International Commercial Arbitration

Law and Recent Developments in India

With inputs from -
Singapore International Arbitration Centre (SIAC)

February 2015
Contents

1. PREFACE 01

2. INTRODUCTION 02
   I. History of Arbitration in India 02
   II. Background to the Arbitration and Conciliation Act, 1996 02
   III. Scheme of the Act, 1996 03

3. INTERNATIONAL COMMERCIAL ARBITRATION – MEANING 04

4. ARBITRABILITY UNDER INDIAN LAW 05

5. INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN INDIA 06
   I. Notice of Arbitration 06
   II. Referral to Arbitration 06
   III. Interim Reliefs 06
   IV. Appointment of Arbitrators 06
   V. Challenge to Appointment of Arbitrator 07
   VI. Mandate of the Arbitrator 07
   VII. Challenge to Jurisdiction 08
   VIII. Conduct of Arbitral Proceedings 08
   IX. Arbitral Award 09
   X. Cost of Arbitration 09
   XI. Challenge to an Award 09
   XII. Appeals 11
   XIII. Enforcement and Execution of the Award 12

6. INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN A RECIPROCATING COUNTRY 14
   I. Referring Parties to Arbitration in Under Part II 15
   II. Enforcement and Execution of Foreign Awards 15
   III. Appealable Orders 17

7. DIFFICULTIES FACED IN AN ICA AGAINST INDIAN PARTIES 19
   I. Applicability of Part I 19
   II. Public Policy 20

8. POSITIVE TRENDS IN INDIA AIDING INTERNATIONAL COMMERCIAL ARBITRATION 21
   I. The 246th Law Commission Report
      Comment: Overhaul suggested for the Act to make India an International Arbitration hub
      Also at Schedule I Page No. 28
   II. World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd
      Comment: Supreme Court held that allegations of fraud are not a bar to foreign seated arbitration
      Also at Schedule II Page No. 32
III. Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr
Comment: Supreme Court brings Indian Arbitration Law up to International Standards
Also at Schedule III Page No. 34

IV. Reliance Industries Ltd. & Ors. v. Union of India
Comment: Supreme Court of India considers impartiality and independence in appointment of arbitrator
Also at Schedule IV Page No. 38

V. Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi
Comment: Supreme Court held that fraud is arbitrable under Indian law
Also at Schedule V Page No. 42

VI. Union of India v. U.P. State Bridge Corp Ltd
Comment: The Supreme Court rules on independence and conduct of government arbitrators
Also at Schedule VI Page No. 45

VII. Associate Builders v. Delhi Development Authority
Comment: Supreme Court clarifies the narrow scope of 'public policy' for challenge of Indian Award
Also at Schedule VII Page No. 48

VIII. The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.
Comment: Calcutta High Court refused to injunct investment arbitration against India
Also at Schedule VIII Page No. 51

Comment: Supreme Court removed interference on Indian Courts in foreign seated arbitrations
Also at Schedule IX Page No. 56

X. Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors. (2013)
Comment: Supreme Court refers non-signatories to arbitration agreement to arbitration
Also at Schedule X Page No. 60

XI. Shri Lal Mahal Ltd. v. Progetto Grano Spa. (2013)
Comment: Supreme Court makes enforcement of foreign awards easier by removing 'patent illegality' and expanding the scope of public policy
Also at Schedule XI Page No. 64

XII. Mulheim Pipe coatings GMBH v. Welspun Fintrade Ltd and Anr. (2013)
Comment: Bombay High Court reaffirms and explains separability of an arbitration clause
Also at Schedule XII Page No. 67

XIII. Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd. (2013)
Comment: Bombay High Court clarified the prospective application of BALCO
Also at Schedule XIII Page No. 70

Comment: Bombay High Court holds existence of mortgage as no bar to arbitrating money claims
Also at Schedule XIV Page No. 73
XV. Antrix Corp. Ltd. v. Devas Multimedia P. Ltd. (2013)
Comment: Supreme Court clarifies its power to appoint an Arbitrator
Also at Schedule XV Page No. 76

Comment: Arbitration award after efflux of prescribed time ruled to be bad in law thereby ensuring timely adjudication of arbitration proceedings
Also at Schedule XVI Page No. 78

XVII. Denel (Proprietary Limited) v. Govt. of India, Ministry of Defence. (2012)
Comment: Supreme Court clarifies process of appointment of an Arbitrator
Also at Schedule XVII Page No. 81

9. CONCLUSION

SCHEDULES

SCHEDULE I
The 246th Law Commission Report

SCHEDULE II
World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd

SCHEDULE III
Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr

SCHEDULE IV
Reliance Industries Ltd. & Ors. v. Union of India

SCHEDULE V
Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi

SCHEDULE VI
Union of India v. U.P. State Bridge Corp Ltd

SCHEDULE VII
Associate Builders v. Delhit Development Authority

SCHEDULE VIII
The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.

SCHEDULE IX
Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc

SCHEDULE X
Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors

SCHEDULE XI
Shri Lal Mahal Ltd. v. Progetto Grano Spa

SCHEDULE XII
Mulheim Pipe Coatings GMBH v. Welspun Fintrade Ltd and Anr

SCHEDULE XIII
Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd
<table>
<thead>
<tr>
<th>SCHEDULE XIV</th>
<th>73</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tata Capital Financial Services Limited v. M/S Deccan Chronicle Holdings Limited</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SCHEDULE XV</th>
<th>76</th>
</tr>
</thead>
<tbody>
<tr>
<td>Antrix Corp. Ltd. v. Devas Multimedia P. Ltd</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SCHEDULE XVI</th>
<th>78</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bharat Oman Refineries Limited v. M/S. Mantech Consultants</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SCHEDULE XVII</th>
<th>81</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denel (Proprietary Limited) v. Govt. of India, Ministry of Defence</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PUBLISHERS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>ABOUT NDA</td>
<td>85</td>
</tr>
<tr>
<td>NDA's International Litigation And Dispute Resolution Practice</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ABOUT SIAC</th>
<th>89</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>SIAC INFORMATION KIT</th>
<th>92</th>
</tr>
</thead>
</table>
1. Preface

The Government of India has under its consideration, proposals for making arbitration as preferred mode for settlement of commercial disputes by making it more user-friendly, cost effective and expeditious disposal of cases (sentence construction; making it – expeditious disposal of cases). The Government of India, under the leadership of Prime Minister Narendra Modi, has shown that it is committed to improve its legal framework relating to arbitration.

In 2014, the Law Commission of India in its 246th Report recommended various amendments in the Arbitration and Conciliation Act, 1996 (“Act”), so that India may become a hub of International Commercial Arbitration. The Law Commission Report attempts to identify and treat the malady plaguing arbitrations in India with clinical precision. Each proposed amendment attempts to not only remedy the malady but also seeks to set up the stage for arbitration in India to achieve a higher plane of growth. If implemented, these amendments will certainly boost confidence in the Indian arbitration space.

Just before the end of 2014, the Press Information Bureau of India released the press release which indicated the amendments suggested by the Law Commission were enacted as law via an ordinance. However, later the press release was withdrawn. Another press release by the law ministry a few days later then suggested that the proposed amendments would be placed before the Indian Parliament in the first half of 2015. This has led to considerable discussions within the arbitration community in India that the long awaited overhaul of the Act may be a reality soon.

This paper is an interim update of the growing pro-arbitration story in India, till these proposed amendments receive the force of law. If these amendments take force of law, it would change the way Indian arbitrates requiring fresh analysis of the Act. (sentence restructuring required) Until such time, this papers aims to summarize the position of Indian law with regards to international commercial arbitration (“ICA”) both seated within and outside India, and discuss the recent judicial precedents in the field which are taking India towards being an arbitration friendly nation, as envisaged by the United Nations Commission on International Trade Law’s (“UNCITRAL”) Model Law on International Arbitration (“Model Law”).
2. Introduction

Increasing international trade and investment is accompanied by growth in cross-border commercial disputes. Given the need for an efficient dispute resolution mechanism, international arbitration has emerged as the preferred option for resolving cross-border commercial disputes and preserving business relationships. With an influx of overseas commercial transactions and open ended economic policies acting as a catalyst, international commercial disputes involving India are steadily rising. This has led to tremendous focus from the international community in India’s international arbitration regime.

Owing to certain controversial decisions by the Indian judiciary in the recent past, especially in cases involving a foreign party, the international community has kept a close watch on the development of arbitration laws in India and has often criticized the Indian judiciary for its interference in international arbitration and extra territorial application of domestic laws to awards obtained outside India. But this attitude of the Indian judiciary towards arbitration is now rapidly changing since the past couple of years. Never before has one seen so many pro-arbitration rulings by Indian Courts. From 2012 to 2014 the Supreme Court of India ("Supreme Court") declared the Indian arbitration law to be seat centric, removed Indian judiciary’s power to interfere with arbitrations seated outside India, and denied strict limit of interference in India seated arbitrations (or arbitrations seated in India), declared fraud to be arbitrable in India, referred non-parties to an arbitration agreement to settle disputes through arbitration, defined the scope of public policy in foreign seated arbitration, recognized the importance and independence and impartiality of even government appointed arbitrators, and has thus shown the much needed pro-arbitration approach.

I. History of Arbitration in India

Until the Act, the law governing arbitration in India consisted mainly of three statutes:

i. The Arbitration (Protocol and Convention) Act, 1937 ("1937 Act")
ii. The Indian Arbitration Act, 1940 ("1940 Act") and
iii. The Foreign Awards (Recognition and

Enforcement) Act, 1961 ("1961 Act")

The 1940 Act was the general law governing arbitration in India and it resembled the English Arbitration Act of 1934.

The Arbitration Act, 1940, dealt with only domestic arbitration and during its tenure intervention of the Court was required in all the three stages of arbitrations in India, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took notice of a dispute, Court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the Court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the Court.

While the 1940 Act was perceived to be a good piece of legislation, however, in its actual operation and implementation by all concerned including the parties, arbitrators, lawyers and the Courts, it proved to be ineffective and was widely felt to have become outdated.

This Act was largely premised on mistrust of the arbitral process and afforded multiple opportunities to litigants to approach the Court for intervention. Coupled with a sluggish judicial system, this led to delays rendering arbitrations inefficient and unattractive.

II. Background to the Arbitration and Conciliation Act, 1996

To address these concerns and with a primary purpose to encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in the national and international sphere, India in 1996, adopted a new legislation modelled on the Model Law in the form of the Act. The Act was also brought in to provide a speedy and efficacious dispute resolution mechanism to the existing judicial system, marred with inordinate delays and backlog of cases.
III. Scheme of the Act, 1996

The Act has three significant parts. Part I of the Act ("Part I") deals with domestic arbitrations and ICA when the arbitration is seated in India. Thus, arbitration seated in India between one foreign party and an Indian party, though defined as ICA is treated akin to a domestic arbitration. Part II of the Act ("Part II") only specifically deals with foreign awards and enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"), or Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention"). Part III of the act is a statutory embodiment of conciliation provisions.

In Part I, Section 8 regulates the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, 28 to 33 regulate the conduct of arbitration, Section 34 regulates the challenge to the award, Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Further Courts have found that Chapters III to VI i.e. Section 10 to 33 of Part I of the Act contains curial or procedural law which parties would have autonomy to opt out from. The other Chapters of Part I of the Act form part of the proper law thus making those provisions non-derogable by parties subjected to Part I, even by contract.

Part II, on the other hand regulates arbitration only in respect of commencement and recognition / enforcement of a foreign award and no provisions under the same can be derogated by a contract between two parties.

---

1. A foreign award is award delivered in an arbitration seated outside India.
3. Anita Garg v. M/S. Glencore Grain Rotterdam B.V., 2011(4) ARBLR 59 (Delhi)
4. Supra Note at 2
3. International Commercial Arbitration – Meaning

Section 2(1)(f) of the Act defines an ICA to mean one arising from a legal relationship which must be considered commercial where either of the parties is a foreign national or resident or is a foreign body corporate or is a company, association or body of individuals whose central management or control is in foreign hands. Thus, under the Indian Law, an arbitration with a seat in India but involving a foreign party, will also be regarded as an ICA and hence subject to Part I of the Act. Where an ICA is held outside India, Part I of the Act would have no applicability to the parties but the parties would be subject to Part II of the Act.

The scope of this section was determined by the Supreme Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.* where despite TDM Infrastructure Pvt. Ltd. had a foreign control, the SC concluded that, “a company incorporated in India can only have Indian nationality for the purpose of the Act.”

Thus though the act recognizes companies controlled by foreign hands as a foreign body corporate the Supreme Court has excluded its application to companies registered in India and which thus have Indian nationality. Hence in case a corporation has dual nationality, one based on foreign control and other based on registration in India, for the purpose of the Act such corporation would not be regarded as a foreign corporation.

5. ‘Commercial’ should be construed broadly having regard to the manifold activities which are an integral part of international trade today (R.M. Investments & Trading Co. Pvt. Ltd v. Boeing Co, AIR 1994 SC 1136).

6. 2008 (14) SCC 271
4. Arbitrability Under Indian Law

Arbitrability is one of the issues where the contractual and jurisdictional facets of international commercial arbitration meet head on. It involves the simple question of what type of issues can and cannot be submitted to arbitration.

In *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.* the Supreme Court discussed the concept of arbitrability in detail and held that the term ‘arbitrability’ has different meanings in different contexts: (a) disputes capable of being adjudicated through arbitration, (b) disputes covered by the arbitration agreement, and (c) disputes that parties have referred to arbitration. It stated that, in principle any dispute that can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stand excluded from resolution by a private forum. Such non-arbitrable disputes include: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified Courts are conferred jurisdiction to grant eviction or decide the disputes. The disputes identified by the Court as non-arbitrable are also non-arbitrable in many New York Convention signatory nations.

The principle controversy which existed with regards to arbitrability under the Indian law was create by the Supreme Court in *N. Radhakrishnan v. M/S Maestro Engineers*. The Court here held that where allegations of fraud and serious malpractices are alleged, the matter can only be settled by the Court and such a situation cannot be referred to an arbitrator. Supreme Court has also observed that fraud, financial malpractice and collusion are allegations with criminal repercussions and as an arbitrator is a creature of the contract, he has limited jurisdiction and that Courts are more equipped to adjudicate serious and complex allegations and are competent to offer a wider range of reliefs to the parties in dispute.

In 2014, the Supreme Court re-examined this position in the landmark ruling in *Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi*. The Supreme Court has held that allegations of fraud and other malpractices are arbitrable in India and *N. Radhakrishnan* does not lay down the correct law. The Court explained that the contention of substantive contract being void/voidable is not a bar to arbitration and the court must follow the policy of least interference. The court further held that arbitration and criminal proceedings may continue simultaneously.

This came after in January of 2014(What came after sentence restructure), the Supreme Court held in *World Sport Group (Mauritius) Ltd. V. MSM Satellite (Singapore) Pte. Ltd* that, allegations of fraud are not a bar to refer parties to a foreign seated arbitration and held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of Act i.e. in cases where the arbitration agreement is either (i) null and void; or (ii) inoperative; or (iii) incapable of being performed. Thus it seems that though allegations of fraud are not arbitrable in ICA’s with a seat in India the same bar would not apply to ICA’s with a foreign seat.

Thus, in 2014 Indian law on arbitrability of disputes has been brought to power with internationally accepted standards.
5. International Commercial Arbitration With Seat in India

The laws applicable to ICA when seat of arbitration is India are discussed in detail herein below.

I. Notice of Arbitration

Arbitration can be said to have commenced when the notice of arbitration requires the other party to take some steps in connection with the arbitration or to do something on his part in the matter of arbitration. Under Section 21 of the Act, a notice of Arbitration has to be served to the other party, requesting that the dispute be referred to arbitration. The day on which the respondent receives the notice, arbitral proceedings commence under the Act. In a Notice of Arbitration, a party communicates a) an intention to refer the dispute to arbitration; and b) the requirement that other party should do something on his part in that regard, this will generally suffice to define the commencement of arbitration.

II. Referral to Arbitration

Under Part I, the Courts can refer the parties to arbitration if the subject matter of dispute is governed by the arbitration agreement. Section 8 of the Act provides that if an action is brought before a judicial authority, which is subject to arbitration; upon an application by a party, the judicial authority would be bound to refer the dispute to arbitration. It is important to note that such an application has to be made by the party either before or at time of making his first statement on the substance of the dispute and the application shall be accompanied by a duly certified or original copy of the arbitration agreement.

III. Interim Reliefs

Parties can seek interim relief from Courts and Arbitral Tribunals under Section 9 and 17 of the Act respectively.

A party may, before, or during arbitral proceedings or at any time after the making of the Arbitral Award but before it is enforced, apply to a Court for seeking interim measures and protections including interim injunctions.

The Arbitral Tribunal vide Section 17 can pass an interim measure or ask the party to provide appropriate security in connection with the matter of dispute, whichever is more convenient or appropriate to the Tribunal.

IV. Appointment of Arbitrators

The parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. The agreement can provide for a Tribunal consisting of three Arbitrators and each party will appoint one Arbitrator and the two appointed Arbitrators will appoint the third Arbitrator who will act as a presiding Arbitrator. If one of the parties does not appoint an Arbitrator within 30 days, or if 2 appointed Arbitrators do not appoint third Arbitrator within 30 days, the party can request Chief Justice of India (“CJI”) to appoint an Arbitrator. The CJI can authorize any person or institution to appoint an Arbitrator. Some High Courts have authorized District Judge to appoint an Arbitrator. In case of an international commercial dispute, the application for appointment of Arbitrator has to be made to the CJI only. In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated.

In 2014, the Supreme Court delivered several landmark rulings pertaining to appointment of an arbitrator. The Court examined the scope of intervention to be exercised by courts when parties have chosen to arbitrate in Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr. The Court’s decision re-affirms the pro-arbitration outlook which the Indian courts have developed in the past few years. This judgment is a significant step in the right direction to bring Indian arbitration law in line with international jurisprudence and will aid...
India in being perceived as an arbitration-friendly jurisdiction. The Court held that an arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear; any allegation of non-conclusion of the main contract is immaterial. If the intention to arbitrate is clear, the court can make good an omission to make the arbitration agreement workable. Sections 8, 10, 11 and 45 of the Arbitration and Conciliation Act are mere machinery provisions for the Court to support and aid arbitration. The seat of arbitration would be the country whose law is chosen as the curial law (law of arbitration) by the parties. The courts of the seat of arbitration have the exclusive jurisdiction to exercise supervisory powers over the arbitration process. The courts of the venue of arbitration cannot have concurrent jurisdiction in this regard.

In 2014, the Supreme Court also examined the importance of impartiality and independence of arbitrators. In Reliance Industries Ltd. & Ors. v. Union of India the Supreme Court of India considered impartiality and independence as important factors to be kept in mind while appointing an arbitrator. The Court held that it is important to ensure that doubts are not cast on neutrality, impartially and independence of the Arbitral Tribunal. It reaffirmed that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute. After relying on renowned scholars it held that qualification, experience and integrity should be the criteria for appointment of an arbitrator.

In Union of India v. U.P. State Bridge Corp Ltd the Supreme Court ruled on independence and conduct of government arbitrators. The Court acknowledged that it is a common sight that government officers are appointed as arbitrators, because of their status and position; discharge of their other duties assumes more importance and their role as arbitrators takes a back seat - this kind of behavior showing a casual approach in arbitration is anathema to the very genesis of arbitration. The Court directed that where the government assumes the authority and power to appoint the arbitral tribunal, it should be vigilant and responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner. The Court further held that the principle of ‘default procedure’ will apply and courts are not powerless to remedy situations arising from inaction of arbitral tribunals (in government contracts) to protect the interest of all parties.

V. Challenge to Appointment of Arbitrator

An Arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. Appointment of Arbitrator can be challenged only if:

i. Circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

ii. He does not possess the qualifications agreed to by the parties.

The appointment of an Arbitrator cannot be challenged on any other ground. The challenge to appointment has to be decided by the Arbitrator himself. If he does not accept the challenge, the proceedings can continue and the Arbitrator can make the Arbitral Award. However, in such case, application for setting aside the Arbitral Award can be made to Court under Section 34 of the Act. If the Court agrees to the challenge, the Arbitral Award can be set aside. Thus, even if the Arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to Court. The arbitration can continue and challenge can be made in Court only after the Arbitral Award is made.

VI. Mandate of the Arbitrator

An encouraging position of Indian arbitration law is the jurisprudence related to that of a mandate of an arbitrator. The Supreme Court in its decision in NBCC Ltd. v. J.G. Engineering Pvt. Ltd. has laid down that the mandate of the Arbitrator expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement.

---

15. AIR 2014 SC 2342
16. 2014 (10) SCALE 561
17. Section 12(1) of the Act
18. Section 12(3) of the Act
19. Section 34(6) of the Act
20. 2010 (2) SCC 385
Today, this helps a party to ensure a time bound arbitration process while entering into a contract and in compelling the arbitrator to deliver his award with that stipulated time. At the same time it equally becomes important to stipulate realistic timeliness for conclusion of an arbitration process so as to avoid forced expiry of the arbitrators mandate despite best efforts to deliver an award in a timely fashion.

VII. Challenge to Jurisdiction

Under Section 16 of the Act, an Arbitral Tribunal has competence to rule on its own jurisdiction, which includes ruling on any objections with respect to the existence or validity of the arbitration agreement. The doctrine of ‘competence-competence’ confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. In *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*, the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdictional issues by exercising its powers of competence-competence under Section 16 of the Act. However, where Section 8 or 11 has been relied on in order to refer the parties to arbitration or to constitute the arbitral tribunal, the competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it.

VIII. Conduct of Arbitral Proceedings

The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present its case. The Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 (“CPC”) or the Indian Evidence Act, 1872. The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the Arbitral Tribunal.

A. Flexibility In Respect of Procedure, Place and Language

The Arbitral Tribunal has full powers to decide the procedure to be followed, unless parties agree on the procedure to be followed. The Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence. Place of arbitration will be decided by mutual agreement. However, if the parties do not agree to the place, the same will be decided by the Tribunal. Similarly, the language to be used in arbitral proceedings can be mutually agreed. Otherwise, the Arbitral Tribunal can decide on the same.

B. Submission of Statement of Claim and Defense

The Claimant should submit the statement of claims, points of issue and the relief or remedy sought. The Respondent shall state his defense in respect of these particulars. All relevant documents must be submitted. Such claim or defense can be amended or supplemented at any time.

C. Hearings and Written Proceedings

After submission of documents and defense, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be an oral hearing or whether proceedings can be conducted on the basis of documents and other materials. However, if one of the parties requests that the hearing shall be oral, sufficient advance notice of hearing should be given to both the parties. Thus, unless one party requests, oral hearing is not compulsory.

D. Settlement during Arbitration

It is permissible for parties to arrive at a mutual settlement even when the arbitration proceedings are going on. In fact, even the Tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration shall be terminated. However, if both parties and the Arbitral

---

21. 2005 (8) SCC 618
22. Section 18 of the Act
23. Section 19 of the Act
24. Section 19(3) of the Act
25. Section 19(4) of the Act
26. Section 20 of the Act
27. Section 22 of the Act
28. Section 23 of the Act
29. Section 24 of the Act
Tribunal agree, the settlement can be recorded in the form of an Arbitral Award on agreed terms, which is called Consent Award. Such Arbitral Award shall have the same force as any other Arbitral Award.\(^{30}\)

Under Section 30 of the Act, even in the absence of any provision in the arbitration agreement, the Arbitral Tribunal can, with the express consent of the parties, mediate or conciliate with the parties, to resolve the disputes referred for arbitration.

### E. Law of Limitation Applicable

Limitation Act, 1963 is applicable to arbitrations under Part I. For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue.\(^{31}\) If arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of Limitation Act. This enables a party to start a fresh case in Court or fresh arbitration without being barred by limitation.

In 2014, the Supreme Court ruled that limitation period for filing a counter claim is computed as on the date of filling of the counter claim in *Voltas Ltd. v. Rolta India Ltd.*\(^{32}\) The Court explained that the exception to the above rule is, if respondent, against whom a claim has been made in arbitration, can satisfy that the respondent had previously made a claim against the claimant and sought arbitration by serving a notice to the claimant. The Court explained that limitation cannot be saved solely on the ground that a party had previously in a notice vaguely stated that it would be claiming liquidated damages.

### IX. Arbitral Award

Decision of Arbitral Tribunal is termed as ‘Arbitral Award’. An Arbitral Award includes interim awards. But it does not include interim orders passed by Arbitral Tribunals under Section 17. Arbitrator can decide the dispute “in justice and in good faith” only if both the parties expressly authorize him to do so.\(^{33}\) The decision of Arbitral Tribunal will be by majority.\(^{34}\) The Arbitral Award shall be in writing and signed by all the members of the Tribunal.\(^{35}\) It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given.\(^{36}\) The Award should be dated and the place where it is made should be mentioned. Copy of award should be given to each party. Arbitral Tribunals can make interim awards also.\(^{37}\)

### X. Cost of Arbitration

Cost of arbitration means reasonable cost relating to fees and expenses of Arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The Tribunal can decide the cost and share of each party.\(^{38}\) If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach the Court. The Court will ask for a deposit from the parties and on such deposit, the award will be delivered by the Tribunal. Then Court will decide the cost of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party.\(^{39}\)

### XI. Challenge to an Award

Section 34 provides for the manner and grounds for challenge of the Arbitral Award. The time period for the challenge is before the expiry of 3 months from the date of receipt of the Award (and a further period of 30 days on sufficient cause being shown for condonation of delay). If that period expires, the award holder can apply for execution of the Award as a decree of the Court. But as long as this period has not elapsed, enforcement is not possible.

Under Section 34 a party can challenge the Arbitral Award on the following grounds:

#### Footnotes

30. Section 30 of the Act
31. Section 43(2) of the Act
32. (2014) 4 SCC 516
33. Section 28(2) of the Act
34. Section 29 of the Act
35. Section 31(1) of the Act
36. Section 31(3) of the Act
37. Section 31(6) of the Act
38. Section 31(8) of the Act
39. Section 39 of the Act
i. the parties to the agreement are under some incapacity;

ii. the agreement is void;

iii. the award contains decisions on matters beyond the scope of the arbitration agreement;

iv. the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;

v. the award has been set aside or suspended by a competent authority of the country in which it was made;

vi. the subject matter of dispute cannot be settled by arbitration under Indian law; or

vii. the enforcement of the award would be contrary to Indian public policy.

In *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* 40 ("Saw Pipes") the Supreme Court opined that an award which, on the face of it is patently in violation of statutory provisions cannot be said to be in public interest and is likely to adversely affect the administration of justice and hence, it is required to be set aside as being patently illegal. While interpreting the phrase "public policy of India" it held that an arbitral award should be "set aside if it is contrary to:

i. fundamental policy of Indian law; or

ii. the interest of India; or

iii. justice or morality, or

iv. in addition, if it is patently illegal.

In 2014, the Supreme Court, for the first time, defined, albeit non-exhaustively, the term “fundamental policy of Indian law” in *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.* 41 ("Western Geco") The Court observed that the phrase “fundamental policy of Indian law” had not been elaborated by the Court. Interpreting it in this case, the Court held that the phrase included, *inter alia*, the following three principles:

A. Judicial Approach

No Tribunal, court or other authority should act in an arbitrary, capricious or whimsical manner or be influenced by any extraneous consideration while making any determination which would affect the rights of citizens or have civil consequences.

B. Principles of Natural Justice

These principles should be followed by all courts and quasi – judicial authorities while determining the rights and obligations of parties. The parties to the dispute should be given the opportunity to be heard. The decision – makers should make reasoned decisions which reflect application of mind to the facts and circumstances of the case.

C. Wednesbury’s Principle of Reasonableness

Where a decision by a court or tribunal is so perverse or irrational that no reasonable person would have arrived at it [*the Wednesbury principle*], then such decision shall not be sustained by the court of law and maybe challenged. The Court stated that the aforementioned principles were applicable to the awards passed in arbitrations.

It is appreciable that these principles have been suggested to be applied to ensure that no award is passed without appreciating the facts and circumstances of a case and without consistent treatment to both the parties. However, rendering the inferences drawn by a tribunal open to scrutiny of the courts based on the aforesaid principles is a regressive step by the Court. While it is common for courts to ensure that an award is reasoned and has been passed after application of mind by the arbitrators, the courts do not usually adjudicate on the outcome of such application of mind. Such restrain is exercised to protect the independence of the arbitration process.

However, in the end of 2014, *the Supreme Court in Associate Builders v. Delhi Development Authority,* 42 has dealt with some of the key issues involving challenge of an arbitral award in an arbitration seated in India. The Supreme Court discussed and clarified some of the earlier rulings on the scope of ‘public policy’ in Section 34 of the Act. The Supreme Court observed that the grounds for interfering with an arbitral award are limited to those mentioned in Section 34 of the Act and held that merits of the award can be looked into only under the broad head of ‘public policy’.

---

40. 2003 (2) ARBLR 5 (SC)
41. (2014) 9 SCC 263
42. 2014 (13) SCALE 226
The Supreme Court relied on the landmark judgments like, Renusagar Power Co. Ltd. v. General Electric Co. ("Renusagar") 43, Saw Pipes 44, McDermott International 45, Western Geco International Ltd. 46 and others, and laid down the heads under the ground of ‘public policy’ as:

**Fundamental Policy of Indian law** would include factors such as:

i. disregarding orders of superior courts;
ii. judicial approach, which is an antithesis to an arbitrary approach;
iii. principles of natural justice;
iv. decision of arbitrators cannot be perverse and irrational in so far as no reasonable person would come to the same conclusion.

Supreme Court held that an arbitrator is the sole judge with respect to quality and quantity of facts and therefore an award is not capable of being set aside solely on account of little evidence or if the quality of evidence is of inferior quality. Supreme Court further held that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently “errors of fact” cannot be corrected unless the arbitrators approach is arbitrary or capricious.

Supreme Court described “Interest of India” as something which deals with India in world community and its relations with foreign nations. Notably, the Supreme Court did not illustrate this ground in detail as the same is a dynamic concept which needs to evolve on a case by case basis.

Supreme Court held that the term “award is against justice and morality” would include the following:

i. with regard to justice, the award should not be such that it shocks the conscience of the court;
ii. with regard to morality, there can be no universal standard however, Supreme Court observed that both the English and the Indian courts have restricted the scope of morality to “sexual immorality” only;
iii. With respect to an arbitration, it would be a valid ground when the contract is not illegal but against the mores of the day, however, held that this would only apply when it shocks the conscience of the court.

Supreme Court further held that “Patent Illegality” would include:

i. fraud or corruption;
ii. contravention of substantive law, which goes to the root of the matter;
iii. error of law by the arbitrator;
iv. contravention of the Act itself;
v. where the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the Act; and
vi. if arbitrator does not give reasons for his decision.

**XII. Appeals**

Only in exceptional circumstances, a Court can be approached under the Act. Approach to Courts has been drastically curtailed under the Act. In some cases, if an objection is raised by the party, the decision on that objection can be given by the Arbitral Tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach the Court only after Arbitral Award is made or in case of an order passed under Section 17 of the Act, after the order is passed. Appeal to Court is now permissible only on certain restricted grounds.

An appeal lies from the following orders and from no others to the Court authorized by law to hear appeals from original decrees of the Court passing the order 47.

i. granting or refusing to grant any measure under Section 9;
ii. setting aside or refusing to set aside an Arbitral Award under Section 34.

Appeal shall also lie to a Court from an order of the Arbitral Tribunal:

i. accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
ii. granting or refusing to grant an interim measure under Section 17.

Moreover no second appeal shall lie from an order passed in appeal under this Section, but nothing

---

43. (1994) 2 Arb. LR 405
44. Supra Note at 40
45. McDermott International Inc v. Burn Standard Co.Ltd and Ors, 2006 (11) SCC 181
46. Supra Note at 41
47. Section 37 of the Act
in Section 37 shall affect or take away any right to appeal to the Supreme Court.

XIII. Enforcement and Execution of the Award

In India, the enforcement and execution of Arbitral Awards, both domestic and foreign, is governed by the Act read with the CPC. While the former lays down the substantive law governing enforceability and execution of an award the latter deals with the curial law pertaining to execution of an award.

According to Section 35 of the Act, an Arbitral Award shall be final and binding on the parties and persons claiming under them. Thus, an Arbitral Award becomes immediately enforceable unless challenged under Section 34 of the Act.

When the period for filing objections has expired or objections have been rejected, the award can be enforced under the CPC in the same manner as if it were a decree passed by a Court of law.48

An ex parte Award passed by an Arbitral Tribunal under Section 28 of the Act is also enforceable under Section 36. Even a settlement reached by the parties under Section 30 of the Act can be enforced under Section 36 of the Act as if it were a decree of the Court.

A. Institution of Execution Petition

For execution of an Arbitral Award, the procedure as laid down in Order XXI of the CPC has to be followed. Order XXI of the CPC lays down the detailed procedure for enforcement of decrees. It is pertinent to note that Order XXI of the CPC is the longest order in the schedule to the CPC consisting of 106 Rules.

Where an enforcement of an Arbitral Award is sought under Order XXI CPC by a decree holder the legal position as to objections to it is clear. At the stage of execution of the Arbitral Award, there can be no challenge as to the validity of the Arbitral Award.49 The Court executing the decree cannot go beyond the decree and between the parties or their representatives. It ought to take the decree according to its tenor and cannot entertain any objection that the decree was incorrect in law or in facts.

All proceedings in execution are commenced by an application for Execution.50 The execution of a decree against property of the judgment debtor can be effected in two ways:

i. Attachment of property; and

ii. Sale of property of the judgment debtor

B. Attachment of Property

‘Attachable property’ belonging to a judgment debtor may be divided into two classes: (i) moveable and (ii) immovable property.

If the property is immovable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property, and then upon a conspicuous part of the Court house.51

Where an attachment has been made, any private transfer of property attached whether it be movable or immovable, is void as against all claims enforceable under the attachment.52

If during the pendency of the attachment, the judgment debtor satisfies the decree through the Court the attachment will be deemed to be withdrawn.53 Otherwise the Court will order the property to be sold.54

C. Sale of attached property

Order XXI lays down a detailed procedure for sale of attached property whether movable or immovable. If the property attached is a moveable property, which is subject to speedy and natural decay, it may be sold at once under Rule 43. Every sale in execution of a decree should be conducted by an officer of the Court

48. N.Poongodi v. Tata Finance Ltd, 2005 (3) ARBLR 423 (Madras)
50. Rule 10 of the CPC
51. O.XXI R.54 of the CPC
52. Section 64 of the CPC
53. O.XXI R. 55 of the CPC
54. O.21 R. 64 of the CPC
except where the property to be sold is a negotiable instrument or a share in a corporation which the Court may order to be sold through a broker. 55

55. s.XXII R.76 of the CPC
6. International Commercial Arbitration With Seat in a Reciprocating Country

It is now established that if the seat of arbitration is outside India, Part I of the Act will not be applicable even if the parties chose to. The Supreme Court while declaring the Act to be a seat centric law concluded that only Part II of the Act would apply to arbitrations seated outside India. Thus, the conduct of the arbitration with a foreign seat would be governed by the institutional rules adopted by the parties and by the applicable laws of arbitration at the seat of arbitration. But this position holds true only for arbitration agreements executed post September 6, 2012.

For arbitration agreements executed prior to September 6, 2012 the position would hold true if parties have expressly or impliedly excluded the application of Part I of the Act. In all other cases the provisions of Part I discussed above would be applicable to arbitration despite being seated outside India.

Irrespective of the date of execution of the arbitration agreement, Part II of the Act is applicable to foreign awards, all foreign awards sought to be enforced in India and to refer parties to arbitration when the arbitration has a seat outside India. Part II is divided into two chapters, Chapter 1 being the most relevant one, as it deals with foreign awards delivered by the signatory territories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") which have reciprocity with India while Chapter 2 is more academic in nature as it deals with foreign awards delivered under the Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention").

A foreign award under Part II is defined as (i) an Arbitral Award (ii) on differences between persons arising out of legal relationships, whether contractual or not, (iii) considered as commercial under the law in force in India, (iv) made on or after 11th day of October, 1960 (v) in pursuance of an agreement in writing for arbitration to which the convention set forth in the first schedule applies; and (vi) in one of such territories as the central government, being satisfied that reciprocal provisions made may, by notification in the Official Gazette, declare to be territories to which the said convention applies.

Thus, even if a country is a signatory to the New York Convention it does not ipso facto mean that an award passed in such country would be enforceable in India. There has to be further notification by the Central Government declaring that country to be a territory to which the New York Convention applies. In the case of Bhatia International v Bulk Trading the Supreme Court has expressly clarified that an arbitration award not made in a convention country will not be considered a foreign award.

About 47 countries have been notified by the Indian government so far. They are:- Australia; Austria; Belgium; Botswana; Bulgaria; Central African Republic; Chile; China (including Hong Kong and Macau); Cuba; Czechoslovak Socialist Republic; Denmark; Ecuador; Federal Republic of Germany; Finland; France; German; Democratic Republic; Ghana; Greece; Hungary; Italy; Japan; Kuwait; Malagasy Republic; Malaysia; Mexico; Morocco; Nigeria; Norway; Philippines; Poland; Republic of Korea; Romania; Russia; San Marino; Singapore; Spain; Sweden; Switzerland; Syrian Arab Republic; Thailand; The Arab Republic of Egypt; The Netherlands; Trinidad and Tobago; Tunisia; United Kingdom; United Republic of Tanzania and United States of America.

Thus, to reach the conclusion that a particular award is a foreign award, the following conditions must be satisfied:

i. the award passed should be an Arbitral Award,

ii. it should be arising out of differences between the parties,

iii. the difference should be arising out of a legal relationship,

56. Supra Note at 1
57. As mostly all parties signatory to the Geneva Convention as now members of the New York Convention, Chapter 2 of Part II remains primarily academic.
58. AIR 2002 SC 1432
59. National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ARBLR 37
iv. the legal relationship should be considered as commercial,

v. it should be in pursuance of a written agreement to which the New York Convention applies and

vi. the foreign award should be made in one of the aforementioned 47 countries.

I. Referring Parties to Arbitration in Under Part II

A judicial authority under Section 45 of the Act has been authorized to refer those parties to arbitration, who under Section 44 of the Act have entered in an arbitration agreement. The Section is based on Article II (3) of New York Convention and with an in-depth reading of Section 45 of the Act, it can be clearly understood that it is mandatory for the judicial authority to refer parties to the arbitration.

Section 45 of the Act starts with a non obstante clause, giving it an overriding effect to the provision and making it prevail over anything contrary contained in Part I or the CPC. It gives the power to the Indian judicial authorities to specifically enforce the arbitration agreement between the parties.

But as an essential precondition to specifically enforcing the arbitration agreement, the Court has to be satisfied that the agreement is valid, operative and capable of being performed. A party may not be entitled to a stay of legal proceedings in contravention to the arbitration agreement under Section 45 in the absence of a review by the Court to determine the validity of the arbitral agreement. The review is to be on a prima facie basis.

The Supreme Court in World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte, Ltd has opined that no formal application is necessary to request a court to refer the matter to arbitration under Section 45 of the Act and in case a party so requests even through affidavit, a court is obliged to refer the matter to arbitration with the only exception being cases where the arbitration agreement is null and void, inoperative and incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dispute to foreign seated arbitrations.

In Chloro Controls (I) P. Ltd v. Severn Trent Water Purification Inc & Ors., the Supreme Court has held that the expression ‘person claiming through or under’ as provided under Section 45 of the Act would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can pray and be referred to arbitration.

This ruling has widespread implications for foreign investors and parties as now in certain exceptional cases involving composite transactions and interlinked agreements, even non-parties such as the parent company, subsidiary, group companies or directors can be referred to and made parties to an ICA.

II. Enforcement and Execution of Foreign Awards

When a party seeking enforcement of a New York Convention award under the provisions of the Act, must make an application to the Court of competent jurisdiction with the following documents:

i. The original/duly authenticated copy of the award;

ii. The original/duly authenticated copy of the agreement; and

iii. Such evidence as may be necessary to prove that the award is a foreign award.

There are several requirements for a foreign Arbitral Award to be enforceable under the Act.

A. Commercial Transaction

The award must be given in a convention country to resolve commercial disputes arising out of a legal relationship. In the case of RM Investment & Trading v Boeing, the Supreme Court observed that the term “commercial” should be liberally construed as having regard to manifold activities which are an integral part of international trade.

B. Written Agreement

The Geneva Convention and the New York
Convention provide that a foreign arbitral agreement must be made in writing, although it need not be worded formally or be in accordance with a particular format.

C. Agreement Must be Valid

The foreign award must be valid and arise from an enforceable commercial agreement. In the case of *Khardah Company v. Raymon & Co. (India)*⁵ the Supreme Court held that an arbitration clause cannot be enforceable when the agreement of which it forms an integral part is declared illegal.

D. Award Must be Unambiguous

In the case of *Koch Navigation v. Hindustan Petroleum Corp*⁶ the Supreme Court held that Courts must give effect to an award that is clear, unambiguous and capable of resolution under Indian law.

Under Sections 48 of the Act, in case of a New York Convention award, an Indian Court can refuse to enforce a foreign Arbitral Award if it falls within the scope of the following statutory defenses:

i. the parties to the agreement are under some incapacity;

ii. the agreement is void;

iii. the award contains decisions on matters beyond the scope of the arbitration agreement;

iv. the composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;

v. the award has been set aside or suspended by a competent authority of the country in which it was made;

vi. the subject matter of dispute cannot be settled by arbitration under Indian law, or

vii. the enforcement of the award would be contrary to Indian public policy.

The term public policy as mentioned under Section 48 (2) (b) is one of the conditions to be satisfied before enforcing a foreign award. The Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.*⁶⁷ ("*Renusagar*") held that the enforcement of foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to-

i. fundamental policy of India; or

ii. the interest of India; or

iii. justice or morality.

Thus, by the above decisions the Courts in India have laid down certain threshold which defines public policy for enforcing foreign awards in India. The Courts after the land mark judgment have further narrowed down the meaning of the word public policy in order to give effect to the Act.

The test of public policy was further narrowed down in another case of *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*,⁶⁸ where the Court was posed with an argument that the impugned award was opposed to public policy under Indian law, as the partner of the firm is not empowered to bind the partnership firm into referring the dispute to arbitration and since the partner of the defendants had done so in the present case, enforcement of an award made pursuant to such an arbitration could not be enforced. It was thus held that even if the enforcement of the award was against the mandate of the Partnership Act that alone would not render it violative of public policy.

The Delhi High Court in *Toepfer International Asia Pvt. Ltd. v. Priyanka Overseas Pvt. Ltd.*,⁶⁹ decided on the question where trivial illegalities were to be excluded; in this case the date of repudiation was fixed by the Arbitral Tribunal based on a date of repudiation that was against the provision of the Contract, it was held that the law of the land mandated that the Tribunal should rule in accordance with the terms of the contract, and hence the award should be set aside to the extent to which it was not in consonance with the contract. Hence damages that would have been arrived at had the terms of the contract been followed, were awarded.

In *Penn Racquet Sport v. Mayor International Ltd*⁷⁰, the petitioner, a company based in Arizona, sought to enforce in India an ICC award passed in its favor. The Respondent, an Indian company, challenged the execution of the award on grounds

⁵ AIR 1962 SC 1810
⁶ AIR 1989 SC 2198
⁷ (1994) 2 Arb LR 405
⁸ (2008) 4 Arb LR 497
⁹ 2007 (4) ArbLR 499 (Delhi)
¹⁰ 2011 (1) ArbLR 244 (Delhi)
inter alia that the award was contrary to the public policy of India. The Delhi High Court, in a well-reasoned decision, rejected the objections raised by the Indian company and held that the foreign award passed in favor of the American company was enforceable in India. It held that merely because the award went against the interest of an Indian company was not enough to qualify as working against the "public policy of India".

However, in *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (*Lal Mahal*), it has been held that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in *Saw Pipes* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b). The Supreme Court further discussed *Phulchand Exports Limited v. O.O.O. Patriot* (*Phulchand*), wherein it was accepted that the meaning given to the expression "public policy of India" in Section 34 in *Saw Pipes* must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. The Supreme Court concluded that "public policy of India" used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal does not lay down correct law and has hence overruled the earlier decisions on this point.

On fulfilling the statutory conditions mentioned above, a foreign award will be deemed a decree of the Indian Court enforcing the award and thereafter will be binding for all purposes on the parties subject to the award.

The Supreme Court has held that no separate application need be filed for enforcement of the award. A single application for enforcement of award would undergo a two-stage process. In the first stage, the enforceability of the award, having regard to the requirements of the Act (New York Convention grounds) would be determined. Foreign Arbitration Awards if valid are treated on par with a decree passed by an Indian Civil Court and they are enforceable by the Indian Courts having jurisdiction as if the decree has been passed by such Courts.74

Once the Court decides that the foreign award is enforceable, it shall proceed to take further steps for execution of the same, the process of which is identical to the process of execution of a domestic award.

### III. Appealable Orders

Under Section 50 of the Act, an appeal can be filed by a party against those orders passed under Section 45 and Section 48 of the Act. However, no second appeal can be filed against the order passed under this Section. These orders are only appealable under Article 136 of the Constitution of India ("Constitution") and such an appeal is filed before the Supreme Court.

The Supreme Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd* held that:

> "While a second appeal is barred by Section 50, appeal under Article 136 of the Constitution of India to the Supreme Court has not been taken away. However, Article 136 does not provide a party a right to an appeal, it is a discretion which the Supreme Court may choose to exercise. Thus, where there existed an alternative remedy in the form of a revision under Section 115 of the Civil Procedure Code or under Article 227 of the Constitution before the High Court, the Supreme Court refused to hear an appeal under Article 136 even though special leave had initially been granted..."75

Out of several issues raised in *Jindal Exports Ltd. v. Fuerst Day Lawson Ltd.*, one was, whether a Letters Patent Appeal would lie against an order under Section 50 of the Act wherein a petition seeking execution of an award was dismissed, no appeal
was maintainable under the Act. Further the Single Judge under Section 45 refused to refer the parties to arbitration, a Letters Patent Appeal was filed against the impugned order. The matter was later referred to the Supreme Court to clarify the stand whether the Letters Patent Appeal was maintainable?

The Supreme Court in its decision held:

“... In light of the discussions made above, it must be held that no letters patent appeal will lie against an order which is not appealable under Section 50 of the Arbitration and Conciliation Act, 1996...”

Thus it is clearly understood that an order under Section 45 is only appealable under Article 136 of the Constitution.
7. Difficulties Faced in an ICA Against Indian Parties

I. Applicability of Part I

A bare reading of the preamble of the Act clearly shows the purpose of the legislation of the Act, especially the bifurcation of the Act into different parts. But, the Courts in India have interpreted the Act in a unique manner, extending the extent of judicial intervention in ICA. But with the growing pro-arbitration stand by the Indian Courts, this difficulty seems to now be disappearing.

A. Ability to obtain Interim Reliefs

In Bhatia International the Supreme Court held that—

"...an ouster of jurisdiction cannot be implied but expressed provisions of Part I of the Arbitration and Conciliation Act, 1996 are applicable also to international commercial arbitration which takes place outside India unless the parties by agreement expressly or impliedly exclude it or any of its provision..."

Thus, making provisions of Part I of the Act applicable to ICAs held out of India unless, the parties by agreement have expressly or impliedly excluded such provisions.

The issue in Bhatia International was regarding the scope/applicability of Section 9 of the Act relating to grant of interim reliefs in arbitrations held outside India. The Supreme Court with a well-reasoned judgment and keeping in mind the intent of the legislation of providing uniform and fair mode of resolution of disputes pertaining to ICA adopted a broader interpretation of the provisions. ICA as defined under Section 2 (f) of the Act does not distinguish between ICA held in India or outside India. The Act is specifically segregated for domestic and international arbitration and separate provisions have been inserted therein. The Court held that as there were no provisions for interim reliefs under Part II, the intervention of Courts in arbitrations held outside India was inevitable, with the sole aim of not leaving any party remediless. Thus, the Supreme Court held that provisions of Part I of the Act, would apply to all arbitrations and to all proceedings relating thereto.

However, in Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc., 77 ("BALCO"), the Supreme Court has over-ruled Bhatia International, making Part I of the Act applicable only when the seat of arbitration is in India for arbitration agreements made post September 6, 2012.

Thus, the judgment by overruling Bhatia International has ruled out the possibility of seeking assistance of Indian Courts to obtain interim reliefs against Indian parties in arbitration agreements executed after September 6, 2012 with the seat of arbitration outside India.

The law however remains unchanged for the arbitration agreements executed before September 6, 2012 and would depend on the arbitration agreement and the implied or express applicability of Part I of the Act to it.

B. Ability to Challenge Foreign Awards in India

The Supreme Court further supported the principle laid down by the Court in Bhatia International, with regards to applicability of Part I of the Act to ICA in the case of Venture Global Engineering v. Satyam Computer Services Ltd. and Anr., 78 ("Venture Global"). The Supreme Court, contentiously, imported the ratio of Bhatia International, though the issue here was pertaining to enforcement of foreign awards under Part I of the Act.

Adopting the approach upheld in Bhatia International for providing interim reliefs, the Supreme Court applied the same analogy, making Part I of the Act applicable to ICA and allowing a

---

77. Supra Note at 2
78. AIR 2008 SC 1061
person to challenge a foreign award under Section 34 of the Act. Thus exceeding beyond the statutory provisions and transgressing the legislative intentions by creating new procedure for challenge of foreign awards. Thus, the judgment undermined the very purpose for which the Act for brought in force and the 1940 Act was repelled.

Further the Courts even extended their jurisdiction to the proceedings which had a close or intimate relation to India, ‘...in present case, award had an intimate and close nexus to India as company was situated in India and the transfer of ownership interest shall be made in India under the laws of India...’

However, in BALCO, the Court following the principles of literal interpretation and giving regard to the legislative intention held that applicability of Part I of the Act is limited only to arbitrations held in India and omission of the word “only” from Section 2(2), as according to Court had no relevance. It further observed that the present wording of the Act does not deviate from the territoriality principle as accepted under Model Law and absence of “only” in the said provision does not change the content/intention of the legislature. The Court concluded that Part I of the Act would be applicable only in cases where the seat of arbitration was in India. The judgment by further clarifying that no annulment proceedings would lie in India against an award made outside India, has got the Indian arbitration law at par with other international jurisdictions. It has eased the difficulties the foreign investors/players have been facing in enforcing foreign awards against Indian parties.

II. Public Policy

The narrow construction of the public policy clause with regard to foreign award was the first mandate of the Supreme Court in Renusagar. The Supreme Court had explicitly stated that the expression “public policy” with regard to a foreign award does not cover the field covered by the words “laws of India”.

Thus, though there was a wide interpretation of the term “public policy” vis-à-vis domestic awards, there was still a very narrow construction of the term “public policy” when it concerned foreign awards in India.

But as explained above, the Supreme Court opened the possibility of challenge to a foreign award in India as if it was a domestic award, through Bhatia International and Venture Global, under Section 34 of the Act, making it difficult to avoid prolonged litigation while enforcing foreign awards in India.

Subsequently, to make matters worse, the Supreme Court in its judgment dated October 12, 2011 in the matter of Phulchand Exports Ltd. v. OOO Patriot held that “patent illegality” under the term “public policy of India”, as laid down in Saw Pipes, needed to be looked at while examining the enforcement of a foreign award under Section 48(2)(b) of Act. By examining the validity of a foreign award under the laws of India, the Supreme Court has struck a heavy blow on the narrow construction that Renusagar had sought to propagate.

However in September 2012 through its decision in BALCO and subsequently through its decision in Lal Mahal, the Supreme Court has been able to secure the sanctity of a foreign award and remove obstacles to its enforcement in India.

In Lal Mahal, the Supreme Court while dealing with objections to enforceability of certain foreign awards on the grounds that such awards are opposed to the public policy of India and while overruling Phulchand, has significantly curtailed the scope of the expression 'public policy' as found under Section 48(2)(b) of the Act, thereby limiting the scope of challenge to enforcement of awards passed in foreign seated arbitrations.

However, in Western Geco, by widely defining the term “fundamental policy of India” which is recognized as an ingredient of public policy both under Renusagar and Saw Pipes, the Supreme Court seems to have taken a regressive step. Though Western Geco was delivered under Section 34 of the Act, its findings may in the future impact the interpretation of the term ‘public policy’ even with regards to arbitrations seated outside India.

79. Supra Note at 2
80. Supra Note at 74.
81. Supra Note at 72.

Thus, one can see that the difficulties faced in an ICA against Indian parties have been gradually but steadily decreasing. The proposed amendments to the act would make India a preferred seat for International Arbitration. Besides the aforementioned, the Courts in India in recent times have taken into consideration the judicial intervention which has hampered the arbitration proceedings in India and through several pro-arbitration rulings removed many hurdles, which parties face while arbitrating against Indian opponents.

The significant pro-arbitration developments in the last three years are summarized hereunder:

I. The 246th Law Commission Report

Comment: Overhaul suggested for the Act to make India an International Arbitration hub

Law Commission releases proposed amendments to the Arbitration & Conciliation Act, 1996; Large-scale amendments are designed to plug major gaps identified over time and if implemented, will work to impart confidence in Indian arbitration and recognition and boost to institutional arbitration in India.

II. World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte. Ltd

Comment: Supreme Court held that allegations of fraud are not a bar to foreign seated arbitration

The Supreme Court held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of the Act i.e. in cases where the arbitration agreement is either (i) null and void or (ii) inoperative or (iii) incapable of being performed and expressly removed allegations of fraud as a bar to refer parties to foreign seated arbitrations

III. Enercon (India) Ltd. & Ors. v. Enercon GmBH & Anr.

Comment: Supreme Court brings Indian Arbitration Law up to International Standards

The Supreme Court rendered a landmark decision affirming the pro-arbitration outlook the Indian courts have developed in the past few years. This judgment is a step in the right direction to bring Indian arbitration law in line with international jurisprudence and will aid India in being perceived as an arbitration-friendly jurisdiction. The Court held that an arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear; any allegation of non-conclusion of the main contract is immaterial. If the intention to arbitrate is clear, the court can make good an omission to make the arbitration agreement workable. Sections 8, 10, 11 and 45 of the Arbitration and Conciliation Act are mere machinery provisions for the Court to support and aid arbitration. The seat of arbitration would be the country whose law is chosen as the curial law (law of arbitration) by the parties. The courts of the seat of arbitration have the exclusive jurisdiction to exercise supervisory powers over the arbitration process. The courts of the venue of arbitration cannot have concurrent jurisdiction in this regard.

IV. Reliance Industries Ltd. & Ors. v. Union of India

Comment: Supreme Court of India considers impartiality and independence in appointment of arbitrator

82. Supra Note at 10
83. Supra Note at 14
84. Supra Note at 15
Supreme Court held that it is important to ensure that doubts are not cast on neutrality, impartially and independence of the Arbitral Tribunal. It reaffirmed that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute. After relying on renowned scholars it held that qualification, experience and integrity should be the criteria for appointment of an arbitrator.

V. Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010, Delhi 

*Comment:* Supreme Court held that fraud is arbitrable under Indian law

The Supreme Court has held that allegations of fraud and other malpractices are arbitrable in India. *N. Radhakrishnan* does not lay down the correct law. Contention of substantive contract being void / voidable is not a bar to arbitration and the court must follow the policy of least interference. The court further held that arbitration and criminal proceedings may continue simultaneously

VI. Union of India v. U.P. State Bridge Corp Ltd 

*Comment:* The Supreme Court rules on independence and conduct of government arbitrators

The Supreme Court acknowledged that it is a common sight that government officers are appointed as arbitrators, because of their status and position; discharge of their other duties assumes more importance and their role as arbitrators takes a back seat - this kind of behavior showing a casual approach in arbitration is anathema to the very genesis of arbitration. The Court directed that where the government assumes the authority and power to appoint the arbitral tribunal, it should be vigilant and responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner. The Court further held that the principle of ‘default procedure’ will apply and courts are not powerless to remedy situations arising from inaction of arbitral tribunals (in government contracts) to protect the interest of all parties

VII. Associate Builders v. Delhi Development Authority

*Comment:* Supreme Court clarifies the narrow scope of ‘public policy’ for challenge of Indian Award

Supreme Court provided guidance on the term ‘public policy’ under Section 34 of the Act and clarifies the extent of judicial intervention in a India seated arbitration. The Court discussed the term ‘morality’ in a challenge under Section 34 of the Act and draws a distinction between ‘error of law’ and ‘error of fact’ and the extent of interference permissible to that effect. The court further held that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected unless the arbitrators approach is arbitrary or capricious.

VIII. The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.

*Comment:* Calcutta High Court refused to injunct investment arbitration against India

The Calcutta High Court held that if there is a valid arbitration agreement between the parties; there is no escape from arbitration. Unless the facts and circumstances demonstrate that foreign arbitration would cause a demonstrable injustice, civil courts in India would not exercise its jurisdiction to stay foreign arbitration. An anti-arbitration injunction can be granted only if (a) the Court is of the view that no agreement exists between the parties; or (b) the arbitration agreement is null and void, inoperative or incapable of being performed; or (c) the continuation of foreign arbitration proceeding might be oppressive.

---

85. *Supra Note* at 9
86. *Supra Note* at 16
87. *Supra Note* at 42
88. 2014 SCC OnLine Cal 17695
or vexatious or unconscionable. The Court held that whether a claim falls within the parameters of a Bilateral Investment Treaty would only be decided by an arbitral tribunal, duly constituted.

**IX. Bharat Aluminum Co. v Kaiser Aluminum Technical Service, Inc**

*Comment:* Supreme Court removed interference of Indian Courts in foreign seated arbitrations

The constitutional bench of the Supreme Court after laudable consideration of the jurisprudence laid down by various Indian & foreign judgments and writings of renowned authors, ruled that its findings in *Bhatia International* and *Venture Global* were incorrect. It concluded that Part I of the Act has no application to arbitrations seated outside India, irrespective of the fact that whether parties chose to apply the Act or not, thereby getting Indian law in line with the well settled principle recognized internationally that “the seat of arbitration is intended to be its center of gravity”. Although the Court has overruled many of its previous decisions, it provides no relief to parties who have executed their arbitration agreements prior to the date of the present judgment, as the Court directed that the overruling was merely prospective and the laws laid down therein applied only to arbitration agreements made after September 6, 2012.

**X. Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.**

*Comment:* Supreme Court refers non-signatories to arbitration agreement to arbitration

In yet another landmark ruling, the Supreme Court has held that the expression ‘person claiming through or under’ as provided under Section 45 of the Act would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can pray for and be referred to arbitration. This ruling has widespread implications for foreign investors and parties as in certain exceptional cases involving composite transactions and interlinked agreements, even non-parties such as the parent company, subsidiary, group companies or directors can be referred to and made parties to ICA.

**XI. Shri Lal Mahal Ltd. v. Progetto Grano Spa**

*Comment:* Supreme Court made enforcement of foreign awards easier by removing ‘patent illegality’ from the scope of public policy

The ever-growing judicial support to ICA and the seminal shift in judicial mindset is now more than established from a landmark ruling of the Supreme Court, wherein the Court has in fact overruled its own decision passed in *Phulchand*. The Supreme Court while dealing with objections to enforceability of certain foreign awards on the grounds that such awards are opposed to the public policy of India, has significantly curtailed the scope of the expression ‘public policy’ as found under Section 48(2)(b) of the Act and thereby limiting the scope of challenge to enforcement of awards passed in foreign seated arbitrations. Therefore, enforcement of foreign awards would not be refused so easily. Thus, a practical takeaway from the above would be to give preference to a foreign seated arbitration as a mechanism for dispute resolution as this would afford a speedy remedy without significant Court interference.

**XII. Mulheim Pipe coatings GmbH v. Welspun Fintrade Ltd and Anr**

*Comment:* Bombay High Court reaffirmed and explained separability of an arbitration clause

The Bombay High Court formulated the principles of the doctrine of severability and held that an arbitration clause in a share purchase agreement could survive annulment of the share purchase agreement by the parties. The Court held that for the arbitration agreement to be null and void, inoperative or incapable of performance, the doctrine

---

89. Supra Note at 2
90. Supra Note at 64.
91. Supra Note at 72
of separability requires a direct impeachment of the arbitration agreement and not a simple parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. By applying this principle, it upheld the validity of arbitration agreement within a share purchase agreement which was declared null and void by a settlement agreement entered into by the parties.

XIII. Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd

Comment: Bombay High Court clarified the prospective application of BALCO

The Bombay High Court provided assistance to a certain degree and indicated that the interpretation to various provisions of the statute as provided in BALCO would not be limited to a prospective application. As per the judgment, the question regarding whether Part I would apply to an arbitration where the arbitration agreement was entered into prior to September 6, 2012 would be decided in accordance with the principle laid down in the Bhatia International case. However having once decided that Part I applies, the question as to which Court would have jurisdiction to entertain applications under Section 9 or Section 34 of the Act etc. would be decided in accordance with the principles provided in the BALCO judgment. The Court explained that while the ratio of the BALCO judgment i.e. Part I of the Act would apply only to arbitrations seated in India, would operate with a prospective effect, the interpretation of Section 2(1) (e) of the Act as provided by the Supreme Court would not be limited to a prospective application.

XIV. Tata Capital Financial Services Limited v. M/s Deccan Chronicle Holdings Limited

Comment: Bombay High Court held existence of mortgage as no bar to arbitrating money claims

The recent judgment of the Bombay High Court in Tata Capital Financial Services Limited v. M/s Deccan Chronicle Holdings Limited gains significant importance in light of the recent spur in lending disputes. The Bombay High Court while dealing with a petition seeking interim reliefs in aid of arbitration under Section 9 of the Act has held that even though certain debts may be secured by a mortgage, the lender may choose to bring only a claim for recovery of the amounts due and not sue for enforcement of mortgage. Accordingly, as money claims arising under contracts are arbitrable disputes, Courts are empowered to grant interim reliefs under Section 9 of the Act.

XV. Antrix Corp. Ltd. v. Devas Multimedia P. Ltd

Comment: Supreme Court clarified its power to appoint an Arbitrator

This case is yet another example of the pro-arbitration approach adopted by the Supreme Court, where the Courts, to the extent possible, deter from interfering in the arbitration process or with the Arbitrators’ judgment. The Supreme Court has relied upon a fairly simple proposition that once an arbitration agreement has been invoked on a particular dispute and an Arbitrator has been appointed, the other party to the dispute cannot again independently invoke the provisions of the arbitration agreement. The issue revolved around a petition filed under Section 11 of the Act, wherein the Supreme Court relying on the above proposition held that once the power to appoint an Arbitrator has been exercised, no powers are left to refer the same dispute again to arbitration under Section 11 of the Act.

XVI. Bharat Oman Refineries Limited v. M/s. Mantech Consultants

Comment: Bombay High Court held Arbitration award delivered after efflux of prescribed time to be bad in law thereby ensuring timely adjudication of arbitration proceedings
The Division Bench of the Bombay High Court held that the award passed by the Arbitrator after an efflux of period prescribed in the agreement is bad in law and upheld the principle laid down in NBCC Limited v. J.G. Engineering Private Limited that the contract of arbitration is an independent contract and parties to such contract (including the Arbitrator) are bound by the terms of such contract. The present case, proceeds on the principle that if the arbitration agreement prescribes a period within which the award is to be passed, any award passed beyond such period would be bad in law unless the parties have mutually agreed to extend this period.

XVII. Denel (Proprietary Limited) v. Govt. of India, Ministry of Defence

*Comment:* Supreme Court clarified process of appointment of an Arbitrator

This case lays down two clear principles with regard to appointment of Arbitrator under Section 11(6) of the Act. First, failure to appoint an Arbitrator within 30 days as prescribed under Sections 11(4) and (5) of the Act does not amount to forfeiture of rights unless the opposite party has filed its petition under Section 11 (6) prior to the said appointment. Secondly, though it is a well-established principle that appointment is required to be done as per the terms and conditions of the contract, however if circumstances exist, an independent Arbitrator may be appointed as an exception to the general rule, if there is reasonable apprehension of bias and impartiality.

*[Note: The details of the significant developments are summarized in the Schedule below]*

97. (2012) 2 SCC 759
9. Conclusion

Thus, the Indian arbitration jurisprudence has been evolving since its inception to suit the needs and complexities of international trade and investment. Though a series of judicial decisions in the first decade of the new millennium showed lack of pro-arbitration approach by the Indian judiciary while interpreting arbitration laws, the trend has now changed and Indian courts are increasingly adopting a pro-arbitration approach.

Further, the Government too is committed to make India into an arbitration friendly country which could serve as an International Arbitration hub for the world. This is aimed to be achieved by amending the existing Act and bringing it to international standards. In totality, the road ahead looks very promising for International Arbitration in India and against Indian parties.
Schedules
I. The 246th Law Commission Report

- Law Commission releases proposed amendments to the Arbitration & Conciliation Act, 1996;
- Large-scale amendments are designed to plug major gaps identified over time and if implemented, will work to impart confidence in Indian arbitration;
- Recognition and boost to institutional arbitration;
- Spread of institutional arbitration.

B. Delays

In Court, before the Tribunals and risks under Bilateral Investment Treatises

Systemic delays do exist. The Law Commission Report seeks to deal with each issue in a systematic and analytical manner.

i. Appointment of an Arbitrator

The Law Commission Report proposes to make appointment of an arbitrator an administrative decision to be carried out by the High Court or the Supreme Court, as the case may be. This approach is designed to bring Indian arbitration in line with global best practices and also, to give effective meaning to the doctrine of Kompetenz-kompetenz. It is also provided that such an application be endeavored to be disposed of expeditiously, and also within a 60 day period, from service of notice.

The issue of jurisdiction of the arbitral tribunal, if in question, could be raised before the arbitral tribunal. Though the Law Commission Report provides for a challenge of refusal to appoint an arbitrator under the Act, it does not provide for a situation where an arbitral tribunal holds that it has jurisdiction. Parties to arbitration will therefore need to go through the entire arbitral process before being able to challenge the jurisdiction of the arbitral tribunal itself.

ii. Challenges to Arbitral Awards

The Law Commission Report provides that such an application be endeavored to be disposed of expeditiously, and also within a 1 year day period, from service of notice. Moreover, in case of foreign awards, the Law Commission Report also has considered applications resisting the enforcement of a foreign award (under Section 48 of the Act) and incorporated similar timelines for (a) institution of an application resisting enforcement; and (b) disposal of such an application; under Section 48 of the Act.

In a well-calculated move designed to give comfort to foreign investors and also to mitigate risks under bilateral investment treatises, any court-related...
proceedings emanating out of an international commercial arbitration (where one party to the matter is a foreign party) is proposed to be dealt with by the High Court. The threshold for judicial intervention is also sought to be raised.

Separately, the Law Commission Report also recommends that specialized and dedicated arbitration benches be constituted (as done in the Delhi High Court).

C. Costs

A regime of actual costs incurred is proposed alongwith detailed points for consideration of the court or arbitral tribunal based on Rule 44 of the Civil Procedure Rules of England. A general rule requiring a losing party to pay actual costs of the successful party, as proposed, would certainly inspire most parties to be reasonable about resolving disputes. Moreover, manufactured counterclaims and dilatory tactics would be minimized and thus, the overall speed and efficacy of the arbitral process would be bound to improve. By keeping a check on parties' conduct including potential offers to settle the disputes, the Law Commission Report seeks to cast an obligation upon each party to the proceeding to cooperate and be reasonable at each step.

D. Setting aside of Domestic Award & Recognition/Enforcement of Foreign Awards

With a view to do away with the unintended uncertainties caused due to the Supreme Court's judgment in ONGC Vs. Saw Pipes, the Law Commission Report proposes a specific provision dealing with setting aside of a domestic award on the ground of patent illegality.

In cases of foreign award and awards passed in international commercial arbitration in India, it is recommended that a narrower construct be given to 'public policy', so as to include only (i) fundamental policy of Indian law; and (ii) most basic notions of justice or morality;

Tightening of the provisions seeking to set aside or challenge the enforcement of arbitral awards is a welcome move and will work to impart confidence in arbitration as an effective and speedy dispute resolution mechanism. However, the inability to set aside an award passed in a domestic arbitration on erroneous application of the law will require extreme judicial care and discipline by the arbitral tribunals as such award may henceforth go unchecked. Further, the additional ground of patent illegality will not be available to international commercial arbitrations which may be seated in India.

E. Judicial Intervention in Foreign Seated Arbitration

The Law Commission Report acknowledges the lack of efficacious redress available to a party seeking protection of assets located in India, where an arbitration is seated abroad. It also acknowledges the issues caused due to the operation of two parallel trails, evolving out the precedents set out in Bhatia International and Balco. In this regard, a large number of changes are proposed whereby it provides that:

- Indian courts will exercise jurisdiction under Part 1 of the Act only when the seat of arbitration is within India;
- Certain provisions in Part 1 of the Act, such as Section 9 (interim relief), Section 27 (court assistance for taking evidence), Section 37(1)(a) and 37(3) (Appealable orders), will remain available to parties in a foreign seated arbitration;
- The proposed changes will not affect applications pending before any judicial authority, relying upon the law set out in Bhatia.
- Legal recognition be accorded to the terms 'seat' and 'venue', consistent with international usage;

It remains to be seen how these proposed amendments will affect the rights of parties to foreign seated arbitrations, who have, relying on the law set out in Bhatia, explicitly agreed to exclude the application of Part 1 from their agreements.

F. Automatic Stay of Enforcement

Under Section 34 of the Act, an automatic stay of the award operated once an application to set aside the award was filed before an Indian court. The court was not permitted to impose terms upon the applicant for such stay. This situation is proposed to be rectified by: (a) requiring an applicant to specifically seek stay of an award; and (b) permitting a court to put a party to terms, keeping in mind the provisions for

---

100. (2003) 5 SCC 705;
102. (2012) 9 SCC 552;
grant of stay of money decrees under the Code of Civil Procedure, 1908. If implemented, one could see applicants being directed to deposit the award amount or portion thereof prior to any stay of the award being granted, thus reducing the incentive to litigate.

G. Interim orders by the Arbitral Tribunal

The Law Commission Report proposes that:

- Once a court grants interim relief under Section 9 of the Act, arbitration proceedings should be commenced within 60 days thereafter failing which the interim relief will cease to operate.
- Once the arbitral tribunal is constituted, a court will not ordinarily entertain a petition under Section 9 until the applicant is able to demonstrate that relief under Section 17 (before the arbitral tribunal) would not be efficacious.

Currently, there is no enforcement mechanism provided for orders passed by an arbitral tribunal. The Law Commission Report proposed to amend Section 17 of the Act expanding the scope of the provisions and ensure that an interim order passed by an arbitral tribunal is treated as an order of the court. The Law Commission report doesn’t provide for enforceability of interim orders passed by arbitral tribunals (both for emergency arbitrator and a duly constituted arbitral tribunal) in foreign seated arbitrations.

H. Arbitrability of Fraud

The Law Commission Report brings closure to the entire controversy by legislatively providing that allegations of fraud/corruption, complicated questions of fact or serious questions of law are expressly arbitrable. This will ensure that (a) there are no ingenious ‘fraud’ defenses are raised with a view to bypass the arbitration agreement; (b) investors can allege fraud without having to fear that the allegation would be used to evade arbitration.

I. Disclosures by Arbitrators

The Law Commission Report proposes amendments requiring written disclosures from the prospective arbitrator(s) with regard to any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. The nature of circumstances has also been detailed and there is an additional layer of checks and balances provided which is the incorporation, as a guide, of the red and orange lists of the International Bar Association Guidelines on Conflicts of Interest in International arbitrations. There is an express bar of certain persons also provided for which is waivable, but only after disputes have arisen and that too only by an express agreement in writing. This is done keeping in mind party autonomy, the grundnorm of arbitration.

Significantly, the proposed arbitrator is also required to disclose if there exist circumstances that are likely to affect his ability to devote sufficient time and to complete the arbitration within 24 months and pass the award within 3 months thereafter. The disclosures also require the arbitrator to disclose his ongoing arbitrations. While the idea of requiring such a disclosure is certainly welcomed with open arms, there is no long stop provided requiring the tribunal to approach the court and seek additional time by demonstrating cause, should the 24 months (for completion of the arbitration proceedings) or 3 months (for passing of the award) be insufficient.

J. Parties to Arbitration

Taking heed from the judgment of the Supreme Court of India in Chloro Controls \(^{103}\), the definition of the word ‘party’ to an arbitration agreement has been expanded to also include persons claiming through or under such party. This would mean that going forward, arbitration may not be limited simply to signatories of the arbitration agreement.

K. Power of the Arbitral Tribunal to Award Interest

Rationalizing the provision permitting grant of interest, the Law Commission Report proposes to move away from the statutory 18% p.a. as currently provided for in Section 31 of the Act and instead, move to a market based determination in line with commercial realities.

L. Arbitration Agreement

In addition to other amendments, with a view to bring Indian law in conformity with UNCITRAL Model law, it is proposed that an arbitration agreement can additionally be concluded by electronic communication.

\(^{103}\) (2013) 1 SCC 641
M. Statement of Defence

An amendment is proposed to grant discretion to the arbitral tribunal to treat the right of the Respondent to file a statement of defence as having been forfeited, where such statement is not filed within the prescribed time.

N. Arbitrator’s Fees

The Law Commission Report recommends, for domestic ad hoc arbitrations, a model schedule of fees, which will be updated regularly to ensure that they remain realistic. As international commercial arbitrations involve foreign parties who have different values and standards as well as institutional rules having their own schedule of fees, these recommendations do not, nor are asked to, capture the requirements of such arbitrations. It may be pertinent to note that international commercial arbitrations held in India do also share arbitrators from the same pool as domestic ad-hoc arbitrations and thus, the common issues raised of high arbitrator’s fees may not be addressed insofar as international commercial arbitrations being held in India are concerned. Also, these are merely recommendations and are in no way binding upon any prospective arbitrators.

O. Conduct of Arbitral Proceedings

The Law Commission Report attempts to discourage the practice of frequent adjournments as well as seeks to push for continuous sittings of the tribunal for recording evidence and arguments. However, inspite of acknowledging that formal sittings merely for compliances should be avoided and use of technologies like video-conferencing and tele-conferencing be encouraged, the Law Commission Report fails to incorporate such recommendations in its proposed amendments.

II. Conclusion

The Law Commission Report attempts to identify and treat each malady plaguing arbitration in India with clinical precision. Each proposed amendment attempts to not only remedy the malady but also seeks to set up the stage for arbitration in India to achieve a higher plane of growth. There do remain certain gaps but this appears to be a well thought effort to plug larger issues affecting the country and if implemented, will certainly boost confidence in the Indian arbitration space.

Arbitration as a dispute resolution mechanism has not found favour due to a number of reasons. With a Government that is eyeing judicial reform, clear and precise amendments which are bound to find favour and imparts confidence to foreign investors should find adequate backing. It will be interesting to see how soon, if at all, these amendments are implemented. The consequent acceptance and manner in which the proposed amendments will actually be interpreted by the judiciary is also something that only time will tell.
Supreme Court held that allegation of fraud is not a bar to refer parties to foreign seated arbitrations;

The law does not require a formal application to refer parties to arbitration;

If an arbitration agreement exists and a party seeks reference to a foreign seated arbitration, court is obliged to refer the parties to arbitration;

The only exception is in cases where the court finds the arbitration agreement to be null and void or inoperative or incapable of being performed.

I. Introduction

In a landmark decision the Supreme Court of India has expressly removed allegations of fraud as a bar to refer parties to foreign seated arbitrations. The Supreme Court by its decision dated January 24, 2014 in World Sport Group (Mauritius) Ltd ("WSG") v. MSM Satellite (Singapore) Pte. Ltd ("MSM") set aside the judgment of the Division Bench of the Bombay High Court ("Bombay HC") in MSM Satellite (Singapore) Pte. Ltd v. World Sport Group (Mauritius) Ltd dated September 17, 2010 ("Impugned Judgment"). Previously as the law stood, allegations of fraud were arguably not arbitrable under Indian Law. The Supreme Court has now clarified the position, removing another possible hurdle that one could face while arbitration against Indian Parties outside India.

II. Background

The dispute pertained to obtaining media rights for the Indian sub-continent from the Board of Cricket Control of India. In this regard WSG and MSM entered into a Deed for Provision of Facilitation Services ("Facilitation Deed"), where under MSM was to pay WSG ₹ 4,250,000,000 as facilitation fees. The Facilitation Deed was governed by English Law and parties had agreed to settle their disputes through arbitration before the International Chamber of Commerce ("ICC"), with a seat of arbitration in Singapore ("Arbitration Agreement").

Eventually, MSM rescinded the Facilitation Deed alleging certain misrepresentations and fraud against WSG and initiated a civil action before the Bombay HC for inter alia a declaration that the Facilitation Deed was void an for recovery of sums already paid to WSG. WSG filed a request for arbitration with ICC and ICC issued notice to the MSM to file its answer. In response MSM filed initiated a fresh action seeking an anti-arbitration injunction against WSG from proceeding with the ICC arbitration.

III. MSM'S Case

It was MSM's case that since the Facilitation Deed, which contained the Arbitration Agreement, in null and void on account of the misrepresentation and fraud of WSG, the Arbitration Agreement itself was void and could not be invoked.

IV. WSG'S Case

It was WSG's case unless the Arbitration Agreement, itself, apart from the Facilitation Deed, is assailed as vitiating by fraud or misrepresentation; the Arbitral Tribunal will have jurisdiction to decide all issues including validity and scope of the arbitration agreement.

V. Impugned Judgment

The Bombay HC had, in the impugned Judgment, held that disputes where allegation of fraud and serious malpractice on the part of a party are in issue, it is only the court which can decide these issues through furtherance of judicial evidence by the party and these issues cannot be properly gone into by the arbitrator, thereby granting the anti-arbitration injunction sought for. This decision of the Bombay HC was the only judgment where an Indian Court had held allegations of fraud as a bar to foreign seated
arbitrations, though such findings were prevalent in the sphere of domestic arbitrations.

VI. Judgment of the Supreme Court

The Supreme Court, by re-enforcing its pro-arbitration approach, set aside the Impugned Judgment and held that only bar to refer parties to foreign seated arbitrations are those which are specified in Section 45 of the Indian Arbitration and Conciliation Act, 1996 ("Act") i.e. in cases where the arbitration agreement is either (i) null and void or (ii) inoperative or (iii) incapable of being performed.

While explaining the term null and void, the Supreme Court clarified that the arbitration agreement being a separate agreement does not stand vitiating if the main contract is terminated, frustrated or is voidable at the option of one party. The Supreme Court held that a court will have to see in each case whether the arbitration agreement is also void along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void, thus accepting the submissions of WSG.

The Supreme Court interpreted the terms inoperative and incapable narrowly, adopting the interpretation of the international authors of these terms in Article II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"). The expression 'inoperative' is understood to cover situations where the arbitration agreement has ceased to have effect such as where parties may have by conduct or otherwise revoked the arbitration agreement. Further, 'incapable of being performed' covers situations where the arbitration cannot be effectively set into motion and covers the practical aspects of the prospective arbitration. Accordingly, the court held that arbitration agreements do not become "inoperative and incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act.

The Supreme Court also opined that no formal application is necessary to request a court to refer the matter to arbitration under Section 45 of the Act and in case a party so requests even through affidavit, a court is obliged to refer the matter to arbitration with the only exception being cases where the arbitration agreement is null and void, inoperative and incapable of being performed, thus limiting the scope of judicial scrutiny at the stage of referring a dispute to foreign seated arbitrations.

VII. Analysis

This is a welcome decision for foreign parties having arbitration agreements with Indian counter-parts. Before this judgment was delivered, Indian parties were increasing challenging arbitrability of disputes where allegations of fraud were made against them, relying of the Supreme Court's own decision in the case of N. Radhakrishnan v. Mastrozo Engineers & Ors 104 ("N Radhakrishnan"). By this decision the Supreme Court has limited the applicability of its decision in N Radhakrishnan to domestic arbitrations hence clarifying that, allegations of fraud against a party or consequential rescission of the main agreement is not a bar on arbitrability of disputes between the parties under Indian Law, when the seat of arbitration is outside India.

104. (2010) 1 SCC 72
3. Enercon (India) Ltd.& Ors. v. Enercon GmBH & Anr.

- An arbitration agreement is valid so far as the intention of the parties to resolve the disputes by arbitration is clear; any allegation of non-conclusion of the main contract is immaterial.
- If the intention to arbitrate is clear, the court can make good an omission to make the arbitration agreement workable.
- Sections 8, 10, 11 and 45 of the Arbitration and Conciliation Act are mere machinery provisions for the Court to support and aid arbitration.
- The seat of arbitration would be the country whose law is chosen as the curial law (law of arbitration) by the parties.
- The courts of the seat of arbitration have the exclusive jurisdiction to exercise supervisory powers over the arbitration process. The courts of the venue of arbitration cannot have concurrent jurisdiction in this regard.

I. Introduction

The Supreme Court ("Supreme Court") in Enercon (India) Ltd. & Ors. ("Appellants") v. Enercon GmBH & Anr("Defendants")105 has rendered a landmark decision affirming the pro-arbitration outlook the Indian courts have developed in the past few years. This judgment is a step in the right direction to bring Indian arbitration law in line with international jurisprudence and will aid India in being perceived as an arbitration-friendly jurisdiction.

II. Fact

A. Background

In 1994, Members of the Mehra family ("2nd and 3rd Appellants") and Enercon GmBH ("1st Respondent") entered into an agreement to start a joint venture business by setting up Enercon (India) Ltd ("1st Appellant"), with registered office in Daman, India.

On January 12, 1994 the 1st Appellant & 1st Respondent, entered into a Technical Know-How Agreement ("THKA") for transfer of technology from the 1st Respondent to the 1st Appellant. In April 2004 the THKA expired but the 1st Respondent continued its supply to the 1st Appellant. The parties thereafter negotiated possibility of further agreements. These negotiations were recorded in document titled "Heads of Agreement" ("Heads of Agreement").

On September 29, 2006 the parties entered into a document titled "Agreed Principles" which recorded the principles based on which new agreements were to be entered into. On the same day the Intellectual Property License Agreement ("IPLA") containing an arbitration clause ("Arbitration Agreement") at Clause 18, was allegedly executed between the Parties. Under the Arbitration Agreement:

- the arbitral tribunal was to consist of three arbitrators, of who one would be appointed by each of the two parties to the IPLA. The arbitrator appointed by the 1st Respondent was to act as the presiding arbitrator,
- the venue of the arbitration proceedings was London,
- the provisions of Indian Arbitration and Conciliation Act, 1996 ("the Act") were to apply, "and," and,
- Indian laws were to govern the Arbitration Agreement and the IPLA.

B. Disputes

Disputes arose between the parties when the 1st Respondent stopped all shipments of supply to India. In response, on September 11, 2007, the 2nd and 3rd Appellants filed a derivarite action before the Bombay High Court ("Bombay Suit"), seeking resumption of supply. In this action the 1st Respondent filed an application under Section 45 of the Act seeking reference of the disputes between the parties to arbitration. The Bombay Suit and the application remained pending for disposal.

105. Civil Appeal No.2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013), decided on February 14, 2014
On March 13, 2008, the 1st Respondent invoked arbitration and sought certain declaratory reliefs from the High Court of Justice, Queens Bench Division, Commercial Court, United Kingdom ("English High Court") including constitution of an arbitral tribunal under the IPLA.

On April 8, 2008 the Appellants filed a fresh suit ("Daman Suit") before the Court of Civil Judge, Sr. Division, Daman Trial Court ("Daman Court") seeking a declaration that the IPLA was not a concluded contract and correspondingly, there was no arbitration agreement between the parties. The Respondents, in response, filed an application under Section 45 of the Act before the Daman Court seeking reference of the disputes between the parties to arbitration ("Section 45 Application"). The Appellants on the other hand sought an anti-suit injunction over the English High Court Proceedings ("Anti-suit Application").

After adjudication by the Daman Court on the Section 45 Application and the Anti-suit Application in favour of the Appellants, which was subsequently overturned by the Daman Appellate Court in the favour of the Respondent, the Appellants filed two writ petitions challenging the decisions of the Daman Appellate Court in the Section 45 Application and the Anti-suit Application ("Writ Petitions") before the Bombay High Court.

The Bombay High Court dismissed the Writ Petitions vide its order dated October 5, 2012 ("Impugned Order") which decision was in appeal before the Supreme Court in the present case.

III. Findings

A. Validity of the Arbitration Agreement

The primary defense of the Appellants was that the IPLA was not a concluded contract and hence, the Arbitration Agreement contained therein could not be considered to constitute a valid arbitration agreement. The Respondents on the other hand contended that an intention to arbitrate was the only requirement for determining the existence of an arbitration agreement and it did not depend on the presence or absence of a concluded substantive contract between the parties.

The Supreme Court upholding the concept of separability of the arbitration clause from the underlying contract, ruled in favour of the Respondents. The Supreme Court held that Section 16 of the Act recognized that the substantive agreement and the arbitration agreement formed two separate contracts and the legitimacy and validity of the latter could not be affected even if one claims that the former is void or voidable or uncompleted.

The Supreme Court clarified that legislative mandate under Section 45 of the Act not to refer a dispute to arbitration in cases where the agreement is "null and void, inoperative or incapable of being performed" is applicable only to the arbitration agreement and a party must contend and prove one of these infirmities to exist in the arbitration agreement itself, as against the substantive agreement. The Supreme Court also clarified that any challenge to the validity of the substantive agreement was a dispute that would fall within the domain of the arbitral tribunal.

Reading the Heads of Agreement where the parties had agreed to be irrevocably bound by the Arbitration Agreement contained in the IPLA, along with the IPLA, the Supreme Court found a clear intention of parties to resolve their disputes via arbitration and concluded without hesitation that the parties must proceed with the arbitration.

B. Unworkability of the Arbitration Agreement

The Appellants contended that the Arbitration Agreement was unworkable as it prescribed for a three member arbitral tribunal but provided for the procedure of appointment for only two of these arbitrators.

The Respondents contended that an arbitration agreement was workable if a manifest intention to arbitrate existed between the parties, in which case any lacuna in an arbitration agreement could be cured. The Respondents relying on Sections 10 and 11 of the Act argued that the underlying object was to avoid failure of appointment of arbitrators.

The Supreme Court ruled in favour of the Respondents and held that courts must adopt a pragmatic, reasonable business person’s approach (and not a technical approach) while interpreting or construing an arbitration agreement and must strive to make a seemingly unworkable arbitration agreement workable. The Supreme Court opined that the legislative mandate to support this was contained

106. The Court, in this regard, relied upon the interpretation of Section 16 of the Act in the decision of Reva Electric Car Company Private Limited v. Green Mobil, (2012) 2 SCC 93
in Section 5 of the Act.

The Supreme Court held that courts must strictly follow the “least intervention” policy in arbitration process and that they must only play a supportive role in encouraging the arbitration proceedings rather than letting it come to a grinding halt. The Supreme Court opined that where there is an omission which would be obvious even to an officious bystander\(^1\) the court should make good such omission to give effect to the arbitration agreement.

The Supreme Court further held that provisions contained in Sections 8, 10, 11 and 45 of the Act are machinery provisions to ensure that parties can proceed to arbitration provided they have expressed the intention to arbitrate in terms of Section 7 or Section 44 of the Act and thus, while constructing an arbitration agreement the approach of courts should be to make it workable.

C. Distinction between Venue and Seat of Arbitration

The Appellants argued that for fixing the seat of arbitration the court would have to apply the ‘closest connection test’. They pointed out that as parties had made provisions of the Act applicable under the Arbitration Agreement; substantive law of the contract was Indian Law; law governing the arbitration was Indian law; curial law was Indian law; applicable Patent Law was that of India; IPLA was to be acted upon in India; enforcement of the award was to be done in India; the joint venture between the parties was to be acted upon in India and the relevant assets were in India, the seat of arbitration would be India.

The Respondents contended that the closest connection test was completely irrelevant as the parties had designated London the place for resolving their disputes. It was also submitted that London, and not India, was to be the seat of arbitration as the terms usually used to denote seat were “venue”, “place” or “seat” and the word “venue” in the Arbitration Agreement attached to London was a misnomer.

The Supreme Court relying on the established jurisprudence in *Bharat Aluminum Company Limited v. Kaiser Aluminum Technical Service*, Inc.\(^2\) concluded that by choosing to apply the Act, the parties had made a choice that the seat of arbitration is India. The Supreme Court held that having chosen all the three applicable laws to be Indian laws, the parties would not have intended to have created an exceptionally difficult situation, of extreme complexities, by fixing the seat of arbitration in London and thus, concluded that in the facts of the case, it would not be appropriate to read the word “venue” as “seat”, as contended by the Respondents.

D. Concurrent jurisdictions of venue and seat courts

In the Impugned Order, the Bombay High Court had concluded that though London was not the seat of arbitration, the English Courts would have concurrent jurisdiction since venue of arbitration was London.

The Supreme Court disagreed with this finding of the Bombay High Court and held that once the seat of arbitration was established, it was clear under both, Indian and English law\(^3\), that the courts of the seat of arbitration would have exclusive jurisdiction to exercise supervisory powers over the arbitration. It was further held that allowing different courts from different jurisdictions concurrent jurisdiction over an arbitration would lead to unnecessary complications and inconvenience which would, in effect, frustrate the purpose of arbitration i.e. a speedy, economic and final resolution of disputes.

Based on this finding, the Supreme Court granted the anti-suit injunction against the Respondents, restraining them from pursuing any reliefs before the English High Courts.

IV. Analysis

The international outlook and the pragmatic approach followed by the Supreme Court is clear evidence that the arbitration law in India has finally evolved to meet the demands of an ever-dynamic arbitration jurisprudence.

The Supreme Court though addressing issues involving an International Arbitration, took aid of provisions under Part I of the Act, making a point that the legislative mandate even in Part I of the Act is for courts to aid, support and facilitate arbitration.

---

1. As laid down in *Shirlaw v. Southern Foundries*, [1937 S. 1835]
2. (2012) 9 SCC 552
3. Reliance was placed upon the decision in *A v. B* [2007] 1 Lloyds Report 23
This indeed is welcome news for Indian and foreign parties alike. Parties would now be encouraged to choose India as the seat of arbitration.

Lastly, this judgment re-establishes the importance of specifically mentioning in the arbitration agreement the law governing it and the seat (not venue) of arbitration in order to avoid litigation.
4. Reliance Industries Ltd. & Ors. v. Union of India

- Supreme Court holds that it is important to ensure that doubts are not cast on neutrality, impartiality and independence of the Arbitral Tribunal;
- Supreme Court has re-affirmed that under Section 11(9) of the Act it is not mandatory for the court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute;
- Supreme Court after relying on renowned scholars has held that qualification, experience and integrity should be the criteria for appointment of an arbitrator;
- Victory is bitter-sweet for Petitioners – with the appointment coming after nearly 28 months of having sent Notice of Arbitration.

In Reliance Industries Ltd. & Ors. v. Union of India, the Hon’ble Supreme Court of India (“Supreme Court”) ruled that in an international commercial arbitration if the two nominated arbitrators failed to reach a consensus on the appointment of the third/presiding arbitrator, considerations of neutrality and impartiality are of great significance. The Supreme Court observed that considerations of nationality were not mandatory while making a decision on the appointment of the third arbitrator. This is certainly a welcome judgment as it provides clarity on the interpretation of Section 11(6) and 11(9) of the Arbitration and Conciliation Act, 1996 (“Act”).

II. Contentions by the Petitioners

The main issue related to appointment of the presiding arbitrator. The two relevant clauses are set out below:

A. Art. 33.5

“33.5 Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party fails to appoint an arbitrator within thirty (30) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed by the Chief Justice of India or by a person authorised by him within thirty (30) days of the date of receipt of such
request, from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings”.

B. Art. 33.6

“33.6 If the two arbitrators appointed by or on behalf of the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, at the request of either Party, the third arbitrator shall be appointed in accordance with Arbitration and Conciliation Act, 1996”.

Petitioners contended that the relevant clause of the PSC did not preclude appointment of a person of foreign nationality and that it was in fact required to instil a sense of impartiality and neutrality. Petitioners also submitted that UNCITRAL Rules which were in force when the PSC was drafted and entered into, recognized that while the appointing authority could appoint an arbitrator of the same nationality as that of the defaulting party (in the event where a party fails to nominate its arbitrator), but the presiding arbitrator that had to be appointed would be of the nationality other than that of the parties. Petitioners contended that the Arbitration Agreement provided for a greater degree of neutrality than the UNCITRAL Rules, by providing that in case one of the parties made a default in nominating its arbitrator then such arbitrator had to be appointed from a neutral nationality.112

III. Contentions by UOI

UOI contended that Arbitration Petition-2 had been filed under Sections 11(6) and 11(9) of the Act, read with Article 33.6113 of the PSC, which in effect, unlike Article 33.5114, did not require that the arbitrator to be appointed should be a foreign national. UOI argued that the Petitioners, by not objecting to the appointment of UOI’s nominee arbitrator, who was of Indian nationality, had waived the requirement that a foreign national be appointed as an arbitrator by the parties, under Article 33.5 of the PSC. Hence, Petitioners were estopped from insisting upon appointment of a foreign arbitrator.

It was also argued that the PSC is one of the most valued, crucial and sensitive contracts because it deals with license and exploration, discovery, development and production of the most valuable natural resources, viz. petroleum products, including crude oil and/or natural gas and hence its interpretation, and execution involved intricate and complex questions of law and facts relating to Indian conditions and Indian laws. Accordingly, UOI submitted that the parties at the time of entering into PSC conscientiously refrained from having the requirement that the third arbitrator should be a foreign national. It was further submitted that since the parties did not choose to have a foreign national to be appointed as the third arbitrator in Article 33.6, therefore, the parties intentionally chose not to make Section 11(1) of the Act115 applicable to them and instead agreed to proceed under Section 11(2)116 because they agreed to appoint an arbitrator without requiring him to be of any foreign nationality.

Finally, UOI submitted that appointment of a foreign national as the third arbitrator was not only legally untenable, but also undesirable, because as both BP and NIKO were multi-national companies, with presence/business connections in about 80 countries. UOI concluded that it was most desirable that a retired judge of the Supreme Court be made the presiding arbitrator.

IV. Judgment

The main issue related to interpretation of Articles 33.5 and 33.6 of the PSC. The Supreme Court rejected Petitioner’s contention that only a foreign national could be the presiding officer and Respondent’s contention that only an Indian could be the presiding officer. Supreme Court held that in terms of the Arbitration Agreement there leaves no concern that the Chief Justice of India (“CJI”), is to appoint the third/presiding arbitrator, who would be neutral, impartial and independent from anywhere in the world, including India. According to the Supreme Court, just as India could not be excluded, similarly the countries where BP and NIKO are domiciled, as an option from where the third arbitrator could be appointed, could not be ruled out. Supreme Court observed that the CJI while exercising jurisdiction under Section 11(6) of the Act was to be guided by

112. Article 33.5 of the PSC
113. Article 33.5 of the PSC provided for appointment of the second arbitrator incase the other party defaults in the making.
114. Article 33.6 of the PSC provided for appointment of the presiding arbitrator when the nominated arbitrators were unable to reach a consensus on the presiding arbitrator.
115. Section 11(1) of the Act provides that an arbitrator can be of any nationality, unless otherwise agreed by the parties.
116. Section 11(2) of the Act provides that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
the provisions contained in the Act and generally accepted practices in the other international jurisdictions. Supreme Court relied on Malaysian Airlines Systems BHD v. STIC Travels (P) Ltd. and MSA Nederland B.V. v. Larsen and Toubro Ltd, where it was held that while nationality of the arbitrator was a matter to be kept in view, it did not flow from Section 11(9) that the proposed arbitrator is necessarily disqualified because he belonged to the nationality of one of the parties. The word “may” in Section 11(9) of the Act was not used in the sense of “shall” and hence the provision was not mandatory. After considering the two earlier rulings, Supreme Court held that “…ratio in the aforesaid cases cannot be read to mean that in all circumstances, it is not possible to appoint an arbitrator of a nationality other than the parties involved in the litigation…”.

According to Supreme Court, unless the parties object otherwise, CJI can appoint an arbitrator belonging to the nationality of one of the parties, and in the event of an objection, the CJI would consider and if an arbitrator from a neutral jurisdiction could be appointed in light of such objections. According to Supreme Court, while taking such a decision, the CJI (or his nominee) could also keep in mind, cases where the parties had agreed that the law applicable to the case is the law of a country to which one of the parties belonged, whether there will be an overriding advantage to both the parties if an arbitrator having knowledge of the applicable law is appointed. Finally, the Supreme Court emphasized that the trend of the third arbitrator/presiding officer of a neutral nationality being appointed was now more or less universally accepted under the arbitration acts and arbitration rules in different jurisdictions and accordingly appointed former Chief Justice of New South Wales as the third arbitrator, from a neutral jurisdiction.

After the Supreme Court pronounced the above judgment on March 31, 2014, UOI brought to the attention of the Supreme Court that Hon’ble James Spigelman was one of the suggested arbitrators by Petitioner. However, during the proceedings, the Supreme Court observed that it would not rely on suggested arbitrators of the Petitioners as well as the Respondent. Consequently, the Supreme Court by way of an Order dated April 2, 2014 has recalled the appointment of Hon’ble James Spigelman and has noted that the substitute arbitrator shall be shortly appointed by a separate order.

V. Analysis

Independence and impartiality forms an integral part of any adjudicatory system, including ICA, as it affects the perception of administration of justice and administration of justice itself. While independence is generally understood to mean that the arbitrator has no stake or apparent conflict with the parties or the sum involved in the proceedings, impartiality means that the arbitrator allows equal opportunity to both the parties to present their case. Impartiality should be ascertained upon satisfaction of the tests laid down for ‘bias’, which again, can be divided under two categories, actual bias and apparent bias. As held in Locabail (UK Limited) v. Bayfield Properties Limited (“Locabail”), instances of actual bias happen when the judge is shown to have an interest in the outcome of the case which he is to decide or has decided, however, on the other hand, apparent bias, as explained in R v. Gough, means whether there is a real danger of bias.

The Supreme Court correctly held that it was important to ensure that no doubts were cast on the neutrality, impartially and independence of the arbitral tribunal. Before arriving at the reasoned conclusion, the Supreme Court referred to notable commentators and applied their view that qualification, experience and integrity should be the criteria for appointment of an arbitrator. Therefore, in the Indian scenario the CJI has been vested with a wide discretion to appoint an arbitrator in an ICA, taking into consideration all necessary factors which would preserve the integrity of the arbitration, and in essence, would not lead to any possibility of bias at a later date.

117. (2001) 1 SCC 509
118. (2005) 13 SCC 719
120. [2000] 1 QB 451
121. Court of Appeal (1992) 4 All ER 481

At Page 265 - “The fact that the arbitrator is of a neutral nationality is no guarantee of independence or impartiality. However, the appearance is better and thus it is a practice that is generally followed…”.

At Para 4.59 - “In an ideal world, the country in which the arbitrator was born, or the passport carried, should be irrelevant. The qualifications, experience, and integrity of the arbitrator should be the essential criteria…”
The other aspect which requires some consideration is that, although two different arbitration petitions were filed at the relevant time for seeking appointment of second as well as the presiding arbitrator, however, it took more than two years to complete the appointment process. The essence of arbitration lies in speedy resolution of a dispute, and if an arbitrator cannot be appointed at the earliest possible opportunity, the purpose would seem to be defeated.

The Supreme Court has held that:

- Allegations of fraud and other malpractices are arbitrable.
- *N. Radhakrishnan case* does not lay down the correct law
- Contention of substantive contract being void / voidable is not a bar to arbitration and the court must follow the policy of least interference
- Arbitration and criminal proceedings may continue simultaneously

I. Introduction

The Supreme Court of India, in *Swiss Timing Limited* [*Petitioner*] v. Organising Committee, Commonwealth Games 2010, Delhi [*Respondent*]123, has now held that the allegations of fraud can be determined by arbitration where an arbitration agreement exists between the parties. This sets a new, pro-arbitration tone to the issue of arbitrability of allegations of fraud in Indian seated arbitrations.

Previously, the Supreme Court, in *N. Radhakrishnan v. Maestro Engineers & Ors.*124 [*N. Radhakrishnan case*], had followed a conservative approach and held that serious allegations of fraud were to be determined by courts and not arbitral tribunals, if the party against whom such allegations were made so desired.

II. Facts

The Petitioner, a Swiss company, entered into an agreement [*Contract*] on March 11, 2010 with the Respondent for providing timing, score, result systems and supporting services required to conduct the Commonwealth Games in India. The Petitioner alleged that the Respondent had defaulted in making the payments due under the Contract. The Petitioner invoked arbitration under clause 38 [*Arbitration Agreement*] of the Contract. As the Respondent failed to nominate its arbitrator, the Petitioner approached the Supreme Court under Section 11125 of the Arbitration and Conciliation Act, 1996 [*Act*] for constitution of the arbitral tribunal.

III. Objections Raised by the Respondent

The Respondent, amongst other issues, raised the following primary objections:

- Under the Contract the parties had warranted that they would not indulge in corrupt practices to induce the execution of the Contract. The Respondent contended that the Petitioner had procured the Contract by indulging in corruption and hence, the Contract was void since its very inception (void ab-initio) and there was no basis for invoking the arbitration.

Interestingly, the Respondent, to establish corruption during execution of the Contract, sought to rely on the pending criminal proceedings initiated against Mr. Suresh Kalmadi (the then Chairman of the Respondent) and other officials of the Respondent on the allegations of corruption, cheating and commission of other fraudulent acts.

- The Respondent further placed reliance on the *N. Radhakrishnan case* wherein it was held that allegations of fraud and serious malpractices cannot be dealt with properly in arbitration.

- Lastly, the Respondent argued that since the criminal proceedings were pending in the trial court, simultaneous continuance of the arbitration

---

123. Arbitration Petition No. 34 of 2013
124. (2010) 1 SCC 72
could result in conflicting decisions between the two forums causing unnecessary confusion.

IV. Findings of the Supreme Court

A. Fraud held arbitrable - N. Radhakrishnan case held per incuriam

The Court has clearly held that the judgment in the N. Radhakrishnan case did not lay down the correct law as it failed to duly consider the earlier judgments of the Court in Hindustan Petroleum Corp case\(^{126}\) and Anand Gajapathi Raju case\(^{127}\), wherein it has been held that a civil court is obligated to direct parties before it to arbitration where there exists an arbitration agreement between such parties.

The Court further cited non-consideration of Section 16\(^{128}\) of the Act, as reason for the incorrectness of the law laid down in N. Radhakrishnan case. It was affirmed that by virtue of Section 16 and the frame of the Act, an arbitration clause is treated as independent from the underlying contract. Section 16 further provides that a decision by the arbitral tribunal holding the contract as null and void would not lead to the invalidity of the arbitration clause contained in such a contract.

It was emphasized that parties cannot be permitted to avoid arbitration unless they satisfy that doing so will be just and in the interest of all the parties.

B. Contention of substantive contract being void / voidable is no bar to arbitration

The Supreme Court highlighted that the courts should adopt a least interference policy in keeping with the general principle under Section 5 of the Act. Having jointly read Sections 5\(^{129}\) and 16 of the Act the Supreme Court held that all matters including the issue as to whether the main contract was void / voidable can be referred to arbitration.

Importantly, the Supreme Court has provided clarity on how objections regarding invalidity of the contract as bar to reference to arbitration have to be dealt with. It has been held that where a court may conclude that a contract is void without receiving any evidence, the court would be justified in declining a reference to arbitration, though such cases would not be common. Examples of situations where a court may reach such a conclusion without requirement of any evidence and upon reading of the contract would be in situations of wagering agreements, where both parties are under mistake of fact or where the consideration or object is forbidden by law. Drawing a distinction between void and voidable contracts, the Supreme Court highlighted that in cases where the defense taken is that a contract is voidable, it would not be possible to decline reference to arbitration. Such cases would include unsoundness of mind, coercion, fraud, undue influence and misrepresentation.

Accordingly, in respect of the Respondent’s contention that it had the right to terminate the Contract as the Contract had been executed by corrupt means, it was held that these contentions would have to be established in a proper forum on the basis of the oral and documentary evidence, produced by the parties, in support of their respective claims. A mere claim of the Contract being void would not suffice.

Interestingly, the Supreme Court has made an observation that defense of the contract being void is routinely taken to delay reference to arbitration and that such grounds should be summarily rejected unless there is clear indication of reasonable chance of success.

C. Arbitration and criminal proceedings may continue simultaneously

The Court rejected the contention of the Respondent that the arbitration should not be commenced pending the adjudication of the criminal proceedings against the officials. The court held that the possibility of conflicting decisions is not a bar against simultaneously proceeding with arbitration and criminal proceedings. The Court relying on the judgment of M.S. Sheriff v. State of Madras\(^{130}\), has held that the solitary consideration to restrain simultaneous civil and criminal proceedings is the likelihood of embarrassment to the accused.

---

\(^{126}\) Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503

\(^{127}\) P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Dead) & Ors. (2000) 4 SCC 539

\(^{128}\) For the text of Sections 5, 11 and 16 of the Act http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/Section_5_11_and_16.pdf

\(^{129}\) For the text of Sections 5, 11 and 16 of the Act http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/Section_5_11_and_16.pdf

\(^{130}\) AIR 1954 SC 397
Lastly, the Court highlighted that if the criminal proceedings result in an acquittal, it would leave little ground for challenging the validity of the underlying contract. Thereby any denial of reference at this stage would unnecessarily delay the arbitration. However, the Court has opined that if the award in arbitration was made in favour of the Petitioner, the Respondent would be at liberty to resist enforcement on the ground of subsequent conviction of the officials in criminal proceedings.

V. Analysis

The judgment provides a much awaited respite to Indian seated arbitrations. In cases of fraud and other malpractices, several arbitrations were stalled due to the objections to arbitrability of allegations of fraud. Parties would renege on their obligation to refer disputes to arbitration with such objections. The decision of the Supreme Court in the N. Radhakrishnan case would often be cited in support the defense that claims pertaining to fraud could not be arbitrated.

Now, with this judgment being passed by the Supreme Court, in circumstances where allegations of fraud and other malpractices have been made, the parties would be compelled to go before the arbitral tribunal for resolution of disputes even where the arbitration is seated in India. The judgment further indicates that allegations relating to corruption may also be capable of being decided by arbitral tribunal.

Furthermore, the Court’s view that the defense of a contract being void should ordinarily be summarily dismissed brings to fore the pro-arbitration progressive approach of the Indian judiciary. It is appreciable that the Supreme Court has promoted the independent nature of arbitration proceedings and encouraged the courts to merely act as vehicles of support which would aide expeditious arbitrations.

This judgment complements another watershed judgment of the Supreme Court, World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.131, which was pronounced earlier this year. Thereunder, the allegations of fraud did not prevent the court from referring the parties to a foreign seated arbitration under section 45 of the Act. Thus, the two judgments bring about a uniform positive change in the India arbitration law stance on the issue of arbitrability of the allegations of fraud.

131. AIR 2014 SC 968; Our analysis of the judgment can be viewed here http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/2215/html/1.html?no_cache=1
6. Union of India v. U.P. State Bridge Corp Ltd

The Supreme Court has:

- acknowledged that it is a common sight that government officers are appointed as arbitrators, because of their status and position; discharge of their other duties assumes more importance and their role as arbitrators takes a back seat - this kind of behavior showing a casual approach in arbitration is anathema to the very genesis of arbitration;
- directed that where the government assumes the authority and power to appoint the arbitral tribunal, it should be vigilant and responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner;
- held that the principle of 'default procedure' will apply and courts are not powerless to remedy situations arising from inaction of arbitral tribunals (in government contracts) to protect the interest of all parties.

III. Background

The parties had entered into an agreement, inter alia, for construction of a rail bridge across the river Ganga near Patna. The general conditions of contract contained arbitration as the dispute resolution mechanism. As is common in such contracts, or members of the tribunal were to be railway authorities. Disputes arose between the parties and in arbitral tribunal was constituted in 2007. This arbitration did not complete for over 4 years and in March 2011, when a request case was filed before the Delhi High Court due to vacancy in the tribunal, the High Court gave a last chance to the tribunal to complete the arbitral proceedings within a period of 3 months with a direction to hold regular sittings at Patna. It was also stated in the order that if arbitration proceedings were not completed within the fixed period, the respondent would be at liberty to approach the Court and the Court would be constrained to pass appropriate orders in accordance with the Arbitration and Conciliation Act, 1996 ("Act").

The arbitral tribunal did not complete the proceedings within the allotted time leading the respondent to approach the Delhi High Court in terms of liberty granted. The Delhi High Court took note of the various dates or hearing fixed by the tribunal in the 3 months granted by the High Court and came to the conclusion that the delay caused in the arbitral proceedings was intentional. It held that the members of the arbitral tribunal were continuing their dilatory tactics and were violating the specific directions of the High Court. The High Court termed this attitude of the tribunal as negligent with no sanctity for any law or for the orders of the High Court. The High Court allowed the request petition and set aside the mandate of the tribunal with the appointment of a sole arbitrator by the court. The appellant challenged this order before the Court contending that it was not open to the High Court to

---

132. Civil Appeal No. 8860 of 2014
appoint a sole arbitrator as (i) it was not empowered to constitute the arbitral tribunal on its own; and (ii) it was contrary to the arbitration clause.

IV. Judgment

The Court perused the provisions of the agreement as well as the Act. The Court was of the view that, taking into account the conduct of the arbitral tribunal from its inception and also after a life was granted by the Delhi High Court, the order of the Delhi High Court terminating the mandate of the arbitral tribunal was flawless.

The only question that remained was whether the substitute tribunal should have been appointed in terms of the agreement between the parties i.e. according to the rules applicable to the appointment of the arbitrator being replaced. The Court acknowledged that ordinarily, that would have been the position. However, referring to its earlier decision in North Eastern Railway v. Tripple Engineering Works, the court held that this position had seen significant erosion.

- In Ace Pipeline Contracts (P) Ltd v Bharat Petroleum Corporation Ltd: the Court held that while the contract between the parties must be adhered to, deviations in exceptional circumstances would be permissible;
- In Datar Switchgears Ltd. v. Tata Finance Ltd, Punj Lloyd Ltd. v. Petronet MHB Ltd and Union of India v. Bharat Battery Manufacturing Co. (P) Ltd: the Court held that the filing of a petition under Section 11(6) of the Act by an aggrieved party after the expiry of the stipulated period to appoint the arbitrator would mean that the right to appoint an arbitrator was forfeited by the other party; this would contain an implication that the Court would be free to deviate from the terms of the contract;
- The divergence in the approach to be taken by the court was resolved in Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Co. Limited, where the Court held that Section 11(6) empowered a court "to take the necessary measure", of course read alongwith the requirement of Section 11(8);
- In Deep Trading Co. v. Indian Oil Corporation the position stated in Punj Lloyd and related cases regarding the forfeiture of rights of the party responsible for appointment of arbitrator was reiterated and the view espoused in Patel Engineering regarding compliance to the qualifications of the arbitrator pursuant to Section 11(8) was deemed to be non-mandatory in nature;
- In Singh Builder Syndicate, the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that arbitration proceedings had not concluded for a very long time making a mockery of the process.

The Court, whilst reiterating the importance of speedy conclusion of arbitration proceedings, analyzed the pillars of arbitration, being:

- The First Pillar: Three General Principles – fair, speedy and inexpensive trial by an arbitral tribunal;
- The Second Pillar: The General Duty of the Tribunal;
- The Third Pillar: The General Duty of the Parties;
- The Fourth Pillar: Mandatory and Semi Mandatory Provisions;

The Court considered that where the government has assumed the role of appointment of the Tribunal to itself and appoints persons who are not able to devote time or become incapable of acting as arbitrators due to transfers etc., the principle of ‘default procedure’ will apply, and the court may step in to appoint an arbitrator by keeping aside the procedure which is agreed by the parties. It was clarified that this would depend on the facts of a particular case, but the court was not powerless in this regard.

The Court upheld the decision of the Delhi High Court.
V. Analysis

The Court has clearly taken heed of the ground level scenario which is emanating from the government appointing its own officers as arbitrators. While the Court has earlier frowned on this practice, it was upheld. Having a government officer as an arbitrator has not been very successful. It has led to a conundrum requiring the Court to step in and have a default procedure ready should the facts of a particular case require it.

The Court acknowledged that fair, speedy and inexpensive trial by an arbitration tribunal and party autonomy were fundamental principles of arbitration. In case of appointment of substitute arbitrators, the provisions of the arbitration clause would have to be followed in light of the principle of party autonomy. However, in certain cases, the principle of party autonomy would give way allowing the court to appoint the arbitrator.

The Court is slowly but surely clipping the wings of the government appointed arbitrators and ensuring that any default situation that arises due to this misadventure is corrected. This is being done to ensure that the principles on which arbitration is founded remain unscathed.
7. Associate Builders v. Delhi Development Authority

- Supreme Court provides guidance on the term ‘public policy’ under Section 34 of the Act and clarifies the extent of judicial intervention in an India seated arbitration;
- Supreme Court discusses the term ‘morality’ in a challenge under Section 34 of the Act;
- Supreme Court also draws a distinction between ‘error of law’ and ‘error of fact’ and the extent of interference permissible to that effect;
- Supreme Court further held that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected unless the arbitrators approach is arbitrary or capricious.

Recently, the Supreme Court of India (“Supreme Court”) in Associate Builders v. Delhi Development Authority, has dealt with some of the key issues involving challenge of an arbitral award in an arbitration seated in India. The Supreme Court discussed and clarified some of the earlier rulings on the scope of ‘public policy’ in Section 34 of the Arbitration and Conciliation Act, 1996 (“Act”), under several headings (viz. patent illegality, contrary to justice, contrary to morality, interest of India and fundamental policy of Indian law).

I. Facts

Associate Builder (“Appellant”) was awarded a construction contract for 168 middle income group houses and 56 lower income group houses in trilok puri in the trans-yamuna area by the Delhi Development Authority (“DDA/Respondent”). The understanding was that the contract will be completed in nine months for INR 87,66,678. However, the work came to be completed only after 34 months.

The Appellant alleged that the delay arose at the instance of the Respondent and subsequently made fifteen claims and consequently, Shri K.D. Bali was appointed as the sole arbitrator by the Delhi High Court to arbitrate the dispute (“Ld Arbitrator”). Ld Arbitrator allowed four claims of the Appellant and further, scaled down two claims on the reasoning that DDA was responsible for the delay in the execution of the contract.

Thereafter, DDA moved an application before the single judge of the Delhi High Court under Section 34 of the Act to set aside the award, which was dismissed on April 3, 2006. Against this order, an appeal was filed under Section 37 of the Act before the Division Bench of the Delhi High Court (“Division Bench”) and vide an order dated February 8, 2012, the Division Bench found the arbitral award to be incorrect and rejected the four claims and further scaled down Claims 12 and 13 (“Impugned Judgment”). Aggrieved by the Impugned Judgment, the Appellant approach the Supreme Court by way of a Special Leave Petition.

II. Issues

The primary issue before the Supreme Court was to decide the correctness of the Impugned Judgment. While deciding the same, the Supreme Court looked into the scope of ‘public policy’ as a ground for setting aside an award under Section 34(2)(b)(ii) of the Act. Supreme Court also considered the extent to which a court can replace the Ld Arbitrator’s conclusion with its own conclusion by way of judicial interference.

III. Contentions

A. Appellant’s Submissions

- The Division Bench has lost sight of the law laid down by the Supreme Court when it comes to challenges made to arbitral awards under Section 34 of the Act.
- The Division Bench has acted as a court of first
appeal and taken into consideration facts which were neither pleaded nor proved before the Ld Arbitrator.

- The Division Bench has wrongfully interfered with the award as no error of law arises thereunder. Further, it has failed to appreciate the legal position that the arbitrator is the sole judge of the quality and quantity of evidence to arrive at a finding.

B. Respondent’s Submissions

- The Ld Arbitrator’s award was in ignorance of the contractual provisions and that such an award amounts to a jurisdictional error by the Arbitrator and hence, the Division Bench has rightfully interfered with the award.

IV. Judgment

The Supreme Court allowed the appeal and set aside the Impugned Judgment. In effect, the Supreme Court refused to interfere with the arbitral award with the following reasoning:

First, Supreme Court observed that the grounds for interfering with an arbitral award are limited to those mentioned in Section 34 of the Act and held that merits of the award can be looked into only under the broad head of ‘public policy’. The Supreme Court relied on the landmark judgments like, Renusagar [142], Saw Pipes [143], McDermott International [144], Western Geco International Ltd [145], and others, and laid down the heads under the ground of ‘public policy’ as:

- “Fundamental Policy of Indian law” would include factors such as a) disregarding orders of superior courts; b) judicial approach, which is an antithesis to an arbitrary approach; c) principles of natural justice; d) decision of arbitrators cannot be perverse and irrational in so far as no reasonable person would come to the same conclusion. Supreme Court held that an arbitrator is the sole judge with respect to quality and quantity of facts and therefore an award is not capable of being set aside solely on account of little evidence or if the quality of evidence is of inferior quality. Supreme Court further held that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently “errors of fact” cannot be corrected unless the arbitrators approach is arbitrary or capricious.
- Supreme Court described “Interest of India” as something which deals with India in world community and its relations with foreign nations. Notably, the Supreme Court did not illustrate this ground in detail as the same is a dynamic concept which needs to evolve on a case by case basis.
- Supreme Court held that the term “award is against justice and morality” would include the following: a) with regard to justice, the award should not be such that it shocks the conscience of the court; b) with regard to morality, there can be no universal standard however, Supreme Court observed that both the English and the Indian courts have restricted the scope of morality to “sexual immorality” only; c) With respect to an arbitration, it would be a valid ground when the contract is not illegal but against the mores of the day, however, held that this would only apply when it shocks the conscience of the court.
- Supreme Court further held that “Patent Illegality” would include: a) fraud or corruption; b) contravention of substantive law, which goes to the root of the matter; c) error of law by the arbitrator; d) contravention of the Act itself; e) where the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the Act; and f) if arbitrator does not give reasons for his decision.

Second, the Supreme Court held that the Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.

V. Analysis

This ruling marks an important step in the line with the pro arbitration decisions of the Supreme Court in the last couple of years. It is a welcome decision in so far as ‘public policy’ had been clarified in order to provide guidance on the level of interference sought to be made under Section 34 of the Act. This marks a rare occasion where Supreme Court has discussed “morality” in a challenge under Section 34 of the Act. Further, in Western Geco International Ltd [146], Supreme Court elaborated the scope of “fundamental policy of Indian law” for challenge of arbitral

---

142. 1994 Supp (1) SCC 644
143. 2003 (5) SCC 705
144. 2006 (11) SCC 181
145. 2014 (9) SCC 263
146. Ibid

© Nishith Desai Associates 2015
award, and consequently the legal community was skeptical, as it was felt that this would open flood gates of challenge to arbitration awards. Therefore, this judgment provides much needed assistance as it defines the narrow boundaries of challenge under Section 34 of the Act.

Supreme Courts finding that an arbitral award cannot be set aside on the grounds of "error in facts", unless the arbitrators approach is arbitrary or capricious, is indeed praiseworthy as it would narrow judicial intervention. Another aspect which needs some attention is that the jurisprudence on ‘public policy’ laid down in this case would apply only to awards arising out of arbitrations seated in India, as Section 34 of the Act would only be applicable in such a situation.
8. The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.

If there is a valid arbitration agreement between the parties there is no escape from arbitration.

Unless the facts and circumstances demonstrate that foreign arbitration would cause a demonstrable injustice, civil courts in India would not exercise its jurisdiction to stay foreign arbitration.

An anti-arbitration injunction can be granted only if:

i. Court is of the view that no agreement exists between the parties; or

ii. If the arbitration agreement is null and void, inoperative or incapable of being performed; or

iii. Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

Whether a claim falls within the parameters of a Bilateral Investment Treaty would only be decided by an arbitral tribunal, duly constituted.

II. Background

A. Background of the Parties

The genesis of the dispute is the awarding of a contract dated October 16, 2009 executed by KBT in favor of the Haldia Bulk Terminals Private Limited ("HBT") ("Contract") for operation and maintenance of berth nos. 2 and 8 of the Haldia Dock Complex of the Port Trust ("Project").

HBT, an Indian Company, was formed specifically for the purpose of carrying out the activities related to the Project and since July 23, 2009, is a subsidiary of an Indian Company, ALBA Asia Private Limited ("ALBA"). Louis Dreyfus holds 49% of ALBA and the remaining is held another Indian Company, ABG Ports Limited ("ABG Ports"). Louis Dreyfus investment in the Project, through ALBA, is claimed to be approximately at US$ 16.5 Million ("Investment").
B. Dispute between HBT and KPT

Claiming breach, HBT terminated the Contract and commenced arbitration against KPT under the Contract seeking damages ("Contract Arbitration"). The Contract Arbitration is a domestic arbitration, seated in India and governed by Indian Law. In the Contract Arbitration, KPT has also preferred a counter-claim against HBT.

C. Background of the Investment Arbitration

On November 11, 2013 the Federal Government, the State of West Bengal and KBT received notice of claim issued from Louis Dreyfus in respect of Investment ("Notification of Claim") under Article 9 of the India- France BIT.

It is Louis Dreyfus’ claim that right from the very inception of the project, India, the State of West Bengal, KPT, and a number of authorities and agencies have consistently and deliberately, through their acts and omissions:

- created impediments to the implementation of the Project in an efficacious manner;
- compelled HBT to overstaff the Project;
- created impediments to the operation of the Project facilities in an efficacious manner in a normal, safe and conducive environment;
- failed to provide protection and safety to the Project facilities or HBT’s personnel adequately or at all;
- financially crippled the Investment and the Project;

as a result of which the Contract was rendered redundant and HBT was left with no choice but to terminate its Contract with KPT.

Louis Dreyfus claims that India, though its acts and omissions, has denied (i) fair and equitable treatment to Louis Dreyfus, (ii) failed to provide protection and safety to Louis Dreyfus’ Investment in India and has ultimately (iii) indirectly expropriated Louis Dreyfus’ Investment in the Project, thereby causing irreparable harm, injury and loss in clear violation of its obligations under the BIT.

Pursuant to the Notification of Claim, Louis Dreyfus issued a notice of arbitration dated March 31, 2014, a notice of appointment of arbitrator on April 17, 2014 on India and notice dated May 19, 2014 once again calling upon India to enter appearance in the Investment Arbitration ("Notice of Arbitration"). India has denied and disputed the right of Louis Dreyfus to invoke the India-France BIT, however has nominated an arbitrator on its behalf under protest.

Though KPT has not been named as a party in the Investment Arbitration, as the Notification of the Claim was addressed to KPT, the Arbitral Tribunal has resorted to notifying the KPT at every stage of the Investment Arbitration including vide letters dated August 13, 2014, August 15, 2014 and August 26, 2014.

D. Proceedings before the Court

Aggrieved by this, KPT filed the present proceedings before the Court seeking an injunction restraining Louis Dreyfus from taking further steps on the basis of Notification of Claim and Notice of Arbitration, essentially seeking an anti-arbitration injunction, against the Investment Arbitration, in its entirety.
III. KPT’s Case Before the Court

KPT sought the aforesaid anti-arbitration injunction on two grounds:

The arbitration clause under the India-France BIT is inoperative as between Louis Dreyfus and India, State of West Bengal and KPT.

KPT is not a party to the arbitration clause in the India-France BIT and accordingly could not be dragged to the Investment Arbitration.

A. First Ground

In support of its case under the first ground, KPT contended that:

- Louis Dreyfus does not qualify as Investor under the India-France BIT;
- The scope of India-France BIT does not cover the nature of claim or dispute raised Louis Dreyfus;
- The substratum of Louis Dreyfus’ claim is the dispute between the HBT and KPT and hence amounts to multiplicity of proceedings;
- The entire cause of action Louis Dreyfus, as pleaded, is against KPT and India is impleaded only for the purpose of invoking the India-France BIT;
- KPT is a public sector undertaking of limited financial resources and conducting arbitration before an international body would be prohibitive and KPT would not be having means to conduct such proceeding effectively;
- The Investment Arbitration is oppressive, vexatious and mala fide.

B. Second Ground

In support of its case under the second ground, KPT relied on an English judgment in the case of City of London v. Sancheti147 (“City of London”), to contend that the fact that under certain circumstances a State may be responsible under international law for the acts of one of its local authorities, or may have to take steps to redress wrongs committed by one of its local authorities, does not make that local authority a party to the arbitration agreement.

KPT submitted that even if under the India-France BIT, India may be held responsible for any particular Act of KPT under no circumstances KPT could be treated as the party to the arbitration clause under the India-France BIT.

C. Jurisdiction to grant anti-arbitration injunction

In response to the Louis Dreyfus’s contention challenging the jurisdiction of the Court to adjudicate upon the proceedings initiated by KPT, KPT submitted that:

- There is no bar under Indian Law or the Arbitration Act, which restricts a civil court from granting an anti-arbitration injunction in respect of foreign arbitration.
- Section 5 of the Arbitration Act, which mandates minimum interference in arbitration proceedings and limits the jurisdiction of civil court to proceedings provided for under Part I the Arbitration Act, does not apply to arbitrations seated outside India to which only Part II of the Arbitration Act applies, as:
  - i. The arbitration agreement between Louis Dreyfus and India would come only into existence upon the Notification of Claim, as prior to that arbitration clause in a BIT is at best a standing offer to arbitrate and upon acceptance by a qualifying investor of this standing offer to arbitrate gives to a binding arbitration agreement. Thus, the concerned arbitration agreement would be governed by law as declared by the Supreme Court of India in Bharat Aluminum Company and Ors. v. Kaiser Aluminum Technical Service, Inc. and Ors (“BALCO”).148ii. The law prior to BALCO also provided that provisions of Part I did not apply to foreign seated arbitrations.
- Under Section 45 of the Arbitration Act a civil court has been vested with the power to decide whether arbitration clause in the India- France BIT is “inoperative or incapable of being performed” against KPT.
- Lack of provisions under Indian Law akin to those under Section 37 of the (English) Supreme Courts Act, 1981 (“English SC Act”) and Section 72 of (English) Arbitration and Conciliation Act, 1996 (“English Arbitration Act”) does not impinge upon

147. (2009)1 LLR 117
148. (2012) 9 SCC 552
IV. Louis Dreyfus’ Case Before the Court

- Louis Dreyfus primarily contended the jurisdiction of the Court to grant anti-arbitration injunction on the following grounds:
  - The India-France BIT was entered into 1997 and hence the arbitration agreement contained therein would be governed by arbitration law as it stood before the Supreme Court’s decision in BALCO.
  - In pursuance to Section 5 of the Arbitration Act no judicial authority can intervene with an arbitration process, except where so provided by Part I of the Arbitration Act, notwithstanding anything contained in any other (Indian) law. The Arbitration Act does not empower a civil court to injunct an arbitration process.
  - Anti-arbitration suit is ordinarily not maintainable, unless the statute gives a right to a civil court to exercise its jurisdiction against initiation of such proceeding. Provisions akin to Section 37 of the English SC Act and Section 72 English Arbitration Act are not present under Indian Law and hence the Court has no jurisdiction to entertain proceedings initiated by KPT.
  - The arbitral tribunal has exclusive jurisdiction to rule its jurisdiction even with respect to existence or validity to the arbitration agreement.

In response the First Ground raised by KPT, challenging the arbitration clause under the India-France BIT as inoperative, Louis Dreyfus submitted that:

The Contract Arbitration is of no relevance as the questions which may arise in that arbitration or the decision passed thereat cannot be looked into or be binding or relevant in the arbitration pending between the Louis Dreyfus and India. Hence, the principle of parallel proceedings and a possibility of conflict of decision have no application in two arbitrations.

India-France BIT gives a right to an investor of the contracting nation meaning thereby the French National, which cause of action is separate and distinct from that being adjudicated under the Contract Arbitration.

KPT is not a party to the arbitration agreement between Louis Dreyfus and India and cannot challenge the arbitration agreement.

Courts play a supportive role in encouraging the arbitration to proceed rather than letting it come to a grinding halt. Another equally important principle recognized in almost all jurisdictions is the least intervention by the courts.

V. Courts Decision

The court found jurisdiction over the proceedings initiated by KPT and stated as follows:

- Section 5 of the Arbitration Act is of general principle which would be applicable to all arbitration proceedings, irrespective of whether it is a domestic arbitration or a foreign seated arbitration.

- Although there may not be same and/or similar provisions in the Arbitration Act to the Section 37 of the English SC Act and Section 72 English Arbitration Act, the jurisdiction of a civil court to interfere is not completely obliterated as one could find that in Sec.45 of the Arbitration Act powers have been given to a civil court to refuse reference in case it is found that the said agreement is null and void, inoperative or incapable of being performed.

- Unless the facts and circumstances of a particular case demonstrate that continuation of such foreign arbitration would cause a demonstrable injustice, civil courts in India would not exercise its jurisdiction to stay foreign arbitration.

- Questions relating to arbitrability or jurisdiction or to staying the arbitration, might in appropriate circumstances better be left to the foreign courts having supervisory jurisdiction over the arbitration. Nonetheless in exceptional cases, for example where the continuation of the foreign arbitration proceedings might be oppressive or unconscionable, where the very issue was whether the parties had consented or where there was an allegations that the arbitration was a forgery the court might exercise its power. The court would pass an anti-arbitration injunction.

- The principle the court is required to keep in mind is that if there is a valid arbitration agreement between the parties there is no escape from
arbitration and the parties shall be referred to arbitration and resolve their dispute through the mechanism of arbitration.

- In the following circumstances an anti-arbitration injunction can be granted:-
  
  i. If an issue is raised whether there is any valid arbitration agreement between the parties and the Court is of the view that no agreement exists between the parties; or

  ii. If the arbitration agreement is null and void, inoperative or incapable of being performed; or

  iii. Continuation of foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

The Court rejected KPT’s plea under the First Ground, challenging the arbitration clause under the India-France BIT as inoperative, stating:

- Since KPT is not a party to India-France BIT the KPT cannot challenge the arbitration agreement. If anyone at all is aggrieved is India and KPT cannot espouse the cause of India.

- The Arbitral tribunal which has been duly constituted to adjudicate the Investment Arbitration would surely consider all objections with all seriousness as it deserves along with the objection.

- The approach of courts should be towards being pro-arbitration. Another equally important principle recognized in almost all jurisdictions is the least intervention by the courts.

- An investor under a BIT has been given certain special rights and privileges which is enforceable under the treaty. Whether the Notification of Claim falls within such parameters and Louis Dreyfus could be treated as an investor is a matter to be decided by the arbitral tribunal duly constituted under the relevant rules.

- In the event, the preliminary objections are overruled and the arbitral tribunal is of the opinion that the matter can proceed and continuation of such proceeding would not be a recipe for confusion and injustice. India would be required to contest the matter on merits.

Approving the decision in City of London, the Court accepted KPT’s under the Second Ground stating that:

- The arbitration agreement is only enforceable against the India and not against KPT.

- The continuation of any proceeding against KPT at the instance of the Louis Dreyfus would be oppressive
  
  - KPT would not be bound to participate in the said proceeding.
  
  - Louis Dreyfus is restrained from proceeding with the arbitral proceeding only against KPT.

V. Analysis

The facts of the case highlight the importance of BITs for protecting cross-border investments and show how the international community investing in India is using the same to secure performance of obligations by India.

The Judgment lays down important guiding principles with respect to ability to obtain anti-arbitration injunction from court in India. The principles laid down seen to be pro-arbitration and in consonance with international jurisprudence on the subject. However, as the Judgment is delivered by a single judge of a High Court it cannot be regarded as a binding precedent and may undergo further judicial scrutiny and/or interpretation.

The Judgment also rightly dismisses an attempt by a state instrumentality to derail investment arbitration under the pretext of multiplicity of proceedings and has safeguarded foreign investors from answering questions regarding applicability of BIT before national forums.

However, the judgment misses the opportunity to clarify the applicability of BALCO to investment arbitration under Indian BITs. KPT’s contention that the arbitration agreement comes into force only once the Notification of Claim is submitted, has received international support from several authors and judicial/arbitral authorities. By concluding that Section 5 of the Arbitration Act, and thereby Part I, would be applicable to the present fact scenario, the Court may have ruled against long standing international jurisprudence, which may open a Pandora’s Box for future investment arbitration.

I. Bhatia International and Venture Global Overruled, but Prospectively

The Constitutional Bench of the Supreme Court ("Court") on September 6, 2012 in its decision in Bharat Aluminum Co. ("Appellant") v Kaiser Aluminum Technical Service, Inc. ("Respondent"), after laudable consideration of jurisprudence laid down by various Indian & foreign judgments and writings of renowned international commercial arbitration authors, ruled that findings by the Court in its judgment in Bhatia International v Bulk Trading S.A & Anr¹⁴⁹ ("Bhatia International") and Venture Global Engineering v Satyam Computer Services Ltd and Anr¹⁵⁰ ("Venture Global") were incorrect. It concluded that Part I of the Arbitration and Conciliation Act, 1996¹⁵¹ ("Act") had no application to arbitrations which were seated outside India, irrespective of the fact whether parties chose to apply the Act or not. Hence getting Indian law in line, with the well settled principle recognized internationally that “the seat of arbitration is intended to be its center of gravity”.

But this welcome overruling by the Court of its previous decisions will provide no relief to the parties who have executed their arbitration agreements prior to the current judgment as the Court, right at the end of its judgment, directed that the overruling was merely prospective and the laws laid down therein apply only to arbitration agreements made after September 6, 2012.

II. Brief Facts

The appeal filed by Bharat Aluminum Co. before the Division Bench was placed for hearing before a three Judge Bench as one of the judges in the Division Bench found that judgment in Bhatia International and Venture Global was unsound and the other judge disagreed with that observation. Subsequently it was directed to be placed before the Constitution Bench on January 10, 2012 along with other similar matters.

III. Relevant Issues Dealt by the Court

The Court was unable to support the conclusions recorded by it in its previous decisions in Bhatia International and Venture Global. It concluded that the Act has adopted the territorial principle unequivocally accepted by the UNCITRAL Model Law, thereby limiting the applicability of Part I to arbitrations, which take place in India. It further stated that the territoriality principle of the Act precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the Arbitration proceedings will be governed by the Act (emphasis supplied).

A. Interpretation of Section 2(2) of the Act

The pertinent issue for consideration before the Court was whether absence of the word “only” in Section 2(2) makes Part I of the Act applicable to all arbitrations, including arbitrations seated outside India. The previous judgments including Bhatia International and Venture Global clearly held that Part I would apply to all arbitrations including those held out of India, unless the parties by agreement, express or implied, exclude all or any of its provisions.

The primary contention put forth by the Appellant was that absence of the word “only” in Section 2(2) of the Act permits applicability of Part I of the Act to arbitrations held outside India, there being a conscious deviation from Article 1(2) of UNCITRAL Model Law. Further, restricting the applicability of this provision would lead to conflict with the rest of the provisions of the Act.

¹⁴⁹. 2004 (2) SCC 105
¹⁵⁰. 2008 (4) SCC 190
The Court following the principles of literal interpretation and in regard of the legislative intention held that applicability of Part I of the Act is limited only to arbitrations held in India and omission of the word “only” from Section 2(2) has no relevance. It further observed that the present wording of the Act does not deviate from the territoriality principle as accepted under Model Law and absence of “only” in the said provision does not change the content/intention of the legislation. It was observed that it is not permissible for the court while construing a provision to reconstruct the provision. The Court cannot produce a new jacket, while ironing out the creases of the old one.

**B. No Conflict with Section 2(4) and 2(5) of the Act**

The Court dealt with the aspect whether the above interpretation of Section 2(2) of the Act would be in conflict with Sections 2(4) & 2(5). The Appellant contended that the language of Sections 2(4) & 2(5) makes Part I applicable to every arbitration, whether in India or outside.

The Court categorically held that there exists no conflict among the said provisions as Section 2(4) is applicable to “every arbitration under any other enactment for the time being in force covered by Part I (emphasis supplied)” and for the purposes of this section “enactment” would mean only an Act made by the Indian Parliament. Section 2(5) is merely an extension to Section 2(4) to deal with all proceedings in relation to arbitration with the exception of statutory or compulsory arbitrations in case of inconsistency and “all arbitrations” includes only those to which Part I is applicable. Thus, by virtue of the above provisions, Part I of the Act applies to all arbitrations held in India in accordance with the provisions of any Indian enactments unless inconsistent with the provisions of the Act.

**C. Award under Section 2(7) of the Act is a "Domestic Award"**

The scheme of the Act indicates that Part I applies to domestic arbitrations as well as international arbitrations conducted in India. International Commercial Arbitration included within Part I contemplate arbitrations between two foreign parties under foreign law with seat in India. Therefore, domestic awards made within Part I of the Act includes within its scope both, award rendered in an international arbitration held in India as well as arbitration between two domestic parties and not awards rendered in arbitration held outside India.

The object of Section 2(7) is to differentiate between domestic and foreign awards as covered under Part II of the Act. There is no overlapping between the two parts of the Act as the latter deals only with arbitrations held outside India, thereby categorizing them as foreign awards. The Court held that Act being based on the territoriality principle excludes applicability of Part I to foreign seated arbitrations even if the agreement is governed by the provisions of the Act.

**D. Party Autonomy**

The Act permits the parties to decide the place of arbitration. The Court interpreting Section 20 of the Act pertaining to place/seat of arbitration has clarified that if seat of arbitration is India, parties are free to choose any place or venue within India for conducting the arbitration proceedings. However, the said provision is to be read with Section 2(2) of the Act to understand the applicability of principle of territoriality. In the absence of parties failing to specify law governing arbitration proceedings, the same would be governed as per the law of the country in which arbitration is held, having the closest connection with the proceedings.

The Court has distinguished the concept of “seat” and “venue” and explained their significance in arbitration proceedings. The distinction between seat and venue of arbitration assumes significance when foreign seat is assigned, with the Act as the curial law governing the arbitration proceedings. In such scenario, Part I would be inapplicable to the extent inconsistent with arbitration law of the seat.

Further, elaborating on the issue of choice of substantive law, the Court interpreting Section 28 of the Act held that arbitrations under Part I of the Act not being international commercial arbitration would be compulsorily governed by the Indian substantive law, to prevent domestic parties from resorting to arbitration with foreign governing law, whereas no such compulsion prevails in case of international commercial arbitration as defined under Section 2(1) (f) of the Act. The very objective of the Section is to segregate domestic and international arbitrations and convey the legislative intention of not providing extra-territorial applicability to Part I of the Act.

**E. Application of Part II of the Act**

The Court held that there is no overlapping of the
provisions of Part I and Part II of the Act and Part II is not merely supplementary. There is complete segregation between both the parts as Part I deals with all four phases of arbitration-commencement, conduct, challenge and recognition and enforcement whereas Part II pertains only to recognition and enforcement of foreign awards. Further, the Court held that regulation of conduct of arbitration and challenge would be done by the Courts of the country in which arbitration is conducted, thereby application of Part I provisions to foreign awards would defeat the very object of the Act. Elaborating on the said issue, the Court has also clarified that approaching judicial authority under the non-obstante clause in Section 45 of the Act, does not make Part I applicable to foreign arbitrations held outside India.

F. Enforcement of Foreign Award under Section 48(1) & (2) Though being under Part II Construed as Falling under Part I

No provision for annulment of foreign award is provided under the Act. Section 34 pertaining to challenge of awards being included within Part I clearly reflects the legislative intention to restrict its scope to domestic awards. Section 48 of the Act recognizes that Courts of two nations are competent to annul or suspend an award including the country in “which the award was made” and “under the law of which the award was made”. Enforcement of foreign award in India would be refused only if the said award is set aside by Courts of either of the countries as specified above. The Appellant contended that Courts in both the countries have concurrent jurisdiction to annul the award.

The Court has clarified that the expression “under the law of which the award was made” refers to the procedural law/curial law of the country and has no reference to the substantive law of the contract between the parties. Rejecting the contrary views upheld in its previous judgments annulling foreign award on the basis of law governing the dispute, the Court held that awards passed in arbitrations conducted outside India cannot be annulled under the provisions of the Act.

G. Applicability of Section 9 to Foreign Seated Arbitrations

The major contention of the Appellant for applicability of Section 9 relief to foreign awards was not to leave any party remediless and correct interpretation being adopted in Bhatia International. The applicability of Part I was extended only to the extent of granting interim reliefs and not annulment as the same would invite extra-territorial operations.

Section 9 of the Act acts in aid of the arbitration proceedings and provides interim reliefs before or during arbitration or at any time after the making of award but prior to the enforcement of the award under Section 36 of the Act. The Court held that Section 36 being applicable only to domestic awards, pertains only to arbitrations with Indian seat, thereby Section 9 cannot be made applicable to arbitrations held outside India in contravention of the territoriality principle established under Section 2(2) of the Act. It was further clarified that if parties voluntarily chose a foreign seat, it would be implied that consequences of such choice would be known to them and non-applicability of Section 9 would not render them remediless.

H. No Relief for Awards Passed in Non-Convention Countries

Awards passed in non-convention countries are not included within the ambit of the Act. The Court held that non-inclusion of the same does not amount to a lacunae as the legislative intention needs to be understood from the language and aspects not included therein cannot be incorporated vide interpretation. The ability to remove such defects is vested only with the Parliament and in its absence; applicability of the Act is limited to awards passed under the Act and in convention countries.

I. Maintainability of Suits for Interim Reliefs

Existence of cause of action is the basis to maintainability of suits under the Code of Civil Procedure, 1908 (“Code”). Pendency of arbitration proceedings does not constitute sufficient ground for maintainability of a suit for interim relief. The Court has specified that no suit on the merits of the arbitration would be maintainable as the same would be subject to Sections 8 and 45 of the Act and relief if any would be purely to safeguard the property in dispute before the Arbitrator. No substantive reliefs on the merits of the arbitration could be claimed in the suit and in the event of a valid cause of action; no such suit would be maintainable. The relief claimed would be subject to future award that may be passed and contingent cause of action would not suffice to get proper reliefs. No provision of the Code or the Act vests powers to grant interim relief in suits in the Schedule IX
IV. Analysis

Due to the limited application of the present judgment to arbitration agreements executed post September 6, 2012, the Appellants in the present appeal are effectively on the losing side as their arbitration agreements were executed prior to the said period and hence the present judgment is not applicable to them. The judgment has several positive and negative elements that need to be considered.

A. Positives

The judgment has clarified several legal anomalies which had tarnished the image of Indian arbitration laws and judicial system. It has remedied the primary concern which foreign parties faced while arbitrating against an Indian party i.e. ensuring minimum interference by local courts in arbitrations seated outside India.

The judgment by further clarifying that no annulment proceedings would lie in India against an award made outside India has got the Indian arbitration law at par with other international jurisdictions. It has eased the difficulties the foreign investors/players have been facing in enforcing foreign awards in India against Indian parties.

B. Negatives

The judgment while overruling Bhatia International failed to appreciate an important observation which was made by the Court in allowing the applicability of Section 9 of the Act to arbitrations seated outside India. The Court in Bhatia International had observed that one important reason for allowing the applicability of Section 9 of the Act to arbitrations seated outside India was that interim orders from foreign courts and arbitration tribunals are not enforceable in India and such a situation would leave foreign parties remediless. The Court by not considering this issue has made it very difficult for foreign parties to now seek meaningful and enforceable interim reliefs against Indian parties in arbitration seated outside India.

The judgment also failed to address the issue as to whether two domestic parties could choose a foreign seat thereby excluding the applicability of Part I of the Act. The said issue has been debated extensively in other jurisdictions and also raised by the Appellant herein. The Court inspite of clarifying that Indian substantive law would be applicable compulsorily to all domestic arbitrations and Indian parties where seat of arbitration is India cannot circumvent the application substantive Indian law has failed to discuss the scenario wherein domestic parties opt for a foreign seat.

The biggest negative one can draw from this judgment is its implied adoption of the doctrine of prospective overruling. The Court has made its ruling applicable only to the arbitration agreements executed post the present judgment i.e. post September 6, 2012. Though the doctrine of prospective overruling is recognized in India the application of the same in the present situation would lead to more confusion. By pegging the applicability of the present judgment to the execution of an arbitration agreement the court has opened a Pandora’s Box of questions. For example: If an arbitration agreement in executed in August, 2012 and the disputes under the same arise in July, 2016 the parties under that agreement would be bound by the rules laid down by Bhatia International and Venture Global leading to two sets of jurisprudence running parallel in India. Infact, for the parties, who challenged the law laid down by Bhatia International and have been successful in their challenge, will be still subject to the said law laid down by Bhatia International for adjudication of their disputes pending before the date of this judgment. This is quite an anomaly that has been created.

The Court could have achieved its objective of avoiding confusion due to overruling of Bhatia International and Venture Global by restricting the applicability of the Court’s decision only to the cases arising in future and prohibiting its applicability to the cases which have attained finality. This would be a more appropriate application of the doctrine of prospective overruling.

V. Steps Ahead

In light of the prospective applicability of the present judgment it is advisable that parties revise their arbitration agreements and re-execute them, if they wish to bring them under the umbrella of the new law.
A. Non-Signatories to Arbitration Agreement Referred to Arbitration

After BALCO v. Kaiser which has completely changed the landscape of arbitration law in India, the Supreme Court of India, on September 28, 2012 in yet another landmark ruling has completely renewed the way in which international commercial arbitrations would now function. In the case of Chloro Controls (I) P. Ltd. (Appellant) v. Severn Trent Water Purification Inc. & Ors. (Respondent), the Hon’ble Supreme Court has held that ‘the expression ‘person claiming through or under’ as provided under section 45 of the Arbitration and Conciliation Act, 1996 (“Act”) would mean and take within its ambit multiple and multi-party agreements and hence even non-signatory parties to some of the agreements can pray and be referred to arbitration.

This ruling has widespread implications for foreign investors and parties as now in certain exceptional cases involving composite transactions and interlinked agreements, even non-parties such as the parent company, subsidiary, group companies or directors can be referred to and made parties to an international commercial arbitration.

B. Dispute and Judgment

The case involved a highly convoluted set of facts where the parties had entered into multiple agreements and disputes had arisen between the Indian promoter and the foreign collaborator in relation to a joint venture which had been undertaken by the two.

The below table provides the agreements (Transaction Documents) which were entered into between the parties and around which the dispute primarily revolved.

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Parties</th>
<th>Particulars</th>
<th>Governing Law</th>
<th>Arbitration Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shareholders Agreement executed on November 16, 1995 (“SHA”)</td>
<td>1. Capital Controls (Delaware) Company Inc. (“Respondent No. 2”) 2. Chloro Controls India Private Limited (“Respondent No. 5”) 3. Mr. M.B. Kocha (“Respondent No. 9”)</td>
<td>Principal Agreement, pursuant to which the JV Company i.e. Respondent No. 5 was established. All other agreements signed pursuant to the SHA and drafts of the agreement had been annexed to the SHA.</td>
<td>Laws of India</td>
<td>In accordance with rules of International Chamber of Commerce (“ICC”) held at London and governed by English laws.</td>
</tr>
<tr>
<td>International Distributor Agreement executed on November 16, 1995 (“IDA”)</td>
<td>1. Capital Controls Company Inc./ Severn Trent Water PurificationInc. (“Respondent No. 1”) 2. Capital Controls (India) Pvt. Ltd.</td>
<td>Respondent No. 5 was appointed as the exclusive distributor of the products for India, Afghanistan, Nepal and Bhutan. IDA provided that the Respondent No. 5 was an independent contractor and not a joint venture partner or employee of the seller</td>
<td>Laws of Pennsylvania, U.S.A. and courts located in Eastern District of Commonwealth of Pennsylvania</td>
<td>No arbitration clause</td>
</tr>
</tbody>
</table>
| Managing Directors Agreement executed on November 16, 1995 ("MDA") | 1. Capital Controls (India) Private Ltd.  
2. Mr. M.B. Kocha | Mr. M.B. Kocha i.e. Respondent No. 9 to be the M.D. of Respondent No. 5 for initial 3 years. Powers of M.D. spelled out | Laws of India | No arbitration clause |
2. Capital Controls (India) Private Ltd. | Terms of the SHA to be implemented through this agreement. License provided to Respondent No. 5 to manufacture the products. Rights under the agreement were non-transferable and restricted to selling products exclusively in India and only through Respondent No. 5. | | In accordance with the rules of ICC, to be held in London and shall be governed by English law. |
2. Capital Controls (India) Private Ltd. | Respondent No. 5 was required to manufacture products as provided under ESA and the SHA and were required to export the same as per the terms of the ESA. Further Respondent No. 1 was to act as the sole and exclusive agent for sale of the products. | Laws of State of Pennsylvania, U.S.A | In accordance with rules of American Arbitration Association to be held in Pennsylvania, U.S.A. |
| Trademark Registered User License Agreement executed on November 16, 1995 ("TMA") | 1. Capital Controls Company Inc./Severn Trent Water Purification Inc.  
2. Capital Controls (India) Private Ltd. | Provided a non-exclusive right to use the trademark. Agreement's duration was co-terminus with the License Agreement. | | No arbitration clause |
2. Capital Controls (India) Private Ltd. | Executed to commence operations after the government approval was obtained and was for confirmation of the SHA. | | |
The allegations *inter alia* were that Respondent No. 1 and 2 were to undertake distribution activities in India solely through Respondent No. 5 i.e. the entity formed due to the joint venture between the Appellant and the Respondent No.1 and 2 and not through any of their group entities. However, Severn Trent (Delaware) Inc. i.e. the ultimate parent company of Respondent No. 1 and 2 was distributing the products in India also through Respondent No. 4 which through a set of subsidiaries and joint ventures was also alleged to be a group entity of Respondent No. 1 and 2. Thus, the Appellant filed a suit before the Bombay High Court *inter alia* praying for declaration that the Transaction Documents entered into are valid, subsisting and binding and sought injunction against the Respondents from committing breach of contract by directly or indirectly dealing with any person other than the Respondent No.5 in relation to the products. An application under section 45 of the Act was filed by certain Respondents requesting for the matter to be referred to arbitration in light of the arbitration clause under the SHA. The application was firstly dismissed by the Single Judge and thereafter on appeal, the Division Bench of the High Court allowed the application ("Impugned Order"). Thus, the Appellant filled an appeal challenging the impugned order.

A. Contentions of the Appellant

The Appellant *inter alia* contended that Respondent No. 3 and 4 were necessary and proper parties as substantive reliefs had been claimed against them and as they were not a party to any of the agreements, the dispute is not covered by the arbitration clause. Further, it was stated the expression ‘parties’ as used under Section 45 of the Act means all the parties and not some or any of them and refers to the parties to the agreement. In furtherance to this, it was argued that under the Act, it was not possible to refer some parties/or some matters to arbitration while leaving the balance to be decided by another forum and that bifurcation of cause of action is not permissible. Lastly, it was contended that the IDA, MDA, TMA and Collaboration Agreement did not contain any arbitration clause and further IDA provided for courts at Pennsylvania to have exclusive jurisdiction and thus due to the uncertainty and indefiniteness the arbitration clause is not enforceable.

B. Contentions of Respondent

The Respondents primarily contended that the entire dispute revolved around the SHA and that Respondent No. 3 and 4 had been added merely to defeat the arbitration clause. The Transaction Documents executed were in furtherance to the SHA and together formed a composite transaction and that their performance was dependent on the performance of the SHA. Further, it was argued that the Act did not provide for any limitation on reference to arbitration and thus the court, in light of the facts of the case, has the power to refer parties to the arbitration with the aid of the inherent powers of the court as provided under Section 151 of the Code of Civil Procedure, 1908. Lastly, equating between section 3 of the Foreign Awards (Recognition and enforcement) Act, 1961 (now repealed) and section 45 of the Act, it was contended that under section 45, the applicant seeking reference can either be a party to the arbitration agreement or a person claiming through or under such party.

C. Judgment and Reasoning

The court extensively relying on jurisprudence internationally available, established that there were two distinct schools of thought existing. One adopting a pro arbitration approach, which allowed for even non-signatories to be subject to arbitration, if the facts in the case justified the referral to arbitration, while the other adopts a very strict approach providing that only if the subject matter of the dispute was covered by the arbitration clause and that the parties to the dispute were parties to the arbitration agreement could a matter be referred to arbitration.

The court observed that language of section 45 is worded in favour of making a reference to arbitration provided the court is satisfied that a valid, enforceable and operative arbitration agreement exists. It was held that the expression ‘person claiming through or under’ provided under Section 45 of the Act indicates that the section does not refer to parties to the agreement but persons in general and if it is established that a person is claiming through or under the signatory to the arbitration agreement then the matter could be referred to arbitration. The court however made a cautionary remark that such reference could be done through only in exceptional cases where the facts principally justify a reference.

Following were certain important factors which the court provided would have to be considered while dealing with such an issue:

i. Direct relationship to the party signatory to the arbitration agreement;

ii. Direct commonality of the subject matter;
iii. Agreement between parties being a composite transaction;

iv. Transaction should be of composite nature where performance of principal agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute; and

v. Whether a composite reference of such parties would serve the ends of justice.

The court thereafter deliberating upon the various agreements executed by the parties pointed out that they all formed part of a composite transaction where the SHA was akin to a mother agreement and the other agreements were executed were ancillary and for effective implementation of the SHA. Thus, the court held in favour of making a reference to arbitration even though certain parties were not signatories to the SHA.

III. Analysis

The judgment is a clear indication of the robust pro-arbitration jurisprudence which has developed in India. This judgment further demonstrates the shift in the intent and mindset of the judiciary, towards a more pro-arbitration stance. An onerous, expensive and the dawdling dispute resolution mechanism was one of the major apprehensions of foreign investors and arbitration was adopted as an answer to the problem. The judgment now makes it clear that in situations of composite transactions, transactions involving group companies, arbitration clauses in the principal agreements would be acted upon in an international commercial arbitration.

Previously, the law as laid down in the case of Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya\(^{133}\), was said to hold the field, whereby if a dispute involved non-signatories or included subject matter which was not strictly within the arbitration agreement, the matter could not be referred to arbitration. However, the present judgment has clearly distinguished between the Sukanya case, which now applies only to domestic arbitrations and where an application under section 8 of the Act is made. Thus, in international commercial arbitrations, parties claiming through or under a signatory to an arbitration agreement can also be referred or apply for the dispute to be referred to arbitration, whereas in a purely domestic scenario that may not be the case.

Further, in relation to composite transactions, the dispute resolution clauses would now have to be looked at more holistically. In a number of transactions such as in case of joint ventures, lending agreements involving security creation, acquisitions where a number of agreements are executed, particular care needs to be taken while incorporating the dispute resolution clauses. In an attempt to broaden the scope of the dispute resolution clause by use of terms such as ‘disputes arising out of or in connection with’, care would have to be taken that in such scenarios disputes, which do not solely relate to the said agreement may also be covered leading to non-parties being subject to arbitration which may include group entities and directors.

\(^{133}\) (2003) 5 SCC 531
11. Shri Lal Mahal Ltd. v. Progetto Grano Spa

I. Enforcement of Foreign Awards Becomes Easier: 'Patent Illegality' Removed from the Scope of Public Policy

The ever-growing judicial support to international commercial arbitration and the seminal shift in judicial mindset is now more than established from yet another landmark ruling of the apex court of the land in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*\(^{154}\), where the court has gone ahead to in fact overrule its own decision passed less than two years back. The Supreme Court while dealing with objections to enforceability of certain foreign awards on the grounds that such awards are opposed to the public policy of India, has significantly curtailed the scope of the expression 'public policy' as found under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 (*"Act"*) and thereby have limited the scope of challenge to enforcement of awards passed in foreign seated arbitrations.

The judgment unmistakably establishes a difference between the scope of objections to the enforceability of a foreign award under Section 48\(^{155}\) of the Act and a challenge to set aside an award altogether under section 34\(^{156}\) of the Act.

II. Facts

The dispute arose out of a contract between an Indian seller (*"Appellant"*) and a foreign buyer (*"Respondent"*) whereby the Appellant had agreed to supply certain type of wheat to the Respondent. The Respondent had alleged that the wheat supplied was not of the quality as agreed to by the parties and as a result it had suffered significant damages.

The matter was referred to the Arbitral Tribunal of the Grain and Feed Trade Association, London (*"GAFTA"*), which passed an award in favour of the Respondent. Thereafter, the Appellant carried such award in appeal before the Board of Appeal of GAFTA, which also passed the award in favour of the Respondent. The awards were then challenged by the Appellant before the courts in U.K., where again the awards were upheld.

The Respondent then sought the enforcement of the awards in India in accordance with the provisions of the Act, to which the Appellant took objection by asserting that the award is against the public policy of India and accordingly enforcement of such awards in India ought to be refused.

The Appellant contended the award to be opposed to public policy of India on the ground that such award was contrary to clearly terms of the contract entered into by the parties. The questions pertained to the certification provided by the expert regarding the quality of the wheat and whether such certification was in the form which was agreed by the parties.

The Respondent on the other hand argued that the matters as raised by the Appellant were questions regarding appreciation of evidence and were questions of fact which could not be gone into at the stage of challenge to enforcement of a foreign award.

---

\(^{154}\) Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012

\(^{155}\) 48. Conditions for enforcement of foreign awards.

- (2) Enforcement of an arbitral award may also be refused if the court finds that-
  - (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India, or
  - (b) the enforcement of the award would be contrary to the public policy of India.

  Explanation: Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

\(^{156}\) 34. Application for setting aside arbitral award.

- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

- (2) An arbitral award may be set aside by the Court only if

  - (a) the Court finds that
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
    - (ii) the arbitral award is in conflict with the public policy of India.

  Explanation: Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.
under section 48 of the Act.

III. Issue

Thus, issue arose regarding the scope and interpretation of the expression ‘public policy’ which is provided as a ground to refuse enforcement of a foreign award under section 48(2)(b) of the Act and whether the enforcement of the awards could be refused on the grounds as alleged by the Appellant.

The issue further was whether the expression ‘public policy’ shall have the same meaning and purport under section 34(2)(b)(ii) and section 48(2)(b) of the Act?

IV. Judgment

As the question revolved around the interpretation of the scope of the expression ‘public policy’ the Supreme Court considered the following three landmark rulings in this regard:

i. Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.157 (“ONGC”);

ii. Phulchand Exports Limited v. O.OO. Patriot158 (“Phulchand”); and


The Supreme Court overruling the judgment in Phulchand held that the meaning of the expression ‘public policy’ under Section 48 was narrower as compared to section 34. Relying on Renusagar, the Court made a highly important observation that there is a fine distinction between applying the rule of public policy in a matter governed by domestic laws and a matter involving conflict of laws as is the case in majority of international commercial arbitrations. The court observed that the applicability of the doctrine of public policy is comparatively limited in cases involving conflict of laws and matters involving foreign element such as a foreign seated arbitration, the courts would not be easily inclined to invoke such doctrine.

The court further observed that ONGC dealt with a situation where the arbitral award was sought to be set aside under section 34 as opposed to an application to refuse enforcement of an award under section 48. It was stated that the expression ‘public policy of India’ under 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contrast to enforcement of award after it becomes final. Thus, it was seen that under Section 34 the expression public policy would also entail within its folds any ‘patent illegality’ for setting aside the award.

Accordingly, the court held that:

"enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to

i. fundamental policy of Indian law; or

ii. the interests of India; or

iii. justice or morality.

The wider meaning given to the expression “public policy of India” occurring in Section 34(2)(b)(ii) in Saw Pipes (ONGC) is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

Thus, relying on the above law, the Supreme Court observed that the same ground had also been raised by the Appellant before the courts in U.K. to have the award set aside. However, the High Court of Justice at London did not consider the ground to be sufficient enough for the award to be set aside. Thus, the court viewed that the same argument could hardly be good enough to refuse enforcement. The court further provided that section 48 does not offer an opportunity to have a second look at the foreign award at the enforcement stage. The court affirmed that section 48 does not permit review of the award on merits and also that procedural defects in course of foreign arbitration do not necessarily imply that foreign award would be unenforceable. Accordingly, the appeal was dismissed by the court and that award was held to be enforceable.
V. Analysis

The judgment in ONGC led to expansion of the meaning of the expression ‘public policy’ as provided under section 34 of the Act, which opened the floodgates to petitions challenging the arbitral award on the ground of ‘patent illegality’. The decision was criticized as it allowed the parties to have a second bite at the matter, to the extent that the ground of patent illegality was viewed broadly.

The above decision coupled with the pre-BALCO\textsuperscript{160} scenario i.e. applying the law as enunciated under the Bhatia International case\textsuperscript{161}, permitted awards passed in arbitrations seated outside India to be challenged under section 34 in certain cases. This led to a very broad ground being available to parties to set aside awards passed in international commercial arbitrations. Though, the BALCO decision has now clarified that awards passed in foreign seated arbitrations\textsuperscript{162} cannot be challenged under section 34, the difficulty arose on account of the judgment of Phulchand.

Phulchand\textsuperscript{163} expanded the meaning of the expression ‘public policy’ as provided under section 48 of the Act and provided that the scope and purport of the expression under section 34 and 48 would be the same. The decision of Phulchand thus also received heavy criticism. Surprisingly, Hon’ble Justice R.M. Lodha, who previously wrote the judgment in Phulchand on behalf of the bench has now himself, overruled the decision of the court of Phulchand and it has now been laid down that the meaning of the expression ‘public policy’ is narrower under section 48 as compared to section 34.

Therefore, now enforcement of foreign awards would not be refused so easily. Thus, a practical takeaway from the above would be to give preference to a foreign seated arbitration as a mechanism for dispute resolution as this would afford a speedy remedy without significant court interference.

\textsuperscript{160} Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., (2012) 9 SCC 552


\textsuperscript{162} Where the arbitration agreement has been entered into after September 6, 2012

\textsuperscript{163} Please refer to our hotline titled ‘Enforcement of Awards- Erasing the distinction between Domestic and Foreign Award’
12. Mulheim Pipe Coatings GMBH v. Welspun Fintrade Ltd and Anr

I. The Bombay High Court Reaffirms Separability of an Arbitration Clause

The Court held that, for the arbitration agreement to be null and void, inoperative or incapable of performance the doctrine of separability requires a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement.

By applying this principle, it upheld the validity of arbitration agreement within a share purchase agreement declared null and void by a settlement agreement entered by the parties.

The Hon’ble Bombay High Court (“Court”) on August 16, 2013 in Mulheim Pipe coatings GmbH (“Appellant”) v. Welspun Fintrade Ltd (“1st Respondent”) and Anr. formulated the principles of the doctrine of severability and held that an arbitration clause in a share purchase agreement could survive annulment of the share purchase agreement by the parties.

II. Facts


As per the terms of the SPA, a joint venture company by the name of Eupec-Welspun Pipe coatings (India) Limited (EWPL) was promoted inter alia by the Appellant and the 1st Respondent. EWPL was proposed to be merged with the 2nd Respondent. Pursuant to the merger, the 2nd Respondent issued shares to the shareholders of EWPL, including the Appellant in accordance with an agreed swap ratio.

As per clause 8 of the SPA the 1st Respondent had a Right of First Refusal (“ROFR”) in case the Appellant decided to transfer its shareholding in the 2nd Respondent.

On October 6, 2009 Appellant issued a notice to the 1st Respondent, intending to sell its shares in 2nd Respondent at the market price as defined in the SPA and called upon the 1st Respondent to exercise its ROFR within fifteen days in accordance with the SPA (“Notice”).

By its reply dated October 21, 2009, the 1st Respondent contended the validity of the Notice and informed the Appellant that notice of offer was not in accordance with the SPA.

A dispute arose between the parties and the Appellant invoked the arbitration agreement contained in Clause 11.13 of the SPA (“Arbitration Agreement”) and proposed the nomination of a sole arbitrator to conduct the arbitration under the Rules of Arbitration of the International Chamber of Commerce (“ICC”).

Subsequently, the 1st Respondent moved an application under Section 9 of Arbitration and Conciliation Act, 1996 (“Act”) before the Court, and obtained an ex-parte order restraining the Appellant from alienating the shares in the 2nd Respondent.

Thereafter a Memorandum of Understanding (“MoU”) was entered on March 17, 2010 between Appellant and 1st Respondent by which parties recorded a settlement.

As per the MoU, out of 8.5 Million shares of the Appellant in the 2nd Respondent, the 1st Respondent was to purchase 5 million shares and for the balance 3.5 Million Share, the Appellant could sell in monthly installments of 100,000 shares over period of 3 years. Importantly, upon signing this MoU the SPA stood null and void.

Post signing of the MoU, certain dispute arose between the Appellant and 1st Respondent pertaining to tax liabilities in relation to the transfer of 5 Million shares. The Appellant moved a Request for Arbitration (RFA) before ICC on May 25, 2011, inter alia seeking a declaration to sell shares to any third Party and claimed damages from the 1st

Respondent. Thereafter the 1st Respondent filed a suit before the Court, inter alia praying for a declaration that SPA stood terminated and to declare the MoU valid and binding over the terminated SPA.

Appellant subsequently moved a petition under section 45 of the Act (“Petition”) inter alia seeking a reference of the dispute to arbitration under clause 11.13 of the SPA. The single Judge rejected the Petition and held that parties have substituted the SPA upon the execution of the MoU ‘in toto by recording fresh terms’ (“Impugned Judgment”).

As a challenge to this order by the single judge the Appellant filed the present appeal before the two judge bench in the Court (“Appeal”).

III. Issue

The issue which was required to be deliberated by the Court was whether the single judge was justified in holding that the arbitration clause in SPA perished upon signing of the MOU and hence a reference under Section 45 of the Act could not be made?

IV. Arguments by the Parties

A. Submission by Appellant

The Appellant submitted that the MOU did not discharge, modify or vary the SPA and in effect, the arbitration agreement which is embodied in the SPA constitutes a separate and independent agreement by virtue of the provisions of Section 16 of the Act and Rule 6(4) of the ICC Rules to which the parties have subjected themselves. Further, the Appellant submitted that the MOU has, in fact, been entered into between the parties in exercise of the right of pre-emption under Clause 8 of the SPA. Moreover, it was submitted that the MOU which was arrived at between the parties arises out of or in connection with the SPA and the dispute which is sought to be raised before the arbitral tribunal is for the tribunal to decide.

B. Submission by Defendants

The Defendants submitted that in order to make a reference under Section 45 of the Act there must be a valid, binding and subsisting arbitration agreement between the parties. They contended that the arbitration agreement in the SPA perished with the SPA by reason of the MOU being executed and the MOU has no arbitration agreement. Moreover, they submitted that the MOU put an end to the SPA completely and irrevocably substituted it by separate obligations inconsistent with those of the SPA. The terms of the SPA and MOU are so inconsistent that the two cannot subsist simultaneously and the MOU specifically provides that on its execution, the SPA has become null and void. The rights and obligations between the parties arise out of the MOU alone and not out of the SPA. Finally, they submitted that any dispute under the MOU would have to be resolved without recourse to arbitration as the MOU does not contain an arbitration agreement. The subject matter of the SPA is completely different and the arbitration clause cannot cover disputes under the MOU even if the arbitration agreement subsists.

V. Held

The Court allowed the Appeal and set aside the Impugned Judgment. The Court held that, Section 45 incorporates the fundamental principle of the separability of the arbitration agreement, as distinct from the underlying contract between the parties of which the agreement to arbitrate is a part.

The court, to which an application under Section 45 of the Act has been made, has to determine as to whether the parties have made an agreement in writing for arbitration to which the New York Convention applies. If they have, the court has no discretion, but to refer them to arbitration, unless the case falls in the exception which is carved out by the provision. The exception is that the arbitration agreement must be found to be null and void, inoperative or incapable of being performed.

With regards when the arbitration agreement would be null and void, the Court importantly distinguished between termination bringing the further performance of the contract to an end and termination bringing the existence of the contract to an end. It opined that in the former case, like in the case at hand, the arbitration clause would survive whereas it was on in the latter that the arbitration clause would not survive.

Formulating the essential features of the doctrine of separability the Court held that:

i. Upon the termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end and would depend
upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

ii. If the nature of the controversy is such that the main contract would itself be treated as non est in the sense that it never came into existence or was void, the arbitration clause could not operate, for along with the original contract, the arbitration agreement would also be void;

iii. Similarly, when the contract was validly executed but parties put an end to it, as if it had never existed, and substitute it with new contract solely governing their rights and liabilities thereunder, the arbitration clause forming a part of the old contract would perish with it;

iv. But where only the future performance of the contract has come to an end and the contract is not put to an end for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end, the contract subsists for those purposes and the arbitration clause would operate for those purposes;

v. The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement.

Accordingly, the Petition filed by the Appellant was made absolute.

VII. Analysis

The doctrine of separability was first formulated in France in the Gosset judgment, five years later, the US Supreme Court also recognized the separability of the arbitration clause in the *Prima Paint case* and modern laws on arbitration confirm the concept. Since then, the doctrine has been widely acknowledged by courts, legislatures and institutionalized arbitration centers.

The 'separability' doctrine is very essential to preserve the autonomy and integrity of the arbitral process. Without 'separability', a party to an arbitration agreement would be able to avoid or delay arbitration merely by challenging or terminating the contract in which the arbitration agreement is found.

The Court has very correctly distinguished between termination of future performance of a contract and a contract being treated as non est and its varying impact on the arbitration agreement.

Certainly, this is a welcome judgment and is yet another step towards the ever growing pro-arbitration approach being adopted by the Indian judiciary.

13. Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd

I. Bombay High Court Clarifies the Prospective Application of Balco

The Bombay High Court in Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd.\(^{167}\) has now clarified that it would not be appropriate to hold that the reasons which are contained in the ruling in Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors.\(^{168}\) ("BALCO") would operate with prospective effect, and thereby to a certain degree have removed the ambiguity prevailing over the nature of prospective application of the BALCO judgment. The court explained that while the ratio of the BALCO judgment i.e. Part-I of the Arbitration and Conciliation Act, 1996 ("Act") would apply only to arbitrations seated in India, operates with prospective effect, the interpretation of Section 2(1)(e)\(^{169}\) of the Act as provided by the Supreme Court would not be limited to a prospective application.

II. Facts

The Appellant had entered into certain contracts with the Respondents for the supply of particular materials. Dispute arose between the parties which were then referred to arbitration. The contracts entered into by the parties provided that the arbitration shall be conducted in accordance with the rules of arbitration of the International Chamber of Commerce and that the venue of arbitration shall be New Delhi. However, upon invocation of the arbitration, the Appellant proposed Mumbai as the ‘place of arbitration’. Such proposal was accepted by the Respondent. The arbitral tribunal constituted, passed an award in favour of the Appellant and the Appellant prior to enforcement of the award filed a petition under Section 9 of the Act, seeking certain interim reliefs requiring disclosure and freezing of assets.

The single judge hearing the petition under section 9 of the Act dismissed the same stating that in view of the agreement between the parties Part I of the Act stood excluded and the mere fact that parties had agreed to the venue/place of arbitration as Mumbai, would not confer jurisdiction on the court in India.

Both parties were aggrieved by the order, filed an appeal as both parties asserted Part I of the Act applied however, the dispute was whether the jurisdiction was vesting with the High Court of Bombay or with High Court of Kolkata where the cause of action is said to have arisen.

The Respondent submitted that as the cause of action for the dispute has arisen in Kolkata, the Calcutta High Court would have jurisdiction over the dispute. The Respondents provided that by virtue of the judgment in Bhatia International v. Bulk Trading S.A.\(^{170}\) ("Bhatia International"), Indian courts may have jurisdiction even though the place of arbitration was not in India and accordingly various High Courts had held that place of arbitration was irrelevant for deciding the question of jurisdiction under Section 2(1)(e) of the Act. It was submitted that the court which would have territorial jurisdiction over the place where the cause of action is said to have arisen in relation to the dispute would be the court for the purposes of section 2(1)(e) of the Act.

The Appellants on the other hand argued that Parties had agreed to Mumbai as the place of arbitration. Further the in the BALCO judgement, the Supreme Court had clarified that the meaning of ‘Court’ as provided under Section 2(1)(e) of the Act would include the court of the place of arbitration. Therefore, the Bombay High Court had jurisdiction to hear the petition under Section 9 of the Act.

Thus, the issue *inter alia* was whether the interpretation of Section 2(1)(e) as provided under

---


168. 2012) 9 SCC 552

169. "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes

170. (2002) 4 SCC 105
the BALCO judgment would apply only prospectively or would the interpretation be also applicable to agreements entered into by the parties prior to September 6, 2012.

III. Judgment

The court initially taking note of the agreement reached between the parties provided that Mumbai is the seat of the arbitration.

The court then analyzed that if Mumbai was the seat of arbitration does Section 2(1)(e) confer jurisdiction on courts whose original civil jurisdiction extended over the place of arbitration, to deal with petitions under Section 9 of the Act. In this regard, the court noted that in BALCO, the hon'ble Supreme Court had held that section 2(1)(e), grants jurisdiction to both the courts i.e. the court within whose jurisdiction the seat of arbitration is located and the court within whose jurisdiction the cause of action is said to arise or the subject matter of the suit is situated. Accordingly, by virtue of the interpretation of Section 2(1)(e) in BALCO judgment, the Bombay High Court would have jurisdiction over the petition under section 9 as the place/seat of arbitration was Mumbai. The court cited the following text from the BALCO judgment:

“...In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.”

Thus, it was to be understood if such interpretation of section 2(1)(e) as provided under BALCO would be applicable to arbitration agreements entered into prior to September 6, 2012.

The court noted that the power of prospective ruling has been evolved by the courts to protect the rights of the parties and to save transactions which were effected due to the law which was previously applying.

Accordingly, it was seen that the Supreme Court had given the principle i.e Part I would apply only to arbitrations which have their seat in India, a prospective application to protect the transactions which were effected on the basis of the law laid down in Bhatia International. The court observed that the Supreme Court had molded the relief only to the extent that the ratio i.e. that the Part I shall apply only to arbitrations seated in India was to apply prospectively. This would mean that for international commercial arbitrations where seat is outside India under arbitrations agreements before September 6, 2012, the Part I may still apply unless it is expressly or impliedly excluded.

The court thus noted that it would be inappropriate to also apply the reasons contained in the BALCO judgment prospectively.

Accordingly, the court proceeded to set aside the order of the learned single judge and granted ad-interim reliefs in terms of temporary injunction against disposal of assets and sent the matter back for disposal on the merits of the case.

IV. Analysis

A lot of debate surrounded the prospective application of the BALCO ruling. The BALCO judgment completely changed the landscape of the arbitration law in India and along with it the approach which was adopted by the courts towards arbitrations. The judgment discussed at length the
meaning, scope and purport of various provisions of the Act before coming to the conclusion. However, the prospective application to the judgment gave rise to a significant amount of ambiguity regarding whether such prospective application would also extend to the reasons as provided or the interpretation provided under the judgment to certain provisions while arriving at the decision.

Accordingly, the present judgment of the Bombay High Court does lend assistance to a certain degree and is indicative of the fact that not everything that has been provided under the BALCO judgment is prospective in nature and the interpretation to various provisions of the statute as provided would not be limited to a prospective application.

As per the judgment, the question regarding whether Part I would apply to an arbitration where the arbitration agreement was entered into prior to September 6, 2012 would be decided in accordance with the principle laid down in the Bhatia International case. However having once decided that Part I applies, the question which court would have jurisdiction to entertain applications under Section 9 or Section 34 etc. would be decided in accordance with the principles provided in the BALCO judgment.

I. Existence of Mortgage is no Bar to Arbitrating Money Claims

A. Introduction

The recent judgment of the Bombay High Court in Tata Capital Financial Services Limited v. M/s Deccan Chronicle Holdings Limited 171 gains significant importance in light of the recent spur in lending disputes. The High Court of Bombay while dealing with a petition seeking interim reliefs in aid of arbitration under Section 9 of the Arbitration and Conciliation Act, 1996 ("Act") has held that even though certain debts may be secured by a mortgage, the lender may choose to bring only a claim for recovery of the amounts due and not sue for enforcement of mortgage. Accordingly, as money claims arising under contracts are arbitrable disputes, courts are empowered to grant interim reliefs under section 9 of the Act.

B. Facts and Contentions

The case involved two separate arbitration petitions filed against Deccan Chronicle Holdings Ltd. and Mr. T. Venkatram Reddy ("Respondent(s)"). The petitions related to certain loans which were provided to the Respondent. Such loans had been secured by the Respondent by mortgage of immovable property. Due to the financial difficulties being faced by the Respondent, the Tata Capital Financial Services and L & T Finance Ltd. ("Petitioner(s)") recalled the entire loan amount with interest. The Respondent failed to repay the said amount in response to the demand from the the Petitioners. Accordingly, the two separate petitions came to be filed against the Respondents under section 9 of the Act, whereby the Petitioners sought various interim reliefs including:

i. Direction to Respondents to furnish additional security;

ii. Direction for appointment of a Court Receiver;

iii. Direction to Respondents to attach their properties before the final judgment;

iv. Direction to Respondents to disclose on oath all the properties owned by them.

One of the principal arguments raised by the Respondents was whether the current dispute was arbitrable or not, as interim reliefs under section 9 of the Act are granted in aid of arbitration. The submission made by the Respondent was that enforcement of mortgage of immovable property could not happen by way of an arbitration. The Respondent submitted that the notice of demand invoking arbitration clause issued by the Petitioner was for enforcement of

171. Arb F No. 1322/2012, Judgment delivered on February 21, 2013

172. Section 9 - Interim measures etc. by Court: A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

173. (2011) 5 SCC 532
mortgage alongwith other claims.

Further, it was argued that by the Respondent that the grant of interim measures under Section 9 of the Act would be governed by the underlying principles for grant of interim relief under Order 38 Rule 5 of the Civil Procedure Code, 1908 ("CPC") and that the present cases did not merit any order for interim reliefs as sought by the Petitioner.

The Petitioner’s on the other hand submitted that the statement of claim was not yet filed before the arbitral tribunal and the Court in such circumstances cannot refuse to grant interim relief based on the presumption of the Respondents that the Petitioner would apply for the enforcement of mortgage against the Respondents before the arbitral tribunal. It is always open to the Petitioner to choose a claim either for enforcement of mortgage or for recovery of money simplicitor based on other securities furnished by the Respondents.

C. Held

The Court appreciating the Petitioners arguments that the statement of claim had not been filed proceeded to assert that it was not up to them to presume that the Petitioner might apply for enforcement of mortgage which would be beyond the jurisdiction of arbitral tribunal. The notice of demand for enforcement of mortgage cannot be treated as a statement of claim.

Based on Order 34 Rule 14 of the CPC, it was observed that there is no bar in filing a mere money claim arising under mortgage by a mortgagee. The mortgaged property could not be sold without instituting a suit for sale of mortgaged properties, however it was up to the mortgagee i.e. the Petitioners to decide In whether to file a money claim before the arbitral tribunal and file a separate suit for enforcement of mortgage after complying with the provisions of Order II Rule 2. It was further held that the interim measures cannot be denied on the ground that the entire demand notice and petition filed under Section 9 of the Act was on the premise that the same was for enforcement of mortgaged properties. The Respondents had executed other securities in the nature of a guarantee and a promissory note and the claim could be made for enforcement of such securities.

Thus, it is for the Petitioner to decide what claims the petitioner would make before the arbitral tribunal and even if a relief by way of enforcement of mortgage was claimed, the same could be subsequently withdrawn or amended. An arbitral tribunal, upon an objection under Section 16 (objection to jurisdiction) of the Act, can always decide whether any of the claims made by the claimants are within its jurisdiction to adjudicate upon. Accordingly, the court in the present case proceeded to hold that the facts satisfy the principles for grant of the reliefs and passed orders in favour of the Petitioner.

D. Analysis

The judgment provides valuable guidance in context of lender disputes, where lenders normally obtain multiple securities such as guarantee, pledge of shares and including a mortgage of property.

The judgment is also critical from the prespective of the real estate sector as lending activites in the real estate sector would almost always be backed by a mortgage of the property. Further, the real estate sector has grown at a tremendous pace in the past few years, and especially since it was opened to foreign investment in 2005. However, with the dampening of the world economy and the regulatory ambiguity surrounding normal modes of exit, foreign investors have adopted a more cautious approach, which has slowly led to a predilection towards mezzanine and pure debt financing structures as opposed to pure equity investments. The regulatory measures

---

174. 14. Suit for sale necessary for bringing mortgaged property to sale. - (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (4 of 1882), has not been extended.

175. 2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim: Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs: A person entitled to more than one relief in respect of the same cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration: A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.
recently taken such as opening up and liberalization of the QFI route and increase in the corporate debt limits available for foreign investment has revealed the regulatory acceptance and interest in attracting foreign investment via the debt route. Buoyed by the regulatory support the sector has continued to attract foreign investments which normally are in form of collateralized debt and one of the most important collateral is the mortgage of the immovable property.

Accordingly, an important takeaway from the present judgment comes in relation to the various debt transactions. The present judgment indicates that in such scenarios lenders may first invoke arbitration to obtain an adjudication on the pending debts and the amounts owed. Thus providing an expeditious option as compared to a through and through court mechanism. Further, the ruling highlights the importance of a section 9 relief in securing the claims as in all scenarios the mortgage security may not be a sufficient security.
I. Supreme Court Boosts Confidence in India as the Seat of Arbitration

The recent ruling in Antrix Corp. Ltd. v. Devas Multimedia P. Ltd176 is yet another example of the pro-arbitration approach adopted by the Supreme Court of India (“SC”), where the courts, to the extent possible, deter from interfering in the arbitration process or with the arbitrators’ judgment. The SC has relied upon a fairly simple proposition that once an arbitration agreement has been invoked on a particular dispute and an arbitrator has been appointed, the other party to the dispute cannot again separately invoke the provisions of the arbitration agreement. The issue revolved around a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”), wherein the SC relying on the above proposition held that once the power to appoint an arbitrator has been exercised, no powers are left to refer the same dispute again to arbitration under Section 11 of the Act.

II. Factual Background

Antrix Corporation Ltd. (‘Petitioner’), entered into an Agreement with Devas Multimedia P. Ltd. (‘Respondent’) on January 28, 2005 for the lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft.

Article 19 of the Agreement empowered the Petitioner to terminate the Agreement in certain contingencies and also provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India.

Article 20 of the Agreement provided that in the event any dispute or difference arises between the parties, such disputes would be referred to the senior management of both the parties to resolve the same within a period of three weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three Arbitrators. The said clause clearly provided that the seat of arbitration would be New Delhi and the arbitration was to be conducted in accordance with the rules of the International Chamber of Commerce (ICC) or UNCITRAL. The ambiguity pertaining to which rules would be applicable to the arbitration proceedings was the bone of contention between the parties and led to the present petition under Section 11 of the Act.

Thereafter, on February 25, 2011, the Petitioner terminated the Agreement with immediate effect. The Respondent objected to such termination. The Petitioner requested for resolution of the disputes through mediation, in accordance with Article 20 of the Agreement, however the Respondent, without complying with the prescribed mediation process, unilaterally invoked arbitration, in accordance with the ICC Rules and nominated their arbitrator. The Petitioner was also called upon to nominate their arbitrator.

The Petitioner’s attempt to mediate in accordance with Article 20 of the Agreement failed as the Respondent had already invoked the arbitration under the rules of ICC and insisted that the matter be resolved through arbitration. Thereafter, the Petitioner sought to initiate separate arbitration proceedings on the same issue and called upon the Respondent to appoint its nominee Arbitrator within a period of thirty days. The Petitioner asserted that the arbitral proceedings would be governed by Indian law, i.e., the Act, which was based on the UNCITRAL Model and that the Respondents could not have unilaterally chosen ICC as the rules governing the arbitration process.

The Respondent however did not appoint the arbitrator within the requested time period. The Petitioner, hence, filed an application under Section 11(4) read with Section 11(10) of the Act requesting a direction upon the Respondent to nominate their arbitrator as per the UNCITRAL Rules.

III. Issues

The issue before the SC was, whether, in respect of a particular dispute, the Chief Justice would have the power, under Section 11(6) of the 1996 Act, to constitute an arbitral tribunal where arbitration proceedings have already been initiated unilaterally, as regards the same dispute, under the ICC Rules and the nominee arbitrator has been appointed under the same.
IV. Judgment

Section 11(6) of the 1996 Act provides, inter alia, that the Chief Justice may be requested to undertake necessary measures where under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure or the parties fail to reach an agreement expected of them under that procedure.

The SC relying on the finding of the Punjab and Haryana High Court in the case of Som Datt Builders Pvt. Ltd. v. State of Punjab177 held that when the Arbitral Tribunal is already seized of the disputes between the parties to the arbitration agreement, constitution of another arbitral tribunal in respect of those same issues which are already pending before the arbitral tribunal for adjudication, would be without jurisdiction.

The SC further emphasized that non-maintainability of a separate application for appointment of an arbitrator, where an arbitrator had already been appointed and the intimation thereof had been conveyed to the other side was a well settled position in law and the same dispute cannot be referred to arbitration yet again under Section 11 of the Act, unless the order closing the existing arbitration proceedings is subsequently set aside.

According to the SC, the aggrieved party is free to challenge the appointment of the arbitrator in accordance with Section 13 of the Act and thereafter under Section 34 of the Act. However, the same could not be done under Section 11(6). The rationale provided was that an anomalous state of affairs would develop if the appointment of an arbitrator, once made, could be questioned in a subsequent proceeding initiated by the other party, also for the appointment of arbitrator.

The Supreme Court held that court could not interfere with the arbitration proceedings under Section 11 of the Act as arbitration under the ICC Rules had already been invoked and an arbitrator had been appointed in this regard.

Thus, the Supreme Court gave a restrictive interpretation to Section 11(6), stating that while the Chief Justice had the power to appoint an arbitrator under Section 11(6), the same could not be exercised to replace an arbitrator who had already been appointed in accordance with the provisions of the arbitration agreement.

V. Conclusion / Analysis

The present decision of the apex court adds to the ever growing jurisprudence highlighting the growth of arbitration as a dispute resolution mechanism in the country and the decision should dilute any perception that Indian seated arbitrations are subjected to court interference.

However, a word of caution that this case highlights is the need for meticulous drafting of arbitration clauses. The arbitration agreement in the present case serves as an example of how ambiguity in a dispute resolution clause (applicable rules to the arbitration—ICC or UNCITRAL) could lead to unnecessary/multiplicity of proceedings. Unlike in this case, parties entering into an arbitration agreement should endeavor to settle all the necessary details of applicable laws and procedure while drafting the arbitration agreement to ensure a smooth and effective arbitration.

177. 2006(3) Raj 144 (P&H)
I. Arbitration Award After Efflux of Prescribed Time: Valid or Invalid?

The Division Bench of the Hon'ble Bombay High Court delivered a judgment in the matter of Bharat Oman Refineries Limited v. M/s. Mantech Consultants, held that the award passed by the Arbitrator after efflux of period prescribed in the agreement is bad in law whereby the Hon'ble Court upheld the principle laid down in NBCC Limited v. J.G. Engineering Private Limited that the contract of arbitration is an independent contract and parties to such contract (including the arbitrator) are bound by the terms of such contract.

II. Facts of the Case

Bharat Oman Refineries Limited ("Appellant") and M/s. Mantech Consultants ("Respondent") had entered into an agreement dated December 30, 1996 ("Agreement") by which the Respondent was required to carry out certain work in respect of inter-state pipeline project. The Agreement contained an arbitration clause. Since the Respondent had not carried out the work as per the Agreement, the parties agreed to terminate the Agreement. However, subsequently certain disputes arose between the parties to the Agreement and the Respondent invoked the arbitration clause whereby a sole arbitrator was appointed by the single judge of Hon'ble Bombay High Court in February 2001.

The arbitration clause in the Agreement is as follows:

"29.3b. The award shall be made in writing and published by the Arbitrator within two years after entering upon the reference or within such extended time not exceeding further twelve months as the Sole Arbitrator shall by a writing under his own hands appoint. The parties hereto shall be deemed to have irrevocably given their consent to the Arbitrator to make and publish the award within the period referred to hereinafbove and shall not be entitled to raise any objection or protest thereto under any circumstances whatsoever."

After the arguments were concluded before the arbitrator on April 21, 2004, the arbitrator, vide letter dated March 14, 2006 requested the Respondent to send him a stamp paper for publishing the award and that he endeavoured to publish the same before March 31, 2006 or latest by April 30, 2006. The Respondent forwarded the stamp paper to the arbitrator. The award was thereafter published by the arbitrator only on August 17, 2006.

The Respondent thereafter preferred an arbitration petition before the Hon'ble High Court of Bombay for setting aside the award of the arbitrator on the ground that the award passed by the arbitrator was not in accordance with the arbitration clause in the Agreement as the arbitrator had no authority to proceed with the award after the stipulated time provided in the Agreement was over. The learned single Judge accordingly allowed the petition and set aside the award on the aforesaid ground. The learned single Judge also came to the conclusion that in view of Section 15(1)(b) of the Arbitration and Conciliation Act, 1996 ("Act"), the mandate of the arbitrator would automatically stand terminated in terms of the arbitration agreement when time limit for making the award expired.

The Appellant challenged the order of the single Judge by way of an appeal before the division bench of the Hon'ble High Court of Bombay.

III. Issue

Whether the pronouncement of an award after the efflux of time as stated in the arbitration agreement is valid?
IV. Arguments Raised by the Parties

The Appellant contended that the Respondent had never objected before the arbitrator that the arbitrator has no jurisdiction to proceed with the matter and on the contrary, the Respondent, by handing over the stamp paper to the arbitrator had fully participated in the proceedings and waived its right to object to the delay under Section 4 of the Act. The Appellants attempted to infer that the waiver of right to object by the Respondent tantamount to an implied agreement between the parties and that the parties to the agreement can, by mutual agreement, extend the time limit provided in the agreement. The Appellant further contended that Section 15 of the Act has no application in the instant case as the said Section has application only subsequent to the arbitration agreement and during the pendency of the proceedings before the Arbitrator.

The Respondent on the other hand contended that the arbitrator has no jurisdiction to proceed with the matter as the time limit prescribed in the Agreement was over. They further submitted that as per Section 7 of the Act, the arbitration agreement should be in writing and any extension of time thereof should also be in writing. They submitted that the arbitrator is not a party to the agreement and his mandate is terminated automatically as per the time limit provided in the agreement and the further proceeding would be without jurisdiction in terms of Sections 14 and 15 of the Act.

V. Judgment and Rationale

Whilst passing the judgment, the Division Bench of the High Court of Bombay observed the following:

In the case of M/s. Snehdeep Auto Centre vs. Hindustan Petroleum Corporation Ltd., the award was passed after the period provided for in the agreement was over, where the extension was provided by the Court and not mutually agreed on by the parties. Whereas, in the case of NBCC Ltd., the Supreme Court observed that “The arbitrator was bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time.”

The Division Bench of the High Court of Bombay further observed in the case of NBCC Ltd.

"22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time limit under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an Award. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.”

The Division Bench of the Hon’ble High Court of Bombay took the view that the time limit provided in the arbitration agreement in a given case cannot be said to have been extended by the act of one side or by conduct of one side and the arbitrator may not get jurisdiction to proceed further with the matter in the case the arbitration agreement provides a particular time limit and the same is not extendable as per the arbitration clause in the agreement.

Further, the Division Bench of the Hon’ble High Court of Bombay took a view that mere providing stamp paper for publishing arbitral award cannot be inferred as participation in the arbitral proceedings since the arguments before the arbitrator were already over. Therefore the argument of waiver as raised by the Appellant has to be rejected and the principle laid down by Snehdeep case in relation to waiver will have no application in the present case.

The Division Bench of the Hon’ble High Court of Bombay also stated that the object and the scheme of the Act are to secure expeditious resolution of disputes. The arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the agreed procedure. All are bound by the agreed terms. Therefore, the arbitration proceedings should be governed and run by the terms. The arbitrator, therefore, cannot go beyond the arbitration
agreement clauses. The speedy and alternative solution to the dispute just cannot be overlooked. Delay occurred, if any, may destroy the arbitration scheme itself.

The Division Bench of the Hon'ble High Court of Bombay, while dismissing the present appeal held that where (a) the Arbitration Agreement prescribes a period within which the Award was to be passed and (b) the said period has expired and has not been extended by mutual consent of the parties, - the award passed by the Arbitrator after efflux of such period is bad in law and contrary to the agreed terms by which the parties as well as the Arbitrator are bound.

VI. Conclusion and Analysis

It is also pertinent to discuss the present case in conjunction with the decision of the Hon'ble Delhi High Court in the recent case of Peak Chemical Corporation Inc. vs. National Aluminium Co. Ltd.\(^1\), wherein the Hon'ble Delhi High Court had held that:

\(^1\) O.M.P. No. 160/2005, High Court of New Delhi

the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, and the detailed reasons issue-wise; and

the dispute between the parties has been pending since 1996;

It would not be in the interests of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination and since the learned Arbitrator who passed the impugned Award has since expired, a fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far.

Please refer to our hotline dated February 12, 2012 for detailed understanding of the abovementioned case.

Therefore, in the event there is no time stipulated in the agreement for the pronouncement of arbitral award and if the award is passed after un-reasonable delay, the Courts would still consider the factors as set out in Peak vs. Nalco before holding that the award is against the public policy of India and provide additional time for the arbitral award to be announced.

The present case however, proceeds on the principle that if the arbitration agreement prescribes a period within which the award is to be passed, any award passed beyond such period would be bad in law unless the parties have mutually agreed to extend this period.

Looking at the diverse stances taken by various Courts, one must bear in mind that the interpretation of law and precedents should be in light of the facts and circumstances at hand. The law is binding if facts are similar and not when facts are different. The fact based decision cannot be treated as precedents, especially when those are distinct and distinguishable.
17. Denel (Proprietary Limited) v. Govt. of India, Ministry of Defence

I. Denial of Appointment of Arbitrator as Per Terms of Contract on Grounds of Bias and Impartiality

A. Introduction

The Supreme Court ("SC") in the case of Denel (Proprietary Limited) vs. Govt. of India, Ministry of Defence exercising its powers under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ("Act") reiterated that right to appointment of an Arbitrator does not get automatically forfeited after expiry of 30 days as prescribed under Section 11(4) & 11(5) of the Act unless petition is filed for appointment of Arbitrator under Section 11(6) of the Act prior to appointment by opposite party. The SC appointed an independent Sole Arbitrator due to apprehensions of bias and impartiality, contrary to the clauses of the contract necessitating appointment of DGOF or government servant, as the Sole Arbitrator.

"All the disputes and difference arising out of or in any way touching or concerning the agreement (matters, for which the decision of a specific authority as specified in the contract shall be final under this agreement, shall not be subject to arbitration) shall be referred to the sole arbitration of the Director General, Ordnance Fys. Govt. of India for the time being or a Government servant appointed by him. The appointee shall not be a Govt. Servant who had dealt with the matters to which this agreement relates and that in the course of his duties as Govt. Servant has not expressed views on all or any of the matter is in dispute or difference. In case the appointed Govt. Servant in place of the incumbents."

B. Facts Of The Case

The parties entered into a contract for supply of 42,000 base bleed units. However, the quantity was later increased to 52,000 units as per clauses of the contract. Denel ("Petitioner") supplied substantial amount of the goods by January, 2005 though some were rejected by the Government ("Respondent").

The Petitioner was ready and willing to supply the remaining units however, received no response from the Respondent with regard to its dispatch leading to losses and damage being suffered by them. The Petitioner after a series of discussions with the Respondent later became aware that units rejected earlier were owing to usage of improper fuzes by the Respondent. Thereafter, the Respondent kept on hold all contracts and sent a notice seeking refund of amounts to the extent of US $ 23,20,240. Non-refund of the said amounts led to dispute between the parties.

The parties failed to resolve their disputes through amicable settlement followed by the appointment of Mr. A K. Jain, Additional General Manager, Ordnance factory as the Arbitrator as per Clause 19(F) of the contract reproduced hereinbelow:

"All the disputes and difference arising out of or in any way touching or concerning the agreement (matters, for which the decision of a specific authority as specified in the contract shall be final under this agreement, shall not be subject to arbitration) shall be referred to the sole arbitration of the Director General, Ordnance Fys. Govt. of India for the time being or a Government servant appointed by him. The appointee shall not be a Govt. Servant who had dealt with the matters to which this agreement relates and that in the course of his duties as Govt. Servant has not expressed views on all or any of the matter is in dispute or difference. In case the appointed Govt. Servant in place of the incumbents."

The appointment of the said Arbitrator was objected to by the Petitioner on the grounds of apprehension of bias and terminated the appointment by Notification under Section 14 of the Act. The Arbitrator continued with the proceedings despite the passing of the said Notification dated January 23, 2009. The Petitioner filed application before the District Court, Chandrapur for termination of the mandate of the Arbitrator. The Hon'ble Court passed orders terminating mandate of the earlier Arbitrator and provided for appointment of Director General, Ordnance Factory ("DGOF") as the Arbitrator or any other government servant appointed by him, as per the terms of the contract.

The DGOF did not commence arbitration proceedings or appoint anyone else within 30 days of the passing of the abovementioned Order leading to the present petition being filed under Section 11 before the SC on March 2, 2011.
C. Denel's Submissions

The Petitioner claimed that orders passed by the District Court were void ab initio as it was not vested with the powers of appointment of Arbitrator and had exceeded its jurisdiction. Secondly, the Petitioner also questioned the authority of the DGOF to be appointed as the Arbitrator raising doubts on his impartiality and independence as the claims raised were against the Ministry of Defence and thereby he would be bound by the directions/instructions of his superior authorities and his previous actions including exchange of correspondences and direct involvement in the matter reflected lack of independence and impartiality. The Petitioner contended that by virtue of the DGOF failing to appoint an Arbitrator as per the orders of the District Court, the Respondent had forfeited their right towards appointment.

D. Ministry of Defence's Submissions

The Government on the other hand questioned the maintainability of the petition and stated that new Arbitrator, Mr. Satyanarayana was appointed by DGOF on March 16, 2011 pursuant to order passed by the District Court, Chandrapur. The Petitioner was informed about the same by letter dated March 26, 2011. However, the Petitioner did not submit any response to the same. Further only upon receipt of letter dated April 8, 2011 with regard to taking forward the arbitration proceedings, the Petitioner later objected to the said appointment by their letter dated April 15, 2011.

E. Issues

§ Whether delay in appointment of an Arbitrator by the Respondent amounted to forfeiture of its rights?

§ Whether apprehensions of bias and appointment of Arbitrator by the Respondent in violation of the principles of natural justice?

F. Decision and Rationale

The SC hearing both the parties held that the petition filed in the present case is maintainable as the same was filed prior to appointment of a new Arbitrator by the Respondent. The SC relying on the precedents of Datar Switchgears Ltd. vs. Tata Finance Limited\(^\text{183}\) and Punj Lloyd Limited vs. Petronet MHB Ltd.\(^\text{184}\) held that non-appointment of an Arbitrator within 30 days does not amount to forfeiture of rights under Section 11(6) of the Act. Unlike Section 11(4) and 11 (5) which prescribes a period of 30 days for appointment of an Arbitrator, there is no time limit for filing petition under Section 11 (6) of the Act. The right to appointment continues provided the same is made prior to the other party filing petition. In the instant case, the mandate of the earlier Arbitrator was terminated owing to him not acting in a fair and impartial manner but appointment of a new Arbitrator by the Respondent was delayed and not done prior to filing of the present petition. As a result, the Respondent's right was forfeited as they failed to appoint an Arbitrator prior to the filing of the petition.

With regard to the second issue on appointment of DGOF or a government servant as an Arbitrator, the SC relying on its previous ruling\(^\text{185}\) held that it is settled law that arbitration agreements in government contracts providing that an employee of the department (usually a high official unconnected with the work or the contract) will be the arbitrator are neither void, nor unenforceable. These officers are expected to act independently and impartially. Further, it is not mandatory to appoint the named arbitrator but at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. Referring the disputes to the named arbitrator shall be the rule. Ignoring the named arbitrator and nominating an independent arbitrator shall be the exception to the rule, which is to be resorted to for valid reasons. (please refer to our earlier hotline dated September 3, 2009).\(^\text{186}\) However, the SC in the present case, declined to appoint an Arbitrator as per the terms of the contract as the apprehensions putforth by the Petitioner had merits as established through correspondences and attitude towards resolving the dispute. The same issue has been dealt earlier in the case of Denel (Proprietary) Limited v. Bharat Electronics Ltd & Anr.\(^\text{187}\) (please refer to our earlier hotline dated July 2, 2010).\(^\text{188}\)

The SC held that under Section 11(6) of the Act, if the circumstances demand, an independent Arbitrator can be appointed as per Section 11(8) (b).

---

183. 2000 (8) SCC 151
184. 2006 (2) SCC 638
185. Indian Oil Corporation Limited & Ors. vs. Raja Transport Private Limited (2009) 8 SCC 520
187. Arbitration Petition No 16 of 2009
contrary to the procedure provided under the terms of the contract. A new and independent Arbitrator was appointed considering the prior approach and attitude of the DGOF towards the dispute.

G. Conclusion

This case lays down two clear principles with regard to appointment of Arbitrator under Section 11(6) of the Act. Firstly, failure to appoint an Arbitrator within 30 days as prescribed under Sections 11(4) and (5) of the Act do not amount to forfeiture of rights unless the opposite party has filed their petition under Section 11 (6) prior to the said appointment. Secondly, though it is a well established principle that appointment is required to be done as per the terms and conditions of the contract, however if circumstances exist an independent Arbitrator may be appointed as an exception to the general rule, if there is reasonable apprehension of bias and impartiality.
Publishers

Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

&

SIAC
Singapore International Arbitration Centre
About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Silicon Valley, Singapore, New Delhi, Munich. We specialize in strategic legal, regulatory and tax advice coupled with industry expertise in an integrated manner. We focus on niche areas in which we provide significant value and are invariably involved in select highly complex, innovative transactions. Our key clients include marque repeat Fortune 500 clientele.

Core practice areas include International Tax, International Tax Litigation, Litigation & Dispute Resolution, Fund Formation, Fund Investments, Capital Markets, Employment and HR, Intellectual Property, Corporate & Securities Law, Competition Law, Mergers & Acquisitions, JV's & Restructuring, General Commercial Law and Succession and Estate Planning. Our specialized industry niches include financial services, IT and telecom, education, pharma and life sciences, media and entertainment, real estate and infrastructure.

Nishith Desai Associates has been ranked as the Most Innovative Indian Law Firm (2014) and the Second Most Innovative Asia - Pacific Law Firm (2014) at the Innovative Lawyers Asia-Pacific Awards by the Financial Times - RSG Consulting. IFLR1000 has ranked Nishith Desai Associates in Tier 1 for Private Equity (2014). Chambers and Partners has ranked us as # 1 for Tax and Technology-Media-Telecom (2014). Legal 500 has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011/2012/2013/2014). IBJ (India Business Law Journal) has awarded Nishith Desai Associates for Private equity & venture capital, Structured finance & securitization, TMT and Taxation in 2014. IDEX Legal has recognized Nishith Desai as the Managing Partner of the Year (2014). Legal Era, a prestigious Legal Media Group has recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013). Chambers & Partners has ranked us as # 1 for Tax, TMT and Private Equity (2013). For the third consecutive year, International Financial Law Review (a Euromoney publication) has recognized us as the Indian "Firm of the Year" (2012) for our Technology - Media - Telecom (TMT) practice. We have been named an ASIAN-MENA COUNSEL IN-HOUSE COMMUNITY FIRM OF THE YEAR’ in India for Life Sciences practice (2012) and also for International Arbitration (2011). We have received honorable mentions in Asian MENA Counsel Magazine for Alternative Investment Funds, Antitrust/Competition, Corporate and M&A, TMT and being Most Responsive Domestic Firm (2012). We have been ranked as the best performing Indian law firm of the year by the RSG India Consulting in its client satisfaction report (2011). Chambers & Partners has ranked us # 1 for Tax, TMT and Real Estate – FDI (2011). We’ve received honorable mentions in Asian MENA Counsel Magazine for Alternative Investment Funds, International Arbitration, Real Estate and Taxation for the year 2010. We have been adjudged the winner of the Indian Law Firm of the Year 2010 for TMT by IFLR. We have won the prestigious “Asian-Counsel’s Socially Responsible Deals of the Year 2009” by Pacific Business Press, in addition to being Asian-Counsel Firm of the Year 2009 for the practice areas of Private Equity and Taxation in India. Indian Business Law Journal listed our Tax, FE & VC and Technology-Media-Telecom (TMT) practices in the India Law Firm Awards 2009. Legal 500 (Asia-Pacific) has also ranked us #1 in these practices for 2009-2010. We have been ranked the highest for ‘Quality’ in the Financial Times – RSG Consulting ranking of Indian law firms in 2009. The Tax Directors Handbook, 2009 lauded us for our constant and innovative out-of-the-box ideas. Other past recognitions include being named the Indian Law Firm of the Year 2000 and Asian Law Firm of the Year (Pro Bono) 2001 by the International Financial Law Review, a Euromoney publication. In an Asia survey by International Tax Review (September 2003), we were voted as a top-ranking law firm and recognized for our cross-border structuring work.

Our research oriented approach has also led to the team members being recognized and felicitated for thought leadership. Consecutively for the fifth year in 2010, NDAites have won the global competition for dissertations at the International Bar Association. Nishith Desai, Founder of Nishith Desai Associates, has been voted 'External Counsel of the Year 2009' by Asian Counsel and Pacific Business Press and the 'Most in Demand Practitioners' by Chambers Asia 2009. He has also been ranked No. 28 in a global Top 50 “Gold List” by Tax Business, a UK-based journal for the international tax community. He is listed in the Lex Witness ‘Hall of fame: Top 50’ individuals who have helped shape the legal landscape of modern India. He is also the recipient of Prof. Yunus ‘Social Business Pioneer of India’ – 2010 award.

We believe strongly in constant knowledge expansion and have developed dynamic Knowledge Management (‘KM’) and Continuing Education (‘CE’) programs, conducted both in-house and for select invitees. KM and CE programs cover key events, global and national trends as they unfold and examine case studies, debate and analyze emerging legal, regulatory and tax issues, serving as an effective forum for cross pollination of ideas.
Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has now been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).
NDA's International Litigation and Dispute Resolution Practice

At Nishith Desai Associates ("NDA"), the International Litigation & Dispute Resolution Team has developed strong expertise and carved a niche in the area of inbound and outbound litigation, international arbitration and dispute resolution with a strong focus on complex cross border disputes and corporate frauds across industries. At NDA, we strive to provide clients with creative and pragmatic solutions and effective pre-litigation strategies.

The team was credited when they were awarded Asian-Mena Counsel ‘In-House Community Firm of the Year’ in India International Arbitration (2011).

The Team has represented clients before international arbitration Centers such as the London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), International Chamber of Commerce (ICC), and International Centre for Dispute Resolution (ICDR - AAA) amongst others. The Team’s understanding of modern cross border litigation issues comes from their experience before to various foreign courts such as courts of California, New York, Las Vegas, London, Singapore, Belgium, Bahrain to name a few.

The team has equally versatile experience before various Indian Courts and Tribunals such as High Courts of Bombay, Delhi, Chennai, Calcutta, Gujarat and Supreme Court of India.

Below are a few examples of some high stakes cross border disputes handled by the team in 2012-2013

i. Advising a telecom giant in a multi-billion dollar investment arbitration against Government of India.

ii. Representing India's largest post production house in a multi-million dollar dispute against a private equity investor before SIAC, Singapore.

iii. Representing an Indian cables manufacture in a multi-million Euro joint venture dispute against its Italian partner before the LCIA, UK.

iv. Representing minority shareholders of a pharmaceutical company against its American Joint Venture partner in a multi-million dollar arbitration before the SIAC, Singapore.

v. Representing one of the largest hydro project in India by way of public-private partnership which had multi-million dollar investment by six large private equity players in series of litigation and arbitration proceedings.

vi. Advising an Indian apparel manufacturer against the State of California for alleged anti-trust violations under Californian Law before the State Court of County of LA.

vii. Independent Expert in a multi-million dollar family dispute between one of the largest real estate India family group before the LCIA; in a multi-million dollar estate dispute before the Singapore High Court and in international tax dispute before the SIAC, Singapore involving issues relating to withholding taxes on payments of royalty made by an Indian resident to a Singapore resident

viii. Representing a large private equity and an American managed services provider in relation to a multi-million dollar FCCB default dispute before the High Court of Bombay and Supreme Court of India.

ix. Advised several private equity funds and real estate funds providing effective exit strategies given the complex Indian regulatory environment.

Focus Areas

International Commercial Arbitration
Corporate, Securities & Regulatory Litigation
Private Equity Investment Disputes
Competition and Anti-trust litigation
Investment Treaty arbitrations
International Tax Litigation
HR Litigation
IP and Patent Litigation
White Collar and Economic Offences

Disclaimer

This report is a copyright of Nishith Desai Associates. No reader should act on the basis of any statement contained herein without seeking professional advice. The authors and the firm expressly disclaim all and any liability to any person who has read this report, or otherwise, in respect of anything, and of consequences of anything done, or omitted to be done by any such person in reliance upon the contents of this report.

Contacts

For any help or assistance please email us on ndaconnect@nishithdesai.com or visit us at www.nishithdesai.com

Alipak Banerjee
Prateek Bagaria
Vyapak Desai
e: litteam@nishithdesai.com
About SIAC

The Singapore International Arbitration Centre (SIAC) was established in July 1991 as a not for profit non-governmental organisation to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia. The SIAC is committed to complete neutrality and independence in its role as an international arbitral institution.

Integrity, fair rules and procedures, efficiency and competence are key to SIAC’s success.

SIAC’s case management functions are overseen by a Court of Arbitration that comprises luminaries in the international arbitration arena. SIAC’s corporate management and other functions are overseen by a Board of Directors comprising of senior members of the legal and business communities.

With an international case management team hailing from different jurisdictions including Belgium, Canada, China, India, Korea, Malaysia, Philippines, Singapore, Taiwan and the UK who have specialised experience and knowledge of the region, SIAC is devoted to serving all its users with a complete understanding of their needs.

As an institution administering arbitrations, SIAC is committed to complete impartiality and transparency in all that it does for parties. Broadly, it helps parties in appointment of arbitrators when they cannot agree on an appointment; management of the financial and other practical aspects of arbitration; and facilitation of the smooth progress of arbitration.

SIAC carries out these responsibilities according to its published rules of arbitration and guidelines as contained in practice notes published from time to time. SIAC seeks to promote the highest standard of conduct and delivery in all arbitrations conducted under its auspices.

The SIAC has an international panel of over 350 independent arbitrators with a spread of expertise, depth of knowledge and experience from over 32 different jurisdictions. 204 of those experts are based in the Asian region.

The SIAC has a proven track record in enforcement of awards. SIAC Awards have been enforced by courts in Australia, China, Hong Kong, India, Indonesia, the UK, USA and Vietnam amongst other New York Convention countries.

The SIAC received a record new caseload of 259 cases in 2013 up by 10% from the new case filings in 2012 and currently handles an active caseload of over 500 cases.

SIAC also established its first overseas liaison office in Mumbai, India in mid-2013. The liaison office is the embodiment of SIAC’s commitment to develop a greater awareness and consciousness of international arbitration in India. The office will provide SIAC the means to interact with, and disseminate necessary information on SIAC administered arbitrations to, our current and potential users in India.
Where India INC Arbitrates

Number of Cases per Country in SIAC Arbitration Cases for 2013

Denotes cases involving companies that are incorporated elsewhere, but are subsidiaries of companies from these countries

“The most preferred seat of Arbitration in Asia”

global market survey on international arbitration by Queen Mary University of London

The SIAC Growth Story

- Active case load of over 500 cases
- Over 85% of cases are international cases
- 10% increase in total new filings from 2012 to 2013
- 48% of cases in 2013 had no Singapore connection
- Average sum indispute for Indian cases of SGD 14.6million with highest sum indispute of SGD 253million in 2013
Singapore and SIAC offer

- Over 350 arbitrators from 32 jurisdictions
- UNCITRAL Model Law and a judiciary that provides maximum support and minimum intervention in arbitrations
- Complete freedom of choice of counsel and law firms
- Competitive cost structure
- Enforceability of awards rendered in Singapore in over 145 countries under the New York Convention
- Excellent facilities and services at the Maxwell Chambers for arbitration hearings
- Unmatched connectivity to India with over 360 flights a week

Influence your business outcome with the SIAC Model Clause

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The Tribunal shall consist of _______________(1 or 3) arbitrator(s).

The language of the arbitration shall be _______________.

Contacts

Vivekananda N.
Deputy Registrar & Head (South Asia)
e: vivekananda@siac.org.sg

Scheherazade Dubash
Deputy Head (South Asia)
e: scheherazade@siac.org.sg
SIAC Information Kit

I. Why SIAC?

- Choosing an institution guarantees defined rules and procedures.
- Choosing an institution guarantees that you have a Secretariat which supervises the entire process and consistently guides parties and arbitrators through the process.
- SIAC’s Court of Arbitration consists of some of the most eminent practitioners of international arbitration who supervise case management at SIAC.
- Choosing SIAC guarantees that arbitrators’ fees are subject to a maximum cap in accordance with the SIAC schedule of fees.
- SIAC controls how arbitrators are paid and determines arbitrator fees on actual work done (not hours spent).
- SIAC controls timelines of cases. The average time for completion of a case is 9 to 12 months.
- SIAC scrutinises awards to ensure that they are enforceable in any jurisdiction. SIAC awards have been successfully enforced in India, China, Indonesia, Vietnam, USA, UK, and Singapore, amongst others.
- SIAC appoints arbitrators from a qualified and publicly available panel of over 350 accredited and trained arbitrators.
- Hearings are not conducted once every month in SIAC cases. There is typically only one or two hearings. Parties need not incur costs to fly down to Singapore for a hearing. They can conduct a hearing where convenient.
- Arbitrators appointed by SIAC will set out a schedule for the conduct of the case at the beginning of the case and follow that schedule including for the hearing.
- Hearings are only conducted for the purpose of final submissions and cross examination of witnesses and not for parties to file documents and pleadings.
- SIAC also provides special procedures such as:
  - a fast track procedure (expedited procedure) which guarantees an award in 6 months from the constitution of the tribunal
  - a procedure to seek urgent interim relief from an emergency arbitrator appointed for that purpose – an emergency arbitrator is normally appointed in 24 hours and deals with request for interim relief (having heard both parties) in a matter of days
- If Singapore is chosen as the seat, Singapore courts will not normally interfere in the arbitral proceedings and will not review the award on merits in a challenge.
- Singapore is the most popular seat for international arbitration in Asia. It is cost effective, well connected, neutral, permits foreign counsel, and has an arbitration legislation in place that is most up to date with international practices and jurisprudence.

II. Statistics

The SIAC’s Annual Report for 2013 which is available on the Centre’s website will give you details of the numbers and value of cases handled by SIAC in 2013. Some important facts are as follows:

i. The number of new cases at SIAC increased by 10% from 235 new cases in 2012 to 259 new cases in 2013
ii. The escalating popularity for SIAC arbitration with Indian parties continued in 2013. India contributed to the highest number of filings at SIAC, generating 85 of 259 new cases. This growing trend follows on from recent years where the number of new cases involving at least one Indian party has grown steadily and for instance, increased tenfold in the period from 2001 to 2012, and by almost 50% from 2011 to 2012.
iii. For new cases filed in 2013, the total sum in dispute amounted to SGD 6.06 billion. The highest claim amount for 2013 was SGD 3.5 billion. This is in contrast with the highest claim amount of SGD 1.5 billion in 2012, which was a case involving an Indian party
iv. The largest case for 2013 involving an Indian party dealt with a sum in dispute of over SGD 253 million.
v. The average value of a dispute at the SIAC in 2013 was over SGD 24.44 million, increasing by 60% on the average sum in dispute of SGD 15.36 million in 2012. The average sum in dispute excluding the SGD 3.5 billion case was still SGD 10.48 million, an increase from last year’s SGD 9.01 million.
vi. The average sum in dispute at the SIAC for 2013
in cases involving Indian parties was SGD 14.61 million.

It is indisputable that India's significant contribution continues to remain a key factor to SIAC's unwavering success as an international arbitral institution. Recognising this, SIAC opened its first overseas office in Mumbai last year. SIAC's Mumbai office facilitates SIAC's interactions and information sharing on a regular basis with current and potential users from India.

III. Costs at SIAC

The cost of an arbitration at the SIAC is determined in accordance with the Schedule of Fees. It can be easily calculated on our website.

On costs, it is important to note that the SIAC's cost structure comprises of the following:

i. Filing fees for a claim or counter claim;
ii. Administration Fees;
iii. Arbitrators' Fees;
iv. Expenses of the arbitration

From the Schedule of Fees, which is available on the website, it is possible to see that:

i. Arbitrators' and SIAC's fees are determined on an ad valorem rate; and
ii. the fees are caps (or ceilings) that are applicable to the administration fees and arbitrators' fees.

In the first instance, when an arbitration commences, the SIAC estimates the costs of arbitration as comprising of:

i. administrative fees and expenses of the SIAC;
ii. fees and expenses of the Tribunal; and
iii. facilities and services required for the physical conduct of the arbitration

Deposits are sought from the parties on the basis of this estimate of the costs of arbitration. The actual cost is determined by the Registrar of the SIAC at the conclusion of a case on the basis of the stage at which the matter has been concluded. Hence, the actual cost of an arbitration will always be lesser than the cap indicated in the Schedule of Fees for a dispute of a particular sum. Moreover, this aids the Registrar in an objective determination of the arbitrators' fees based on work performed and the stage at which a case concludes.

Several international surveys have been conducted comparing costs at various international arbitral institutions, which categorise SIAC as a cost effective option for parties. For more information on cost comparisons with other institutions, do feel free to contact us.

IV. Duration of an Arbitration at SIAC

While there is no absolute data on the duration of a case at the SIAC, experience suggests that an arbitration with a sole arbitrator is likely to require between 9 and 12 months from commencement of arbitration to the delivery of an award. Similarly, in a three-member arbitral tribunal, owing to factors such as the complexity and quantum of the dispute and other logistical issues, it would appear that an arbitration would require between 15 and 18 months from commencement of arbitration to the delivery of an award. Needless to say, this depends entirely on the particularities of a case and the attitude of the parties, and can vary.

The following is a depiction of caseflow at the SIAC:
<table>
<thead>
<tr>
<th>Month</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIAC writes to parties on</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>commencement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Calculation of estimated costs of</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Response to Notice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitution of Tribunal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary meeting</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Claim</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Defence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Replies, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request to produce documents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ruling on requests</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reply witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expert reports, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written opening submissions for</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>hearing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing tranche (1-5 days)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written closing submissions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Submissions on Costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draft award sent to SIAC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination of costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed award issued to parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
V. Innovations in Reducing Cost and Time in International Arbitrations at SIAC

Of some additional interest are the SIAC Rules 2010 and 2013, which introduced two new mechanisms to reduce the duration of proceedings or be used in cases where urgent or emergency relief is required.

A. Expedited Procedure

Parties can choose to apply the SIAC’s Expedited Procedure under Rule 5 of the SIAC Rules (i) in their contract by using the SIAC Expedited Procedure Model Clause (which is available on our website); or (ii) post-dispute by agreement between parties.

Alternatively, a party can choose to make an application to the SIAC for the Expedited Procedure if the amount in dispute does not exceed the equivalent amount of SGD 5,000,000 or in cases of exceptional urgency.

If the President of the SIAC Court of Arbitration determines that the arbitral proceedings should be conducted in accordance with the Expedited Procedure, an award will be made within six months of the constitution of the tribunal.

In 2013, SIAC received 36 requests for the application of the Expedited Procedure, of which SIAC accepted 22 requests. As of 31 December 2013, SIAC received a total of 115 applications for the Expedited Procedure and accepted 83 requests since the introduction of these provisions in the SIAC Rules in July 2010.

A few examples are below.

i. Case Study 1

In one of the cases decided under the Expedited Procedure, the following were the brief facts of the case:

- The parties were a Japanese claimant and an Indian respondent
- The dispute was an international trade dispute regarding shipment of iron ore in the sum of SGD 1,600,537
- 1 October 2010 – Claimant filed notice of arbitration and request for Expedited Procedure nominating a particular individual to be appointed as the sole arbitrator
- 3 November 2010 – Respondent agreed to the Expedited Procedure and to the appointment of the Claimant’s nominee
- 19 November 2010 – SIAC Chairman determined that the arbitral proceedings in this reference shall be conducted in accordance with the Expedited Procedure. The parties were informed of this decision and SIAC approached the parties’ joint nominee regarding his prospective appointment on that day
- 26 November 2010 – Nominee was appointed by the Chairman as the sole arbitrator in this matter
- 30 November 2010 – Tribunal communicated to the parties regarding further conduct of this arbitration and circulated the draft Procedural Timetable.
- 10 December 2010 – Tribunal held the first preliminary meeting with the parties via telephonic conference
- 9 May 2011 – Hearing on merits took place at Maxwell Chambers, Singapore
- 11 May 2011 – SIAC received the draft award from the Tribunal for scrutiny
- 25 May 2011 – Tribunal issued the signed Award
- Total time between filing and rendering of Award – 7 months, 25 days
- Total time between constitution of Tribunal and rendering of Award – 6 months

ii. Case Study 2

In another case to which the Expedited Procedure was applied, the following was the timeline:

- The parties were an Indian claimant and a Hong Kong SAR incorporated respondent
- The dispute was an international trade dispute regarding shipment of coal with a claim amount in the sum of about SGD 1 million
- 06 June 2011 – Claimant filed notice of arbitration and request for Expedited Procedure nominating a particular individual to be appointed as the sole arbitrator
- 08 June 2011 – Arbitration deemed commenced
- 29 August 2011 – Chairman, SIAC was requested to determine whether the Expedited Procedure ought to be applied on the basis of the parties’ submissions up to such date
- 30 August 2011 – Chairman, SIAC determined that the Expedited Procedure ought to be applied
- 31 August 2011 – SIAC approached a prospective arbitrator for appointment in the case
- 01 September 2011 – Prospective arbitrator reverted to accept appointment on the condition that the hearing be held in January 2012
- 02 September 2011 – Parties were informed of the arbitrator’s condition and their views were requested
- 16 September 2011 – Parties accepted the prospective arbitrator’s condition on the hearing to be held in January 2012
- 19 September 2011 – Arbitrator appointed by Chairman, SIAC
- 23 September 2011 – Arbitrator informed parties that given their different locations, the preliminary meeting did not require a physical meeting
- 04 October 2011 – All procedural steps and timelines finalised
- 29 November 2011 – Parties settled the dispute and consent terms agreed
- Total time between commencement and completion of proceedings – 5 months, 22 days
- Total time between constitution of Tribunal and completion – 2 months, 11 days

The following is a depiction of caseflow at the SIAC for an Expedited Procedure case:

<table>
<thead>
<tr>
<th>Month</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>SIAC writes to parties on commencement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Calculation of estimated costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Response to Notice</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1st tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination of Expedited Procedure Application</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constitution of Tribunal</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2nd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preliminary meeting</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Claim</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement of Defence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Replies, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Request to produce documents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ruling on requests</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3rd tranche of deposits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reply witness statements</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expert reports, if any</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written opening submissions for hearing</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing tranche (1-5 days)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written closing submissions</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Submissions on Costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draft award sent to SIAC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination of costs of arbitration</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signed award issued to parties</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
B. Emergency Arbitrator

A party in need of emergency relief prior to the constitution of the Tribunal may apply for such relief pursuant to Rule 26.2 and Schedule 1 of the SIAC Rules. Under this mechanism:

i. the President, SIAC Court of Arbitration will appoint an Emergency Arbitrator within one business day of deciding to accept an application for emergency relief under these provisions;

ii. any challenge to the appointment of the Emergency Arbitrator must be made within one business day of his appointment;

iii. the Emergency Arbitrator must establish a schedule for considering the application for emergency relief within two business days of his appointment;

Singapore’s International Arbitration Act was amended in 2012 to provide for the enforceability of awards and orders issued by emergency arbitrators in Singapore. This makes Singapore the first jurisdiction globally to adopt legislation for the enforceability of such awards and orders. Most cases handled by SIAC under these provisions have seen voluntary compliance of the orders and awards issued by emergency arbitrators.

The SIAC was the first Asian arbitral institution to introduce these provisions. In 2013, SIAC received a new record number of 19 applications to appoint an emergency arbitrator under the SIAC Rules 2010 and 2013 versions. SIAC accepted all 19 requests, taking the total number of emergency arbitrator applications accepted and handled by SIAC to 34 (as of 28 February 2014), since the introduction of these provisions in the SIAC Rules in July 2010. 9 of these 34 applications involved Indian parties.

Interestingly, a recent decision of the Bombay High Court in HSBC (2014) endorsed, validated and effectively enforced interim awards issued by an emergency arbitrator appointed in SIAC administered arbitrations under the SIAC 2010 Rules, wherein the emergency arbitrator had issued interim protective orders.

A few examples of case studies involving the emergency arbitrator procedure are below.

i. Case Study 1

In the first case where an Emergency Arbitrator was appointed, the following were the brief facts of the case:

- **Claimant:** Indian
- **Respondent:** Indian
- **Broad nature of interim relief sought:**
  The Claimant sought an injunction restraining the Respondent from calling upon certain performance bank guarantees provided under a contract for provision of dredging services by the Claimant at a port in India.

  - The SIAC received the application at 21:30 hrs Singapore Time
  - The Chairman, SIAC determined that the application should be accepted and on the basis of the nature of dispute, nationality of parties and relief sought, appointed the Emergency Arbitrator the next day
  - The Emergency Arbitrator appointed was well recognised as a leading international arbitrator, having sat as arbitrator in more than 170 cases and written numerous awards
  - Within one day of his appointment, the Emergency Arbitrator established a schedule for consideration of the application for emergency relief
  - As per the schedule, the parties made written submissions on the application and a telephonic hearing was conducted within one week of the appointment of the Emergency Arbitrator
  - The Emergency Arbitrator passed an ad-interim order one day thereafter
  - Parties, by consent, amended the terms of the order and the main arbitral tribunal was constituted
  - Parties, thereafter, settled the case.
  - **Number of days between request for emergency relief & first interim order:** 4 days
  - **Number of days from First interim order to Award on interim relief:** 9 days
  - Whether the interim relief sought was granted by the EA: Yes

  
  ii. Case Study 2

In another case where an Emergency Arbitrator was appointed, the brief facts were as follows:

- **Claimant:** Indian
- **Respondent:** BVI
- **Broad nature of interim relief sought:**
  The Indian company filed an application for emergency interim relief seeking an order (i)
restraining the BVI company from breaching the confidentiality provisions; and (ii) abiding by the contractual dispute resolution mechanism of arbitration at the SIAC.

- The Claimant initiated arbitration on the basis that the BVI company had breached the shareholders agreement and was alleging that it would breach the confidentiality obligation by initiating court action in multiple jurisdictions.
- Within 20 hrs of the receipt of the application, the SIAC appointed the Emergency Arbitrator.
- A preliminary hearing was scheduled within one day of the appointment of the Emergency Arbitrator.
- An preliminary order was issued on the same day to preserve the status quo.
- An interim award was issued two days thereafter and a supplemental interim thereafter.
- The parties, thereafter, settled the matter.
- **Number of days between request for emergency relief & first interim order:** 1 day.
- **Number of days from First interim order to Award on interim relief:** 19 days.
- Whether the interim relief sought was granted by the EA: Yes.

### III. Case Study 3

In a third case where an Emergency Arbitrator was appointed, the brief facts were as follows:

- **Claimant:** Indonesian.
- **Respondent:** Chinese.
- **Broad nature of interim relief sought:** This occurred over the Chinese New Year Holiday.
- The dispute between a Chinese company and an Indonesian company was in relation to the quality of a shipment of coal.
- The Indonesian shipper wanted to sell the cargo of coal pending the resolution of the dispute as the cargo was deteriorating.
- They contacted the SIAC on Monday morning warning us of their intention to make an emergency arbitrator application.
- The Indonesian applicant filed their papers at 2pm and by 5pm, an experienced Singaporean shipping lawyer was appointed as the Emergency Arbitrator.
- The Emergency Arbitrator gave his preliminary directions that evening and a hearing was scheduled for the next day.
- On the next day, he made an order permitting the sale and directing the respondents to co-operate to permit the cargo to leave the port.
- **Number of days between request for emergency relief & first interim order:** 1 day.
- **Number of days from First interim order to Award on interim relief:** 2 days.
- Whether the interim relief sought was granted by the EA: Yes.

### VI. Arbitrators

SIAC retains a Panel of Accredited Arbitrators of local as well as international experts, from which the majority of SIAC appointments of arbitrators are made. SIAC also appoints arbitrators for ad hoc arbitrations and is the statutory appointing authority for arbitrators under the International Arbitration Act (Cap 143A) and Arbitration Act (Cap 10). The SIAC Panel of Arbitrators and their curriculum vitae are publicly available on our website.

The arbitrators on SIAC’s Panel hail from over 32 jurisdictions and different nationalities. The Panel consists of legal and sector specific industry experts.

The Panel also has several strict standards for admission including e.g. minimum 10 years PQE, fellowship accreditation, acted as arbitrator in at least 5 cases, written at least 2 awards. The Board of the SIAC determines the applications to be added on the Panel.

In 2013, SIAC made a total of 143 individual appointments of arbitrators to - 114 sole arbitral tribunals; 8 two-member tribunals; 21 three-member tribunals; and 5 individual appointments of adjudicators. 113 of these appointments were made under the SIAC Rules, whilst the remaining 35 were appointments made under other rules and in ad hoc arbitrations.

Parties are free to choose anybody outside the Panel while nominating arbitrators in their cases at the SIAC. In 2013, more than 50% of the party appointed arbitrators were from Singapore, 18% from the UK and 13% from India.

### VII. Confidentiality

Confidentiality is a key advantage of international arbitration. Arbitration proceedings conducted at the
SIAC are private and confidential in nature. Under the SIAC Rules, 2013:

i. unless the parties agree otherwise, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used shall remain confidential [Rule 21.4];

ii. the parties and the Tribunal are required to treat all matters relating to the proceedings and any award as confidential [Rule 35.1];

iii. the obligation in respect of confidentiality extends to the existence of the proceedings, the pleadings, evidence and other materials in the arbitration proceedings, all other documents produced by a party in the proceedings and the award arising from the proceedings, but excludes any matter that is otherwise in the public domain [Rule 35.3];

iv. the Tribunal is vested with the power to take appropriate measures including issuing an order or award for sanctions or costs if a party breaches the provisions under Rule 35 enumerated above [Rule 35.4];

v. there are certain recognized exceptions provided to the obligations of confidentiality. Hence, a party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such confidential matter except:

a. for the purpose of making an application to any competent court of any State to enforce or challenge the award;

b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;

c. for the purpose of pursuing or enforcing a legal right or claim;

d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure;

e. in compliance with the request or requirement of any regulatory body or other authority; or

f. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties [Rule 35.2]

The SIAC Code of Ethics for arbitrators also prescribes that arbitration proceedings shall remain confidential and that an arbitrator should not use confidential information acquired during the course of the proceedings to gain personal advantage or advantage for others, or to adversely affect the interest of others.

VIII. Enforceability

The SIAC scrutinises awards in draft form before they are made and issued to parties by tribunals in order to ensure consistency and enforceability under the New York Convention. Under the SIAC Rules, the Registrar may suggest ‘modifications as to the form of the award’ and without affecting the Tribunal’s liberty of decision also ‘draw attention to points of substance’. The SIAC performs this duty also with a view to its general duty to ensure enforceability of any SIAC award under rule 37.2.

SIAC awards have been enforced in many jurisdictions across the world including Australia, China, Hong Kong, India, Indonesia, Vietnam, UK and the USA.

For more information on SIAC, please visit our website at www.siac.org.sg.
The following research papers and much more are available on our Knowledge Site: www.nishithdesai.com

**NDA Insights**

<table>
<thead>
<tr>
<th>TITLE</th>
<th>TYPE</th>
<th>DATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas Cook – Sterling Holiday Buyout</td>
<td>M&amp;A Lab</td>
<td>December 2014</td>
</tr>
<tr>
<td>Reliance tunes into Network18!</td>
<td>M&amp;A Lab</td>
<td>December 2014</td>
</tr>
<tr>
<td>Jet Etihad Jet Gets a Co-Pilot</td>
<td>M&amp;A Lab</td>
<td>May 2014</td>
</tr>
<tr>
<td>Apollo's Bumpy Ride in Pursuit of Cooper</td>
<td>M&amp;A Lab</td>
<td>May 2014</td>
</tr>
<tr>
<td>Diageo-USL ‘King of Good Times; Hands over Crown Jewel to Diageo</td>
<td>M&amp;A Lab</td>
<td>May 2014</td>
</tr>
<tr>
<td>Copyright Amendment Bill 2012 receives Indian Parliament's assent</td>
<td>IP Lab</td>
<td>September 2013</td>
</tr>
<tr>
<td>Public M&amp;A’s in India: Takeover Code Dissected</td>
<td>M&amp;A Lab</td>
<td>August 2013</td>
</tr>
<tr>
<td>File Foreign Application Prosecution History With Indian Patent Office</td>
<td>IP Lab</td>
<td>April 2013</td>
</tr>
<tr>
<td>Warburg - Future Capital - Deal Dissected</td>
<td>M&amp;A Lab</td>
<td>January 2013</td>
</tr>
<tr>
<td>Real Financing - Onshore and Offshore Debt Funding Realty in India</td>
<td>Realty Check</td>
<td>May 2012</td>
</tr>
<tr>
<td>Pharma Patent Case Study</td>
<td>IP Lab</td>
<td>March 2012</td>
</tr>
<tr>
<td>Patni plays to iGate's tunes</td>
<td>M&amp;A Lab</td>
<td>January 2012</td>
</tr>
<tr>
<td>Vedanta Acquires Control Over Cairn India</td>
<td>M&amp;A Lab</td>
<td>January 2012</td>
</tr>
<tr>
<td>Corporate Citizenry in the face of Corruption</td>
<td>Yes, Governance Matters!</td>
<td>September 2011</td>
</tr>
<tr>
<td>Funding Real Estate Projects - Exit Challenges</td>
<td>Realty Check</td>
<td>April 2011</td>
</tr>
</tbody>
</table>
Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "Hotlines". These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our NDA Insights dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our ThinkTank discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports. Please feel free to contact us at research@nishithdesai.com