

## GUIDE TO ARBITRATION PLACES (GAP)

# INDIA

CHAPTER PREPARED BY

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OF TRILEGAL



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### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

In India, arbitration is governed by the Arbitration and Conciliation Act, 1996 (**“the Act”**) and is a fairly common mechanism for the resolution of disputes. Over time, the law as interpreted by case law<sup>1</sup>, has evolved in a manner that favours a pro-arbitration approach and emphasizes party autonomy. Several sections of the Act are drafted in a manner that promotes party autonomy in the conduct of arbitration and the rules by which an arbitration is to be carried out. Some representative sections that highlight party autonomy are Section 2(6) (freedom of parties to let a person or institution determine the issue), Section 3 (party agreement in written communications), Section 10 (number of arbitrators), Section 13 (procedure for challenging an arbitrator), Section 19(2) (freedom of parties to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings). The Act and its subsequent amendments have created an ecosystem wherein disputes can be resolved through both *ad hoc* and institutional arbitration. Several arbitral institutions have now emerged in India and can be used to resolve both domestic and foreign-seated arbitrations.

Key places of arbitration in the jurisdiction?	New Delhi, Mumbai, Bangalore, Hyderabad and Kolkata.
Civil law/common law environment? (if mixed or other, specify)	Common Law.
Confidentiality of arbitrations?	Section 42A of the Act mandates the arbitrator, the arbitral institution and the parties to maintain confidentiality of all arbitral proceedings, except for the award in instances where its disclosure is necessary for the purpose of implementation and enforcement of the award.
Requirement to retain (local) counsel?	<p>In international commercial arbitrations that are conducted in India, registered foreign lawyers can appear and provide legal expertise/advice in respect of foreign law for any entity that is multinational in nature i.e., has an address or principal office or head office in a foreign country.<sup>2</sup> Such registered foreign lawyers would not be able to advise Indian clients in India-seated arbitrations, and if Indian clients want to avail of the expertise of foreign lawyers, these lawyers will have to render this advice from their foreign offices on a fly-in and fly-out basis.</p> <p>Indian lawyers (who are not working for a Registered Foreign Law Firm) can appear before any court or arbitral tribunal in India. There is an express bar on foreign lawyers or law firms appearing before courts, tribunals or other statutory or regulatory authorities in India. So, for arbitration-related proceedings in a domestic court, only Indian lawyers would be permitted to appear.</p>

<sup>1</sup> PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited, 2021 SCC OnLine SC 331, State Trading Corporation of India Vs Jindal Steel and Power Limited and Ors. (Civil Appeal No 2747 of 2020); Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO), (2012) 9 SCC 552.

<sup>2</sup> Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022, available at, <https://egazette.nic.in/WriteReadData/2023/244365.pdf>

Ability to present party employee witness testimony?	Yes, there is no embargo on parties presenting employee testimony in arbitration.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Parties may agree to hold meetings at a place that is different from the seat of arbitration. In case the parties do not arrive at such an agreement, the arbitral tribunal has the discretion to determine the place after having considered all the circumstances of the case including the convenience of the parties. However, notwithstanding the above, unless the parties have agreed otherwise, the arbitral tribunal has the full discretion to meet at any place it considers appropriate for consultation amongst its members, for hearing witnesses, experts or the parties or for inspection of documents, etc. <sup>3</sup>
Availability of interest as a remedy?	Interest under Section 31(7) of the Act is provided in two stages, pre-award interest and post-award interest. Indian courts have recognised the unfettered discretion enjoyed by arbitral tribunals in granting both pre-award and post-award interest <sup>4</sup> . The discretion for pre-award interest is only subject to any agreement that may be entered into between the parties. However, if the arbitral award is silent on post-award interest, the Act provides that the award holder will be entitled to post-award interest at the rate of 2% higher than the current rate of interest prevalent on the date of the award. <sup>5</sup> The term “current rate of interest” shall have the meaning ascribed to it under the Interest Act, 1978 i.e., the highest of the maximum rates at which interest is paid on different classes of deposits by different classes of scheduled banks.
Ability to claim for reasonable costs incurred for the arbitration?	<p>Yes, Part VIII of the TAA details the bases for claiming costs incurred for the arbitration.</p> <p>By way of the Arbitration and Conciliation (Amendment) Act, 2015, Section 31A was introduced as a provision to strengthen the cost regime under the Act.</p> <p>As per Section 31A, the arbitral tribunal has the discretion to award costs in relation to any arbitration proceeding under the Act. Such discretion of the arbitral tribunal is required to be determined based on the following:</p> <ul style="list-style-type: none"> <li>(a) Whether costs are payable by one party to another;</li> <li>(b) The amount of such costs; and</li> <li>(c) When such costs are to be paid</li> </ul> <p>Section 31A also specifies the general “loser-pays” rule by providing that the unsuccessful party can be ordered to pay the costs of the successful party. However, if the arbitral tribunal differs from this view, they may make a different order recording the reasons for the same in writing.</p>

<sup>3</sup> Section 20(3) of the Arbitration and Conciliation Act, 1996.

<sup>4</sup> Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd, Civil Appeal No. 5437 of 2022.

<sup>5</sup> Section 31 (7)(b) of the Arbitration and Conciliation Act, 1996.

	<p>The intention for introducing Section 31A in the Act was to give more teeth to the tribunal's discretion to award costs and to provide the various contours of the costs regime. Section 31A also provides pointers that an arbitral tribunal may consider when determining the costs i.e.,</p> <ul style="list-style-type: none"> <li>(a) Conduct of all the parties;</li> <li>(b) Whether a party has succeeded partly in the case;</li> <li>(c) Whether the party had made a frivolous counter-claim leading to delay in the disposal of the arbitral proceedings; and</li> <li>(d) Whether any reasonable offer to settle the dispute is made by a party and refused by the other party.</li> </ul> <p>Section 31A has also introduced a clause which provides different types of costs that may be awarded by passing an order stating that a party shall pay:</p> <ul style="list-style-type: none"> <li>(a) A proportion of another party's costs;</li> <li>(b) A stated amount in respect of another party's costs;</li> <li>(c) Costs from or until a certain date only;</li> <li>(d) Costs incurred before proceedings have begun;</li> <li>(e) Costs relating to particular steps in the proceedings;</li> <li>(f) Costs relating to only a distinct part of the proceedings; and</li> <li>(g) Interest on costs from or until a certain date.</li> </ul> <p>The powers available to the arbitral tribunal under Section 31A of the Act are also available to a court (under the Section 31A itself) before whom any court proceedings in relation to an arbitration are ongoing. As such, a regime for costs wherein courts are empowered to award costs is already contained in the Code of Civil Procedure, 1908. However, Section 31A of the Act specifically empowers the arbitral tribunal to award costs and is in that sense a unique provision in the current legal regime. Further, Section 31A also clarifies that if the parties enter into any agreement that has the effect of requiring a party to pay the whole or part of the costs of arbitration, such agreement shall only be valid if it has been made <i>after</i> the dispute has arisen.</p>
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>The Bar Council of India does not permit advocates to charge their clients fees that are either subject to the outcome of a litigation or are a percentage or share of the awarded claims by the court. There is no separate law governing third-party funding in India but in general there is no embargo against it.</p>
Party to the New York Convention?	<p>Yes. India signed the New York Convention on June 10, 1958 and ratified it on July 13, 1960. Part II of the Act deals with foreign awards and Chapter 1 deals with New York Convention awards. There are two avenues available for enforcement of foreign awards in India, i.e., (1) the New York Convention and (2) the Geneva Convention.</p> <p>Under Section 44 (b) of the Act, the Central Government has notified a list of reciprocal territories and declared them to be territories to which the New York Convention applies. Awards from</p>

	such territories will be considered as "foreign awards" under Part II of the Act (provided other conditions under Section 44 are fulfilled).
Party to the ICSID Convention?	No.
Default time-limitation period for civil actions (including contractual)?	As per the Limitation Act, 1963, usually 3 (three) years from the cause of action, e.g., of breach of contract or tort.
Other key points to note?	<p>Section 12 of the Act provides for disclosures to be made by an arbitrator when a person is approached to be appointed as an arbitrator. Based on these disclosures, if an arbitrator's relationship with parties, counsel or subject matter falls within certain categories as specified in Schedule V or Schedule VII of the Act, it would give rise to immediate disqualification or be a ground for challenge to the appointment of the arbitrator.</p> <p>Under Section 29A of the Act, an award is to be made by the tribunal within 12 months of the completion of pleadings (which are to be completed within 6 months) by parties, and parties may only extend this term for a further period not exceeding a period by six months.</p> <p>For recognition of a foreign award, the award must be "commercial" in nature and must have been made pursuant to an agreement to which the New York Convention applies. It must also have been made in a country which is notified by the Indian Government. This means that the foreign award should have been made in a country which is not only a signatory to the New York Convention but one that has also been declared to be a reciprocating territory by the Central Government.</p>
World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020?	41.2 is the score for 2020 which is the last available score.
World Justice Project, Rule of Law Index: Civil Justice score for 2022?	0.50 is the score for 2022 which is the last available score.

## ARBITRATION PRACTITIONER SUMMARY

The Arbitration and Conciliation Act, 1996<sup>6</sup> (“**Act**”), as last amended in 2021, is closely modelled on the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (“**UNCITRAL Model Law**”). The Act sought to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the UNCITRAL Model Law and Rules.

By virtue of Section 2(2), Part I of the Act governs arbitral proceedings seated in India, and Section 2(7) provides that an award made under Part I shall be considered to be a domestic award. Part II of the Act governs the recognition and enforcement of foreign-seated arbitral awards.

With respect to Part I, pursuant to Section 2(1)(f) of the Act, an arbitration is an “international commercial arbitration” where:

1. *firstly*, the arbitration relates to a dispute arising out of legal relationships whether contractual or not;
2. *secondly*, such dispute is “commercial”<sup>7</sup> under Indian law; and
3. *thirdly*, at least one of the parties to the arbitration is
  - 3.1. an individual who is a national of, or habitually resident in a country other than India; or
  - 3.2. a body corporate incorporated under the laws of any country other than India; or
  - 3.3. an association or body of individuals whose central management and control is exercised in any country other than India; or
  - 3.4. the Government of a foreign country.

Part II of the Act recognises foreign awards under the New York Convention (“**NYC**”) and the Geneva Convention on the Execution of Foreign Arbitral Awards (“**Geneva Convention**”).

India has made certain reservations regarding the applicability of the NYC. Under Section 44 of the Act, four ingredients are necessary for a foreign award under the NYC to be enforced in India:

1. the dispute must be a “commercial dispute” under the law in force in India;
2. it must be made in pursuance of an agreement in writing for arbitration;
3. it must be a dispute arising between “persons” (without regard to their nationality, residence or domicile); and
4. the arbitration must be conducted in a country which is a signatory to the NYC, and a territory where reciprocal provisions have been made such that the Central Government has notified the territory in the Official Gazette.<sup>8</sup>

Similarly, foreign arbitral awards under the Geneva Convention are recognised and enforced in accordance with Sections 53 to 60 of the Act and the Second and Third Schedules of the Act.

It is the commercial division of the district, state or apex courts that handles all arbitration related matters depending on either the pecuniary value of the subject-matter or the nature of the relief sought.

Date of arbitration law?	26 August 1996 (last amended on March 11, 2021 and deemed to have come into force on November 4, 2020.)
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<sup>6</sup> Available at: <https://indiacode.nic.in/bitstream/123456789/1978/1/199626.pdf>.

<sup>7</sup> “Commercial” is as defined in Section 2 (c) of the Commercial Courts Act, 2015.

<sup>8</sup> PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited (2021) 4 MLJ 59 (SC); LNIND 2021 SC 144.

<p>UNCITRAL Model Law? If so, any key changes thereto? 2006 version?</p>	<p>The current Act is broadly drafted taking into account the UNCITRAL Model Law 1985 and UNCITRAL Conciliation Rules, 1980.</p> <p>The key changes as included in the Act are as follows:</p> <ol style="list-style-type: none"> <li>Grounds for challenge to arbitrators have been detailed out and specified as per prevalent international standards to uphold independence and impartiality of arbitrators.</li> <li>A statutory framework has been provided for time bound completion of arbitration proceedings.</li> <li>Interim orders that can be passed by the courts or arbitral tribunals, as the case may be, relating to arbitral proceedings have been detailed out to enable protection of the value of the subject matter of dispute during the pendency of the arbitration proceedings.</li> <li>The grounds for challenge to arbitral awards have been clarified to convey that the scope of challenge is intended to be limited. This would enable finality to arbitral awards.</li> </ol> <p>The provision of automatic stay on the enforcement of arbitral awards, as soon as an application for setting aside an arbitral award is filed, has been done away with and a provision has been included which states that a stay on the enforcement of an arbitral award may be granted upon imposition of conditions including deposit in case of monetary awards.</p>
<p>Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?</p>	<p>Under the Act, certain applications that can be filed such as for the appointment of arbitrators, jurisdictional challenges, annulment, recognition and enforcement of the award, have to be filed before the ordinary civil courts in India. Within these courts, matters that classify as “commercial” under the Commercial Courts Act 2015 are assigned to specialised commercial benches, to ensure that such matters are handled by judges with relevant experience. Further, the relevant seats of arbitration, such as New Delhi, Mumbai, Bangalore, Hyderabad and Kolkata, have many experienced judges.</p> <p>Under the currently applicable statutory regime in India, i.e., the Commercial Courts Act 2015, disputes that are “commercial” in nature, are filed before specialised commercial courts. Such disputes are disputes arising out of commercial transactions. Some of these commercial transactions include ordinary transactions of merchants, bankers, financiers, etc. such as those relating to mercantile documents, joint venture agreements, shareholders agreements, agreements for sale of goods or provision of services, etc.</p> <p>The “specified value” (as defined in the Commercial Courts Act, 2015) of the subject matter of a commercial dispute has been defined under the Act as being computed by taking into account the value of the money sought to be recovered in a suit where the relief sought is the recovery of money, or in the case of moveable property or immoveable property the specified value will be determined by taking into account the market value of such property.</p>

	Under the Commercial Courts Act, 2015, where the subject matter of an arbitration is a commercial dispute of a “specified value”, it will be heard by the appropriate commercial court. Within such appropriate commercial court, there may be special rosters of judges constituted for hearing arbitration matters.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<p>Yes, parties may request <i>ex parte</i> interim measures prior to the commencement of the arbitration proceedings.</p> <p>Generally, <i>ex parte</i> interim injunctions are rare and are granted only in urgent and exceptional circumstances. Such an injunction may be granted only until the next date of hearing and not as an interim injunction until the completion of the matter<sup>9</sup>.</p> <p>Another important consideration when applying for interim protection before the commencement of arbitral proceedings is Section 9(2) of the Act, which stipulates that in case of any court order for interim protection under Section 9 (1), arbitral proceedings must commence within a period of 90 days of such order. The intention with which such a provision has been introduced is to prevent the practice of parties with favourable interim orders delaying the invocation of arbitration proceedings.</p>
Courts’ attitude towards the competence-competence principle?	Courts in India have generally tended to not interfere with the jurisdiction of the arbitral tribunal particularly in the recent past. The <i>kompetenz-kompetenz</i> principle is recognised statutorily in Section 16 of the Act which empowers the arbitral tribunal to rule on its own jurisdiction. This power of the arbitral tribunal includes the power to rule on any objections with respect to the existence and validity of the arbitration agreement.
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	<p>The issue of whether an arbitral tribunal may render a ruling on jurisdiction with reasons to follow in a <i>subsequent</i> award, has not been settled conclusively in Indian law so far. However, since a ruling of an arbitral tribunal <i>declining</i> jurisdiction is appealable under Section 37 of the Act, it would be prudent for the tribunal to provide reasons at the time of rendering the ruling since an order without reasoning may be set aside because it is unreasoned. Conversely, the tribunal may render a decision accepting jurisdiction with reasons deferred to a later stage since such a decision cannot be appealed under Section 37 and can only be challenged with the rest of the award under Section 34 of the Act.</p> <p>Overall however, Indian law is settled on the issue of whether a ruling under Section 16 of the Act needs to be decided as a preliminary issue or if it can be decided at a subsequent stage until the stage of rendering of the award. It is clear that an arbitral tribunal need not decide a jurisdictional challenge under Section 16 of the Act at the time it is submitted. It can decide to postpone its decision on a jurisdiction challenge to a later stage. This stage can extend up</p>

<sup>9</sup> Order XXXIX, Code of Civil Procedure, 1908 (CPC).



	to the rendering of the arbitral award itself, as long as the jurisdictional challenge is dealt with in the award. <sup>10</sup>
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The additional ground in Indian arbitration law over and above the New York Convention grounds is provided in Section 34 (2A) of the Act. Section 34 (2A) states that for arbitral awards arising out of arbitrations other than international commercial arbitrations, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award, it may set aside the award. Therefore, under Indian law, patent illegality is available as a ground for setting aside awards that are rendered in arbitrations that are not international commercial arbitrations.
Do annulment proceedings typically suspend enforcement proceedings?	There is no automatic stay on the execution of an award when a party files an application to challenge it. A party that files for annulment of an award must make a separate application for stay of the enforcement of the award. By an amendment in 2021, a new provision was introduced by which if a court <i>prima facie</i> finds that the arbitral agreement or the underlying contract or the making of the award, is induced by fraud or corruption, it has to automatically stay the award unconditionally.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	<p>One of the grounds for refusing enforcement of a foreign award under Section 48 of the Act is if the award has been set aside or suspended by a court in the jurisdiction where the award was made.</p> <p>Arguably, setting aside of the award in the jurisdiction where the award was made would be considered a "mandatory" ground for refusing enforcement under Section 48 of the Act. In the landmark judgment of <i>Vijay Karia v. Prysmian Cavi</i>, the Supreme Court held that certain grounds under Section 48 of the Act are "mandatory grounds", such as the ground pertaining to the invalidity of the arbitration agreement or grounds affecting the jurisdiction of the arbitration proceedings, while other grounds such as those linked to party interest alone, such as the inability of a party to present its case, have been classified as "discretionary".<sup>11</sup></p> <p>Therefore, it is likely that if a foreign award has been set aside in the jurisdiction where the award was made, Indian courts would refuse enforcement as such a ground would be considered "mandatory" and not "discretionary".</p>

<sup>10</sup> Glencore International AG v. Indian Potash Limited & Ors. [263 (2019) DLT 663], Maharshi Dayanand University & Ors., v. Anand Co-op. L/C Society Limited & Ors, (2007) 5 SCC 295.

<sup>11</sup> Vijay Karia and Ors., v. Prysmian Cavi E. Sistemi SRL & Ors., 2020 SCC OnLine SC 177.

<p>If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?</p>	<p>Under Section 19 of the Act, parties are free to agree on a procedure to conduct the proceedings. When there is no agreed procedure, the tribunal may conduct the proceedings in the manner it considers appropriate.</p> <p>Under Section 4 of the Act, if a party fails to object to a non-compliance during the arbitration proceedings with any non-derogable provision under the Act, or any other requirement under the arbitration agreement, then it is treated as having waived its right. However, if a party has objected to the non-compliance but the tribunal has rendered an award without regard to the objection, it may become a ground for setting aside the award under Section 34 of the Act. The tribunal is bound to consider the objection and decide if the case reasonably warrants a physical hearing. A party may seek to set aside an award based on the fact that the tribunal decided to conduct a hearing remotely even though the case warranted a physical hearing. However, the party raising the objection would have to demonstrate that conducting the proceedings remotely was in violation of Sections 18 and/or 19 of the Act. Section 18 requires a tribunal to treat parties equally and provide both parties a full opportunity to present their respective cases.</p>
<p>Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?</p>	<p>The Indian Government has recently released a draft scheme for the quick settlement of disputes where a public or government body is a litigant. Under this scheme, the primary aim is to settle contractual disputes of government and government undertakings, wherein an arbitral award is under challenge in a court, a voluntary settlement scheme with standardised terms will be introduced. This will be done by offering graded settlement terms depending on the pendency level of the dispute. From the perspective of enforcement, under this draft scheme, where a court order or award is passed, the government will pay 80% of the amount awarded by the court. In the case of an arbitral award and where the case may or may not be under appeal, the government will pay 60% of the amount awarded by the arbitral tribunal.</p>
<p>Is the validity of blockchain-based evidence recognised?</p>	<p>Under the Act, there is no express recognition of blockchain technology. In India, the Information Technology Act, 2000 (IT Act) gives legal recognition to electronic communication and transactions carried out by electronic data interchange. However, the IT Act too does not recognise blockchain technology. That said, there is no embargo on the use of blockchain technology and owing to the principle of party autonomy, by mutual agreement parties may use blockchain-based evidence provided it does not go against any general law on contracts or evidence.</p>

Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?	<p>The recognition of an agreement or award recorded on blockchain may be better understood by a reference to recognition of electronic agreements under the general law of contracts and evidence. Under the law of evidence, all documents including electronic records are treated as documentary evidence. The Information Technology Act, 2000 defines electronic record to mean data, which can be an image or sound, which is stored, received or sent in an electronic form.</p> <p>As the Act does not expressly recognise blockchain technology, an arbitration agreement recorded on a blockchain can only arguably fall within the definition of an arbitration agreement under Section 7 of the Act (which defines an arbitration agreement) if it meets the criteria of the general law on electronic record and contracts.</p> <p>However, when a party makes an application to a court under Section 8 of the Act seeking reference of the dispute to arbitration, such an application must be accompanied by an original agreement or a certified copy. Whether an arbitration agreement recorded on a blockchain is considered an original for the purpose of Section 8 of the Act (by which a party may approach a court to refer the parties to arbitration) has not yet been tested before Indian courts.</p>
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	As above.
Other key points to note?	<ul style="list-style-type: none"> <li>• An application made by a party to the court or to any person designated by the court, for the appointment of an arbitrator will have to be disposed of expeditiously, within 60 days from the date of the service of notice of such proceedings on the other party.<sup>12</sup></li> <li>• The time limit for the completion of arbitration proceedings as provided under the Act, is 12 months from the date of the completion of the pleadings. This time limit can be extended by another 6 months by the consent of parties and for a further period of 6 months by the court if the parties show sufficient cause. However, international commercial arbitrations are exempted from this 12 month time limit.</li> <li>• A party may only file an application to challenge the arbitral award after issuing prior notice to the other party. An affidavit to that effect must accompany the challenge application.<sup>13</sup></li> </ul>

<sup>12</sup> Section 11(13) of the Arbitration and Conciliation Act, 1996.

<sup>13</sup> Section 34 (5) of the Arbitration and Conciliation Act, 1996.

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model law? 1985 or 2006 version?

The current Act seeks to consolidate and amend the law governing domestic arbitration, international commercial arbitration, the enforcement of foreign arbitral awards, and the definition of the law governing conciliation, while taking the UNCITRAL Model Law 1985 and UNCITRAL Conciliation Rules, 1980 into account.<sup>14</sup> When the Indian legislature enacted the 1996 Act, it adopted the text of the Model Law with some additions and omissions. In *Bharat Aluminium Co. v. Kaiser Aluminium*,<sup>15</sup> it was argued that the changes made in the 1996 Act that deviated from the Model Law acted to distance the 1996 Act from some of the Model Law's underlying principles (such as the principle of territoriality). The Supreme Court disagreed, finding that the 1996 Act adopts the UNCITRAL Model Law in spirit and with its underlying principles, and explaining why some of the changes had been made by the Indian legislature in the 1996 Act. It is evident that there has been a deviation and that the uniformity with the UNCITRAL Model Law has been altered as a result of amendments to the Act. Nonetheless, the broad perspective of the UNCITRAL Model Law has been maintained by the Act's provisions and judicial pronouncements.

##### 1.1.1 If yes, what key modifications if any have been made to it?

India has had difficulties with the UNCITRAL Model Law, particularly on the issue of interim measures. Despite the adoption of Indian arbitration laws in line with the UNCITRAL Model Law, there is extensive court interference in India, owing to the reliance on domestic procedural laws such as the Civil Procedural Code, 1908 and the Specific Relief Act, 1963. The intent clearly stated in Article 2A of the UNCITRAL Model Law to have "*regard*" to the UNCITRAL Model Law's "*international origin*," "*the need to promote uniformity in its application*," and "*the observance of good faith*" have been largely ignored by India.<sup>16</sup>

The language of Section 9 of the Act does not appear to be identical to Article 9 of the UNCITRAL Model Law.<sup>17</sup> Despite the fact that England has not fully adopted the UNCITRAL Model Law, the language has been borrowed from Section 44 of the English Arbitration Act.<sup>18</sup> Section 9 of the Act, like the English Arbitration Act, identifies the situations in which interim relief can be granted, recognising the court's power to grant interim measures in aid of arbitration. Thus, Indian law provides courts an autonomous source of power to grant interim measures through the Act. Section 9 of the Act, further, does not specify the scope of the courts' power, the standards to be adopted, the procedures to be followed, or the procedure for enforcement of such orders. Furthermore, unlike Article 17G of the UNCITRAL Model Law,<sup>19</sup> Indian law does not provide for the express liability of the party seeking the interim measure for costs and damages incurred by any party as a result of an interim measure granted that the arbitral tribunal later determines should not have been granted.

<sup>14</sup> Available at: [https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation\\_0.pdf](https://legalaffairs.gov.in/sites/default/files/arbitration-and-mediation_0.pdf)

<sup>15</sup> *Bharat Aluminium Co. v. Kaiser Aluminium*, (2012) 9 SCC 648; (2012) 4 SCC (Civ) 906.

<sup>16</sup> Article 2A of the UNCITRAL Model Law, The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf); Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729, 359 (2012). c.f. Jose F Sanchez, *Applying the Model Law's Standard for Interim Measures in International Arbitration*, 37 (1) J. Int'l Arb. 49 (2020).

<sup>17</sup> *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 SCC 479.

<sup>18</sup> Section 44 of the English Arbitration Act, 1996. The consolidated text of the Act is available at <https://www.legislation.gov.uk/ukpga/1996/23/contents>.

<sup>19</sup> Article 17G of the UNCITRAL Model Law. The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

Section 8 of the Act departs from the UNCITRAL Model Law inasmuch as it does not permit a court to entertain an objection to the effect that the arbitration agreement is "*null and void, inoperative or incapable of being performed*". As a result, the Act allows for more court intervention (to the extent permitted by the UNCITRAL Model Law) only in foreign arbitrations.

Section 16 deviates slightly from Article 16 of the UNCITRAL Model Law<sup>20</sup> as well. In contrast to the UNCITRAL Model Law, under Section 16, if the tribunal declares that it has jurisdiction, no interim court recourse is permitted. In such a case, the challenge is only permitted after the final award has been issued. Further, the Act does not contain an equivalent to Article 7 of the UNCITRAL Model Law,<sup>21</sup> which provides a detailed definition of electronic communication as well as detailed provisions for interim measures.<sup>22</sup> Lastly, Section 36 of the Act does not include the modification to Article 36 of the UNCITRAL Model Law<sup>23</sup> that requires the filing of the original/copy of the arbitral award for its enforcement before a court. However, the requirement to file an original/copy of the award in order for it to be enforced is incorporated into Indian law through procedural rules of Indian courts.

## 1.2 When was the arbitration law last revised?

Most recently in 2023, the Government of India, Ministry of Law & Justice constituted an expert committee under the chairpersonship of Dr. T.K. Vishwanathan, former law secretary, to examine the working of arbitration laws in the country and recommend reforms to the Arbitration and Conciliation Act, 1996. The committee has also invited comments and suggestions from all stakeholders, including arbitrators, judges, senior counsels, advocates, domestic and international law firms. Based on the terms of reference of the committee, the committee is likely to evaluate and analyse the operation of the arbitration ecosystem, recommend a framework of a model arbitration system, propose measures to fast track enforcement of awards, recommend statutory means to minimise recourse to judicial authorities, and suggest measures, including the need for a new legislation on arbitration in simple language.

In the past, the Act has been subjected to continuous piecemeal amendments in an effort to make India a pro-arbitration hub and an effective business destination by providing a robust dispute resolution mechanism that improves the ease of doing business in India. Prior to the Act, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961 governed arbitration law in India.<sup>24</sup>

The Arbitration and Conciliation (Amendment) Act, 2015<sup>25</sup> amended the Act and came into effect on October 23, 2015. The 2015 Amendment was seen as a significant step towards making arbitration a more efficient and attractive means of dispute resolution in India. Further, the Arbitration and Conciliation (Amendment) Act was further amended in 2019. This amendment brought significant changes to the Indian arbitration law aimed at promoting institutional arbitration, enhancing the quality of arbitrators, and reducing the time and cost involved in arbitration proceedings. The 2019 amendment Act added Sections 43A to 43M to the Act. These sections set out the constitution of the Arbitration Council of India (ACI), its duties, and responsibilities. The amendment Act was notified in August 2019, but the ACI is yet to be constituted. Once constituted, it will

<sup>20</sup> Article 16 of the UNCITRAL Model Law, The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

<sup>21</sup> Article 7 of the UNCITRAL Model Law, The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

<sup>22</sup> Article 17 of the UNCITRAL Model Law, The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

<sup>23</sup> Article 36 of the UNCITRAL Model Law, The consolidated text of the Code is available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf).

<sup>24</sup> Section 85 of the Arbitration and Conciliation Act, 1996. The consolidated text of the Act is available at [https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996\\_26.pdf](https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996_26.pdf).

<sup>25</sup> The Arbitration and Conciliation (Amendment) Act, 2015 available at: <http://lawmin.gov.in/arbitration-and-conciliation-amendment-act-2015>.

be the duty of the ACI to take all measures to promote alternate dispute resolution mechanism and frame policies, guidelines and regulations in relation to conduct of arbitration in India.

The 2021 Amendment to the Arbitration and Conciliation Act of 1996<sup>26</sup> is the third change to the main Act in the last six years. The following are the significant changes brought about by this amendment Act:

- i. The amendment provides for an automatic stay of execution of any arbitral award if the courts discover clear evidence that the award was influenced by fraud or corruption. This modification has been incorporated into Section 36 of this Act by referencing Section 2 of the principal Act.
- ii. Secondly, it omitted the Eighth Schedule from the main Act, which specified the arbitrator's qualifications, experience, and the general norms to be followed.

## 2. The arbitration agreement

### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

The legal position in India on this issue has been settled by the Supreme Court in the decision of *National Thermal Power Corporation v. Singer Company*<sup>27</sup> ("**NTPC**"). In this case, the issue that arose for determination was what law would govern the arbitration agreement when the same was not expressly mentioned in the contract, i.e., whether the arbitration agreement would be governed by the law governing the main contract or the law of the seat. On the facts of the case, the law governing the contract was Indian law, while the seat of arbitration was in London.

The Court held that in the absence of an unmistakeable intention to the contrary, where the proper law of the contract has been expressly chosen by the parties, it would govern the arbitration agreement. It considered the arbitration clause to be contained in and forming a part of the main contract, and not existing as a separate agreement. In addition, the Court also took into account the fact that the contract had in every respect "*the closest and most real connection*" with the Indian system of law and that it was by that law that the parties had expressly evinced their intention to be bound in all respects.

More recent decisions in India have also dealt with the issue of whether the proper law of the contract or the law of the seat would have to be construed as the law applicable to the arbitration agreement.<sup>28</sup> For instance, in the case of *Archer Power Systems Private Limited v. Kohli Ventures Limited*,<sup>29</sup> the High Court of Madras dealt with a situation where the parties to a contract had explicitly provided for the seat of arbitration to be London, and hence agreed that the curial law for the arbitration would be English law. The parties had provided for the proper law of the contract to be Indian law. However, the parties did not expressly provide for the proper law of the arbitration agreement. In this context, the Court found that the proper law of the arbitration agreement (in the absence of any agreement to the contrary) would be the law of the seat of the arbitration, i.e., English law in the present case.

### 2.2 In the absence of an express designation of a 'seat' in the arbitration agreement, how do the courts deal with references therein to a 'venue' or 'place' of arbitration?

The Act uses the word "place" instead of "seat" or "venue" of arbitration. Section 20(1) of the Act states that the parties are free to agree on the place of arbitration. However, as per Section 20(2) of the Act, in case there is no agreement amongst the parties on the place of arbitration, the arbitral tribunal will determine the place taking into consideration the circumstances of the case including the convenience of the parties. Section

<sup>26</sup> The Arbitration and Conciliation (Amendment) Act, 2021, available at: <https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29act-2021.pdf>

<sup>27</sup> *National Thermal Power Corporation v. Singer Company and Ors.*, 1993 AIR 998.

<sup>28</sup> *Archer Power Systems Private Limited v. Kohli Ventures Limited*, 2017 (4) CTC 449.

<sup>29</sup> *Archer Power Systems Private Limited v. Kohli Ventures Limited*, 2017 (4) CTC 449.

20(3) of the Act allows the arbitral tribunal to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or parties or for inspection of documents as provided under the Act.

Even though the terms "seat" and "venue" are not explicitly mentioned in the Act, courts have adopted the following approaches:

1. The Supreme Court in *Union of India v. Hardy Exploration and Production (India) Inc.*<sup>30</sup> ("**Hardy Exploration**"): In this case, the arbitration agreement had provided the "venue" of arbitration proceedings as Kuala Lumpur. However, when disputes arose, one of the parties contended that the arbitration agreement only provided for "venue" and therefore Kuala Lumpur was not intended to be the "seat" of arbitration which ought to be New Delhi. The Supreme Court held that the parties had not chosen the seat of arbitration, and a mere mention of Kuala Lumpur as the venue could not imply that it had become the seat of arbitration. "Venue" could not be read as "seat" unless there were additional factors added to justify the treating of the venue as a seat.
2. The Supreme Court in *BGS SGS SOMA JV v. NHPC Ltd*<sup>31</sup> ("**BGS Soma**"): The Court held that a chosen venue for arbitration proceedings would become the seat of arbitration in the absence of any "*significant contrary indicia*." If the arbitration agreement uses language such as stating that the arbitration proceedings "*shall be held*" at a particular venue as opposed to stating that the "*tribunal is to meet or have witnesses, experts or parties*" at a particular venue, it shall imply that the venue was intended to be the seat.  
In this case, the Court held its earlier decision in *Hardy Exploration* to be *per incuriam* for its failure to follow the principle espoused by the English case of *Roger Shashoua and Ors. v. Mukesh Sharma*<sup>32</sup> which had been adopted in the Indian context by the five-judge bench decision in *Bharat Aluminium Co. v. Kaiser Aluminium*. The "*Shashoua principle*" articulated that a particular place would be the seat of arbitration if parties had (a) chosen it as the venue (b) not designated any other place as the seat (c) chosen a supranational body of rules to govern the arbitration and (d) there were no contrary indicia.
3. The Supreme Court in *Mankatsu Impex Private Limited v. Airvisual Ltd*<sup>33</sup> ("**Mankatsu Impex**"): In this case, the agreement stated that any disputes shall be resolved in Hong Kong, and that it would be the place of arbitration. However, the governing law of the contract was Indian law. In approaching the Supreme Court for the appointment of an arbitrator, the issue that arose was whether India (being the law of the contract) or Hong Kong (being the venue) would be the seat of arbitration. The Supreme Court held that merely the words "place of arbitration" could not decide the seat, and the intention of the parties had to be determined from their conduct and the terms of the contract. Ultimately, Hong Kong was held to be the seat because the agreement stated that disputes were to be administered in Hong Kong.
4. The Delhi High Court in *Dholi Spintex Private Limited v. Louis Dreyfus Company India Private Limited*<sup>34</sup> ("**Dholi Spintex**"): The issue that arose concerned the determination of the seat of arbitration. The plaintiff contended that the seat would be New Delhi since Clause 7 of the contract between the parties designated the courts of New Delhi as having exclusive jurisdiction, and because the two parties were Indian and could not have decided a foreign seat in the absence of any foreign element. The defendant, on the other hand, cited earlier judgements, especially *Mankatsu Impex*, to contend that where parties had explicitly agreed for "*arbitration administered in Hong Kong*", it meant that parties had expressly agreed for Hong Kong to be the seat of arbitration.

<sup>30</sup> Union of India v. Hardy Exploration and Production (India) Inc, AIR 2018 SC 4871.

<sup>31</sup> BGS SGS Soma JV v. NHPC Ltd., (2020) 4 SCC 234.

<sup>32</sup> Roger Shashoua and Ors. v. Mukesh Sharma, [2009] EWHC 957 (Comm).

<sup>33</sup> Mankatsu Impex Private Limited v. Airvisual Ltd., (2020) 5 SCC 399.

<sup>34</sup> Dholi Spintex Private Limited v. Louis Dreyfus Company India Private Limited, (2021) 2 RCR (Civil) 162.



The Court held that by agreeing to conduct the arbitration through the International Cotton Association, the parties have agreed that the seat of arbitration would be London, and not Delhi. The implication of Clause 7 was merely that Indian law governed the substantive law of the contract and would be relevant only if by an agreement both parties were to decide not to settle their disputes through arbitration but by approaching courts of law.

The decision in *Mankatsu Impex* does not explicitly affirm *BGS Soma*, though it follows a similar approach in deciding the seat of arbitration. The decision in *Dholi Spintex* also follows *Mankatsu Impex* and diverges from the approach in *Hardy Exploration*. It is evident that the law on this issue is not settled and has a chequered history. However, the predominant approach taken by courts at the moment seems to be in adherence with the Shashoua Principle i.e., that notifying the venue of arbitration along with a supra national body of rules to govern the arbitration would determine the seat in the absence of any explicit contrary indicia.

### **2.3 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?**

The doctrine of separability dictates that an arbitration clause in a contract is a separate and distinct agreement independent of the underlying contract in which it is embedded, and that notwithstanding the invalidity or termination of the substantive underlying commercial contract, the arbitration agreement in the said contract would continue to remain valid.<sup>35</sup> Therefore, the arbitration clause being a separate agreement would survive the termination of the contract that contains it. This was the approach taken by the Supreme Court in the recent three-judge bench decision of *N.N. Global Merchantile (P) Limited v. Indo Unique Flame Limited*.<sup>36</sup> While negating the legal position laid in the previous decisions of *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd*<sup>37</sup> and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*,<sup>38</sup> the Supreme Court held that the non-payment of stamp duty on the underlying contract would not invalidate the arbitration agreement and render it non-existent in the eyes of the law. However, due to contradictory findings with another three-judge bench of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*,<sup>39</sup> the Supreme Court referred the matter to a larger bench to settle the issue authoritatively. In the larger bench i.e., the constitutional bench (five-judge), decision of the Supreme Court in *N. N. Global Merchantile Private Limited v. Indo Unique Flame Limited and Other*<sup>40</sup>, by a 3:2 majority, the court set aside its previous three-judge bench decision and held that the arbitration agreement, being an independent agreement on its own (i.e., separable), is subject to the payment of stamp duty, and that an agreement which was unstamped was unenforceable in law. It would also not be appropriate to describe the non-stamping as a “curable defect”. Therefore, parties would not be able to proceed with arbitration arising from an unstamped arbitration agreement.

### **2.4 What are formal requirements (if any) for an enforceable arbitration agreement?**

The formal requirements of an enforceable arbitration agreement are contained in Section 7 of the Act, which states that an arbitration agreement is an agreement to submit to arbitration all or certain disputes that may arise in respect of a defined legal relationship, whether contractual or not.

An arbitration agreement must be in writing, and it can take the form of an arbitration clause in a contract or a separate agreement. An arbitration agreement may be deemed to be in writing if it is contained in:

- a. a document signed by the parties;

<sup>35</sup> N. N. Global Merchantile v. Indo Unique Flame Limited & Ors., (2021) 4 SCC 379.

<sup>36</sup> N.N. Global Merchantile (P) Limited v. Indo Unique Flame Limited, (2021) 4 SCC 379.

<sup>37</sup> SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd, (2011) 14 SCC 66.

<sup>38</sup> Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Limited, 2019 SCC OnLine SC 515.

<sup>39</sup> Vidya Drolia v. Durga Trading Corporation, AIR (2019) SC 3498.

<sup>40</sup> N. N. Global Merchantile v. M/S Indo Unique Flame Limited & Ors., 2023 SCC OnLine SC 495, Paras 120, 125.



- b. t an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- c. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied.

In addition, the agreement must also satisfy the requirements of enforceability of contracts under the Indian Contract Act, 1872,<sup>41</sup> such as the capacity of the parties to contract (age, soundness of mind, etc), free consent, lawful consideration and lawful object of the contract, etc.

An arbitration agreement can cover future disputes, given the use of the words “*disputes which have arisen or which may arise*” under Section 7(1) of the Act.

## **2.5 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

This has been a highly debated and litigated question in India. Binding third parties to an arbitration agreement and impleading such third parties to an arbitration (where such parties are frequently, affiliates, subsidiaries or associate companies of the signatories) is largely governed by the “group of companies” doctrine.

In India, the decision of the Supreme Court in *Chloro Controls India (P) Ltd., v. Severn Trent Water Purification Inc.*<sup>42</sup> was the first significant instance of the application of the “group of companies” doctrine. In determining whether non-signatory parties to agreements that constitute a composite transaction could seek to be referred to arbitration, the Court laid down that only in cases where “*the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates*” would a non-signatory be bound by the arbitration agreement. In the absence of prior consent, only in exceptional situations would non-parties be subjected to arbitration. Such exceptions would be judged on the touchstone of: “*direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction.*”

Besides the above, the Court would also have to examine whether the transaction is of a “*composite nature*” where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having a bearing on the dispute. Besides all this, the Court would also have to examine whether a composite reference of such parties would serve the ends of justice. Only once all of these criteria are fulfilled would the reference of a non-party to an arbitration be permitted.

The group of companies’ doctrine was further referred to in the case of *Cheran Properties Ltd. v. Kasturi and Sons Ltd.*,<sup>43</sup> where the issue was whether a non-signatory can be bound by an arbitral award. Giving primacy to the “mutual intention” of the parties, the Supreme Court stated that “[t]he group of companies doctrine is essentially intended to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories.”

The group of companies’ doctrine was also invoked in the case of *MTNL v. Canara Bank*,<sup>44</sup> where the Supreme Court joined a third-party non-signatory to the arbitration proceedings pending before the arbitral tribunal because there was a clear intention of the parties to bind the non-signatory (being a subsidiary of one of the parties) to the proceedings. *Secondly*, the tri-partite nature of the transaction meant that there could be a final resolution of the disputes only if all three parties were joined in the arbitration proceedings, to finally

<sup>41</sup> The Indian Contract Act, 1872, available at: <https://indiacode.nic.in/bitstream/123456789/2187/3/A1872-9.pdf>.

<sup>42</sup> Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors., Civil appeal no. 7134 of 2012.

<sup>43</sup> Cheran Properties Limited v. Kasturi & Sons Ltd. & Ors. (Civil Appeal Nos. 10025-10026 of 2017).

<sup>44</sup> MTNL vs. Canara Bank and Others., (2020) 12 SCC 767.

resolve the disputes. Therefore, the Court also recognised implicit or tacit consent evident through conduct as being one of the grounds for impleading third parties to arbitration proceedings.

Following the 2015 amendment of the Act, the apex court reaffirmed the principle established in *Chloro Control* in several recent decisions.<sup>45</sup> In *Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Limited*,<sup>46</sup> while upholding the *Chloro Control* doctrine, the Supreme Court laid down certain factors to be considered in deciding whether a non-signatory may be bound by an arbitration agreement:

- (i) The mutual intent of the parties;
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;
- (iii) The commonality of the subject matter;
- (iv) The composite nature of the transaction; and
- (v) The performance of the contract.

On the issue of enforcement of an arbitral award that binds non-signatories, in the recent case of *Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited*<sup>47</sup> ("**Gemini Bay**"), the Supreme Court has refused to interfere in such an award, holding that such a foreign award could be enforced i.e., awards that bind third party non-signatories could be enforced under the Act.

In *SBS Holding Inc v. Anant Kumar Choudhary & Ors*,<sup>48</sup> on the issue of enforcing an arbitral award against a third-party litigation-funding entity, the Delhi High Court, citing *Gemini Bay*, held that the costs which are due to be paid by the parties to the award can be claimed against the litigation funding entity as well, due to the funding arrangement that existed between these parties. The court held that the defendants could not be left high and dry and be made to bear their own costs of defending a litigation which may not have been initiated had it not been for the funding received from the third party.

Therefore, in certain situations, courts have not shied away from enforcement of an arbitral award against third party non-signatories.

In the case of *Cox and Kings v. SAP India (P) Ltd.*<sup>49</sup> on account of a difference in opinion between the judges, the Supreme Court made a reference to a larger bench of judges (i.e., a constitutional bench of judges) for an examination of this doctrine and for a determination of the following question, amongst others: "*Whether the 'Group of companies' doctrine as expounded by the Chloro Control Case (supra) and subsequent judgments are valid in law?*" Arguments have been heard by the constitutional bench and the case has been reserved for orders.

Therefore, while the position of law at present remains the same as the holding in the *Chloro Controls* case, it is potentially subject to change in the future.

## 2.6 Are there restrictions to arbitrability? In the affirmative:

Under Indian law, certain disputes are treated as non-arbitrable. The concept of non-arbitrability is rooted in different types of legal reasoning. Some reasons relate to the subject matter of the dispute. Matrimonial and testamentary matters are considered non-arbitrable as they are reserved for determination by public courts. Further, statutory tenancy and rent control matters as well as insolvency matters are non-arbitrable subjects as there are special courts and tribunals which are granted exclusive jurisdiction to adjudicate those matters.

<sup>45</sup> Cheran Properties Limited v. Kasturi & Sons Ltd. & Ors. (Civil Appeal Nos. 10025-10026 of 2017; Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr., Civil Appeal No. 4690 of 2018 (Arising out of SLP (C) No. 16789 of 2017); MTNL vs. Canara Bank and Others., (2020) 12 SCC 767; Duro Felguera v. Gangavaram Port Limited., 2017 9 SCC 729.

<sup>46</sup> Oil and Natural Gas Corporation Ltd. vs Discovery Enterprises Pvt. Ltd. and another, Civil Appeal No. 2042 of 2022.

<sup>47</sup> Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited, Civil Appeal No. 8343-8344 of 2018 and 8345-8346 of 2018, Supreme Court.

<sup>48</sup> SBS Holding Inc v. Anant Kumar Choudhary & Ors., O.M.P (I) (COMM.) 71/2023, Delhi High Court.

<sup>49</sup> Cox and Kings Limited v. SAP India Private Limited and Anr. Arbitration Petition (Civil) No. 38 of 2020, Supreme Court.

Finally, certain matters are considered to be matters *in rem* and hence are suited to adjudication by public courts and tribunals as opposed to matters which are *in personam*. A right *in rem* is exercisable against the world at large and not against a specific set of individuals. Since a right *in rem* is exercisable against the world at large, it cannot be adjudicated as a private dispute between parties through arbitration.

In the landmark decision of *Vidya Drolia v. Durga Trading Corporation*<sup>50</sup> ("**Vidya Drolia**"), the Supreme Court laid down a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable. i.e., in the following four scenarios:

- "(1) when the cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*  
*(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*  
*(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*  
*(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

The Court also clarified that these tests are not meant to be watertight compartments, and there is a possibility that they may overlap. However, applying such tests in a holistic and pragmatic manner, it would be possible to ascertain with a great amount of certainty whether a dispute or subject matter is non-arbitrable.

#### **2.6.1 Do these restrictions relate to specific domains (such as anti-trust, employment law etc.)?**

The well-recognised examples of non-arbitrable disputes in India as affirmed by *Vidya Drolia* are as follows:<sup>51</sup>

1. disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
2. matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
3. guardianship matters;
4. insolvency and winding-up matters;
5. testamentary matters (grant of probate, letters of administration and succession certificate);
6. 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; (Therefore, landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in rem but pertain to subordinate rights *in personam* that arise from rights in rem. Such disputes would not affect third-party rights or have any "*erga omnes*" effect requiring adjudication by a court of law. An award that decides landlord-tenant disputes can be executed and enforced like a decree of the civil court. These disputes do not pertain to inalienable and sovereign functions of the State and are not barred from arbitration by the provisions of the Transfer of Property Act.)<sup>52</sup>
7. grant and issue of patents, registration of trademark and copyright;
8. anti-trust/competition laws; and
9. claims over which the Debt Recovery Tribunal has jurisdiction.<sup>53</sup>

In India, the law recognises that there are offshoot disputes from non-arbitrable disputes which are arbitrable if they do not fall under any of the non-arbitrability criteria set out above. When a landlord-tenant

<sup>50</sup> Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

<sup>51</sup> Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

<sup>52</sup> Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

<sup>53</sup> Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

dispute comes under the purview of the Transfer of Property Act, 1888 (and not rent control legislation), then such a dispute is arbitrable. In a dispute involving a leave and license agreement where the dispute is not governed by a special statute, then such a dispute is also arbitrable.

The reasoning given by the Supreme Court to treat the above matters as non-arbitrable is that they relate to actions *in rem* as mentioned above. A right *in rem* is a right exercisable against the world at large, as contrasted from a right *in personam* which is an interest protected solely against specific individuals. Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

As for the arbitrability of allegations of fraud, they would be non-arbitrable only in situations where situations where the alleged fraud vitiates and invalidates the arbitration agreement itself and affects rights *in rem*.<sup>54</sup> The law on arbitrability of fraud was settled recently in *Vidya Drolia* was affirmed in the decision of *M/s. N.N. Global Mercantile Pvt. Ltd.*<sup>55</sup> where a three-judge bench held that: "*The civil aspect of fraud is considered to be arbitrable... the only exception being... that the arbitration agreement itself is vitiated by fraud... or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself.*"

#### 2.6.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

No, such restrictions are not applicable to specific persons. Consumer disputes in fact, are arbitrable. In *Emaar MGF Land Limited v. Aftab Singh*,<sup>56</sup> the Supreme Court held that while proceedings under the Consumer Protection Act, 1986 are special remedy proceedings, recourse to arbitration is not barred in case the aggrieved consumer in question is party to an arbitration agreement and decides to opt for arbitration as the dispute resolution mechanism. Therefore, in case the aggrieved consumer who is a party to an arbitration agreement does not opt for the additional/special remedy available to them by virtue of being able to approach the consumer forums under the Consumer Protection Act, 1986, it would be permissible for them to proceed with the dispute in arbitration. Therefore, it is only when the aggrieved consumer has decided to opt for redressal before the consumer forums, can such forums refuse to relegate the parties to arbitration.

### 3. Intervention of domestic courts

#### 3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

As per Section 8 of the Act, a court seised of a dispute which is the subject of an arbitration agreement, shall, if the respondent raises an objection to this effect prior to filing its first statement on the substance of the dispute, treat the matter as inadmissible and refer the matter to arbitration; unless the court finds that *prima facie* no valid arbitration agreement exists.

This "prima facie" standard for determining if a valid arbitration agreement exists, was introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") with the intention of restricting the scope of judicial intervention at the pre-arbitral stage, leaving the final decision on the existence and validity of the arbitration agreement to the arbitral tribunal under its *kompetenz-kompetenz* jurisdiction.

As per the holding in *Vidya Drolia*, "*a 'prima facie' examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes.... Referral proceedings are preliminary and summary and not a mini trial.*" Accordingly, in *Vidya Drolia*, it was asserted that

<sup>54</sup> Vidya Drolia and Ors. v. Durga Trading Corporation, (2019) 20 SCC 406.

<sup>55</sup> N. N. Global Mercantile v. M/S Indo Unique Flame Limited & Ors., (2021) 4 SCC 379.

<sup>56</sup> Emaar MGF Land Limited v. Aftab Singh, Review Petition (C) Nos 2629-2630 of 2018 in Civil Appeal No. 23512-23513 of 2017.

a *prima facie* examination would mean looking for existence of an arbitration agreement would mean even considering its validity, which would include looking at payment of stamp duty on the arbitration agreement.

Under Section 8(3) of the Act, while the application/objection of a respondent as per Section 8(1) is pending before a court, there is no bar on an arbitral proceeding which may nonetheless be commenced or continued, and an award may be made by the tribunal.<sup>57</sup>

### 3.1.1 If the place of the arbitration is inside of the jurisdiction?

The answer in 3.1 above applies.

### 3.1.2 If the place of the arbitration is outside of the jurisdiction?

If the place of the arbitration is outside India, i.e., it is a foreign-seated arbitration, Section 45 from Part II of the Act would apply to determine if the dispute should be referred to arbitration. The scope of inquiry even under Section 45 of the Act is confined only to the question of whether the arbitration agreement is “*prima facie...null and void, inoperative or incapable of being performed*” but not the legality and validity of the substantive contract.<sup>58</sup> The insertion of the phrase “*prima facie*” in Section 45 was pursuant to the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment**”).

A landmark judgement on anti-arbitration injunctions in India has been the judgement of the High Court of Calcutta in *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.*<sup>59</sup> In this case, the Court, in granting an anti-arbitration injunction, laid down the following factors that Courts ought to examine before granting such injunction i.e.:

- (i) If no valid agreement exists between the parties;
- (ii) If the arbitration agreement is null and void, inoperative or incapable of being performed; and
- (iii) If the continuation of the foreign arbitration proceeding might be oppressive or vexatious or unconscionable.

In a more recent judgement in the case of *Bina Modi v. Lalit Modi*,<sup>60</sup> a Division Bench of the Delhi High Court did not shy away from reversing the decision of a single judge bench rejecting an application for an anti-arbitration injunction. The Division Bench issued an anti-arbitration injunction in a situation where the subject matter of the dispute was *prima facie* non-arbitrable as per Indian law (the arbitration was to be decided as per the rules of ICC, Singapore). It was also held that the arbitral tribunal inherently lacked the jurisdiction to adjudicate the dispute and that the relief under Section 16 of the Act was not an efficacious remedy.

## 3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

In India it is not a usual practice for arbitrators to pass injunctions prohibiting parties from initiating court proceedings.

An anti-suit injunction is an injunction ordering a party in a suit or proceeding before it, either not to commence or not to take any further steps in proceedings in another jurisdiction.

The landmark judgement on anti-suit injunctions in India is that of *Modi Entertainment Network v. WSG Cricket PTE Limited*,<sup>61</sup> which outlined the principles for the grant of an anti-suit injunction. The court held that the

<sup>57</sup> Section 8(3) of the Arbitration and Conciliation Act, 1996. .

<sup>58</sup> *Sasan Power Limited v. North American Coal Corporation India Private Limited*, Civil Appeal No. 8299 of 2016, Supreme Court.

<sup>59</sup> *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.*, 2014 SCC OnLine Cal 17695.

<sup>60</sup> *Bina Modi & Ors., v. Lalit Modi & Ors.*, (2020) 268 DLT 548.

<sup>61</sup> *Modi Entertainment Network v. WSG Cricket PTE Limited*, (2003) 4 SCC 341.

power of courts to grant anti-suit injunctions to a party can only be permissible when it has jurisdiction over that party. Further, due to the principle of comity and non-interference in the exercise of jurisdiction of another court, such a power will be sparingly exercised.

In exercising discretion to grant an anti-suit injunction, therefore, the court must be satisfied that:

- a. The defendant has consented to the jurisdiction of the court;
- b. If the injunction is declined, the ends of justice will be defeated, and injustice will be perpetuated; and
- c. The principle of comity i.e., respect for the court in which the commencement or the continuance of action/proceeding is sought to be restrained must be borne in mind.

### **3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to anti-suit injunctions/anti-arbitration injunctions or orders, but not only)**

Anti-arbitration injunctions are injunctions granted by civil courts to stay arbitration proceedings either at the initiation stage or during the continuance of such proceedings. Courts in India have struggled to strike a balance between, on the one hand, the responsibility of a court to ensure that a party before it is not unfairly prejudiced and, on the other hand, ensuring adherence to the principles of comity and sovereignty of judicial fora in a friendly nation. This issue arises from time to time in the context of an arbitration when a litigating party requests an anti-arbitration injunction against the conduct of a foreign seated arbitration.

One of the initial cases in India where a court granted an anti-arbitration injunction was the case of *The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.*<sup>62</sup> The Respondent had issued a notification of claim to the Petitioner under the India-France Bilateral Investment Treaty ("**BIT**"), despite the Petitioner not being named as a party in the investment arbitration. Aggrieved by this, the Petitioner sought an anti-arbitration injunction before the High Court of Calcutta on the ground of it not being a party to the arbitration clause in the India-France BIT. The Court found that this was an exceptional circumstance where continuation of the foreign arbitration proceeding was oppressive and unconscionable, and that the arbitration agreement was only enforceable against India and not the Petitioner. Therefore, this was a fit case for the grant of an anti-arbitration injunction.

In *Balalore Alloys Limited v. Medima LLC*,<sup>63</sup> the Calcutta High Court issued a detailed judgement discussing the power of Indian courts to award anti-arbitration injunctions against foreign-seated arbitrations, as well as the extent and limitations of that power. In its evaluation, the court considered the following principles as laid down (for anti-suit injunctions) in the judgement of *Modi Entertainment Network v. W.S.G. Cricket*<sup>64</sup> ("**Modi Entertainment**") :

- a) Whether the defendant, against whom an injunction is sought, is amenable to the personal jurisdiction of the court;
- b) if the injunction is declined, will the ends of justice be defeated and injustice be perpetuated; and
- c) the principle of comity i.e., respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained must be borne in mind.

In light of the observations made in *Modi Entertainment*, the Calcutta High Court considered the case on its merits and concluded that the plaintiff had failed to meet its burden of demonstrating that the ICC in London, the alternate forum in this case, was either a *forum non-conveniens* or that the proceedings initiated before it by the respondent were oppressive or vexatious in nature. Therefore, an anti-arbitration injunction was not granted.

<sup>62</sup> The Board of Trustees of the Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors, 2014 SCC OnLine Cal 17695.

<sup>63</sup> Balalore Alloys Limited v. Medima LLC, (2020) 9 SCC 136.

<sup>64</sup> Modi Entertainment Network v. W.S.G. Cricket, (2003) 4 SCC 341.

The case of *Bina Modi v. Lalit Modi*<sup>65</sup> ("**Bina Modi**"), cited above, was a significant development in the anti-arbitration injunction jurisprudence in India. As discussed in 3.1, the court in this case issued an anti-arbitration injunction in a situation where the subject matter of the dispute was *prima facie* non-arbitrable as per Indian law.

Pertinently, to clarify, the Delhi High Court in *McDonald's India Private Limited v. Vikram Bakshi*<sup>66</sup> as well as *Bina Modi* have held that the principles governing anti-arbitration injunctions could not be the same as those governing anti-suit injunctions due to the principles of party autonomy in arbitration and kompetenz-kompetenz.

Separately, the Act provides for grounds for refusal of enforcement of foreign arbitral awards under Section 48, which states the following:

- 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 i.e., induced by fraud or corruption.

Therefore, if these grounds exist, courts may prevail in interfering with foreign-seated arbitration awards.

#### 4. The conduct of the proceedings

##### 4.1 Can parties retain foreign counsel or be self-represented?

Yes, parties can represent themselves, or they can engage foreign lawyers to act as their authorised representatives. However, retaining foreign counsel is subject to limitations imposed by existing law.

In *Bar Council of India v. A.K. Balaji & Ors.*,<sup>67</sup> the Supreme Court of India had held that foreign lawyers can only visit India on a temporary period on a "fly in fly out" basis (which should not amount to the practice of law) for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues.

The Supreme Court had held that if rules of institutional arbitration apply or the matter is covered by provisions of the Act, then foreign lawyers may not be debarred from conducting proceedings in international commercial arbitration, provided that foreign lawyers will be governed by the general code of conduct applicable to the legal profession.

The Bar Council of India, by way of a notification dated March 13, 2023 on the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India 2022 ("**Foreign Law Firms Rules**"), has now opened up the law practice in India to foreign lawyers in international arbitration cases and non-litigious matters (such as transactional/corporate work). The Bar Council of India does not permit foreign lawyers or foreign law firms to appear before any courts or tribunals or statutory authorities. However, they are permitted to provide legal expertise/ advice and appear as a lawyer for any person, firm, company etc. who/which has an address or principal office in a foreign country, in any international arbitration case which is conducted in India and in which foreign law may or may not be involved.

The Foreign Law Firms Rules also provide that a foreign lawyer or a foreign law firm shall not be entitled to practice law in India unless he/it is registered with the Bar Council of India. This prohibition will not apply to a foreign lawyer or foreign law firm if their practice is on a 'fly in and fly out basis' and is for the purpose of giving legal advice to the client in India regarding foreign law and diverse international legal issues. Another proviso to this clause is that the foreign lawyer or foreign law firm ought not to maintain an office in India for

<sup>65</sup> Bina Modi & Ors., v. Lalit Modi & Ors., (2020) 268 DLT 548.

<sup>66</sup> McDonald's India Private Limited v. Vikram Bakshi, 2016 (4) ARBLR 250.

<sup>67</sup> Bar Council of India v. A.K. Balaji & Ors. [(2018) 5 SCC 379].



the purpose of their practice and their presence in India also cannot exceed 60 days in any period of 12 months.

**4.2 How strictly do courts control arbitrators' independence and impartiality? For example, does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances be of gravity such as to justify this outcome?**

Under Section 12 of the Act, the arbitrator has a duty to disclose in writing certain circumstances such as the direct or indirect existence of any past or present relationship with or interest in any of the parties or in the subject matter of the dispute, which is likely to give rise to justifiable doubts as to his or her independence or impartiality and which will affect the arbitrator's ability to devote time to the arbitration so as to complete it in twelve months.

An arbitrator's appointment may be challenged only if circumstances give rise to justifiable doubts as to his/her impartiality or independence,<sup>68</sup> or if s/he does not possess the qualifications agreed to by the parties.<sup>69</sup>

The Fifth Schedule of the Act provides the grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.<sup>70</sup> The Seventh Schedule of the Act, on the other hand, provides the categories which would determine ineligibility. Any person whose relationship with the parties or counsel or the subject matter of the dispute falls within the Seventh Schedule would be ineligible to be appointed as an arbitrator.<sup>71</sup> The Fifth and Seventh Schedules of the Act are based on the IBA Guidelines on Conflict of Interest.<sup>72</sup>

In *HRD Corporation v. Gail India Limited*, the Supreme Court observed that when a challenge is based on the circumstances identified under the Fifth Schedule, the issue of whether justifiable doubts exist as to the arbitrator's independence and impartiality should be separately determined based on the facts of the case. On the other hand, the occurrence of a circumstance provided under the Seventh Schedule in and of itself renders a person ineligible to be appointed as the arbitrator. The Court further held that while a challenge based on the grounds mentioned in the Seventh Schedule can be made directly to the Court, the appointment of an arbitrator can be questioned based on circumstances under the Fifth Schedule only after the award, i.e. at the setting-aside stage.<sup>73</sup>

Section 13 of the Act provides the procedure for challenging the appointment of an arbitrator.

Sections 12 and 13, read together, require the arbitral tribunal to examine whether circumstances exist that give rise to justifiable doubts as to the independence and impartiality of the arbitral tribunal.

A failure to comply with the duty to disclose all relevant circumstances as to the arbitrator's impartiality and independence may justify a challenge of the arbitrator under Sections 12 and 13 of the Act.

However, whether the failure to disclose alone is sufficient to give rise to justifiable doubts would depend upon the facts and circumstances of the case. More likely than not, the arbitral tribunal would consider not only the fact of non-disclosure but also the substance of the matter that was not disclosed to determine if the same would give rise to justifiable doubts as to the independence and impartiality of the arbitrator.

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<sup>68</sup> Section 12(3) of the Act.

<sup>69</sup> Section 12(3) of the Act.

<sup>70</sup> Explanation 1 to Section 12 (b) of the Act.

<sup>71</sup> Section 12 (5) of the Act.

<sup>72</sup> The Law Commission of India 246th Report dated 5 August 2014, Para 59; *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited*, (2018) 12 SCC 471, Para 20.

<sup>73</sup> *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited*, (2018) 12 SCC 471.



If such a challenge fails and the arbitral tribunal determines that the challenge to an arbitrator's appointment is not successful, the arbitration proceedings before the arbitral tribunal would continue and terminate only once an award is rendered.<sup>74</sup> The party challenging the mandate of the arbitrator must await the making of the award and only then would it be able to assail the same under Section 34 of the Act.<sup>75</sup>

Section 12 (5) of the Act provides the circumstances under which a person would be *ineligible* to be appointed as an arbitrator i.e., in case the person's relationship with the parties, the counsel or the subject-matter of the dispute falls under any of the categories under the Seventh Schedule.

Therefore, if the facts required to be disclosed under the Act fall under any of the categories specified in the Seventh Schedule, for example, if the arbitrator has a significant financial interest in the outcome of the dispute, the arbitrator regularly advises the appointing party, arbitrator's law firm has significant commercial relationship with one of the parties, etc., the person would be *ineligible* to be appointed as an arbitrator.<sup>76</sup>

Despite the Act providing such criteria of ineligibility, sub-section (5) of Section 12 of the Act also has a proviso which states that the parties may, subsequent to the disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

Therefore, Sections 12 and 13 of the Act constitute the statutory scheme for challenging the appointment of the arbitrator- either in case of justifiable doubts as to his or her independence or impartiality, or in the case of his or her ineligibility based on the grounds provided under the Seventh Schedule.

While Sections 12 and 13 of the Act mandate approaching the arbitral tribunal itself for challenging an arbitrator's appointment, Section 14 allows parties to approach the court with circumstances for which the mandate of the arbitrator ought to terminate as provided under the section, i.e., (i) in case he (or she) becomes *de jure* or *de facto* unable to perform his (or her) functions or for other reasons fails to act without undue delay, and (ii) he (or she) withdraws from his (or her) office or the parties agree to the termination of his mandate.

Additionally, courts have given a lot of importance to the independence of an arbitrator, and in furtherance of this objective have held clauses that grant power to appoint an arbitrator *unilaterally* to one party of the arbitration agreement as invalid.<sup>77</sup> However, in the case of *Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML*,<sup>78</sup> agreements where the appointing party gives an option to the other party to choose from a panel of arbitrators have been held to be valid.

The landmark judgement in India on unilateral appointment of arbitrators is the judgement of the Supreme Court in *Perkins Eastman Architects DC & Anr. V. HSCC (India) Limited ("Perkins")*. In this case, the court held that the unilateral appointment of a sole arbitrator by a single party would not be valid, and even if the sole arbitrator's appointment is secured through a seemingly neutral process, it still would not be permissible.

It is pertinent to note that recently, the Calcutta High Court in *McLeod Russel India Limited & Anr. v Aditya Birla Finance Limited & Ors.*<sup>79</sup> ("**McLeod Russel**") held that under certain circumstances a party can unilaterally appoint an arbitrator. The Court held that a unilateral appointment of an arbitrator is not inherently illegal unless the unilaterally appointed arbitrator's relationship is covered under the Seventh Schedule of the Act.

<sup>74</sup> Union of India v. Reliance Industries Limited & Ors., O.M.P.(T) (COMM.) 125/2022 & I.A. 20680/2022, Delhi High Court.

<sup>75</sup> Union of India v. Reliance Industries Limited & Ors., O.M.P.(T) (COMM.) 125/2022 & I.A. 20680/2022, Delhi High Court.

<sup>76</sup> Seventh Schedule of the Act.

<sup>77</sup> Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd., 2019 (6) ArbLR132 (SC); and Central Organisation for Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, (2020) 14 SCC 712.

<sup>78</sup> Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company, (2020) 14 SCC 712.

<sup>79</sup> McLeod Russel India Limited & Anr. vs Aditya Birla Finance Limited & Ors., Calcutta HC A.P. No. 106 of 2020

The petitioners had contended that the unilateral appointment of the arbitrator fell afoul of Entry 12 of the Seventh Schedule. However, the court found this to be factually incorrect as the arbitrator was not a “manager, director, or part of the management” of the appointing party, but instead was merely a retired judge of a High Court.

Therefore, the court distinguished between (a) an arbitration clause that permits mere simpliciter unilateral appointment of an arbitrator and (b) a clause that provides for arbitration before some person who is in charge of one of the parties or falling within the relations covered under the Seventh Schedule of the Act. According to the Court, only in the latter case would the person designated be ineligible from acting as an arbitrator or even nominating another arbitrator on its behalf to serve as an arbitrator himself (or herself). The court therefore held that since in this case there was no ineligibility in the first case, it fell within the former scenario and not the latter.

Even assuming that the unilateral appointment of the arbitrator violated the Seventh Schedule of the Act, the Court further clarified that the petitioner had communicated a waiver under the proviso to Section 12(5) of the Act since it participated in the proceedings for a significant amount of time before challenging the arbitrator's appointment. The continued participation and filing of pleadings amounted to an express waiver of such disqualification under the proviso to section 12(5) of the Act.

While McLeod Russel distinguishes Perkins on the basis of this express waiver, the Calcutta High Court has subsequently and more recently passed a judgement in *SREI Equipment Finance Limited v. Sadhan Mahal*<sup>80</sup> (“SREI”), where it has denied the enforcement of an arbitral award where the arbitrator was unilaterally appointed. It has held that in such a situation, the arbitral proceedings and the award itself stand vitiated as the arbitrator lacked the inherent jurisdiction to adjudicate the disputes between the parties. The award would not be a valid arbitral award as the ineligibility of the arbitrator goes to the root of their jurisdiction.

In SREI, the court distinguished its own judgement in McLeod Russel on the ground that in the latter case there was an express waiver by the party that did not have the power to unilaterally appoint the arbitrator.

While Perkins, being a judgement of the Supreme Court, is the leading authority in India on the issue of unilateral appointment of arbitrators, High Courts have interpreted it in varying ways, as seen in the recent developments discussed above. Due to the conflicting judgments on the unilateral appointment of arbitrators, the Supreme Court in *Union of India v. Tania Constructions*<sup>81</sup> has referred the issue to a larger bench. However, as of October 2023, the Constitution Bench constituted to hear the reference has deferred the hearing of the reference for two months, after the Attorney General submitted that the Government has constituted an expert committee to consider the provisions of the Arbitration and Conciliation Act, 1996 and the issues before the Constitution Bench will also come up before the expert committee. As a result, the issue of unilateral appointment of arbitrators likely will be taken up by the expert committee which will submit a report on various issues, including on appointment of arbitrators.

#### **4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of *ad hoc* arbitration)?**

Under Section 11 of the Act, when there is no agreement between the parties on an appointment procedure, courts may intervene in the following cases:

In case of an arbitration with three arbitrators:

- (i) if a party to the arbitration agreement fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

<sup>80</sup> SREI Equipment Finance Limited v. Sadhan Mahal, EC 137 of 2023, Calcutta High Court.

<sup>81</sup> Union of India v. Tania Constructions, Petition for Special Leave to Appeal (C) No. 10722/2022.

- (ii) if the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment.

In either of these two scenarios, the necessary arbitrators will be appointed on an application of a party, either by the arbitral institution designated by the Supreme Court (in case of an international commercial arbitration), or by the High Court or the arbitral institution designated by the High Court (in other types of arbitration). Although the Act allows parties to apply to a person or an arbitral institution designated by the courts to appoint arbitrators, such person or arbitral institutions must first have been designated by the courts to exercise this power.

In an arbitration with a sole arbitrator, if the parties fail to agree on an arbitrator within 30 days from receipt of a request by one party to another party, one party can apply to the court under Section 11 of the Act, and the appointment shall be made: in an international commercial arbitration, by the arbitral institution designated by the Supreme Court; or, in other types of arbitration, by the High Court.

However, in case there is an appointment procedure agreed by the parties, a party may request the court to appoint an arbitrator/arbitrators in the following cases:

- (i) if a party fails to act as required under the procedure; or
- (ii) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (iii) a person, including an institution, fails to perform any function entrusted to him/her or it under the procedure.

In any of these scenarios as well, the appointment shall be made either by the arbitral institution designated by the Supreme Court (in case of an international commercial arbitration), or by the High Court (in other types of arbitration), unless the agreement on the appointment procedure provides for other means of securing the appointment.

The Supreme Court in the case of *Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff & Widmann A.G. V. Municipal Corporation of Greater Mumbai*<sup>82</sup> ("**Walter Bau AG**") held that the appointment of an arbitrator by the Municipal Corporation of Greater Mumbai ("**MCGM**") beyond the 30 day period from the date of receipt of the notice from other party was contrary to the agreed procedure contemplated in the arbitration agreement which also required the appointment to be made by MCGM from the panel submitted by the ICADR. Under the arbitration clause in the *Walter Bau AG* case, once a party appointed an arbitrator and gave notice of the appointment to the other party, the latter was supposed to appoint its arbitrator within 30 days. If the two arbitrators appointed by both sides failed to nominate a third arbitrator, the matter was to be referred to the International Centre for Alternative Dispute Resolution in India ("**ICADR**"). So while the Petitioner appointed its arbitrator, the MCGM failed to do so within the 30-day period. Subsequently, the ICADR asked the MCGM to appoint its arbitrator from a panel of three arbitrators identified by the ICADR or to independently appoint an arbitrator. MCGM did the latter. The Petitioner challenged that appointment by way of a petition under Section 11(6) of the Act. The Supreme Court allowed the petition on the ground that the appointment by the MCGM was *non-est* in law since the ICADR rules did not allow MCGM to independently appoint an arbitrator. The court then appointed a retired judge on behalf of the MCGM who along with the arbitrator appointed by the other party would name the third arbitrator.

#### **4.4 Do courts have the power to issue interim measures in connection with arbitrations? If so, are they willing to consider *ex parte* requests?**

Interim relief may be granted by the court to a party either before or during the arbitral proceedings, or at any time after the making of the arbitral award but before it is enforced. Under Section 9(3) of the Act, once

<sup>82</sup> *Walter Bau AG, Legal Successor of the Original Contractor, Dyckerhoff & Widmann A.G. V. Municipal Corporation of Greater Mumbai*, (2015) 3 SCC 800.

the arbitral tribunal has been constituted, a court shall not entertain an application for interim relief unless the court finds that circumstances exist which demonstrate that the remedy provided under Section 17 is not efficacious.

The Supreme Court in *ArcelorMittal Nippon Steel (India) Limited v. Essar Bulk Terminal Limited*<sup>83</sup> stated that in the event that the court passes an order granting an interim relief under Section 9 (1) of the Act, the arbitral proceedings must commence within 90 days from the date of such order being passed.

The source of power of the court to grant interim relief is Section 9 of the Act, and the principles for grant of such relief can be traced to Section 94 of the Code of Civil Procedure, 1908 ("**CPC**") read with Order XXXIX, and in exceptional cases under Section 151 of the CPC.<sup>84</sup> The Supreme Court in *Essar House Pvt. Ltd. v. Arcelor Mittal Nippon Steel India Ltd.*<sup>85</sup> and *JP Parekh Son & Anr. V Naseem Qureshi & Ors.*<sup>86</sup> after considering several judgments of the Supreme Court and of High Courts, held that the scope of Section 9 of the Act is very broad and that the court while dealing with an application under Section 9 has the discretion to grant a wide range of interim measures of protection which may appear to the court to be just and convenient. It further held that the court must be guided but not curtailed by the restrictions of every procedural provision of the CPC. The technicalities of the CPC should not prevent the court from securing the ends of justice from being met.

#### 4.4.1 If so, are they willing to consider *ex-parte* requests?

In most situations, *ex parte* applications for interim measures are not granted in favour of a party. However, this may not be the case in the event that the other side has repeatedly failed to appear before the court despite the issuance of notices to that effect. In such a situation, courts may permit *ex-parte* requests. Therefore, *ex-parte ad-interim* injunctions are granted by the court only in urgent and exceptional circumstances. It is pertinent to note that an "*ad interim*" injunction is a temporary injunction given even before the contesting party has filed its reply. On the other hand, after the other party has filed its reply, , and the concerned court passes an order after both the parties are heard, it becomes an interim injunction which is issued pending the final adjudication of the matter.

In the case of *M/s. East India Udyog Limited v. Maytas Infra Limited & Anr.*,<sup>87</sup> the court held that an application under Section 9 would stand on the same footing as the proceedings under Section 141 of the Civil Procedure Code. When a Section 9 application is filed and, while the application is pending, if an *ex-parte ad-interim* order is necessary, the court may pass such *ex-parte* order based on the facts and circumstances of the case and in accordance with the provisions of Order XXXIX of the Civil Procedure Code. It was held that the Court had the authority to decide the application made in accordance with Section 9 of the Act even before the arbitration procedure was initiated in accordance with Section 21 of the Act. The Court may issue an *ex-parte ad-interim* order pending the application submitted in accordance with Section 9 of the Act, but it is not permitted to decide such an application *ex-parte* without notifying the respondents. This view was reiterated in *New Morning Star Travels Vs. Volkswagen Finance Private Limited*.<sup>88</sup>

#### 4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

The law regulates the following aspects of arbitral proceedings: :<sup>89</sup>

<sup>83</sup> ArcelorMittal Nippon Steel (India) Limited v. Essar Bulk Terminal Limited, (2022) 1 SCC 712.

<sup>84</sup> Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552.

<sup>85</sup> Essar House Pvt. Ltd. V Arcelor Mittal Nippon Steel India Ltd, 2022 SCC Online SC 1219.

<sup>86</sup> JP Parekh Son & Anr. V Naseem Qureshi & Ors., 2022 SCC Online Bom 6716.

<sup>87</sup> M/s. East India Udyog Limited v. Maytas Infra Limited & Anr., 2015 SCC Online Hyd 214.

<sup>88</sup> New Morning Star Travels Vs. Volkswagen Finance Private Limited, CM (M) 553/2020 & CM APPL.28266/2020, Delhi High Court.

<sup>89</sup> Chapter V of the Act.

- (i) equal treatment of parties;
- (ii) determination of rules of procedure;
- (iii) place of arbitration;
- (iv) commencement of arbitral proceedings;
- (v) language;
- (vi) statement of claim and defence;
- (vii) hearings and written proceedings;
- (viii) default of a party;
- (ix) expert appointed by arbitral tribunal; and
- (x) court assistance in taking evidence.

However, in case there is no agreement between the parties, the Act permits the arbitral tribunal to conduct the arbitration proceedings in such a manner as it considers appropriate (Section 19(3)).

#### **4.5.1 Does it provide for the confidentiality of arbitration proceedings?**

Section 42A was introduced and incorporated into the Act by the 2019 Amendment. The section relates to confidentiality of arbitrations and provides that the arbitrator, arbitral institution and the parties to an arbitration shall maintain the confidentiality of all arbitral proceedings, except for an award where its disclosure is necessary for the purposes of its implementation and enforcement.

As per the language of the section, the only exception to confidentiality is when the disclosure of the arbitral record is necessary for the limited purpose of the implementation and enforcement of award.

The language of the section has been criticised as being ambiguous and wanting. The section does not require other persons who are part of the arbitration to maintain confidentiality. The section is also silent on whether proceedings before the court under Section 9 and 34 of the Act should be kept confidential.

#### **4.5.2 Does it regulate the length of arbitration proceedings?**

After the amendment in the Act in 2015, Section 29A was introduced which requires the award to be made within 12 months from the date of completion of pleadings. Section 23 states that the pleadings (being the statement of claim and defence) shall be completed within a period of 6 months from the date of the appointment of the arbitrator.

The abovementioned period mentioned under section 29A may be extended by another 6 months by consent of the parties. If an award is not made within the extended period, the mandate of the arbitrator(s) shall terminate unless the court has, prior to or after the expiry of the period so specified, extended the period. The provision to Section 29A (4) states that if the delay is caused by the arbitrator, the Court has the right to reduce the arbitrator's fee by up to 5% a month.

Section 29A(1) makes clear that the time limit mandated under Section 29A does not apply to international commercial arbitration. The Act indicates only that the award in case of an international commercial arbitration should be made as expeditiously as possible, and that there should be an endeavour made towards disposing of the matter within 12 months from the completion of pleadings under section 23.<sup>90</sup>

#### **4.5.3 Does it regulate the place where hearings and/or meetings may be held, and can hearings and/or meetings be held remotely, even if a party objects?**

Section 20 of the Act deals with the determination of the place of arbitration. Following the principle of party autonomy, parties are free to agree on the place of arbitration. Failing any agreement, the arbitral tribunal may meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the

<sup>90</sup> Tata Sons Pvt. Ltd. (Formerly Tata Sons Ltd.) v. Siva Industries and Holdings Ltd. & Ors., (2023) 5 SCC 421.

parties, for consultation among its members or for inspection of property or documents, even if a party objects but subject to the requirements of due process.<sup>91</sup>

Under Section 24 of the Act, unless otherwise agreed by the parties, the arbitral tribunal shall decide whether oral hearings ought to be held for the presentation of evidence or for oral argument, or whether the proceedings can be conducted on the basis of documents or other materials.<sup>92</sup> Section 19(3) of the Act empowers the arbitral tribunal to determine the procedure for conducting the arbitration proceedings in the absence of any agreement between the parties.

The Act is silent on remote/virtual hearings, but in cases where there is no agreement between the parties and one party requests for virtual hearings while the other party objects, the arbitral tribunal can direct that the proceedings will be held remotely pursuant to its powers under Section 19(3) read with Section 24 of the Act.

As to the determination of the place of arbitration, as per *BALCO v. Kaiser Aluminium*,<sup>93</sup> Section 20 gives due recognition to party autonomy. A plain reading of the section leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any “place” or “seat” within India, be it Delhi, Mumbai etc. However, in the absence of the parties’ agreement, under Section 20(2), an arbitral tribunal will determine the place or seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties.

The choice of “juridical seat” in domestic arbitrations determines which Court shall, pursuant to Section 42 of the Act, have jurisdiction over the arbitral proceedings and all subsequent applications, which includes an application for setting aside the arbitral award.

Where an arbitration agreement contains an exclusive jurisdiction clause stating that only the courts in a specific location would have jurisdiction over disputes arising under the agreement, then that court would supersede all other courts’ jurisdiction in the matter, even if no part of the cause of action is based there.

The Supreme Court in *Indus Mobile Distribution Pvt. vs Datawind Innovations Pvt. Ltd*<sup>94</sup> held that if, according to the arbitration agreement, the juridical seat of arbitration is chosen, then such designated seat of arbitration is similar to an exclusive jurisdiction clause and the court has supervisory powers over the arbitration. In this case, since the parties held that the Indian Arbitration Act, 1996 would apply to the arbitration, the court went on to hold that the Mumbai Courts alone would have jurisdiction to the exclusion of all other courts in the country and that London was only a “venue” for the arbitration.

#### **4.5.4 Does it allow for arbitrators to issue interim measures? In the affirmative, under what conditions?**

Under Section 17 of the Act, the arbitral tribunal during the arbitral proceedings may issue interim measures and, in that case, it shall have the same powers as a court. The powers of a court under Section 9 are co-extensive with that of a tribunal under Section 17 of the Act.

The Act provides for interim measures under Sections 9 and 17 by courts and arbitral tribunals respectively. Section 9 of the Act is broadly based on Article 9 of the UNCITRAL Model Law and provides for the grant of interim measures by a court.

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<sup>91</sup> Section 20(3) of the Act.

<sup>92</sup> Section 24 of the Act.

<sup>93</sup> *BALCO v. Kaiser Aluminium*, (2012) SCC OnLine SC 693.

<sup>94</sup> *Indus Mobile Distribution Pvt. vs Datawind Innovations Pvt. Ltd.*, (2017) 7 SCC 678.

Interim measures ordered by arbitral tribunals, as set out in Section 17 of the Act, are also based on Article 17 of the UNCITRAL Model Law. This provision can be triggered only at the request of one of the parties to the arbitration proceedings, once the arbitral tribunal is constituted.

Unlike the UNCITRAL Model Law, Section 9 provides for interim measures of protection not just before the commencement of arbitral proceedings and during the arbitral proceedings but also after the award has been rendered (but prior to its enforcement).

The 2015 Amendment Act introduced certain changes to the provisions on interim reliefs with respect to the kinds of reliefs available and the time-frame for seeking such reliefs before courts, i.e., if an order of interim relief has been granted by a court prior to the constitution of the arbitral tribunal, parties are required to initiate arbitral proceedings within a period of ninety days. Once arbitral proceedings have commenced, the parties would have to seek interim reliefs before the arbitral tribunal.

A court would ordinarily not entertain a petition for interim reliefs in such a situation unless the party is able to prove the existence of circumstances that make a relief granted by an arbitral tribunal inefficacious. After the rendering of an award, the award debtor has the option of approaching the courts of law for seeking interim reliefs for securing and safeguarding the effectiveness of the arbitral award prior to its enforcement.

In both domestic and international commercial arbitrations, the aforesaid application is generally required to be made before a court before said award is enforced.

A party may seek interim reliefs up to the point in time at which an award is made by the tribunal. Previously, the question of whether the powers of an arbitral tribunal to grant interim reliefs were narrower compared to the power of a court under Section 9 of the Act was extensively debated. However, after the 2015 Amendment, the powers of an arbitral tribunal to grant interim reliefs have been made on par with those of the court under Section 9 of the Act.

In the case of *Baker Hughes Singapore Pte vs. Shiv-Vani Oil and Gas Exploration Services Ltd*<sup>95</sup> the Bombay High Court held as follows:

*"50. Interim reliefs are in aid of final relief. The arbitral tribunal while deciding such application for interim measures ought to have considered the material on record including affidavits for taking a prima facie view. In my view application under section 17 could not have been rejected on the ground that the rival claims could not be considered at all since evidence was yet to be led. For the purpose of considering interim measures, the arbitral tribunal has to consider whether the claimant has made out a prima facie case that he would succeed finally in the arbitration proceedings and whether had made out a case for grant of interim measures. In my view, the arbitral tribunal has failed to exercise that power and duty to even look into the matter for the purpose of taking a prima facie view which is mandatory while considering an application for interim measures.*

*51. Since the arbitral tribunal is also empowered to make an interim award and to grant money claim on the basis of admitted claim and/or acknowledged liability, in my view the arbitral tribunal has also power to grant interim measures so as to secure the claim which is subject matter of the dispute before the arbitral tribunal if such case is made out by the applicant. The provisions under sections 9 and 17 of the Arbitration and Conciliation Act are meant for the purpose of protecting the subject matter of the dispute till the arbitration proceedings culminates into an award."*

A party may during the arbitral proceeding apply to the arbitral tribunal under Section 17 of the Act for the following reliefs:

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<sup>95</sup> Baker Hughes Singapore Pte Vs. Shiv-Vani Oil and Gas Exploration Services Ltd., (2015) 1 Bom CR 377 : (2015) 1 AIR Bom R 133.



- (a) interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
- (b) securing the amount in dispute;
- (c) the detention of any property or thing which is the subject matter of the dispute in arbitration, 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) or any other interim measure of protection as may appear to the arbitral tribunal to be just and convenient. The arbitral tribunal will have the same authority to issue orders on any proceedings before it as the court does.

Further, subject to any orders made in an appeal under Section 37, Section 17(2) deems any order issued by the arbitral tribunal under this section to be an order of the court and enforceable under the Code of Civil Procedure.

#### **4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence? For example, are there any restrictions to the presentation of testimony by a party employee?**

The law empowers an arbitral tribunal to determine questions of admissibility of evidence, to take evidence and to freely assess such evidence.<sup>96</sup>

Section 19 of the Act states that the arbitral tribunal is not bound by the Code of Civil Procedure, 1908, or the Indian Evidence Act, 1872, and that the parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of its proceedings.<sup>97</sup> It is a settled position of law that an arbitral tribunal is not required to comply with the technical rules of evidence that the courts are required to comply with.<sup>98</sup> Further, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.<sup>99</sup>

In *Rishabhkumar and Ors. v. Secretary to the Government of India, Ministry of Road Transport and Highways and Ors.*,<sup>100</sup> the Bombay High Court held the following in relation to the determination of the procedure to be followed in arbitration proceedings:

1. If there is no agreement between the parties to the arbitration with respect to the procedure to be followed by the arbitral tribunal or whether oral hearings for the presentation of evidence should be held, then the arbitral tribunal may conduct the arbitration in the manner it deems fit and appropriate.
2. The arbitral tribunal's decision to conduct the proceedings in the way it deems appropriate cannot be later objected to if the opportunity to object was not taken advantage of at an appropriate stage.
3. If these procedural objections are not addressed before the arbitrator at the right time, they will be deemed to have been waived under Section 4 of the Act.

#### **4.5.6 Does it make it mandatory to hold a hearing?**

Under Section 24 of the Act, unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested by a party.<sup>101</sup>

However, if parties agree in writing at any stage either before or at the time of appointment of the arbitral tribunal to have their disputes resolved by fast-track procedure under the Act as introduced under the 2015

<sup>96</sup> Section 19 (4) of the Act.

<sup>97</sup> Section 19 (1) and 19 (2) of the Act.

<sup>98</sup> NPCC Limited Vs. Jyothi Sarup Mittal Engineers, Contractors and Builders 2007 (93) DRJ 379 at para 20.

<sup>99</sup> Section 19(4) of the Act.

<sup>100</sup> *Rishabhkumar and Ors. v. Secretary to the Government of India, Ministry of Road Transport and Highways and Ors*, 2021 SCC Online Bom 4561.

<sup>101</sup> Section 24 of the Act.



amendment to the Act, the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing.<sup>102</sup>

#### 4.5.7 Does it prescribe principles governing the awarding of interest?

Under the Act, the power of the arbitrator to award interest for the pre-award *pendente lite*, and post-award periods, is conferred by the statute. Section 31(7)(a) empowers the arbitral tribunal to award interest, at such rates as it deems reasonable, on the whole or any part of the amount awarded, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made, i.e. pre-award period.<sup>103</sup>

The Supreme Court in *Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd.*,<sup>104</sup> held that it is the discretion of the arbitrator to award post-award interest on a part of the sum. The arbitrator has the authority to choose the amount on which interest is to be paid (whether it be the entire principal amount or only a portion of it), the rate of reasonable interest, and the time period for which interest is to be paid (whether it should be for the whole or any part of the period between the date the cause of action arose and the date of the award). In addition, the court utilised the language "*unless the award otherwise directs*" in Section 31(7)(b) exclusively to qualify the interest rate. In accordance with Section 31(7)(b), the award holder is entitled to post-award interest at a rate of 18% if the arbitrator does not grant it.

Under Section 31(7)(a) of the Act, a wider discretion is conferred on the arbitral tribunal with regard to determining the reasonable rate of interest, the sum on which the interest is to be paid and the period for which payment of interest is to be made. On the other hand, Section 31(7)(b) of the Act only contemplates a situation where the arbitration award is silent on post-award interest, in which event the award-holder is entitled to a post-award interest of eighteen percent. The Court held that the discretion of the arbitral tribunal can only be restricted by an express provision to that effect and there is nothing in Section 31(7)(b) of the Act which restricts the discretion of the arbitral tribunal for the grant of post-award interest. In *Morgan Securities*, the court interpreted Section 31(7)(b) to mean that the arbitral tribunal has the discretion to grant post-award interest and that clause (b) of Section 31(7) of the Act does not fetter the discretion of the arbitral tribunal to grant post-award interest on the 'sum' as interpreted in earlier judgements.

#### 4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Section 31A which provides the regime for costs was introduced by way of the 2015 amendment to the Act. The arbitral tribunal has the discretion to determine the allocation of arbitration costs in an arbitration. In determining costs, the arbitral tribunal is to have regard to the conduct of parties, whether a party has succeeded partly in the case, whether a party made a frivolous counter-claim leading to delay in disposal of the arbitration and whether a reasonable offer to settle the dispute is made by a party and refused by another.

The Section provides that when a court or tribunal decides to make an order on payment of costs, the general rule to be followed is that the unsuccessful party shall be ordered to pay costs of the successful party. Should the court or tribunal make an order of costs deviating from this principle, it would have to record the same in writing.

An agreement between the parties that has the effect of making one of the parties pay whole or part of the costs of the arbitration, shall only be valid if such agreement is made after the dispute in question has arisen.

<sup>102</sup> Section 29B(3)(a) of the Act.

<sup>103</sup> *McDermott International Inc. v. Burn Standard Co.* (2006) 11 SCC 181.

<sup>104</sup> *Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd.*, (2023) 1 SCC 602.

## 4.6 Liability

### 4.6.1 Do arbitrators benefit from immunity to civil liability?

The doctrine of arbitral immunity was incorporated in the Act by the 2019 Amendment leading to the addition of Section 42-B which states that no suit or legal proceedings can lie against an arbitrator for anything done by him (or her) in good faith or intended to be done as per the Act.

Immunity is also granted to judges in India which shields them from being held financially or otherwise liable in civil court for actions taken in accordance with their decisions. This immunity is crucial for guaranteeing judicial independence and impartiality. This rationale similarly applies to the granting of immunity to arbitrators.

### 4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

Yes, under Section 27 of the Act, when parties are issued process to give evidence and if those persons fail to attend in accordance with such process, refuse to give evidence, or are guilty of any contempt, they are subject to the same penalties and punishments as they would face if those offences were committed in suits before the court. The contempt may be civil contempt as well as criminal contempt. The Supreme Court in its judgement in *Alka Chandewar v. Shamshul Israr Khan*<sup>105</sup> observed that Section 27(5) applies to 'persons failing to attend in accordance with process' and also the separate category from "any other default". It observed that this Section is not confined merely to failure to attend in accordance with court process but also to any other default during the conduct of the arbitral proceedings. Thus, parties to an arbitration may face contempt proceedings (which may be criminal) in case there is a violation or disobedience of an order passed by the arbitrator. The parties and the arbitrator may also face charges of bribery or corruption, in the event any such act is committed by them.

It is also often observed that, parties tend to initiate criminal proceedings where an ongoing arbitration is taking place. The rationale for this is that criminal proceedings are often found to be an attractive pressure tactic, and the initiation of criminal proceedings is routinely used as a ploy by the parties to compel certain demands of the party.

## 5. The award

### 5.1 Can parties waive the requirement for an award to provide reasons?

In line with the principle of party autonomy, Section 31(3) of the Act provides that parties are free to agree that the award will not give reasons on which it is based.<sup>106</sup> Further, under the Act, if the award is an arbitral award on agreed terms as provided under Section 30 of the Act, i.e., based on settlement between parties, in that case too, the award will not provide reasons.<sup>107</sup> The settlement between the parties is what forms the terms of the award.

### 5.2 What atypical mandatory requirements apply to the rendering of a valid award at a seat in the jurisdiction?

Under the Act, Section 34 provides for grounds of annulment or setting aside of an arbitral award. This is a provision that cannot be derogated from and cannot be waived.

In addition, under the general law of contracts in India (i.e., Indian Contract Act, 1872), any agreement (which includes an arbitration agreement) which: (i) restrains parties from enforcing their contractual rights, (ii) restricts the time within which such right can be enforced, (iii) extinguishes the right of a party, or (iv)

<sup>105</sup> *Alka Chandewar v. Shamshul Israr Khan*, Civil Appeal No. 8720 of 2017. (Arising out of S.L.P.(Civil) No.3576 of 2016)

<sup>106</sup> Section 31 (3) (a) of the Act.

<sup>107</sup> Section 31 (3)(b) of the Act.

discharges a party from liability is void.<sup>108</sup> Following this, any agreement of parties to waive their right to seek annulment of the award would itself be void.

Under Section 4 of the Act, parties can only waive their right to object to those provisions which can be derogated from, (i.e., which may be done away with or removed) or waive the right to object any requirement under the arbitration agreement. However, the right to seek annulment of an award is a statutory right and parties cannot contract out of it as this would be in violation of Section 28 of the Indian Contract Act, 1872 as explained above. In, effect, there is no provision which allows waiver of the right to seek annulment.

### **5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?**

In terms of atypical requirements that apply to rendering of a valid award, a look at stamping statutes is relevant. The stamping statutes in different states provide for different rates of stamp duty to be paid on an award. An award which is to be enforced in Mumbai (or Maharashtra) requires to be stamped for an amount of Rs. 500,<sup>109</sup> while in Delhi the stamp duty on an award is approximately 0.1% of the value of the property to which the award relates.

### **5.4 Is it possible to appeal an award (as opposed to seeking its annulment)? If yes, what are the grounds for appeal?**

Under the Act, it is not possible to appeal an award and the only recourse is to set it aside on the limited grounds available under the Act.<sup>110</sup> In fact, the court annulling the award cannot even take on the mantle of an appeal court and it does not have powers to modify the award.<sup>111</sup>

While the court cannot sit in appeal over an arbitral award, by consent of the parties, the court before which there is an annulment application can remand the matter back to the tribunal.<sup>112</sup>

Although the Act does not allow for appeal against an award, following the principle of party autonomy, contracting parties are allowed to take the award to an appellate arbitral tribunal if the arbitration clause allows for a two-tier arbitration.<sup>113</sup>

### **5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?**

- 1) *Enforcement of domestic awards:*<sup>114</sup> *Time for enforcement of domestic award:* A party can seek enforcement of a domestic award under Section 36 of the Act after the time for seeking annulment of the award has expired. The time for making an annulment application is three months from the date of receipt of the award. Thus, enforcement of an award can be initiated after the end of three months from the date of receipt of the award.<sup>115</sup> However, once the three-month period is complete, the party has to file for enforcement within 12 years. If an award grants a mandatory injunction, the action for enforcement has to be filed within three years.<sup>116</sup>

<sup>108</sup> Section 28 Indian Contract Act, 1872.

<sup>109</sup> Article 12 of Schedule I of Maharashtra Stamp Act, 1958.

<sup>110</sup> Section 34 of the Act.

<sup>111</sup> National Highways Authority of India v. M. Hakeem & Anr. dated 20 July 2021, C.A. No. 2756/2021.

<sup>112</sup> Mutha Constructions v Strategic Brand Solutions (I) Pvt Ltd dated February 4, 2022, Special Leave Petition (Civil) No. 1105 of 2022.

<sup>113</sup> Centrotrade Minerals and Metal Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228.

<sup>114</sup> An award rendered under Part I of the Act, is considered as a domestic award (Sections 2(2) and 2(6) of the Act).

<sup>115</sup> Article 136 and Article 135 of the Limitation Act, 1963. Sections 34 and 36 of the Act.

<sup>116</sup> Article 136 and Article 135 of the Limitation Act, 1963.

- 2) *Stay before enforcement of domestic award:* When a party applies for annulment of an award, it does not automatically stay the enforcement of the award.<sup>117</sup> The party seeking annulment must separately make an application for a stay of the award. However, in 2021, the Act was amended and a provision was introduced by which a court can automatically and unconditionally stay the enforcement of an award if the arbitration agreement or the award was vitiated by fraud or corruption.<sup>118</sup>
- 3) *Award to be enforced as a decree:* Under the Act, an arbitral award is to be enforced in the same manner as a decree of a civil court and the general law of civil procedure would apply. The party seeking enforcement can file for enforcement before a civil court which has original jurisdiction, which includes the High Court. The enforcement application should set out the important facts, points of reference framed by the arbitral tribunal and the tribunal's determination on those points. The relief granted should be specifically mentioned. The application for enforcement of the award is to be accompanied by either the original award or a duly authenticated copy of it. At the time of seeking enforcement, the award should be stamped with the legally applicable stamp duty.
- 4) The court to which the enforcement application is made may order that the enforcement be transferred to another court in case the property under the award or the person against whom it is being executed are present outside the jurisdiction of that court.
- 5) *Recognition of foreign awards:* Under the Act, foreign awards enjoy recognition if they are awards made on disputes based on a written agreement for arbitration to which the New York Convention or Geneva Convention applies. Further, for an award to be recognised as a foreign award, it must also be made in a country which the Indian Government has recognised (based on the principle of reciprocity) as a country to which the New York Convention or Geneva Convention applies.<sup>119</sup>
- 6) New York Convention awards are recognised and enforced under Sections 44 to 52 of the Act. Geneva Convention awards are recognised and enforced under Sections 53 to 60 of the Act.<sup>120</sup>
- 7) Sections 45 and 54 of the Act provide that a judicial authority in India has the power to refer disputes to arbitration when a party applies to it provided that the arbitration agreement between them is governed by the New York Convention or the Geneva Convention.
- 8) *Conditions for enforcement of New York Convention Awards:* Under the Act, the court may refuse enforcement of a foreign award if a party shows existence of the following conditions:
  - (a) Party suffered some incapacity or the agreement is not valid under the law to which parties have subjected it;
  - (b) Party against whom award is enforced was not given proper notice or arbitrator's appointment or of arbitral proceedings;
  - (c) Award deals with a dispute beyond the reference of the arbitration;
  - (d) Composition of arbitral tribunal was not in accordance with agreement;
  - (e) The award was annulled at the seat;
  - (f) Subject matter of award is not capable of settlement by arbitration or enforcement would be contrary to the public policy of India.
- 9) *Conditions for enforcement of Geneva Convention Awards:* For enforcement of a foreign award made under the Geneva Convention, the following conditions should be met:
  - (a) Award made on submission to arbitration which is valid under the law applicable to it;
  - (b) Subject matter of award is capable of settlement by arbitration in India;

<sup>117</sup> Section 36 of the Act.

<sup>118</sup> Section 36 of the Act.

<sup>119</sup> Part II, Chapter I and II of the Arbitration and Conciliation Act, 1996; <https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996-26.pdf>

<sup>120</sup> Part II, Chapter I and II of the Arbitration and Conciliation Act, 1996; <https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996-26.pdf>

- (c) The award and constitution of tribunal has been made in conformity to the law governing arbitration procedure;
- (d) Award has become final and is not open to opposition or appeal;
- (e) Enforcement of the award should not be contrary to public policy in India.

#### **5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

Under the Act, there is no automatic stay on the execution of an award when a party files an application to challenge it. A party that files for annulment of an award must specifically make a separate application for stay of the enforcement of the award. The court hearing the application may grant a stay of the award on conditions it deems fit, providing reasons for the grant of the stay.

When the court grants a stay and imposes the condition of the deposit of an amount, it is to be guided by the provisions of the Code of Civil Procedure, 1908. The court is not bound to consider the provisions of the CPC and this requirement is only directory and not mandatory.<sup>121</sup>

Under the Act, a court granting a stay of an arbitral award for payment of money shall be guided by the following considerations: (i) party applying for stay may suffer substantial loss without the stay; (ii) application for stay has been made without unreasonable delay; and (iii) applicant applying for stay has given security for due performance of the decree or order.<sup>122</sup>

By an amendment in 2021, a new provision was introduced by which if a court *prima facie* finds that the arbitral agreement or the underlying contract or the making of the award was induced by fraud or corruption, it has to automatically stay the award unconditionally.<sup>123</sup> The amendment is an exception to the rule that there is no automatic stay on the award if an application for annulment is filed.

#### **5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

The Act sets out conditions for enforcement of foreign awards and states that enforcement of foreign awards may be set aside if certain conditions are shown to exist.<sup>124</sup> One of the grounds for refusing enforcement of a foreign award is if the award is annulled or set aside by a court in the jurisdiction in which the award is made. Hence, when a foreign award is annulled at the seat, it would necessarily not be enforced by Indian courts.

#### **5.8 Are foreign awards readily enforceable in practice?**

In India, the pro-arbitration trend is increasingly visible in the regime which is also becoming pro-enforcement of foreign awards. Courts which are deciding challenges to enforcement of foreign awards are favouring a more relaxed reading of the conditions or grounds to challenge enforcement.

Some of the grounds to challenge enforcement are if the party has suffered due to being unable to present its case, award deals with disputes beyond the scope of arbitration, enforcement of award would be against public policy in India.

In *Cruz City I Mauritius Holdings v. Unitech Ltd.*, the court rejected the challenge to the foreign award enforcement, reasoning that the ground of public policy is to be interpreted narrowly.<sup>125</sup>

<sup>121</sup> Pam Developments Pvt. Ltd. v. State of West Bengal, (2019)8SCC112.

<sup>122</sup> First proviso to sub-section (3) of Section 36 of the Act.

<sup>123</sup> Second proviso to sub-section (3) of Section 36 of the Act.

<sup>124</sup> Section 48 of the Act.

<sup>125</sup> Cruz City I Mauritius Holdings v. Unitech Ltd.; (2017) 239 DLT 649.

In *Vijay Karia v. Prysmian Cavi E Sistemi Srl*, the court affirmed its pro-enforcement position while deciding on the due process objection taken by parties that they were not able to present their case before the arbitral tribunal.

## 6. Funding arrangements

### 6.1 Are there laws or regulations relating to, or restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws or regulations relating to, or restrictions?

In the recent 2023 case of *Tomorrow Sale Agency Pvt. Ltd. v. SBS Holdings Inc. and Ors.*<sup>126</sup> ("**SBS Holdings**"), a division bench of the Delhi High Court has set aside its own order passed by a single judge in the case of *SBS Holding v. Anant Kumar Choudhary*,<sup>127</sup> and held that a litigation-funding entity cannot be made party to the arbitration agreement under which the funded arbitration was initiated. The court further stated that an award passed as a result of such funded arbitration proceedings cannot be enforced against such litigation-funding entity under section 36 of the Act, for a decree enforceable under section 36 is to be executed in accordance with the provisions of the CPC, and it is trite law that a decree is to be executed in its terms and it is not open for the executing court to go behind the decree.

The decision of the court in *SBS Holdings* can be seen as a landmark for the acceptance of third-party funding ("**TPF**") in Indian jurisprudence. The court in recognising the importance of TPF also opined that TPF is essential to ensure access to justice, for it allows a person having a valid claim to pursue the same and is not restricted for doing so for the want of funds. The court further added that third-party funders need to be fully aware of their exposure, and hence, cannot be subject to liability which they have neither undertaken nor are aware of.

Currently in India, contracts of champerty are not *per se* illegal, except in cases where the lawyer representing the claimant is a party to the agreement, because a lawyer is prohibited from having any financial interest in the claim amount or from charging fees that are contingent on the outcome of the litigation.<sup>128</sup> Such contingency fee agreements by lawyers are expressly barred under Bar Council of India Rules ("**BCI Rules**"), which govern the conduct of lawyers in India. BCI Rules do not permit advocates to stipulate fees that are contingent on the results of the litigation or to agree to share the proceeds thereof.<sup>129</sup> The BCI Rules further prohibit practices akin to champerty or maintenance, under which an advocate is prohibited from buying or trafficking in or stipulating or agreeing to receive any share or interest in an actionable claim.<sup>130</sup>

Under the Code of Civil Procedure, 1908 ("**CPC**"), a litigation-funder cannot become a party to the proceedings unless it can show that it is a "proper" or a "necessary" party.<sup>131</sup> In an arbitration, an opposite party can object to the joinder of any party on the ground that it is not a party to the arbitration agreement.

However, amendments to the CPC brought in by amending Order 25 Rule 1 by certain states such as Maharashtra, Karnataka, Gujarat and Madhya Pradesh, specifically provide the courts with the power to secure costs for litigation by asking the financier to become a party to the suit and deposit the cost in court.

Currently, there exists no regulatory framework for TPF in India at present. It is neither expressly permitted nor prohibited under Indian law. Third-party financing agreements where one of the parties to the agreement is an advocate, or where the agreement is extortionate and unconscionable, and hence contrary

<sup>126</sup> Tomorrow Sales Agency Pvt. Ltd. v. SBS Holdings Inc. and Ors., 2023 SCC OnLine Del 3191.

<sup>127</sup> SBS Holding Inc v. Anant Kumar Choudhary & Ors., O.M.P (I) (COMM.) 71/2023, Delhi High Court.

<sup>128</sup> Bar Council of India vs. A.K Balaji & Ors., (2018) 5 SCC 379.

<sup>129</sup> Rule 20 in Part VI, Chapter II of the BCI Rules.

<sup>130</sup> Rule 21 in Part VI, Chapter II of the BCI Rules.

<sup>131</sup> Order I, Rule 1 and 3, Code of Civil Procedure, 1908 (CPC).

to public policy would be void.<sup>132</sup> What this means is that despite there being no express regulations governing TPF in India, it would be legal to enter into a TPF agreement provided it is not extortionate or unconscionable. However, the determination of whether an agreement is indeed "*extortionate and unconscionable*" is left to the courts.<sup>133</sup>

Furthermore, with a rise in global trade and consequently disputes with Indian parties and in view of the cost involved in arbitration, increasingly more and more Indian parties are now agreeable to having their dispute resolution funded through TPF.

## **7. Arbitration and technology**

### **7.1 Is the validity of blockchain-based evidence recognised?**

Under the Act, there is no express recognition of blockchain technology. In India, the Information Technology Act, 2000 (IT Act) gives legal recognition to electronic communication and transactions carried out by electronic data interchange.<sup>134</sup> However, the IT Act too does not recognise blockchain technology. That said, there is no embargo on use of blockchain technology and owing to the principle of party autonomy, by mutual agreement parties may use blockchain-based evidence provided it does not go against any general law on contracts or evidence.

### **7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?**

The recognition of an agreement or award recorded on blockchain may be better understood by a reference to recognition of electronic agreements under the general law of contracts and evidence. Under the general law of contracts, a valid contract is one which is made by free consent of parties that are competent to contract, and such contract is made for lawful consideration and for a lawful object.<sup>135</sup> Under the law of evidence, all documents including electronic records are treated as documentary evidence. The Information Technology Act, 2000 defines electronic record to mean data, which could be image or sound, which is stored, received or sent in an electronic form.

As the Act does not expressly recognise blockchain technology, an arbitration agreement recorded on a blockchain can arguably fall within the definition of an arbitration agreement under Section 7 of the Act only if it meets the criteria of the general law on electronic record and contracts. However, this has not been tested. However, when a party makes an application to a court under Section 8 of the Act seeking reference of the dispute to arbitration, such an application shall be accompanied by an original agreement or a certified copy. That said, the legal position on whether an arbitration agreement recorded on a blockchain is considered an original for the purpose of Section 8 of the Act has not yet been tested.

An arbitral award to be recognised or enforced or annulled in India requires the petition to be filed along with an original/certified copy of the arbitral award.<sup>136</sup> The legal position on whether an award recorded on a blockchain is recognised as an original is not tested.

<sup>132</sup> This arises out of Section 23 of the Indian Contract Act, 1872.

<sup>133</sup> See Suganchand v. Balchand; 1956 SCC OnLine Raj 127 ; see also, Nuthaki Veukataswami v. Katta Nagireddy, 1962 SCC OnLine AP 100.

<sup>134</sup> The Information Technology Act, 2000 available at: [https://www.indiacode.nic.in/bitstream/123456789/13116/1/it\\_act\\_2000\\_updated.pdf](https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf).

<sup>135</sup> Section 10 of the Indian Contract Act, 1872.

<sup>136</sup> Atul Singh v Sunil Kumar Singh, (2008) 2 SCC 602; United India Insurance Co Ltd v M.D. Pahochiya, 2002 SCC OnLine Guj 17; India Lease Development Ltd v Thimmakka, 2002 SCC OnLine Kar 247.



### 7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

Yes, a court would consider a blockchain arbitration agreement and/or award as original. This may be better understood by making a reference to recognition of electronic records under the Information Technology Act, 2000 and the Indian Evidence Act, 1872.

Under the Indian Evidence Act, 1872, all documents including electronic records are treated as documentary evidence. The Information Technology Act, 2000 defines electronic record to mean data, which could be image or sound, which is stored, received or sent in an electronic form.

Under the Indian Evidence Act, 1872, an electronic record is treated as original when it is contained in the computer in which the original record is first stored.<sup>137</sup> A copy of the original electronic record is treated as original if it is certified to meet certain conditions under the evidence law.<sup>138</sup>

In the absence of any law on how a blockchain agreement or award is treated as original, the law on how an electronic record is treated as original may be applied to such blockchain agreement or award. However, the legal position on whether a blockchain agreement or award may be treated as original by applying the standards for electronic records remains untested to date.

### 7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

Under the Act, the award is to be signed by the arbitrators or majority of arbitrators. There are no particulars about the nature of signature on the award.<sup>139</sup>

However, the Information Technology Act, 2000 states that in any law (such as the Arbitration and Conciliation Act, 1996) that provides for authentication of a document by a signature, the signature requirement would be satisfied if the document is authenticated by means of an electronic signature in a manner prescribed by the Government.<sup>140</sup>

Looking to the relevant provisions of the Information Technology Act, 2000, an award passed under the Act would be considered authenticated only if it contains an electronic signature as specified in the Information Technology Act, 2000.<sup>141</sup> Inserting the image of a signature is not considered an electronic signature and such an award would not be valid for recognition and enforcement of the award.

## 8. Is there likely to be any significant reform of the arbitration law in the near future?

The Government of India, Ministry of Law & Justice in June 2023, constituted an expert committee under the chairpersonship of Dr. T.K. Vishwanathan, former law secretary to examine the working of arbitration law in the country and recommend reforms to the Arbitration and Conciliation Act, 1996. The committee has also invited comments and suggestions from all stakeholders, including arbitrators, judges, senior counsels, advocates, domestic and international law firms.

<sup>137</sup> Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.; (2020)7SCC1.

<sup>138</sup> Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors.; (2020)7SCC1.

<sup>139</sup> Section 31 of the Act.

<sup>140</sup> Section 5 of the Information Technology Act, 2000.

<sup>141</sup> Section 2(ta) of the Information Technology Act, 2000 defines "electronic signature" as: "electronic signature means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature"



The Act was amended in 2019 by way of The Arbitration and Conciliation (Amendment) Act, 2019. The 2019 amendment act brought in amendments to promote institutional arbitration in India. The amendment act added Sections 43A to 43M to the Act. These sections set out the constitution of the Arbitration Council of India, its duties, and responsibilities. The amendment Act was notified in August 2019 but the ACI is yet to be constituted. Once constituted it will be the duty of ACI to take all measures to promote alternate dispute resolution mechanism and frame policies, guidelines and regulations in relation to conduct of arbitration in India.

The government of India in the Union Budget, 2023 has introduced a one-time voluntary settlement scheme called Vivad se Vishwas II (contractual disputes).<sup>142</sup> This scheme has been introduced to settle contractual disputes of government and government undertakings that have *inter alia* led to arbitration proceedings between the parties. The scheme provides for graded settlement terms based on the stage of the dispute. The draft scheme was made available to the stakeholders from February 8, 2023 to March 8, 2023 for comments. The scheme will be introduced soon and will impact ongoing domestic arbitration proceedings that were invoked before September 30, 2022, and involved the government or a government undertaking as a party.

The Bar Council of India on March 10, 2023, notified the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022.<sup>143</sup> These rules provide for practice areas in which foreign lawyers and foreign law firms can practice in India. The rules *inter alia* provide that a foreign lawyer and / or a foreign law firm can provide legal advice and appear in any international arbitration case which is conducted in India, provided it is for a person or a corporate entity or a trust etc., that have an address in a foreign country. As the rules have already been notified, foreign lawyers and foreign law firms can now register in India and represent international parties in international commercial arbitrations.

The Act may see further amendments as the law is rapidly changing and the Government of India is taking an active interest in making India an arbitration friendly country. The Supreme Court of India is also regularly considering important questions of arbitration law such as the validity and admissibility of an unstamped arbitration agreement,<sup>144</sup> and the inclusion of a non-signatory to an arbitration agreement as a party to the arbitration (Group of Companies Doctrine).<sup>145</sup> The decisions in these matters will have an impact on the arbitration law in India.

## 9. Compatibility of the Delos Rules with local arbitration law

Delos Rules are different from local arbitration law.

## 10. Further Reading

- The Act:  
[https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996\\_26.pdf](https://www.indiacode.nic.in/bitstream/123456789/1978/1/A1996_26.pdf)
- The Law Commission's 246<sup>th</sup> Report dated 5 August 2014:  
<https://lawcommissionofindia.nic.in/reports/report246.pdf>
- Press Information Bureau Press Release, 'Constitution of high level committee to review Institutionalization of Arbitration Mechanism in India', 29.12.2016; and Report of the High Level Committee to Review the Institutionalization of Arbitration Mechanism in India, dated 30.07.2017:  
<https://legalaffairs.gov.in/sectiondivision/report-high-level-committee-review-institutionalisation-arbitration-mechanism-india>

<sup>142</sup> Office Memorandum dated February 8, 2023, available at, <https://doe.gov.in/sites/default/files/Vivad%20se%20Vishwas%20II%20%28Contractual%20Disputes%29.pdf>.

<sup>143</sup> Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022, available at, <https://egazette.nic.in/WriteReadData/2023/244365.pdf>.

<sup>144</sup> N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited & Ors., (2021) 4 Supreme Court Cases 379.

<sup>145</sup> Cox and Kings Ltd. vs. SAP India Pvt. Ltd., (2022) 8 Supreme Court Cases 1.

- Arbitration and Conciliation (Amendment) Act, 2019:  
<https://egazette.nic.in/WriteReadData/2019/210414.pdf>
- Arbitration and Conciliation (Amendment) Act, 2021:  
<https://egazette.nic.in/WriteReadData/2021/225832.pdf>
- Draft Scheme for stakeholder consultation: Vivad se Vishwas II (Contractual Disputes):  
<https://doe.gov.in/sites/default/files/Vivad%20se%20Vishwas%20II%20%28Contractual%20Disputes%209.pdf>
- Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022:  
<https://egazette.nic.in/WriteReadData/2023/244365.pdf>

## ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> with offices and a case team?	<ol style="list-style-type: none"> <li>1. Mumbai Centre for International Arbitration, Mumbai, Maharashtra- India (<b>'MCIA'</b>) <a href="https://mcia.org.in/">https://mcia.org.in/</a></li> <li>2. Delhi International Arbitration Centre, Delhi- India (<b>'DIAC'</b>) recently renamed to India International Arbitration Centre <a href="https://dhcdiac.nic.in/">https://dhcdiac.nic.in/</a></li> <li>3. Indian Dispute Resolution Centre (<b>'IDRC'</b>) <a href="https://theidrc.com/">https://theidrc.com/</a></li> <li>4. Indian Council of Arbitration (<b>'ICA'</b>) <a href="https://www.icaindia.co.in/">https://www.icaindia.co.in/</a></li> <li>5. Construction Industry Arbitration Council (<b>'CIAC'</b>), New Delhi <a href="http://www.ciac.in/">http://www.ciac.in/</a></li> <li>6. International Centre for Alternative Dispute Resolution (<b>'ICADR'</b>), New Delhi <a href="https://www.ic-adr.org/">https://www.ic-adr.org/</a></li> <li>7. ICC Council of Arbitration <a href="https://www.indianchamber.org/services/icc-council-of-arbitration/">https://www.indianchamber.org/services/icc-council-of-arbitration/</a></li> <li>8. International Arbitration and Mediation Centre (<b>'IAMC'</b>), Hyderabad <a href="https://iamch.org.in/">https://iamch.org.in/</a></li> <li>9. Indian Institute of Arbitration and Mediation (<b>'IIAM'</b>) <a href="https://www.arbitrationindia.com/">https://www.arbitrationindia.com/</a></li> <li>10. Hyderabad Arbitration Centre (<b>'HAC'</b>) <a href="https://hac.org.in/">https://hac.org.in/</a></li> <li>11. Nani Palkhivala Arbitration Centre (<b>'NPAC'</b>) <a href="http://www.nparbitration.net/">http://www.nparbitration.net/</a></li> </ol>
Main arbitration hearing facilities for in-person hearings?	<ol style="list-style-type: none"> <li>1. MCIA, 20<sup>th</sup> Floor, Express Towers, Nariman Point, Mumbai, 400021</li> <li>2. DIAC, Delhi High Court Campus, Shershah Road, New Delhi, 110503</li> <li>3. Nani Palkhivala Arbitration Centre, New No. 22, Karpagamal Nagar, Mylapore, Chennai-600004</li> <li>4. Hyderabad Arbitration Centre, 4th Floor, Imperial Square, HUDA Techno Enclave,HITEC City, Hyderabad, Telangana 500081</li> </ol>
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	<p>Judgements of Indian courts are reported in reporting services such as All India Reporter (<b>'AIR'</b>), Supreme Court Cases (<b>'SCC'</b>), etc.</p> <p>Recently, there has been an endeavour by the Supreme Court to have live transcription of its proceedings, and a live transcription service provided by TERES (a company named Technology Enabled Resolution) using Natural Language Processing (NLP) and Artificial Intelligence (AI) has been launched on a trial basis in the courtroom</p>

	<p>of the Chief Justice of India. The official transcript of the proceedings has also been published.</p> <p>Live transcription of proceedings will be expanded eventually to other courts well.</p>
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	<p>Each court has provisions for translation through means of official translation services.</p> <p>Besides these official translation services, there are also local translation services that are available. However, these would not generate official translation copies.</p>
Other leading arbitral bodies with offices in the jurisdiction?	<p>International Chamber of Commerce (India Chapter)</p> <p><a href="http://www.iccindiaonline.org/">http://www.iccindiaonline.org/</a></p> <p>Singapore International Arbitration Centre</p> <p><a href="https://www.siac.org.sg/">https://www.siac.org.sg/</a></p> <p>Indian Council of Arbitration</p> <p><a href="http://www.icaindia.co.in/">http://www.icaindia.co.in/</a></p> <p>London Court of International Arbitration</p> <p><a href="https://www.lcia.org/News/the-lcia-in-india.aspx">https://www.lcia.org/News/the-lcia-in-india.aspx</a></p>