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VOLUME IV | ISSUE III

ATTALIKA AVENUE, KNOWLEDGE CORRIDOR, PDPU ROAD,
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FOREWORD

PROF. (DR.) S. SHANTHAKUMAR

Director, Gujarat National Law University

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

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 twelth edition of the Magazine, the editors are pleased to present the feature interview with Ms. Laila Ollapally. She has been practising as a lawyer before various Courts for more than three decades, and is a prominent figure in the field of International Mediation She was most solicitous in sharing his insights and advice with the editorial team. We take this opportunity to extend our gratitude to Ms. Ollapally for engaging with us.

Volume IV Issue III of the ADR Magazine features five articles. 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 the five writings on contemporary issues of ADR which are both interesting and informative. We hope this attempt of ours is recognized by our readers and contributors and 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 while putting it together for you.

Gujarat National Law University

GNLU SRDC ADR

MAGAZINE

VOLUME IV | ISSUE III

GNLU SRDC ADR MAGAZINE

NAVIGATING THE EFFECT OF NO-CLAIMS CERTIFICATES IN CONSTRUCTION CONTRACTS

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Introduction

In construction contracts, it is commonplace for employers to devise mechanisms to restrict the claims of contractors after the completion of works under the contract. These mechanisms may be clothed in the form of either express terms of the contract[1] or in the form of a separate agreement.[2] In as much as contractual clauses are concerned, works contracts may contain a clause that prohibits the contractor from claiming compensation for claims attributable to either the contractor, the employer or both parties.[3] Generally, these clauses stipulate that where extensions of time are granted due to delays, the contractor cannot seek any compensation on the ground of such delay, apart from time extension.[4] As far as the latter mechanism is concerned, employers may withhold the clearance of final bills unless the contractor submits a 'no-demand'/ 'no-claim' certificate ["**NCC**"], a settlement agreement, or a discharge voucher signed by contractors.[5] This NCC is used by the employer as an instrument for preventing the contractor from pursuing future claims, predicated on the premise that the NCC serves as acceptance by contract in full accord and satisfaction of the parties to the contract.[6]

Interestingly, an NCC may not necessarily be for the final discharge of the entire contract. For example, a no-claims clause may provide that the contractor will not be entitled to payment of escalation during the contract period. However, if the contract period is extended due to delays not attributable to the contractor, this restriction or bar on pursuing a claim for escalation does

[1] *State of Bihar v. Hanuman Mal Jan* (1997) 11 SCC 40.
[2] *M/s ONGC Mangalore Petrochemicals v. M/s Ans Constructions Limited* 2018 (3) SCC 373.
[3] *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited* (2010) SCC 377.
[4] *Ramnath International Construction (P) Ltd. v. Union of India* (2007) 2 SCC 453.
[5] *United India Insurance Company Limited v. Antique Art Exports Private Limited* (2019) 5 SCC 362.
[6] *P.K. Ramaiya & Co. v. Chairman and Managing Director, NTPC Ltd.* 1994 Supp (3) SCC 126.

not apply and the same can be disputed through arbitration/ litigation.[7] However, these terms or the agreement, as the case may be, are not infallible in their pursuit of putting a hiatus on the prospective claims of the contractor and the weightage that is to be given to such terms or agreement is a question that has vexed the courts and the stakeholders alike.

Impact of NCC on the arbitration clause

A contract is generally discharged upon fulfilment of respective obligations by the parties under the contract. Alternatively, the parties may choose to substitute their existing obligations with a new set of obligations and the contract may be discharged by performance of such new set of obligations. The performance of the substituted obligations by the parties is referred to as discharge by accord and satisfaction. Section 63 of the Indian Contract Act is the legislative embodiment of the common law principle of discharge by accord and satisfaction. This accord and satisfaction can be in form of an NCC or a discharge certificate issued by the contractor to the employer.[8] Resultantly, the employers use the NCC as a tool to prevent the referral of the dispute to arbitration on the premise that issuance of NCC completely discharges the contract.

At this juncture, it is appurtenant to note that owing to the doctrine of separability, even in cases where there has been a valid discharge of the principal contract, the arbitration clause continues to survive. The doctrine of separability of arbitration clause, as propounded by the House of Lords in *Heyman v. Darwins,*[9] is premised on the principle that the nature and function of an arbitration clause are distinct from the substantive clauses of the contract. Unlike the other provisions of the contract, the arbitration clause does not deal with the substantive rights and obligations of the parties, instead it provides for the medium of resolution of disputes between the parties and thus, the discharge of the underlying contract does not *ipso facto* extinguish the arbitration agreement.

It therefore follows that even where the contract has allegedly been discharged by accord and satisfaction owing to signing of NCC or execution of a settlement agreement, as the case may be, the arbitration clause continues to survive and the parties are not discharged of their obligation to settle their disputes as per the arbitration agreement.[10] The dispute regarding full and final settlement of the contract, is thus, a dispute arising out of or in relation to the substantive contract and hence, is referable to arbitration.

[7] *Associated Construction v. Pawanhans Helicopters Pvt. Ltd.* (2008) 16 SCC 128.
[8] *Payana Reena Saminathan v. Pana Lana Palaniappa* (1913-14) 41 IA 142.
[9] *Heyman v. Darwins* (1942) A.C. 356.
[10] *SBI General Insurance Co. Ltd. v. Krish Spinning* 2024 SCC OnLine SC 1754.

This notion that there remains no dispute to be referred to arbitration pursuant to issuance of the NCC, also gained traction after the decision of the Supreme Court of India in *Nathani Steels Ltd. v. Associated Constructions*[11] wherein it was held that in the event of full and final settlement of any dispute by accord and satisfaction, there ceases to exist any arbitrable dispute and thus the arbitration clause cannot be invoked. Such a conclusion flows from the premise that "*a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order.*"[12] However, there cannot be an omnibus conclusion that issuance of an NCC would *ipso facto* render any dispute arising out of the contract non-arbitrable, unless the parties expressly agree to do the same. In this regard, we may gainfully refer to the decision of the Apex Court in *National Insurance Company Limited v. Boghara Polyfab Private Limited*[13] wherein the following principles were laid down:

1. In a scenario where a claim is resolved through conciliation or pre-Lok Adalat leading to an accord and satisfaction, arbitration cannot be pursued.
2. Among the various claims of the claimant, if the admitted ones are settled, and negotiations resolve the remaining disputed claims through a written agreement, upon payment of the agreed amount and issuance of a discharge voucher/ no-claims certificate, any further reference to arbitration is precluded.
3. When a contractor completes the work and claims payment as per the contract, but the employer only partially admits the claim, demanding a discharge voucher/ NCC in a prescribed format for releasing the admitted amount. In such a case, the contractor might reluctantly sign the NCC to obtain at least the admitted payment. Such a discharge due to factors like economic pressure would not prevent arbitration.
4. An agreement/ "accord" provided by an insured, under the condition that the entire claim will be denied unless a full and final voucher for an amount lower than what was claimed is given, cannot be viewed as voluntary consent, and hence, would be arbitrable.
5. In a case where a contractor voluntarily reduces their claim amount to resolve disputes after the employer rejects their initial claims, and subsequently settles by signing a full and final discharge voucher, they cannot pursue future claims or arbitration. This holds true even if the

[11] *Nathani Steels Ltd. v. Associated Constructions* 1995 Supp (3) SCC 324.
[12] *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited* (2011) 10 SCC 420.
[13] *National Insurance Company Limited v. Boghara Polyfab Private Limited* (2009) 1 SCC 267.

contractor opted for the settlement due to financial or commercial pressures, as the choice to lower the claim was made willingly.

To sum up, the legal position on this matter stands crystallized to the effect that when a final settlement is reached amicably, even with adjustments, accepting payment as full and final, along with providing discharge vouchers/NCC, there remains no subsisting dispute. Subsequently, neither party can raise any further claims or demands against the other. The courts will also consider that the transaction was finalized between the parties not due to any inadvertent mistake but, in fact, after extensive bilateral discussions with the intention of resolving the dispute.[14] On the contrary, where the execution of discharge voucher is a pre-condition to the payment of claim, or where the settlement amount is offered to the contractor on a take it or a leave it basis, the dispute is arbitrable. In what has now come to be established as a norm in the construction sector, after issuing the NCC, contractors do seek to defy the legal validity of such no-claims/no-demand certificates on grounds of want of free consent.

Free consent vis-à-vis a no-claims certificate : How determined?

A principle of contract law that is more settled than any other is that there can be no enforceable contract sans *consensus ad idem* of the parties.[15] The legislative exposition of this principle may be traced to Section 14 of the Indian Contract Act, 1872. The provision stipulates that consent is said to be free when it is not induced by coercion, undue influence or fraud. In the modern world of large corporations, extensive infrastructure, and the involvement of state instrumentalities in various industries, unequal bargaining power may often lead to unfair and unreasonable agreements.[16] In cases, where the bargain is found to be unconscionable, the courts have repeatedly refused to enforce such unreasonable agreements.[17]

In this regard, the Supreme Court while relying on the maxim '*necessitas non habet lagem*' has held that "*a person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.*"[18] The court has further addressed the power difference among contracting parties in *Central Inland Water Transport Corpn. Ltd.*[19] and asserted that "*the courts will not enforce and will, when*

[14] *R.L Kalathia & Co. v. State of Gujarat* (2011) 2 SCC 400.
[15] *Brij Mohan & Ors. v. Sugra Begum & Ors.* 1990 SCR (3) 413.
[16] *Central Inland Water Transport Corporation Ltd., v. Brojo Nath Ganguly* (1986) 3 SCC 156.
[17] *Dicitex Furnishing Ltd. v. Oriental Insurance Co. Ltd* 2015 SCC OnLine Bom 5055.
[18] *Chairman and Managing Director NTPC Ltd. v. Reshmi Constructions Builders and Contractors* [2004] 2 SCC 663.
[19] *Brojo Nath Ganguly* (n 16).

called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power."

(emphasis supplied)

In certain works contracts, unless a discharge certificate is given in advance, payment of bills are generally delayed.[20] It is also common practice in some sectors to obtain undated receipts of advance payment.[21] This situation exemplifies instances where contractors are compelled to sign an NCC without proper consideration, with such no-claim certificates routinely demanded and accepted without thoughtful evaluation, sometimes for a sum which is smaller than the claim in full and final settlement of all claims. The courts have thus ruled that the existence of such a clause requiring a no-claim certificate in the agreement cannot absolutely prevent the contractor from raising claims which are genuine. [22] Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence, such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such 'no-claim certificate'.[23]

However, a mere allegation that the NCC was an offspring of coercion/ undue influence will not be, a plea sufficient enough to invalidate the NCC.[24] In cases where a claimant sets up a plea that a no-claim certificate was acquired through fraud, coercion, undue influence and the other party contests its correctness, the courts have ruled that there is no fixed rule to determine the same and the court must look into this aspect to find out, *prima facie*, whether or not the dispute is bona fide.[25] It has been categorically held by courts that "*a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets such a plea must prima facie establish the same by placing material before the Chief Justice/ his designate.*"[26] In the subsequent section, with the help of judicial precedents, the author will analyse the aspects that must be factored in while determining the value that is to be attached to an NCC.

Judicial precedents on the validity of NCC

[20] *Ambica Construction v. Union of India* (2006) 13 SCC 475.
[21] *Boghara Polyfab Private Limited* (n 13).
[22] *M/s Associated Construction v. Pawan Hans Helicopters* Appeal (Civil) 3376-3377 of 2008.
[23] *R.L. Kalathia* (n 14).
[24] *Oriental Insurance Co. Ltd* (n 17).
[25] *Union of India vs. Master Construction Co.* (2011) 12 SCC 349.
[26] ibid.

In *Ambica Construction*,[27] the Supreme Court examined the validity of a contractual clause that mandated the contractor to furnish a no-claim certificate specified by the Railways after the final measurement, and that further provided that the contractor would be prevented from challenging the accuracy of items covered by the certificate. The fact that at the time of issuance of the no-claim certificate the work was unfinished and final measurements had not been conducted, evidenced that the certificate was obtained under duress and coercion. The court held that such a prohibitory contract clause does not completely prevent a contractor from asserting claims that are genuine.

In some instances, the court may examine the conduct of the parties through correspondences/ communication exchanged to check the veracity of the claim of coercion/ undue influence. In the facts that led to the decision in *Reshmi Constructions*,[28] the employer cleared a final bill with a 'no-demand certificate' indicating no claims, which the contractor signed and submitted. However, the same day, the contractor sent a letter to the employer stating that the certificate was issued under a threat of non-payment until its execution. In this instance, the Supreme Court was convinced by the contractor's argument that the no-demand certificate was *prima facie* obtained under coercion/ undue influence. The fact that the contractor's initial final bill was rejected, but a subsequent final bill, accompanied by a 'no-demand certificate' was prepared and signed to ensure payment and went on to prove that the contractor's claim of being under influence of coercion was not considered an afterthought.

Similarly in *Bansal Infratech*,[29] the arbitral tribunal reviewed the evidence presented by both parties. It found that after the claimant submitted the final bill, the employer issued a letter stating that specific documents, including an NCC and a Material Reconciliation Statement ["**MRS**"], were required for processing. Consequently, the tribunal determined that the claimant was economically pressured to provide the NCC and MRS.

Another crucial aspect to consider in navigating a no-claims clause is contingent on the acceptance and processing of the final payment by the contractor without raising any objections.[30] Such acceptance by conduct is also recognised under Section 8 of the Contract Act.[31] In this regard, the

[27] *Ambica Construction* (n 20).
[28] *Reshmi Constructions* (n 18).
[29] *GAIL (India) Limited v. Bansal Infratech Synergies Limited* 2021 SCC OnLine Del 3628.
[30] *Union of India v. Onkar Nath Bhalla and Sons* (2009) 7 SCC 350.
[31] Section 8, Indian Contract Act, 1872.

court in *Bhagwati Prasad Pawan Kumar v. Union of India*[32] has ruled that keeping or encashing the cheques without any protest signifies complete and final settlement of the claim.

Thus, it is important for contractors to express any objections or non-acceptance before encashing the cheques. Further, thus, it is essential for contractors to present *prima facie* proof of coercion/ undue influence in order to succeed in court for seeking reference to arbitration. [33] This action challenges the authenticity of the claim, ensuring that the claims remain eligible for arbitration.

Conclusion

There exists no rule of universal application that discharge of contract by accord and satisfaction would render the dispute non-arbitrable. However, the issuance of an NCC is not a paper tiger in every case. If the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute is amicably settled by way of a final settlement by and between the parties, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the arbitration clause.

The above referred body of cases firmly crystalize the principle that a contractor may not, as an afterthought, allege that the NCC was a result of fraud, coercion, duress or undue influence. Where the full and final satisfaction is acknowledged by the parties to the contract and the amount is received unconditionally, a subsequent allegation of coercion is viewed as a merely a devise by the contractor to get over the settlement of the claims. It is important to acknowledge that the purpose of a full and final settlement is to prevent future disputes between the parties involved. Consequently, the contractor should present compelling evidence to confirm the authenticity of the coercion allegations and refrain from using them to gain an advantage from the employer after receiving payment. A plain allegation of fraud or coercion without specific details proving circumstances that nullify consent will not benefit the contractor's case.

[32] *Bhagwati Prasad Pawan Kumar v. Union of India* (2006) 5 SCC 311.
[33] *New India Association Co. Ltd. v. Genus Power Infrastructure Ltd.* (2015) 2 SCC 424.

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INCORPOREAL LOOP OF EXTENSION: ANALYZING EXTENSION OF MANDATE OF ARBITRAL TRIBUNAL UNDER SECTION 29A(4) OF THE ARBITRATION AND CONCILIATION ACT, 1996

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Introduction

Section 29A of the Arbitration and Conciliation Act, 1996[1] ["**Arbitration Act**"], introduced by the Amending Act of 2015[2] (effective as of October 23, 2015), was aimed at establishing a timeframe for the conclusion of arbitration procedures. Initially, the arbitral tribunal's consideration began in the statutory timeframe of twelve months. However, the Amending Act of 2019[3], which became effective on August 30, 2019, altered the specified time limit. Twelve months from the date when pleadings were concluded, arbitration proceedings are now required to be completed. Additionally, an extension of six months if the award is not passed in the twelve-month window is permitted by mutual agreement of the parties according to sub-Section (3). Sub-section 4 further states that if the award is not passed even in the stipulated eighteen-month mandate (including the extended period), the parties can apply to the court for an extension.

The Delhi[4] and Bombay[5] High Courts, when granting applications under Section 29A(4) of the Arbitration Act, carefully considered two crucial factors: the reasons for the delay and the status of the arbitration proceedings. The High Court of Himachal Pradesh in *Dinesh Kumar v Land Acquisition Officer*[6] determined that if the party filing a submission under Section 29A(4) can demonstrate to the court that the delay occurred due to a valid reason, the court can extend the

[1] The Arbitration and Conciliation Act 1996, s 29A.
[2] ibid.
[3] ibid.
[4] *Barasat Krishnagar Expressways Ltd. v National Highways Authority of India* [2023] SCC OnLine Del 243.
[5] *Tikamdas & Associates v V. Raheja Design Construction Pvt. Ltd.* [2021] SCC OnLine Bom 11799.
[6] *Dinesh Kumar v Land Acquisition Officer* [2023] SCC OnLine HP 767.

time. Denying such an application would be equivalent to restricting the rights of the concerned party, predominantly the arbitration claimant or the petitioner.

Nevertheless, the Hon'ble Calcutta High Court adopted a different stance. In the recent case of *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.*[7], a rigorous interpretation of Section 29A(4) was employed, considering the language used in the provision and discerning the legislative intent. The 176th Report of the Law Commission of India[8] ["**LCI Report**"] recommended the term "suspension of arbitral proceedings" (rather than "terminate"). Single Judge held that the deadline for the conclusion of arbitration procedures be included. The lawmakers used the word "terminate" deliberately to suggest that the tribunal's mandate would not merely persist in suspension but be terminated. About Rohan Builders, a Special Leave Petition (SLP) was lodged in the Supreme Court, and it has recently given its pronouncement. But before delving into it, it is essential to analyse the issue surrounding it.

Decoding Section 29A(3) to (6) in the essence of "extension."

The Black's Law Dictionary[9] reads extend as "to expand, enlarge, prolong, widen, carry out, further than the original limit." In the Indian legal realm, the Supreme Court distinguished between the terms "extension" and "renewal" in *Provash Chandra Dalui v Biswanath Banerjee*[10], the division bench held that renewal is a situation where "a new lease is required while extension means a prolongation of the lease."

The Companies Act, 1956, in its Section 18(4)[11] states, "the Court may, at any time, by order, extend the time for the filing." The interpretation implies flexibility to allow the court to exercise its power to extend deadlines, even years or decades after the original filing date. The Punjab and Haryana High Court judgment in *The National Industrial Corporation Ltd. v The Registrar of Companies*[12], Justice Tek Chand indicated that unlike the term "revive", which involves bringing something back to life after it has become moribund or inactive, the term "extension" signifies the continuation of an existing entity. Thus, courts exercise their authority to extend deadlines at any time, emphasising the continuity of existing entities rather than creating new ones.

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[7] *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.* [2023] SCC OnLine Cal 2645.
[8] Law Commission of India, *The Arbitration and Conciliation (Amendment) Bill, 2001 (176th LCI Report, 2001).*
[9] Bryan A. Garner, *Black's Law Dictionary* (11th edn, Thomson Reuters West 2019).
[10] *Provash Chandra Dalui v Biswanath Banerjee* [1989] Supp (1) SCC 487.
[11] The Companies Act 1956, s 18(4).
[12] *The National Industrial Corporation Ltd. v Registrar of Companies* [1963] AIR P&H 239.

Extension vs. Renewal of Mandate

Section 29A(4), rather than applying itself, emphasises the state of its pendency and contemplates the ongoing status of an application requesting an extension of the arbitrator's authority. This implies that the extension is only viable if the application is submitted before the expiration of the mandate and not after that. A deemed fiction is employed in the provision to ensure timely submission, creating a scenario where the application is considered to be submitted while the arbitrator's mandate is still in force. The specific language, "either before or after the expiry of the period so specified", underscores the importance of the application being made within the existing timeframe.

The division bench of the Patna High Court stated that[13], "if the mandate has already terminated and expired for the Arbitral Tribunal if the legislature so intended. It would have used the term revival or renewal and not the word extension, which presupposed the existence of something." Further, the statements were backed by the meanings of the words from Mitra's Legal and Commercial Dictionary and Chambers 21st Century Dictionary[14]. The lines of the judgment were also quoted in the High Court of Bombay.[15].

In Section 29A(4), the term "extension" is directly linked to the timeframe outlined in Section 29A(1) or (3) concerning the arbitrator's mandate for delivering a decision. The deliberate omission of terms like "renewal" or "revival" suggests that the application for an extension should be structured as a continuous mandate. This implies that the framers intended for the application to extend the arbitrator's mandate to be made within the existing mandate's duration. Had the intention been to allow for extension requests at any point following the mandate, the language might have incorporated other terms like "revive" or "renew" instead of "terminate" in Section 29A(4).

The catalysing effect of Section 29-A in Arbitration

Section 29A was amended in response to the 176th LCI Report[16], which identified several issues with delays and high costs in the arbitral award-making process in India. To address these concerns, the report recommended several vital changes to expedite proceedings and establish clear deadlines for rendering awards. These amendments aimed to streamline the arbitration

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[13] *South Bihar Power Distribution Co. Ltd. v Bhagalpur Electricity Distribution Co. Pvt. Ltd.* [2023] SCC OnLine Pat 1658.
[14] Chambers, *The Chambers Dictionary* (2nd edn, Chambers Publishing 2008).
[15] *Nikhil H. Malkan v Standard Chartered Investment & Loans (India) Ltd.* [2023] SCC OnLine Bom 2575.
[16] *LCI Report* (n 8).

process and reduce delays. As a result, Section 29A of the Arbitration Act now plays a crucial role in accelerating arbitration timelines.

The presentation of the award should take place within one year following the conclusion of the pleadings, and an additional six months may be allowed if mutually agreed upon by the parties, according to Sections 29A(1) and (3) as reiterated in the case of *M/S Lucknow Agencies v U.P. Avas Vikas Parishad*[17] According to Section 29A(2), if the arbitral tribunal renders an award within six months of the reference date, the parties may agree to additional fees for the tribunal. However, if the arbitral tribunal is to blame for the delay in the proceedings, the Court may lower the arbitrator's costs[18] under the first provision of Section 29A(4). Furthermore, Section 29A(4) provides for extensions of the arbitral tribunal's mandate, which, according to the recent Supreme Court ruling in *Chief Engineer (NH) PWD v M/s BSC & C and C JV*[19], is vested solely in the principal civil court of original jurisdiction or a High Court with ordinary civil jurisdiction. This decision clarifies that the term "Court" under Section 29A(4) does not extend to High Courts without original jurisdiction, thus setting a clear procedural boundary for extension applications and reinforcing the authority of district-level courts or equivalent High Courts. This clarification is vital in ensuring consistency and predictability in the arbitration process, though it raises concerns for ongoing cases previously granted extensions by High Courts without such jurisdiction.

According to Section 29A(5), the court may only prolong the arbitrator's mandate if it finds adequate justification for the terms and conditions it deems appropriate[20]. In addition to extending the mandate, Sections 29A(6) and 29A(7) empower the Court to substitute one or more arbitrators and ensure the continuation of the arbitral proceedings, even after the tribunal has been reconstituted. In *Sh. Ram Chand v Union of India & Ors*[21], Section 29A(9) imposes a time limit on the Court to render a decision on an application under Section 29A(5) within 60 days from the opposite party's receipt of notice. Furthermore, Section 29A(8) grants the Court the authority to levy actual or exemplary costs on the parties involved in the arbitration process.

[17] *M/S Lucknow Agencies v UP Avas Vikas Parishad* [2019] 07 AHC CK 0081.
[18] Singhania & Partners LLP, 'Application Under Section 29A of The Arbitration Act Lies Only Before The Court Competent To Appoint Arbitrator' (*Mondaq,* 3 March 2021). <https://www.mondaq.com/AdviceCentre/Content/4788/Application-Under-Section-29A-Of-The-Arbitration-Act-Lies-Only-Before-The-Court-Competent-To-Appoint-Arbitrator.> accessed 16 September 2024.
[19] *Chief Engineer (NH) PWD (Roads) v BSC & C & C JV* [2024] SCC OnLine SC 1801.
[20] Ayush Mehta, Samkit Jain, 'Decoding Time Bound Arbitration in India: A Closer Look At Section 29A' (*NUALS Law Journal*, 12 April 2020) <https://nualslawjournal.com/2020/04/12/decoding-time-bound-arbitration-in-india-a-closer-look-at-Section-29a/> accessed 16 September 2024.
[21] *Ram Chand and Ors. v Union of India & Ors.* [1994] 1 SCC 44.

On the other hand, the Delhi High Court adopted a different position in the *ATC Telecom Infrastructure Pvt. Ltd. v Bharat Sanchar Nigam Ltd.*[22] case. It contended that preventing parties from applying the arbitral tribunal's mandate would negate the entire objective of the Act, which disagrees with the Calcutta and Patna High Courts. The Delhi High Court highlights that preventing parties from requesting an extension after the tribunal's mandate has expired would undermine the goal of the Act. The court's observation reflects this stance[23].

Section 29A of the Arbitration Act, in its entirety, aims to compel all entities participating in the arbitration process to demonstrate diligence and commitment to expeditiously conclude the arbitration proceedings, facilitating the prompt issuance of the award. In addition to the arbitrator's obligation to provide the decision within the allotted time frames, as reiterated in *South Bihar Power Distribution Co. Ltd. v Bhagalpur Electricity Distribution Co. Pvt. Ltd.*[24] The extra time allotted by Section 29A(3) is the penultimate opportunity for extending the mandate. The fundamental mandate is that the parties must take concrete, timely actions to extend the arbitral tribunal's authority to make the award during its term rather than seeking the authority after the term concludes automatically.

Section 29A – "A Sense of Many Endings"

Section 29-A and its sub-sections are interpreted as an extension of the arbitrator's authority, which persists until the court resolves an application. Essentially, the argument suggests that the mandate endures until the Court terminates it through an application initiated by a party.

The reasoning conflicts with the events found in Section 29A (1) through (5), where each mandate extension from 29A (1) through (4) envisions the end of the period under each sub-Section as reiterated in *M/S Lucknow Agencies Lko v U.P. Avas Vikas Parishad*[25] stated differently, there are multiple ends in Section 29A that can only be extended by the parties or the Court as long as the compulsion remains valid. This Section serves as a reminder to expedite the arbitration process, as the mandate may be revoked if the parties fail to act precisely and promptly. This Section focuses on the conclusion of the mandate.[26] At different points, rather than emphasising new beginnings.

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[22] *ATC Telecom Infrastructure Pvt. Ltd. v Bharat Sanchar Nigam Ltd.* [2023] SCC OnLine Del 7135.
[23] Upadhyay S., & Khare R., 'Judicial Discretion in Arbitration: A Critical Examination of Section 29A(4) of the Arbitration and Conciliation Act, 1996' (*Lexology*, 20 November 2023) <https://www.lexology.com/library/detail.aspx?g=78bbf618-a778-4626-ac3d-477e1b47f5d8> accessed 16 September 2024.
[24] *South Bihar Power Distribution Co.* (n 13).
[25] *M/S Lucknow Agencies* (n 17).
[26] Payal Chandra, Rhythm Buaria, 'Appointment of arbitrators under Section 11 by the Supreme Court: A time intensive phenomenon' (*SCC Times,* 28 November 2020)

In addition to allowing for a time extension, subclause (6) of Section 29A gives the authority to replace any or all arbitrators. This is significant because if we interpret "Court" defined in Section 2(1)(e) of the Act, the High Court may replace the arbitral tribunal that the Apex Court appoints under Section 11 of the Arbitration Act in the event of international commercial arbitration. Similarly, a primary Civil Court may replace an arbitral tribunal that the High Court appoints in any other arbitrations. In the second instance, the circumstances will become even more unique and strange[27] because a primary Civil Court does not, in the first place, have the power to appoint an arbitrator in any circumstances.

A New Cycle of Extension

Section 29A of the Arbitration Act addresses adhering to specified timelines for rendering awards. The deadlines should be interpreted as obligatory limits, requiring vigilance from both the arbitrator and the involved parties regarding deadlines.[28] I am looking for an extension of the arbitral tribunal's authority. The request for an extension must be submitted while the mandate is still in effect, not after.

Only an order granting an extension for sufficient cause may be issued by the Court under Sections 29A(4) and (5) of the Act. The mandatory-peremptory phrase "the mandate of the arbitrator(s) shall terminate"[29] appears in Section 29A(4). If the arbitral tribunal chooses to render an award beyond the established deadlines, such a decision could be susceptible to jurisdictional errors. This is because once the tribunal's mandate is terminated by operation of law, there is no provision for it to be renewed.

To address the issue of drawn-out arbitral proceedings,[30] Section 29A was added; nevertheless, it may create more problems than it attempts to resolve. Preserving party autonomy and ensuring that the parties involved in arbitration retain the freedom to extend the proceedings beyond the

<https://www.scconline.com/blog/post/2020/11/28/appointment-of-arbitrators-under-Section-11-by-the-supreme-court-a-time-intensive-phenomenon/> accessed 16 September 2024.

[27] Soumya, 'Analysing The Issue Of Jurisdiction With Respect To Section 29a Of The Arbitration And Conciliation Act, 1996' *(Mondaq*, 6 May 2022) <https://www.mondaq.com/india/arbitration--dispute-resolution/1190810/analysing-the-issue-of-jurisdiction-with-respect-to-Section-29a-of-the-arbitration-and-conciliation-act-1996> accessed 16 September 2024.

[28] *Dalmia Office Trust v ATS Housing Pvt. Ltd.* [2021] SCC OnLine NCLT 29210.

[29] Ruchika Darira, 'Section 29A Of The Amended Indian Arbitration And Conciliation Act, 1996'(*Mondaq,* 10 May 2017) <https://www.mondaq.com/india/arbitration--dispute-resolution/592764/Section-29a-of-the-amended-indian-arbitration-and-conciliation-act-1996> accessed 16 September 2024.

[30] 'What is Section 29B of Arbitration and Conciliation Act' (*Indian Dispute Resolution Centre*) <https://theidrc.com/content/adr-faqs/what-is-Section-29b-of-arbitration-and-conciliation-act> accessed 16 September 2024.

stipulated six-month period specified in Section 29A is one approach to tackle the issue arising from the mentioned Section[31]. This approach should consider the nature and complexity of the matter to accommodate necessary extensions as required. The only situation in which the court should become involved is if the arbitration's participants cannot agree on whether the deadline should be extended.

Applying for an extension under 29A(4) does not automatically bring post-termination back to life under the mandate. In these cases, the respondents have declined to consent for the additional six-month period.[32] under Section 29A(3) or beyond the stage of Section 29A(1). The crucial phrase, which is found in Section 29A(4), states explicitly that "the mandate of the arbitrator(s) shall terminate." When the mandate expires, the arbitrator or arbitral tribunal is de jure incapable of carrying out their duties, similar to what would happen in a case covered by Section 14(1)(a) of the Act. Furthermore, someone dissatisfied with the outcome could argue that an award issued following an extension of a mandate is illegitimate,[33] as the tribunal did not possess the authority to render the decision after the conclusion of its mandate.

The Supreme Court's Ruling

The Court in *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.*[34] clarified several important aspects of Section 29A. First, it held that the period for an award could not be extended beyond six months by mutual consent of the parties. Any extension beyond this point requires judicial intervention, which may be granted either before or after the statute of limitations expires. The court also elaborated that although the arbitral tribunal is *functus officio* (i.e. its order expires) after the lapse of time, it is not absolute. If an extension is requested and approved by the court, the court order can again be revived.

Further, the court held that the arbitral tribunal should refrain from making a pronouncement while an application for extension under Section 29A(5) is pending before the tribunal. Even if a statement is issued while such an application is pending, the court must decide the application and,

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[31] Gaurav Juneja, Aayush Jain, 'Applications for Extension of Time for Passing the Award in India: Which Court to Entertain?' (*Kluwer Arbitration Blog*, 1 January 2020) <https://arbitrationblog.kluwerarbitration.com/2020/01/01/applications-for-extension-of-time-for-passing-the-award-in-india-which-court-to-entertain/> accessed 16 September 2024.

[32] Anshika Sharma, Khyati Mehrotra, 'Unraveling the Dilemma of Application of Amended Section 29A of Arbitration and Conciliation Act' (*IRCCL*, 10 May 2020) <https://www.irccl.in/post/unraveling-the-dilemma-of-application-of-amended-Section-29a-of-arbitration-and-conciliation-act> accessed 16 September 2024.

[33] *Ayush Mehta* (n 20).

[34] *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.* [2024] SCC OnLine SC 2494.

where necessary, may apply other sub-sections, such as (6) to (8), that have been used to improve the situation. Finally, the High Court concluded that applications under Section 29A(4) read with Section 29A(5) for extension of time for arbitration proceedings apply when the first time or which even at the end of the expansion. This decision has provided much-needed clarity on this issue, reinforcing the importance of court oversight in the court system and ensuring that technical delays do not compromise the integrity of the case.

Conclusion

Section 29A reveals an interplay between the court's discretion and the expansion of the arbitrator's mandate. The term "extension" in Section 29A(4) reflects a deliberate choice by the legislature, signalling the continuity of the existing mandate rather than a revival or renewal. Courts across India have grappled with divergent interpretations, with some emphasising the need for strict adherence to timelines and others recognising the importance of flexibility to accommodate unforeseen circumstances.

The recent Supreme Court ruling reaffirms that while strict adherence to timelines is crucial, courts retain the power to grant extensions even after the statutory period is over. This ensures that arbitration proceedings are not unjustly curtailed.

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INTERIM REMEDY IN INDIA UNDER SECTION 9: IS IT EFFICACIOUS ENOUGH?

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Introduction

The Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] has two important compartments for domestic and foreign arbitration: Part I and Part II. Part I lays down the procedure when the place of arbitration is in India. Part II applies to foreign awards that are sought to be enforced or recognised in India. The hot debate in the Indian courtrooms during the early 21st century revolved around whether the two parts could overlap with each other. To say otherwise, the big question was whether Part I could apply to Part II since the latter did not deal with other essentials of arbitration. One of these essentials is interim measures of protection where the subject matter of foreign-seated arbitration is situated in India. The division bench of *Bhatia International v. Bulk Trading S.A.*[1] ["**Bhatia**"] opened the floor to discuss the scope of Part I laid down under Section 2(2) of the Arbitration Act, which read as:[2]

"*This Part shall apply where the place of arbitration is in India*"

It was held that provisions of Part I equally apply to International Commercial Arbitrations ["**ICA**"] taking place outside India unless parties agree to exclude any or all such provisions of Part I, expressly or by implication. Accordingly, the Apex Court allowed the application seeking interim injunction under section 9 of the Arbitration Act for an arbitration being held in Paris as per the Rules of the International Chamber of Commerce ["**ICC**"]. Although the judgement attempted to widen the scope of Part I by covering seat-centric ICA, it digressed from the purpose behind the enactment of the two parts. After a decade, in *Bharat Aluminium v. Kaiser Aluminium*[3]

[1] *Bhatia International v Bulk Trading S.A*, (2002) 4 SCC 105.
[2] Arbitration and Conciliation Act 1996, s. 2(2).
[3] *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 648.

[“**BALCO**”] the Apex Court purposively interpreted the text, delineating the scope of two parts. It held that the courts of the country where arbitration is conducted have the authority to regulate the conduct of arbitral proceedings. Such regulation extends to the provision of interim protection. The judgement emphasised that there would have been an express provision regarding the jurisdiction of courts to entertain any application in case of foreign-seated arbitration had the legislature intended so. Implied inclusion or exclusion is an ambiguous trajectory.

In 2015, India’s self-contained arbitration code transcended the domestic limits of interim protection to cover foreign-seated arbitrations by introducing a proviso to Section 2(2) of the Arbitration Act in line with the suggestion of 246th Law Commission Report 2014 [“**246th LCI Report**”]. This internal aid bridges the gap that *Bhatia* ruling subconsciously intended for. It applies Section 9[4], 27(1)(a)[5] and 37(3)[6] of Part I to Part II, thereby allowing the overlapping between the two. The sweetest fruit of this amendment is rendering interim relief by courts available even in cases where parties have opted for foreign-seated arbitration. By streamlining the protections available to the parties, this reform significantly adds to India’s efforts in becoming a hub for ICA, and contributes to ‘ease of doing business’ for the corporations.[7] Further, it introduced sub-section (3) under Section 9, that limited the scope of Court’s interference only before constitution of arbitral tribunal or when “*circumstances exist which may not render the remedy under section 17 efficacious*”.[8] This amendment gave effect to the “Court-subsidiarity Model”, which prompts the parties to move to a tribunal on a priority basis for relief rather than a court unless the tribunal has not yet been constituted or cannot deliver the appropriate relief.[9]

This article discusses three aspects. Firstly, it analyses the application of Section 9 to secure the subject matter or amount of dispute in the case of seat-centric ICA. Secondly, it highlights the interim remedies available before institutions or courts of different jurisdictions. This comparison enables us to understand the issues that remain unaddressed by the domestic law in terms of Section 9. Lastly, it concludes by exploring the available solutions with suggestive changes.

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4 Arbitration and Conciliation Act 1996, s. 9.

5 Arbitration and Conciliation Act 1996, s. 27(1)(a).

6 Arbitration and Conciliation Act 1996, s. 37(3).

7 Zabeen Motorwala, ‘Arbitration And Conciliation (Amendment) Act, 2015 - Key Changes And Circumstances Leading To The Amendments’ (2016) Bharati Law Review <https://docs.manupatra.in/newsline/articles/Upload/5A0EB862-FAAC-492E-9457-12119D50FD2A.pdf> accessed 4 September 2024.

8 Arbitration and Conciliation Act 1996, s. 9(3).

9 Muskan Agarwal & Amitanshu Saxena, ‘Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty’ (2021) 7(2) NLS Bus L Rev 91 <https://repository.nls.ac.in/nlsblr/vol7/iss2/6> accessed 27 March 2024.

Developments post 2015 amendment: Relief by Indian courts for foreign-seated arbitrations

Ever since the scope of Section 9 has been extended to Part II, the parties referring their disputes to foreign-seated arbitration, have had better access to interim remedies where the subject matter or the security for the dispute exists in India, unless there is an agreement to the contrary.

i. *Seat-centric approach*

A party-centric arbitration is trapped in the confines of the nationality of the parties, limiting their choices before other jurisdictions; seat-centric approach frees the parties to exercise their choice of seat without compromising on their rights.[10] The legislature imbued Part II with the principle of seat-centricity, doing away with the requirement of at least one party being a foreign national. Accordingly, the party-centric ICA, as defined under Section 2(1)(f) of the Arbitration Act, differs from the seat-centric ICA referred to in the proviso to Section 2(2). In *PASL v. G E Power*,[11] the court interpreted that even two Indian parties are free to opt for a neutral arbitration forum outside India and still be able to avail of interim protections by Indian courts. The proviso to Section 2(2) clarifies that the courts in India may pass interim orders where the seat of arbitration is outside India, but the assets requiring protection are situated in the country. This approach upholds the party autonomy without compromising on the judicial remedies available in India.

ii. *Foundation on Three Pillars*

To seek protection, the party should demonstrate first, that a prima facie case exists owing to the overt or covert behaviour of the defendant; second, that the balance of convenience favours the grant of interim injunction; and third, if the interim remedy is not provided, it will result in irreparable loss to the plaintiff.[12] These underlying principles govern the remedy of "attachment before judgment" available under Order XXXVIII Rule 5 of the Civil Procedure Code, 1908 ["**CPC**"].[13] They equitably guide Section 9 of the Arbitration Act to prevent the "just and convenient" discretion of the court from being arbitrary.

iii. *Efficacious remedy*

Section 9 assumes more importance since interim reliefs by foreign arbitral tribunals or courts are not enforceable under Section 13 of the CPC[14] which determines whether a foreign judgment is conclusive or not. An interim order by a foreign court is not a "judgment or decree". Additionally,

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10 *Sasan Power v North American Coal Company*, (2015) SCC OnLine MP 7417.
11 *PASL Wind Solutions (P) Ltd. v GE Power Conversion (India)(P) Ltd.*, 2021 SCC OnLine SC 331.
12 *Essar House (P) Ltd. v Arcellor Mittal Nippon Steel India Ltd.*, 2022 SCC OnLine SC 1219.
13 Civil Procedure Code 1908, O. XXXVIII R. 5.
14 Civil Procedure Code 1908, s. 13.

no remedy before a tribunal, which is analogous to Section 17[15] of Arbitration Act exists. Such an order may only be treated as an ad-interim measure, and the party would need to utilise Section 9 to obtain the efficacious remedy. An emergency arbitrator's interim order was held to be unenforceable by the Delhi and Bombay High Courts in *Raffles Design International India v. Educomp Professional Education Ltd.*[16] ["**Raffles**"] and *HSBC PI Holdings (Mauritius) v. Avitel Post Studioz* [17] ["**HSBC**"] respectively. However, both the courts did not deprive the party of an interim remedy under Section 9.

The extent of Section 9 is far and wide. *Shanghai Electric Group Co. Ltd. v. Reliance Infrastructure Ltd.*[18] highlights that this relief is available to a party till an arbitral award is "enforced". It is loud and clear that the absence of any other remedy renders Section 9 vital for the preservation of the status quo of the subject matter.

Limitations in the existing interim remedy: A Comparative

Despite the efficacy, Section 9 remedy is not in tandem with remedies available internationally. The Arbitration Act does not recognise or enforce interim reliefs passed by foreign arbitral tribunals, reducing the Court-subsidiarity model adopted through Section 9(3) contrary to the letter of the law. Consequently, the ambit of domestic relief restricts the international relief so awarded by a foreign tribunal when the subject matter relates to India. The legislature neither envisaged nor aims to fill the void, thereby, derailing its efforts to make India the hub for ICA. The reasons behind the lacuna are discussed below.

i. *Implied exclusion*

In case of foreign-seated arbitration, the exclusion of interim remedy without any express provision in the contract amounts to uncertainty. As an outcome of the Bhatia ruling, the application of implied exclusion has created a ruckus for the party seeking provisional relief. Despite the 2015 amendment maintaining "subject to an agreement to the contrary", the courts lack consensus ad idem that exclusion should be express.

The Delhi High Court fell prey to the application of this principle in *Ashwani Minda v. U-Shin Ltd.*,[19] ["**Ashwani Minda**"] wherein the provision of an emergency arbitrator in the agreement impliedly deprived the party of approaching courts in India. The ruling is celebrated for observing minimum

[15] Arbitration and Conciliation Act 1996, s. 17.
[16] *Raffles Design International India Pvt. Ltd. v Educomp Professional Education Ltd.*, 2016 SCC OnLine Del 5521.
[17] *HSBC PI Holdings (Mauritius) Ltd. v Avitel Post Studioz Ltd.*, 2014 SCC OnLine Bom 929.
[18] *Shanghai Electric Group Co. Ltd. v Reliance Infrastructure Ltd.*, 2024 SCC OnLine Del 1606.
[19] *Ashwani Minda v U-Shin Ltd.*, 2020 SCC OnLine Del 721.

judicial interference and recognising the emergency arbitrator's decision under the Japan Commercial Arbitration Association Rules ["**JCAA Rules**"]. However, the finding of Section 9 being impliedly excluded from the arbitration clause by choice of a foreign seat creates conflict with proviso to Section 2(2). Dismissal of application on the ground of maintainability eliminated all paths for the party to enforce any reliefs in India.

ii. *Divergence from UNCITRAL Model Law*

The Arbitration Act, based on UNCITRAL Model Law, is perhaps not the latter's exact replica. Article 17H of the Model Law provides for the recognition and enforcement of interim measures by a tribunal "irrespective of the country in which it was issued". Such a corresponding provision is absent from the Arbitration Act. This implies that the courts in India are not in a position to enforce interim orders passed under the rules of international arbitration institutions. For instance, Rule 30 of the Singapore International Arbitration Centre ["**SIAC**"] Rules effectuates and recognizes the interim and emergency interim reliefs by both the tribunal and a judicial authority.[20] Similarly, the ICC,[21] London Court of International Arbitration[22] ["**LCIA**"], Stockholm Chamber of Commerce[23] ["**SCC**"], and others provide for similar interim measures. This void in domestic law leads India astray from a time-efficient and effective dispute resolution mechanism.

iii. *Emergency arbitration*

Emergency Arbitration is a tool in a tribunal's hands to provide urgent interim relief. It is mostly provided by arbitration institutions.[24] Unfortunately, the Arbitration Act does not recognise such arbitration despite the proposal by the 246th LCI Report to amend Section 2(1)(d) and include "emergency arbitrator" in it. The dispute between Amazon and Future Group granted the same pedestal to an emergency arbitrator as an arbitrator of a tribunal in the case of Indian-seated arbitrations.[25] However, it also created divergent perspectives in relation to foreign-seated arbitrations. While *HSBC* and *Raffles* did not recognise the emergency arbitration, a distinct view has been observed in *Ashwani Minda* wherein Section 9 interim relief was not granted on account of the party's failure to obtain similar relief from the emergency arbitrator.

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[20] Singapore International Arbitration Centre Rules 2016, r. 30.3.
[21] International Chamber of Commerce Arbitration Rules 2021, art. 28.
[22] London Court of International Arbitration Rules 2020, art. 25.
[23] Stockholm Chamber of Commerce Arbitration Rules 2023, art. 37.
[24] Muskan Agarwal & Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7(2) NLS Bus L Rev 91 <https://repository.nls.ac.in/nlsblr/vol7/iss2/6> accessed 27 March 2024.
[25] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.*, (2022) 1 SCC 209.

Extent of interim relief in other jurisdictions

Laws in other jurisdictions are more inclusive. They appreciate necessary intervention to abate threats to the subject matter of the arbitration. They concomitantly maintain comity by respecting the jurisdiction of the country whose governing law is involved.

i. *Singapore*

Singapore is a pro-arbitration state. Under the International Arbitration Act 1994, court-ordered interim measures under Article 12A are allowed notwithstanding the place of arbitration.[26] The power is entrusted with the General Division of the High Court of Singapore. The statute is cognizant of situation where the court should not interfere in case of foreign-seated arbitrations. Accordingly, the General Division may refuse to pass any order in such circumstances.[27] This act also acknowledges the supremacy of an arbitral tribunal. The order of the court ceases to have effect when the tribunal empowered to act on the subject matter of such order has expressly passed another order.[28]

ii. *England*

The English Arbitration Act 1996 also empowers its courts, under Section 44, to make orders that buttress arbitral proceedings.[29] The power is like the one with Singapore. Enacted in the same year as India's act, England adopted rather a pro-arbitration approach than the Indian legislature. The court does not exercise its power inordinately but when it is appropriate. In England, the precedent is that the natural court in the seat of arbitration has the power to pass interim injunctive reliefs.[30] When the governing law is that of England, the courts are empowered to interfere.[31]

iv. *New Zealand*

Section 9 of New Zealand's Arbitration Act 1996 provides for interim measures either by High Courts or district courts and extends in cases where a seat is outside the state.[32] Since the arbitral tribunal's power is given greater value than that of the courts, the provision may not have enough utility. In 2016, after an amendment to the act, the definition of arbitral tribunal now also includes

[26] International Arbitration Act, 1994, art. 12A.
[27] International Arbitration Act, 1994, art. 12A (3).
[28] International Arbitration Act, 1994, art. 12A (7).
[29] Arbitration Act 1996, s. 44.
[30] *Econet Wireless Ltd. v Vee Networks Ltd.*, [2006] EWHC 1568 (Comm).
[31] *Company 1 v Company 2*, [2017] EWHC 2319(QB).
[32] Arbitration Act 1996, s. 7.

an "emergency arbitrator".[33] It implies that the awards by the emergency arbitrators are enforceable in the land of the Kiwis.

Conclusion

Section 9 of the Arbitration Act allows the court's interference in limited matters in both domestic and foreign arbitrations. However, the enactment has certain grey areas that hinder India from adopting a pure pro-arbitration approach. By recognising the interim orders by other courts to express the inclusion of emergency arbitrators within the meaning of arbitral tribunal, the scope of relief can be widened.

Every state with a pro-arbitration stance enforces the interim measures by any tribunal within or outside the country. This equitable treatment of all types of tribunals streamlines the procedure for the parties. Since tribunals are not courts in Indian jurisprudence,[34] their orders should not be treated as foreign judgments under Section 13 of CPC, as the Arbitration Act can provide sufficient guidance to such orders. Measures by a tribunal should be kept on a higher pedestal based on the court-subsidiarity model. The principle of minimum judicial intervention can be juxtaposed with the recognition of interim measures by foreign tribunals for efficacious remedy. Section 9(3) needs to be effectuated both in its letter and spirit without any reservations in cases of ICA. This would clear the clutter surrounding the appropriate place and time for interim reliefs to be approached by the parties.

In the 246th LCI Report, the commission pursued to accord legislative sanction to institutional arbitration. It recommended the inclusion of emergency arbitrators within the meaning of arbitral tribunal. Provided the legislature acts upon this recommendation, the issue of foreign tribunals' recognition of measures may be resolved.

Further, the legislature may amend the proviso to Section 2(2) to "subject to an *express* agreement to the contrary". This would end the saga of divergent views by the courts and bring the proviso in line with Section 7, which only recognises written arbitration agreements. As the seat is the "centre of gravity" of arbitration, no party should be denied any remedy before the seat, regardless of the venue of the proceedings.

[33] Arbitration Act 1996, s. 2(1)(b).
[34] *Nahar Industrial Enterprises Ltd. v Hong Kong and Shanghai Banking Corporation*, (2009) 8 SCC 646.

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IS THE EFFICACY OF COMMUNITY MEDIATION OVERLY DEPENDENT ON COMMUNITY DYNAMICS? - A PARALLEL DRAWN WITH INDIAN KHAP PANCHAYATS

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Introduction

The Mediation Act, 2023 ["**the Act**"] has introduced a new concept of 'Community Mediation' through Sections 43 and 44 under Chapter X of the Act. This concept tries to usher community dynamics into alternative dispute resolution practices. The community itself is made a part of the process of resolving community disputes that seek to affect "peace, harmony and tranquility" within the community.

However, in India, community structures for dispute resolution existed even before this Act. Such an example is that of the 'Khap Panchayats'. Several instances have already suggested how the decisions of the Khap Panchayats have led to more disturbance rather than resolution for the community and the parties involved. The Supreme Court has declared time and again that Khap Panchayats are not legally recognized and should not be given a 'formal institutional character'.[1]The question, therefore, arises whether a Khap Panchayat-like system can legally emerge through the 'Community Mediation' practices. If the answer to this is in positive, subsequently, one needs to analyse whether there should be sufficient safeguards incorporated in these provisions.

Section 43 And 44 of The Mediation Act, 2023 - Entrenched in Problems

The major issues that lie in Sections 43 and 44 of the Act[2] are three-fold-

[1] Kashish Makkar, 'Don't encourage revival of Khaps' (*Deccan Herald*, 5 September 2023) <https://www.deccanherald.com/opinion/dont-encourage-revival-of-khaps-2672820> accessed 29 December 2023.
[2] Mediation Act 2023, ss. 43, 44.

Firstly, the peace and tranquility of entire groups being 'residents of the locality' or 'families' are involved. Hence, they serve as "parties to the dispute" with whose mutual consent the dispute is submitted for mediation. However, in such disputes, many a time, the actual significant impact of the mediation can be on specific individuals whose approval may get muffled or improperly subsumed within the 'community approval.'

Secondly, under Section 43(5)(a) specifically, it is stated that "*persons of standing and integrity who are respectable in the community*" can act as members of the panel of mediators. This concept of 'integrity' and 'respect' is very subjective to the community in which the mediation takes place. In many cases, such respect can be attributed to individuals who perpetuate illegality, as the same illegality in the Indian legal landscape may be perfectly legal and respectable for that particular community. It is herein that the parallel with persisting Khap Panchayats can be brought in as they, too, keep functioning in the community on this same ideology, resolving disputes by illegal means. Moreover, Section 43(5)(e) is also very vague, as it is not clear whether the "*person deemed appropriate*" is in the context of the community or the authorities as mentioned in the section.

Thirdly, the issue also lies in Section 44 of the Act. This is because, just like in every mediation, even in 'Community Mediation', once the panel is established, the entire dispute resolution up till the settlement is left with this panel. It is only where there is non-settlement that the authorities are again involved in the process. For a normal mediation, this serves well as it reduces the undue burden on the authorities. However, where community members get involved in the process, there is an inevitable 'conflict of interest' that arises in certain situations, which is in contradiction to Section 10 of the Act regarding 'disclosure of conflict of interest'. Hence, discarding the authorities in these types of mediation can inevitably result in a forced settlement agreement being reached due to an indirect influence of 'this respectable community panel member' on the parties to the dispute.

Balancing Community Dynamics and Independence - Perspectives Of USA, China and Malaysia

As already referred to hereinbefore, Section 10 of the Act[3] enunciates that in case there is a "conflict of interest", proper disclosure of the same is mandatory. Such "conflict of interest" is quite extensive as it includes the term 'otherwise' in it. This is to ensure that there remains no doubt with regard to the independence and impartiality of the mediator involved. But when it

[3] Mediation Act 2023, s. 10.

comes to 'Community Mediation', the independence of the body (panel of mediators) from the community seems far-fetched. Community influence is prominent in community mediation.

i. *US perspective:*

If one would look at the United States, early community mediation practices started early in the 1960s and focused heavily on democratic ideals. This could be connected with the 'community structure' at that time with democratic revolutions taking place during that phase, like the passage of the Voting Rights Act of 1965 that focused on removing racially discriminatory practices from the voting structure. The Rochester American Arbitration Association Community Dispute Service Project and the Boston (Dorchester) Urban Court Program emerged in the 1970s, focusing on racial struggles.[4] A case study done later of the San Francisco Community Boards in the USA showed that in the US, even though community mediation was focused more on 'popular justice notions' and 'empowerment', ultimately, the interpretation of such community was always based on certain 'common values'. As a result, the US community focused more on fostering social harmony even if it required a controlling structure as existed between colonial governments and indigenous populations.[5] Today, research suggests that Americans are turning more conservative by the day from an earlier liberal-conservative balance.[6] Therefore, it will not be folly to assume that community mediation in such situations will also tend to have a conservative outlook.

ii. *Chinese perspective:*

If one takes a look at the Chinese community, one will notice that many nations comment on China's assertiveness, tough attitude, and relative lack of freedom.[7] China states that its 'tough outlook' is often misunderstood, and it simply does not want to deviate from its basic core principles and is quite strict in that regard.[8] This tough community structure is also visible in its approach towards community mediation. Its mediation is very formal and strict and could also use

[4] 'History of Community Mediation in the U.S.' (*Community Mediation Center*) <https://2mediate.org/history1.html> accessed 31 December 2023.

[5] Susan Coutin, 'Review- The Possibility of Popular Justice: A Case Study of Community Mediation in the United States by Sally Engle Merry and Neal Milner' (1995) 22(2) AMERICAN ETHNOLOGIST <https://www.jstor.org/stable/646744> accessed 28 December 2023.

[6] Molly Bohannon, 'Americans Suddenly More Conservative Than Liberal On Social Issues, Poll Says' (Forbes, 8 June 2023) <https://www.forbes.com/sites/mollybohannon/2023/06/08/americans-suddenly-more-conservative-than-liberal-on-social-issues-poll-says/?sh=788de27c6b7d> accessed 28 December 2023.

[7] Laura Silver et al., 'Large Majorities say China does not respect the personal freedoms of its people' (*Pew Research Centre*, 30 June 2021) <https://www.pewresearch.org/global/2021/06/30/large-majorities-say-china-does-not-respect-the-personal-freedoms-of-its-people/> accessed 31 August 2024.

[8] Michael D. Swaine, 'Perceptions of an Assertive China' 32 CHINA LEADERSHIP MONITOR <https://carnegieendowment.org/files/CLM32MS1.pdf> accessed 31 December 2023.

force to resolve disputes and determine the right rather than focusing too much on party autonomy and involvement through the process of listening and gathering information.[9]

iii. *Malaysian perspective:*

This Chinese form of community mediation is much in contrast with that of Malaysia. Malaysian community mediation is rather informal and gives due importance to party involvement rather than direct criticism and forceful determination of right and wrong like in China. Moreover, Malaysian community mediation is also influenced by religious leaders like the imam primarily for family and religious disputes. The other type of mediator is the secular ketua kampung. However, there is no water-tight classification of which disputes will go to which mediator, and hence, there lies a huge possibility of a normal civil dispute going to an imam which could result in religious influence over the dispute.[10]

Hence, by analysing the differences in the community mediation setups of different nations, we see how community mediation is heavily dependent on community perspectives and local outlooks rather than just focusing on impartiality during dispute resolution.

Why Community Mediation is not All Bad - Understanding who Forms 'The Community' - an Indian Perspective

The significance of Community Mediation cannot be undermined if the 'community' that plays the primary role in such mediation is kept in proper check. Even community policing has been upheld as 'democracy in action'.[11] However, one must note that community policing requires cooperation between the community involved and the police of that locality. It should not result in a structure where the police take a backhand, and the community substitutes the police in its primary duty of maintaining law and order.[12] The community must be utilized to supplement rather than to substitute.

[9] James A. Wall Jr. and Ronda Roberts Calliste, 'Malaysian Community Mediation' (1999) 43(3) THE JOURNAL OF CONFLICT RESOLUTION <https://www.jstor.org/stable/174671> accessed 28 December 2023.

[10] James A. Wall Jr. and Ronda Roberts Calliste, 'Malaysian Community Mediation' (1999) 43(3) THE JOURNAL OF CONFLICT RESOLUTION <https://www.jstor.org/stable/174671> accessed 28 December 2023.

[11] 'Community Policing is Democracy in Action: Foundation stone of new model police station laid in Gabu' (*UNDP*, 6 April 2022) <https://www.undp.org/guinea-bissau/news/community-policing-democracy-action-foundation-stone-new-model-police-station-laid-gabu> accessed 31 August 2024.

[12] 'Understanding Community Policing- A Framework in Action' (*Bureau of Justice Assistance, US Department of Justice*) <https://www.ojp.gov/pdffiles/commp.pdf> accessed 05 January 2024.

In the Indian scenario, we can also enumerate certain relevant yet not much-focused areas of community mediation where the importance of keeping a check on the communities involved and the community mediator has been recognized.

i. *Indian community mediation - taking from Vedas, Ramayana, Mahabharata, Mahajans, Panchas*

Vedic times saw the emergence of mediation from the early Aryans, who believed in the principles of "Wisdom, Reason, and Prudence". The institutions of Kula and Shreni also dealt with community disputes. Shreni specifically dealt with internal disputes in the artisan community. Famous figures like Lord Buddha and Patanjali also approved of mediation, stating that it brings wisdom and progress rather than a simple adjudication of right and wrong.[13]

In Ramayana, for the dispute between Lord Rama and Ravana, Hanuman is considered a mediator. But Hanuman again failed to prove an ideal mediator due to his already persisting bias for Lord Rama. This bias towards a certain set of beliefs alone upheld by the majority of the community could also give rise to a failed community mediation setup.

Failure of mediation, primarily when it involves two or more communities rather than individuals, can result in disastrous effects. This was well realized in Mahabharata when the failure of the mediation by Lord Krishna between the two communities of Pandavas and Kauravas led to the Kurukshetra war. The same was also noted by former CJI, Justice N.V. Ramana.[14] Hence, the importance of the community mediator cannot be disregarded.

Among the business community in India, the power of informal resolution of trade, business, and commerce-related disputes was vested in the Mahajans.[15] Mahajans were respected businessmen and hence, their role in resolving disputes for the business community was seen with reverence.

For the resolution of disputes among the tribal community, certain wise elderly tribal men, as considered by the community, known as Panchas or Pancha Parmeshwaras, have been taken to be the community mediators.[16] In most tribal communities, the precedence is given to the community as a whole rather than to the individual. This basic tenet among the tribal communities makes community mediation a well-established practice therein which may not be for other areas or communities. For example, the Kondh tribe of southern Odisha is famous for resolving disputes

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[13] Niranjan Bhatt, 'Evolution and Legislative History of Mediation' (2009) 1 GNLU JL Dev & Pol 83.

[14] Harish V Nair, 'Mahabharata teaches us significance of mediation, conciliation: CJI Ramana to business community' (*Times Now News*, 04 December 2021) <https://www.timesnownews.com/india/article/mahabharata-teaches-us-significance-of-mediation-conciliation-cji-ramana-to-business-community/837757> accessed 05 January 2024.

[15] Aditya Mehta et al., 'Analysis: Mediation in India' (*India Corporate Law*, 31 October 2022) <https://corporate.cyrilamarchandblogs.com/2022/10/analysis-mediation-in-india/> accessed 06 January 2024.

[16] Nivriti Dubey, 'Resolving the Issues of Tribal Community via Mediation' (2019) 6(6) JETIR <https://www.jetir.org/papers/JETIR1906778.pdf> accessed 28 December 2023.

through community mediation tactics. In this tribe, a tribal council known as baarika is formed to preside over and resolve the disputes.[17]

Khap Panchayats Revival Vis-À-Vis Section 43 And 44 - A Possibility If Not Controlled

Khap Panchayats have been quite in the news recently. They are similar to community mediators, with certain village unions forming quasi-judicial bodies to resolve disputes that arise within the village community.[18] Similar to Section 43(5)(a) of the Act, Khap Panchayats comprise certain so-called "caste lords" that possess the authority granted to them by their village community to preserve the village honour and keep it in check.[19] They are considered as "*person of standing and integrity who are respectable in the community*".

In the Jat community, it has been found that the elderly men therein form the Khap Panchayats. The major issue with these Khap Panchayats is that they are very strict about the rules they make, and most of the time, these rules are quite regressive. The penalties for non-compliance with these rules are very harsh punishments that cause harm not only to the individual concerned but also to the abiding families, like in the case of honour killing verdicts.[20] These 'dictats' of the Khap Panchayats can range from commenting on marrying a girl at an early age for preventing rape[21] to stereotypical and autocratic decisions like preventing marriages between two people because they were from the same village.[22]

Khap Panchayats were already in existence a long time back and they have been declared to be functioning illegally. Recently in 2018, the Supreme Court held that Khap Panchayats should have no business in unnecessarily blocking marriages between two people on arbitrary and unjustifiable grounds.[23] Hence, this is not something out of the blue. However, the novel issue that arises after the passage of the Act is that now there is some scope for legalizing the illegality being perpetrated

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[17] Minaj Ranjita Singh, 'How Odisha's Kondh tribe resolves conflicts' (*Village Square*, 23 June 2023) <https://www.villagesquare.in/odia-tribes-resolve-conflicts-through-dialogue/> accessed 06 January 2024.

[18] 'What is Khap Panchayat?' (*India Today*, 11 October 2012) <https://www.indiatoday.in/india/north/story/what-is-khap-panchayat-118365-2012-10-10> accessed 08 January 2024.

[19] Rajika Chaudhary, 'Lousy Truth of Khap Panchayat' (*Times of India*, 22 May 2022) <https://timesofindia.indiatimes.com/readersblog/premiumbytes/lousy-truth-of-khap-panchayat-43073/> accessed 09 January 2024.

[20] Preetha Kadhir, 'Khap panchayats for justice?' (*The Hindu*, 21 March 2014) <https://www.thehindu.com/in-school/signpost/khap-panchayats-for-justice/article5814495.ece> accessed 09 January 2024.

[21] Ibid.

[22] Bhupendra Yadav, 'Khap Panchayats: Stealing Freedom?' (2010) 44(52) EPW <https://www.jstor.org/stable/25663933> accessed 10 January 2024.

[23] 'Supreme Court Declares Khap Interference in Marriages 'Absolutely Illegal'' (*The Wire*, 27 March 2018) <https://thewire.in/law/supreme-court-khap-interference-marriages-illegal> accessed 10 January 2024.

by the Khap Panchayats. This is because Khap Panchayats also act in a similar structure like 'Community Mediation'.

Once the permanent panel of community mediators is notified, the authorities cease to have any significant part to play. From there on, the community mediators carry out the entire settlement procedure. Out of the five options given under Section 43(5) from whom the panel members will be chosen, only one option is "a person having experience in the field of mediation." This could result in a huge problem in the future with panels of community mediators taking the shape of Khap Panchayat-like bodies, but this time legalized by way of the Act.

Preventing Legalization of an Illegality- Incorporating Better Safeguards

A significant issue that may not yet be realized is that without any additional safeguards added to Sections 43 and 44 of the Act, the true impact of community mediation may not materialize. It cannot be disregarded that the 'community' has an important role in determining the 'panel of community mediators', and it is this 'panel' that thereafter determines the fate of the parties involved in the dispute.

Certain safeguards that may be incorporated into Sections 43 and 44 of the Act are as follows-

1. In the creation of the panel by the authorities involved, the parties themselves should be heard to ensure that their panel of community mediators does not consist of persons who may have an inherent bias against the matter to be dealt with, even if they are of persons of standing and integrity.

2. Most importantly, 'experience in the field of mediation' should be a mandatory requirement and not an option available for the constitution of the panel. This is to say that even if a person of standing and integrity is chosen as a community mediator, that person should first be trained in mediation and only then be permitted to resolve the disputes through community mediation. In Madhya Pradesh, the MP State Legal Services Authority trains the community mediators in mediation techniques and certain qualifications of community mediators are also provided, like they should preferably be graduates and should have no criminal antecedents.[24] This practice should be mandated under Sections 43 and 44 of the Act on the concerned authority under the State Legal Services Authority so that every state compulsorily has to take it up. Leaving such things

[24] 'Madhya Pradesh Community Mediation Programme' (*Madhya Pradesh State Legal Services Authority*) <https://www.mpslsa.gov.in/docs/mediation_training/Madhya_Pradesh_Community_Mediation_Programme_English.pdf> accessed 10 January 2024.

to the community itself could be less burdensome for the state authorities in the short run, but will become ineffective in the long run.

3. Section 43(5)(e) should be made more specific as to the factors that are to be considered for selecting the "*person deemed appropriate*" and the relevant determining authority (whether the SLSA or District Magistrate or Sub-Divisional Magistrate or the community itself or any combination of them) to take the concerned decision. Unless this is done, the vagueness of this sub-section can be used inappropriately to perpetuate Khap Panchayat-like structures.

4. Since in community mediation, the factor of influence can become more prominent- as can be seen in the case of Khap Panchayats (that follow a similar structure), the termination of the mandate of a community mediator should not be left to the parties involved or based on a complete reliance on third party information as is provided under Section 11[25] of the Act. The authorities mentioned under Section 44 should be given a suo moto power to terminate the mandate of a community mediator if it reasonably feels that the mediator is trying to impose any regressive practice of the community on the parties to the dispute.

Conclusion

Community mediation as a statutory inclusion is a novel approach that has been introduced through the Act. There is no doubt that involving the community in a dispute resolution process will make the process better and less burdensome for the courts and authorities involved. However, with every community mediation, a 'community' gets attached, and so does the 'community influence' carried by that community. In certain cases, such influence can lead to better settlements, while in others, the same can lead to regressive and forced agreements for the parties involved. This conflicting position can disturb the entire impact of such mediation type. Finally, it cannot be denied that the efficacy of community mediation would depend a lot on the community involved, and no 'one-size-fits-all' independent and impartial approach can be applied.

Speaking about a negative community influence, if one looks at the Indian perspective, one cannot forget about the Khap Panchayats, who have been known for their illogical and regressive verdicts. Sections 43 and 44 of the Act have a lot of scope for legalizing the so-called Khap Panchayats and letting them flourish, albeit this time legally. Hence, there is a requirement for certain additional

[25] Mediation Act 2023, s. 11.

safeguards to be incorporated in Sections 43 and 44 of the Act to realize the impact of 'Community Mediation' to its fullest.

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SHIFTING OF PARADIGM IN THIRD-PARTY PARTICIPATION IN ARBITRATION

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Introduction

Certain disputes demand third-party involvement, prompting an assessment of the contributions made by non-signatories or third parties and their shared interest in fulfilling the terms. The matter gains significance in assessing the extent of the third party's consent to the arbitration agreement. Mere affiliation with a company does not suffice; requiring the non-signatory's conduct expressly/tacitly indicating agreement with the signatories' arbitration agreement. If deducible from the circumstances, they can be held liable & be bound by it, irrespective of their non-signatory status. The extension to third parties hinges on their contribution to fulfilling the agreement terms.

The legal framework governing the inclusion of third parties in arbitral proceedings & imposing an obligation on them to be bound has substantially evolved, with Indian courts recognizing its necessity. However, the courts also acknowledge the exceptional nature of such inclusion.

Drawing from Indian precedents, the study delves into the evolution & implications of mandating non-signatory/third-party impleadment in arbitration.

Third-party or non-signatory & their involvement in Arbitration

In common parlance, "third party" and "non-signatory" mean the same thing. At the outset, a distinction in terms is required. As noted by renowned arbitrator, arbitration practitioner, and author James M. Hosking, a "non-signatory" is someone who has not physically signed the agreement containing the arbitration clause. On the other hand, "third party" denotes an individual or organisation that is not a signatory or not named as a party to the agreement being discussed. The rights and obligations of a "non-signatory" or "third party" in relation to an arbitration

agreement can be determined through several legal theories, such as Joinder to Arbitration, the Doctrine of Group of Companies, and Intervention/Consolidation.[1]

In certain disputes, third-party involvement in arbitration may be necessary. For that, it is imperative to note the implicit/explicit consent of the third party to be bound by the arbitration agreement. The non-signatory's conduct must be such that it can reasonably be interpreted as consent, expressly or inferred, to be bound by the signatories' arbitration agreement.

Arbitral jurisdiction hinges upon the consent of the participant. Disputes emanate when non-signatories are forcefully obligated to be bound by terms they didn't agree to, thereby undermining the arbitral process's legitimacy. Hence, there should be a distinction made between "*consenting non-signatories*" & "*non-consenting non-signatories*". For obvious reasons, it is simpler to justify letting a consenting party participate in an arbitration proceeding than the alternative.[2]

Being a private method of dispute resolution that relies on mutual agreement, arbitration requires all parties to reach an agreement with its application.[3] Section 9 of the Arbitration & Conciliation Act, 1996 ["**the Act**"] is predicated on the UNCITRAL Model Law ["**UNCITRAL**"] on International Commercial Arbitration, 1985,[4] which when taken at face value, applies only to the parties to the Arbitration Agreement.[5] Moreover, in terms of Section 2(h) of the Act, a "Party" indicates a "party to the Arbitration Agreement".[6] This implies that only a Party to an Arbitration Agreement is entitled under Section ["**u/s**"] 9, before or during the arbitration proceedings. Accordingly, third parties, because of their affiliation & commercial engagement with signatories, can be mandated to arbitration proceedings.

Impleadment of the Third-party

Indian law has evolved over the years through the acknowledgement of international arbitration norms, such as the "*group of companies doctrine*" ["**Doctrine**"]. However, impleading non-signatories in proceedings u/s 9 of the Act was adversely received. This is because the parties who agreed to arbitrate have consented that the provisions of the Arbitration Act "are made to apply" to them. According to the Supreme Court ["**SC**"], if a third party is impleaded u/s 11 of the Act, the Court

[1] James M Hosking, 'The Third-Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent' (2004) 4 Pepperdine Dispute Resolution Law Journal 472.
[2] Kunal Mimani, Ishan Jhingran, 'Extension of Arbitration Agreements to Non-Signatories: An International Perspective' (2020) 4 India Law Journal.
[3] Gary Born, *International Arbitration Law and Practice*, vol 2 (3rd ed., 2021).
[4] UNCITRAL Model Law on International Commercial Arbitration, 1985.
[5] The Arbitration & Conciliation Act 1996, s 9.
[6] The Arbitration & Conciliation Act 1996, s 2(h).

must either dismiss them or restrict the proceedings to the original parties since non-signatories cannot seek redress or join proceedings u/s 9 of the Act.[7]

An arbitration agreement or an arbitral clause must subsist between the parties in order to institute a case for arbitration & seek relief. The SC affirmed this notion by stating that "a person who is not a part to the arbitration agreement or the arbitration proceedings has no right to seek redress or to be joined as a party in a petition u/s 9 of the Act".[8] Thus, necessitating understanding the expression "Party" defined u/s 2(1)(h), "party" as one bound by an arbitration agreement unless the context otherwise requires. This is essential in order to understand the Section 9 mandate & *locus standi* of the party. However, the literal interpretation of Section 9 shows that the tribunal has the discretion to grant interim remedies to a third party if the circumstances warrant it. This is done solely to ensure a proper adjudication, and it is based on the parties' or the subject matter's proximity to the arbitration agreement. Ultimately, as the SC noted, an arbitration agreement binds only signatories, irrespective of other parties involved in the transaction leading to the dispute.[9]

Nevertheless, where non-signatories hold significant positions, and considering the compressed nature of the grouping where the transaction could not have occurred without the assurances from these non-signatories, it becomes crucial that they should bear responsibility. The possibility of binding a "non-signatory" to arbitration does not negate the requirement for an arbitration agreement. Rather, it indicates that the agreement's binding effect arises from circumstances beyond just the formal act of signing.

The recent observation of the Hon'ble SC in *Cox and Kings Ltd v. SAP India Pvt Ltd*[10] ["**Cox & Kings Case**"], supports this understanding wherein it noted: "*the requirement of a written arbitration agreement does not preclude from binding non-signatories, when there exists a defined legal relationship between the signatories and the non-signatories & that the parties mutually intended to be bound by it by the act of conduct*".

Chloro Controls Case as a precedent

In *Chloro Controls (I) Pvt. Ltd. v. SAP India Pvt. Ltd. & Ors.* ["**Chloro Controls Case**"],[11] the SC went on to determine whether non-signatories to multi-party agreements could be compelled to arbitrate. The Court held that u/s 45 of the Act, the phrase "person claiming through or under" extends to include non-signatories in cases of interconnected agreements. This decision allowed

[7] *Jagdish Chander v. Ramesh Chander and Ors.*, (2007) 5 SCC 719.
[8] *Firm Ashok Traders and Ors. v. Gurumukh Das Saluja and Ors.*, (2004) 3 SCC 155.
[9] *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, (2003) 5 SCC 531.
[10] *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Ors.*, 2023 SCC OnLine SC 1634.
[11] *Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Incorporated,* (2013) 1 SCC 641.

for non-signatories to be involved in arbitration in certain complex transactions. The ruling significantly expanded the scope of parties that can be involved in commercial arbitration.

While concurring with the ratio decidendi in the *Chloro Controls Case*,[12] the SC had also acknowledged the atypical nature of the doctrine recognizing that its applicability is highly dependent on the terms within the arbitration agreement and the specific circumstances of the matter before the court.[13]

Following a similar fashion, the Delhi High Court ["**HC**"] in *R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit and Ors.* ["**R. V. Solutions**"] noted that when there is a lack of exceptional circumstances, a non-signatory or third party can't be brought into arbitration without its willingness to do so. The parties to the Arbitration Agreement must have a connection, either via business operations or commonalities concerning the subject or transactions at hand.[14] It is necessary to "identify the real essence of the commercial transaction and to untangle from a layered structure of commercial layout" the intention to bind a non-signatory who has endorsed on to be lawfully accountable for the conduct of the signatory.[15]

Binding the non- signatory

While there is no universally accepted test for determining the usage of doctrine, Indian precedents have established some relevant parameters. The parties' intent and the test of common control guide the adoption of the doctrine. The arbitration agreement may bind non-signatories linked through contract enforcement, benefit entitlement, or involvement in a series of transactions forming a composite deal. In the same vein, the SC reversed an arbitral award that improperly overlooked this doctrine.[16]

In an instance, the Delhi HC refused to lift interim relief granted u/s 9 concerning non-signatory guarantors. The court considered their intertwined shareholding and significant roles in signatory companies, asserting that due to the close grouping and the necessity of assurances from non-signatories, they were liable to be accountable for the interim measures imposed.[17] If a cohesive corporate group structure reflecting a unified economic reality is in place, the doctrine may be employed to compel a third party into arbitration.[18]

[12] ibid.
[13] *Cheran Properties Ltd v. Kasturi and Sons Ltd & Ors.*, (2018) 16 SCC 413.
[14] *R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit and Ors.*, AIR ONLINE 2019 DEL 1537.
[15] *Kotak Mahindra Bank Ltd. v. Williamson Magor and Co. Ltd. and Ors.*, 2021 SCC OnLine. Bom 305.
[16] *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. and Ors.*, (2022) 8 SCC 42.
[17] *Eveready Industries India Ltd. v. KKR India Financial Services Limited & Ors.*, MANU/DE/0421/2022.
[18] *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*, (2019) SCC Online SC 995.

The Constitution Bench of the SC in *Cox & Kings Case*,[19] deduced that an arbitration agreement can bind non-signatories as per the doctrine. CJI DY Chandrachud underscored that "*the signature of the party in the agreement is the most profound expression of consent of the person to submit to jurisdiction. However, the corollary that persons who have not signed aren't part of agreement may not always be correct*". Nevertheless, an exercise of caution in applying the doctrine is necessary, as mere affiliation doesn't extend the arbitration agreement to non-signatories.

The case underpinned- "*the judgment in Chloro Controls Case is flawed in its interpretation that 'non-signatories' can be roped in by invoking "parties claiming through or under". The phrase "parties claiming through or under" is specifically intended for successors-in-interest in a derivative capacity*". The court criticized the *Chloro Controls Case* for its economically driven interpretation of this phrase.

Exploring the Ramifications

i. *Lucrative advantages of impleading non-signatories*

In a layered structure of commercial arrangements, disputes and the rights of the parties cannot be properly adjudicated without paying adequate attention to third parties who are not part of the arbitral proceeding. The purpose of arbitration is to resolve conflicts outside of court; however, if third parties are not given a voice in the process, it can lead to multiple proceedings, which can be harassing to the parties involved. Hence, impleading third parties or non-signatories will be beneficial in such cases.

In cases where a participant to the arbitration agreement may not be capable of fulfilling the award, the claimant may wish to bind the financially sounder non-signatory to the arrangement. The ultimate focus is to prevent the potential of inconsistent or contradictory verdicts from multiple proceedings probing the same or comparable matters & involving multiple parties. The ultimate goal is to issue a ruling that settles the case once and for all, affecting all parties involved.

ii. *Daunting challenges arising from the inclusion of non-signatories*

Although promising at first, the application of doctrine should be the exception rather than the rule as certain parties are purposefully excluded from commercial contracts and arrangements. In applying the doctrine or executing the arbitration agreement, the court or arbitral tribunal must

[19] *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Ors.*, 2023 SCC OnLine SC 1634.

not be biased towards doing so in such a way as to disregard the actual objective of the parties as endorsed in the agreement. The application of this doctrine calls for the utmost care.

Arbitration is not just a fancy theory of contract law. There are crucial jurisdictional considerations that are being ignored. The issue of third parties is frequently misunderstood from a contractual standpoint and reduced to a question of evidence of consent. The issue here is whether or not a court should exercise jurisdiction over a non-party to a lawsuit if doing so is necessary for it to achieve what it was originally convened to do, resolve the dispute at hand. Whether or not a tribunal could produce evidence that the non-signatory had consented to the arbitration clause is less significant than the degree of implication of the non-signatory party in the main dispute before the tribunal.

Conclusion & Analysis

The Indian arbitration jurisprudence is emerging to support the view that non-signatories can be made "party" to an arbitration agreement and so be bound by its terms.

This shift is marked by the inclusion of doctrines like the "group of companies" to bind non-signatories to arbitration under specific circumstances, particularly where there is explicit or implicit consent or a close connection to the dispute. While the *Chloro Controls Case* broadened this scope, the recent judgment in the *Cox and Kings Case* emphasized caution, ensuring that such inclusion does not undermine the integrity of the arbitration process or the original intent of the parties. Consequently, in summation, the nature of the transactions may indicate an intent to bind non-signatory entities within the same group. Thus, to enforce an arbitration agreement against a non-signatory, courts should consider whether the transactions were intended to be read in a commercially consistent manner.

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MONTHLY ROUND-UP (FEB 2024 – JUL 2024)

FEBRUARY

1. **Company related claims are arbitrable even though it is non-signatory to the Arbitration Agreement.**

In *M/S Opuskart Enterprises & Ors. v. Kaushal Kishore Tyagi*,[1] the Delhi High Court ruled that disputes arising among partners concerning their business activities, whether conducted through the firm or the company, fall within the ambit of arbitrable matters. The Court rejected the notion that a firm or company cannot engage in arbitration proceedings solely due to its non-signatory status in the arbitration agreement.

The Court, presided over by Justice Pratibha M. Singh, observed that the broad nature of the arbitration clause in the partnership deed supports the view that disputes related to business matters between partners, whether conducted through the firm or the company, are arbitrable. Additionally, the Court invoked the Group of Companies doctrine, emphasizing that non-signatory affiliates may be considered parties to an arbitration agreement if there exists mutual intention.

2. **Striking off company's name by ROC post-commencement of arbitration is not a ground to set aside award.**

In *M/s Exotic Buildcon Pvt. Ltd. v. M/s Medors Biotech Pvt. Ltd.,*[2] the Delhi High Court has ruled that arbitral awards cannot be set aside under Section 34 of the Arbitration & Conciliation Act, 1996 **["Arbitration Act"]**[3] on the basis of a company's name being struck off by the Registrar of Companies ["**ROC**"] after the commencement of arbitration. A Division Bench of the High Court dismissed the appellant's appeal seeking to set aside the arbitral award,

[1] *M/S Opuskart Enterprises & Ors v Kaushal Kishore Tyagi,* 2024 DHC 290.
[2] *M/s Exotic Buildcon Pvt Ltd v M/s Medors Biotech Pvt Ltd,* 2024 DHC 577.
[3] Arbitration and Conciliation Act 1996, s 34.

emphasizing that the cancellation of a company's incorporation does not affect the realization of owed amounts or the discharge of obligations.

While recognizing the need for a struck-off company to take steps to restore its name on the register of companies to pursue its claim, the High Court held that setting aside the arbitral award on this ground is unwarranted. The Court considered the timing of the ROC's action and the arbitration reference, noting that the parties were referred to arbitration before the respondent's name was struck off. The historical context of widespread company striking-offs in 2015 was also taken into account while arriving at this decision.

3. **The limitation for filing a petition under Section 11 of the Arbitration Act, 1996 arises upon failure to appoint arbitrator within 30 days from the issuance of the notice.**

The Delhi High Court in *Information TV Pvt. Ltd. v Jitendra Dahyabhai Patel*[4] held that a petition under Section 11 of the Arbitration Act can only be filed after the notice in respect of the particular claim(s)/dispute(s) to be referred to arbitration, as contemplated by Section 21 of the Arbitration Act,[5] is made, and there has been a failure to make the appointment of an arbitrator within 30 days. The bench held that the cause of action arises upon the failure to make the appointment of the arbitrator within 30 days from the issuance of the notice invoking arbitration.

4. **Limitation for challenging award under Section 34 is absolute; condonation of delay impermissible unless party shows diligence and bona fide reasons.**

In *National Research Development Corp. & Anr. v Chromous Biotech Pvt. Ltd.,*[6] the Delhi High Court held that the time limit for limitation under Section 34(3) of the Arbitration Act[7] is absolute in nature, and it is impermissible to condone the delay in challenging an arbitral award under Section 34 unless the party demonstrates diligence and bona fide reasons beyond its control for the delay.

The court also emphasized the minimal supervisory role of the courts in the arbitral process to determine the impermissibility of extension beyond the stipulated period.

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[4] *Information TV Pvt Ltd v Jitendra Dahyabhai Patel,* 2024 DHC 927.
[5] Arbitration and Conciliation Act 1996, s 21.
[6] *National Research Development & Anr v Chromous Biotech Pvt Ltd* 2024 DHC 131.
[7] Arbitration and Conciliation Act 1996, s 34(3).

5. **Cannot raise an allegation of bias after the award has been passed under Section 31.**

The Delhi High Court in *Allied-Dynamic Joint Venture v Ircon International Ltd.,*[8] held that challenging an arbitral award on the grounds of arbitrator bias is not permissible if such a challenge was not brought up during the arbitration proceedings.

The High Court noted that the arbitration was invoked prior to the 2015 Amendments to the Arbitration Act, and thus, disqualification of an employee from being appointed as an arbitrator in terms of Section 12(5)[9] read with the Seventh Schedule of the Arbitration Act would not be attracted. The High Court also noted the joint venture's conduct during the arbitration proceedings, as Allied-Dynamic did not seek a formal adjudication of disputes in respect to their allegation of bias. Although the petitioner claimed to have raised the issue of bias through letters, no formal adjudication or request for a change of arbitrator based on bias was made during the proceedings. Therefore, the award could not be challenged under Section 34 of the Arbitration Act.

6. **An award under the Micro, Small, and Medium Enterprises Development Act, 2006 (MSME Act) Act[10] cannot be challenged through the invocation of writ jurisdiction without availing the remedy under S 34 of the Arbitration Act.[11]**

In the case of *State Trading Corporation of India Ltd. v Micro and Small Enterprises Facilitation Council Delhi and Anr.*[12], the Delhi High Court has refused a party from filing a writ petition under Articles 226/227[13] challenging an award passed under the Micro, Small, and Medium Enterprises Development Act, 2006 ["**MSME Act**"] without taking recourse under Section 34 of the Arbitration Act.[14] The Delhi High Court, in another case as well[15], had held that the aggrieved party should avail the alternate remedy available under the Arbitration act before approaching the court under Article 226[16] unless there are extraordinary or exceptional circumstances while clarifying that remedy under Article 226 is not absolute and is at the discretion of the High Court.

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[8] *Allied-Dynamic Joint Venture v Ircon International Ltd, Delhi,* O.M.P. (COMM) 461/2016.
[9] Arbitration and Conciliation Act 1996, s 12(5).
[10] Micro, Small, and Medium Enterprises Development Act 2006.
[11] Arbitration and Conciliation Act 1996, s 34.
[12] *State Trading Corporation of India Ltd v Micro and Small Enterprises Facilitation Council Delhi and Anr.*, LPA 91/2024.
[13] The Constitution of India 1950, art 227.
[14] Arbitration and Conciliation Act 1996, s 34.
[15] *Shri Balaji Enterprises & Ors v Reserve Bank of India & Anr.*, 2024 SCC OnLine Del 689.
[16] The Constitution of India 1950, art 226.

In another case concerning MSMEs, the Delhi High Court in *JKG Infratech Pvt. Ltd.v Larsen &Toubro Ltd.*[17] held that the MSME Facilitation Council cannot refer enterprises to Arbitration under Section 18 of the MSME Act[18] for contracts that were signed by such MSMEs before they were registered under the MSME Act.

7. High Court not competent to extend Arbitrator's mandate under Section 29(4), jurisdiction lies exclusively with Court which appointed the Arbitrator.

In *K.I.P.L. Vistacore Infra Projects J.V v Municipal Corporation of the City of Ichalkarnji*,[19] the Bombay High Court held that the term "Court" used in Sub-Section (4) and in the Scheme of Section 29A of the Arbitration Act[20] must be construed in reference to the context. The Court observed that an arbitrator appointed by the High Court or Supreme Court in the case of International Commercial Arbitration would not be subject to the Principal Civil Court of Original Jurisdiction in a subordinate district exercising the power under Sub-Section (4) or, for that matter, the power under Sub-Section (6) to substitute an arbitrator while extending the period referred to in Sub-Section (4).

The Hon'ble High Court concluded that introducing the meaning assigned to the term "Court" in Section 2(1)(e)[21] into Section 29A would run contrary to the legislative intent. Such an interpretation would defeat the purpose of the provision by allowing a "Court" as defined under Section 2(1)(e) to exercise power vested in the High Court to extend the mandate of the arbitrator and even substitute the arbitrator or arbitral tribunal itself.

8. Issuance of "No Claim Certificate" does not render dispute non-arbitrable.

The Gujarat High Court in *Poll Cont Associates v Narmada Clean Tech Ltd.*[22] ruled that the reference to the arbitration can be refused only when the Court concludes that the claim is non-arbitrable without even the slightest doubt.

The single bench of Chief Justice Sunita Agarwal, allowing a Section 11 application of the Arbitration Act seeking the appointment of an Arbitrator, reiterated that it could only carry on a prima-facie assessment as a general rule of law and the decision on arbitrability lies

[17] *JKG Infratech Pvt Ltdv Larsen &Toubro Limited,* 2024 SCC OnLine Del 809.
[18] Micro, Small, and Medium Enterprises Development Act 206, s 18.
[19] *K.I.P.L. Vistacore Infra Projects J.V v Municipal Corporation of the City of Ichalkarnji,* 2024 SCC Online Bom 327.
[20] Arbitration and Conciliation Act 1996, s 29A(4).
[21] Arbitration and Conciliation Act 1996, s 2(1)(e).
[22] *Poll Cont Associates v Narmada Clean Tech Ltd,* 2024 SCC OnLine Guj 1123.

primarily within the Arbitrator's ambit. The Bench refuted the Respondent's contention that the disputes are no longer arbitrable because they become "stale" once the No Claim Certificate is issued. In this regard, the High Court referred to the 'Eye of the Needle' principle propounded by the Supreme Court in *NTPC Ltd. v SPML Infra Ltd.*,[23] which means that the jurisdiction of the Courts under Section 11(6) of the Arbitration Act is very narrow and warrants just two inquiries. The primary inquiry has to be whether an arbitration agreement existed between the parties (this includes the question of privity of contract), and the secondary inquiry has to be whether the dispute is arbitrable. The High Court further clarified that arbitrability of the dispute, as a general rule, also lay under the Arbitrator's ambit. However, the referral Court may reject claims which are ex-facie and manifestly non-arbitrable.

9. Mere negotiations do not delay the cause of action for the purpose of limitation.

In the case of *Sri Athelli Mallikarjun & Ors. v S.S.B Constructions & Anr.*,[24] the Telangana High Court reaffirmed the established legal principle that mere negotiations do not postpone the cause of action for limitation. The Court clarified that a dispute between parties cannot be referred to arbitration when the notice invoking arbitration is *ex facie* time-barred.

The Court held that since the Arbitration Act does not specify the limitation period for filing an application under Section 11, recourse must be taken to the Limitation Act, 1963. Notably, the notice invoking arbitration issued by the Applicants was over five years after the rejection of their claims by the Respondent. The Court emphasized the necessity for a clear notice invoking arbitration, specifically setting out the particular dispute within three years from the rejection of a final bill.

10. The High Court of Calcutta held that an arbitration agreement cannot be inferred from the conduct of the parties alone

The Calcutta High Court, in the case of *Tarit Mitra and Anr. v Sharad Goenka*[25], while adjudicating on a civil suit for possession of premises from the tenants wherein the tenants sought to refer the dispute for arbitration under an application under Section 8 of the Arbitration Act,[26] held that an arbitration based on the tenancy agreement, which had

[23] *NTPC Ltdv SPML Infra Ltd, 2023 9 SCC 285.*
[24] *Sri Athelli Mallikarjun & Ors v S.S.B Constructions & Anr*, Arbitration Application No. 169 of 2022.
[25] *Tarit Mitra and Anr v Sharad Goenka,* IANo. GA/1/2024.
[26] Arbitration and Conciliation Act 1996, s 8.

expired and was not novated or renewed could not be invoked due to non-existence of an explicit agreement showing that the disputes related to the tenancy should be resolved through arbitration. Therefore, in the absence of such a written indication, the requirements of Section 7 of the Arbitration Act[27] have not been fulfilled. The arbitration clause formed a part of the tenancy agreement, which had expired and not renewed. Therefore, while tenancy could be concluded from the conduct of the parties, an agreement regarding the applicability of the arbitration clause cannot be inferred from the conduct of the parties alone.

In another case,[28] the Bombay High Court also held that the parties should have a separate arbitration agreement between them for reference to arbitration under the MSME Act. This clarifies that an arbitration agreement cannot be deemed and has to be explicitly laid down.

11. The International Olympic Committee's decision to suspend the Russian Olympic Committee upheld by the Court of Arbitration for Sports

The Court of Arbitration for Sport has dismissed Russia's bid to reverse the International Olympic Committee's decision to suspend its official status[29]. The IOC took this action after Russia attempted to absorb Ukrainian sports organisations following the 2022 invasion of Ukraine. Established in 1984, the CAS is a global organization dedicated to resolving sports-related disputes through arbitration. CAS is headquartered in Lausanne, Switzerland, and operates courts in New York City, Sydney, and its primary location in Lausanne.

The CAS panel overseeing the appeal upheld the IOC's October 12 decision, stating that the Olympic organization did not violate the principles of legality, equality, predictability, or proportionality in suspending the Russian Olympic Committee.

[27] Arbitration and Conciliation Act 1996, s 7.
[28] *M/s Bafna Udyog v Micro & Small, Facilitation Council and Another,* arbitration petition no. 201of 2023.
[29] *Russian Olympic Committee (ROC) v International Olympic Committee* (IOC), CAS 2023/A/10093 ROC v IOC.

MARCH

1. **Arbitral tribunal appointment may be refused if Section 11(6) petition or claim is clearly time-barred. Parliament should consider introducing a limitation period for filing Section 11 applications.**

   In *M/S Arif Azim Co. Ltd. v M/S Aptech Ltd.,*[1] the Supreme Court urged the Parliament to bring an amendment to the Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"] prescribing a specific period of limitation within which a party may approach the Court under section 11 of the Arbitration Act[2] for the appointment of arbitrators.

   The Division Bench observed that: "*this Court, while dealing with similar issues in many other matters, has observed that the applicability of Section 137*[3] *of the Limitation Act, 1963 to applications under Section 11(6) of the Act, 1996 is a result of legislative vacuum as there is no statutory prescription regarding the time limit… Various amendments to the Act 1996 have been made over the years so as to ensure that arbitration proceedings are conducted and concluded expeditiously. We are of the considered opinion that the Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation within which a party may move the Court for making an application for appointment of arbitrators under Section 11 of the Act, 1996*." The Supreme Court also observed that the limitation period starts only after the applicant sends a valid notice to initiate arbitration and the other party fails or refuses to comply with the demands outlined in that notice.

2. **A general reference to another contract is insufficient to incorporate an arbitration clause; a specific reference is required.**

   In *NBCC (India) Ltd. v Zillion Infra Projects Pvt. Ltd.,*[4] the Delhi High Court while dealing with an application for the appointment of an arbitrator under Section 11(6) of the Arbitration Act, held that the application has to be allowed and took note of the fact that the letter of intent ["**LOI**"] stated the terms and conditions in another contract which would apply mutatis mutandis to the LOI.

[1] *M/S Arif Azim Co Ltd v M/S Aptech Ltd,* [2024] 3 S.C.R. 73.
[2] Arbitration and Conciliation Act 1996, s 8.
[3] The Limitation Act 1963, s 137.
[4] *NBCC (India) Ltd. v Zillion Infra Projects Pvt. Ltd.,* 2024 SCC Online SC 323.

The Supreme Court, while rejecting the approach of the High Court, held that there is no specific reference made in the LOI to incorporate the arbitration clause mentioned in another contract.

3. **Refusal to enforce a foreign award should be rare, with international standards used to assess potential bias.**

In *Avitel Post Studioz Ltd. & Ors. v HSBC PI Holdings (Mauritius) Ltd.*[5], the Supreme Court emphasized the principle of minimal judicial intervention in foreign arbitral awards, citing the precedent set in *Vijay Karia v Prysmian Cavi E. Sistemi SRL.*[6] Furthermore, the Court highlighted the narrow grounds for resisting the enforcement of foreign awards, drawing from the International Law Association's recommendations for using global standards in defining "public policy" in international arbitration.

With respect to the case at hand, the Court held that the choice of Singapore as the seat of arbitration and the exclusive supervisory jurisdiction vested in the seat court. Emphasizing party autonomy and the principle of perceived neutrality, the Court rejected challenges to the award based on bias, as they were not raised before the Singapore courts.

4. **The Limitation Act does not cover prolonged delays, and condonation is only granted in exceptional cases.**

In State of *UP & Ors. v Rajveer Singh & Anr.*[7], the Appellant filed an appeal under Section 37 of the Arbitration Act. The appeal was filed after a delay of four years.

The Allahabad High Court referred to *NHAI v Smt. Sampata Devi & Ors.*[8] and held that Section 5 of the Limitation Act can be invoked but sparingly. The Court also noted that the term "sufficient cause" in Section 5 of the Limitation Act, 1963, does not cover long delays, and condonation can be granted only in exceptional circumstances.

5. **When an arbitral award is essentially a money decree, a 100% deposit of the award amount is required for the grant of a stay.**

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[5] *Avitel Portz Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd*, AIR OnLine 2020 SC 691.
[6] *Vijay Karia v Prysmian Cavi E. Sistemi SRL,* AIR 2020 SC 1807.
[7] *State of UP & Ors v Rajveer Singh & Anr,* 2024 AHC 66171.
[8] *National Highways Authority of India v Smt. Sampata Devi & Ors*, 2023 (12) ADJ 787.

In *M/s Balmer Lawrie & Co. Ltd. v M/s Shilpi Engineering Pvt. Ltd.*[9], the applicant sought a stay on the execution of the award through an interim application. The High Court noted that under section 36(3) of the Arbitration Act, the Court exercises its discretion in granting a stay on the award. The High Court referred to various judgments of the Supreme Court that require the deposit of 100% of the awarded amount for stays when the award is in the form of money decree.

The Court also noted that there is no distinction between an application under Sections 36(3) and 37 of the Arbitration Act, as neither provision mentions any such differentiation.

6. Arbitral tribunal cannot be criticized for disallowing additional evidence at the final stage, especially when the document was already in the party's possession.

In *M/s Fortuna Skill Management Pvt. Ltd. v M/s Jaina Marketing & Associates*[10], the Delhi High Court observed that the application for additional evidence was made three years after the petitioner had filed its statement of defence. The Court noted that the arbitral tribunals should focus on fair, speedy and inexpensive trials. However, such additional evidence can be allowed at the end of the trial only in cases where the evidence could not be produced earlier, and there were valid reasons for such non-production.

The Delhi High Court concluded that the Tribunal in the present case at hand was justified in rejecting the application, as it would lead to unnecessary delays in the proceedings.

7. A single party cannot appoint two-thirds of the arbitral tribunal.

The Delhi High Court in *Apex Buldsys Ltd. v IRCON International Ltd.*[11], noted that Clause 73 of the contract stipulates that the arbitrators must be selected from a list of three names provided by the respondent, with the petitioner having the authority to choose only one arbitrator, while the other two are appointed by the respondent.

The Court concluded that this arrangement, which permits the employer to select two-thirds of the arbitration panel, contravenes principles of impartiality, balance, and diverse representation.

[9] *M/s Balmer Lawrie & Co Ltd v M/s Shilpi Engineering Pvt Ltd,* Interim Application (l) No 779 of 2024.
[10] *M/s Fortuna Skill Management Pvt Ltd v M/s Jaina Marketing & Associates,* O.M.P. (COMM) 511 of 2023.
[11] *Apex Buldys Ltd v IRCON International Ltd*, 2024 DHC 2113.

8. Under the MSME Act, the Council is not authorized to consider the maintainability of a reference during the conciliation stage.

In *National Small Scale Industries Ltd. v State of Odisha & Ors.*[12], the case involved a challenge to an order issued by the Micro & Small Enterprises Facilitation Council, Cuttack ["**Council**"], which instructed the parties to engage in conciliation proceedings after the Council entertained an application from the Petitioner questioning the reference's maintainability.

The Orissa High Court ruled that the Council had not initiated the conciliation process as required by Section 18(2) of the MSME Act, 2006. According to Section 18(2), upon receiving a reference, the Council must either conduct the conciliation itself or enlist the help of an institution that offers alternative dispute resolution services. In this context, the High Court highlighted that the Council's authority does not include entertaining applications that challenge the reference's maintainability before starting arbitration proceedings.

[12] *National Small Scale Industries Ltd v State of Odisha & Ors,* W.P.(C) No. 10409 of 2014.

April

1. **A policy circular requiring further consent for arbitration cannot be construed as an arbitration clause.**

   The Calcutta High Court, in *Dhansar Engineering Co. Pvt. Ltd. v Eastern Coalfields Ltd.,*[1] ruled that a policy circular issued by a parent company contemplating arbitration does not constitute an arbitration agreement if it requires fresh consent from the contractor to refer disputes to arbitration. The court held that when a circular requires the contractor's consent for existing contracts, it cannot be construed as an arbitration agreement, as it would necessitate a new arbitration agreement between the parties before referring disputes to arbitration. The court also stated that a circular expressing a desire for arbitration would not be considered an arbitration clause unless a definite agreement is executed between the parties pursuant to such expression.

2. **The decision of an arbitral tribunal to not implead a party to the arbitration is not an interim award.**

   The Delhi High Court, in *NHAI v M/s IRB Ahmedabad Vadodra Super Express Tollways,*[2] held that an arbitral tribunal's decision to refuse to implead a party to the arbitral proceedings does not constitute an "Interim Award", which can be directly challenged under Section 34[3] of the Arbitration Act. The court referred to the decision of a coordinate bench in *NHAI v Lucknow Sitapur Expressway,*[4] wherein the court held that the order of the tribunal on the issue of impleading of a party does not constitute an interim award. The court ruled that an order qualifies as an interim award only when it touches upon the merits of claims or conclusively decides a dispute between parties. It also held that the application praying for the impleading of a third party was not a matter that would be dovetailed into the final award.

3. **A petition under Section 34 filed after the grace period expiry during court break is not entertainable even if filed on the reopening day.**

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[1] *Dhansar Engineering Co Pvt Ltd v Eastern Coalfields Ltd,* [2024] SCC OnLine Cal 4028.
[2] *National Highway Authority of India v IRB Ahmedabad Vadodra Super Express Tollways Pvt Ltd,* [2024] SCC OnLine Del 2397.
[3] Arbitration and Conciliation Act 1996, s 34.
[4] *National Highway Authority of India v Lucknow Sitapur Expressway Ltd.,* [2022] SCC OnLine Del 4527.

The Delhi High Court, in *MyPreferred Transformation & Hospitality Pvt. Ltd. & Anr. v Faridabad Implements Pvt. Ltd.*,[5] ruled that a petition under Section 34[6] of Arbitration Act is not entertainable if filed after the expiry of the 30-day condonable grace period given under the proviso to Section 34(3), even if this period ends during court breaks and the petition is filed on the court's reopening day. The court clarified that Section 10[7] of the General Clauses Act, 1897, which typically allows acts to be done on the next working day when the last day falls on a court holiday, does not extend to petitions challenging arbitration awards. The court referred to the Apex Court judgment in *Bhimashankara Sahakari Sakkare Karkhane Niyamita v Walchandnagar Industries Ltd.,*[8] wherein the Supreme Court held that proviso to Section 10 of the General Clauses Act excludes its applicability to proceedings to which the Limitation Act applies and since the arbitral proceedings are governed by the Limitation Act, 1963,[9] the benefit of Section 10 would not be available.

4. An award by a unilaterally appointed arbitrator can be challenged even by the appointing party.

The Delhi High Court, in *Telecommunication Consultants India Ltd. v Shivaa Trading,*[10] ruled that an award passed by a unilaterally appointed arbitrator can be challenged for invalidity of such appointment and lack of jurisdiction, even by the party who made such an appointment. The court held that a defect of jurisdiction can be challenged at any stage as it affects the power of the tribunal to decide the dispute. The court relied on the decision of the Supreme Court in *Bharat Broadband Network Ltd. v United Telecom Ltd.,*[11] wherein the court held that unilateral appointment could also be challenged by the appointing party. It also held that mere participation in arbitral proceedings does not constitute an 'express waiver' under Section 12(5)[12] of the Arbitration Act.

5. Attempts by the arbitrator to reach a settlement are not tantamount to conciliation proceedings under Part III.

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[5] *MyPreferred Transformation & Hospitality Pvt Ltd v Faridabad Implements Pvt Ltd.,* [2024] SCC OnLine Del 2437.
[6] Arbitration and Conciliation Act 1996, s 34.
[7] The General Clauses Act 1897, s 10.
[8] *Bhimashankar Sahakari Sakkare Karkhane Niyamita v Walchandnagar Industries Ltd.,* [2023] 8 SCC 453.
[9] The Limitation Act 1963.
[10] *Telecommunication Consultants India Ltd v Shivaa Trading,* [2024] SCC OnLine Del 2937.
[11] *Bharat Broadband Network Ltd v United Telecoms Ltd.,,* [2019] 5 SCC 755.
[12] Arbitration and Conciliation Act 1996, s 12(5).

In *MFAR Constructions Pvt. Ltd. v Bengal Shristi Infrastructure Development Ltd.,*[13] the Calcutta High Court held that attempts made by an arbitrator to encourage the parties to reach a settlement would not be a conciliation proceeding under Part III of the Arbitration Act since the same is covered under Section 30[14] of the Arbitration Act. In the present appeal, the arbitral award had been set aside by the Commercial Court, Alipore, by holding that the arbitrator had taken part in a conciliation exercise between the parties. The High Court held that efforts by parties in resolving their dispute during the pendency of the arbitral proceedings were akin to settlement as under Section 89 read with Order 23 Rule 3 of the Code of Civil Procedure, 1908, and is not a process of conciliation.

6. Insolvency disputes and matters relating to winding up are arbitrable in nature.

The Telangana High Court in *Shameen Sultana Khan v Faizunnisaa Begum*[15] applied the doctrine of kompetenz-kompetenz while holding that disputes relating to insolvency and winding up matters are arbitrable since, under Section 16(1)[16] of the Arbitration Act, the arbitral tribunal can rule on its own jurisdiction and judicial intervention at the application stage ought to be minimised. An application under Section 11[17] of the Arbitration Act had been filed to adjudicate a dispute relating to the settlement of accounts arising from the dissolution of a partnership firm under Section 43[18] of the Indian Partnership Act, 1932. The court held that objections relating to the arbitrator's jurisdiction regarding the applicant's claim can be raised before the arbitral tribunal.

7. Courts must scrutinise fundamental issues before referring disputes to arbitration under Section 11(6A).

The Delhi High Court, in *Deepak Maurya v Saraswathi Supari Processing Unit & Ors.*[19], held that the Court must not mechanically send disputes to an arbitral tribunal under Section 11(6A)[20] of the Arbitration Act. The court is required to consider fundamental issues and ensure the existence of an arbitrable dispute before making such a reference. The court emphasised that while its jurisdiction at the reference stage is limited, it must not act in a mechanical

[13] *MFAR Constructions Pvt Ltd v Bengal Shristi Infrastructure Development Ltd,* [2024] SCC OnLine Cal 3786.
[14] Arbitration and Conciliation Act 1996, s 30.
[15] *Shameen Sultana Khan v Faizunnisaa Begum,* [2024] SCC OnLine TS 612.
[16] Arbitration and Conciliation Act 1996, s 16(1).
[17] Arbitration and Conciliation Act 1996, s 11.
[18] The Indian Partnership Act 1932, s 43.
[19] *Deepak Maurya v Saraswathi Supari Processing Unit & Ors,* ARB.P. 420/2023.
[20] Arbitration and Conciliation Act 1996, s 11(6A).

manner. The referral to arbitration can only be made if the petitioner demonstrates the existence of an arbitrable dispute. The Court referred to the Supreme Court's decision in *DLF Home Developers Ltd. v Rajapura Homes Pvt. Ltd. & Anr.,*[21] underscoring the duty of courts to scrutinise preliminary issues within the statutory framework before referring disputes to arbitration.

8. Arbitral tribunal can't go outside reference order and cannot widen its jurisdiction by dealing with disputes not referred to it.

The Punjab and Haryana High Court, in *Talwandi Sabo Power Ltd. v Punjab State Power Corp. Ltd.,*[22] ruled that an arbitral tribunal cannot extend its jurisdiction beyond the reference order. The High Court held that an Arbitral Tribunal is bound by the terms of the reference made to it and cannot go beyond the scope of the reference order. It reiterated that the Tribunal's jurisdiction is derived solely from the reference made to it, and it cannot entertain disputes outside the scope of the arbitration clause.

9. Arbitrator's mandate would not be terminated when the delays in arbitral proceedings are not attributable to it.

The Bombay High Court in *Glencore India Pvt Ltd v Amma Lines Ltd*[23] ruled that an arbitrator's mandate does not terminate when proceedings exceed agreed timelines if delays are attributable to the party seeking termination. The court held that while generally, an arbitrator's mandate expires upon failure to conclude proceedings within the agreed time period in arbitrations not governed by Section 29A,[24] this does not apply when the tribunal acted expeditiously, and delays were caused by the parties themselves. The court dismissed a petition challenging the tribunal's extension of its mandate, upholding the order that extended the mandate, as the petitioner had caused substantial delays in filing documents and examining witnesses.

[21] *DLF Home Developers Ltd v Rajapura Homes Pvt Ltd & Anr,* [2021] 16 SCC 743.
[22] *Talwandi Sabo Power Ltd v Punjab State Power Corp Ltd,* [2024] 2024:PHHC:057870.
[23] *Glencore India Pvt Ltd v Amma Lines Ltd,* [2024] MANU/MH/2359/2024.
[24] Arbitration and Conciliation Act 1996, s 29A.

MAY

1. The arbitrator's power under Section 32(2)(c) can be exercised only if the continuation of proceedings has become unnecessary or impossible.

The Supreme Court, in *Dani Wooltex Corp. & Ors. v Sheil Properties Pvt. Ltd. & Anr.,*[1] held that the power under Section 32(2)(c)[2] of the Arbitration Act can only be exercised if the continuation of proceedings becomes unnecessary or impossible. The mere existence of a reason is insufficient, the reason must render continuation unnecessary or impossible. The Court stated that abandonment of a claim, either express or implied, can be a ground for invoking Section 32(2)(c). Implied abandonment requires proven facts that clearly indicate abandonment. Non-appearance or failure to schedule a hearing by the claimant does not automatically constitute abandonment. The Court referred to Section 32(2), highlighting that termination can occur due to the claimant's withdrawal or mutual agreement of the parties. The Court emphasised that procedural lapses or non-appearance alone do not justify termination unless unequivocally established through compelling evidence.

2. Arbitral award liable to be set aside for disregard of evidence by the arbitrator.

The Delhi High Court, in *M/S Divyam Real Estate Pvt. Ltd. v M/S M2k Entertainment Pvt. Ltd.*[3] ruled that an arbitral award must be set aside if the arbitrator has not rendered clear findings on the contentious issue and the conclusions drawn by the arbitrator disregard evidence on record and do not clearly address contentious issues. The Court stated that such awards are perverse and patently illegal by relying on the Supreme Court judgement in *I-Pay Clearing Services Pvt. Ltd. v ICICI Bank Ltd.,*[4] where the court held that "*if there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself.*"

3. The court has the authority to appoint a sole arbitrator even though the arbitration agreement specifies a three-member tribunal.

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[1] *Dani Wooltex Corp v Sheil Properties Pvt Ltd* [2024] SCC OnLine SC 970.
[2] Arbitration and Conciliation Act 1996, s 32(2)(c).
[3] *Divyam Real Estate Pvt Ltd v M2K Entertainment Pvt) Ltd,* [2024] SCC OnLine Del 3786.
[4] *I-Pay Clearing Services Pvt Ltd v ICICI Bank Ltd,* [2022] 3 SCC 121.

The Delhi High Court, in *M/S Twenty-Four Secure Services Pvt. Ltd. v M/S Competent Automobiles Co. Ltd.,*[5] ruled that it has the authority to appoint a sole arbitrator even when the arbitration agreement specifies a three-member tribunal. Under Section 11(6)[6] of the Arbitration Act, the court can appoint an arbitrator if the parties cannot reach an agreement for the appointment of arbitrators. The court referred to the Supreme Court's decision in *Union of India v Singh Builders Syndicate,*[7] which upheld the appointment of a sole arbitrator by the High Court despite the arbitration agreement calling for a three-member tribunal.

4. **A party cannot dispute a court's jurisdiction over a Section 34 application after having filed a Section 9 application in that same court.**

The Allahabad High Court, in *M/S Devi Dayal Trust & Ors. v M/S Rajhans Towers Pvt. Ltd.,*[8] ruled that once a party files a Section 9[9] application before one court under the Arbitration Act, they cannot subsequently dispute the jurisdiction of that court when dealing with any other application arising from the same arbitration agreement. Section 42 of the Arbitration Act grants exclusive jurisdiction to the court where the first application under Part-I of the Act is filed, ensuring uniformity and preventing conflicting judgments. This provision aims to avoid parallel proceedings and facilitates expedited dispute resolution. The court emphasised that applications under Section 8[10] and Section 11[11] are exceptions to this rule, as they require specialised adjudication and may be filed before different authorities. The ruling also emphasised the principle of estoppel, barring parties from disavowing the jurisdiction of the court where they initially sought relief.

5. **Arbitral award can't be set aside merely due to incorrect application of law or misinterpretation of evidence.**

The Allahabad High Court, in *National Highways Authority of India v Rampyari & Anr.,*[12] held that arbitral awards should only be set aside if they exhibit "patent illegality" evident on the face of the record. The court ruled that incorrect application of law or misinterpretation of evidence are not sufficient grounds for annulment. The decision emphasised that

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[5] *M/S Twenty-Four Secure Services Pvt Ltd v M/S Competent Automobiles Co Ltd,* [2024] ARB.P. 24/2024.
[6] Arbitration and Conciliation Act 1996, s 11(6).
[7] *Union of India v Singh Builders Syndicate,* [2009] 4 SCC 523.
[8] *Devi Dayal Trust v Rajhans Towers Pvt Ltd,* [2024] SCC OnLine All 1681.
[9] Arbitration and Conciliation Act 1996, s 9.
[10] Arbitration and Conciliation Act 1996, s 8.
[11] Arbitration and Conciliation Act 1996, s 11.
[12] *National Highways Authority of India v Rampyari,* [2024], SCC OnLine All 1902.

interference in arbitral awards is limited to the grounds available under Section 34[13] of the Arbitration Act, and should only occur if there is a clear violation of law or a glaring error on the face of the record.

6. **An extension of limitation cannot be claimed by invoking Section 32(5) once the party becomes aware of the contents of the award.**

The Allahabad High Court, in *Bharatiya Rashtriya Rajmarg Pradhikaran v Neeraj Sharma & Ors.,*[14] ruled that under Section 31(5)[15] of the Arbitration Act, once a party knows the contents of the award, it cannot seek an extension of limitation. Even if a signed copy of the award is not formally received, if the party has acted upon the award, it implies awareness, nullifying the effect of non-signing. This interpretation aligns with the legislative intent to ensure parties are informed about awards to take necessary legal actions within prescribed timelines. The Court emphasised that literal interpretation leading to unjust outcomes contradicts the purpose of arbitration as a speedy dispute resolution mechanism. It applied the doctrine of estoppel, stating that a party, once it acts upon an award, cannot benefit from procedural irregularities. Therefore, knowledge of the contents of the award triggers the limitation period under the Arbitration Act.

7. **The timeline under Section 34 of the Arbitration Act is to be strictly adhered to, and Section 5 of the Limitation Act does not apply to such applications.**

The Allahabad High Court, in *Sh. Dharmveer Tyagi & Ors. v Competent Authority, DFCC, Special Land Acquisition (Joint Officer Organization) & Ors.,*[16] ruled that Section 5[17] of the Limitation Act, 1963 does not apply to applications under Section 34[18] of the Arbitration Act, and the timeline provided in Section 34(3) for challenging an arbitral award must be strictly adhered to. Section 34(3) mandates a three-month period for challenging an arbitral award, with a possible extension of thirty days if sufficient cause for delay is shown, not beyond that. The court emphasised that the phrase *"but not thereafter"* indicates a legislative intent to enforce strict, non-negotiable timelines for such challenges, leaving no room for court discretion beyond this period. In this case, an application under Section 34 was filed after a delay of

[13] Arbitration and Conciliation Act 1996, s 34.
[14] *Bharatiya Rashtriya Rajmarg Pradhikaran v Neeraj Sharma,* [2024] SCC OnLine All 1800.
[15] Arbitration and Conciliation Act 1996, s 31(5).
[16] *Sh. Dharmveer Tyagi & Ors v Competent Authority, DFCC, Special Land Acquisition (Joint Officer Organization) & Ors.* 2024:AHC:85334.
[17] The Limitation Act 1963, s 5.
[18] Arbitration and Conciliation Act 1996, s 34.

120 days and was rejected on these grounds. The Court's decision was supported by precedents such as *Union of India v Popular Construction Co.*[19] and *Bhimashankar Sahakari Sakkare Karkhane Niyamita v Walchandnagar Industries Ltd.,*[20] which held that the timeline under Section 34(3) is non-negotiable, and extending this period would render the provision meaningless.

8. An arbitral tribunal does not have the power to recall or modify its award under Section 33 of the Arbitration Act.

The Allahabad High Court in *National Highways Authority of India v Musafir & Ors.,*[21] ruled that the arbitral tribunal can only correct and interpret an award. An additional award can be made only with respect to claims that have been omitted from the arbitral award. Interpretation of the award and additional award can be made only upon a request received by a party. However, correction can be done by the arbitral tribunal on its own within thirty days from the date of the arbitral award. However, none of the provisions give the arbitral tribunal the power to recall and modify its award. Arbitral tribunals are not courts of law which are bestowed with inherent powers. Arbitrators are required to act within the confines of the arbitration agreement and the framework enshrined in the Arbitration Act. Any act which the arbitral tribunal is not empowered to do under the Arbitration Act is *void ab initio*.

9. Termination of Arbitrator's mandate does not terminate arbitral proceedings

The Delhi High Court, in *Extramarks Education India Pvt. Ltd. v Saraswati Shishu Mandir,*[22] held that the termination of an arbitrator's mandate does not equate to the termination of the arbitral proceedings. Instead, it allows for the appointment of a substitute arbitrator to ensure the continuation of the proceedings under Sections 14 and 15 of the Arbitration Act. The Court observed that Section 14[23] specifies conditions such as an arbitrator becoming unable to perform functions, failing to act without undue delay, withdrawing from office, or the parties agreeing to terminate their mandate, leading to the termination of the arbitrator's mandate. Section 15[24] facilitates the appointment of a substitute arbitrator, allowing the arbitration to proceed from where the original arbitrator left off. The court relied on the Supreme Court's decisions in *Religare Finvest Ltd. v Widescreen Holdings Pvt. Ltd.*[25] and *SREI*

[19] *Union of India v Popular Construction Co,* [2001] 8 SCC 470.
[20] *Bhimashankar Sahakari Sakkare Karkhane Niyamita v Walchandnagar Industries Ltd,* [2023] 8 SCC 453.
[21] *National Highways Authority of India v Musafir & Ors.* 2024:AHC:81638.
[22] *Extramarks Education India Pvt Ltd v Saraswati Shishu Mandir,* [2024] SCC OnLine Del 3710.
[23] Arbitration and Conciliation Act 1996, s 14.
[24] Arbitration and Conciliation Act 1996, s 15.
[25] *Religare Finvest Ltd v Widescreen Holdings Pvt Ltd,* [2024] SCC OnLine Del 2769.

Infrastructure Finance Ltd. v Tuff Drilling Pvt. Ltd.,[26] which clarified that the termination of an arbitrator's mandate does not terminate the arbitral proceedings but rather permits the appointment of a substitute arbitrator.

[26] *SREI Infrastructure Finance Ltd v Tuff Drilling Pvt Ltd,* [2017] SCC OnLine SC 1210.

JUNE

1. **Parties cannot be compelled to arbitrate if the clause explicitly allows discretion: Madhya Pradesh High Court.**

The Madya Pradesh High Court bench of Justice Subodh Abhyankar in *Yeshwant Boolani*[1] held that in case of a discretionary clause in the agreement, the parties cannot be compelled to opt for arbitration without mutual consent. The agreement must clearly specify the choice and the necessity of mutual consent. The High Court emphasized the significance of clauses 21 and 23 in the partnership deed, stating that the firm's continuity upon a partner's death, insolvency, or retirement depended on the remaining partners" discretion, and arbitration of disputes required mutual consent. The Applicant, the son of a deceased partner, claimed a right to partnership under Clause 21, but the court noted this was subject to the other partners' approval. Citing Section 40 of the Arbitration Act,[2] and relevant Supreme Court precedents, the court affirmed that arbitration clauses are enforceable against legal heirs. However, it distinguished the present case from others where ambiguous arbitration clauses were deemed binding, concluding that the explicitly optional nature of the clause precluded compelling arbitration without mutual agreement. Consequently, the application was dismissed, allowing the applicant to seek other legal remedies.

2. **Courts are duty-bound to scrutinize and dismiss time-barred claims to avoid costly arbitration: Gauhati High Court.**

The Gauhati High Court dismissed a PIL[3] seeking directions to prevent the State of Assam from encroaching on subjects allocated to the Karbi Anglong Autonomous Council under the 6th Schedule of the Constitution[4] and governed by the 2011 Memorandum of Settlement. The bench observed that it is the court's responsibility to scrutinize and dismiss time-barred claims to prevent parties from being ensnared in lengthy and expensive arbitration proceedings. The division bench, comprising Chief Justice Vijay Bishnoi and Justice Kardak Ete, concluded the matter based on the State Government's assurance of adherence to the Settlement's conditions. The Union of India also affirmed its commitment

[1] *Yeshwant Boolani (Dead) through Lrs Tarun Dhameja v Sunil Dhameja and Anr,* [2024] MPHC Arb Case No. 19 of 2024.
[2] The Arbitration and Conciliation Act 1996, s 40.
[3] *M/S Jcl Infra Pvt Ltd v The Union of India &Anr*, , Arb.P./22/2023.
[4] The Constitution of India 1950, sch 6.

to the Settlement. The court decided no further order was necessary and disposed of the petition.

3. Arbitrator's conclusions ignoring evidence would render award perverse, patently illegal and liable to be set aside: Delhi High Court.

The Delhi High Court bench of Justice Anup Jairam Bhambhani,[5] ruled that an arbitrator's award must be set aside if it lacks clear findings on contentious issues or disregards evidence, deeming it perverse and patently illegal. This decision arose from a case where the arbitrator awarded Rs. 20 lakhs to the respondent for loss of profit due to a contract breach, despite acknowledging the speculative nature of the claim. The arbitrator noted that the respondent's claimed losses from ticket sales, advertising, and concessions were based on estimates and lacked a straightforward formula. Despite this, the arbitrator awarded the amount as a "reasonable loss of profit" without a clear basis in the evidence presented. The High Court found the arbitrator's reasoning sparse and cryptic and concluded that the award was unsupported by evidence. The court emphasized that awards made in disregard of evidence or lacking findings on contentious issues are liable to be set aside in line with previous judgements.[6] Consequently, the court allowed the petition, determining that the arbitrator failed to establish whether the respondent actually incurred or would have incurred any loss of profit.

4. Upon Confirmation of an Arbitration Agreement, the Court Should Abstain from Addressing Further Issues: Delhi High Court.

Justice Amit Bansal of the Delhi High Court ruled[7] that the court's role is limited to verifying the existence of a valid arbitration agreement, after which it should refrain from addressing other issues, leaving them to the arbitral tribunal. Citing Clause 26 of the EPC Contract and the Arbitration and Conciliation (Amendment) Act 2015,[8] the court highlighted that unresolved disputes following conciliation should be referred to arbitration. Once the arbitration agreement is confirmed, further examination by the court is unnecessary, as

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[5] *M/S Divyam Real Estate Pvt Ltd v M/S M2k Entertainment Pvt Ltd,* O.M.P. (COMM) 162/2020 & I.A. 14331/2012, I.A. 10655/2022.
[6] *I-Pay Clearing Services Pvt Ltd v ICICI Bank Ltd,* S.L.P. (C) No. 24278 of 2019.
[7] *M/S Kld Creation Infrastructure Pvt Ltd v National Highways & Infrastructure Development Corp.Ltd.,* [2024] Del HC, ARB.P. 321/2024.
[8] The Arbitration and Conciliation (Amendment) Act 2015.

established in *BSNL v Nortel Networks Pvt. Ltd.*[9] Consequently, the court-appointed Mr. Amiet Andlay, Advocate, as the sole arbitrator to adjudicate the disputes between the parties.

5. Parties Cannot Challenge Arbitrator's Procedural Orders Under Section 9 of the Arbitration Act: Delhi High Court.

The Delhi High Court bench of Justice Prathiba M. Singh has ruled[10] that parties cannot challenge procedural orders made by an arbitrator under Section 9 of the Arbitration Act[11]. The court observed that the petitioner's attempt to use Section 9 to contest such orders was an effort to bypass the appellate provisions under Section 37,[12] which specifies appealable orders. The court, highlighting inconsistencies and lack of diligence in the petitioner's evidence, emphasized that Section 9 is intended for interim measures, not for contesting procedural decisions. Citing the Supreme Court's decision in *Deep Industries Ltd. v ONGC*,[13] the High Court affirmed that Section 37 of the Arbitration Act restricts appeals to certain orders, excluding procedural matters. Consequently, the court dismissed the petition, imposing a cost of Rs. 10,000 on the petitioner for attempting to circumvent the established appeal process.

6. In the absence of a Specified Seat in an Arbitration Agreement, court jurisdiction is to be determined according to Sections 16 to 20 of the CPC: Delhi High Court.

The Delhi High Court,[14] led by Justice Neena Bansal Krishna, ruled that in the absence of a specified seat for arbitration in an agreement, court jurisdiction should be determined according to Sections 16 to 20 of the Code of Civil Procedure, 1908 ["**CPC**"]. The bench clarified that general jurisdictional clauses, such as those specifying "Delhi jurisdiction only," do not define the arbitration seat. Referring to the Supreme Court's decisions,[15] the High Court emphasized that the seat of arbitration is crucial for determining jurisdiction, and without a designated seat, jurisdiction is based on CPC provisions. Since the contract was executed in Madhya Pradesh and related to work in that state, the court held that only

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[9] *BSNL v Nortel Networks Private Ltd,* [2021] 5 SCC 738.
[10] *Jagdish Tyres Pvt Ltd v Indag Rubber Ltd*, 2024 SCC OnLine Del 3961.
[11] The Arbitration and Conciliation Act 1996, s 9.
[12] The Arbitration and Conciliation Act 1996, s 37.
[13] *Deep Industries Ltd v ONGC,* [2020] 15 SCC 706.
[14] *M/S Kings Chariot v Mr Tarun Wadhwa*, 2024 SCC OnLine Del 4039.
[15] *M/S Ravi Ranjan Developers Pvt Ltd v Aditya Kumar Chatterjee*,, SLP(C) No. 17397-17398/2021.

Madhya Pradesh courts had jurisdiction over the dispute, leading to the dismissal of the petition.

7. Bombay High Court: High Courts' Jurisdiction under Section 37 of the Arbitration Act is Restricted to Arbitrary, Capricious, and Perverse orders.

The Bombay High Court,[16] led by Justices A.S. Chandurkar and Rajesh S. Patil, affirmed that appellate jurisdiction under Section 37 of the Arbitration Act[17] is confined to reviewing orders that are arbitrary, capricious, or ignore established legal principles. The Court noted that Halliburton's appeal challenging the denial of interim relief under Section 9 was inappropriate, as such matters fall within the discretionary power of the lower court. The High Court found the single judge's decision reasonable, noting that disputes over contract issues and financial liabilities should be resolved through arbitration. The appeal was dismissed as the decision did not warrant interference under Section 37(1)(b) of the Arbitration Act.[18]

8. Arbitration Bar of India Urges Withdrawal of Government's New Arbitration Guidelines for Procurement Contracts.

The Arbitration Bar of India ["**ABI**"] and the Indian Arbitration Forum ["**IAF**"] have raised concerns regarding the recent office memorandum issued by the Ministry of Finance entitled "Guidelines for Arbitration and Mediation in Contracts for Domestic Public Procurement."[19] Issued by the Department of Expenditure, this memorandum advises against routinely incorporating arbitration clauses in large-scale government procurement contracts, recommending that arbitration be limited to disputes valued under Rs. 10 crores and not used for higher-value disputes. In a formal representation to Finance Minister Nirmala Sitharaman, the ABI and IAF argued that this guidance contradicts the government's earlier efforts to strengthen the arbitration framework in India, noting that such efforts were supported by endorsements from the Prime Minister and other senior officials.

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[16] *M/s Halliburton India Operations Pvt Ltdv Vision Projects Technologies Pvt Ltd*, Comm Appeal (L) No. 17720 of 2024.
[17] The Arbitration and Conciliation Act 1996, s 37.
[18] The Arbitration and Conciliation Act 1996, s 37(1)(b).
[19] Department of Expenditure, 'Guidelines for Arbitration and Mediation in Contracts for Domestic Public Procurement' (*Finance Ministry*, 3 June 2024) <https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf> accessed 20 July 2024.

9. Claimant's failure to request Arbitral Tribunal to fix a date for hearing cannot be inferred an abandonment of their claim: Supreme Court.

The Supreme Court has, in the case of *Dani Wooltex Corporation v Sheil Properties Pvt. Ltd.,*[20] mere failure to participate in the arbitration proceedings or absence from the proceedings cannot establish abandonment of claim leading to termination of arbitral proceedings under Section 32(2)(c) of the Arbitration Act.[21] The court said that an order passed terminating the arbitral proceedings based on the failure of the claimant to get their date of hearing fixed cannot be considered valid. Powers under Section 32(2)(c) of the Arbitration Act can only be exercised if the continuation of the proceedings becomes unnecessary or impossible, and failure to fix a date is no ground to conclude that the proceedings have become unnecessary. Abandonment of a claim, either express or implied, is a ground where proceedings can be considered to have become unnecessary.

[20] *Dani Wooltex Corporation v Sheil Properties Pvt Ltd,* 2024 SCC OnLine SC 970.
[21] The Arbitration and Conciliation Act 1996, s 32(2)(c).

JULY

1. Doctrine of Separability; Arbitration Agreement survives termination of Main Contract: Bombay High Court

The Bombay High Court, in the case of *EBIX Cash Pvt. Lt. v State of Maharashtra and Ors.*[1] dismissed a writ petition averring that the dispute between the parties was arbitrable and covered under the arbitration clause. The facts of the case signify that a contract for an e-ticketing system for buses in Aurangabad was awarded to Ebix Cash after a tender process. Ultimately, a termination notice was served on the petitioner. The Bombay High Court followed the principle laid down by the Supreme Court in *SBI General Insurance Co. Ltd. v Krish Spinning,*[2] which expressed that an arbitration clause survives termination of the main contract. It reiterated the doctrine of severability enshrined under Section 16(1) of the Arbitration Act.[3]

2. Avoid bulky pleadings & lengthy submissions in Arbitration Appeals: Supreme Court to advocates

The Supreme Court of India[4] expressed its displeasure over lengthy and bulky pleadings filed under Sections 34 and 37 of the Arbitration Act.[5] The Supreme Court stressed the huge pendency of cases and inefficiency and unfairness in arbitral proceedings. It urged the Bar to refrain from incorporating all the grounds which are not available in law.

3. Retroactive Application of Judicial Decisions to Arbitral Awards would create legal & procedural chaos

The Allahabad High Court[6] emphasized the ensuing chaos in proceedings if the retroactive application of judicial decisions is allowed. It elaborated on the Supreme Court judgement in *Union of India v Tarsem Singh and Ors.*[7] The Court was dealing with an arbitration concluded

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[1] *EBIX Cash Pvt Ltd v State of Maharashtra and Ors*, W.P. No. 6707/ 2024.
[2] *SBI General Insurance Co Ltd v Krish Spinning*, Civil Appeal No. 7821 of 2024 SLP (C) No. 3792 of 2024.
[3] Arbitration and Conciliation Act 1996, s16(1).
[4] *Bombay Slum Redevelopment Corp Pvt Ltd v Samir Narain Bhojwani*, Civil Appeal No. 7249 of 2024.
[5] Arbitration and Conciliation Act, 1996 s34, 37.
[6] *Smt. Savitri Devi v Union of India*, 2024 AHC 109223.
[7] *Union of India v Tarsem Singh & Ors*, AIR 2019 SC 4689.

in 2008 and held that reopening of arbitration due to a judicial decision would lead to instability in arbitral proceedings.

4. Calcutta High Court strikes down Arbitration Clause as unconstitutional, upholds Subcontractor's Right to Independent Dispute Resolution

Justice Sabyasachi in *M/s Zillion Infraprojects Pvt. Ltd. v. Bridge and Roof Co. India Ltd.*[8] declared an arbitration clause to be in contravention of Article 14 of the Indian Constitution. The said clause prevented the subcontractor from participating in arbitration proceedings despite bearing the expenses of the proceedings. In addition, it allowed the Indian Oil Corporation to unilaterally refer the dispute to arbitration, thus precluding the subcontractor from raising disputes.

5. Referral Courts Must Not Conduct Intricate Enquiry on Whether Claims Are Time-Barred

The Supreme Court elucidated[9] on time-barred claims as highlighted in the *Azim Premji* judgement.[10] It furthered the understanding under the said judgement by circumscribing the scope of enquiry of a referral court when a petition under Section 11(6) of the Arbitration Act is filed for the appointment of an arbitrator. The restricted scope must only deal with whether the petition has been filed within the limitation period of three years or not.

6. Composite Reference to Arbitration Necessary when Dispute involves the same subject matter

The Calcutta High Court bench led by Justice Sabyasachi allowed composite references from two companies to arbitration since the two arbitration agreements referred to the self-same demised property.[11] In this case, both the agreements were entered into by the same proposed lessee and the two co-owners for the self-same demised property. The Court held: "*if two different references were to be made, there would be ample scope of conflict of decision pertaining to the self-same subject matter between the co-owners of the self-same property.*"

[8] *M/s Zillion Infraprojects Pvt Ltd v Bridge and Roof Co India Ltd*, AP-COM No. 77 of 2024.
[9] *SBI General Insurance Co Ltd v Krish Spinning*, Civil Appeal No. 7821 of 2024 SLP (C) No. 3792 of 2024.
[10] *M/S Arif Azim Co Ltd v M/S Aptech Ltd*, 2024 3 S.C.R. 73.
[11] *K2V2 Hospitality LLP v. Limton Electro Optics Pvt. Ltd & Ors.*, AP/472/2023.

7. **Aggrieved Third Party Beneficiaries of domain names cannot challenge Arbitration Award under Section 34 of the Arbitration Act**

The Delhi High Court in the case of *Mukesh Udeshi v Jindal Steel Power Ltd. & Anr.*[12] has held that only parties to arbitration can challenge an award under Section 34 of the Arbitration Act. Third party beneficiaries of domain names, though impacted, cannot be challenged under Section 34. The High Court relied on its own judgement in *M/s Tara Logitech Pvt. Ltd. v Religare Finvest Ltd.*[13] to signify that only parties to the arbitration agreement can challenge award under Section 34 of the Arbitration Act.

8. **Arbitral Tribunal can award compensation for breach if specific performance is not possible**

The Delhi High Court, in its seminal ruling in *The Deputy Commissioner of Police v. Score Information Technologies Ltd.*[14] has allowed the arbitral tribunal to award compensation in case the specific performance of the contract is unworkable. Moreover, the Court emphasized that the arbitral tribunal has the authority to interpret the provisions of the contract. Even if the interpretation is erroneous, the courts will not interfere unless it is perverse and patently illegal and goes to the root of the matter.

9. **Equatorial Guinea signs the ICSID Convention**

Equatorial Guinea becomes the 159th Contracting state of the ICSID Convention. Pursuant to Article 68(2) of the ICSID Convention,[15] the Convention will enter into force on August 23, 2024. Interestingly, Honduras' decision to exit from the ICSID Convention will come into effect on August 25, 2024, thus, bringing the number down to 158 contracting states.

[12] *Mukesh Udeshi v. Jindal Steel Power Ltd & Anr,* O.M.P. (COMM) 213/2023 and I.A. 11241/2023.
[13] *M/s Tara Logitech Pvt Ltd v Religare Finvest Ltd*, 2014 DHC 7410.
[14] *The Deputy Commissioner of Police v. Score Information Technologies Ltd*, FAO(OS) (COMM) 357/2019.
[15] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (World Bank) art 68(2).

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IN CONVERSATION WITH MS. LAILA OLLAPALLY

Editor's Note: Ms. Laila Ollapally is the founder of CAMP Arbitration and Mediation Practice Pvt. Ltd. ["**CAMP**"], a leading private mediation organization based in Bangalore, India, established in 2015 to advocate for mediation as an alternative method for dispute resolution. CAMP is recognized as the sole Qualifying Assessment Program ["**QAP**"] for the International Mediation Institute in India. She has been a lawyer for more than 3 decades, practicing in the Supreme Court of India, as well as the High Court and Consumer Courts in Karnataka. Additionally, Ms. Ollapally is an IMI-certified mediator and serves on the mediation panels at the Singapore International Mediation Centre ["**SIMC**"] and the American Arbitration Association's International Centre for Dispute Resolution ["**AAA-ICDR**"]. She has also been appointed to the SIMC User's Council and sits on the advisory board of The Foundation for Sustainable Rule of Law Initiatives ["**FSRI**"], California.

Editorial Board ["EB"]: You have mediated hundreds of complex civil and commercial disputes. Can you share any recent trends or changes you have observed in the types of disputes being mediated in India? How has the nature of these disputes evolved over the years?

Laila Ollapally ["LO"]: I have had the privilege of being the founding coordinator of the Court-annexed mediation program in Karnataka for almost ten years. I have also been in private mediation for the last decade. So, I can give you my observations from both perspectives.

At the court-annexed mediation program, many cases that came in were matrimonial in nature. When I think about the reason for this, I think that a huge number of these cases come because the judges are familiar with the concept of 'conciliation' through the Family Courts Act, 1984. Conciliation had limited impact in family courts, but when mediation was introduced, judges were more willing to refer the cases for mediation instead of the required conciliation. As they observed positive outcomes, they began referring more cases, leading to matrimonial cases dominating court-annexed mediation programs.

As the Coordinator of the Bangalore Mediation Centre ["**BMC**"], I often noticed that when the

Chief Justice and the Governing Board of the BMC encourages the referring Judges, diverse kinds of cases would come in for mediation. When this spirit abates, matrimonial cases dominate. So, a lot depends on the enthusiasm of the Judges to refer cases for mediation.

When we started CAMP in 2015, the larger public did not know anything about mediation. We once had a situation when somebody came into our office with a yoga mat, asking for a yoga session. They did not know the difference between "mediation" and "meditation". Things have changed since then. We have mediated cases under diverse subject heads including commercial, Intellectual Property ["**IP**"] related cases, workplace disputes, tenancy related disputes, etc.

I have noticed an interesting trend. When mediation-friendly judges are handling Section 11 applications under the Arbitration and Conciliation Act of 1996, they try to persuade parties to try mediation before going in for arbitration. Most often these references are to the court annexed programs. Sometimes they refer the mediation to a mediator who mediates outside the Court program. All such cases that came to CAMP have been resolved successfully. This clearly indicates institutional mediation would be a good option for commercial disputes and this could be a trend in the future.

Another interesting development I notice, and which I cannot deem a trend as yet, is the National Company Law Tribunal recently referred a case for 'private mediation'. This gave the parties an opportunity to choose their private mediation institution, and the mediation came to CAMP.

These are beginnings of the trend for institutionalized mediation, as envisaged in the Mediation Act, 2023.

EB: Since mediation spans across various areas, including matrimonial, commercial, and family disputes, could you tell us how you tailor your approach to mediate disputes across these diverse areas so that parties can reach an effective settlement?

LO: I think we in India have an advantage. Our mediators are mostly generalists. In court-annexed programs, mediators are often allotted cases where they may not be familiar with the domain. The mediator relies on their process expertise. A process expert knows how to use the domain experts available in the room. The parties and lawyers are invariably the domain experts. It further helps that these domain experts are the decision makers. Further mediation allows outside experts to be brought in, if required. A skilled mediator knows how to bring information onto the table so that parties can take informed decisions.

EB: Given your experience with international mediation institutions like the Singapore

International Mediation Centre and the American Arbitration Association, how do you compare the mediation practices in India with those in other countries? Is there a particular practice from a specific jurisdiction that you find especially interesting or unique, that we could also imbibe in our system?

LO: I had the privilege to co-mediate a case at CAMP with Judge Danny (Daniel) Weinstein, who is one of the founders of JAMS, USA, which is the biggest private mediation services provider in the world. After observing the process at CAMP, he clearly approved of the process we followed. I am confident that we in India could build the best practices for mediation, on par with any other in the world, with due attention and commitment to follow best practices.

I have the confidence that a skilled mediator in India is as good as any other in any part of the world. Our efforts should be to nurture skills and best practices in the profession.

To answer the second part of your question, we could study the community mediation practice in Bhutan. Mediation has been prevalent in Bhutan from the 7th century. A senior member of the Judiciary (Judge Pema Needup from Bhutan), was a Weinstein Fellow with JAMS Foundation the same time I was doing my fellowship in 2011. After studying the modern concepts of mediation during the Fellowship, he went back to Bhutan and committed himself to work with the traditional mediation to strengthen the concepts like confidentiality, voluntariness and self-determination. He recently told me that this adaptation has made a huge difference, and mediation has become even more popular in Bhutan. Mediation has become the first preference of the people for the resolution of their disputes. A large majority of their cases are now being resolved through mediation.

EB: You co-founded the CAMP mediation practice. Could you share the inspiration behind this initiative, how the idea originated, and your journey so far? How has the practice evolved since its inception, and what are your future goals for CAMP?

LO: I was one of the few lawyers who experienced a difficult litigation in my personal life. Many years ago, a case was filed against my husband's business. At that time, my father was a sitting Judge of the Supreme Court and when I shared with him my ordeal, the first thing he said was "*please resolve this dispute outside the courts.*" I was almost angry with him for his suggestion. My husband continued the litigation for four more years and I witnessed the stress that litigation involves. After four years, we resolved the dispute outside the courts. That was my first attempt at mediation, although at that time I was not a trained mediator. I think it is this experience that

planted in me a deep desire for amicable dispute resolution.

During my Fellowship with the JAMS Foundation, I observed mediations of diverse nature; bankruptcy dispute, employment dispute, IP dispute involving four large tech companies, a maritime dispute, and a dispute between a police officer and the public. Many of these disputes were multimillion dollar disputes. I realized how immensely powerful this process was to resolve a wide variety of disputes. That inspired me to contemplate private mediation. I realized that to optimize the potential of mediation, it must become a profession, a career choice and cannot remain a pro-bono service.

CAMP was set up in 2015 and since then we have mediated a large variety of disputes at CAMP, including bankruptcy, IP, employment disputes and others.

More and more people are opting to be trained in mediation. At CAMP, we see a growing interest from different sectors for mediation training. Lawyers, Human Resources ["**HR**"] professionals, Counselors, Leadership coaches, Chartered Accountants, Medical professionals, Actors and others.

My dream for CAMP is that it becomes a space where several mediators with a passion for peace can practice their mediation and in CAMP the community will find excellent mediation services.

EB: Based on your professional experiences, you have discussed IP and mediation. In fact, there was a recent article of yours in Bar & Bench on the intersection of IPR with mediation. Going a bit technical, with respect to that, section 12A of the mandates mediation between the parties before seeking interim relief. Have you come across any misuse of the section by the parties in order to avoid mandatory mediation? What could possibly be the viable tests in assessing the applications for interim injunctions to determine whether mandatory mediation is necessary?

LO: The Supreme Court, in the 2023 case of *Yamini Manohar v. TKD Keerthi* ["**Yamini Manohar**"], established that it is not the plaintiff's prerogative to decide whether interim relief should be granted. The commercial court Judges must apply their mind to assess whether the balance of convenience and potential harm justify departing from mandatory mediation in favor of interim relief. Only upon such an evaluation can parties be granted interim relief instead of proceeding with mandatory mediation.

Although I have been a lawyer for several decades, since 2015, I am exclusively in the practice of mediation. I understand from some others that often there is a reluctance by the parties and lawyers

to go in for mediation in commercial disputes and instead they seek interim relief under section 12A.

EB: Considering the recent letter of the Arbitration Bar of India urging the government to withdraw its "protectionist" guidelines regarding government procurement contracts, how far do you think this saga of *arbitration v. mediation* will stretch? According to you, which method is the most effective in dealing with government procurement contracts?

LO: We cannot pitch two different dispute mechanisms against each other. These are all tools required for dispute resolution. Just as scalpel and scissors are required in the toolkit of a surgeon and it must be used appropriately, both these dispute resolution mechanisms are required in the tool kit of a dispute resolver and must be used appropriately.

Government officers are reluctant to use mediation to resolve a dispute as they apprehend being accused of favoritism and bias. It is safer for these officers to rely on arbitration where the arbitrator is the decision maker. These guidelines have provided for the protection of government officers from such consequences while they negotiate in mediation.

EB: What are your views on the current level of public awareness and acceptance of mediation as a dispute resolution mechanism in India? What strategies do you believe are essential to enhance public trust and utilisation of mediation for dispute resolution?

LO: There is growing awareness of mediation in larger cities. All high courts have set up mediation programs. However, mediation requires a change in mindset. The intuitive response to conflict is adversarial. Historically, for many years in India, we relied on the adversarial approach for dispute resolution. For mediation to become the norm, we need to work more towards changing mind sets.

In my view we need to reimagine our court-annexed mediation programs. It is recognized all over the world that when mediation is new in a society, people are reluctant to use it. An aspiring mediator will find it extremely difficult to get a case to mediate. However, in court programs, there are many more cases. The cases are allotted to mediators. This will give an aspiring mediator the opportunity to mediate, develop skills, gain experience and reputation.

More and more aspiring mediators need to be given opportunities to practice in the court programs irrespective of the current requirement of 15 years of court practice. This opportunity should be given only for a limited period. After completing that period in the court program, they need to

move on and make space for new mediators to come in and hone their skills. This may motivate the mediator, while in the program, to focus on developing skills to prepare himself for private practice later and at the same time enhance the quality of mediation in the court programs. A mediator aspiring to do private practice will have to prepare herself for the stringent requirements of market selection.

EB: Looking ahead, what are your aspirations for the future of mediation in India? What key initiatives or reforms do you believe are necessary to strengthen the mediation landscape in the country?

LO: Today, the legislation exists, and it has been drafted with a lot of attention. We at CAMP worked on its first draft along with several expert mediators from the mediation community, Judges having experience in mediation, and other international mediators. Several other consultations were conducted throughout the country by different groups of mediators. The Supreme Court set up a committee to make recommendations and the ministry set up a committee to work on the legislation. Many progressive elements are present in the legislation. However, all this fructifies when we build mediation capacity i.e. mediators with skills. Mediation is based on self-determination. The parties have to come to their own realizations and only a mediator with superior skills can achieve that. Mediators who can bring in reflective practices and become self-aware will be able to help build mediator capacity and improve the quality of mediation in India.

EB: Drawing from your extensive experience in the field, what advice would you offer to young mediators regarding the essential qualities and skills that contribute to becoming an effective mediator?

LO: Mediators need to have a thirst for dispute resolution and peace building. Mediators need listening skills, empathetic understanding and an ability to connect with human beings. It is crucial that mediators have an ability to talk straight on critical issues and have the courage to highlight risks in a non-threatening and humble way. Robust preparation, i.e. knowledge of the facts and the law, is very important, and to add to these, a curious and creative mind makes an effective mediator.

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