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VOLUME V | ISSUE I

FOREWORD

Prof. (Dr.) S. Shanthakumar

Director, Gujarat National Law University

As Director of GNLU, it gives me profound satisfaction to present the GNLU SRDC ADR Magazine. Since its inception in 2020, the Magazine has established itself as a pioneering platform in India's Alternative Dispute Resolution (ADR) discourse, publishing four volumes and twelve issues that have consistently advanced the understanding and practice of ADR in our nation.

The significance of ADR in today's legal landscape cannot be overstated. India's journey toward building an effective and internationally aligned ADR framework has been marked by transformative changes. While this path has presented its challenges, these very challenges underscore the vital importance of academic debate and research in refining and strengthening our ADR systems.

The Magazine distinguishes itself through its innovative structure: scholarly articles examining contemporary issues, a Round Up section covering significant developments, and interviews with leading legal luminaries. This comprehensive approach ensures readers benefit from both academic insights and practical expertise from the field.

We are profoundly honoured to have the steadfast guidance of our esteemed advisory board, led by Justice Dipak Misra, Former Chief Justice of India. His profound insight and visionary perspective have been instrumental in shaping this publication's scholarly path, ensuring it remains a rigorous and dynamic forum for advancing ADR. The invaluable counsel of our advisory board members has maintained the highest standards of academic integrity, relevance, and depth.

At the core of this publication lies our remarkable student editorial board, whose dedication to advancing ADR knowledge is truly inspiring. Working closely with experienced external peer reviewers, they have consistently produced a publication that sets a benchmark for student-led academic initiatives and exemplifies the scholarly excellence that defines GNLU. Their commitment to each edition has been instrumental in the Magazine's growth and relevance in the ADR community.

As we release this issue, we remain confident that the Magazine will continue to enrich its readership and play a vital role in shaping the future of ADR in India. We hope these pages serve not only as an academic resource but as a catalyst for progressive thought, inspiring readers to engage deeply with contemporary ADR issues. We look forward to the Magazine's continued growth, sustained by the support of our readers, advisors, and contributors.

ABOUT THE MAGAZINE

The ADR Magazine was launched in 2020 under the aegis of GNLU's Student Research Development Council. The Magazine, now in its fourth year of operations, is a tri-annual student-run publication that publishes articles pertaining to the field of Alternative Dispute Resolution. The Magazine aims to keep pace with the recent developments, judicial decisions, and practices being adopted in Indian and foreign jurisdictions and promote a comparative and interdisciplinary understanding of various dynamics shaping this domain of law. Throughout its stint, the Magazine has successfully published 4 Volumes and 12 Issues featuring articles from notable practitioners and interviews with industry leaders.

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NOTE FROM THE EDITORS

We extend our heartfelt gratitude to our readers, advisors, contributors, and everyone involved with this magazine for their unwavering support and commitment. Your steadfast faith in our vision has been vital to the success and growth of this magazine, now proudly in its fifth edition. As the Magazine continues to make strides and build a respected presence in the field, we look forward to reaching an even broader audience. We hope this platform will catalyze the free exchange of ideas further and provide a valuable learning resource for students and professionals dedicated to Alternative Dispute Resolution.

We are elated to announce the publication of Volume V Issue I of the Magazine. This Issue features an Interview with Dr. Rishab Gupta. He is a practicing advocate at Bombay High Court and Barrister at Twenty Essex. We take this opportunity to extend our gratitude to Dr. Gupta for engaging with us.

This Issue presents five meticulously curated articles, each exemplifying the highest standards of academic integrity and research quality that define the GNLU Academia. We are proud to uphold these standards within the pages of this Issue, which brings together insightful perspectives on pressing contemporary issues in the realm of Alternative Dispute Resolution. We trust that our readers and contributors will continue to recognize and support our commitment, helping us maintain the quality and standards of the Magazine.

We hope our readers will enjoy reading this Issue as much as we have in assembling it.

GNLU SRDC ADR MAGAZINE
VOLUME V | ISSUE I

ENFORCING FOREIGN SEATED EMERGENCY AWARDS IN INDIA: A PROCEDURAL WORKAROUND

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Disclaimer: The views expressed are personal.

Introduction

The idea of "Emergency Arbitration" has gained significant traction over the past couple of years in the international arbitration community. Emergency arbitration is a process through which parties can avail urgent interim and conservatory reliefs before the formation of an arbitral tribunal. This is done to ensure that the assets forming the subject matter of the arbitration and/or being claimed by the opposing party are preserved, and the object of arbitration is not defeated pending the constitution of the arbitral tribunal. This recourse becomes particularly important if access to courts is limited or if courts from which interim reliefs are sought, are tardy.

Legal Framework for Emergency Arbitrators' Awards ["EA Decision"]

All major arbitral institutions around the world have provisions in their arbitration rules to include emergency arbitration.[1] Furthermore, arbitral institutions established in India have incorporated provisions for Emergency Arbitrators in their rules as well.[2] To ensure that interim relief is obtained in time, the arbitral institution moves towards the appointment of an Emergency Arbitrator very quickly once the request for the appointment of an Emergency Arbitrator has been raised by the party and accepted by the institution. The Singapore International Arbitration Centre ["**SIAC**"] Rules expressly provide for the appointment of an Emergency Arbitrator within one

[1] International Chamber of Commerce, 'Rules of Arbitration of the International Chamber of Commerce' (2021) art 29; Singapore International Arbitration Centre, 'Arbitration Rules of the Singapore International Arbitration Centre' (2016) sch 1 (SIAC Rules); London Court of International Arbitration, 'LCIA Arbitration Rules' (2020) art 9B.
[2] Delhi International Arbitration Centre, 'DIAC (Arbitration Proceedings) Rules (2023) r 14 (DIAC Rules); Mumbai Centre for International Arbitration, 'Arbitration Rules of the Mumbai Centre for International Arbitration' (2017) r 14 (MCIA Rules).

day.[3] Similarly in India, the Mumbai Centre for International Arbitration ["**MCIA**"] Rules provide for the appointment of an Emergency Arbitrator within one business day from the receipt of the request and payment of fees,[4] and the Delhi International Arbitration Centre ["**DIAC**"] Rules provide for the appointment of an Emergency Arbitrator within two business days from making such a request.[5] Further, these institutional arbitration rules provide for the time frame within which the Emergency Arbitrator is required to pronounce its order. For example, the MCIA Rules and DIAC Rules provide for a period of 14 days, from the date of appointment, for an Emergency Arbitrator to pass orders.[6]

Evidently, emergency arbitration appears to be an efficient way to avail urgent interim reliefs. However, efficiency and enforceability of an EA Decision are required to be assessed before recommending emergency arbitration as a potential approach. Despite the increasing popularity of Emergency Arbitrator provisions, the enforceability of an EA Decision in India remains doubtful. While Singapore has given statutory recognition to the concept of Emergency Arbitrators,[7] the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], does not contain any provisions for emergency arbitration. The Hon'ble Supreme Court of India has held that if in an arbitration agreement the parties have agreed to institutional rules that incorporate reference to emergency arbitration, they are deemed to have consented to undergoing emergency arbitration if required.[8]

Since the Arbitration Act does not contain any provisions for emergency arbitration, there are concerns about the enforceability of EA Decisions in India. In reference to India seated arbitrations, these concerns were addressed by a three-judge Bench of the Hon'ble Supreme Court of India in *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.*[9]["**Amazon.com**"]. The Hon'ble Supreme Court while enforcing a SIAC EA Decision for an arbitration seated in New Delhi held that there were no provisions in the Arbitration Act prohibiting emergency arbitration, and parties by agreeing to institutional rules having provisions for emergency arbitration had consented to the same while exercising their party autonomy.[10] Pertinently, the Hon'ble Supreme Court also clarified that "arbitral tribunal" as defined under Section 2(1)(d) of the Arbitration Act includes an Emergency Arbitrator.[11] Moreover, an EA Decision would be classified as an "interim

[3] SIAC Rules, sch 1.
[4] MCIA Rules, r 14.2.
[5] DIAC Rules, r 14.3.
[6] MCIA Rules, r 14.6; DIAC Rules, r 14.10.
[7] International Arbitration Act 1994, s 2(1).
[8] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.* (2022) 1 SCC 209 [21].
[9] *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.* (2022) 1 SCC 209.
[10] ibid [21].
[11] ibid [23].

order" as under Section 17 of the Arbitration Act, and could be enforced as a court order by virtue of Section 17(2) of the Arbitration Act.[12] While the chances of enforcing an EA Decision in an India seated arbitration have increased with this much needed clarification, the chances of enforcing an EA Decision in a foreign seated arbitration are unpredictable as described below in further detail.

Enforcing Foreign EA Decisions – a Procedural Workaround

Amazon.com laid to rest the concerns surrounding the enforcement of an EA Decision seated in India because the Supreme Court had held that an EA Decision can be enforced as a court order under Section 17(2) of the Arbitration Act. Nevertheless, Part I of the Arbitration Act, which includes Section 17(2) of the Arbitration Act applies only to arbitrations seated in India[13] with the exception of Sections 9, 27, 37(1)(a) and 37(3) under Part I of the Arbitration Act which apply to foreign seated arbitrations so long as there exists no agreement to the contrary.[14]

The problem with enforcing a foreign seated EA Decision arises because there is no provision *pari materia* or corresponding to Section 17(2) in Part II of the Arbitration Act which is concerned with arbitrations seated outside India. The UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**UNCITRAL Model Law**"] contains express provisions for the enforcement of foreign seated interim measures.[15] These have not found their way into the Arbitration Act, thus resulting in uncertainty as to the provision under which such measures would be enforced in the event where the parties seek to enforce them.[16]

Parties have sought to enforce foreign seated EA Decisions before various Indian courts. However, the issue of enforcement of foreign seated EA Decisions is yet to be tested before the Hon'ble Supreme Court. This paper examines how different High Courts have approached the issue of enforcement of a foreign seated EA Decision, and the solutions devised by Courts to give effect to an EA Decision.

Pre-Amazon.com

- *HSBC PI Holdings Ltd. v Avitel Post Studioz Ltd.* ["**HSBC PI**"] [17]

[12] ibid [40], [46].
[13] Arbitration & Conciliation Act 1996, s. 2(2).
[14] ibid.
[15] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration' (1985) arts 17 H-17 I.
[16] Muskan Agarwal and Amitanshu Saxena, 'Interim Measures of Protection in Aid of Foreign-Seated Arbitrations: Judicial Misadventures and Legal Uncertainty' (2021) 7 NLSBLR 73, 76.
[17] *HSBC PI Holdings (Mauritius) Ltd. v Avitel Post Studioz Ltd. & Ors.* [2014] SCC OnLine Bom 102.

The first instance of a party seeking to enforce an EA Decision came up before the Hon'ble Bombay High Court ["**Bombay HC**"] in *HSBC PI* involving disputes arising out of shareholders and share subscription agreements. In an SIAC arbitration seated in Singapore,[18] the Emergency Arbitrator had issued orders directing Avitel to refrain from disposing of, dealing with or diminishing the value of assets up to USD 50 million. Thereafter, HSBC. approached the Bombay HC for interim reliefs under Section 9 of the Arbitration Act seeking identical reliefs. An argument was advanced by Avitel that the nature of the petition was such that it essentially sought enforcement of a foreign award under Section 9 of the Arbitration Act and that the requirements under Section 48 of the Arbitration Act could not be circumvented. The Bombay HC rejected this argument by holding that the petition for interim measures under Section 9 would be applicable to foreign seated arbitrations as well. The Bombay HC rejected the argument that the requirements of Section 48 of the Arbitration Act would apply to petitions under Section 9 also.[19] The Bombay HC independently analysed the pleadings and arguments advanced by the parties under the petition and granted interim relief along the lines of what had been granted in the emergency award.[20] However, it is pertinent to note that while the EA Decision had been issued in May 2012, the instant petition was disposed of more than one year later in January 2014 (although ad interim reliefs had been granted).

- *Raffles Design International India Pvt. Ltd. v Educomp Professional Education Ltd.& Ors.*[21] ["**Raffles**"]

The next case on this issue came up before the Hon'ble Delhi High Court ["**Delhi HC**"] in *Raffles* which was once again a Singapore seated SIAC arbitration.[22] *Vide* EA Decision dated 6 October 2015, the Emergency Arbitrator had granted the interim reliefs sought by the Claimant. The Respondents continued to act in contravention of the EA Decision as a result of which the Claimant was constrained to approach the Delhi HC under Section 9 of the Arbitration Act.

Hence, the Delhi HC was required, inter alia, to decide the question about whether the Petitioner could approach the Delhi HC for an interim relief considering that it had already approached the Arbitral Tribunal in Singapore, and thereafter obtained a judgment in terms of the interim order from the Singapore High Court. The Delhi HC observed that Section 17 of the Arbitration Act was not applicable to foreign seated proceedings, and there was no provision in the Arbitration

[18] ibid [2].
[19] ibid [77], [89].
[20] ibid [93]–[101].
[21] *Raffles Design International India Pvt. Ltd. & Anr. v Educomp Professional Education Ltd. & Ors.* [2016] SCC OnLine Del 5521.
[22] ibid [4.4].

Act for the enforcement of foreign seated interim orders. Consequently, a foreign seated EA Decision could not be enforced under the Arbitration Act and the only remedy for the same was by filing a civil suit.[23] Nevertheless, the Delhi HC noted that while recourse to Section 9 of the Arbitration Act is not available for the purpose of enforcing the orders of an arbitral tribunal that does not mean that a court cannot independently apply its mind and grant interim reliefs in cases where such reliefs are warranted.[24] The Delhi HC held the Section 9 petition to be maintainable. However, interestingly, while ad interim relief had been granted immediately,[25] the Section 9 petition was disposed of as being infructuous in 2017 since the SIAC award had been passed.[26]

- *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors.*[27] ["**Plus Holdings**"]

The Bombay HC in *Plus Holdings* granted ad interim relief precisely along the lines of a Singapore seated SIAC EA Decision in favour of the Petitioner. While granting the remedy, the Bombay HC considered the reliefs by the Emergency Arbitrator and the merits of the Petitioner's contentions based on the material before it. Subsequently, it dismissed the Section 9 petition for want of prosecution as whilst the matter was settled *inter se* between the parties, the petitioner (who was to remain present and withdraw the section 9 petition) was not present on the hearing date.[28]

- *Ashwani Minda and Jay Ushin Ltd. v U-Shin Ltd. & Minebea Mitsumi Inc.*[29] ["**Ashwani Minda**"]

In the absence of a statutory enforcement mechanism for an EA Decision and by permitting a party to file an application for interim reliefs before Indian courts, an interesting question came up in *Ashwani Minda* – whether having chosen an institutional process in a foreign-seated arbitration, having invoked the provisions of Emergency Arbitrator, and having failed in its endeavour to obtain interim relief, a party can then seek the self-same relief in an application for interim reliefs before Indian courts. This dispute arose in a Japan seated arbitration under the institutional rules of the Japan Commercial Arbitration Association.[30] In this case, the Emergency Arbitrator *vide* order dated 2 April 2020 rejected the request for emergency reliefs.[31] Subsequently, but prior to the constitution of the Tribunal, one of the parties, aggrieved by the order of the Emergency Arbitrator,[32] approached the Delhi HC under Section 9 of the Arbitration Act seeking

[23] ibid [102]-[104].
[24] ibid [105].
[25] *Raffles Design International India Pvt. Ltd. & Anr. v Educomp Professional Education Ltd. & Ors.* (Del HC, 2 December 2015).
[26] *Raffles Design International India Pvt. Ltd. & Anr. v Educomp Professional Education Ltd. & Ors.* (Del HC, 26 April 2017).
[27] *Plus Holdings Ltd. v Xeitgeist Entertainment Group Ltd. & Ors.* [2019] SCC OnLine Bom 13069.
[28] *Plus Holdings Ltd. v Xeitgeist Entertainment Group Pte. Ltd. and Ors.* [2019] BHC-OS 16607.
[29] *Ashwani Minda and Jay Ushin Ltd. v U-Shin Ltd. & Minebea Mitsumi Inc.* [2020] SCC OnLine Del 721.
[30] ibid [4].
[31] ibid [10].
[32] ibid [43].

interim reliefs similar to those that had been rejected by the Emergency Arbitrator on the grounds that the Arbitral Tribunal was yet to be constituted.[33] and since they were aggrieved by the order of the emergency arbitrator.[34] The Delhi HC rejected the Section 9 petition, and observed that Section 9 of the Arbitration Act could not act as a ground for appealing the decision of an Emergency Arbitrator. Once the parties had chosen the seat, the rules and the tribunal, they could not later revise their choice after the dispute had arisen.[35] The Delhi HC went on to observe that the independent evaluation and grant of remedies as envisaged in *Raffles* would only apply in cases where the emergency tribunal had granted relief, and not in cases where it had been rejected.[36]

Post – Amazon.com

- *Ashok Kumar Goel & Anr. v Ebix Cash Ltd. & Ors.*[37] ["**Ebix Cash**"]

A change in the line of thinking is evident post *Amazon.com*. This was seen recently in *Ebix Cash* before the Bombay HC. While granting interim relief in a Section 9 petition along the lines of those granted by a Singapore seated SIAC Emergency Arbitrator, the Bombay HC noted that the EA Decision was well reasoned and that there was no reason to reject the findings recorded in the EA Decision.[38] The Bombay HC, in fact, found that such an approach would support arbitration and ensure its effectiveness.[39] Laying emphasis on party autonomy being the bedrock of an arbitration agreement , the Bombay HC held that parties having agreed to institutional rules with provisions for emergency arbitration would be bound by such an award and must comply with it immediately.[40] The Bombay HC granted reliefs to the Petitioner,[41] and observed that the "award" was an interim order and not an arbitral award requiring enforcement under Part II of the Arbitration Act in view of the decision in *Amazon.com.*[42]

Key Takeaways and Conclusion

From the above, it is clear that while an EA Decision is referred to as an "award", it is in fact an interim order passed by an Emergency Arbitral Tribunal. There is no direct enforcement

[33] ibid [14], [39].
[34] ibid [43].
[35] ibid [44].
[36] ibid [46].
[37] *Ashok Kumar Goel & Anr. v EbixCash Ltd. & Ors.* [2024] BHC-OS:15701.
[38] ibid [29].
[39] ibid [29F].
[40] ibid [29E-29F].
[41] ibid [29G].
[42] ibid [29A-29B].

mechanism prescribed under Part II of the Arbitration Act for such decisions or orders in foreign seated arbitrations.

Coupled with the above and in the absence of a statutorily prescribed mechanism for enforcement of an interim ruling by a foreign seated arbitral tribunal, Section 9 proceedings are the only enforcement mechanism for reliefs granted in an EA Decision. In fact, as the Courts have pointed out, when parties have already agreed to the arbitral tribunal, the seat, the applicable rules and the forum to obtain interim measures, when disputes arise, the parties cannot override their arbitration agreement.

The current mechanism to make EA Decisions efficacious in India necessitates a party to undertake further proceedings, thus militating against the very principles and foundations which have necessitated the concept of EA Decision, i.e., urgent relief within a few days. As seen from the above cases, to make such urgent relief efficacious in practice, parties may spend a few months before Indian courts. In such situations, an efficacious remedy arguably remains which is at the first instance, to institute Section 9 proceedings, for interim measures of protection which relate to assets and properties located in India and are the subject matter of the foreign seated arbitration.

As India evolves to accommodate modern international arbitration practices and looks to becoming more arbitration friendly, it must seek to harmonise the Indian arbitration law with leading institutional rules to ease the enforceability of EA Decisions.

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EX-FACIE TIME BARRED CLAIMS: BROADENED SCOPE OF SECTION 11 RESTING ON A SHAKY FOUNDATION

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Introduction

Section 11 of the Indian Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] lays down the procedure for appointment of the Arbitral Tribunal. The section also provides, under limited scenarios, for a party to approach the Supreme Court in case of an international commercial arbitration or a High Court in case of domestic arbitration for appointment of an arbitrator. To expedite arbitral proceedings and to ensure that the courts do not infringe upon the jurisdiction of arbitral tribunals by adjudicating upon any aspect relating to dispute between the parties, the Indian legislature introduced Section 11(6A) by way of the Arbitration and Conciliation (Amendment) Act 2015 ["**2015 Amendment**"], which restricted the power of the court during the stage of appointment of an arbitrator to only examination of existence of an arbitration agreement.

However, the jurisprudence of Section 11 appears to be moving away from the objectives of the 2015 Amendment. The recent judgement passed by the Hon'ble Supreme Court titled *Elfit Arabia v Concept Hotel Barons Ltd.,*[1] ["**Elfit Arabia**"], serves as an example of the expanding role of the courts in arbitral proceedings. In *Elfit Arabia,* the petitioner, an entity based in the United Arab Emirates, had approached the Supreme Court seeking the appointment of an Arbitrator. However, the Supreme Court refused the appointment of the arbitrator on account of the claims of the Petitioner being *ex-facie* time barred[2].

This paper highlights how the courts are infringing upon the jurisdiction of the arbitral tribunal by refusing to appoint an arbitrator if it finds the claims to be *ex-facie* time barred. Further, the paper delves into how this jurisprudence is based on a shaky foundation as it contradicts the legislative intent of the Indian Legislature and international position on this issue.

[1] *Elfit Arabia v Concept Hotel Barons Ltd.,* 2024 SCC OnLine SC 1739.
[2] Ibid [10-11].

Scope Under Section 11: 246th Report of the Law Commission and 2015 Amendment

The Hon'ble Supreme in the judgement *SBP & Co. v Patel Engg.* Ltd.[3] ["**Patel Engineering"**], where it held that the power of the Chief Justice of appointment of an arbitrator is a judicial power and not an administrative one[4], had created an anomaly whereby the courts had a wide scope of examination while appointing an arbitrator under Section 11, including considering issues such as claims being time barred. This led to delays in arbitral proceedings at their inception as well as encroachment by courts to the arbitral tribunal's jurisdiction. The decision had drawn criticism as it had over-ruled the hands-off approach towards the appointment of an arbitrator, laid down earlier in *Konkan Railway Corp. Ltd. v Rani Construction (P) Ltd.*[5] ["**Rani Construction**"] by the Hon'ble Supreme Court, and permitted an intrusive adjudication by the concerned court at the very inception of the arbitration proceedings itself.

To counter this anomaly, Law Commission of India, in its 246th Report[6] recommended, among other amendments to Section 11, the introduction of sub-section 11(6A), which restricted the power of the court during the stage of appointment of an arbitrator to only the examination of the existence of an arbitration agreement. By incorporating Section 11(6A) to the Arbitration Act, *Patel Engineering* was legislatively overruled.

Following the incorporation of sub-section 11(6A), the Supreme Court showed strict adherence to the confines of the sub-section, as highlighted by the judgement *Duro Felguera, S.A. v. Gangavaram Port Ltd.*[7]. But the contours of power would still remain unsettled, and rather different positions would be taken by the Supreme Court in different cases, as in some cases, the Supreme Court would take into consideration objections beyond the contours of sub-section 11(6A)[8], yet in other cases, the Supreme Court would adopt a strict approach and would not step beyond the contours of sub-section 11(6A)[9].

The question regarding the scope of power under Section 11 would again come before the Supreme Court and would culminate into the landmark judgement *Vidya Drolia & Ors. Durga Trading Corp.*[10] ["**Vidya Drolia**"], whereupon a reference made by the two-judge bench, the

[3] *SBP & Co. v Patel Engg. Ltd.* (2005) 8 SCC 618.
[4] Ibid [47(i)], at 663.
[5] *Konkan Railway Corp. Ltd. v Rani Construction (P) Ltd.* (2002) 2 SCC 388.
[6] Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996 (August 2014) 3 [10] https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf accessed (December 21, 2024).
[7] *Duro Felguera, S.A. v Gangavaram Port Ltd.* (2017) 9 SCC 729.
[8] *Garware Wall Ropes Ltd. v Coastal Marine Constructions and Engineering Limited* (2019) 9 SCC 209.
[9] *Mayavati Trading Pvt. Ltd. v Pradyuat Deb Burman* (2019) 8 SCC 714.
[10] *Vidya Drolia & Ors. Durga Trading Corp.* (2021) 2 SCC 1.

Supreme Court was to decide on the question of arbitrability of the disputes between landlord-tenant governed by the Transfer of Property Act, 1882.

Before proceeding further, it is important to note that Section 11 was further amended by Arbitration and Conciliation (Amendment) Act 2019 ["**2019 Amendment**"]. By way of Section 3 of the Arbitration and Conciliation (Amendment) Act 2019, sub-section 11(6A) has been deleted, however, the said amendment is yet to be notified.

Genesis of the Issue

In the *Vidya Drolia*, the Supreme Court would go on to opine on the role of a court during the stage of Section 11, noting that the court does not perform ministerial function but perform judicial function when they decide objections in accordance with Section 11 [and Section 8] of the Arbitration Act[11] and that the Court should carry out a "*prima facie review*" to cut the deadwood, in order to protect the parties from arbitration where the matter is "non-arbitrable"[12]. Further, the Supreme Court noted that Limitation Act, 1963 is applicable to arbitrations at it is applicable to court proceedings, by operation of Section 43 of the Arbitration Act. On the basis of the same, it would expand the scope of enquiry at the stage of appointment of an arbitrator again, holding that a court can reject a petition for such appointment when the claims are *ex-facie* time barred and dead[13]. It is important to note that the Hon'ble Court would proceed to deliver the judgement on the presumption that Section 11(6A) was omitted by 2019 Amendment[14].

The jurisprudence surrounding the time-barred claims would be further crystallized by the Supreme Court in *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.*[15] [***"Nortel Networks"***]. In *Nortel Networks,* the Supreme Court noted that ordinarily the issue of limitation of claims should be decided by the Arbitral Tribunal itself, however Court may strike out such claims that are manifestly *ex-facie* time barred. The court relied on *Vidya Drolia*, stating that the Court must undertake a review to cut out deadwood[16]. The Supreme Court would affirm the "tribunal v claim" test, relying on judgement of Court of Appeal of Singapore titled *BBA and Ors. v. BAZ and Anr.*

[11] Ibid [132], at 110.
[12] Ibid [154.4], at 121.
[13] Ibid [147.11] at 119.
[14] Ibid [143], at 114.
[15] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[16] Ibid [45.1], at 764.

appeal'[17], holding that since the issue of claims being time barred attacks the claims itself rather than the jurisdiction of the Arbitral Tribunal, the issue should be decided by the Arbitral Tribunal[18].

Finally, in *Arif Azim Co. Ltd. v APTECH Ltd.*[19], where the Supreme Court dealt with the question whether the petition for appointment of arbitrator was barred by limitation, the Court delved into the interplay between the Limitation Act, 1963 and the Arbitration Act. While the Supreme Court would hold that the issue of limitation is an admissibility issue, it is "duty" of the Court to prima facie examine claims before it and reject the claims that are manifestly time-barred[20]. The Supreme Court enunciated the "Two-Pronged" test, where the court would have to satisfy themselves that the petition under Section 11 has been filed within the limitation period and that the claims sought to be arbitrated are not *ex-facie* time barred claims. The Supreme Court noted that if either of the question is answered against the party seeking appointment of the arbitrator, the Court may refuse the appointment[21].

It would on the basis of the principles laid down in *Vidya Drolia,* and *Arif Azim* the Supreme Court would refuse appointment of an arbitrator in *Elfit Arabia*. The case marks a clear shift in contours of power exercised by the court under Section 11, where examination required to be undertaken by a court has now travelled beyond the contours of sub-section 11(6A). However, as stated above, the increased scope of examination by court is based on shaky foundation, with two primary challenges that this current jurisprudence surrounding Section 11 encounters, which are highlighted below.

Issues with Current Jurisprudence

Vidya Drolia relies on an incorrect presumption

It was in *Vidya Drolia* the Supreme Court envisaged the role of the court appointing arbitrator as a gatekeeper of arbitration, where the court are now to ensure that the arbitrators are not appointed where the claims are *ex-facie* time barred. The Supreme Court, while clarifying that the scope of review as laid out in *Patel Engineering* judgement is not applicable even after omission of sub-section 11(6A)[22], has gone on to expand the scope of the examination under Section 11, incorporating a

[17] *BBA and Ors. v BAZ and Anr. appeal,* In the Court of Appeal of the Republic of Singapore, Civil Appeal Nos 9 and 10 of 2019 (2020).
[18] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[19] *Arif Azim Co. Ltd. v APTECH Ltd.* (2024) 5 SCC 313.
[20] Ibid [68], at 345.
[21] Ibid [92], at 357.
[22] *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.* [2021] NSWSC 1498 (Austl.).

portion of the legal position first envisaged under *Patel Engineering* on the presumption that sub-section 11(6A) has been omitted by the 2019 Amendment.

However, the presumption is incorrect as while Section 3 of Arbitration and Conciliation (Amendment) Act 2019 did omit sub-section 11(6A), the said amendment has not been notified yet. The error would be recognised by the Supreme Court in its recent 7-Judge Bench judgment *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re*[23] [**'NN Clobal III'**]. The Supreme Court in *NN Global III* overruled the 5-judge bench judgement *N.N. Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.*[24] and held that while an unstamped or insufficient stamped instrument is inadmissible in evidence, the instrument is not rendered void and the court under Section 11 (and Section 8) is not required to decide upon objection regarding stamping of the instrument.

In regard to *Vidya Drolia,* the Supreme Court would go on to note that the premise of the said judgement, that Section 11(6A) has been omitted, is incorrect as the omission of the sub-section 11(6A) has not been notified hence the said sub-section continues to remain in force and courts should give full effect to the legislative intent[25]. Further, in the separate but concurring decision to *NN Global III,* authored by Justice Sanjiv Khanna, who also authored *Vidya Drolia* judgement*,* admitted the error that *Vidya Drolia* observes sub-section 11(6A) has ceased to be operative[26]. However, it is important to note here that the Supreme Court's observation was an obiter dicta and remarks of Justice Sanjiv Khanna were in his concurring judgement and not in the majority decision.

Since sub-section 11(6A) had not been omitted, the expanded the scope of examination is in contradiction to the legislative intent behind enacting the said sub-section. The Law Commission of India, in its 246th report, recommend that scope of the intervention should only be restricted to where the Court find that the Arbitration Agreement does not exist or is null and void and that the Court shall appoint the arbitrator if it is prima facie satisfied against the challenge to the arbitration agreement[27].

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[23] *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re* (2024) 6 SCC 1.
[24] *N.N. Global Mercantile (P) Ltd. v Indo Unique Flame Ltd.* (2023) 7 SCC 1.
[25] Ibid [162], at 87.
[26] Ibid [277], at 123.
[27] Law Commission of India, Report No 246 – Amendments to the Arbitration and Conciliation Act 1996 (August 2014) 3 [10] https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf accessed (December 21, 2024).

With the words of the sub-section 11(6A) clear and unambiguous, the expanded scope of enquiry to remove *ex-facie* dead barred claims is in contradiction to the legislative intent.

Admissibility of claims is in the domain of arbitral tribunal

The Supreme Court in *Nortel Networks* noted that the issue regarding limitation, which is mixed question of fact and law, should lie within the domain of the arbitral tribunal. The Court distinguished between jurisdictional issues and admissibility issues, where the jurisdictional issues pertain to power and authority of the arbitrator to decide a dispute[28] and the issue of admissibility relate to procedural requirements, including breach of pre-arbitration requirements, or challenge to a claim[29]. The Supreme Court noted that the issue of limitation of claims is challenge to admissibility of the claim, which is to be decided by the Arbitral Tribunal[30]. Applying the 'tribunal v claim' test, the Court held that the issue of statutory time bar against the claim is to be decided by the arbitral tribunal, as the issue regarding limitation concerns admissibility and it must be decided by the arbitral tribunal[31]. However, the Supreme Court, relying on *Vidya Drolia*, affirmed that a Court may undertake a prima facie review and interfere at the appointment stage when it is manifest that the claims are *ex-facie* time barred[32].

Internationally, the prevailing position is that the question regarding admissibility of claims should be decided by the Arbitral Tribunal, including issues related to claims being time-barred. The distinction between jurisdictional issues and admissibility issues has succinctly been summarized by Sir Michael Burton in the judgement of English High Court *Republic of Sierra Leone v SL Mining Ltd.*[33]as follows [selectively reproduced]:

> "*It was common ground before me that there is a distinction…between a challenge that a claim was not admissible before Arbitrators (admissibility) and a challenge that the Arbitrators had no jurisdiction to hear a claim (jurisdiction).*"[34]

In Singapore, the Court of Appeal in *BBA v BAZ*[35], while upholding the arbitral award and dismissing the appeals filed by the respondents in the arbitration, stated that issue of claims being time barred, arising from statutory limitation, is an admissibility issue and issues of admissibility

[28] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[29] Ibid [39], at 762.
[30] Ibid [40], at 762.
[31] Ibid [43], at 763.
[32] *Bharat Sanchar Nigam Ltd. & Anr. v Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738.
[33] *Republic of Sierra Leone v SL Mining Ltd.* [2021] Bus LR 704 (England).
[34] Ibid [8].
[35] *BBA and Ors. v BAZ and Anr. appeal,* In the Court of Appeal of the Republic of Singapore, Civil Appeal Nos 9 and 10 of 2019 (2020).

are to be decided by the arbitral tribunal[36]. The Court of Appeal applied the 'tribunal v. claim' test, affirmed by the Supreme Court in *Nortel Networks*, to arrive at its conclusion. Further, the Court of Appeal noted that this is also the position of law on this subject in other jurisdictions as well[37]. Similarly, in *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.*[38] the Supreme Court of New South Wales, considered the difference between issue regarding admissibility and jurisdiction and, adopting the analysis of the Singapore Court of Appeal in *BBA v BAZ*, noted that the issue regarding claims being time barred does not oust the jurisdiction of the arbitrator[39].

The analysis of the Supreme Court in *Nortel Networks*, where it held that the issue regarding claim being time-barred shall lie within the domain of the Arbitral Tribunal, is line with the international position. However, by placing reliance on *Vidya Drolia,* Supreme Court, in *Nortel Networks*, proceeded to decide an issue regarding admissibility, and hence infringing upon the jurisdiction of the Arbitral Tribunal. Hence, while the Supreme Court affirmed 'tribunal v. claim' test, it also proceeded to take decision contrary to the said test by deciding the issue of admissibility of claim itself rather than leaving the same for the Arbitral Tribunal to decide.

Conclusion

The jurisprudence of Section 11 of the Arbitration Act has come a long way since the Supreme Court ruled in *Patel Engineering* that order of appointment of an arbitrator is judicial in nature. However, it appears that the contours of the power exercised by court are shifting again, in contradiction to express language of Section 11(6A), with courts now refusing appointment of the arbitrator after finding the claims to be *ex facie* time barred, which was envisaged under *Patel Engineering* as well.

While the Supreme Court has repeatedly asserted in the above referred judgments that the review of claims of a party shall be prima facie, considering that there are no strict standards as to what constitutes a prima facie review, the Supreme Court itself is aware of the dangers of adopting such standard. The Supreme Court in *SBI General Insurance Co. Ltd. v Krish Spinning*[40] clarified *Arif Azim,* stating that the Courts "*must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator*"[41].

[36] Ibid [73].
[37] Ibid [82].
[38] *Nuance Group (Australia) Pty Ltd. v Shape Australia Pty Ltd.* [2021] NSWSC 1498 (Austl.).
[39] Ibid [132].
[40] *SBI General Insurance Co. Ltd. v Krish Spinning* 2024 SCC OnLine SC 1754.
[41] Ibid [133].

The "duty" of the court to examine and reject *ex-facie* time barred claims itself is based on a shaky foundation, in contravention to the intention of the Indian Legislature as well as the international position. So, the contour of power of the court under Section 11 is only set for further examination before the courts in India as the risk of the position of law reverting to what was laid down in *Patel Engineering* appears to be alive, even if unlikely.

However, for now, the intent of the Indian Legislation, of restricting the power of the courts to only the examination of the existence of an arbitration agreement, appears to be taking a backseat. Now, a party seeking appointment of an arbitrator under Section 11 faces a risk of its dispute being decided at the stage of appointment of an arbitrator itself, without undergoing a trial before an Arbitral Tribunal and in complete contradiction to the intent of introduction of Section 11(6A), if a court, in its prima facie review, holds that the claims of the party seeking appointment are time barred.

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FROM DOUBT TO DECISION: RETHINKING BIAS IN CHALLENGE PROCEEDINGS

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Introduction

Natural justice forms the bedrock of all judicial and quasi-judicial processes, including arbitration.[1] *Nemo judex in causa sua* or Rule against bias is a cornerstone principle of natural justice[2] and this principle finds its voice in Section 12 of the Arbitration and Conciliation Act, 1996 ["**1996 Act**"].[3] Section 12 of the 1996 Act sets out the test of neutrality for an arbitrator and envisages two scenarios, viz. ineligibility and presence of justifiable doubts. In the first scenario, a person is 'ineligible' de jure to be appointed as an arbitrator if their relationship to the parties, counsel or the subject matter falls under any category specified in the Seventh Schedule of the 1996 Act, and a party can apply to the Court under Section 14 of the 1996 Act to decide on the termination of their appointment.[4] In the second scenario, when there are circumstances giving rise to justifiable doubts about the independence or impartiality of the person appointed as the arbitrator, a party can challenge the appointment of the arbitrator under Section 13 of the 1996 Act.[5] Unlike Section 14, a challenge under Section 13 is decided not by a Court but by the arbitrator herself, whose neutrality is called under scrutiny. Whether justifiable doubts arise is a matter of fact and the grounds stated in the Fifth Schedule of the 1996 Act serve as a guide to such determination.[6] Despite the grounds in the Fifth Schedule largely coinciding with the grounds in the Seventh Schedule, the 1996 Act mandates a different course for a challenge under the former shutting recourse to a Court. When a challenge under Section 13 is rejected, the arbitrator is ordained to continue with the arbitral proceeding and only when the final award has been passed, the

[1] *Voestalpine Schienen GmbH v Delhi Metro Rail Corp. Ltd.* [2017] 4 SCC 665.
[2] *P.D. Dinakaran (1) v Judges Inquiry Committee* [2011] 8 SCC 380.
[3] The Arbitration and Conciliation Act 1996, s 12.
[4] The Arbitration and Conciliation Act 1996, s 14.
[5] The Arbitration and Conciliation Act 1996, s 13.
[6] *HRD Corp. v GAIL (India) Ltd.* [2018] 12 SCC 471.

apprehensive party becomes eligible to make an application before a Court for setting aside the award in accordance with Section 34 of the 1996 Act.[7] This makes the arbitrator a judge of their own cause and forces an apprehensive and unwilling party to continue with the arbitration, rendering an application under Section 34 seemingly inevitable. In 2023, the Ministry of Law and Justice constituted an Expert Committee ["**EC**"] to suggest reforms to the 1996 Act.[8] The key recommendations of the EC included, inter alia, providing for an immediate appeal to a Court against an order that rejects the challenge under Section 13.[9] Against this backdrop, we examine the contemporary regime, to highlight the deficiencies and examine the EC's recommendation thereto.

Threading the Legislative Intent

To understand the intent behind the extant legislative scheme, it would be germane to refer to the genesis of the 1996 Act. Prior to the 1996 Act, the Arbitration Act, 1940 ["**1940 Act**"] was the principal legislation governing domestic arbitration. However, the 1940 Act drew heavy criticism because it espoused an overly intrusive role of the Courts, thereby leading to protracted arbitral proceedings. The Parliament, to eliminate this mischief and, in a bid to inspire commercial confidence, enacted the 1996 Act in line with the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"].[10]

Marking a radical departure, the 1996 Act ushered in a novel jurisprudence domestically. References to the 1940 Act while interpreting and construing the 1996 Act were dropped in favour of the Model Law to avoid 'misconstruction'.[11] The Statement of Objects and Reasons of the Arbitration and Conciliation Bill, 1995 expressly demanded 'minimisation of the supervisory role of Courts'. This demand was recognised in Section 5 of the 1996 Act,[12] which while borrowing the principle of limited judicial intervention from Article 5 of the Model Law,[13] went a step further and framed this principle in the language of a non-obstante clause.[14] Similarly, other sections of

[7] The Arbitration and Conciliation Act 1996, s 34.
[8]Ministry of Law and Justice, 'Notice Inviting Comments from Stakeholders' <https://legalaffairs.gov.in/sites/default/files/Notice_inviting_comments_from_stakeholders.pdf> accessed 24 October 2024.
[9] Rajesh Kumar, 'Expert Committee On Arbitration Law Proposes Complete Overhaul Of Arbitration And Conciliation Act, 1996' (*Live Law*, 5 March 2024) <https://www.livelaw.in/arbitration-cases/expert-committee-on-arbitration-law-proposes-complete-overhaul-of-arbitration-and-conciliation-act-1996-251306> accessed 24 October 2024.
[10] *Konkan Railway Corp. Ltd. v Mehul Construction Co.*, [2000] 7 SCC 201.
[11] *Sundaram Finance Ltd. v NEPC India Ltd.*, [1999] 2 SCC 479.
[12] *Union of India v Popular Construction Co.*, [2001] 8 SCC 470.
[13] United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration 1985, art 5.
[14] The Arbitration and Conciliation Act 1996, s 5.

the 1996 Act, including Section 13, were not imported *in toto* but underwent a process of legislative redrafting to serve this objective.[15] The considerations that drove the legislature to abandon the 1940 Act, and refer to the Model Law also compelled it to recast the latter and craft the 1996 Act. In this process, minimal judicial intervention came to serve as a foundational precept.

In this context, Section 13 of the Act makes a departure from the Model Law because Article 13(3) of the Model Law provides for an immediate right to appeal to the Court or to the 'Appropriate Authority' under the law if a plea of bias is rejected by the arbitral tribunal. The difference between Section 13 of the 1996 Act and Article 13 of the Model Law should be understood not only as procedural but also as jurisprudential. Omission should be given due weight as it becomes imperative in gathering the intent behind a statute.[16] Hence, the absence of an appeal in Section 13 is a mere prong in the advanced policy of minimal judicial intervention.

The constitutionality of Section 13 was upheld by both the Karnataka High Court[17] and the Delhi High Court.[18] In their judgements, the Karnataka High Court dealt with two contentions, viz. the arbitrator sitting over their own case and the absence of appeal from a decision thereof while the Delhi High Court largely limited itself to the second contention. On the first contention, the Karnataka High Court supplies a twofold justification. First, it draws a parallel with the English Arbitration Act, 1996 ["**English Act**"] wherein the Courts decide a plea of bias. It reasons that an arbitrator under the English Act is impleaded as a party before the Court and is given an effective right to dislodge the allegations of bias and the 1996 Act is different only inasmuch as it directly permits the arbitrator to dislodge such allegations themselves. Second, it reasons that being a judge over one's own case does not *ipso facto* cause prejudice. It quotes contempt proceedings and the principle of *kompetenz-kompetenz* under the 1996 Act as illustrations in support. On the second contention, both the Courts expound similar opinions, holding that an appeal under section 13 is not omitted but merely deferred in the form of Section 34 and such deferment is necessary to ensure speedy disposal. This view is tied to Karnataka High Court's first justification because if an arbitrator decides the allegations in a prejudiced manner, the aggrieved party can always approach the Court via a deferred appeal under section 34.

Labyrinth of the Challenge Regime

[15] Gourab Banerji, 'Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts' [2009] National Law School of India Review 39.
[16] *Progressive Career Academy (P) Ltd. v FIIT Jee Ltd.*, [2011] SCC OnLine Del 2271.
[17] *R.K. Agrawal v B.P.K. Johri*, [1999] SCC OnLine Kar 469.
[18] *Bharat Heavy Electricals Ltd. v C.N. Garg*, [2000] SCC OnLine Del 773.

At first blush, an argument premised on speedy resolution by avoiding minimal intervention may appear apposite but at its core lies a faulty framing. The legislature has juxtaposed minimal intervention and an appeal against the plea of bias as zero-sum choices, resulting in an artificial dichotomy, unfounded in the Model Law. The current challenge mechanism might be viable when the grounds for challenge surface later stage or at post-award stage but the proceedings for setting aside an arbitral award under Section 34 cannot be considered as an appropriate substitution for an appeal process under Section 13. First, there is no express provision in Section 34 mentioning 'bias' as a ground or indicating as such. The Courts, through judicial pronouncement, have read partiality as a ground under Section 34(2)(b)(ii).[19] Pertinently, this ground is available for vitiating an arbitral award in entirety and naturally serves a different purpose than an appeal against an order of rejection of a plea of bias. Section 34 is a narrowly drawn provision to ensure that the Courts do not sit on an appeal over the merits of the award.[20] Second, the proceedings under Section 34 are of summary in nature,[21] distinguishable from an appeal.[22] The threshold for adducing additional documents is pivoted on absolute necessity[23] and the Court's power to re-appreciate the evidence and facts is circumscribed,[24] thereby posing evidentiary difficulties. Third, a recourse to Section 34 entails completion of the arbitral proceedings, which forces an unwilling party to spend resources in continuing the arbitral procedure without completely satisfying themselves of fair play in the decision of the Arbitral Tribunal and therefore undermines party autonomy. This is in teeth of the principle that justice should not only be done, but also manifestly seen to be done. It infringes upon the procedural sanctity as the rudiments of arbitration involves it offering resolution, not only expeditiously but also through a neutral and impartial person.[25]

Furthermore, a plea of bias cannot be treated on the same footing as a contempt proceeding or a challenge of jurisdiction. A contempt proceeding generally deals with overt acts which are tangible and easier to discern,[26] unlike bias, which is more subtle and suffused. Moreover, contempt powers are used sparingly with an appeal being vested with the contemnor under the 'Contempt of Courts Act, 1971', thereby underscoring procedural safeguards.[27] Similarly, a proceeding by the arbitral tribunal determining its own jurisdiction is patently different from a plea of bias. In making a

[19] *Avitel Post Studioz Ltd. v HSBC PI Holdings (Mauritius) Ltd.* [2024] 7 SCC 197; *State of M.P. v Vayam Technologies Ltd.* [2014] SCC OnLine MP 5358.
[20] *PSA SICAL Terminals (P) Ltd. v Board of Trustees of V.O. Chidambranar Port Trust Tuticorin* [2021] SCC OnLine SC 508.
[21] *Canara Nidhi Ltd. v M. Shashikala* [2019] 9 SCC 462.
[22] *NHAI v M. Hakeem* [2021] 9 SCC 1.
[23] *Alpine Housing Development Corp. (P) Ltd. v Ashok S. Dhariwal* [2023] SCC OnLine SC 55.
[24] *Associate Builders v DDA* [2015] 3 SCC 49.
[25] *Era International v Aditya Birla Global Trading India (P) Ltd.* [2024] SCC OnLine Bom 835.
[26] *Balwantbhai Somabhai Bhandari v Hiralal Somabhai* [2023] SCC OnLine SC 1139.
[27] The Contempt of Courts Act 1971, s 19.

jurisdictional enquiry, the tribunal is uninfluenced from bias. The arbitrator acts fairly, whereas in a challenge under Section 13, a biased arbitrator is likely to depart from the standards of even-handed justice. Hence, Section 13, which is designed to weed out bias, hands over the reins to the perpetrator of bias to do the needful. It is not gainsaid that not all arbitrators are biased, but biased arbitrators may manage to shield themselves because the 1996 Act conflates minimal role of the Courts to no role when it comes to disputes in relation to the Vth Schedule.

The V Schedule and VII Schedule are based on the 'IBA Guidelines on Conflict of Interest' ["**IBA Guidelines**"] Orange List and Red List respectively. While the critique on IBA Guidelines in India remains sparse, there is copious criticism internationally on account of, inter alia, the arbitrary need of disclosures, excessive similitude of situations across the lists, opaque demarcation of Lists (one may say that a situation can be in either of the lists) and inadequate addressing of situations where the arbitrator's office may have dealt with the parties or their affiliates. The courts in India have conceded to the extortionate similarity of the two Schedules on the premise that certain instances exist wherein a disclosure becomes imperative but they need not be regarded as so severe as to go to the root of appointment.[28] This draws a stark contrast from the stance that independence and impartiality are procedural hallmarks of arbitration.[29] Thus, the parties are being restricted from an immediate relief based on an artificial distinction between the two Schedules.

Juxtaposing Challenge in India and Beyond

Internationally, deliberations regarding the necessity for uniformity in international commercial arbitration have predated the Model Law. Early Reports of the General Assembly cited, inter alia, ECAFE, UNIDROIT and IBRD Convention prevalent then to trigger discourses upon a unanimous Model Law.[30] They recognised that an institutional method of challenging an arbitrator, i.e., the authority responsible for appointing arbitrators, would facilitate the challenge by designating another member or a Special Committee to decide on the appeal to rejection of challenge by the arbitrator.[31] Further deliberations regarding the challenge procedure continued to sporadically spring up even until the final stages of drafting Model Law, for example suggestions that the challenged arbitrator in a tribunal should not sit in the challenge proceedings or that the

[28] *HRD Corp. v GAIL (India) Ltd.* [2018] 12 SCC 471.
[29] *Voestalpine Schienen GmbH v Delhi Metro Rail Corp. Ltd.* [2017] 4 SCC 665.
[30] UNGA 'Report of the Secretary-General (1969) UN Doc A/CN. 9/21 <https://documents.un.org/doc/undoc/gen/nl6/900/31/pdf/nl690031.pdf> accessed 24 October 2024, pg 30 onwards.
[31] UNGA 'Recommendations Concerning Administrative Services Provided in Arbitrations Under the UNCITRAL Arbitration Rules' UN GAOR 15th Session A/CN.9/222 <https://documents.un.org/doc/undoc/gen/v82/261/79/pdf/v8226179.pdf pg 7//> accessed 24 October 2024.

challenged arbitrator should not be allowed to withdraw from his office voluntarily as the progress made within proceedings may turn futile at the expense of time and money.[32]

Another pertinent observation made at the time of enacting the Model Law was that in a scenario where the challenge is not visibly made on a frivolous ground, the parties may explore to negate the final adjudication by a court.[33] This alternative, along with the mandate of Section 5,[34] perhaps influenced the challenge mechanism in the 1996 Act. The 176th Law Commission Report initially rejected the idea of an immediate appeal on the possibility of an overwhelming scope of abuse by employing dilatory tactics.[35] But the EC has disapproved the Law Commission's stance by recommending an immediate appeal under Section 37 of the 1996 Act. Therefore, the challenge mechanism under Section 13 in the Indian landscape has come full circle, from restraining timely judicial supervision over challenge to inevitably adopting the idea encapsulated in Model Law.

Conclusion: Catalysing Change

The EC's recommendation will bring the 1996 Act in conformity with the Model Law approach. However, the EC is silent about whether to replace the word "*shall*" with "*may*" in Section 13(4) of the 1996 Act as the tribunal may halt proceedings to save costs pending challenge. Several other suggestions by the EC, including standardisation of the time limit for filing an appeal, expanding the definition of "*affiliate*" as outlined in the Fifth Schedule and a comprehensive revision of the Sixth Schedule to detail the grounds that might make a person incapable to be appointed as an arbitrator are noteworthy. However, it is essential to look beyond the IBA Guidelines to enforce more stringent norms of disclosure. An overdependence on these guidelines, which have faced significant international criticism may hinder India's progress towards becoming a leading hub for arbitration.

An appeal to the decision on challenge will only augment the credibility of arbitrators' transparency and ensure that the courts do not merely supervise over a procedure that stands vitiated at the threshold. Section 18 of the Arbitration Act mandates that the parties to an arbitration agreement are treated equally. As recently clarified by the Supreme Court, Section 18 is applicable at all stages

[32] UNGA 'Summary Records for 313th Meeting on the UNCITRAL Model Law on International Commercial Arbitration' UN GAOR A/CN. 9/263 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/313meeting-e.pdf //> accessed 24 October 2024, pg 4 Onwards.
[33] UNCITRAL, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration' (18th Session, UN GAOR, A/CN.9/264) 32.
[34] The Arbitration and Conciliation Act 1996, s 5.
[35] Law Commission of India, Report No 176: The Arbitration and conciliation (Amendment) Bill, 2002 (Law Comm No 16, 2001).

of the arbitration proceedings,[36] including when a plea of bias is taken. Despite Section 18's non-derogable mandate,[37] in a scenario where an arbitrator decides a plea of bias in a partisan manner, the provision in itself is insufficient to deal with such a situation because it lacks teeth. An appeal, in such circumstances, comes to the rescue. Consistent with how the Indian jurisprudence vis-a-vis bias has developed in arbitration law, an appellant need not to establish that the arbitrator lacks independence or impartiality beyond a reasonable doubt but merely needs to demonstrate that a reasonable person, who has the knowledge of the relevant facts and circumstances, would conclude that there are possible doubts as to an arbitrator's independence or impartiality, or in other words, it is likely that the arbitrator may be influenced by factors other than the merits of the case in reaching their decision.[38] This effectively means that while hearing an appeal, a Court need not to conclusively satisfy itself of bias but only whether there is a real possibility of bias, thereby harmonising the objective of expeditious resolution with an appeal under the Arbitration Act.

Moreover, referring the challenge decision to an appeal renders the scope of judicial scrutiny narrower because the Courts have the benefit of a reasoned order from the tribunal before them and this reasoned order may additionally serve as a material to draw bias from. Thus, instances of countries deviating from the procedure as under Model Law are rare, for example, the English Law mandates that a challenge against the tribunal is made to a court at first instance after the parties have exhausted any remedy agreed upon for such challenges.[39] While this approach is somewhat aligned with institutional arbitration practices and conserves time, it enhances the scope of judicial inquiry. Additionally, there is an enhanced risk of such cases languishing in the courts' docket thereby impeding the arbitration procedure.

The reliance placed on courts is a testament to the entrenched confidence individuals have in the Indian judicial framework. To foster a similar magnitude of trust in arbitration, significant reforms are the need of the hour. The recent report of the EC has highlighted the urgent need to reform the existing arbitration framework by identifying procedural fallacies and placing central the parties' interests. Courts must assume a proactive role at crucial stages of arbitration such that the process is not vitiated and eventually piling up the court's docket. Limited yet effective Judicial intervention is viewed as acceptable if done for effectuating not obstructing Arbitration. Lastly,

[36] *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Co.* [2024] SCC OnLine SC 3219.
[37] *Union of India v Vedanta Ltd.* [2020] 10 SCC 1.
[38] *Central Organisation for Railway Electrification v ECI SPIC SMO MCML (JV) A Joint Venture Co.* [2024] SCC OnLine SC 3219.
[39] The Arbitration and Conciliation Act 1996, s 24.

enhancing arbitration in India necessitates comprehensive reforms and a collective commitment to upholding rudiments of fairness and equity.

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PRECISION IN CONTRACTUAL PENUMBRA: INCORPORATION BY REFERENCE

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Introduction

The recent ruling in *NBCC (India) Limited v Zillion Infraprojects Pvt. Ltd.*[1] ["**NBCC**"] by the Apex Court of India on March 19, 2024, marks a crucial shift in the interpretation of incorporation of arbitration clauses by reference establishing a new standard for interpreting Sec.7(5) of the Arbitration and Conciliation Act, 1996[2] ["**Arbitration Act**"]. Therefore, this research paper attempts to decode the Court's reasoning, investigate its multi-faceted effects, and critically analyse its impact on the evolving landscape of alternative dispute resolution, nationally and internationally.

The apple of the discord emanates from a construction contract between NBCC (India) Limited, a government undertaking engaged in infrastructure projects, and Zillion Infraprojects Pvt. Ltd., a private construction company. NBCC had issued a tender (NIT No. 01-WEIR/06) for the construction of a dam with allied structures across the Damodar River at DVC, CTPS, Chandrapura, Bokaro, Jharkhand and following Zillion's successful bid, NBCC issued a Letter of Intent ["**LOI**"] on December 4, 2006, awarding a contract of Rs.19,08,46,612/-. Crucially, the LOI referred to terms and conditions from an earlier tender issued by the Damodar Valley Corporation ["**DVC**"] to NBCC.

As the project progressed, disagreements emerged, and on March 6, 2020, Zillion invoked the arbitration clause contained in Cl. 3.34 of Sec. III Vol. III of the Tender Documents (General

[1] *NBCC (India) Ltd v Zillion Infraprojects Pvt. Ltd.* AIR OnLine [2024] SC 172.
[2] Arbitration and Conciliation Act 1996, s 7(5).

Conditions of Contract) ["**GCC**"] issued by DVC to NBCC. Subsequently, Zillion sought NBCC's consent for the former High Court judge's appointment as the sole arbitrator, but NBCC remained silent, prompting Zillion to apply under Sec.11(6) of the Arbitration Act[3] before the Delhi High Court. The Court, through an interim order dated March 12, 2021, and a final judgment dated April 9, 2021, allowed Zillion's application. Aggrieved, NBCC appealed to the Supreme Court and on March 19, 2024, the Division Bench of Justice B.R. Gavai and Justice Sandeep Mehta allowed the appeal, finding the Delhi High Court's decision to be erroneous.

Mapping the court's analytical contours

Primarily, the contended question was whether a general reference to terms and conditions from another contract is sufficient to incorporate an arbitration clause, necessitating the Court to interpret Sec. 7(5) of the Arbitration Act, which governs the incorporation of arbitration agreements by reference and reads, "*The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*"[4]

In their analysis, the Apex Court relied on its earlier decision in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*[5] ["**M.R. Engineers**"] and reaffirmed the following principles:

- *Specificity and Intention Requirement*: The Court upheld that for incorporation of an arbitration clause from a separate document requires a specific reference to the arbitration clause itself and that such reference should clearly indicate an intention to incorporate the arbitration clause
- *Execution v. Dispute Resolution*: When a contract refers to another document for execution or performance terms, the arbitration clause from that document is not automatically incorporated without a particular reference, which is crucial for separating operational aspects of a contract from its dispute resolution mechanism.
- *Standard Forms and Trade Practices*: The Court acknowledged that where a contract provides for the application of standard form terms and conditions of an independent trade or professional institution, such standard forms, including their arbitration provisions, may be deemed incorporated by reference.

[3] Arbitration and Conciliation Act 1996, s 11(6).
[4] Arbitration and Conciliation Act 1996, s 7(5).
[5] *M.R. Engineers and Contractors Private Limited v Som Datt Builders Ltd.* [2009] 7 SCC 696.

- *Familiarity and Understanding*: Lastly, The Court noted that explicit statements in the contract indicating that parties are familiar with or understand the referenced terms could strengthen the case for incorporation of an arbitration clause. Further, where a contract stipulates that one party's contract conditions, like general conditions, shall form part of their contract, the arbitration clause within such general conditions will apply to the contract between parties.

By meticulously examining the language of the LOI, the Court focused on several key clauses:

- Cl. 1.0, which listed the documents that would form part of the agreement, including the Notice Inviting Tender, General Conditions of Contract, Special Conditions of Contract, and Bill of Quantity.
- Cl. 2.0, which stated that the DVC-NBCC tender terms would apply "mutatis mutandis except where these have been expressly modified by NBCC."
- Cl. 7.0, which specified that disputes "shall only be through civil courts having jurisdiction of Delhi alone."
- Cl. 10.0, which affirmed that the LOI itself would form part of the agreement.

The Court interpreted these clauses, particularly Cl. 7.0, as demonstrating a clear intention to modify the dispute resolution mechanism, effectively overriding any arbitration clause that might have been contained in the referenced DVC-NBCC tender documents. Notably, the Court distinguished its ruling in *Inox Wind Limited v Thermocables Limited* ["**Inox Wind**"],[6] remarking that the present case involved a two-contract scenario, which involves at least one different party across the two contracts or two other parties, unlike the single-contract, which involves the same parties across both contracts. The court in Inox Wind also held that a standard form of contract shall be sufficient to incorporate the arbitration clause in a single-contract case but not for the two contract cases where a specific reference to the primary contract's arbitral clause is needed. This was referenced from *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* ["**Habas**"]*,* [7] which distinguished between two-contract cases and single-contract cases, in which a strict test of incorporation of referencing arbitration clause was applied in the former, and general words of incorporation were considered sufficient in the latter. This distinction is key to understanding the Court's approach to incorporation by reference in different commercial contracts.

This judgment was further followed by the Delhi High Court Judgment of *Deepa Chawla v. Raheja Developers Ltd*, dealing with whether an initial agreement's arbitration clause could be applied to a

[6] *Inox Wind Ltd. v Thermocables Ltd.* [2018] 2 SCC 519.
[7] *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm).

later agreement between the same parties, where the latter explicitly excluded arbitration for disputes. It was held that the second agreement would have an overriding effect due to the specific exclusion of the arbitration clause and stated that arbitration clauses of the prior contract have to be specifically referenced to be enforceable in subsequent agreements.

Critically analysing the court's approach

The Hon'ble Apex Court's approach emphasizes on parties' express intentions and explicit incorporation of arbitration clauses, ensuring certainty; however, it also raises critical considerations:

- *Party Autonomy vs. Formalism*: The Court's interpretation upholds the principle of party autonomy as a fundamental tenet of arbitration law by ensuring that parties are fully aware of and consent to arbitration as their chosen dispute resolution methods by mandating specific reference to arbitration clause thus preventing being bound by unintended or not agreed arbitration claims. However, it also introduces a level of formalism that may not always align with commercial realities or the parties' true intentions. For example, two companies, A and B, add an addendum to amend the arbitration clause in their contract to solely rely on litigation but do not explicitly state the arbitration clause to be null and void, the formalist approach, involving strict interpretation may still enforce arbitration due to lack of explicit rescission and reference to original clause despite the intention to exclude arbitration. Therefore, Formalism introduces a strict adherence to the word's literal meaning in a contract, which ensures certainty and predictability but may lead to non-alignment with the parties' true intention. In the present case, the parties modified the dispute resolution clause to exclude arbitration by the inclusion of the word 'only,' which, according to formalism, will follow a strict interpretation of strictly excluding arbitration, contrary to the respondent's intention to resolve the dispute through arbitration as evidenced by its invocation. This also conflicts with commercial realities, which prioritize efficient, faster dispute resolution and focus on the broader spirit of agreements over meticulous drafting, with intentions inferred from context and terms.
- *Practical Challenges in Complex Transactions*: Strict requirements for specific incorporation can create practical difficulties in complex commercial transactions with multiple documents/contracts, which may lead parties to unintentionally fail to incorporate arbitration clauses despite genuine intent to incorporate, undermining arbitration's efficiency and leading to drawn-out jurisdictional disputes.

- *Incorporation vs. Reference Dichotomy*: The Court emphasized a distinction between "incorporation" and "reference," holding the case to be that of the latter, which though provides some clarity but also introduces complexity in certain scenarios mainly where the distinction between the two is less clear-cut. Back-to-back contracts allow the main contract's terms to be passed down to subcontractors or other parties or replicated between different parties. Herein, the parties clearly intended to include Cl.7.0 of L.O.I. in the agreement as per Cl.10.0. The Court held that referencing the first contract's terms in the second contract, does not ipso facto apply the arbitration clause to subsequent contract, without specific reference, making it a case of reference, not incorporation. Incorporation by reference applies when arbitration clause is contained in a separate document, not being part of original signed contract like GCC. Here, the contract clauses, vide the LOI., referenced Tender Documents, including GCC, as applicable and binding, implying a back-to-back contract as the subsequent contract is largely based on the DVC tender whose terms were to apply mutatis-mutandis. However, the incorporation by reference requires an express reference, which was not followed, and LOI modified the arbitration clause to further exclude it, making the case a back-to-back contract that did not fulfil incorporation by reference criteria.

The *Habas* case, which was held to be a single-contract case involving multiple previous contracts between parties, therefore, requiring only general reference, provided 4 broad categories/situations of incorporating arbitration, where A and B make contracts-

- In which standard terms are incorporated, including standard terms of one party, organizations', or a particular industry's terms, or contained in another document.
- Incorporating terms previously agreed between them in another contract.
- Incorporating terms agreed between A (or B) and C, like the bill of lading, reinsurance contracts/excess insurance, and building/engineering sub-contracts/sub-sub contracts incorporating main contract/subcontract terms, respectively.
- Incorporating terms agreed between C and D

This Court held that a more restrictive approach exists in the last two categories, which are two-contract cases, than the former two, which are single-contract cases, as even with multiple contracts in consideration, the distinction exists in the incorporation of terms made between a) the same and b) different parties. Thus, single-contract and two-contract agreements consist of multiple, closely related agreements, but the latter involves different parties. This is because references from different contracts involving different parties do not inherently extend the

intention to incorporate an arbitration clause alongside substantive provisions. This distinguishes back-to-back contracts, where, without specific reference, an arbitration clause is not incorporated by reference in separate albeit related contracts involving reference/replication of terms.

International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd. ["**International Research Corp**"],[8] involved a Cooperation Agreement ["**CA**"] between Lufthansa and Datamat Public Company and two Supplemental Agreements ["**SA**"] between Datamat and the appellant. This Court held that the strict reference rule in two-contract cases has been stretched beyond its original application as under bills of lading and should not be taken as a general application rule. Instead, it emphasized focusing on the parties' intent to incorporate it within the context and objective circumstances. The court ruled that the parties did not intend for the arbitration clause in CA to be incorporated into SA.

In *Barrier Ltd. v Redhall Marine Ltd* ["**Barrier Ltd**"],[9] similar to the back-to-back cases, which involved a sub-contract assigning part of the main contract's functions to Barrier Ltd. without replicating it entirely and incorporating standard terms. The full incorporation of the arbitration clause in the main contract was rejected due to the general reference lacking sufficient clarity and specificity, though the standard terms were incorporated. The judgment raised important questions about interpreting "mutatis mutandis" clauses, emphasizing the phrase "except where these have been expressly modified by NBCC" in Cl. 2.0 of the LOI. This interpretation suggests that courts may view such clauses as potential carve-outs that can override general incorporations by reference. The Court's approach offers certainty in determining an arbitration agreement's existence but may lack flexibility in some commercial contexts. Its rigid requirement for specific incorporation might not align with the informal or expedited nature of certain business transactions, potentially leading to unintended consequences.

The global position: A comparative analysis

The Indian approach to incorporation by reference, as reinforced by this judgment, appears to be more stringent than that of some other jurisdictions. For instance, in *International Research Corp*[10] the Singapore Court of Appeal held that general words of incorporation could be sufficient to incorporate an arbitration clause, subject to the parties' intention and the circumstances of the case.

[8] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2014] 1 SLR 130.
[9] *Barrier Ltd v Redhall Marine Ltd.* [2016] EWHC 381 (QB).
[10] *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd.* [2014] 1 SLR 130.

English courts often adopt a liberal approach, permitting arbitration clauses to be incorporated through general references so long the wording is sufficiently comprehensive and there is no indication that the parties intended otherwise.[11] Though there has not been a clear stance on the matter but *Barrier Ltd.*[12] depicts a diversion in the lenient approach by the English Courts to hold that the arbitration clause in the sub-contract, involving a general reference, was not considered clear or explicit enough to bind parties to the arbitration or incorporate the main contract's clause.

Meanwhile, Hong Kong law takes a middle-ground approach, like in *G & C Construction Ltd. v. Hsin Chong Construction (Asia) Ltd.*,[13] the Court held that while specific words of incorporation are not always necessary, the incorporating words must be construed to determine whether they are wide enough to include the arbitration clause.

The United States of America ["**USA**"] also prefers to take a less stringent approach, with more emphasis on contractual clarity, intent, and enforcement, as showcased in *Standard Bent Glass Corp. v Glassrobots Oy.*[14] The case emphasized arbitration clauses to demonstrate an express, unequivocal agreement, with clear reference in the main contract, the identity of the referenced document being ascertainable, and the incorporation does not result in surprise/hardship. Here, though the arbitration clause was unsigned, it was contained in an exchange of letters that satisfied the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"], Art.2 requirements for constituting the term 'agreement in writing'[15] and the Glassrobots standard sales agreement made explicit references to another document containing an arbitration clause un objected by Standard Bent Glass, as substantiated by the ongoing contract performance.

Art.2 of the New York Convention stipulates that states must recognize agreements to arbitrate disputes; they should be in writing, including clauses in contracts, signed agreements, or exchanged in letters or telegrams, and that the court must refer parties to arbitration unless an agreement is invalid or inoperative or void.[16] The arbitration by reference is not directly referenced under Art.2 but leaves the matter to different national jurisdictions.[17] This was also cited by *Jiangxi Provincial Metal & Minerals Import and Export Corporation v Sulanser Corporation*,[18] which held that the definition

[11] *Maritime Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 2530 (Comm).
[12] *Barrier Ltd v Redhall Marine Ltd.* [2016] EWHC 381 (QB).
[13] *G & C Construction Ltd. v Hsin Chong Construction (Asia) Ltd* [2018] HKCFI 1595.
[14] *Standard Bent Glass Corp v Glassrobots Oy* 333 F.3d 440 (3d Cir. 2003).
[15] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 2.
[16] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art 2.
[17] Bhavna Mishra 'Arbitration and Standard Form of Contracts' in Sairam Bhat (ed), Contracts, Agreements and Public Policy (NLSIU, 2015).
[18] *Jiangxi Provincial Metal & Minerals Import and Export Corporation v Sulanser Corporation* [1995] 2 HKC 373.

under Art.2 was not exhaustive, allowing for both express and general or insufficient references in the main contract, as the Article's wording omits the term 'only.' In this case, despite the contract being unsigned, the court found that the written contract and the defendant's acknowledgment in correspondence, fulfilled Art.7(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"],[19] with the defendant's subsequent participation in arbitration reinforcing this conclusion.

Similarly, In Italy, while *Drefus Commodities Italia v Cereal Mangimi*[20] stipulated an express reference, but the recent *Del Medico v Iberprotein*[21]case held, an arbitration clause in general terms and conditions of an international sale agreement, as binding, as it did not conflict with the New York Convention permitting for incorporation by general reference, especially as the defendant, as commercial operator was familiar with main contract's standard terms.

Furthermore, the UNCITRAL Model Law, as amended in 2006, provides in Art. 7(6) that "*The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*"[22] Thus, though the Indian approach prioritizes certainty and express consent, but may be more restrictive than those of other major arbitration jurisdictions.

From a practitioner's perspective: Understanding NBCC's practical impact

The decision has key implications for arbitration practice in India, particularly in drafting, contract review, jurisdiction, and commercial negotiations. Legal practitioners and drafters must be cautious when incorporating arbitration clauses by reference, ensuring explicit and unambiguous language that refers directly to the arbitration clause, not just general terms, which may require revising standard contract templates.

Furthermore, a thorough review of all contractual documents is essential, especially in multi-contract scenarios or where standard terms are referenced, to ensure proper incorporation of arbitration clauses as intended. This decision may also increase jurisdictional challenges in arbitration, particularly with general references for incorporation.

Additionally, Parties should ensure that dispute resolution clauses clearly express their intentions regarding arbitration in the primary contract itself. The judgment's suggestion to narrowly interpret mutatis mutandis clauses, especially when terms are expressly modified, requires parties to be

[19] UNCITRAL Model Law on International Commercial Arbitration, art 7(2).
[20] *Dreyfus Commodities Italia v Cereal Mangimi,* [2009] Court of Cassation, Italy 2009, 649.
[21] *Del Medico v Iberprotein SL* (2011, No 13231).
[22] UNCITRAL Model Law on International Commercial Arbitration, art 7(6).

cautious about relying on such clauses for incorporation and may prompt a review of existing contracts using such language.

Lastly, Legal professionals, including in-house counsel, may require additional training to understand the decision's impact. There may also be discussions on potential amendments to the Arbitration and Conciliation Act to offer more flexibility in arbitration clauses due to the Court's stringent stance.

Conclusion

The judgment reaffirms and refines India's approach to incorporating arbitration clauses by reference by building on M.R. Engineers principles. It emphasizes clarity, explicit consent, and party autonomy in arbitration agreements, promoting certainty and setting a high standard for including dispute resolution clauses in commercial agreements. The case underscores the need for meticulous drafting and comprehensive contract review.

As India positions itself as an arbitration-friendly jurisdiction, the judgment raises questions about balancing strict standards with pro-arbitration policies. It suggests a more flexible approach to incorporation by reference to align with the evolving arbitration framework and better balance commercial parties' needs while maintaining arbitration process' integrity maybe considered.

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PUBLIC PROCUREMENT CONTRACT GUIDELINES: A COLLABORATIVE MED-ARB SOLUTION TO CONFLICTS

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Introduction

Over the years, arbitration has emerged as a preferred method for resolving disputes in India, due to its efficiency and commercial practicality.[1] As noted by former Chief Justice of India in his speech at the UK Supreme Court, "arbitration is no longer an alternative but the preferred method for commercial justice."[2] Arbitration mechanism has also been promoted by the Indian government and various stakeholders for addressing disputes in government contracts, praised for its speed, informality, and finality compared to litigation in the past.[3] Arbitration in India has been the traditionally promoted form of alternate dispute resolution. The importance of arbitration can be noted in the comments of former Minister of Law and Justice[4], there he reiterated the importance of arbitration in facilitating international trade and investment for providing a stable and predictable dispute resolution mechanism and therefore fostering confidence among foreign investors.

However, the recent 2024 Guidelines for Arbitration and Mediation in Domestic Public Procurement Contracts issued by the Ministry of Finance ["**Guidelines**"] signals a shift in approach, advocating mediation instead of arbitration as the primary mode of dispute resolution

[1] Deepika Kinhal & Tarika Jain, 'The Future of Dispute Resolution in India' (*Vidhi Centre for Legal Policy*, July 2020) <https://vidhilegalpolicy.in/wp-content/uploads/2020/07/200727_The-future-of-dispute-resolution-in-India_Final-Version.pdf> accessed on 17 November 2024.
[2] Bhumika Indulia, 'Future of arbitration is already here: CJI Dr. DY Chandrachud at UK Supreme Court' (*SCC Times Online*, 7 June 2024) <https://www.scconline.com/blog/post/2024/06/07/future-arbitration-already-here-cji-dr-dy-chandrachud-uk-supreme-court/> accessed on 17 November 2024.
[3] Department of Legal Affairs, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (Ministry of Law and Justice, 2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed on 17 November 2024.
[4] Arjun Ram Meghwal, 'Keynote address' (Conference on Arbitrating Indo-UK Commercial Disputes on 5 July, 2022 at London) <https://legalaffairs.gov.in/sites/default/files/speech.pdf> accessed on 18 November 2024.

in public procurement contracts.[5] This article examines the implications of these new guidelines and evaluates the inherent challenges in the proposed framework. It also analyses successful mediation models around the globe to suggest a uniform framework which can be adopted for Domestic Public Procurement Contracts in India.

Understanding the Guidelines

The guidelines propose a more restrained use of arbitration clauses in public procurement contracts. Specifically, arbitration is now recommended only for disputes below INR 10 Crores, with institutional arbitration preferred when feasible.[6] For high-value disputes, there is a proposal of establishment of a High-Level Committee which may act as mediator between the parties besides allowing them to directly negotiate the matter, if they prefer to do so. For these high-value contracts, there are no arbitration clause included which means that arbitration mechanism cannot be resorted to by the parties.

The guidelines, noting the shortcomings of arbitration in government-related disputes in the past, recommend that where the alternative methods are unsuccessful, litigation should be preferred.[7] The guidelines emphasize the advantages of mediation under the Mediation Act, 2023.[8] This pivot marks a significant departure from the earlier focus on positioning India as a global hub for arbitration. Public procurement, essential to government operations, involves procuring goods and services from the private sector to achieve public objectives. Given its reliance on the taxpayer's money, the process demands transparency, efficiency, and fairness.

This significant policy shift raises several critical questions regarding its practicality and implications. First, how viable is the preference for mediation over arbitration in high-value government contracts? Second, is the INR 10 Crore threshold an effective parameter for determining dispute resolution mechanisms? Finally, would a uniform dispute resolution framework across all public procurement contracts, regardless of value, better serve the government's pro-arbitration stance, especially considering India's broader policy objectives.

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[5] Rajesh Kumar, 'Ministry of Finance Pushes For Mediation Over Arbitration In Domestic Public Procurement Contracts' (*LiveLaw*, 7 June 2024) <https://www.livelaw.in/news-updates/ministry-of-finance-pushes-for-mediation-over-arbitration-in-domestic-public-procurement-contracts-229456> accessed on 17 November 2024.

[6] Ministry of Finance, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement* (Office Memorandum No. F.1/2/2024-PPD, 3 June 2024) <https://doe.gov.in/files/circulars_document/Guidelines_for_Arbitration_and_Mediation_in_Contracts_of_Domestic_Public_Procurement.pdf> accessed on 17 November 2024.

[7] 'The Final Decree' (Supreme Court Observer, 2024) <https://www.scobserver.in/journal/the-final-decree/> accessed on 17 November 2024.

[8] The Mediation Act 2023 (India).

Practical Implications of the Guidelines

The guidelines fail to consider a factor that without arbitration agreements, failed mediation would cause the disputes to go to overburdened courts with already huge pendency of cases.[9] Given that courts have been struggling to deal with the challenges to arbitral awards within the statutory period, full trials in complex cases, can still take over 10+ years.

The Guidelines also fail to follow the Law Commission and Supreme Court directions to curtail excessive litigation by the government and Public Sector Undertakings.[10] The presumption behind the guidelines that arbitration can lead to incorrect application of law lacks a sound backing. On the contrary, one of the core benefits of arbitration is the higher probability of the matter being adjudged by a field expert, while such opportunity may not always be the case in litigation.

However, in a case where one of the parties deliberately pushes the matter to litigation, as has been highlighted by the routine manner in which arbitral awards are appealed by the government itself, such an issue may continue to persist despite mediation becoming the prescribed mode. A change in the attitude instead of the mode of dealing with such conflicts is of enhanced importance here.

Arbitration plays a vital role in enhancing the Ease of Doing Business.[11] The amendments of 2015 in the Arbitration Act significantly improved this ranking by fostering investor confidence.[12] However, the shift in focus under the new guidelines, prioritizing mediation and litigation over arbitration, could adversely affect investment inflows and potentially harm India's standing on the index. Institutions like the World Bank also evaluate projects not only for the financial efficiency but also for the strong framework of dispute resolution mechanisms which largely discourage prolonged litigations.

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[9] Deepika Kinhal, Shriyam Gupta and Sumathi Chandrashekaran, 'Government Litigation: An Introduction' (*Vidhi Centre for Legal Policy*, 16 February 2018) <https://vidhilegalpolicy.in/wp-content/uploads/2019/05/GovernmentLitigationFinal.pdf> accessed on 18 November 2024; Ministry of Law and Justice, *Action Plan to Reduce Government Litigation*, (Ministry of Law and Justice, June 2017) <http://doj.gov.in/page/action-plan-reduce-government-litigation> accessed on 18 November 2024.

[10] *Ibid.*

[11] Arbitration Bar of India and Indian Arbitration Forum, *Representation to the Ministry of Finance* (Arbitration Bar of India and Indian Arbitration Forum, 3 June 2024) <https://www.livelaw.in/pdf_upload/representation-to-the-ministry-of-financeabi-and-iaf-545988.pdf> accessed on 18 November 2024.

[12] *Ibid.*

Proposing a pro Med-Arb approach

In light of the aforementioned implications, at a time when India is advocating to become a global arbitration hub,[13] such guidelines that proscribe arbitration as lengthy, expensive and unreliable due to arbitrators' standards may hinder its aforementioned goal. The same may be true for settlement of disputes through mediation, which despite its good intentions is not bound by any legal encumbrance to reach a decision, not to mention reaching a decision within the prescribed limitation of time.[14]

In the authors' opinion, mediation and arbitration are not agnostic to each other, on the contrary, they are very much capable of being used together efficiently to reduce the workload of the judiciary. Pre-arbitration mediation, as a comparable measure to pre-litigation mediation, is an alternative to conflict which is required, not only as a legislative measure, but also as a measure to be pushed from the judiciary.

Making mediation a pre-arbitration mandate, rather than completely erasing the possibility of arbitration may facilitate seamless dispute resolution all while avoiding resorting to litigation. Prescribing mandatory mediation with experienced mediators guiding the process can prevent disputes from reaching arbitration in the first place. An analysis of successes of mandatory mediation regimes may form important inspirations and learning while dealing with associated challenges of implementing mandatory form of mediation.

Countries such as Italy have experimented with making pre-litigation mediation a mandate for resolving the disputes at the initial level itself.[15] The Italian experience shows that lack of a mediation culture is one of the major hurdles that needs to be targeted. Their legislation instead of vesting the responsibility on the courts to refer the parties to mediation mandates all parties to participate in mediation but with a choice to 'opt-out' in case the proceeding does not lead to an agreement.[16] The mediation model has not only been effective in raising the acceptance of

[13] Narendra Modi, 'The Quest for Making India the Hub of International Arbitration' (Prime Minister of India, 21 October 2016) <https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-the-hub-of-international-arbitration/> accessed on 18 November 2024.
[14] Deepika Kinhal, 'Mandatory Mediation in India - Resolving to Resolve' (*Vidhi Centre for Legal Policy*, 05 March 2021) <https://vidhilegalpolicy.in/wp-content/uploads/2021/03/Mandatory-Mediation-in-India-Resolving-to-Resolve.pdf> accessed on 17 November 2024.
[15] Directorate-General for Internal Policies, *Italian Legislation on Mediation* (Note, PE 453.175, 2011) Ch 2.2.
[16] Leonardo D'Urso, Julia Radanova, Constantin Adi Gavrila, 'The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision (Wolters Kluwer, 14 Oct 2024) <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/> accessed on 18 November 2024.

mediation and but has also contributed in an increased number of mediators successfully reducing the rates of litigation.[17]

Italian model is peculiar in the sense that despite the mandatory nature of referring parties to mediation, it does not restrict their autonomy by forcing them to reach a settlement, and thus, it is instrumental in fostering an environment where mediation complements traditional litigation rather than competing with it.[18] In Italy, arbitration in disputes is not prohibited and can relied upon as another alternative means of dispute resolution before litigation.

The England & Wales model of compulsory, court-referenced mediation in the field of family and employment law is another effective example. The state encourages mediation in the civil procedure rules[19] and in family matters through the Children and Families Act 2014.[20] The procedure prescribed in the act induces parties to go through the 'Mediation Information and Assessment Meeting' before going forward with proceeding with disputes in the court, further approaching a merits-based analysis of the said dispute in 'Early Neutral Evaluation'.[21]

Mediation and arbitration can co-exist efficiently by serving complementary roles within the spectrum of alternative dispute resolution ["**ADR**"]. Mediation, as a facilitative and voluntary process, fosters communication between parties, helping them arrive at mutually acceptable solutions through negotiation. It is particularly effective for preserving relationships and addressing complex, multi-faceted issues. Arbitration, on the other hand, functions as a more formal, adjudicative mechanism where a neutral arbitrator delivers a binding decision. The coexistence of these processes as streamlined by incorporating mediation as a precursor to arbitration, allows parties to first attempt amicable resolution. Together, they enhance efficiency by reducing litigation costs, expediting resolution, and tailoring dispute resolution to parties' needs.

According to the guidelines, the actual experience of arbitration in respect of contracts where the Government is a party has been unsatisfactory in many cases.[22] It is purported therein that arbitration is expensive and time-consuming, with questionable ability and expertise of arbitrators to judge cases and improper application of the law. In the authors' opinion and the view expressed

[17] MondoADR Editorial Board, 'Cartabia: "Alternative forms of conflict resolution produce virtuous effects of easing the administration of justice"' *Mondo ADR* (Italy, 5 April 2021).
[18] Directive on certain aspects of mediation in civil and commercial matters [2008] 2008/52/EC, art 1.
[19] Ministry of Justice, 'Civil Procedure Rules' (*Ministry of Justice*, 6 April 2022) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed on 18 November 2024.
[20] Children and Families Act 2014, S. 10(1).
[21] Ministry of Justice, 'Court's Case Management Powers' (*Ministry of Justice*, 5 September 2023) <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.2> accessed on 18 November 2024.
[22] *ibid.*

in the 'Report to Review the Institutionalisation of Arbitration Mechanism in India,' proper and effective institutionalisation of arbitration will help solve most of these issues.[23] The exact number of cases challenging arbitration awards currently pending in India isn't widely reported, but it is clear that there is a significant backlog. Indian courts frequently handle challenges under Section 34[24] of the Arbitration and Conciliation Act, which allows parties to seek the setting aside of arbitral awards.

Proposed Monetary Threshold and Associated Challenges

As per the Guidelines, arbitration may only be restricted to disputes with a value less than Rs. 10 crores. The differentiation by the contract value, for instance, grouping of contracts and disputes below and above INR 10 crores may actually hamper the efficiency of the dispute resolution mechanism in public procurement contracts. This kind of threshold can end up causing inconsistency and fragmentation of the resolution process whereby disputes of lesser value may still involve significant operational and reputational stakes.

A uniform and consistent dispute resolution mechanism, irrespective of a monetary limit, may be employed to ensure fairness and predictability in all public procurement contracts. Since arbitration can be institutionalized together with mediation as a pre-dispute resolution method, implementing a more holistic and flexible model to address disputes can be developed to handle disputes of all complexities.

The MSME Dispute Resolution Mechanism Model – A Probable Solution

The Micro, Small, and Medium Enterprises Development Act, 2006[25] ["**MSMED**"] provides a model which can be employed regardless of the value of the contractual disputes and applied to domestic public procurement contracts. The Micro and Small Enterprise Facilitation Councils ["**MSEFC**"] created by the Act have proved to be effective, efficient and fair in its resolution of the disputes.[26] Drawing inspiration from this, the proposed High-Level Commission under the current guidelines may act parallel to the Facilitation Councils under the MSMED. Other key

[23] Department of Legal Affairs, *Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (Ministry of Law and Justice, 2017) <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> accessed on 18 November 2024.
[24] Arbitration and Conciliation Act, 1996, s 34.
[25] Micro, Small, and Medium Enterprises Development Act, 2006 (India).
[26] E Bhaskaran, 'The Performance of Micro and Small Enterprise Facilitation Councils in India' (January 2021) <https://www.researchgate.net/publication/348523881_THE_PERFORMANCE_OF_MICRO_AND_SMALL_ENTERPRISE_FACILITATION_COUNCILS_IN_INDIA> accessed 18 November 2024.

points in adopting the MSMED Act Model for Domestic Public Procurement Contract are as follows:

1. Structure and Membership:

Like the Micro and Small Enterprise Facilitation Councils, the proposed High-Level Commission could consist of three to five members and Chairperson from the senior government positions, for example, the Director of Public Procurement. Members could be drawn from the law, relevant industry and finance, government and private sector bodies and associations.

2. Jurisdiction and Role:

The High-Level Commission would have jurisdiction over all disputes over public procurement contracts that are executed in its territory, irrespective of the contract value. Paralleling MSME Section 18[27] which provides that its role would entail, at first stage, to conciliate the dispute and at second stage, to arbitrate the dispute.

3. Procedure for Dispute Resolution:

On the instance that the Commission received a dispute referral, it would commence conciliation with principles stipulated in the Mediation Act, 2023. If conciliation does not work, the Commission may either arbitrate the matter or refer it to other recognized arbitration institutions under the Arbitration and Conciliation Act, 1996. The next principle of resolution would be time-bound resolution with arbitration proceedings expected to take a specific time-frame, as is the case with the MSEFC's 90 days' timeline.[28]

4. Incentives for Resolution:

In a bid to discourage frivolous appeals, the appellants could be made to deposit a substantial portion of the awarded amount similarly as prescribed in the provisions of the MSMED Act.

The implementation of such model would enhance the use of mediation for solving disputes in compliance with the objectives of the Mediation Act, 2023.[29] Through insisting on parties to engage in dialogue first, the framework would reduce reliance on litigation and costs and time that come with it. On the same note, institutional arbitration guarantees the parties a formal system of dispute resolution that remains open to them in case of failure in mediation. This twin strategy not only serves the Indian vision of the promotion of mediation but also helps to clear the backlog in

[27] Micro, Small, and Medium Enterprises Development Act, 2006, s 18.
[28] Press Information Bureau, *Enterprises Facilitation Councils* (PIB 2016) <https://www.pib.gov.in/newsite/PrintRelease.aspx?relid=145093> accessed 19 November 2024.
[29] The Mediation Act 2023 (India).

courts and keep out of litigation, which could otherwise delay public procurement projects. Through this balanced mechanism, India can establish a robust and efficient framework for domestic public procurement contracts dispute resolution, meeting the needs of both public and private stakeholders while advancing its standing as a global hub for commercial arbitration.

Conclusion

The new guidelines for public procurement contracts surely deflect from the approach preferred by the government, which is to promote arbitration as the primary form of dispute resolution and as an alternative to litigation. However, it may not all be for the worst provided exploring other dispute resolution methods may prove effective and possibly less expensive. The Mediation Act, 2023 has provided the much needed framework for institutionalising one of the most effective forms of dispute resolutions, however, it must not be at expense of the work done in its absence.

A uniform dispute resolution framework, inspired by the MSME model, can provide the balance needed to address inefficiencies while maintaining investor confidence and public trust. By fostering a complementary relationship between mediation and arbitration, India can set a global precedent for efficient and equitable dispute resolution in public procurement, reinforcing its position as a leader in commercial justice.

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QUARTERLY ALTERNATE DISPUTE RESOLUTION ROUND-UP (AUGUST 2024 – NOVEMBER 2024)

AUGUST

1. **Court's role is confined to verifying arbitration agreement and timely filling under Section 11(5) and (6) of the Arbitration Act.**

   The Delhi High Court in the case of *Raj Kumari Taneja v Rajindra Kumar & Anr.*[1] held that the Court only has to ensure the existence of the arbitration agreement between the parties and to confirm that the petition has been filed within three years of the service of the Section 21[2] notice under Sections 11(5) and (6) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].[3]

   The High Court relied on the Supreme Court decision in *SBI General Insurance Co. v Krish Spinning,*[4] where the Court had held that under Sections 11(5) and (6) of the Arbitration Act, the role of the Court is confined to ensuring the existence of the arbitration agreement between the parties and confining that the petition was filed within three years of the service of Section 21 notice.

2. **Parties cannot invoke arbitration proceedings after voluntarily submitting to Court's jurisdiction during proceedings.**

   The Gujarat High Court in the case of *Prabhudas Jesangbhai Patel v Vinodbhai Mohanbhai Togadiya*[5] held that whether a party has waived their right to seek arbitration or submitted to the jurisdiction of the Court is based on the party's conduct during the suit. A party who wilfully participates in the suit and subjects himself to the jurisdiction of the Court cannot later claim the right to arbitrate the dispute.

[1] *Raj Kumari Taneja v Rajindra Kumar & Anr.* [2024] DHC 6365.
[2] Arbitration and Conciliation Act 1996, s 21.
[3] Arbitration and Conciliation Act 1996, ss 11(5) and 11(6).
[4] *SBI General Insurance Co. Ltd. v Krish Spinning* [2024] SCC OnLine 1754.
[5] *Prabhudas Jesangbhai Patel v Vinodbhai Mohanbhai Togadiya* [2024] GUJHC 41973.

The court reiterated that the proposition of law remains that an application under Section 8 (1)[6] of the Arbitration Act should be filed before submission of the first statement on substance of dispute.

3. Pre-arbitration steps cannot be treated as mandatory if could not be fructified.

The Rajasthan High Court in the case of *M/s Larsen and Toubro v Rajasthan Urban Sector Development Project & Anr.*[7] held that where the pre-arbitration steps mentioned in the agreement could not be fructified, it could not be held that the said pre-conditions are mandatory in nature and in failure of these no arbitration can be initiated.

Furthermore, while considering the appointment of arbitrators, the Court referred to the Supreme Court's decision in *Re: Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act 1996 and the Indian Stamps Act, 1989*[8] to state that the High Court was only required to examine the existence of the arbitration agreement provided by Section 11(6A) of the Arbitration Act.[9]

4. Time limit under Section 29A does not apply to arbitral proceedings commenced before 2015 Amendment to the Arbitration Act.

The Delhi High Court in the case of *M/s Chinar Steel Industries v Ircon International Ltd.*[10] ["**Chinar Steel Industries**"] held that the time limit under Section 29A of the Arbitration Act[11] is not applicable to arbitral proceedings commenced pursuant to Section 21 of the Arbitration Act[12] prior to the 2015 amendment. The High Court referred to the case of *Ministry Defence v M/s Agusta Westland International Ltd.*[13] where the Court clarified that commencement of the arbitration proceedings under Section 21 is an important yardstick to determine the applicability of Section 29A of the Arbitration Act.

In *Chinar Steel Industries*, the Court noted that while the arbitral tribunal was constituted, or "entered into reference", after the 2015 Amendment, the arbitration had been initiated prior to the amendment. Consequently, the time limit stipulated under Section 29A of the

[6] Arbitration and Conciliation Act 1996, s 8(1).
[7] *M/s Larsen and Toubro v Rajasthan Urban Sector Development Project & Anr.* [2024] RJ-JP 33112.
[8] *Re: Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamps Act, 1989* [2023] INSC 1066.
[9] Arbitration and Conciliation Act 1996, s 11(6A).
[10] *M/s Chinar Steel Industries v Ircon International Ltd.* (Del HC, 16 August 2024).
[11] Arbitration and Conciliation Act 1996, s 29A.
[12] Arbitration and Conciliation Act 1996, s 21.
[13] *Ministry of Defence v Agusta Westland International Ltd.* [2019] SCC OnLine Del 6419.

Arbitration Act does not apply to the present case or to any arbitration proceedings initiated before the 2015 Amendment.

5. Both District Courts and High Court can extend the arbitration deadlines.

The Goa Bench of the Bombay High Court, in *Sheela Chowgule v Vijay V. Chowgule & Ors.*[14] held that in instances where an Arbitral Tribunal is constituted by the High Court under Section 11(6), an application under Section 29A(4)[15] seeking an extension of time is maintainable before the High Court in matters of domestic arbitration. Furthermore, if an Arbitral Tribunal comprising three arbitrators, constituted under Section 11(2) with the agreement and consent of the parties, fails to conclude the proceedings within the stipulated or extended period, the application under Section 29A(4) would lie before the principal civil court of original jurisdiction in a district which also includes the High Court in exercise of its ordinary original civil jurisdiction.

6. Duty of the Court and arbitral tribunal to examine what the contract provides.

The Supreme Court in the case of *Pam Developments Pvt. Ltd. v State of West Bengal & Anr.* [16] emphasised the responsibility of courts and arbitral tribunals to carefully review the contractual clauses in arbitration proceedings. This was in the context of upholding the Calcutta High Court's decision to annul the arbitrator's ruling, which had awarded compensation for losses due to idle machinery and labour, despite such claims being prohibited under the contract.

Justice Pamidighantam Sri Narasimha and Justice Pankaj Mithal observed that "…*the High Court did what the Arbitrator should have done: examine what the contract provides. This is not even a matter of interpretation. It is the duty of every Arbitral Tribunal and Court alike, and without exception, for the contract is the foundation of the legal relationship. The Arbitrator did not even refer to the contractual provisions, and the District Court dismissed the objections under Section 34 with a standard phrase, as extracted hereinabove.*"

7. No prerequisite of a prior request under Section 21 of the Act for filing Section 11 arbitration applications.

[14] *Sheela Chowgule v Vijay V. Chowgule & Ors.* [2024] BHC-Goa 1275-DB.
[15] Arbitration and Conciliation Act 1996, s 29A (4).
[16] *Pam Developments Pvt. Ltd. v State of West Bengal & Anr.* [2024] INSC 628.

The Calcutta High Court in the case of *Kakali Khasnobis v Mrs Reeta Paul & Anr.*[17] held that for an application under Section 11(5) of the Arbitration Act,[18] there is no requirement of a prior request for reference to arbitration under Section 21 of the Arbitration Act.[19] The prior notice is only mandatory for the appointment of the arbitrator and not for the initiation of the proceedings itself.

The Court noted that the Petitioner had sufficiently complied with Section 11(5) of the Arbitration Act by invoking the arbitration clause vide a letter dated July 2021, a copy of which was served to the Respondents. The Respondents not only acknowledged the letter but also did not raise any objections to the notice itself. The only objection raised by the Respondents pertained to the unilateral appointment of an arbitrator, which was subsequently addressed by the Petitioner through the application before the High Court under Section 11 of the Arbitration Act.

8. Orders by Arbitral Tribunal in relation to discovery and inspection are not interim awards if they don't resolve the disputed issues.

In *Aptec Advanced Protective Technologies AG v Union of India & Anr.*,[20] the Delhi High Court, referencing its earlier decision in *Rhiti Sports Management Pvt. Ltd. v Power Play Sports & Events Ltd.*,[21] held that an order issued by an arbitral tribunal addressing applications related to the discovery and inspection of documents does not qualify as an interim award unless it resolves the issue between the parties.

Justice Anup Jairam Bhambhani observed that although the Arbitrator's decision addressed various aspects of the dispute, it did not resolve the fundamental issues at the core of the case. The Arbitrator's order was confined to matters of document discovery and inspection, which cannot be regarded as resolving the dispute between the parties. An interim award must address and resolve a matter that is capable of being conclusively determined in the final award.

9. An arbitral award can be enforced at any location within the country where a decree is executable.

[17] *Kakali Khasnobis v Mrs. Reeta Paul & Anr.* (Cal HC, 21 August 2024).
[18] Arbitration and Conciliation Act 1996, s 11.
[19] Arbitration and Conciliation Act 1996, s 21.
[20] *Aptec Advanced Protective Technologies AG v Union of India & Anr.* [2024] DHC 6202.
[21] *Rhiti Sports Management Pvt. Ltd. v Power Play Sports & Events Ltd.* [2018] SCC OnLine Del 8678.

In *M/s Mahindra & Mahindra Financial Services Ltd. v Mr. Neelambar Singh Patel & Ors.,*[22] the Madhya Pradesh High Court while referring to the Supreme Court's decision in *Sundaram Finance Ltd. v Abdul Samad,*[23] held that an arbitral award can be enforced through execution at any location in the country where the decree is executable. The Bench further clarified that obtaining a transfer of the decree from the court with jurisdiction over the arbitral proceedings is not required.

10. The correct date for determining the conversion rate of an award amount expressed in foreign currency is the date the award becomes enforceable.

In the case of *DLF Ltd. & Anr. v Koncar Generators and Motors Ltd*.,[24] the Supreme Court of India has clarified two main issues regarding the conversion rate for foreign arbitral awards expressed in foreign currency: the correct date for determining the foreign exchange rate for converting the award amount into Indian Rupees and the relevant date for conversion when the award debtor deposits an amount before the Court during ongoing challenge proceedings. The Court reaffirmed that the appropriate date for currency conversion is when the award becomes enforceable, which occurs after all objections to its enforceability are resolved. This principle is based on Section 49[25] of the Arbitration Act, which states that a foreign arbitral award is deemed enforceable as a Court decree once objections under Section 48[26] are settled.

The Court referenced the landmark case *Forasol v ONGC*[27] to support this position, emphasising that currency conversion should occur on the date of enforcement to accurately reflect the award's value at that time. Regarding partial payments made by the award debtor during enforcement, the Supreme Court ruled that if a portion of the arbitral award is deposited in Court, the conversion rate for that amount should be based on the exchange rate on the date of deposit. This approach ensures that the award holder does not benefit from a potentially higher exchange rate at a later date, thereby maintaining fairness in the process.

[22] *M/s Mahindra & Mahindra Financial Services Ltd. v Mr. Neelambar Singh Patel & Ors.* CR No. 240/2012 (MP HC).
[23] *Sundaram Finance Ltd. v Abdul Samad* (2018) 3 SCC 622.
[24] *DLF Ltd. & Anr. v Koncar Generators and Motors Ltd.* [2024] INSC 593.
[25] Arbitration and Conciliation Act 1996, s 49.
[26] Arbitration and Conciliation Act 1996, s 48.
[27] *Forasol v Oil & Natural Gas Commission* (1984) 1 SCR 526.

SEPTEMBER

1. An award cannot be set aside merely because the Appellate Court's view is a better view.

On 27 September 2024, the Supreme Court delivered a judgment in the case *Punjab State Civil Supplies Corporation Ltd. & Anr. v M/s Sanman Rice Mills & Ors.*[28] The case arose from a challenge to a judgment by the High Court of Punjab and Haryana, which had set aside an arbitral award under Section 34 of the Arbitration Act.[29]

The division bench comprising Justices Pankaj Mithal and PS Narasimha reiterated that the powers of the appellate Court under Section 37 of the Arbitration Act[30] is limited to the grounds specified in Section 34,[31] emphasising that an arbitral award cannot be disturbed merely because an appellate court believes a different view is preferable. The Court clarified that its interference is confined to instances where the award contravenes substantive law or public policy, thereby upholding the integrity of arbitral proceedings.

2. Once a valid arbitration agreement exists, it is not appropriate for Courts to address contested issues involving complex facts at the referral stage.

In a recent ruling, the Supreme Court of India reiterated the principle that once the validity of an arbitration agreement is established, Courts should refrain from addressing complex factual disputes at the referral stage. This decision emerged from the case *Cox & Kings Ltd. v SAP India Pvt. Ltd. & Anr.,*[32] where the petitioner, Cox & Kings, sought to include SAP India's parent company as a party in arbitration proceedings despite it not being a signatory to the arbitration agreement.

The three-judge bench, comprising Justices Sanjiv Khanna, Vikram Nath, and Suryakant, held that Courts are not required to assess the merits of whether a non-signatory is bound by the arbitration agreement during the referral process. Instead, such determinations should be reserved for the arbitral tribunal, in line with the doctrine of *kompetenz-kompetenz* outlined in Section 16 of the Arbitration Act.[33] This ruling aligns with previous judgments that have

[28] *Punjab State Civil Supplies Corporation Ltd. & Anr. v M/s Sanman Rice Mills & Ors.* [2024] INSC 742.
[29] Arbitration and Conciliation Act 1996, s 34.
[30] Arbitration and Conciliation Act 1996, s 37.
[31] Arbitration and Conciliation Act 1996, s 34.
[32] *Cox & Kings Ltd. v SAP India Pvt. Ltd. & Anr.* [2024] INSC 670.
[33] Arbitration and Conciliation Act 1996, s 16.

established a restricted scope for judicial interference at this stage, reinforcing the autonomy of arbitral tribunals in determining jurisdictional matters.

3. **In exercise of jurisdiction under Section 34 of the Arbitration Act, Courts need to apply their mind to the grounds of challenge before deciding whether it is necessary to interfere with the arbitral award.**

In the case of *Kalanithi Maran v Ajay Singh and Anr.,*[34] a three-judge bench of the Supreme Court emphasized the necessity for Courts to thoroughly consider the grounds for challenge when exercising their jurisdiction under Section 34 of the Arbitration Act.[35] This ruling arose after a Single Judge Bench of the Delhi High Court upheld an arbitral award in favour of Mr. Maran and KAL Airways. Mr. Singh, the Respondent, sought to overturn this decision before a Division Bench, which subsequently remanded the matter back to the Single Judge due to insufficient clarity and substance in the original order.

The Supreme Court supported the Division Bench's decision, noting that the Single Judge's ruling lacked substance and failed to adequately address the arguments presented by both parties. The Court highlighted that the earlier order was neither conclusive nor determinative, thus necessitating a reconsideration of the Section 34 petition.

This case underscores the significant supervisory role of Courts at the arbitration seat. While it is recognized that grounds for challenging an award under Section 34 are limited by statute, it remains imperative that Courts actively engage with these grounds to determine if judicial intervention is warranted.

4. **A party seeking arbitration encounters a scenario where the opposing party either fails to respond to a notice under Section 21 of the Arbitration Act or refuses to consent to arbitration, the only remedy available is to approach the Court under Section 11(5) or Section 11(6) of the Arbitration Act.**

In the case of *Meenakshi Agrawal v M/s Rototech,*[36] the Delhi High Court clarified important procedural aspects regarding arbitration under the Arbitration Act. The Court held that if a party seeking arbitration faces a situation where the opposing party either does not respond to a notice issued under Section 21 of the Arbitration Act[37] or refuses to consent to arbitration,

[34] *Kalanithi Maran v Ajay Singh and Anr.* [2024] SCC OnLine SC 1876.
[35] Arbitration and Conciliation Act 1996, s 34.
[36] *Meenakshi Agrawal v M/s Rototech* [2024] DHC 6813.
[37] Arbitration and Conciliation Act 1996, s 21.

the only available remedy is to approach the Court under Section 11(5)[38] or Section 11(6)[39] of the Arbitration Act.

The Court further emphasized that a party cannot unilaterally confer jurisdiction upon an arbitrator, even if an arbitrator has already been appointed. It noted that an arbitrator does not have the authority to summon the opposing party to participate in arbitration proceedings independently.

The ruling underscores the necessity of adhering to proper procedures when initiating arbitration and highlights that parties must act within the framework established by law.

5. The legal position of non-condonation of delay exceeding 120 days in filing a Section 37 appeal under the Arbitration Act may need to be reviewed in view of Section 43 of the Arbitration Act.

In the case of *M/s SAB Industries Ltd. v The State of Himachal Pradesh & Anr.,*[40] a two-judge bench of the Supreme Court examined the implications of non-condonation of delays exceeding 120 days for filing an appeal under Section 37 of the Arbitration Act,[41] This review was prompted by a challenge to an order from the Himachal Pradesh High Court, which had condoned a delay of 166 days in such an appeal.

The Petitioner contested the High Court's decision by referencing the Supreme Court's ruling in *Union of India v Varindera Constructions Ltd.,*[42] which established that delays beyond 120 days in filing a Section 37 appeal cannot be condoned. The Supreme Court acknowledged this argument and issued a notice, indicating that its previous decision in Varindera Constructions Ltd may need to be reconsidered, as it had explicitly stated that condoning delays beyond 120 days is not permissible.

This case highlights the ongoing legal discourse regarding the limits of judicial discretion in arbitration-related appeals and the potential need for re-evaluation of established precedents considering current statutory provisions.

6. Application to extend time to pass award is maintainable even if the period under Section 29A(4) of the Arbitration Act expires.

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[38] Arbitration and Conciliation Act 1996, s 11(5).
[39] Arbitration and Conciliation Act 1996, s 11(6).
[40] *M/s SAB Industries Ltd. v State of Himachal Pradesh & Anr.* (SC, 17 September 2024).
[41] Arbitration and Conciliation Act 1996, s 37.
[42] *Union of India v Varindera Constructions Ltd.* (2020) 2 SCC 111.

A bench consisting of Justice Sanjiv Khanna and Justice R. Mahadevan, in the case of *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.,*[43] held that an application for extension of time to pass an award under Section 29A(4) of the Arbitration Act[44] is maintainable, even after the expiry of the period for making the arbitral award, i.e., before the expiry of the mandate of the arbitral tribunal. By doing so, they upheld the view of the High Courts of Delhi, Jammu and Kashmir and Ladakh, Kerala, Madras, Bombay and Calcutta in various cases.

Prior to this, the Calcutta High Court had in *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.*[45] had held that when the mandate of the arbitral tribunal to pass an award had expired, i.e., the period of 12 months was over, then the application presented by the parties for an extension of time under Section 29A(4) cannot be invoked. This judgement overrules the above judgement and the view taken by the Division Bench of the High Court of Judicature at Patna.

The Court arrived at this conclusion by adopting a purposive interpretation of the word "terminate", holding that the word must be understood in terms of the syntax of the provision. It considered the fact that it was followed by a continuing expression and held that the expression "prior to or after the expiry of the period specified" should be understood with the reference to the power of the Court to grant an extension of time.

7. An arbitral award won't be invalid merely because of violation of law; a fundamental policy of law must be violated.

In the judgement of *OPG Power Generation Pvt. Ltd. v Enexio Power Cooling Solutions India Pvt. Ltd. & Anr.*,[46] Justice Chandrachud, Justice JB Pardiwala and Justice Manoj Mishra observed that mere violation of law is not enough in order to interfere with an arbitral award. It must be in conflict with the fundamental aspects of public policy and justice. For something to contravene the "fundamental policy of Indian law", it must contravene fundamental principles which act as a basis for the administration of justice and enforcement of the law.

The scope for judicial interference in arbitral awards under Section 34[47] is narrow, particularly after the 2015 amendment. It can be challenged only on grounds of violation of public policy.

[43] *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.* [2024] INSC 686.
[44] Arbitration and Conciliation Act 1996, s 29A (4).
[45] *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd* [2023] CHC-OS 5103.
[46] *OPG Power Generation Pvt. Ltd. v Enexio Power Cooling Solutions India Pvt. Ltd. & Anr.* [2024] INSC 711.
[47] Arbitration and Conciliation Act 1996, s 34.

Under Explanation 1 of the Section, the award must violate fundamental principles which are essential to the administration of justice, such as violation of the principles of natural justice.

Under Explanation 1 of Section 34(2)(b)(ii), the Court, relying on the decision in *Renusagar Power Co. Ltd. v General Electric Co.*[48], held that an arbitral award can be set aside if it is in conflict with the basic notions of justice and morality. "Morality", according to the Court extends only to sexual morality, as any further extension would mean that it would apply to agreements which conflict societal norms, although not illegal. The Court also clarified that interference on grounds of morality would happen only if it shocks the Court's conscience.

8. An arbitration agreement can be binding on non-signatories if the relationship of the non-signatory party with the signatories and their conduct decides the intent of the party to be bound by the arbitration agreement.

In the case of *Ajay Madhusudhan Patel & Ors. v Jyotindra S. Patel & Ors,*[49] a two-judge bench of the Supreme Court ruled that an arbitration agreement is not necessarily non-binding on a non-signatory party. The party may have intended to be bound by the arbitration agreement, even if he is not a signatory, through his conduct or relationship with signatory parties. What determines the intention of the non -signatory to be bound by the agreement is the mutual intent of the parties, the relationship of a signatory and non-signatory, commonality of the subject matter, the composite nature of the transactions and the performance of the contract.

It is also notable that the definition of "parties" under the Arbitration Act includes both signatories and non-signatories. The intention of the parties is to be gauged by the circumstances surrounding the participation of the non-signatory in the negotiation, performance and termination of the contract containing the arbitration agreement, or the underlying contract.

9. Twelve-month period for arbitral award begins from the completion of pleadings, not from the statement of defence.

In the case of *Emco Ltd. v Delhi Transco Ltd.,*[50] the Delhi High Court held that Section 29A(1) of the Arbitration Act,[51] read with Section 29A(4) implied that the mandate of the arbitral tribunal terminates if the arbitral tribunal does not issue the award within 12 months of

[48] *Renusagar Power Co. Ltd. v General Electric Co*. [1993] INSC 342.
[49] *Ajay Madhusudhan Patel & Ors. v Jyotindra S. Patel & Ors* [2024] INSC 710.
[50] *Emco Ltd. v Delhi Transco Ltd.* [2024] DHC 6878.
[51] Arbitration and Conciliation Act 1996, s 29A (1).

completion of pleadings under Section 23(4).[52] This means that the 12 month period is to be calculated not from the date of filing the Statement of defence, but from the date of completion of pleadings.

The inclusion of Section 23(4) is because it refers to the Statement of defence, but this does not mean that the date is to be calculated as such. Such an interpretation would effectively rewrite the provision. In furtherance of the same, the High Court also held that rejoinders and replications are considered to be a part of pleadings.

[52] Arbitration and Conciliation Act 1996, s 23(4).

OCTOBER

1. **Arbitral award to carry mandatory post-award interest under Section 31(7)(b) irrespective of any agreement between parties.**

   The Supreme Court, in *R. P. Garg v Chief General Manager*,[53] ruled that the sum directed to be paid under an Arbitral Award under Section 31(7)(b) of the Arbitration Act[54] should carry interest from the date of the award till its realisation.

   In this case wherein the executing Court had declined to grant interest on account of a clause in the arbitration agreement prohibiting the grant of interest, the Supreme Court held that such agreement between the parties would not affect the interest granted with respect to the post-award period since under Section 31(7)(b) it is mandatory for the sum directed to be paid to carry interest. This statutory requirement cannot be avoided by means of a contract between the parties. The Court, relying on *Morgan Securities & Credits Pvt. Ltd. v Videocon Industries Ltd.,*[55] clarified that the phrase "*unless the award otherwise directs*" related to the Arbitrator's discretion in stipulating the rate of interest rather than the entitlement of post-award interest.

2. **Proceedings under Arbitration Act during subsistence of arbitration agreement not affected by eviction order issued under the Public Premises Act.**

   In *Central Warehousing Corp. v Sidhartha Tiles & Sanitary Pvt. Ltd.*,[56] the Supreme Court held that an arbitrator could be appointed by the High Court under Section 11 of the Arbitration Act[57] under a valid arbitration clause of the lease agreement for the determination of right of renewal of the lease and revision of storage rates during subsistence of the contract despite eviction order under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ["**Public Premises Act**"].

   The Court ruled that the Public Premises Act does not override the Arbitration Act because it relates to the eviction of a tenant in unauthorised occupation of public premises after the expiration of the lease, and thus, this does not preclude the scope of appointment of the arbitrator for the determination of disputes which arose during the subsistence of the lease

[53] *R. P. Garg v The Chief General Manager, Telecom Department & Ors.* [2024] INSC 743.
[54] Arbitration and Conciliation Act 1996, s 31(7)(b).
[55] *Morgan Securities & Credits Pvt. Ltd. v Videocon Industries Ltd.* (2023) 1 SCC 602.
[56] *Central Warehousing Corporation & Anr. v M/s Sidhartha Tiles & Sanitary Pvt. Ltd.* [2024] INSC 805.
[57] Arbitration and Conciliation Act 1996, s 11.

agreement since the Public Premises Act does not bar or overlap the ambit and scope of proceedings initiated under the Arbitration Act.

3. Well-reasoned arbitral awards cannot be interfered with under Section 34 as the arbitral tribunal is the master of evidence.

The Delhi High Court, while upholding the Arbitral Award in *PEC Ltd. v ADM Asia Pacific Trading Pte. Ltd.*,[58] reiterated that the Arbitral Tribunal is the master of evidence, and that the scope of interference in an Arbitral Award under Section 34 of the Arbitration Act[59] was limited when the findings of fact have been based on the appreciation of evidence and documents on record. In the present case, the Appellant contended that the terms of the Charter Party Agreement between the Respondent and the owner of the concerned ship had to be read into the Contract governing the parties while determining the rate of demurrage by considering the Charter Party Agreement as the principal contract while awarding damages.

The Arbitral Tribunal, relying on *MMTC Ltd. v International Commodities Export Corporation of New York,*[60] had held that though a Charter Party Agreement had been signed by the Respondent and the shipowner, to which the Appellant had not been privy, the Agreement could not be incorporated as a part of the Contract since it was a Cost and Freight Contract, and the role of the Appellant was limited to the discharge of cargo once the ship had arrived at the nominated port. Thus, the Appellant had been held to be liable to pay damages for delay in discharging the cargo within the stipulated time since the incorporation of the Charter Party Agreement into the Contract would lead to contradictory terms because the Contract had already provided for a fixed pre-determined rate of demurrage.

4. Common jural relationship necessary for composite reference when there may not exist a common objective between the impugned agreements.

In *Smt. Sonia Dhir v Prestar Infrastructure Projects Ltd.*, [61] the Calcutta High Court, while relying on *Ganapati Technology Services Pvt. Ltd. v State Fisheries Development Corporation Ltd.*,[62] held that a composite reference could be made under Section 11 of the Arbitration Act[63] when two or more contracts are so intertwined with each other such that separate arbitral proceedings

[58] *PEC Ltd. v ADM Asia Pacific Trading Pte. Ltd.* [2024] DHC 8211.
[59] Arbitration and Conciliation Act 1996, s 34.
[60] *MMTS Ltd. v International Commodities Export Corporation of New York* [2013] SCC OnLine Del 832.
[61] *Smt. Sonia Dhir & Anr. v Prestar Infrastructure Projects Ltd.* (Cal HC, 8 October 2024).
[62] *Ganapati Technology Services Pvt. Ltd. v State Fisheries Development Corporation Ltd.* [2021] SCC OnLine Cal 4320.
[63] Arbitration and Conciliation Act 1996, s 11.

would prejudice the parties. The Court stated that even though both agreements may not achieve a common goal or objective, the requirement for such composite reference was that the underlying jural relationship or common platform between the agreements must be the same, thus unifying the rights flowing from the two agreements. Thus, the disputes arising from the two agreements can be clubbed so as to commonly invoke Section 21 of the Arbitration Act.[64]

In the present case, the two agreements had been entered into by the parties on the same day, of which the first agreement was a leave and licence agreement between the second petitioner and the respondent while the second agreement was a service agreement between the first petitioner and the respondent. It had been contended by the respondents that a composite reference under Section 11 of the Arbitration Act[65] could be made only when a common goal or objective was sought to be achieved by both the parent agreement and ancillary agreement.

5. Arbitral proceedings are not barred by the application of Section 69 of the Partnership Act.

The High Court of Delhi, in *Hari Om Sharma v Sauman Kumar Chatterjee & Anr.,*[66] held that the ban imposed under Section 69 of the Partnership Act, 1932[67] had no application with regards to arbitral proceedings since the bar against Courts under Section 69 did not come within the purview of Section 69(3)'s expression of *other proceedings*. The Court held that the statutory bar due to non-registration would not affect reference of the dispute to arbitration if the Partnership Deed provided for reference of disputes arising inter se the partners to arbitration. The Court also observed that it is not permitted to interfere with an Arbitral Award by independently evaluating the merits of the award, it has to restrict itself as per the scope mentioned by the Statute, as held in *MMTC Ltd. v Vedanta Ltd.*[68]

In a suit under Section 34 of the Arbitration Act[69] challenging the Arbitral Award which had decided the claims of the parties in relation to their partnership at Will, it was contended by the Petitioner that the Award was ultra vires since the Arbitrator had not decided the claims in accordance with the Partnership Deed and the Partnership Act. It was argued that all disputes arising from the partnership had to have been decided in accordance with the

[64] Arbitration and Conciliation Act 1996, s 21.
[65] Arbitration and Conciliation Act 1996, s 11.
[66] *Hari Om Sharma v Sauman Kumar Chatterjee & Anr.* [2024] DHC 8383.
[67] Indian Partnership Act 1932, s 69.
[68] *MMTC Ltd. v Vedanta Ltd.* (2019) 4 SCC 163.
[69] Arbitration and Conciliation Act 1996, s 34.

Partnership Act as was provided in the Partnership Deed. It was asserted by the Respondents that the claims arising from the dissolution of the partnership firms were barred under both Section 69 of the Partnership Act[70] since the partnership firms had not been registered.

6. Additional evidence cannot be brought on record during the stage of appeal under Sections 34 and 37 of the Arbitration Act.

In *State of U.T. v M/s Virat Construction,*[71] the Allahabad High Court held that Courts could not re-appreciate the evidence by way of amending the appeal or raising fresh grounds at the appellate stage in order to conclude whether the Arbitral Award had suffered from patent illegality, as under Sections 34 and 37 of the Arbitration Act[72] the Courts do not sit in appeal against the Arbitral Award. It was held that the Court could, under Sections 34 and 37 of the Arbitration Act, interfere with the Arbitral Award on merits only if the Arbitrator's findings were arbitrary, capricious, perverse or on the limited grounds as per Section 37(2) of the Arbitration Act. It was also appreciated by the Court that the extent of judicial intervention in appeal against an Arbitral Award would be absolutely subject to the time limit prescribed under the Limitation Act[73] with no scope of extension of period of appeal.

In the present case, the dispute arose from a claim for damages for the financial loss suffered by the Claimant due to an inordinate delay in commencing the project within the stipulated time period. On appeal under Section 34 of the Arbitration Act,[74] the Court had, in the impugned judgment, upheld the Arbitral Award since the Award had been passed after having considered the parties' contentions and terms of the contract thus, did not carry *patent illegality on the face of the award.*

7. Patent illegality of arbitral award requires contravention of substantive laws and applicable rules.

The Delhi High Court, in *Naresh Kumar Bajaj v Bunge India Pvt. Ltd.,*[75] held that the scope of interference under Section 34 of the Arbitration Act[76] was limited such that an Arbitral Award could only be challenged on grounds of patent illegality when there has been a contravention

[70] Indian Partnership Act 1932, s 69.
[71] *State of Uttar Pradesh & Ors. v M/s Virat Construction* [2024] AHC 171241 DB.
[72] Arbitration and Conciliation Act 1996, ss 34 and 37.
[73] Limitation Act 1963.
[74] Arbitration and Conciliation Act 1996, s 34.
[75] *Naresh Kumar Bajaj & Ors. v Bunge India Pvt. Ltd.* [2024] DHC 8134.
[76] Arbitration and Conciliation Act 1996, s 34.

of substantive laws of India, Arbitration Act, or rules which are applicable to the subject matter of the dispute, thus upholding the Nil Award by the Arbitral Tribunal.

The present suit arose from the Nil Award passed by the Arbitral Tribunal stating that since the Assessment Order had been quashed, the question of determination of the contractual obligations of the parties with respect to the indirect tax liability of the parties and contractually agreed liability of the Respondent under the Non-Compete Agreement and Business Transfer Agreement, had become an academic exercise. The Petitioners challenged the Arbitral Award as being unjust and patently illegal on the grounds that the Award had been passed on the basis of an extraneous consideration without having appreciated the terms of reference made to the Arbitral Tribunal.

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1. The referral court is required to limit its inquiry solely to the issue of the limitation period.

In *Aslam Ismail Khan Deshmukh v ASAP Fluids Pvt. Ltd.*[77] the Supreme Court has ruled that while determining the issue of limitation in the exercise of powers under Section 11(6) of the Arbitration Act[78] the referral court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not.

The three-judge bench emphasized that at this stage it is inappropriate for the referral court to engage in a detailed examination of whether the claims are barred by time. The determination of such matters should be left to the arbitrator's discretion. The Court highlighted that while the arbitrator's award can be challenged by any party, courts have the authority to review the adjudication at a later stage if deemed necessary.

2. The Arbitration Act does not differentiate between private and government entities.

In *International Seaport Dredging Pvt. Ltd. v Kamarajar Port Ltd.,*[79] the Supreme Court hearing an appeal contesting the Madras High Court's decision made during an interlocutory stage of Section 34 challenge, emphasized that the Arbitration Act is self-contained and does not distinguish between government bodies and private entities. Therefore, the court's decision cannot be influenced by whether a party is a government agency or a private operator.

The bench further noted that evaluating the reliability or trustworthiness of a party is a subjective judgment. They explained that private entities may also present factors such as business size, success, and reputation to argue against being classified as unreliable. Without a specific legal provision on this matter, the court found it inappropriate to impose such a standard when deciding on conditions for staying an arbitral award.

3. An arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by Public Sector Undertakings.

[77] *Aslam Ismail Khan Deshmukh v ASAP Fluids Pvt. Ltd. & Anr.* [2024] INSC 849.
[78] Arbitration and Conciliation Act 1996, s 11(6).
[79] *International Seaport Dredging Pvt. Ltd. v Kamarajar Port Ltd.* [2024] INSC 827.

In *Central Organisation for Railway Electrification v ECI SPIC SMO MCML,*[80] the Apex Court held that the principle of party equality governs all stages of arbitration, including arbitrator appointments. While Public Sector Undertakings can empanel arbitrators, they cannot compel the other party to choose from their panel. Unilateral appointment clauses in public-private contracts lack the necessary integrity for quasi-judicial functions, contravening the fundamental arbitration principle of impartiality and the nemo judex rule, a key aspect of Indian public policy.

The five-judge bench with former Chief Justice of India DY Chandrachud penning the majority opinion deemed such clauses as undermining the independence of arbitrators and creating justifiable doubts about their impartiality. Mandating a party to select an arbitrator from a pre-curated panel in a three-member tribunal violates the principle of equal participation, rendering the process prejudiced and biased. It was ruled that unilateral clauses in public-private contracts breach Article 14 of the Constitution. The decision applies prospectively to arbitrator appointments made after the judgment and specifically affects three-member arbitration tribunals.

4. The express specification of a place in an arbitration agreement serves as a valid criterion for determining the seat of arbitration.

In *Arif Azim Co. Ltd. v Micromax Informatics FZE,*[81] the Supreme Court held that the explicit designation of a place in an arbitration agreement is a decisive factor in determining the seat of arbitration, as long as there are no significant contrary indications. Even if referred to as a "venue," the designated place will be considered the seat if it serves as the anchor for arbitral proceedings. This determination grants exclusive jurisdiction to the courts of that seat, excluding the application of concurrent jurisdiction principles.

The Court also overruled the "Closest Connection Test" for identifying the seat of arbitration, noting that abstract connecting factors or choice of law rules cannot formulaically determine the seat. Simply stipulating the law governing the main contract does not imply that the same law governs the arbitration agreement or the seat. The Shashoua Principle was upheld, emphasising that clarity and predictability are paramount in arbitration agreements. This ruling provides a more straightforward framework for determining the seat of arbitration, reinforcing

[80] *Central Organisation for Railway Electrification v M/s ECI SPIC SMO MCML (JV)* [2024] INSC 857.
[81] *M/s Arif Azim Co. Ltd. v M/s Micromax Informatics FZE* [2024] INSC 850.

the importance of an explicit designation within arbitration agreements to avoid jurisdictional ambiguities.

5. The unconditional withdrawal of an application for arbitrator appointment prohibits filing a second application based on the same cause of action.

In *HPCL Bio-Fuels Ltd. v Shahaji Bhanudas Bhad,*[82] the Supreme Court while applying the principles of Order 23 Rule 1 of the Code of Civil Procedure, 1908[83] to applications under Section 11(6) of the Arbitration Act,[84] held that only applications filed after the withdrawal of a prior one on the same cause of action are barred. In a case appealed from the Bombay High Court, the respondent's petition under Section 11(6) of the Act, 1996, was allowed, appointing a sole arbitrator to resolve disputes with HPCL Biofuels Ltd.

However, the Supreme Court overturned this decision. The Court held that since no permission was granted when the respondent withdrew the earlier application under Section 11(6), the new application was not maintainable. It was also deemed time-barred, and the respondent could not claim benefits under Section 14(2)[85] or seek delay condonation under Section 5 of the Limitation Act, 1963.[86]

6. 'Sufficient cause' should be interpreted in the context of facilitating effective dispute resolution under Section 29A of the Arbitration Act.

In *Ajay Protech Pvt. Ltd. v General Manager,*[87] the Supreme Court addressed the issue of extending an arbitral tribunal's time to pass an award, emphasising that such extensions can be granted even after the statutory period has expired. The Court examined the phrase "sufficient cause" under Section 29A of the Arbitration Act, stressing that it should be interpreted in line with the fundamental purpose of arbitration, which is to provide an effective mechanism for resolving disputes. A bench comprising Justices P.S. Narasimha and Sandeep Mehta remarked.

The meaning of 'sufficient cause' for extending time must reflect the arbitration process's primary objective: resolving disputes through the mechanism agreed upon by the parties. Arbitration is designed to ensure efficiency and uphold the intent of the contractual terms. Therefore, any interpretation of 'sufficient cause' should focus on facilitating timely and

[82] M/s *HPCL Bio-Fuels Ltd. v M/s Shahaji Bhanudas Bhad* [2024] INSC 851.
[83] Code of Civil Procedure 1908, Ord 23.
[84] Arbitration and Conciliation Act 1996, s 11(6).
[85] Limitation Act, 1963, s 14(2).
[86] Limitation Act, 1963, s 5.
[87] *M/s Ajay Protech Pvt. Ltd. v General Manager & Anr.* [2024] INSC 889.

effective resolution, aligning with the parties' expectations. This clarification reinforces the judiciary's role in supporting arbitration as a preferred dispute resolution mechanism.

7. Challenge under Section 34 of the Arbitration Act without filing the award is to be considered invalid filling.

In the *Vasishta Mantena NH04 JV v Blacklead Infratech (P) Ltd.,*[88] Delhi High Court led by Justice Subramonium Prasad, ruled that a challenge to an arbitral award under Section 34 of the Arbitration Act,[89] must include the filing of the award itself. The Court emphasized that without the award, the challenge becomes futile, as the Court cannot assess or adjudicate its validity without reviewing the award's content.

Discussing the timelines under Section 34(3), the Court reiterated that applications to set aside an arbitral award must be filed within three months from the date the party receives the award. The proviso allows a further extension of 30 days if the Court finds sufficient cause for the delay, but no more. Examining the case at hand, the Court noted the petition was filed on 21 August 2023, within the permissible period but without attaching the award. It ruled such a filing invalid, reiterating that Section 34 petitions inherently require the award for the Court's scrutiny.

8. Unexplained delay in passing arbitral award can justify setting aside under Section 34.

In *HR Builders v Delhi Agricultural Marketing Board,*[90] the Delhi High Court, led by Justice Sachin Datta, ruled that an inordinate and unexplained delay in issuing an arbitral award after concluding arguments can be grounds for setting it aside under Section 34 of the Arbitration Act.[91] In the case at hand, over two years elapsed between the conclusion of arguments and the issuance of the award, prompting the petitioner to file a grievance under Sections 14[92] and 15(2) of the Arbitration Act.[93]

The Court agreed with the petitioner, emphasising that such a delay undermines the core objective of alternative dispute resolution—delivering timely justice. Referring to *Harji Engineering Works Pvt. Ltd. v BHEL,*[94] the Court reiterated that an award issued three years after the last effective hearing, without a satisfactory explanation, is unjust and contrary to the

[88] *Vasishta Mantena NH04 JV & Ors. v Blacklead Infratech Pvt. Ltd.* [2024] DHC 8489.
[89] Arbitration and Conciliation Act 1996, s 34.
[90] *HR Builders v Delhi Agricultural Marketing Board* [2024] DHC 8400.
[91] Arbitration and Conciliation Act 1996, s 34.
[92] Arbitration and Conciliation Act 1996, s 14.
[93] Arbitration and Conciliation Act 1996, s 15(2).
[94] *Harji Engineering Works Pvt. Ltd. v Bharat Heavy Electricals Ltd.* [2008] SCC OnLine Del 1080.

principles of arbitration. It observed that undue delays defeat the purpose of arbitration, rendering the process unfair and ineffective for resolving disputes.

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IN CONVERSATION WITH DR. RISHAB GUPTA

DR. RISHAB GUPTA

ADVOCATE, BOMBAY HIGH COURT
BARRISTER, TWENTY ESSEX

Editor's Note: Dr. Rishab Gupta is an expert in international arbitration, commercial litigation and public international law. With over 15 years of experience, Dr. Gupta has handled arbitrations across London, Singapore, New York, Stockholm, and more under LCIA, ICC, SIAC, and UNCITRAL Rules. Before joining Twenty Essex, he worked with esteemed firms like Allen & Overy, Debevoise & Plimpton, and led Shardul Amarchand Mangaldas' arbitration practice in Mumbai. He holds a distinguished academic background, including a B.A. in Mathematics from St. Stephen's College, an LL.B. from the London School of Economics, a J.D. from Columbia Law School (Harlan Fiske Stone Scholar), and a DPhil from the University of Oxford as a Rhodes Scholar. Dr. Gupta has also contributed to leading publications, including the Kluwer Arbitration Blog and Dispute Resolution International (of the International Bard Association). Recognized by Who's Who Legal and the 2023 "45 under 45" list by Global Arbitration Review, he is currently a practicing advocate before the Bombay High Court and a Barrister at Twenty Essex.

Editorial Board ["**EB**"]: **You have excelled in all fields and in multiple roles – as an academic, as a partner at law firms and now as an independent practitioner. How do the operational dynamics in each of these professional environments differ, what are the pros and cons of each, and how do you go about addressing them?**

Rishab Gupta ["**RG**"]**:** That is a good question, so the three parts that you mentioned are basically educational pursuits, being in a law firm, and then lastly, counsel practice. Now, as far as educational pursuits are concerned, in my case, I never felt that I wanted to be a full time academic. I was always interested in the practice of law, but I have also found the academic side of law very interesting. I genuinely felt, and I still feel, that I was lucky to find law as a subject because there are few such pursuits where both the theory of it and the practice of it are really interesting. For me, an ideal mix has always been one where I am engaging with the subject both professionally

and academically. The upside of it is that it engages you at multiple levels, because what you do in practice is quite narrow. While practicing, you are looking at one particular question for a client and you're advocating a 'position.' You are not really dealing with the question in an objective fashion; whereas, in academia you deal with questions at a more general level, and in a fairly objective manner. When you are writing as an academic, it is possible to advocate for change. However, as a practitioner, you cannot really stand before an arbitration tribunal or a Court and say that I would like the law to develop in this direction. You just have to state what the law is at the moment and how your facts fit that current disposition and how that favors your client's position. As an academic, you are not bound by all those things and you can advocate for a position where you think the law should be.

For me, personally, the disadvantage of being in academia was always was that I found it to be a fairly lonely existence. While you have students and the larger faculty but ultimately the work that really satisfies you, which is the research and the writing, that is a very lonely job. You have to just do it by yourself and that was not the right fit for me, for my own personality. So, for me the correct mix therefore, was to practice law while maintaining some elements of academic pursuits. Unfortunately, finding the right balance is really difficult, particularly in India, because the volume of disputes we deal with as disputes lawyers in this country is huge and the demands on your time are very significant. The system is such that you get instructed on matters on very short notice, so to be able to plan things is much harder. It is easier in the context of international arbitration, it is easier in the English court context, but less so in the Indian context. As you don't have that luxury of time, you're unable to plan your day such that you can block out a few hours for academic pursuits.

The other disadvantage or difficulty, in the Indian context, is that our universities are still not as 'mature' in terms of dealing with adjunct professors as they are outside of India. It is very common for law firm partners and counsel in the US or England to go and teach in universities. These universities encourage adjunct professors; they allow for seminars which are more practice oriented, they allow for the overall curriculum to be planned in such a way that you can teach for few hours and not deal with the various administrative issues. That, unfortunately, is not necessarily true for Indian universities.

Now coming to the law firm versus independent counsel part, those again are fairly different pursuits but the good thing is that, especially in the area which I specialize in, they are not that distinct. Because, even as an international arbitration lawyer, when I was a partner at a law firm, I

used to argue most of my cases on my own. Therefore, when I moved to the counsel side, it was not necessarily that big of a shift.

The biggest shift is one that I now have more time to do pure advocacy, which is something that always got a bit diluted in the law firm by all the other administrative responsibilities that I had. The second difference is that there is more variety in what I do today, because what typically would happen in law firm is that you get siloed in certain kinds of practice areas, whereas as a counsel, you have the ability to take on whatever you want to take on. Those are all the upsides. The downside is that it is a more 'lonely existence,' the counsel practice, because you're not working in a large firm, you're not seeing that many people, though of course you get instructed by other lawyers who you meet in conferences, work with chamber juniors etc. In England, I have large chambers (Twenty Essex) that I am a part of, so that helps. But ultimately the act of preparing and arguing a case you have to do by yourself and that's lonely as well. So, there are upsides and downsides to both.

EB: You're a recipient of the prestigious Rhodes Scholarship, which a lot of people in GNLU apply for every year and a few have also received it. So, for those applying and for those interested, the personal statement asks candidates to address "humanity's pressing challenges." Do you think arbitration can be a tool to tackle such challenges and would you recommend it?

RG: I do not think so to be honest. See, the reality is that a lot of work that we end up doing as lawyers, especially in international arbitration, is just representing corporates or individuals in their commercial disputes. To classify that as addressing 'humanity's problems' would put our work at a pedestal that it does not deserve.

I think the bigger contribution that we can make as commercial disputes lawyers in India is not necessarily by being lawyers in arbitration tribunals or courts, because that is just *status quo* being pushed further; the real contribution we can make is by helping the system improve. For example, bringing best practices from other jurisdictions to India, being able to find solutions to resolve disputes in an efficient and cost-friendly manner, suggesting changes at policy level on how to deal with those issues; I think those are contributions which each one of us can make which would genuinely have some impact.

Personally, I always thought that the biggest contribution I could make was to practice abroad for some time, learn what I believe would be the best practices in my chosen pursuit and then deploy them in India. That was the driving force behind my decision to come back to India from England in 2016.

EB: With the reforms proposed by the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ["**Draft Bill**"] **such as redefining arbitral institutions, granting them enhanced powers, enforcing emergency arbitrator awards, and introducing appellate arbitral tribunals, do you think these amendments would effectively address the evolving needs of contemporary India? Are there any suggestions that you have?**

RG: I have never believed that the way you bring about change in the Indian ecosystem is by continuously amending statutes. I have always felt that it is a very 'lazy' way to bring change because, in practice, it doesn't achieve much. Amending statutes is the easiest thing to do, because all that requires is for a few academics or a few policy makers to sit across a table, look at statutes from other jurisdictions, pick up a few pieces from here and there, amend the statute and then it put it through the legislative process. In order to bring lasting change, investment should instead be made in our institutions, by improving our court systems, our bar, training our judges, improving our jurisprudence and so on. Amendment of statutes can happen very quickly, but bringing improvement in institutions and preparing them for the better future, that is really hard and takes a lot of time and effort. I have, therefore, always feared that too many amendments to the Arbitration Act can be a distraction because you can stand up and say that "we have just amended our arbitration laws and therefore, we are closer to that ultimate dream of becoming a hub of international arbitration," but that is not true at all. India would not never become an arbitration friendly destination just because it has amended its arbitration laws. That is a part, but it is a very small part of the overall project. The bigger part of it is that our Courts must be capable of and willing to enforce those statutory amendments properly, that the delay which is there in the Court system reduces, judges are better trained, there are better arbitrators in the country, and better lawyers in the country who understand the best practices and then follow those best practices in a disciplined fashion.

Indeed, if you look at leading jurisdictions in the world, take England for example, the English arbitration act has not been amended since 1996, while in India we have gone through multiple amendments since 1996. But no one is saying that England is not a favourable arbitration destination because its arbitration act is outdated.

Coming to your specific question, frankly, I haven't looked at the Draft Bill very carefully. I did notice, however, that there are some welcome changes such as the introduction of the 'emergency arbitrator regime' for even ad hoc arbitrations, which is likely to reduce pressure on Courts, because even today a very large portion of arbitration related application before courts are 'S.9' applications and those could now go before emergency arbitrators, if this was to be given effect

to. There were other edits is relation to timelines and other things which (if enforced) would be welcome changes.

EB: Many believe that the culture in India leads to an overlap between the Court and arbitration procedures, subsequently discouraging foreign investors. Further, this would also include former judges being appointed as arbitrators. Based on your varied experience across civil and common law jurisdictions, do you agree with this view, and what changes would you suggest to make India a more attractive venue for arbitration?

RG: There is a lot to unpack there. Starting with the overlap between the judiciary and arbitration. I do not think that's a bad thing, you'll always have that in every jurisdiction –both from a counsels' and arbitrators' standpoint. While some jurisdictions may have a more specialised arbitration bar than we do in India, ultimately, you will find that counsels who regularly appear in Courts will also appear in arbitration and that retired judges in different jurisdictions would sit as arbitrators. In England, for example, I am appearing before multiple former English judges who are sitting as arbitrators. I appear before English Courts and London-seated arbitrations and the same is the case in India. I do not think that such overlap itself is the problem. The problem arises, as it does in the Indian context, where volume of litigation is so large, that counsel appearing in courts can take out time for arbitration in evenings or over weekends only.

The second problem comes up when you rely heavily on former judges as arbitrators. So, in England, as I said earlier; former judges do it as arbitrators. But, if you look at the overall pool of arbitrators in England, majority of them would not be judges, instead they would be solicitors or barristers. In India, on the other hand, if you look at the arbitrator pool for high value matters, it will almost exclusively consist of former judges.

The other disadvantage of appointing former judges as arbitrators is that those judges bring to arbitration their learnings and experiences from the court system. That is true in India, but it is also true elsewhere. For example, when I appear before even former English judges, I do not find them to be as attuned to international arbitration, as say a senior partner at a large law who regularly advises clients on international arbitrations.

The other thing you asked me about is the cultural differences between common law and civil law systems. The common law world, and particularly England, has had a very large impact on development of international arbitration practices. A lot of the things we do in international arbitration such as disclosure, pre-trial reviews, skeleton filings etc, these are practices which come from English commercial litigation. In fact, today's international arbitration procedure looks a lot like a truncated form of litigation before the English Commercial Court. Therefore, common law

has had a greater influence on international arbitration. But, I think, some of that is changing and is being influenced by practitioners who are more deeply involved in the civil law side of things. For example, the scope of disclosure in international arbitration is very limited. This is a civil law approach. In common law courts, extensive disclosure is quite common, but not so much in civil law courts.

EB: Considering the recent judgment of the Supreme Court of India, popularly regarded as *CORE II*, on unilateral appointment clauses in an arbitration agreement, do you feel that the doctrine of unconscionability, under the principles of Contract, can be a good ground for striking down such clauses?

RG: You know, these unilateral clauses is a very timely topic for me. Yesterday, I was arguing a Singapore seated arbitration before a Hong Kong based arbitrator where the arbitration clause provided for unilateral appointment by the opposite side. That party appointed the sole arbitrator and one of the questions to be decided in yesterday's hearing was whether such appointment was valid. Now there were multiple questions to be answered here. The first is which body of law determines the validity of such appointments. Is it a question to be determined by the governing law of the contract, by the law of the seat or by the law of the arbitration agreement? We do not ever have to answer that question in India because all of this has happened in the context of purely Indian law contracts with Indian seats. But in the context of this case, where the seat was Singapore and the arbitrator was sitting in Hong Kong, you must first ask which law applies to this question. I argued it is the law of the arbitration agreement which governs, whereas the opposite side argued that it is the law of the seat. Let us see what the tribunal decides.

Then comes the second question that, in case a foreign law applies to this question, what is the position of unilateral appointments outside of India? Before the hearing, we did a lot of research on Singapore law and on this particular point, and you will all be surprised, that outside of India, there is virtually no law on this issue, because these questions have rarely, if ever come up before foreign courts. In fact, most probably the answer to unilateral clauses in these jurisdictions is that they are valid. The concerns that are raised in the Indian context, those are quite peculiar to India where public sector undertakings have often abused the significant bargaining power, they have at the time of contracting by insisting on one-sided clauses such as clauses for unilateral appointments.

Coming more specifically to my views on unilateral appointments in the Indian context, I have always had some difficulty with striking them down. Contract law is premised on the principle of 'freedom to contract.' Arbitration law is premised on the principle that arbitration is a 'creature of

consent.' That must mean that a commercial party can choose to enter into an arbitration agreement which gives one party the exclusive right to appoint an arbitrator. The only way you get out of that, I have always felt, is by arguing that the entire contract or the arbitration agreement should be struck down on the ground of 'unconscionability.' But the test of unconscionability would be very hard to meet in these contracts because there are commercial and sophisticated parties on both sides.

EB: Is it difficult for foreign parties to appoint Indian legal professionals as arbitrators in Investor-State Disputes System ["ISDS"], considering only a handful of Indian scholars have been appointed as an arbitrator in ISDS? If so, why?

RG: There are a variety of reasons for this. One is, of course, pure experience. You would generally not appoint someone to your tribunal who you do not think has sufficient experience in that body of law. In India, there is not much experience because the Indian Government often chooses to instruct lawyers outside of India, which has meant that the local Bar has not developed in the same way as it has developed in other jurisdictions. For example, if you look at countries like Mexico or Argentina, which have been very common respondents, the governments there insist on using the local Bar. They may instruct foreign lawyers too, but the local lawyers are always present.

Secondly, the Indian Government should try to appoints arbitrators from India – whether former judges, practising lawyers or academics. At the moment, they don't necessarily do that.

The third reason is that India is not a member of International Centre for Settlement of Investment Disputes ["**ICSID**"]. As a result, ICSID appointments do not normally come to Indian nationals. Many arbitrators in this field received their first appointment from ICSID, either as Chair of the tribunal or as a member of the Annulment Committee. Since India is not a signatory to ICSID Convention, Indian nationals are not considered for such appointments. Consequently, there are fewer opportunities for Indian nationals to be appointed in investor-state cases.

EB: How do you view India's departure from its Model Bilateral Investment Treaty ["BIT"] in the recent India-UAE BIT, particularly regarding the new investment definition and the shortened three-year timeline for exhausting local remedies before ISDS? What do you think can be the consequences of such measures?

RG: The Model BIT is obviously a disaster. The India-UAE BIT is a good document. It still departs from what many of us would think are fundamental principles of investor-state arbitration,

such as no requirement to exhaust local remedies. But it is still better than the Model BIT. It also has a wider definition of investment and so on.

As for the repercussions of this, looking at my own practice, I often act for foreign investors who are either suing the UAE under various investment treaties or UAE based investors who are thinking of bringing claims against India. All of that, in my view, is healthy because ultimately you do want countries and their instrumentalities to realise that their actions can be scrutinized at an international level.

EB: The ICC Young Arbitration and ADR Forum (YAAF) Workshop on "Navigating the Frontiers of Artificial Intelligence in Arbitration," held in Zurich on October 19, 2023, highlighted key areas where Artificial Intelligence ["AI"] could impact arbitration, such as document review, arbitrator selection, and decision-making. Do you think AI will have a major impact on the practice of arbitration? What do you see as the most practical and impactful application of AI in arbitration today?

RG: Maybe, yes. I do not really have a straight answer to that question because I've not really used AI much myself. But whenever I have encountered AI in practice – for example, in the context of document review, preparing chronologies, summarising documents etc – it has been very impressive. I think that ultimately, AI will make our practice more efficient and may take away the need for lawyers to perform certain laborious tasks. But certain keys tasks, like identifying key issues in a dispute, taking judgment calls, devising strategy and arguing cases before courts/ tribunals, that would remain a human pursuit, I think.

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