, with over ten percent of cases pending for over ten years.[57] Keeping these statistics in mind, by the time an EA's order is "enforced" by way of a suit, it is almost certain that the main arbitral proceedings themselves would have concluded.

In some cases, courts permit parties to resort to Section 9 of the Arbitration Act, which deals with Court-ordered interim measures. While this provision falls under Part I of the Arbitration Act, it is one of a handful of sections that are made applicable to both India and foreign seated arbitrations (in the case of the latter, it may be excluded by agreement).

The Bombay High Court dealt with a case where a party filed proceedings under Section 9 of the Arbitration Act seeking the same reliefs as those granted to it by an EA's interim award. The counterparty argued that this was an abuse of process, as the Petitioner was seeking to "enforce" the EA's award through Section 9 rather than through Section 48 of the Arbitration Act (which deals with grounds on which enforcement of a foreign award can be resisted).[58] The Petitioner, on the other hand, simply argued that it was making a choice to approach the Court under Section 9 of the

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[54] *Amazon.com* (n 4) [69]-[70].

[55] The Arbitration and Conciliation Act 1996, s 44 and 53.

[56] *Raffles Design International India Pvt Ltd & Anr v Educomp Professional Education Ltd & Ors* 2016 SCC OnLine Del 5521.

[57] Rukmini S, 'District courts will take 10 years to clear cases', *The Hindu* (New Delhi, 27 September, 2015).

[58] *HSBC PI Holding (Mauritius) Limited v Avitel Post Studioz Ltd Arbitration Petition 1062 of 2012*, Order dated January 14, 2012 [52].

Arbitration Act and was not enforcing the EA's award.[59] The Petitioner succeeded, and the Court granted relief. An appeal against this order also came to be dismissed, with the appellate court holding that the existence of the EA award "[*made*] *no difference*".[60]

A similar approach was adopted by a Single Judge of the Delhi High Court, who granted reliefs under Section 9 of the Arbitration Act. Holding that Section 9 of the Arbitration Act could not be resorted to for enforcement of an EA's award, the Court nonetheless held that it could "*independently apply its mind and grant interim relief in cases where it is warranted*".[61] However, the converse is not true. Where a party does not succeed before the EA, it is not permitted to avail of a second opportunity before Courts under Section 9 of the Arbitration Act.[62] The Division Bench in this appeal upheld this finding and distinguished *Raffles* on account of subsequent events therein, which had indicated the respondents' reluctance to comply with the EA's order, which had influenced the Court's decision to grant protective relief.[63]

The availability of Section 27(5)

Section 27(5) of the Arbitration Act specifically permits Indian courts to subject a party acting in contempt of an arbitral tribunal in the conduct of the arbitral proceedings to appropriate disadvantages, penalties and punishments on the representation of the arbitral tribunal. Section 27 provides as follows.

> "***27. Court assistance in taking evidence.***—*(1) The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*
>
> *(2) The application shall specify*—
>
> ….

[59] ibid.
[60] *HSBC PI Holding (Mauritius) Limited v Avitel Post Studioz Ltd* [2014] SCC OnLine Bom 929, [28].
[61] *Raffles Design International India Pvt.Ltd. & Anr v Educomp Professional Education Ltd & Ors* [2016] SCC OnLine Del 5521 [105].
[62] *Ashwani Minda & Ors v U-shin Limited and Ors* 2020 SCC OnLine Del 1648.
[63] *Ashwani Minda v U-Shin Limited* 2020 SCC OnLine Del 721, [46] and [49].

> *(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.*
>
> ….
>
> *(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence,* ***or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings*** *shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court."*
>
> (**Emphasis** added)

Section 2(2) of the Arbitration Act makes it clear that subject to an agreement to the contrary, recourse to Section 27 is available in respect of an international commercial arbitration seated outside India. Accordingly, any violation by a person subject to the Indian Courts' jurisdiction of an order passed by an arbitral tribunal, wherever it may be seated, is punishable as civil contempt of Court.

Any person failing to comply with an order of the arbitral tribunal is deemed to be "*making any other default*" or "*guilty of any contempt to the arbitral tribunal during the conduct of the proceedings*" under Section 27(5). The term "*contempt to the arbitral tribunal during the conduct of arbitral proceedings*" in Section 27(5) has been broadly interpreted by the Supreme Court of India to include contempt by a party of the interim orders of an arbitral tribunal.[64] The purpose of this provision is to give teeth to the interim orders of a tribunal.

This would require the other party is to apply to the arbitral tribunal for making a representation to the Court to meet out such punishment, penalty to the guilty party, as would have been incurred for default in or contempt of the Court. Upon the referral or representation of an arbitral tribunal, the appropriate Indian Court will be competent to deal with the party in default under the provisions of the Contempt of Court Act, 1971 and Order 39 Rule 2-A of the Code of Civil Procedure, 1908. This may include the imposition of a fine, detention in a civil prison or attachment of property, depending on the nature of contempt.

[64] *Alka Chandewari v Shamshul Ishrar Khan* [2017] 16 SCC 119.

In practice, though, this remedy may not be as effective as it appears. Section 27(5), by its plain language, still requires a reference by the arbitral tribunal, and the arbitral tribunal itself ought to be willing to make such a reference. Whether arbitral tribunals agree to make this reference and whether that could lead to effective sanctions for contempt of an EA's award remain to be seen. Unfortunately, this could be one of those areas where reality overtakes the law. However, the Supreme Court's decision in *Amazon* is an encouraging milestone in ensuring that remedies within the arbitral process are not rendered toothless or academic.

IDENTIFYING E-ARBITRATION ISSUES IN THE DIGITAL LABYRINTH

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Introduction

Legal technology in the process of delivering legal services is usually viewed as the use of software and technology. This disrupts the approach used by traditional legal services and extends to the domain of international business arbitration by the buzz phrase "e-arbitration". The objective of this article is to discuss the most relevant topics of e-arbitration. The article first defines e-arbitration, along with an overview of some of its service providers. It further addresses the use of information technology ["**IT**"] in international arbitration. The authors conclude with an analysis of key legal issues arising when various aspects of the arbitral process are commenced, conducted or concluded in digital form.

What is E-arbitration?

The influence of technological advances on legal practice is still impossible to anticipate. Including various digital solutions under the aggregate name "Legal Tech", they join the legal market and serve the usual goals of the competence of a lawyer. Although their level of ambitiousness and sophistication varies, these methods are usually considered to cause disturbances in the legal sector.[65] In the field of arbitration, this includes a picture of a future in which conflicts are resolved exclusively by artificial intelligence,[66] which is a striking scene for a large number of dispute practitioners. However, this ought not to dissuade the adoption of modern aspects into the arbitral practice as well.

[65] Kai Jacob/Dierk Schindler/Roger Strathausen, 'Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry' (2017) <https://link.springer.com/book/10.1007%2F978-3-319-45868-7> accessed 28 August 2021.

[66] Paul Cohen/Sophie Nappert, 'The March of the Robots' (2017) (12) (1) Global Arbitration Review <https://shop.globalarbitrationreview.com/products/gar-volume-12-issue-1> accessed 19 June 2021.

In contrast to national courts, arbitration provides extraordinary procedural flexibility and is thus able to adapt to technological advancement considerably sooner.[67] Besides a few high-tech national judicial systems, South Korea arguably has the most apparent influence of technology.[68]

Form of arbitration which largely rely on IT have been used is recent terminologies, such as electronic arbitration, or e arbitration.[69] When the advent of e-commerce produced a need for the settlement of disputes through electronic communications, e-arbitration had its beginnings in the early 90s. While a definition of e-arbitration remains as elusive as predicting the form of technological progress, in light of the above considerations, it may be attempted as follows: "E-arbitration can be understood as the predominant use of IT for the arbitral process, whereby particularly the conduct of evidentiary hearings, but also the formation of the arbitration agreement and the rendering of arbitral awards in electronic form constitute pertinent, but not constitutive, elements."

The purpose of this article is to provide an introduction to relevant matters arising in connection with e-arbitration (B2B) conflicts. It will describe the several methods in which IT is applied in contemporary arbitrary practice before considering possible legislative repercussions.[70]

Who Offers E-Arbitration?

In addition to the regulations on tailor-made arbitration, adequate technological infrastructure for online procedures and a technically skilled administration are required for electronic arbitration. Major international arbitration participants may best spend the subsequent costs. However, although most of the top arbitral institutions are the apparent options, they do not supply e-arbitration solutions, as stated above.[71] Instead, they use IT to assist conventional processes. The Online Dispute Resolution Center of the China International Economic and Trade Arbitration Commission ["**CIETAC**"] is one exception which concentrates on specific areas of law, such as the resolution of domain names and e-

[67] Latham and Watkins International Arbitration Practice, 'Guide to International Arbitration' (2017) <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017> accessed 28 August 2021.
[68] Amitav Mallik, 'SIPRI Research Report No. 20 Technology and Security In The 21st Century A Demand-Side Perspective' (2004) <https://www.sipri.org/sites/default/files/files/RR/SIPRIRR20.pdf> accessed 28 August 2021.
[69] Mohamed S. Abdel Wahab, 'ODR and e-Arbitration – Trends & Challenges' (2012) Online Dispute Resolution Theory and Practice, International Eleven Publishing <https://www.mediate.com/articles/ODRTheoryandPractice18.cfm> accessed 21 June 2021.
[70] Gabriele Kaufmann-Kohler/Thomas Schulz, 'The Use of Information Technology in Arbitration' (2005) Jus Letter <https://lk-k.com/wp-content/uploads/The-Use-of-Information-Technology-in-Arbitration.pdf> accessed 22 June 2021.
[71] ibid.

commerce issues.[72] As a result, smaller providers of full-scale e-arbitration services currently dominate the market.[73] These are frequently run by corporations, organisations, or private persons who are only marginally known in the arbitration community.[74] It cannot be assured that experienced users can all have the confidence to deal with trade disputes equally, particularly as sites range from highly professional designs and explanatory videos with well-known arbitrators to somewhat more confusing installations that feature on the welcome page payment methods and defenses against scam reports.[75]

At present, e-arbitration appears to be primarily directed at arbitral proceedings where the sum at issue is small, at least as compared to those of the arbitral institutions in question.[76] Whilst one factor may be that parties and arbitrators still prefer to have face-to-face meetings and at least several papers for more complicated cases, the lack of infrastructure needed to manage such huge cases could be another explanation. At the same time, significant arbitrations are more dependent on technology facilitation. The arbitral practice appears to be in the phase of steadily raising its technical support levels and, in turn, may lead in the future to greater use of e-arbitration for broader disputes.[77] It is useful to give you a brief review of the usage of IT in the current arbitration practice.

How is Technology used in Arbitration?

As part of the general process of digitalization, different services based on IT are more influential in international arbitration in the overall process of digitization,[78] making it probably the most efficient, economical and convenient. With the scope of current trend, the gradual absorption of current technologies should not be misconstrued as a pioneering action in the avant-garde business industry. The growth of the internet and electronic technology has redefined standards in business and law, and the increasing intolerance of users to sluggish proceedings and delays is a matter of arbitral practice.[79]

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[72] ibid.
[73] China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules 2014.
[74] cf Wahab (n 5).
[75] ibid.
[76] Pradeep Nayak/Sulabh Rewari/Vikas Mahendra/Keystone Partners , 'Arbitration procedures and practice in India' (2021) Thomson Reuters <https://uk.practicallaw.thomsonreuters.com/9-502 0625?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 24 June 2021
[77] Michael Reuter, 'CodeLegit Conducts First Blockchain-based Smart Contract Arbitration Proceeding' (2017) Datarella < https://datarella.com/codelegit-conducts-first-blockchain-based-smart-contract-arbitration-proceeding/> accessed 24 June 2021.
[78] United Nations, 'Digital Economy Report 2019: Value Creation And Capture: Implications For Developing Countries' (2019) < https://unctad.org/system/files/official-document/der2019_en.pdf> accessed 28 August 2021.
[79] Lars Markert/Jan Burghardt, 'Navigating the Digital Maze - Pertinent Issues in E-Arbitration' (2017) (27) (3) Journal of Arbitration Studies <https://www.koreascience.or.kr/article/JAKO201728642462610.page> accessed 25 June 2021.

To remain in demand, counsel, arbitrators and arbitral institutions are therefore required to continue technical progress.

This article does not aim to present a thorough list of the variants in the arbitration using IT. However, to analyse the specific legal concerns that arise from it, it is necessary to present a brief, basic concept of the technical context available in the arbitral procedures. Three types of variants shall therefore be referred to.

First and most obvious, information technology is used for written communication. According to an International Chamber of Commerce ["**ICC**"] Commission Report published in 2017, regarding *"Information Technology in International Arbitration"* ["**ICC Commission Report 2017**"], once the arbitral tribunal is constituted, written communication between and among the parties, the arbitrator(s) and the administering body often takes place exclusively in electronic form, with e-mail being the means of choice.[80] Despite this fact, it is unlikely that many people in arbitration circles would consider this to fall under the notion of e-arbitration.

Secondly, arbitral participants may transmit or store papers utilizing cloud-based services for file storage. Several case-management systems by major arbitral institutions to meet the needs of arbitral practice have been created and made available. These include the old "Net Case," the former web-based case-management tool for the ICC, and the "Web File" service of the American Arbitration Association ["**AAA**"] and the World Intellectual Property Organization ["**WIPO**"].[81] A wide range of files may be forwarded, regardless of size, through such services; this can only be performed in a restricted way by e-mail.

In contrast to e-mail services, case management instruments also make it easier for content related to a certain case to be organized and searched. Documents may be filed, marked by origin or substantive aspects systematically. The material can then be accessed whole or in part, regardless of where it is located, by a select number of people. Transmissions and exchanges can also be followed, and a comprehensive history of the procedure can be established. When a resourceful user applies those instruments, they exceed the benefits in terms of ease and efficiency of e-mail and offline document

[80] ibid.
[81] cf Kohler (n 6).

submission; not to mention the more nostalgic paper-based case-management tactics. These platforms often use default encryption techniques, which allow for greater privacy and data integrity than e-mail.

Apart from the offers furnished by arbitrators, companies, and business service providers, products have also been developed to transmit and host vast amounts of data electronically. The use of File Transfer Protocol ["**FTP**"] links to deliver documents and the use of cloud services to upload documents are not specific to arbitration.[82] Although FTP links are produced by secure servers, the cloud services typically give a provider ample right to submitted content, as provided by its terms.[83] This suggests that users are either uninformed of the legal consequences of using such software or, unwittingly, choose ease of use over secrecy.

Specialized litigation support providers, in addition to general service providers, provide cloud services with specific annotation and display choices for the documents kept throughout the evidentiary hearing.[84]

Thirdly, if an in-person hearing is not possible, video conferencing provides an option that permits hearings to take place across long distances without incurring the price of travel. Most professional legal firms and arbitral institutions now have sophisticated video conferencing gear and software, and, as with cloud storage, there is a variety of dependable commercial solutions. Despite the promise for increased efficacy and convenience, video conferencing remains a relatively uncommon replacement for in-person evidence hearings in arbitral procedures.[85] There may be some uncertainty about whether video conferencing can capture the instant and delicate impressions of a witness replying to questioning or the arbitral tribunal's reaction to petitions. Furthermore, having everyone in the same room may make it simpler for the arbitral panel to retain control over a highly contentious session.

Finally, technology has not yet evolved sufficiently to eliminate the potential of technical difficulties unexpectedly disrupting the proceedings, especially if the parties, witnesses, and three arbitrators are all participating in the video conference from different places. As a result, e-arbitration, as understood without an in-person hearing, remained the exception, except in minor situations. However, given that

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[82] WIPO, 'WIPO Online Case Administration Tools' <http://www.wipo.int/amc/en/ecaf/> accessed 26 June 2021.
[83] ibid.
[84] Andrew Haslam, 'In Conjunction with Complex Discovery E- Disclosure Systems- Buyers Guide 2021 Edition' (2021) (9) (1) <https://complexdiscovery.com/wp-content/uploads/2021/01/eDisclosure-Systems-Buyers-Guide-2021.pdf> accessed 27 June 2021.
[85] Sharon Miki, 'Video Conferencing for Lawyers: How to Video Conference Like a Pro' (2020) *Clio* < https://www.clio.com/blog/video-conferencing-for-lawyers/> accessed 28 June 2021.

video conferencing, at least for the questioning of individual witnesses or experts, is becoming more frequent, if not always without complications, this may alter in the coming years.[86]

To summarize, IT has altered parts of arbitral practice and has the potential to further simplify and make arbitral practitioners' tasks more efficient. The ICC Commission's thorough guideline on IT in international arbitration emphasizes the rising relevance of incorporating technology into arbitral procedures. However, as will be demonstrated under, e-arbitration presents several legal concerns that must be addressed to secure the legality of the arbitral procedures and their conclusion.

What are the key legal issues in e-arbitration?

The use of IT in arbitration necessitates a **(i)** reconsideration of due process, **(ii)** confidentiality, and **(iii)** the use of IT when issuing awards.

i. Can due process be observed?

Due process in arbitration consists of procedural norms that assure the impartiality and fairness of arbitral decision-making.[87] Due process violations frequently result in setting aside arbitral awards in national courts or the absence of international enforceability.[88]

The core principle is that the parties must have an equal opportunity to state their case, which is a fundamental procedural requirement. When the IT used during arbitral proceedings cannot be accessed or mastered equally by both parties, problems ultimately develop.[89] Such "virtual inequality" can be generated by disparities in the parties' financial resources, particularly if the expenses of acquiring the requisite technical infrastructure would place one party in financial jeopardy.[90] Inequality can also be caused by technological constraints; services may not be accessible internationally or may

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[86] Benjamin Button-Stephens, 'WeChat' App not for Hearing Evidence, Says Australian Court' Global Arbitration Review News (6 October 2016) < https://globalarbitrationreview.com/wechat-app-not-hearing-evidence-says-australian-court> accessed 30 June 2021.

[87] Matti Kurkela/Santtu Turunen, 'Due Process in International Commercial Arbitration' (2010) Oxford University Press <https://global.oup.com/academic/product/due-process-in-international-commercial-arbitration 9780195377132?cc=in&lang=en&> accessed 1 July 2021.

[88] Margaret Moses, 'The Principles and Practice of International Commercial Arbitration' (2017) Cambridge University Press < http://assets.cambridge.org/97805218/66668/frontmatter/9780521866668_frontmatter.pdf> accessed 1 July 2021

[89] Cf Wahab (n 5).

[90] cf Markert/Burghardt (n 15).

surpass a party's or its counsel's technological expertise. Having stated that, it is important to remember that inequity of means is nothing new in arbitral procedures.

A party may choose to engage a more costly law firm or undertake an expensive internal document review at the start of the litigation to be aware of potentially damaging content. Similarly, *"the use of information technology for internal reasons to prepare as best as possible does not need to be the opposing party's or the tribunal's concern."*[91] Equal treatment must be maintained primarily when IT is utilized to present the parties' case. The issue of equality is determined by the services used in each situation. Issues may be avoided once more by reaching a mutual agreement on the type of technology to be used in the arbitral proceedings, preferably during an early case management meeting and, if required, again before the evidentiary hearing. If required, the arbitral tribunal may need to assure equitable treatment by limiting the use of technology to the "lowest common denominator." The more technologically knowledgeable party can always raise the bar by instructing or educating the tribunal and the opposing party on how to utilize more sophisticated technology.

Another key procedural principle is the right to be heard in adversarial proceedings, meaning that parties must be given the opportunity to respond to submissions by their opponent and to instructions or comments by the arbitral tribunal.[92] This also entails that the arbitral tribunal is not to communicate with one party without the presence of the other. When arbitral hearings are conducted via online or video conferencing, technical failure can lead to the potentially unnoticed temporary exclusion of a party from the proceedings. To avoid such issues potentially affecting the enforceability of arbitral awards, technical safeguards need to be implemented that interrupt the arbitral proceedings as soon as one party is excluded or at least appropriately warn the arbitral tribunal about the issue. It will then be up to the arbitral tribunal, and less to the arbitral institution to take the appropriate steps and to also decide how to appropriately adjust the limited available hearing time.

The above shows that the principles of due process do not constitute an insurmountable obstacle to e-arbitration or electronically supported arbitration, as long as sufficient procedural and technical safeguards are implemented. Of course, these principles do not mean that the arbitral tribunal has to protect parties from their deliberate use of insufficient technology.

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[91] Gary B. Born, 'International Commercial Arbitration - Volume II: International Arbitral Procedures' (2014) Kluwer Law International <https://lrus.wolterskluwer.com/store/product/international-commercial-arbitration-volume-ii-international-arbitration-procedures/> accessed 3 July 2021.

[92] cf Markert/Burghardt (n 15).

ii. Can confidentiality be ensured?

While there is disagreement as to whether there is a general duty of confidentiality governing international arbitrations, the level of confidentiality and privacy achieved in the practice of arbitral proceedings is an important factor in many parties' decisions to choose arbitration over state court proceedings.[93] In arbitral procedures, confidentiality has a broad reach, affecting both the arbitrators, the arbitral institutions, and in many circumstances, the parties as well. In most cases, the parties will have a strong incentive to keep the substance of the conflict, if not the issue itself, hidden from third parties. This will frequently include the arbitration agreement, the submissions in a dispute, and the final award's substance. However, confidentiality is not a new concern in arbitral procedures; paper-based correspondence and in-person sessions are not immune in this sense either.[94] It is a repeating theme, emerging in ever-changing forms as the digitization of arbitration progresses.[95] In order to maintain trust in the electronic arbitral process, law firms are beginning to address cyber security problems, such as by raising awareness of the issue and offering extensive guidelines.

iii. Can arbitral awards be validly issued in electronic form?

As previously said, while electronic versions of arbitration agreements may become more frequent in the future, electronic arbitral awards may remain science fiction for some time.

Arbitral verdicts must meet formal criteria set by national arbitration laws, which in most circumstances include written form and the signature of at least one arbitrator.[96] Failure to comply with these criteria may result in an invalid, and hence unenforceable award or cause the award to be set aside later.[97] As with arbitration agreements, the question to be answered is whether such form requirements may be met in electronic form.[98] Once again, some governments have tackled the issue through the law, either directly or indirectly. Where such regulations do not exist, the likelihood of a progressive interpretation of the in-writing requirement being recognized by competent courts is substantially lower than for arbitration agreements. In contrast to the latter, the arbitral award is a

[93] Queen Mary University of London, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <http://www.arbitration.qmul.ac.uk/research/2015/> accessed 3 July 2021.
[94] cf Markert/Burghardt (n 15).
[95] International Court of Arbitration, 'Dispute Resolution Services' < https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> accessed 28 August 2021.
[96] Arbitration Act of Korea 2010, art. 32 (1).
[97] Reinmar Wolff/Christian Borris, 'New York Convention - Convention on the Recognition and Enforcement of Arbitral Awards of 10 June 1958 – Commentary' (2012) < https://www.worldcat.org/title/new-york-convention-convention-on-the-recognition-and-enforcement-of-foreign-arbitral-awards-of-10-june-1958-commentary/oclc/822653392> accessed 4 July 2021.
[98] cf Wahab (n 5).

document capable of triggering domestic legal enforcement. This appears to prevent the application of interpretive concepts derived from contract law and even calls for a restricted interpretation of applicable form requirements.

The structure of an arbitral award is also significant in terms of its foreign recognition and enforcement under the New York Convention. In the absence of specific restrictions, formal requirements are considered in the context of the Convention's underlying definition of arbitral decisions. Given that the Convention's openness to technical development is confined to arbitration agreements, a similarly progressive reading of the form requirements for arbitral judgments may be ruled out.[99]

Conclusion

The legal environment and the field of international arbitration are not exceptions to technological advancement. New developments should thus be taken into consideration and used in the arbitration procedure. E-arbitration is such a new development and may be regarded as electronically performed, especially in respect of evidence hearings, and arbitration of its essential elements. Currently, disagreements over modest sums of money under the aegis of specialist providers largely appear to be resolved. However, as technology is advancing and users are striving to make arbitral procedures more successful, this might soon be changing. The use of technology in international arbitrations of all sizes and complexity is rising, and the gap in what is now called specialist e-arbitration is being steadily broken. In the near future, e-arbitration services might become solid in the world of international business arbitration if trustworthy suppliers continue and grow their operations. As demonstrated by this research, the legal problems involved may be resolved. Arbitral practitioners must bear in mind, however, that conducting e-arbitral proceedings presents a number of particular issues to be addressed to maintain the validity and enforceability of the process. Effective consideration of the specific features and the exercise of its arbitral party autonomy in order for the procedure to be adapted to their demands is a good idea. They will be supported by a variety of studies and recommendations that provide valuable orientation on the use of technology in arbitration, cyber security and e-

[99] Olivier Cachard, 'United Nations Conference on Trade and Development - Course on Dispute Settlement in International Trade, Investment and Intellectual Property, module 5.9 - Electronic Arbitration' (2003) http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-DisputeSettlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx accessed 5 July 2021.

arbitration. The authors believe that this study of relevant topics will be another compass that guides readers through the digital labyrinth.

CLEARING THE FOG: A PERSPECTIVE TOWARDS THE ENFORCEMENT OF PRE-ARBITRAL CLAUSES

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Introduction

Pre-arbitration clauses are the new norm that has seen an upward movement, especially in the realm of international commercial transactions having a complex nature. Comprising of multi-tiered steps, these clauses include different kinds of alternative dispute resolution ["**ADR**"] mechanisms, followed by arbitration in the end. Strategically placing arbitration as the final process for dispute resolution, adopting the ADR mechanism, namely, negotiation, mediation and/or conciliation, expert determination, etc., gives sufficient attempts to the parties to achieve a cost-effective and efficient mode for resolving conflicts. This helps the parties save the cost as well time, which serves as the most important factor in dispute resolution.

Merging the other ADR techniques with arbitration procedures in multi-tiered dispute resolution ["**MTDR**"] clauses provides for a perfect blend of a complete dispute resolution procedure. If the selected ADR mechanism in the pre-arbitration clause fails to settle the dispute, then arbitration is invoked as a final resort. Imbibing the use of such multi-tiered steps in the dispute resolution builds up an escalation that helps the parties to take the dispute to a further level in a steady and stable manner. This maintains an amicable and harmonious environment between the parties, thereby increasing the chances of dispute resolution at an early stage itself. Unless the pre-arbitration clause is satisfied, the arbitration clause cannot be invoked at all, and if invoked it is to be declared premature in nature. Catering the particular needs of each agreement, the pre-arbitral clauses can be tailor-made to fit the best interest of the parties.

However, the adherence to pre-arbitration clauses in itself is a problem at times. Driven by party autonomy and being party-centric, the invocation of such clauses depends upon the will of both the parties, thereby making it problematic when one of the parties does not wish to adhere to such a pre-arbitral clauses. This puts in jeopardy the whole pre-arbitral process and further stirs up the complications. To tackle the same, the present article aims to determine the multi-fold nature of

the MTDR clauses in consonance with the problems that act as a roadblock against the enforceability and effectiveness of such clauses.

Meaning and Significance of MTDR Clauses

MTDR clauses are often regarded as a filter as they funnel out the disputes that can be resolved with consistent and amicable efforts of the parties. It brings out the actual interest of the parties when coupled with an appropriate ADR mechanism depending upon the nature of the agreement or contract. This helps to facilitate the dispute, and reduce the cost and time of the dispute resolution process.[100] MTDR clauses include different modes of resolution as chosen by the parties. These methods may contain two or more processes like arbitration, expert determination, mediation, conciliation and/or negotiation.[101] The idea behind the inclusion of multiple dispute resolution mechanisms is to identify and eliminate the dispute in the early stages itself and promote amicable settlements.

The inclusion of such clauses is usually seen in commercial transactions. The parties particularly aim at a long harmonious relationship and thereby try to resolve the dispute amicably by using ADR mechanisms. This helps them look for various alternate arrangements that can be adopted to minimize the hostility between the parties. Each combination of the dispute resolving mechanism provides a unique approach to the problem and it is up to the parties to select the one that would cater to their needs. A layered and escalated MTDR method is being taken up in most arbitration matters across various industries. For example, the construction industry often includes a multiple step-by-step process of resolving disputes in Engineering, Procurement and Construction contracts. Since such a contract is vast in scope and complex at the same time, possibility of arising disputes is palpable. The dispute resolution process usually starts with consultation amongst the authority and the contractor to arrive at a mutually satisfying agreement (negotiation); followed by the expert's determination who is chosen from a panel of experts, if the conflict involves price fluctuations mechanics, it goes to a financial expert; and if any of the above does not result in a satisfactory result for either of the parties, then arbitration takes its course.

Since the arbitration mechanism involves a lot of technicalities and often the losing party is dissatisfied with the arbitral award, issues with respect to the enforcement arise most often. This

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[100] Nada Abouelseoud, 'A Practical Approach to Multi-Tiered Dispute Resolution Clauses' (*Lexology,* 31 October 2019) <https://www.lexology.com/library/detail.aspx?g=9b1a27f2-1edc-43e7-b119-e6560d90eaf1> accessed 4 July 2021.
[101] Gary B Born, International Arbitration and Forum Selection Agreements: Drafting and Enforcing (Kluwer Law International 2013) 100.

elongates the process of dispute resolution and becomes frustrating for the parties. The idea of inculcation and adherence to MTDR clauses is to hold and freeze the dispute, thereby invoking the appropriate ADR mechanism to diffuse the situation and reach an amicable settlement.[102]

Arbitration is pre-mature without the prior satisfaction of pre-arbitral process

A definite pre-arbitration method in an agreement forms a pre-requisite of arbitration which must be followed in all circumstances. Adherence to the conditions mentioned in the pre-arbitration clause is a precondition to be satisfied to proceed with the case on merits.[103] Discrepancies or non-compliance with the mentioned pre-arbitral conditions can even deprive the tribunal of its jurisdiction to decide upon the matter.[104] Unless the pre-arbitral condition, prior to the initiation of arbitral proceeding is satisfied, the claim put forth by the parties before the tribunal should be treated as procedurally inadmissible.

In *Tulip Hotel v Trade Links Ltd,*[105] the parties had an MTDR clause having conciliation followed by arbitration. However, the claimant overlooked the conciliation and directly initiated the arbitration proceedings against the respondent. The Hon'ble bench outrightly denied the arbitration application owing to the lack of adherence to the MTDR clause and stated that, merely because the respondents have filed the suit, that itself would not lead to a conclusion that conciliation proceedings in the matter would be of no use or would be without any effective solution. It would be too premature to make any comment in that regard. If an arbitration agreement is coupled with a condition, then the non-fulfilment of such pre-condition made the dispute non-arbitrable.[106] The completion of pre-condition to arbitration is a *sine qua non* for setting in motion the arbitration clause.[107]

The parties cannot skip or jump directly to the final step of the MTDR procedure i.e., arbitration. The prescribed mode stated in the agreement between the parties is bound to be followed as it is the parties themselves that have agreed to the MTDR procedure in the first place.[108]

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102 Gregory Trivaini, 'Multi-Tiered Dispute Resolution Clauses, a Friendly Miranda Warning' (*Kluwer Arbitration Blog,* 30 September 2014) <http://arbitrationblog.kluwerarbitration.com/2014/09/30/multi-tiered-dispute-resolution-clauses-a-friendly-miranda-warning/> accessed 4 July 2021.

103 Dmitry Davydenko, 'Does Noncompliance with Pre-Arbitration Dispute Settlement Procedures Affect Awards Enforceability in Russia?' (*Kluwer Arbitration Blog,* 9 April 2010) <http://arbitrationblog.kluwerarbitration.com/2010/04/09/does-noncompliance-with-pre-arbitration-dispute-settlement-procedures-affect-awards-enforceability-in-russia/> accessed 4 July 2021.

104 *Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd* [2014] EWHC 2104.

105 *Tulip Hotel v Trade Links Ltd* (2010) 2 Arb LR 286.

106 *United India Insurance Co Ltd v Hyundai Engineering and Construction Civil* (2018) 17 SCC 607.

107 *Oriental Insurance Company Ltd v M/S Narbheram Power and Steel Pvt Ltd* (2018) 6 SCC 534.

108 *State of Kerala and Others v Fr William Fernandez Etc* (1999) SCC On Line Ker 149.

Defining the Parameters: Reinforcing the Position of Pre-Arbitration Clauses

To concretise the enforceability of the pre-arbitration clauses, multiple parameters should be adhered to for avoiding any uncertainties and ambiguities with respect to the clause. A clear and well-defined pre-arbitration clause is necessary to execute a harmonious and amicable settlement of the dispute in the nascent stages itself. To discuss the same, the following are the parameters that should be complied with while drafting a pre-arbitration clause:

Language of MTDR clause

The Hon'ble Bombay High Court in *Quick Heal Technologies Limited v M/S NCS Computech Pvt Ltd*,[109] elaborately dealt on the issue of use of specific words and their rightful interpretation to conclude the intention of the parties to arbitrate. The court held that the interplay of words like 'shall' and 'may' has to be taken into consideration so that the binding nature of the clause can be determined and invalidated the arbitration clause for lack of mandatory language. Such details can make or break the deadlock between the parties who are reluctant to enforce the pre-arbitral clause. The application of the word 'shall' in the Arbitration Clause manifests the clear intention of the parties to turn to a mandatory pre-arbitral process,[110] before the commencement of arbitration proceedings. Unless these steps are followed, the arbitral tribunal shall default upon the jurisdiction to entertain it. When the language of an MTDR clause employs imperative terms, such as 'shall' or 'must', it becomes mandatory for the parties to submit to a pre-arbitration mechanism before submitting the dispute for arbitration.[111] Hence, the language of the pre-arbitration clause is of utmost importance because it gets to decide upon the enforceability of the clause.

Clarity and Specificity of Pre-Arbitration Clauses

Setting out a well-defined structure for the pre-arbitral conditions is necessary to avoid any confusion at a later stage and serves in the best interest of the parties. Reducing the ambiguities to the maximum extent will not only help in making it well-defined but will also strengthen the enforceability of the clause. To corroborate the same, in the case of *International Research Corp PLC*,[112] it was held that whenever the pre-conditions prior to arbitration are unambiguous, specific and have sufficient clarity, they are mandatory upon the parties.

The arbitral tribunal can deny its jurisdiction on the ground that the appellant did not comply with certain mandatory requirements when the language of the arbitration clause required prior satisfaction of such conditions. The dispute resolution clause laying a condition to attempt a good

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[109] *Quick Heal Technologies Limited v M/S.NCS Computech Pvt Ltd* (2020) SCC Online Bom 693.
[110] *Emirates Trading Agency LLC v Prime Mineral Exports Pvt Ltd* [2014] EWHC 2104 (Comm).
[111] cf Born (n 2) 102.
[112] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55.

faith negotiation to resolve a dispute is considered to be a well-enunciated procedure and thus, is enforceable.[113]

Reason for Lack of Implementation of Pre-Arbitration Clauses

The principal excuse that parties find to evade the pre-arbitral condition is the uncertainty of the process.[114] In both civil and common law courts, specific arrangements to deal with dispute settlements that are necessarily unclear and vague are considered to be null.[115] The courts shall consider in deciding the enforceability of such a conflict settlement process, the interest of parties and the language of the pre-arbitral dispute settlement provision. The wordings of the clause regulate the intention of the parties and the binding structure of the clause. Sometimes it is disregarded for lacking details as to its procedure and the clause functions as just a subordinate.[116] The Supreme Court of India, in *Zhejiang Bonly Elevator*,[117] has indicated that the parties normally prolong the arbitration taking the excuse of the technical defences.

Generally, the courts are reluctant to consider the enforceability of pre-arbitral clauses involving good faith or amicable discussion.[118] Construing the legal interpretation of such phrases, the courts have often held them to be too vague to be given a legal recognition. Phrases like 'good faith', 'amicable negotiation', 'friendly manner', etc., are too open-ended, having the potential of wide interpretation which makes reflecting the rights and obligations difficult to determine.[119] It is advisable to avoid using such phrases while drawing the dispute resolution clause. Therefore, it is paramount to draft the pre-arbitral clause carefully giving specific details of the procedure to be adopted and avoiding any uncertainties. [120]

Pre-Arbitration: A Jurisdictional Prerequisite to Arbitration

The Supreme Court of India ["**SCI**"] considered whether awards could be set aside if any "procedural preconditions" were not fulfilled in the case of *MK Shah Engineers*.[121] In this situation, the arbitration provision allowed the parties first to refer disputes to the "Superintendent Engineer." Then, in the event that a party was unhappy with the Superintendent Engineer's

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[113] *Cable and wireless PLC v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041.
[114] Chahat Chawla,'The Muddy Waters of Pre-Arbitration Procedures - Are They Enforceable? Answers from an Indian Perspective' *(Kluwer Arbitration Blog,* 9 June 2019) <http://arbitrationblog.kluwerarbitration.com/2019/06/09/the-muddy-waters-of-pre-arbitration-procedures-are-they-enforceable-answers-from-an-indian-perspective/> accessed 23 August 2021.
[115] *Sulamerica CIA Nacional De Seguros SA & Ors v EnesaEngenharia SA & Ors* [2012] Civ 638 (EWCA).
[116] cf Trivaini (n 3).
[117] *Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited v Jade Elevator Components* (2018) 9 SCC 774.
[118] *Tang & Anor v. Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch).
[119] *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).
[120] Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 6 J. Int. Arb. 27.
[121] *MK Shah Engineers v State of Madhya Pradesh* (1999) 2 SCC 594.

decision, it may proceed to arbitration. The principal issue formulated by the SCI was to determine the impact on the beginning of the arbitration procedure if there is no decision by the Superintending Engineer. The SCI concluded that the pre-condition was "essential" to the text of the clause and that it must certainly be complied with.

When the parties have in mind to consider the pre-arbitral as a precedent condition, the arbitral tribunal cannot exercise jurisdiction over it. Either of the parties is then required to meet the requirements of the clause with due consideration. In case of failure of the negotiation mechanism, arbitration may be commenced by either of the parties.

Not considering the pre-arbitral clause as an important pre-requisite can have repercussions at a later stage. It has been asserted that the arbitral award is invalidated by a breach of the negotiation provision. In support of this assertion, the authors argue that the arbitral tribunal which granted the award lacked the competence to do so as the negotiating clause was a prerequisite to arbitration. Thus, its judgement is therefore void from the beginning. In *White v. Kampner,*[122] the court held the parties ought to have participated in the mandatory negotiation sessions before coming to the arbitral tribunal.

SIAC's New Hybrid mechanism

Since mechanisms such as negotiation and mediation often lack proper procedural structure when kept as a pre-condition to arbitration, a new hybrid structure of multi-stage ADR is evolved, often known as "arb-med-arb." In this method, arbitration commences when a dispute arises, however, parties are directed to amicably resolve it by mediation and only if the mediation goes unsuccessful, the arbitral process is continued to get the final award. Often known as the AMA Protocol, it has been welcomingly adopted by the SIAC and SIMC in collaboration.[123] Pursuant to AMA Protocol, once the arbitration pleadings commence and documents are lodged further process of arbitration is put on hold. Thereafter, all the documents and pleadings submitted before the tribunal are sent to SIMC, where the mediation is commenced. After a thorough process of mediation if the disputes still pertain, then such disputes are again remanded to arbitration.[124]

[122] *White v Kampner* 641 A.2d 1381 (Conn 1994).
[123] Christopher Boog 'The New SIAC/SIMC AMA Protocol: A Seamless Multi-Tiered Dispute Resolution Process Tailored to the User's Needs' 17 Asian Disp. Rev. 91.
[124] Sharon Lin, Daniel Cheong 'Arb-Med-Arb: Connecting the Dots between Arbitration and Mediation' (*Mondaq.com*, 14 August 2018) <https://www.mondaq.com/arbitration-dispute-resolution/727790/arb-med-arb-connecting-the-dots-between-arbitration-and-mediation> accessed 23 August 2021.

Concluding Remarks

MTDR clauses play a crucial role in weeding out the disputes by bringing the parties to one table for an amicable resolution of the dispute. Jurisdictions across the world have laid down differing opinions and thus, pre-arbitral clauses are held on a pendulum running between the extremes of mandatory on one end to the directory on the other end. However, in evaluating pre-arbitration clauses and their enforcement capacity, the requirements for consistency, specified structure and clear language are beyond all borders which resonate in a similar fashion with the role of pre-arbitration clauses in India. As a matter of caution, it must be kept in mind that the application of the pre-arbitration clause is possible if the performance terms are clearly defined, but not if the clause is limited to generic or inaccurate claims. Several practical and procedural conditions must be sufficiently clear to assess the negotiating efforts of a party meaningfully. Adding time frames to each step in the escalated MTDR process is an effective way to ensure compliance and enforceability.

At the time of conclusion of contract, the parties exercising their autonomy, themselves decide to adopt the multi-tiered process. When one party discredits the agreed procedure, it is a blow on the contractual rights of the other party. Ideally, both parties should respect each other's will within the limits of their autonomy when drafting a valid and binding MTDR clause. The doctrine of party autonomy stands at the highest pedestal when it comes to commercial arbitration. Decision with respect to the process of dispute resolution made at the time of conclusion of contract derives sanctity through this doctrine. Therefore, it is pertinent to note here when at least one of the parties sis still willing to adhere to the pre-arbitral requirement to settle the dispute, such process should not be neglected. The courts should preferably instruct the parties to devise the protocol for enforcing the pre-arbitral mechanism instead of declaring the pre-condition invalid.

The Unsolved Conundrum: Post-Award Interim Measures Granted by Courts Under Section 9 of the Arbitration and Conciliation Act, 1996

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Introduction

Interim relief to be granted by the Court, before and during the arbitration proceedings is mentioned under Section 9 of the United Nations Commission on International Trade Law's Model Law[125] ["**UNCITRAL**"] and was also a provision in the Arbitration and Conciliation Act, 1940. However, Section 9 of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"][126] states that interim measures can be granted, before, during as well as after the passing of an award but before the enforcement of the same under Section 36 of the Arbitration Act.

By the 2015 amendment of the Arbitration Act, interim measures after the passing of an award can also be granted by the Arbitral Tribunal under Section 17 of the Arbitration Act[127]. However, according to Section 32 of the Arbitration Act, the Arbitral Tribunal becomes *functus officio* after the award has been passed, making this provision incongruent and absurd. Subsequently, it was omitted by the 2019 amendment.

Grant of post-Award reliefs under Section 9: Award Debtor or Award Creditor?

The Hon'ble Supreme Court has remained completely silent on the issue of who has the *locus standi* to file a petition for reliefs under Section 9 of the Arbitration Act after an award has been passed. Relevant landmark judgments of the Supreme Court such as *Hindustan Construction Co. Ltd. v Union of India*[128] and *McDermott International Inc v Burn Standard Co. Ltd.,*[129] make no mention of the scope of a Section 9 petition and its applicability in a post-award scenario.

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[125] Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) [1985] UN Doc A/40/17, Annex I, s 9.
[126] The Arbitration and Conciliation Act 1996, s 9.
[127] The Arbitration and Conciliation (Amendment) Act 2015, s 17.
[128] *Hindustan Construction Co Ltd v Union of India* AIR 2020 SC 122.
[129] *McDermott International Inc v Burn Standard Co. Ltd* (2006) 11 SCC 181.

In *Hindustan Construction Co. Ltd. v Union of India,* the Supreme Court struck down Section 87 of the Act, which granted an automatic stay on an arbitral award once a Section 34 petition was filed. Additionally, it was held that an award cannot be modified by the courts, it can either be wholly admitted or dismissed. Further, in *McDermott International Inc v. Burn Standard Co. Ltd,* while stressing on the supervisory role of the Courts in arbitral proceedings, it was stated that *"Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired"*. Both the apex court judgements fail to set out a definitive position on the unresolved question of scope and applicability of post-award interim reliefs.

Several High Courts have set the law in this regard however, vastly contrasting views expressed on the subject again render the issue unresolved.

Bombay High Court

The learned division bench of the Hon'ble Bombay High Court in the case of *Dirk India Pvt. Ltd. v Maharashtra State Electricity Generation Co. Ltd.,*[130] ["**Dirk India**"] while expressing that interim reliefs after the passing of an order are "*to secure the property, goods or amount for the benefit of the party which seeks enforcement",* effectively stated that only the successful party, procuring the award could seek for reliefs post-arbitration. In this case, the losing party filed an application under Section 34 of the Arbitration Act to set aside the arbitral award, but it failed in the same. The learned division bench stated that Court interference at a stage where not only an award was passed but also the application of Section 34 of the Arbitration Act was rejected, would reduce the sanctity and efficacy of arbitration as a means of alternate dispute resolution.

In *Home Care Retails Pvt. Ltd. v Haresh N. Sanghavi,*[131] Hon'ble Justice R.D. Dhanuka stating he is bound by *Dirk India* reiterated that if the claims of a petitioner have been rejected by the arbitrator in the final Award, he cannot seek interim relief under Section 9 of the Arbitration Act. Several judgements such as *Wind World (India) Ltd v Enercon Gmbh* [132] and *Oil and Natural Gas Corp. Ltd. v Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd.,*[133] followed the law set in *Dirk India.*

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[130] *Dirk India Pvt Ltd v Maharashtra State Electricity Generation Co Ltd* [2013] 7 Bom CR 493.
[131] *Home Care Retails Pvt Ltd. v Haresh N. Sanghavi,* Appeal (L) No. 701 of 2015 in Arb. Petn. No. 1403 of 2015.
[132] *Wind World (India) Ltd v Enercon Gmbh* 2017 SCC OnLine Bom 1147.
[133] *Oil and Natural Gas Corp Ltd v Consortium of Sime Darby Engineering Sdn. Bhd. and Swiber Offshore Construction Pte. Ltd* 2018 SCC Online Bom 6034.

Karnataka High Court

In *Padma Mahadev and Ors. v Sierra Constructions Pvt. Ltd.,*[134] the Respondent was in the process of dissipating its assets which formed the subject matter of the ongoing application under Section 34 of the Arbitration Act. The Hon'ble Karnataka High Court while relying heavily on *Dirk India* explicitly held that pending a Section 34 petition, the unsuccessful party cannot take recourse to interim reliefs.

Gujarat High Court

In *Gail India Ltd. v Latin Rasayani Ltd.,*[135] the learned single judge bench of the Gujarat High Court while disagreeing with the Bombay High Courts' views in *Dirk India*, held that no distinction is made against a successful party and an unsuccessful party under Section 9 of the Arbitration Act. Therefore, post Award relief is available to both the award creditor and award debtor.

Delhi High Court

An interesting question was posed before the Hon'ble Delhi High Court in *Nussli Switzerland Ltd. v Organizing Committee Commonwealth Games,*[136] wherein the Court had to decide the scope of post-arbitration under Section 9 of the Arbitration Act. In this case, a party's claims were mainly rejected but accepted in part in the final award. Section 34(2)(iv) of the Arbitration Act empowers the courts to partially set aside awards but there is no provision on whether such a party has any *locus standi* to file for interim reliefs. The Court while interpreting the language of the Section held that the power conferred to grant post reliefs "*does not mean that the legislative intent was to vest an all-embracing, all-pervading power in favour of any party, irrespective of it being the losing party*". It further held that since the claim of the losing party subsumes into the larger amount awarded in favour of the opposite party, the application for post Award reliefs was not maintainable. Further, the learned single judge bench in *Technimont Pvt. Ltd. and Ors. v ONGC Petro Additions Ltd.*[137] also held that a losing party in an arbitration cannot seek post-Award reliefs under Section 9 of the Arbitration Act.

Scope and extent of reliefs under Section 9 post Award

According to Section 34 (3) of the Arbitration Act, after an arbitral award is passed, the award-debtor has three months to appeal and file an application for setting aside the arbitral award. These three

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[134] *Padma Mahadev and Ors v Sierra Constructions Pvt Ltd* 2021 (2) AKR 648.
[135] *Gail India Ltd v Latin Rasayani Ltd* 2014 SCC OnLine Guj 14836.
[136] *Nussli Switzerland Ltd v Organizing Committee Commonwealth Games* 2014 (4) ArbLR 196 (Delhi).
[137] *Technimont Pvt Ltd and Ors v ONGC Petro Additions Ltd* (2020) VAD 77 (Delhi).

months can be misused by the unsuccessful party by alienating, dissipating, transferring or destroying their assets. Therefore, the purpose of interim reliefs post Award is to ensure that the subject matter of the arbitration is duly secured. In *Dirk India*, it was held that when an interim measure is sought after the arbitral Award, its objective is to *"safeguard the fruit of the proceedings until the eventual enforcement of the Award"*.

However, it is necessary to set a limit as to what the court can grant as interim measures under Section 9 after the arbitration proceedings are completed, especially in cases where Order 21 of the Civil Procedure Code ["**CPC**"][138] reliefs are sought in a Section 9 petition. Order 21 of the CPC talks about the execution of decrees and orders. Some litigating parties misuse Section 9 as a means to virtually execute the Award and interdict the rights of the Award-Debtor. Further clarification on this matter was provided by the Delhi High Court in *SMJ-RK-SD(JV) v National Highways Authority of India*[139], as more particularly discussed below.

Section 36 of the Arbitration Act states that an award is enforceable only when no objections are filed. In *Delta Construction Systems Ltd. v Narmada Cement Co. Ltd.,*[140] the Bombay High Court held that after the award is passed it does not automatically become a decree, the unsuccessful party has a chance to challenge it under Section 34 or correct it under Section 33, thereby, stating that an Award cannot be executed without giving an opportunity to object. *In SMJ-RK-SD(JV) v National Highways Authority of India,* a Section 34 application was pending before the court to set aside the arbitral Award. During the pendency of such an application, the award-creditor filed a Section 9 petition whereby, he sought to withdraw the Award amount citing "*extreme hardships in absence of liquidity*" and offering to furnish a matching bank guarantee in exchange. The learned single judge bench of the Delhi High Court held that the main purpose of Section 9 is to secure by interim measures the subject matter of dispute and not use it as a loophole to procure the award during the pendency of objections. Further, the Court held that Section 9 cannot be invoked to circumvent Section 36 of the Arbitration Act. Therefore, the Section 9 petition was dismissed.

However, in *Sampson Maritime Ltd. v Hardy Exploration and Production (India) Inc,*[141] the award-holder filed a Section 9 petition seeking Order 38 Rule 5 of CPC reliefs, while a Section 34 application was pending

[138] Civil Procedure Code 1908, Order 21.
[139] *SMJ-RK-SD(JV) v National Highways Authority of India* (2009) 164 DLT 655.
[140] *Delta Construction Systems Ltd. v Narmada Cement Co Ltd* (2002) 1 Mah LJ 684.
[141] *Sampson Maritime Ltd v Hardy Exploration and Production (India) Inc* 2017 (2) CTC 48.

adjudication. Under Order 38 Rule 5 of CPC, a party may be called upon to furnish security. The Court distinguished a Section 9 petition from an Order 38 Rule 5 application and an Order 21 application. The Hon'ble Madras High Court held that when an application is filed under Order 38 Rule 5, it is prior to the announcement of the judgment and therefore the rights of the parties are yet to be crystallized. However, after the passing of an award, the rights of the parties then stand crystallized whereby, the plaintiff and respondent come to be the award creditor and the award debtor. The Court held that securing the subject matter of the award under Section 9 while a Section 34 application is pending is a right of the award-creditor. Further, the Court observed that this right is irrespective of the award-debtor's intentions or actions to defer the award. Thereby, directing the award-debtor to deposit 100% of the award amount as an interim relief.

In *Centrient Pharmaceuticals India Pvt. Ltd. v Hindustan Antibiotics Ltd.*,[142] a Section 34 application was pending for adjudication in the Court but no stay was imposed on the execution of the award. The award-creditor sought Section 9 interim reliefs despite being able to file a Section 36 application for the enforcement of the award. In this case, Justice G. S. Kulkarni of the Bombay High Court held that when an award is enforceable under Section 36, the award-holder cannot take recourse under Section 9, thereby limiting the scope of Section 9. Further, in *C.S.S. Corp Pvt. Ltd. v Space Matrix Design*[143], the learned Single Judge bench of the Madras High Court held that post-award Section 9 reliefs can be granted to the award-holder but only in cases where there are averments that the award-debtor is displaying obstructive conduct to defeat the award.

However, the Delhi High Court in *Power Mech Projects v SEPCO Electric Power Construction Corp*. has expressed contrasting views. In this case, the learned Single Judge bench directed the award-debtor to deposit 100% of the award amount under Section 9 as a pre-condition for hearing of the Section 34 petition on merits. Thereby, granting Section 9 reliefs to the award holder while the award was enforceable under Section 36.

In *National Shipping Co. of Saudi Arabia v Sentrans Industries Ltd.,*[144] the Bombay High Court while granting Section 9 post-award reliefs, held that conditions under Order 38 Rule 5 of CPC are not necessary to be satisfied. It was held that Section 9(ii)(b) can be granted to a party seeking protection only if there is an imminent need owing to the intention or attempts of the award-debtor to defeat the

[142] *Centrient Pharmaceuticals India Pvt. Ltd v Hindustan Antibiotics Ltd* (2019) SCC OnLine Bom 1614.
[143] *C.S.S. Corp Pvt Ltd v Space Matrix Design* 2012 (1) CTC 225.
[144] *National Shipping Co of Saudi Arabia v Sentrans Industries Ltd* 2004 (1) ArbLR 409.

award. It was further held that provisions of the CPC would not be applicable *stricto senso* and shall only be guiding principles.

It should be noted that directing a party to furnish security while a Section 34 is pending in Court, effectively results in the temporary execution of the award for the award debtor. Therefore, in some cases, there exists a possibility of this rendering the filing of a Section 34 application redundant.

Prior to the 2015 amendment of the Arbitration Act, a Section 34 application would automatically stay the arbitral award and would render it unenforceable under Section 36. This was the case in *Essar Oil Ltd. v United India Insurance Co. Ltd.*[145], whereafter the passing of an arbitral award a Section 34 application was filed by the award-debtor. The learned division bench of the Gujarat High Court quashed the impugned order that directed a well-to-do company to furnish a bank guarantee under Section 9(ii)(b) of the Arbitration Act. The Court held that when the Award is unenforceable, a financially sound company cannot be asked to furnish a bank guarantee, merely because it is incurring a loss unless there are allegations that the company is trying to defeat the award by dissipating the assets.

Conclusion

As evident from the conspectus of judgments set out above, there exist vastly contrasting views amongst the high courts regarding issues related to post-award reliefs under Section 9, leading to dubiety. Several high courts have vehemently opposed the granting of post-award reliefs to award-debtors while some high courts have stated that directing deposit of securities as interim reliefs under Section 9 is nothing short of a right bestowed upon the award-holder. Since arbitration is no longer an alternate means of dispute resolution, rather it has become a default clause in any agreement, the Hon'ble Supreme Court must remove practical defects from the Arbitration Act.

Any further delay in providing clarity on this issue is likely to have disastrous consequences, not only for the parties involved but also for the general standing of arbitral proceedings. As mentioned in *Dirk India*, it is necessary to maintain the sacredness and sanctity of the procedure of arbitration. The unwarranted interference of the Courts, after the arbitral procedure has concluded will prove to be impractical.

[145] *Essar Oil Ltd v United India Insurance Co Ltd* 2015 (3) GLH 28.

It is the need of the hour to lay down appropriate guidelines regarding the admissibility and scope of post-award Section 9 reliefs. Failing which, the party dissatisfied with the award, has an opportunity to in effect, virtually start litigation afresh. This will result in frustration of the award, rendering the entirety of the arbitral proceedings futile and redundant.

The tolerance by courts towards exploitation of the legal loopholes and the prolongation of the current state of affairs will discourage parties from pursuing arbitration. Therefore, there is a pressing requirement for legislative guidelines to be laid down providing some much-needed clarity to put this issue to rest, absent which, the faith and relevance of this means of Alternate Dispute Resolution may be lost.

REVISITING THE PRINCIPLES OF PARTY AUTONOMY, PUBLIC POLICY, FOREIGN AWARDS & INTERIM RELIEF W.R.T FOREIGN SEATED ARBITRATION OF INDIAN PARTIES

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Introduction

Indian Arbitration Law is a dynamic force constantly changing and adapting to the needs of the time and society. Indeed, the Arbitration and Conciliation Act, 1996, ["**Arbitration Act**"] has undergone considerable changes from time to time. In recent times, the 2015 amendment had taken into account various suggestions made by the 246th Law Commission Report.[146] Arising out of the amendment and few conflicting Judicial opinions, uncertainty in the sphere of international arbitration was causing unwarranted confusion. Recently, in the case of in *PASL Wind Solutions Private Ltd v. GE Power Conversion India Pvt Ltd.*[147] ["**PASL**"], the Supreme Court has put an end to some of the few issues by upholding the Pro-Arbitration regime for speedy disposal and remedy of disputes. The Apex Court undertook to settle the validity of a Foreign Seated Arbitration Agreement entered into by two Indian parties. The Court revisited the principle of party autonomy, further analysing to what extent can there be interference by the Court in the decision to choose the seat of their arbitration.

This time the Court took to test one such foreign seated arbitration agreement and applied the established principles of 'Public Policy' in light of granting interim reliefs against the enforcement of the arbitral award. In other words, the Apex Court settled the principle that two Indian Parties can arbitrate a dispute which is not governed by substantive Indian law. The Court additionally, settled the conflicting position of law and reinforced the 2015 Amendment having an effect on Interim Reliefs for International Commercial Arbitration. It becomes very pertinent to now understand the relevance and rationale of the Court's decision through briefly discussing the following principles.

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146 Law Commission of India, *Report No 246: Amendments to the Arbitration and Conciliation Act 1996* (Law Comm No 20, 2014).

147 *PASL Wind Solutions Private Ltd v GE Power Conversion India Pvt Ltd* [2021] SCC OnLine SC 331.

Legal Positions of Indian Courts on Foreign Awards with respect to Public Policy, Party Autonomy & Interim Relief

Foreign awards generally operate at the level of private international law as opposed to domestic awards. Thus, a distinction needs to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving a conflict of laws.[148] The doctrine of public policy has a more restricted relevance in the sphere of conflict of laws than it does in domestic law, and courts are more reluctant to apply it in cases having a foreign element than in situations involving exclusively local legal issues.[149]

There are two types of public policy norms: *first*, which are overriding in nature and can be resisted, and the *second*, which are local in origin and represent some component of internal policy. Assuming this is the case, it must be limited to domestic law conditions and not extend to international law concerns.[150] When it comes to domestic awards, the legitimacy of judicial intervention is far greater than when it comes to foreign awards or domestic awards in international commercial arbitration, according to the supplementary report of the 246th Law Commission.[151]

The fact that minimal judicial action is required in enforcing international judgments and domestic public policy must be seldom applied demonstrates a limited understanding of public policy. Courts in India have supported a narrow view of public policy as will be evident below.

In *Renusagar Power and Co Ltd v. General Electric Co*[152] ["**Renusagar**"], with respect to the 'fundamental policy of Indian law', the Court held,

> *"(i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy".*

Similarly in *Ssangyong Engineering and Construction Company Ltd. v. NHAI.,*[153] ["***Ssangyong Engineering***"], the award was set aside on the grounds that it unilaterally altered the terms of the underlying contract, violating fundamental justice principles and shocking the court's

[148] Bhavana Sunder, Kshama A Loya, 'Demystifying public policy to enable enforcement of foreign awards – Indian perspective' (*The National Law Review*, 4 May 2021) <https://www.natlawreview.com/article/demystifying-public-policy-to-enable-enforcement-foreign-awards-indian-perspective> accessed 05 August 2021.
[149] *Dicey, Morris, Collins on The Conflict of Laws* (5th supp, 15th edn, Sweet and Maxwell).
[150] *PASL Wind Solutions* (n 2).
[151] *Law Commission* (n 1).
[152] *Renusagar Power and Co Ltd v General Electric Co* [1994] Supp (1) SCC 644.
[153] *Ssangyong Engineering and Construction Company Ltd v NHAI* [2019] (15) SCC 131.

conscience.[154] In the case of *Cruz City 1 Mauritius Holdings v. Unitech Limited.,*[155] ["***Cruz City***"], the Delhi High Court proposed a balancing test to determine when a foreign arbitral award may be refused enforcement on the ground of public policy. The Court further held that while the width of discretion to refuse the enforcement of an arbitral award is narrow and limited, if sufficient grounds are established, the courts can accept the contentions to refuse the enforcement of an arbitral award.

Applicability of Part-I and Part-II of Arbitration Act with respect to '*Foreign Award*'

The Court in the PASL judgement clarified the four elements that must be satisfied for an award to be designated a "foreign award" under Section 44:

> *"(i) the dispute must be a commercial dispute as understood under Indian law; (ii) the award must be made pursuant to a written arbitration agreement; (iii) it must be a dispute that arises between "persons" (without regard to their nationality, residence, or domicile), and (iv) the arbitration must be conducted in a country that is a signatory to the New York Convention.*[14]

The Court found that if the arbitral award, in this case, satisfied all four elements, then it becomes a "foreign award" under Part II of the Act. Section 44 (which defines Foreign Awards) of the Arbitration Act, was "*party-neutral*" and the key factor to be looked at is the place of arbitration. Part II of the Arbitration Act applies to the enforcement of foreign awards in India.[156] According to PASL, the phrase "unless the context otherwise requires" in Section 44 (set out above) permits the definition of "International Commercial Arbitration" in Section 2(1)(f) to be imported into Section 44. Therefore that definition of "International Commercial Arbitration" requires that at least one of the parties have some foreign nexus before a proceeding can be considered an "International Commercial Arbitration."

Following its decision in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services.,*[157] ["**Bharat Aluminium**"], the Supreme Court noted that Part I of the Act is a comprehensive code that deals with arbitrations seated in India. Part II, on the other hand, is primarily concerned with the enforcement of foreign awards. The two parts thus do not overlap in the application and,

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[154] ibid.
[155] *Cruz City 1 Mauritius Holdings v Unitech Limited* [2017] 239 DLT 649.
[156] *GMR Energy Limited v Doosan Power Systems India* (2017) CS (Comm) 447.
[157] *Bharat Aluminium Co v Kaiser Aluminium Technical Services* [2012] 9 SCC 552.

in the words of the Supreme Court, are "mutually exclusive."[158] Based on that understanding of the Act, the Supreme Court held that the definition of "international commercial arbitration" in Section 2(1)(f) in Part I of the Act could not be imported into Section 44 because that term is "party-centric," while the same term when spoken about in the context of Part II of the Act is meant to have a "place-centric" focus. Put differently, for the purposes of Part II of the Act, the only relevant factor is whether the parties had chosen a foreign arbitral seat, regardless of whether the parties themselves have any foreign nexus.[159]

In agreeing to a neutral forum outside India, the Court remarked that parties are taking two bites of the cherry namely, *"the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country (which may be wider than the grounds available under section 34 of the Arbitration Act), and then resisting enforcement under the grounds mentioned in section 48 of the Arbitration Act."* [160]

Thus, it was held that the balancing act between party autonomy and the undeniable harm to public policy, must be tilted in favour of party autonomy if in fact there lies no harm to the fundamental policy and it is a conscious decision of the parties. Therefore, it becomes relevant to discuss further upon the issue of Party Autonomy.

Foreign Seat and Party Autonomy

In light of recent judicial pronouncements, the issue of the foreign seat of arbitration has also been categorically analysed. It is not that Indian parties never had an option of choosing an overseas seat for arbitration. In 1999, the Supreme Court, in *M/S Atlas Export Industries v. M/S Kotak & Company*,[161] ["**Atlas**"] had held that two Indian parties can indeed choose a foreign seat for arbitration.

It is important to note that the Atlas Division Bench decision was passed in the context of the Foreign Awards (Recognition and Enforcement) Act, 1961 and not the Arbitration Act, 1996,

[158] 'Indian Supreme Court allows Indian Parties to choose a foreign seat of arbitration' (Herbert Smith Freehills, 30 April, 2021) <https://hsfnotes.com/arbitration/tag/pasl-wind-solutions-private-limited-v-ge-power-conversion-india-private-limited/> accessed 06 August 2021.
[159] Abhi Udai Singh Gautam, Mustafa Rajkotwala, 'Indian Parties without an Indian Court: The Verdict in PASL Wind Solutions' (*India Corp Law,* 14 May 2021) < https://indiacorplaw.in/2021/05/indian-parties-without-an-indian-court-the-verdict-in-pasl-wind-solutions.html> accessed 06 August 2021
[160] *PASL Wind Solutions* (n 2).
[161] *M/S Atlas Export Industries v M/S Kotak & Company* [1997] 7 SCC 61.

thereby rendering it inadequate with the provisions of the Arbitration Act.[162] To top this defect came the judgment of *TDM Infrastructure Private v. UE Development India Pvt. Ltd.*,[163] ["**TDM**"] which in the context of the appointment of a foreign arbitrator, held that arbitration between Indian entities cannot be considered as 'International Commercial Arbitration'. The Apex Court agreed that Indian parties who desire to arbitrate should not be allowed to deviate from Indian law, adopting an anti-foreign arbitral seat policy. Therefore, the Court undertook a party-based rather than a location-based determination of curial law, which would not have been in the spirit of section 2(2) and section 44 of the Arbitration Act. In *GMR Energy Limited v. Doosan Power Systems India*,[164] the court relied on the ratio of Atlas, allowing Indian parties to continue with a foreign seat of arbitration.

In Bharat Aluminium, the Court had envisaged the freedom of parties on different laws governing their contract as;

> "*Party autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract — (1) proper law of contract, (2) proper law of arbitration agreement, and (3) proper law of the conduct of arbitration, which is popularly and in legal parlance known as "curial law".*

With the 2021 PASL judgement, there has been a resolution for a boost to India's pro-arbitration trend and against the adverse judicial methods. The Apex Court had primarily focused on arguments arising from section 28 of the Indian Contract Act, 1872 ["**ICA**"] wherein it found that the right of a party to enter into an arbitration agreement was preserved by Exception 1 to Section 28.[165] This meant that an arbitration agreement, regardless of its choice of seat, could not be contested on the grounds that it excluded Indian courts from jurisdiction.

The Continuum on Interim Relief's on Foreign Awards

The genesis of this issue that whether Interim Reliefs should be provided to arbitration with a foreign seat can be categorized by taking two different stances opposing each other. *First,* is wherein the scope of Part I of the Arbitration Act provided in the proviso of Section 2(2)[166] is

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162 Steven Finizio, Shanelle Irani, Dharshini Prasad, 'PASL Wind Solutions Pvt Ltd v. GE Power Conversion India Pvt Ltd: The Indian Supreme Court Clarifies that Two Indian Parties Can Choose a Foreign Arbitral Seat' (*JDSupra*, 26 May 2021) <https://www.jdsupra.com/legalnews/pasl-wind-solutions-pvt-ltd-v-ge-power-8050136/> accessed 05 August 2021.

163 *TDM Infrastructure Private v UE Development India Pvt Ltd* [2008] 14 SCC 271.

164 *GMR Energy* (n 11).

165 *India Corp Law* (n 14).

166 Arbitration and Conciliation Act 1998, s 2(2).

restrictive to the Part I itself, and therefore when two or more parties are undergoing arbitration seated outside India, the same is barred from invoking the possible measure under Part I.[167] Additionally, the parties could have 'impliedly excluded' the jurisdiction by redirecting the governing law of the arbitral agreement outside India,[168] or when the arbitral proceedings were to be conducted under Singapore International Arbitration Centre, and the seat was to remain as Singapore, the apex court barred the application of Part I,[169] similar reasoning was again followed in the case of *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.*[170]

Whereas on the other hand, the contrary judicial approach has been that when the parties have knowingly entered into an agreement, and with the effect to that agreement have selected their seat of arbitration as a foreign country then such choice must be upheld.[171] The Supreme Court in this reasoning held that provisions of Part I are equally applicable to ICA held outside India unless provided otherwise and the application under Section 9 shall also remain maintainable unless excluded in the arbitral agreement.[172] It was further held that where the arbitration was to be conducted as per ICC rules, the right to approach appropriate judicial authority for interim relief was appropriate.[173] A similar approach was again taken by the Apex court in addition to applying the Close Nexus Test for establishing the jurisdiction of Indian Courts in entertaining an application for interim relief. [174]

The status quo tipped when the Apex Court Constitutional bench overruled both *Bhatia International v Bulk Trading* and *Venugopal Global Engineering v Satyam Computer Services*, the bench held with the 'place-centric approach' that Part I will apply only to the arbitrations taking place within the territory of India. Furthermore, in light of justice, the bench made this ruling in prospective application creating a Pre-Post Balco continuum.

The 2015 Amendment remedying Balco's impact

The approach of the court led the legislature into action wherein by virtue of the 2015 Amendment,[175] a proviso was added to Section 2(2). It provided that, '*subject to an agreement to the contrary*', provisions pertaining to Interim Measures, provisions relating to the Courts assistance in

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[167] *TDM Infrastructure* (n 18).
[168] *Videocon Industries Ltd v Union of India* [2011] 6 SCC 161.
[169] *Yograj Infrastructure Ltd v Ssangyong Engineering Construction Co Ltd* [2012] 12 SCC 359.
[170] *Harmony Innovation Shipping Ltd v Gupta Coal India Ltd* [2015] 9 SCC 172.
[171] *TDM Infrastructure* (n 18).
[172] *Bhatia International v Bulk Trading*, [2002] 4 SCC 105.
[173] International Chamber of Commerce (ICC) Rules of Arbitration, art 23.
[174] *Venugopal Global Engineering v Satyam Computer Services* [2008] 4 SCC 190.
[175] The Arbitration and Conciliation (Amendment) Act, 2015.

taking evidence and appeals[176] shall be applicable to International Commercial Arbitration, even if the place of arbitration is outside India. It is relevant to note that Post the amendment, the reliance made by Balco on judgments such as *Channel Tunnel* which provided that an underlying right should also be provided with the necessary jurisdiction to exercise interim measures,[177] would have a resultant different effect altogether.

Finally arriving towards the recent development where the Supreme Court in the PASL[178] judgement has finally settled the issue by interpreting the expression "International Commercial Arbitration", the two different contexts of interpretation this expression can elucidate completely changes the consequence and reference of the same. If the same is 'party-centric', then as per Section 2(1)(f)[179] at least one of the parties should be a person who is a national or habitually a resident in any country other than India. However, when the point of reference is shifted as 'Place-centric' as provided in Section 44,[180] then expression simply means to be taking place outside the territory of India whereupon the New York Convention applies. Therefore the Apex court upheld the High Court's judgement except the finding on Section 9's maintainability, it cleared the controversy holding that two Indian parties are free to arbitrate outside India and their interim relief would be enforceable in Indian courts, it further held that these types of arbitrations are not international commercial arbitrations according to section 2 (1) (f) of Arbitration Act. The proviso to Section 2(2) which effectively entitles parties to ICA in a foreign seat to seek interim relief before an Indian court, should be read as referring solely to arbitrators outside of Indian territory, allowing parties to seek interim relief from Indian Courts regardless of nationality.

Conclusion

The Hon'ble Bench of Supreme Court Consisting Justice Rohinton Fali Nariman, BR Gavai, and Hrishikesh Roy have endeavoured to settle one of the most important issues of International Commercial Arbitration in India, there is no doubt that this shall provide an impetus to the parties in opting for arbitration as a dispute resolution mechanism. Such a decision welcomes, the Pro-Arbitration Regime and promotes foreign arbitrators and Arbitral Seat to undertake Indian disputes comprising of both the parties as Indian Parties themselves. The court in the light of party autonomy has recognised the seminal principle of private law that in the absences of public harm, autonomy must be maintained. It is settled that now parties who arbitrated domestically can choose

[176] Arbitration and conciliation Act 1998, s 9, 27, 37(1)(b), 37(3).
[177] *Channel Tunnel case* [1993 AC 334: (1993) 2 WLR 262: (1993) 1 All ER 664: (1993) 1 Lloyd's Rep 291 (HL)]
[178] *PASL Wind Solutions* (n 2).
[179] Arbitration and Conciliation Act 1998, s 2(1)(f).
[180] Arbitration and Conciliation Act 1998, s 44.

to do so abroad as two parties can now opt for a foreign seated arbitration as Section 9 of the Act shall remain applicable.

INTERVIEW: IN CONVERSATION WITH MR. GOURAB BANERJI

Senior Advocate, Supreme Court of India
Overseas Associate, Essex Court Chambers
Additional Solicitor General for the Union of India at the Supreme Court (2009-2014)

Editor's Note: Mr. Gourab Banerji, one of the leading arbitration experts of the country, is a distinguished Senior Advocate in the Supreme Court of India. He appears as counsel in a large number of domestic and international commercial arbitrations and investment arbitrations in India and overseas. He is an alumnus of Cambridge University, from where he graduated with First Class Honours. He was the Additional Solicitor General for the Union of India at the Supreme Court from 2009-2014 and represented the Government of India in *Republic of Italy v Union of India* among other landmark cases. He developed his practice mainly before the Supreme Court of India with an emphasis on commercial matters, and particularly commercial arbitration.

Editorial Board (EB): ***How would you describe your law school experience?***

Mr. Gourab Banerji (GB): I went into law school in rather unusual circumstances. I went to Cambridge immediately after high school, when I was 18, which is the standard in England. So, I did three years of law, and it was unadulterated law. My experience at Cambridge was quite a revelation for somebody who had studied in Calcutta and Delhi, and obviously there are so many memories from those three years. What I found really special about that system of supervision, which we call tutorials here. So, the learning was much more during the supervisions. We had supervisions with one teacher and maybe three to four students. Sometimes the teacher was from our college, sometimes they were from some other college, and we had to put in an essay or an answer, and then we had a one-hour discussion. What I learnt in those one-hour sessions, with three or four of my contemporaries was much more than I learnt in lectures. One essentially learnt how to think about interesting problems. What was particularly unusual about Cambridge was that the top professors would conduct supervision for undergraduate courses. They had a lot of focus on undergraduate courses. So, we had a lot of eminent people including Chris Greenwood, Mickey Dias, Conor Gearty amongst the many well-known names who supervised me. Of course, one remembers all the friendships, and all the other activities as well. I was captain of the college badminton team. It was a wonderful experience.

EB: What is your most cherished memory from your time at Cambridge?

GB: There are obviously a lot of memories, not all to do with academics. Mainly, what one remembers are the friendships that you make across the board, and of course a very happy moment was when I got my final year results. I could not actually find the result on the board, because in Cambridge, the system which was there, which I am not sure if it is still there now, is that they put up a typed list on the Senate hall steps. So, you have to go there and fight through a crowd of people to see where your name is in the list. I looked at the 2.1 list, I could not find my name. I then looked at the 2.2 list, I could not find my name. I looked at the third list, I could not find my name. I was extremely disappointed, I thought that I had not got through, I remember lying down on the grass and trying to figure out how I will tell my parents. Somebody came by and told me that I had got a first class. So that was a much cherished moment of my life. I went there and looked at it four or five times to satisfy myself that it was actually there. I had missed a 1st class in my previous two years, so I was not very hopeful.

EB: What were the factors which motivated you to have a special focus on arbitration?

GB: You know that is a really interesting question because I get bombarded by people wanting to join or wanting to intern because I am a so-called specialist in arbitration. The fact is that, I came in into this by chance and because of opportunities that came my way, so there was no predetermined place for me to become a so-called arbitration practitioner. In fact, the first major arbitration that I did internationally was very interesting, one where the then Solicitor General of India, Mr. Tehmtan Andhyarujina was the lead counsel. He brought in Rohinton Nariman (who is now retired Justice Nariman), as the second counsel, and Rohinton then recommended me as the junior lawyer. The three of us went to Amsterdam in the year 2000 to appear for National Fertiliser Limited. That was my first major international arbitration, and I have very happy memories of that. It was an unusual case because the public sector undertaking which we were representing actually won the arbitration, which was quite an achievement. I also did a few arbitrations in London around that time.

I was fortunate, I would say and once you get into arbitration, and develop a liking for that, more cases of that nature come on your way. Apart from arbitration, there are many matters which have I done, and many other aspects which I am also interested in.

EB: Could you brief us on your other areas of interests which aren't recognized as you just mentioned, due to arbitration taking the limelight?

GB: So, I have obviously represented the government when I was the Additional Solicitor General, I remember doing the Italian Marines Case. I have done a lot of writ and constitutional matters in the Supreme Court, and also as an *amicus*. Particularly as a law officer, I've represented various organs of the state, including the Intelligence Bureau. A lot of court, including constitutional law as well, which for some reason is downplayed nowadays, because everybody thinks it's all about arbitration.

EB: In your experience, how is the arbitration practice in India different from other developed jurisdictions? Do tell us about your role as an Overseas Associate at Essex Court Chambers?

GB: So far as my experience regarding arbitration practice in India being different from practice abroad, I think it's relatively well-known that India has much more of an ad-hoc system, and abroad it is mainly institutional. The reality is that if you do international commercial arbitration, then the timelines are tight, the hearings are focused, the stakes are often very high, and you have to realise that the people who do this- whether they are QCs in England or Senior Counsel from Singapore or Hong Kong- they devote a lot of time to doing these matters, also doing them single-mindedly. So, of course the quality is, in a sense, superior. But I would say that that is not limited to arbitration abroad. I have appeared as counsel and arbitrator in matters in Delhi and Bombay in international matters, where it is been as per international standards.

We have top-class senior advocates, younger lawyers, and some arbitrators who can compete with the best in the world, but the difference is that, in reality we don't have much of a developed a system, so the arbitrations here have their own dynamics and difficulties. There are practical difficulties which are required to be worked out in domestic arbitration, but not in international arbitrations.

Moving on to the second part of the question, what is interesting about Essex Court Chambers is this. in England there are two categories of lawyers: Barristers and Solicitors, unlike India which has a unified system. Barristers are traditionally those who would be in Court, and solicitors would

be traditionally those who would interact with the clients. This barrier is breaking down, but it is still there in England. Barrister's chambers in London are common. There are generally accepted to be four to five Magic Circle law firms; similarly, there are four to five magic circle sets of barrister's chambers, one of which is Essex Court Chambers which I have joined, the others include the Brick Court, Fountain Court, Blackstone, and One Essex Court. So, there are these four to five top commercial chambers. Essex Court Chambers is particularly well-known for commercial arbitration and international law. We have a lot of barristers there, who are very well-known internationally in arbitration, and also public international law. So, what my experience there has been is, once you actually interact with some of the leading QCs in England, in commercial work, in arbitration, and in international law. You can see how they function, and you can see how each of them approaches work. Of course, everybody has their own style, but it's been a learning experience to see how the best and brightest in England deal with these problems, and how they operate in Singapore, how they handle arbitrations.

I have now had the opportunity to be on the same side, on opposing sides, seeing them cross-examine witnesses. Also, I have argued before high quality arbitrators. Essex Court Chambers also has its panel of top arbitrators who are internationally very known. So, it's been a learning experience. It's been an interesting journey, I joined them in 2014, soon after I ceased to be the ASG. In seven years, obviously there have been many opportunities internationally. In the last couple of years, I have been an expert witness in a London arbitration, and I have been a sole arbitrator for an LCIA matter seated in London between a Canadian and a Kenyan party with English law as the law of the arbitration, so absolutely no connection with India. So, it has been quite an interesting experience.

I was in one of the arbitrators in a ICC arbitration. In fact, the Supreme Court revealed the names of the arbitrators in the order, so I can mention that it was the case of *Balasore v Medima* where I believe that Justice Bobde gave judgement; I was noted as one of the arbitrators. So, it has been an interesting experience, lots of opportunities, lots of learning, and good fun. I am an individual lawyer though I have some juniors, I was never a part of a law firm or a collegiate setup. Now, there is some sort of a collegiate setup where you have other lawyers, senior lawyers who are friends, older than you, younger than you and it's a different experience.

EB: In the past, you have represented the Government of India in arbitration proceedings. How has that experience been, and how is it different from representing individuals or body corporates?

GB: I have represented India in many Court proceedings, which was an experience in itself which we will leave aside for a moment. So far as arbitration proceeding is concerned, there are two categories of cases where I represented government or government instrumentalities. I have in the recent past represented the Government of India in the Antrix-Devas dispute, and what I could find is when it comes to commercial matters, the briefing is excellent, like in this Antrix-Devas dispute, where was a commercial arbitration- I, of course, came in only after the arbitration was over and we challenged the award. I want to make it clear that Antrix is a government instrumentality, but it is not the government, it is a separate corporate entity. Of course, now it is subject to winding up, but that is a different matter.

The government responds extremely well in commercial cases when the stakes are high. One cannot simply criticise the government. When they are at the top of their game, they respond very well and certainly, it was a very good experience.

I was involved for some time in this Cairn-Vedanta investment arbitrations, with which I am no longer involved, so I can talk about it. I think the problem with investment treaty arbitration, is that the government somehow, is not attuned to being at the receiving end in an investment treaty arbitration. It finds it very difficult to admit that it is liable to be questioned, that too by a foreign tribunal on sovereign actions; for instance, in Cairn and Vedanta, it was the legislation by the government that is contentious. In any other action in investment treaty arbitration, it is always a governmental action, so the government is very un-used to being questioned about government action before foreign tribunal. I have found that in such cases, the response, perhaps is not appropriate, because they have not been able to get their head around the fact that they are liable under investment treaties. Not that the government has a bad case or anything, it is just that they are not used to it. So that is a little bit of a difficult experience, and as it happened, I stepped out of both Cairn and Vedanta for certain reasons, a couple of years ago.

EB: Recently, the Government of India has suggested retracting the retrospective tax amendments. This has come in the light of the Cairn and Vodafone arbitrations. What are your thoughts on that?

GB: I was not involved in Vodafone, but I was certainly involved in Cairn and Vedanta at some point of time, so my thoughts are coloured by the fact that I do understand the government's position. The fact of the matter is, that the judgement of the Supreme Court in 2012 is in fact quite debatable. Justice Chandrachud in the Bombay High Court had decided in favour of the government and then it was reversed by Justice Kapadia and I think Justice Radhakrishnan, in the Supreme Court. It's debatable whether the Supreme Court came to the right decision on the point, In fact, Rohinton Nariman argued it as the Solicitor General in that matter against Vodafone, but be that as it may, the decision to then retrospectively or at least take away the basis of that judgement by the amendment, was a controversial one, and there were different voices there.

I am glad that this decision to reverse the judgments has been taken now, it would have been much more helpful had it been taken earlier, a lot of the pain of going through all these arbitration proceedings and costs might have been saved. Optically, it might have been better for the Government as now it may even appear that the Government is doing this because it has lost the case. There is much to be said about the government's position on the awards, there are good grounds to challenge the awards. When I was ASG, I used to regularly appear before Justice Kapadia during the time when he was CJI, in a large number of tax matters listed before him, and one of his comments on the bench was that the real issue was not the retrospective amendment but the fact that the retrospective amendment was made many years after the issue arose. He gave an example that in England, similar amendments were brought out relatively quickly. So, had the government acted quickly and plugged the loopholes quickly, this dispute would not have really arisen.

Instead of bringing in the retrospective amendment which they did in 2012, had they brought it at an earlier stage, then really there would not have been much debate because other countries had done it, and Justice Kapadia specifically mentioned to me that England had done it, he mentioned it in court, so I'm sure he was right. So, the answer here is that the government is required to be a little more proactive and close all these disputes one way or the other, much more quickly. By government, I don't mean this government, or the previous government. Whatever the dispensation is, they should react more quickly and deal with these specific problems which arise out of investment treaty disputes.

EB: In the recent past, there were coordinated efforts to institutionalize arbitration in India through amendments. How do you evaluate the progress made in this direction?

GB: So, I was also involved to some extent in some of these discussions, in 2015, 2019 etc. The problem here is that this is really, in some sense, not for the government to do, this is a very top-down approach. You cannot, by amendment, force people to go to institutional mechanisms. You can cajole them, question them, you can guide them but until you have credible domestic institutions, whether in the public or the private sector, who have credibility, to whom people will go to, or you will inevitably have ad hoc arbitration. You have to change the mindset; you have to put in the clauses in the agreement before the dispute arises.

Now, people are, of course, putting in institutional agreement clauses when people negotiate agreements. But it is a matter of changing the mindset and it is unfair to put the burden on the government to introduce amendments to solve this problem. Unless and until there are credible institutions of domestic origin who will be deemed acceptable to industry, there will be no option of institutional arbitration, though the government may want to try by introducing amendments. So, amendments may be necessary, but they may not be decisive.

EB: Has there been any peculiar or comical instances in the courtroom, or during arbitral proceedings which left an impression on you?

GB: So, let me limit to arbitration, because in court I will be subject to contempt laws. I had a peculiar experience in the NFL Karsan matter. Actually, the witness for the other side was in handcuffs because he had been arrested by the CBI. He was led in, in handcuffs and he spoke in Turkish, so we had this surreal situation of the witness speaking in Turkish and the translation taking place; and because we did not want the other side, the Swiss lawyers, to understand what we were saying, we were speaking to each other not in English, but in Hindi. Neither Mr. Andhyarujina, nor Mr. Nariman's Hindi at that point was very good, but it was the only common language we could speak. Of course, they spoke to each other in Gujarati.

The second incident I remember is, in a sense, a little sad but quite interesting. There was an arbitration which I did very early in my career against DMRC relating to the first Metro line set up in Delhi and there was an arbitration on that. It was an interesting case where we were for this venture, ASHI versus DMRC. Obviously, this was quite a long time ago and I aggressively cross-

examined one of the witnesses, I don't think I would have done it now. At a certain point of time, the witness broke down and there were copious tears. After I demonstrated about five or six times that he was essentially not telling the truth, at five or six occasions, he broke down, and he had to be led out, he had a glass of water and joined back in. Anyway, that arbitration ended in our favour.

Fast forward to 2012. The law officer of the DMRC came to me and asked me if I would like to be briefed for DMRC. So, I was a law officer and it was a government body, so I could do it. After about two months, he came to us and told me that they were not in a position to brief me. On asking why, he said that I may remember so and so, who I didn't. He then told me that the person had I cross examined earlier had now become a senior officer at DMRC and he had instructed him to meet anybody except Mr. Banerji, and was instructed not to brief me under any circumstance. So, that is what happened, it came back to bite me. I would have thought that the very fact I conducted a good cross-examination would enable me to be on his side and he would have wanted that, but evidently not. He harboured that grudge, perhaps justifiably, but I still remember that as the only time in my career where a witness was actually reduced to tears.

EB: The Amazon Case highlighted some of the major discrepancies in the Indian arbitration regime. Where do you feel we are lacking in making progressive arbitration laws?

GB: I don't think we are lacking in making laws, in the sense that we were lacking maybe five to seven years ago. We have brought in one amendment in 2015, post the 2015 law commission report, and post the 2019 Law commission report. Yes, there are gaps which are yet to be filled, but I think that so far as legislation is concerned, the last few years have been reasonably proactive. That doesn't mean that we should not be more proactive. Other countries, particularly Singapore and Hong Kong are very good at this, as they are marketing themselves as well. So, we should move faster, we should get the government to make further amendments. Frankly, this is something that the industry and businesses should drive, and the government should be taking a secondary role and responding to industry and business. It is not fair to expect the government to step in at every stage, unless it is persuaded by corporates that this is a good idea, and I am sure that if you can persuade the government, they will take the necessary steps.

My only concern is that, on the previous occasions, I have found that the way the government approaches these matters is a little top-heavy, in the sense that they primarily involve judges and

bureaucrats, who may not perhaps be the best persons to be on committees and suggest amendments. Of course, nobody can doubt their legal knowledge and acumen, but on the practical aspect they should have more input from business corporates and practitioners, so that they can push through the amendments.

Justice AP Shah, who an exceptionally good chairman of the Law Commission, suggested amendments, as also Justice Srikrishna, who is also an expert in arbitration. So, obviously there were many well-known big names in the Committee. Justice Nariman was involved, Justice Indu Malhotra was involved, Justice Narasimha was involved, etc.. I mean it was quite a high-powered set-up on both occasions, and it would be interesting to see what the government would do now. But a little more involvement of industry and practitioners might produce a more internationally attuned set of amendments.

EB: What are some of the tips you can share with graduates who are entering the profession and starting their career as a litigator or an arbitrator, and taking up matters and briefs? What are the skills that one should develop? And how should one arm themselves to sustain in the profession?

GB: In my view, this is the most difficult question you have asked me in this entire interview, and I am not sure that there is a simple and easy answer to this. I receive virtually on a daily/weekly basis, CVs from students for an internship or to join me, and every time I look at them, I get a feeling that I could not have been able to join my chambers because everybody seems to have had so many achievements in their short careers in terms of moots, in terms of articles, and God knows what else. My understanding here is that the broadest approach is required, I don't think it is possible to say that I will become a specialist arbitration lawyer, or a specialist competition lawyer, there has to be a more open mind and less focus on the black letter of law. I think the best comment I would note here is of Justice Nariman, as he puts it: "You have to read and look beyond the law in order to be a good lawyer." So that's the first tip.

The second thing I would say is that this is not a sprint, this is a marathon; everyone has their own journey, you will always find people who are doing better than you, who have better connections than you, who are getting better cases than you. Everybody has their own journey. If you persevere, if you put in the hours, you will ultimately get to the end of the marathon, and you will be a winner.

So, the most dangerous thing you can do is to compare yourself to a contemporary, because that will bring nothing else but unhappiness.

And just an anecdote on the fact that you must read or be interested in matters beyond the law. In the Karsan arbitration, we were coming back from Amsterdam and somebody had a heart attack, and the plane had to land in Istanbul. We were in the plane for half an hour to 40 minutes with Justice Nariman sitting next to me. And for 40 minutes, without reference to any anything else, he told me the entire history of the Ottoman British Empire, with all the names, dates, the Sultans, etc., I mean obviously you have to have a phenomenal interest and memory to do that. But this is not unusual; one of the top English lawyers who was directly appointed to the Supreme Court, was Jonathan Sumption, who I have seen in action and was an absolutely brilliant lawyer. He is a world-renowned expert in one particular area of history. So, a lot of very successful lawyers have a definite interest in areas other than law - Soli Sorabjee's interest in jazz. There are any number of examples. I don't think that this is the age where you immediately specialize, unless you want to achieve everything by the age of 35! You will have your own path, you will be successful in your own way and everyone has their own journey. Each one of us has a unique story to tell.

QUARTERLY ALTERNATIVE DISPUTE RESOLUTION ROUND- UP

(APRIL-JUNE 2021)

APRIL

1. Madras High Court reiterates the threefold test for granting Anti-arbitration Injunctions.

In the recent decision of *ADM International Sarl v Sunraja Oil Industries Pvt. Ltd. & Ors.*,[181] the Madras High Court discussed, in length, the principal conditions for granting an anti-arbitration injunction. The High Court reiterated the findings of the Delhi High Court in the case of *McDonald's India Pvt. Ltd. v Vikram Bakshi & Ors.*,[182] wherein it was held that the court would grant an anti-arbitration injunction only when the arbitration agreement is (i) null and void, (ii) inoperative or, (iii) is incapable of being performed. The Madras High Court reinforced the position in law, stating that the focus needs to be on minimising the courts' interference with the arbitration process. It is only in furtherance of the object of the Arbitration Act that the courts be extraordinarily circumspect and reluctant to thwart arbitral proceedings.

2. The issue of novation of contract cannot be considered in an application under Section 11 of the Arbitration and Conciliation Act, 1996.

The Supreme Court of India in *Sanjiv Prakash v Seema Kukreja & Ors.,*[183] has held that the question of novation of contract containing an arbitration clause cannot be considered by the court in an application filed under Section 11 of the Arbitration Act.[184] The Supreme Court relied on its recent decision in *Vidya Drolia v Durga Trading Corporation*[185] to hold that the court cannot, at the stage of an application under Section 11 of the Arbitration Act,[186] enter into a mini-trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal.

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[181] *ADM International Sarl v Sunraja Oil Industries Pvt. Ltd. & Ors.* Application Nos. 5723 to 5730 of 2019, O.A. Nos. 644, 645 of 2019 in C.S. Nos. 406 and 407 of 2019.
[182] *McDonald's India Pvt. Ltd. v Vikram Bakshi & Ors.* 2016 SCC Online Delhi 3949.
[183] *Sanjiv Prakash v Seema Kukreja & Ors.* 2021 SCC OnLine SC 282.
[184] Arbitration and Conciliation Act 1996, s 11.
[185] *Vidya Drolia v Durga Trading Corporation* 2020 SCC OnLine SC 1018.
[186] Arbitration Act and Conciliation Act 1996, s 11.

3. When parties change the venue of arbitration by mutual agreement, the changed venue becomes the seat of arbitration.

In *M/s Inox Renewables Ltd v Jayesh Electricals Ltd.,*[187] the Supreme Court held that when parties change the venue/place of arbitration by mutual agreement, the new venue/place will become the seat of the arbitration. The court relied on the decision of *BGS SGS Soma JV v NHPC Ltd.*,[188] wherein it was held that the venue of arbitration will be the juridical seat of arbitration in the absence of contrary intention of the parties. The court observed that the parties may mutually arrive at a seat of arbitration and may change the seat of arbitration by mutual agreement.

4. Court can appoint new arbitrator with parties' consent after award is set aside.

Relying on the principle of party autonomy, the Calcutta High Court in *Jagdish Kishinch & Valecha v Srei Equipment Finance Ltd. & Anr.*,[189] whilst setting aside an award on account of lack of impartiality and independence of the arbitrator, appointed a different arbitrator. In this regard, the Court, relying on Section 43(4) of the Arbitration Act[190] and Section 89 of the Civil Procedure Code, 1908,[191] observed that the Act ensures party autonomy at all levels right through the dispute resolution process and even to the procedure for the challenge to the award. The freedom of the parties to decide on the next course of action must, therefore, be preserved in the facts of the present case. The basic premise is that, the parties who have come to the Court cannot be without a remedy when they have agreed that the matter should go before a different arbitrator. The Arbitration Act does not curtail the power of a Court to mould the relief in fit cases, provided the relief is not repugnant to the law as existing on that date.

5. Introduction of the new Brazilian Contracts Act which fosters the use of arbitration.

Introducing a new regime for private parties to bid and enter into contracts with Brazilian state-controlled entities, Brazilian Law 14.133[192] was brought out on April 1, 2021. The new Brazilian Public Contracts Act allows the adoption of arbitration, mediation, and dispute boards. The new Public Contracts Act acknowledges that state-controlled entities can submit disputes to arbitration, provided that such disputes deal with "disposable pecuniary rights". The procedure to choose arbitrators, arbitral institutions, and members of dispute boards shall have a technical basis, be

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[187] *M/s Inox Renewables Ltd v Jayesh Electricals Ltd.* Civil Appeal No. 1556 of 2021.
[188] *BGS SGS SOMA JV v NHPC Ltd.* (2020) 4 SCC 234.
[189] *Jagdish Kishinchand Valecha v Srei Equipment Finance Ltd. & Anr.* Calcutta High Court, AP/103/2021.
[190] Arbitration and Conciliation Act 1996, s 43(4).
[191] Civil Procedure Code, 1908, s 89.
[192] Law No. 14.133 of April 1, 2021.

transparent, and equally treat the parties. The new Public Contracts Law did not bring news for arbitration, but it is positive as it consolidates the possibility to submit disputes with state entities to arbitral proceedings.[193]

6. The Supreme Court of Canada finds Uber's arbitration clause to be unconscionable.

In *Uber Technologies Inc. v Heller*,[194] the Supreme Court of Canada upheld the Ontario Court of Appeal's decision that Uber's arbitration agreement is invalid and unenforceable, leaving disputes under the clause to be litigated in the courts. The Court re-affirmed the competence principle and the deference generally afforded to arbitrators by the courts while creating an exception to the general rule of arbitral referral.

7. A non-signatory third party can be compelled to arbitrate if the courts deem it to be a necessary and a proper party for the arbitration.

In the case of *Shapoorji Pallonji & Co. Pvt. Ltd. v Rattan Indian Power Ltd. & Anr.,*[195] the Delhi High Court dealt extensively with joinders of non-signatories to arbitral proceedings. The court reiterated a principle indicating that in some situations, an arbitration agreement between two or more parties could operate to bind other parties as well. Additionally, it was reaffirmed that where a party conducted itself as if it were a party to a commercial contract by playing a substantial role in negotiations or performance, it may be held to have consented, in an implied manner, to be bound by the arbitration agreement. While referring to multiple decisions, the High Court also explained the 'group of companies' doctrine, stating that it could be invoked to bind the non-signatory affiliate of a parent company if there was: (i) a direct relationship with the signatory to the arbitration agreement; (ii) commonality of the subject matter, and; (iii) a composite transaction between the parties at dispute.

8. Supreme Court's decision on Choice of Foreign Seat Of Arbitration by Indian Parties.

In its latest pro-arbitration judgement delivered on April 20, 2021, a 3-judge bench of the Supreme Court, in the case of *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.,*[196] settled

[193] Joaquim de Paiva Muniz, 'New Brazilian Bid and Public Contracts Act fosters the use of arbitration' (*Global Arbitration News,* 7 April 2021) <https://www.globalarbitrationnews.com/2021/04/07/new-brazilian-bid-and-public-contracts-act-fosters-the-use-of-arbitration/> accessed 12 July 2021.
[194] *Uber Technologies Inc. v Heller* 2020 SCC 16.
[195] *Shapoorji Pallonji & Co. Pvt. Ltd. v Rattan Indian Power Ltd. & Anr.* 2021 SCC OnLine Del 2875.
[196] *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited* Civil Appeal No. 1647 of 2021.

the most commonly asked question in Indian arbitration law - whether two Indian parties can adopt a foreign seat of arbitration. The Supreme Court has decided this issue in favour of party autonomy and held that two Indian parties can choose a foreign seat of arbitration. The Supreme Court has further upheld the right of parties to seek interim relief under Section 9 of the Arbitration Act[197] in such cases.

9. United States: First Circuit Enforces Delegation Clause in an Arbitration Agreement.

In *Bossé v New York Life Insurance Co.*.,[198] the First Circuit Court of Appeals issued an important decision upholding the enforceability of an arbitration agreement that delegates the arbitrability of claims to an arbitrator and not a court. In recent years, employers have increasingly sought to include delegation clauses in an attempt to avoid adverse holdings from judges on "gateway" issues like arbitrability. With the decision in *Bossé*, employers operating within the First Circuit can be more confident that if their arbitration agreements contain delegation clauses that clearly and unmistakably manifest an intent to delegate issues of arbitrability to arbitrators, courts within the First Circuit will likely enforce the clauses.

10. Supreme Court reiterates that Courts at the Seat Of Arbitration have Exclusive Jurisdiction over Arbitral Proceedings.

In the recent decision taken in *M/s Inox Renewables Ltd. v Jayesh Electricals Ltd.*,[199] a two-judge bench of the Supreme Court held that it's open for parties to an arbitration agreement to change the seat of arbitration through mutual agreement. Such an agreement, albeit not in writing, would be considered valid if it is recorded in the award and not challenged by either party. Referring to *BGS SGS SOMA JV v NHPC Ltd.,*[200] the Court reiterated that the selection of a seat by the parties is akin to an exclusive jurisdiction clause conferring jurisdiction on the courts at such seat over all matters connected with the arbitration.

This decision of the Supreme Court once again emphasized the need to be prudent when deciding the venue, place and seat of arbitration. The importance of the parties' choice in this regard cannot be contradicted. As iterated by the Supreme Court repeatedly, choosing a seat of arbitration is akin to an exclusive jurisdiction clause. Where parties do not use the word "seat" but designate a

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197 Arbitration and Conciliation Act 1996, s 9.
198 *Bossé v New York Life Insurance Co.* No. (2021) 19-2240.
199 *M/s Inox Renewables Ltd.* (n 7).
200 *BGS SGS SOMA JV* (n 8).

"venue" or "place" of arbitration in the arbitration agreement, such venue/place will be considered to be the seat in the absence of any contrary indication in the agreement.

11. When a contract provides for the payment of interest but the rate of interest is blank, the concerned party is obligated to pay the same.

In an interesting case, a division bench of the Supreme Court, in *Oriental Structural Engineers Pvt. Ltd. v State of Kerala,*[201] held that an arbitral tribunal's award of interest to a party in a contract (under whose terms the rate of 'payment of interest' is not expressly provided for) is valid unless the contract specifically excludes it. Consequently, such an award of interest by a tribunal cannot be subject to judicial interference on the grounds of 'patent illegality'. When a contract specifically provides for payment of interest, but the rate of interest is blank, the concerned party is obligated to pay the same. A person deprived of legitimately entitled money must be compensated in the form of interest or damages.

[201] *Oriental Structural Engineers Pvt. Ltd. v State of Kerala* Civil Appeal No. 3454 of 2021.

MAY

12. If the relevant statutory enactment has introduced a period of limitation, Section 2(4) of the Arbitration Act would not provide protection against rigours of limitation.

The Bombay High Court in the case of *Satish K. Narang & Co. v Jamnadas Morarje Secs. Ltd.*[202] held that in view of Section 2(4)[203] of the Arbitration Act, the limitation period for arbitration wasn't applicable to the transactions entered into between the Appellant and the Respondent, as they were under a different enactment. The transactions happened prior to 29th August 1998, when the provisions of the Limitation Act, 1963, were extended to the arbitral proceedings under the Stock Exchange Bye-laws.

However, the Appellant's contention that despite the applicability of the provisions of the Limitation Act, he would continue to be subject to no period of limitation in view of Section 2(4) of the Arbitration Act was rejected. It was held by the court that as the limitation period was introduced by the amendment to the Bye-Laws on 29th August 1998, the Appellant should have instituted arbitral proceedings within three years from the date of the amendment, which are statutory by-laws. Even if the cause of action arose before the said amendment, the court ruled that because no arbitration had been instituted, the provisions of the amendment would be applicable in case of limitation.

13. While exercising powers under Section 84 of the Multi States Cooperative Societies Act, 2002, no powers are vested with the Registrar of Cooperative Societies to pass any interim orders.

The Delhi High Court, in the case of *National Federation of Fishermen Co-Operative Ltd. v Union of India,*[204] set aside the interim order of the Central Registrar of Co-operative Societies who had referred the parties to arbitration under Section 84[205] of the Multi States Cooperative Societies Act, 2002 ["**MSCS Act**"]. The court ruled that while Section 84 allowed the Registrar to refer certain disputes to arbitration, the section also provided that the provisions of the Arbitration Act would apply to the arbitration under the MSCS Act. It was also held that under Section 9[206] or Section 17

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[202] *Satish K. Narang & Co. v Jamnadas Morarje Secs. Ltd.* 2021 SCC OnLineBom 652.
[203] Arbitration and Conciliation Act 1996, s 2(4).
[204] *National Federation of Fishermen Co-Operative Ltd. v Union of India* 2021 SCC OnLine Del 2265.
[205] Multi State Cooperative Societies Act 2002, s 84.
[206] Arbitration and Conciliation Act 1996, s 9.

of the Arbitration Act,[207] the powers to grant interim orders or protection were available with the court or with the arbitrator, respectively. The court ruled that it was clear that no powers are vested with the Registrar to pass any interim orders while exercising its powers under Section 84 of the MSCS Act to refer the disputes to arbitration.

14. Appointment of an arbitrator cannot be done for enforcement of a void agreement.

The Delhi High Court, in the case of *Banga Electronics Pvt. Ltd. v Jagmohan Singh*,[208] dismissed the petition to appoint an arbitrator. The court found that the agreement between the parties for the sale of immovable property, which contained the arbitration clause, was in violation of a stay order for the property passed before the execution of the said agreement. The court ruled that as the agreement was in violation of the stay order, it was not enforceable by law and, thus, void as per Section 2(g) of the Indian Contract Act.[209] It was held by the court that under Section 11 of the Arbitration Act,[210] the court has to consider the validity and existence of the arbitration agreement and, therefore, was of the view that an arbitrator cannot be appointed to enforce a void agreement.

15. There should be an express repudiation of liability to attract arbitration for a dispute as provided in the contract.

The Delhi High Court in *Geo Chem Laboratories Pvt. Ltd. v United India Insurance Co. Ltd.*[211] received a petition for the appointment of an arbitrator where the arbitration clause in the insurance policy stated that if the company (Respondent) has disputed or not accepted the liability under the policy, the dispute won't be referred to arbitration. The Respondent contended that the petition was premature as they had never admitted any liability, but the Petitioner contended it to be a case of deemed admission.

It was held by the court that as the Respondent had not denied or disputed the liability till date and as the Petitioner cannot be left remediless while the Respondent delays the decision, for the limited purpose of determining arbitrability under Section 11, the bar contained in the arbitration clause won't be attracted. The court proceeded to appoint an arbitrator. To protect the Respondent's rights under the contractual clause, the court ruled that in the event the Respondent ultimately repudiates the Petitioner's claim, the consequences as per the arbitration clause will be

[207] Arbitration and Conciliation Act 1996, s 17.
[208] *Banga Electronics Pvt. Ltd. v Jagmohan Singh* 2021 SCC OnLine Del 2401.
[209] The Indian Contract Act 1872, s 2(g).
[210] Arbitration and Conciliation Act 1996, s 11.
[211] *Geo Chem Laboratories Pvt. Ltd. v United India Insurance Co. Ltd.* 2021 SCC OnLine Del 3054.

followed, as ruled in *United India Insurance Co. Ltd. v Hyundai Engg. & Construction Co. Ltd.*[212] and other judgements.

16. Section 34(4) of the Arbitration Act has a limited scope and cannot be relied upon to allow the arbitrator to cure certain defects.

The Delhi High Court in *Airports Authority of India v Bentwood Seating System (P) Ltd.*,[213] set aside the arbitral tribunal's award, which granted specific performance of the contract, on the ground that the tribunal had failed to decide on one of the principal issues, i.e., whether the contract had been obtained by fraud. The court ruled that specific performance of the contract couldn't be granted, despite not being one of the reasons in the termination letter, if it was proved that the contract had been obtained by fraud.

The Respondent had contended that the court proceedings should be adjourned to resume the arbitration as there were no reasons on the issue of fraud. But the court rejected this contention and held that the case was about the arbitral tribunal failing to decide one of the principal disputes between the parties, and the same couldn't be cured by adjourning the proceedings and enabling the arbitral tribunal to issue clarifications as the scope of Section 34(4) of the Arbitration Act[214] was limited. Thus, the court set aside the award but gave liberty to the Respondent to refer the dispute to arbitration.

17. Granting compound interest per se is not against the fundamental policy of Indian law.

The Delhi High Court in *Steel Authority of India Limited . Jaldhi Overseas Pte. Ltd.*[215] repudiated the Respondent's argument contending that the award of a 12% rate of interest per annum compounded quarterly was against the fundamental policy of Indian law. The court pointed out that there are several Indian legislations that provide for compound interest, including the Micro, Small and Medium Development Act, 2006. The court also stated that in cases where contracts, trade practices or statutes provide for payment of interest on a compound basis, the same is required to be paid. Thus, the court ruled that per se, compound interest doesn't go against Indian law.

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[212] *United India Insurance Co. Ltd. v Hyundai Engg.& Construction Co. Ltd.* (2018) 17 SCC 607.
[213] *Airports Authority of India v Bentwood Seating System (P) Ltd.* 2021 SCC OnLine Del 2853.
[214] Arbitration and Conciliation Act 1996, s 34(4).
[215] *Steel Authority of India Limited vJaldhi Overseas Pte.Ltd.* 2021 SCC OnLine Del 3002.

18. Under the Insolvency and Bankruptcy Code, 2016, an award holder cannot seek enforcement of an arbitral award following the announcement of a moratorium.

The Calcutta High Court in *Sirpur Paper Mills Ltd. v I.K. Merchants Pvt. Ltd.*[216] dealt with an application to set aside an arbitral award under Section 34 of the Arbitration Act.[217] During the pendency of the proceedings, corporate insolvency resolution proceedings were initiated against the petitioner along with a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 ["**IBC**"].[218] The contention of the petitioner was that the proceedings under Section 34 of the Arbitration Act had become infructuous as the award holder's claim was frustrated by the approval of the resolution plan under Section 31 of the IBC.[219]

The court noted that the Respondent had ample opportunities to get appropriate relief, and thus, there was an obligation on their part to take active steps under the IBC instead of waiting for the proceedings under Section 34 of the Arbitration Act. Thus, the court held that upon the approval of the resolution plan under Section 31 of the IBC, the claim of the award holder had been extinguished.

19. The scope of judicial interference under Section 37(2) of the Arbitration Act is not wider than under Section 34.

The Delhi High Court in *Raghuvir Buildcon Pvt. Ltd. v Ircon International Ltd.*[220] rejected the contention of the Appellant that the scope of judicial interpretation under Section 37(2) of the Arbitration Act[221] would be wider than under Section 34. The court held that, on the contrary, the scope of interference against the interlocutory orders is traditionally far more limited than the scope of interference against the authority's final decision. Further, the court also noted that Section 37(2), like Section 34, was in Part I of the Act and, thus, came under the ambit of Section 5 of the Act,[222] which forbids judicial intervention. As a result, in exercising jurisdiction over the impugned Arbitrator's order under Section 37(2)(a), the court would only consider whether the order contains any patent illegality or perversity or is otherwise unconscionable in law on the facts. The court held that it doesn't, therefore, re-arbitrate the application decided by the Arbitrator.

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[216] *Sirpur Paper Mills Ltd. v I.K. Merchants Pvt. Ltd.* 2021 SCC OnLine Cal 1601.
[217] Arbitration and Conciliation Act 1996, s 34.
[218] Insolvency and Bankruptcy Code 2016, s 14.
[219] Insolvency and Bankruptcy Code 2016, s 31.
[220] *Raghuvir Buildcon Pvt. Ltd. v Ircon International Ltd.* 2021 SCC OnLine Del 2491.
[221] Arbitration and Conciliation Act 1996, s 37(2).
[222] Arbitration and Conciliation Act 1996, s 5.

20. The existence of an arbitration clause does not prevent the court from entertaining a writ petition.

The Supreme Court in *Uttar Pradesh Power Transmission Corp. Ltd. v CG Power & Industrial Solutions Ltd.*[223] held that the High Court may entertain a writ petition despite the availability of alternate remedies. The Respondent had entered into a contract with the Petitioner where the contract contained an arbitration clause for resolving all disputes and differences between the parties. The Allahabad High Court had entertained the Respondent's petition, against which the petitioner filed a Special Leave Petition before the Supreme Court. The court also ruled that under Article 226[224] of the Indian Constitution, relief may be granted in cases arising out of a contract even if the contract contains an arbitration clause.

[223] *Uttar Pradesh Power Transmission Corp. Ltd. v CG Power & Industrial Solutions Ltd.* 2021 SCC OnLine SC 383.
[224] The Constitution of India 1950, art 226.

JUNE

21. The Limitation Act, 1963 applies to arbitration proceedings conducted under the MSMED Act.

The Supreme Court in *M/s Silpi Industries etc. v Kerala State Road Transport Corp.*[225] held that a simple reading of Section 43 of the Arbitration Act revealed that the Limitation Act of 1963 applied to arbitrations in the same way as it did to court proceedings. The respondents, Kerala State Road Transport Corporation, in this case, issued a request for proposals for thread rubber for tyre rebuilding. The purchase orders were handed to the appellants, who were the claimants before the arbitrator. According to the purchase orders, the appellants/claimants would get 90% of the entire purchase price upon receipt of materials, with the remaining 10% contingent on the final performance report.

The appellants herein addressed the Industrial Facilitation Council (now the Micro and Small Enterprises Facilitation Council created under the Micro, Small and Medium Enterprises Development Act when the ten percent balance money was not paid as per the purchase order. The parties were referred to arbitration after attempts at conciliation failed, and the award was in favour of the appellants. Following that, the awards were challenged under Section 34 of the 1996 Arbitration and Conciliation Act. Respondents took the matter to the High Court of Kerala in an appeal under Section 37 of the 1996 Act after the applications were dismissed. The court ruled that if the parties are unable to reach an agreement, the Council may refer the case to arbitration under clause (3) of Section 18 of the MSMED Act.

22. The criterion of minimal curial intervention could not be interpreted as to allow an arbitral tribunal to take shortcuts and make unjustified decisions based solely on speculation, leaving the reasons to the imagination.

In *BCCI v Deccan Chronicle Holding Ltd.*[226], the High Court of Bombay made it clear that an arbitrator may only function as an amiable compositeur if the underlying contract allowed it. However, if the parties did not specifically agree to have the dispute resolved *ex aequoet bono* under Section 28 of the Arbitration Act, the arbitrator cannot consider issues of justice and fairness. The court further

[225] *M/s Silpi Industries etc. v Kerala State Road Transport Corp.* 2021 SCC OnLine SC 439.
[226] *BCCI v Deccan Chronicle Holding Ltd.* 2021 SCC OnLineBom 834.

held that only when the underlying contract allows, then only, it might function as an amiable compositeur.

In the present case, Deccan Chronicle Holdings Ltd. and the Board of Cricket Control in India signed a ten-year Franchise Agreement in 2008. The Respondent was awarded the right to operate the Deccan Chargers, a cricket franchise based in Hyderabad, as part of the Agreement. However, due to Respondent's alleged contractual breaches relating to non-payment of player salaries and a 'bankruptcy event' under the Agreement, the parties became embroiled in a dispute. The Petitioner terminated the Agreement in August 2012 due to the Respondent's refusal to correct the aforementioned contractual defaults. Former Supreme Court Justice C K Thakker, was appointed as an arbitrator by the court in the matter.

The order was issued in favour of the Respondent by the Arbitrator. The Petitioner was ordered to pay an amount of Rs. 4814,67,00,000 plus interest at a rate of 10% per year from the start of the arbitration procedures until it was completed. The Petitioner, who was dissatisfied with the verdict, filed this case under Section 34 of the Arbitration Act. The High Court ruled that the present arbitration case could not be considered from a public law viewpoint because the arbitrator was constrained by the terms of the agreement. When the Respondent did not press for specific performance in the first place, it was not possible to grant damages instead of specific performance. The criterion of limited curial interference could not be interpreted as authorising an arbitral tribunal to take shortcuts and make unjustified awards based solely on speculation, leaving explanations to the imagination. An arbitral award should be self-evident. As a result, it was illegal for a party to provide grounds that were not included in the award in the first place.

23. An award holder cannot seek the enforcement of an arbitral award post the announcement of a moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016.

The case of *Sirpur Paper Mills v I.K. Merchants*[227] was concerned with an application to set aside an arbitral decision made in proceedings between I.K. Merchants Pvt. Ltd. and Sirpur Paper Mills Ltd. under Section 34 of the Arbitration and Conciliation Act, 1996. During the course of the proceedings, the Petitioner was subjected to a Corporate Insolvency Resolution Proceeding ["**CIRP**"], and a moratorium was imposed under Section 14 of the Insolvency and Bankruptcy Code, 2016. The award debtor, i.e., the Petitioner, argued that the proceedings under Section 34

[227] *Sirpur Paper Mills v I.K. Merchants* 2021 SCC OnLine Cal 1601.

of the Arbitration Act had become futile. The Petitioner's justification was that under the IBC, a resolution plan for the Petitioner's insolvency resolution had been authorised. As a result, the award holder's claim was thwarted by the resolution plan's approval under Section 31 of the IBC. The court remarked that the Respondent, in this case, had ample options, including an option to apply to the National Company Law Tribunal ["**NCLT**"] for appropriate relief. As a result, rather than waiting for the application to be adjudicated under Section 34 of the 1996 Act, the Respondent was required to take active steps under the IBC. Thus, the appropriate forum for this case is NCLT under IBC and not an application under Arbitration Act.

24. Court cannot venture into deciding the disputes arising between the parties at a preliminary stage.

In *IMZ Corporate Pvt. Ltd. v Telematics Pvt. Ltd.*[228], the Delhi High Court decided that the court's jurisdiction under Section 11 of the Arbitration Act is limited to determining whether an arbitration agreement exists and whether there are arbitral disputes that need to be resolved. The court was also told that at this point in the proceedings, it couldn't decide on the parties' disagreements. It was noted that the court would only initiate a judicial inquiry if the arbitration agreement appeared to be manufactured ex-facie and that a simple claim of fraud is insufficient.

25. Disputes arising from an agreement to assign a trademark are Arbitrable.

In *Golden Globe Pvt. Ltd. v Golden Tobacco Ltd.*[229], the Delhi High Court concluded that trademark assignment conflicts do not come within the legislative limitations of the Trademark Act, 1999, but rather within the domain of contract and so are arbitrable. It was also decided that trademark assignment is done through a contract rather than a statutory fiat, and therefore it does not involve the exercise of sovereign powers. The court found that the right to use a trademark was acquired by a specific agreement, not the grant, registration, or infringement of trademarks, in this case.

26. The prior consent of the Central Government is not necessary under Section 86(3) of the Code of Civil Procedure to enforce an arbitral award against a foreign State.

In *KLA Const. Technologies Pvt. Ltd. & Ors. v The Embassy of Islamic Republic of Afghanistan & Ors.*[230]The High Court of Delhi held that a foreign State cannot claim sovereign immunity against the

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[228] *IMZ Corporate Pvt.Ltd. v Telematics Pvt. Ltd.* ARB P 204/2021.
[229] *Golden Globe Pvt. Ltd. v Golden Tobacco Ltd.* CS(COMM) 178/2021.
[230] *KLA Const. Technologies Pvt. Ltd. & Ors.v The Embassy of Islamic Republic of Afghanistan & Ors.*2021 SCC OnLine Del 3424.

enforcement of an arbitral award arising out of a commercial transaction. The case involves two enforcement petitions in which the petitioners were seeking to have arbitral judgements enforced against the respondent foreign states. In the first petition, the petitioner sought to have an arbitral award issued on November 26, 2018, against the Embassy of the Islamic Republic of Afghanistan enforced. In the second case, the petitioner sought to have an arbitral ruling against the Federal Democratic Republic of Ethiopia's Ministry of Education enforced.

The respondents in both of the above cases did not participate in the arbitration proceedings, resulting in the ex-parte arbitral rulings. The court held that the Central Government's consent is not required to enforce an arbitral judgement against a foreign state under Section 86(3) of the Code of Civil Procedure. An arbitral award arising out of a commercial transaction cannot be enforced if a foreign state claims sovereign immunity.

Section 36 of the Arbitration Act treats an arbitral award as a decree of the court for the limited purpose of enforcing an award under the Code of Civil Procedure, and it cannot be interpreted in a way that contradicts the Arbitration Act's underlying rationale, namely, the prompt, binding, and legally enforceable resolution of disputes between parties. The court went on to say that once a foreign state assumes the role of a commercial enterprise, it is bound by the norms of the commercial legal ecosystem and is not authorised to claim any immunity that it might otherwise have in its sovereign position. If they are allowed to obtain immunity, this would be a direct violation of the International Commercial Arbitration.