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# LAW OF ARBITRATION IN INDIA - THE CHANGING LANDSCAPE

## PREFACE

The law of arbitration in India has been evolving to complement the needs of India's globalising economy. India's intent to elevate arbitration as the preferred mode of dispute resolution, for both international and domestic businesses operating in India, has been well documented in the recent past. Over the past few years, there have been catena of pro arbitration judgments passed by the various High Courts and the Supreme Court of India, as well as legislative amendments to the Arbitration and Conciliation Act, 1996 (**"the Act"**) through the Arbitration and Conciliation (Amendment) Act, 2015 (**"Amendment Act"**) (the Act, as amended by the Amendment Act, will be referred to as the **"Amended Act"**).

At the emergence of the new arbitral regime, we brought to you an analysis of amendments proposed under the Arbitration & Conciliation (Amendment) Ordinance, 2015. The Amendment Act eventually received the President's assent on December 31, 2015, and the Amended Act retrospectively came into effect from October 31, 2015. After two abandoned attempts to amend the law of arbitration in India – in 2001 and in 2002, the Amended Act has been a remarkable step towards remedying the blemishes to the law of arbitration in India.

We have reflected on the recent changes in the arbitration landscape in India since the introduction of the Amended Act and analysed the impact of these amendments in both legal and practical terms. Previously, a brewing cause of concern for litigants was the surge in court intervention in arbitration proceedings in India, particularly ad hoc arbitrations. Over the last two years, the courts have made a conscious effort to follow the policy of minimal intervention, portraying India as both an arbitration friendly jurisdiction and a viable seat for arbitration proceedings.

In this backdrop, this write up seeks to collate and analyse the judicial landscape since the Amendment Act came into force, and the way forward in light of the proposed Arbitration and Conciliation (Amendment) Bill, 2018 (**"Bill"**). The Amended Act has been in operation for a little more than two years. We delved into the development in law over these last couple of years and indeed, the readers will find it heartening to see that both, the Indian legislature, as well as the judiciary, are taking proactive steps to support the cause of dispute resolution through arbitrations.

We do hope this makes for some interesting reading. We enjoy every reader's opinion and welcome your feedback.

## JURISDICTION OF THE COURTS AND TERRITORIAL APPLICABILITY OF THE ACT

In its effort to increase the ease of conducting arbitrations in India for foreign parties and to re-affirm India as a friendly jurisdiction for parties seeking speedy resolution of disputes, the Amendment Act has expanded the territorial applicability of the Act and done away with the role of lower judicial courts in matters of international commercial arbitrations.

### THE MEANING OF ‘COURT’ FOR THE PURPOSE OF “INTERNATIONAL COMMERCIAL ARBITRATIONS”

Prior to the Amendment Act, in cases wherein the High Courts did not exercise ordinary civil jurisdiction, the Principal Civil Court (i.e. the court subordinate to the High Court) would qualify as the applicable “court” for international commercial arbitrations.

The Amendment Act has expanded the definition of the term “Court” to include the High Court as the court of first instance for international commercial arbitrations (where at least one party is a foreign party), instead of the lower judicial courts.<sup>1</sup> Hence, the High Courts shall now exercise jurisdiction in all cases of international commercial arbitration.

This amendment will ensure that court matters pertaining to international commercial arbitrations are heard expeditiously, by commercially oriented and experienced judges. The amended provision essentially spares a foreign party with little knowledge of the legal system in India from having to litigate in the lower judicial courts, in remote areas of the country.

### THE CONCEPT OF ‘JURIDICAL SEAT’ IN INDIA

Through *Indus Mobile*<sup>2</sup>, the Supreme Court applied the international concept of ‘juridical seat’ in cases of domestic arbitration in India. The Supreme Court ruled that once the seat of arbitration is designated under a contract, it is akin to an exclusive jurisdiction clause and held, that the moment the “seat” is determined, the fact that the seat is at Mumbai, would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between parties.

In *Devyani International*<sup>3</sup>, while the arbitration clause in the agreement fixed the “seat” of arbitration as Delhi, it also vested the courts at Mumbai with exclusive jurisdiction. Interestingly, despite vesting courts at Mumbai with exclusive jurisdiction and despite the cause of action having arisen in Mumbai, the court solely relied upon the position taken in *Indus Mobile*<sup>4</sup>, and held that since the seat of arbitration is Delhi, the courts at Delhi would have exclusive jurisdiction to adjudicate the dispute between the parties. In *Antrix Corporation*<sup>5</sup>, the Delhi High Court has taken a contrary view and has distinguished *Indus Mobile*<sup>6</sup> on the ground that in *Indus Mobile*<sup>7</sup>, parties specified the seat of arbitration as well as expressly granted exclusive jurisdiction to the courts at Mumbai whereas, in *Antrix Corporation*<sup>8</sup>, while the seat was Delhi, exclusive jurisdiction was not conferred on the courts at

<sup>1</sup> Section 2(1)(e)(ii) of the Amended Act

<sup>2</sup> *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors*, AIR 2017 SC 2105

<sup>3</sup> *Devyani International Ltd. v. Siddhivinayak Builders and Developers*, 2017 SCC Online Del 11156

<sup>4</sup> *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors*, AIR 2017 SC 2105

<sup>5</sup> *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*, 2018 SCC OnLine Del 9338

<sup>6</sup> *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors*, AIR 2017 SC 2105

<sup>7</sup> *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd & Ors*, AIR 2017 SC 2105

<sup>8</sup> *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*, 2018 SCC OnLine Del 9338

Delhi. Based on this distinction, the Delhi High Court held that since the cause of action arose in Bangalore, courts at Delhi as well as Bangalore would have jurisdiction.

In *Roger Shashoua*<sup>9</sup>, the Supreme Court ruled that “venue cannot be equated with the seat/place of arbitration” and when a court finds there is prescription for venue, the court must adjudge the facts of each case to determine the juridical seat. The Supreme Court found that since London was designated as the “venue”, in the absence of anything to the contrary, the “seat” was also London.

In context of international commercial arbitrations, agreements which only designate the “venue” of arbitration and not the “seat” have often surfaced in Indian courts. In *Hardy Exploration*<sup>10</sup>, the arbitration agreement fixed the “venue” for holding the arbitration sittings but remained silent on the “seat”. In an effort to lay down the principles in determining the “seat” of arbitration when the “venue” is predetermined in the arbitration agreement, the Supreme Court has referred the *Hardy Exploration* case to a larger bench.

While drafting arbitration clauses, parties ought to carefully choose the seat of the arbitration. Further, parties ought to specifically confer exclusive jurisdiction on courts of a particular place. In our experience, conferring exclusive jurisdiction on courts of the seat of arbitration will reduce the possibility of conflict on this issue in the arbitral proceedings.

## SCOPE OF “INTERNATIONAL COMMERCIAL ARBITRATIONS”

Section 2(1)(f) of the Act earlier listed the criteria for an arbitration to qualify as an “international commercial arbitration”. For an arbitration to qualify as an “international commercial arbitration”, under the earlier Act, one party was necessarily required to be a foreign party, i.e. a foreign national, a foreign resident, a body corporate incorporated outside India, or a company or an association or body of individuals whose central management and control is outside India.

Therefore, the criteria for a body corporate/company to qualify as a foreign party was obscure in the Act i.e. while the Act provided that the place of incorporation of a company was a determinant factor, subsequently the Act also provided that the place of central management of the company would be a determinative factor.

The Amendment Act, has done away with the criteria that a company whose central management and control is outside India would also qualify as a foreign party for an “international commercial arbitration”, and clarified that the place of incorporation shall be the only deciding factor in determining the nationality of a company.

## TERRITORIAL APPLICABILITY OF THE ACT

The famed *Bharat Aluminium* judgment<sup>11</sup> specifically disallowed the availability of provisions of Part I of the Act to foreign seated arbitrations. This adversely impacted the ability of a foreign party to get interim relief against an Indian party or assets located in India, in support of a foreign seated arbitration.

Section 2(2) of the Amended Act has now extended the applicability of certain provisions of Part I of the Act, namely, Section 9 (interim measures by court), Section 27 (court’s assistance in taking evidence), and Section 37(1) (a) and Section 37(3) (appealable orders), to “international commercial arbitrations” seated outside India, unless expressly excluded by parties through an agreement.

<sup>9</sup> *Roger Shashoua v. Mukesh Sharma*, 2017 SCC Online SC 697

<sup>10</sup> *Union of India v. Hardy Exploration and Production (Inc.) India*, 2018 SCC On Line SC 474

<sup>11</sup> *Bharat Aluminum Company Limited v. Kaiser Aluminum*, (2012) 9 SCC 552

## WELCOMING E-COMMUNICATION - ARBITRATION AGREEMENT

The Act as it originally stood provided that an arbitration agreement in writing shall be contained in a document which was signed by the parties; an exchange of letters, telex, telegrams or other means of telecommunication which allow a record of the agreement, or in an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.

However, keeping up with the evolving domain of e-commerce, where many agreements are concluded electronically, Section 7(4) of the Amended Act has now expanded its scope of what would constitute an “*arbitration agreement in writing*” by “*including communication through electronic means*” within its ambit.<sup>12</sup>

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<sup>12</sup> Section 7(4) of the Amended Act

## POWERS OF THE COURTS

The Amendment Act has redefined the scope and nature of the role of the courts while referring parties to arbitration. In the Amended Act, the acceptable judicial intervention is minimal and limited to examining the existence of a *prima facie* arbitration agreement.

With respect to the powers of the court to grant interim reliefs, the legislature has made provisions to preclude parties from unnecessarily seeking intervention of the court to grant interim measures. For instance, once the tribunal is constituted, a party shall not seek interim relief from the court, unless the tribunal is unable to grant an efficacious remedy.

### REFERRING PARTIES TO ARBITRATION

Section 8 of the Act provided that a judicial authority must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement, if the party seeking reference makes an application “*not later than when submitting his first statement on the substance of the dispute.*” However, the Act was not clear on the scope of analysis required by the courts in deciding whether a valid arbitration agreement existed between the parties.

In the new regime, Section 8(1) of the Amended Act specifies that unless the judicial authority finds that *prima facie* no valid arbitration agreement exists, it must compulsorily refer the parties to arbitration in a matter which is the subject of an arbitration agreement. Thereby, reducing discretion of the courts in determining whether a valid arbitration agreement exists, before referring the parties to arbitration. Indeed, courts can always leave it up to the arbitral tribunals to determine whether a valid arbitration agreement exists between the parties, under section 16 of the Act – based on the principle of ‘*kompetenz-kompetenz.*’ For now, all the courts need to see is that there is a *prima-facie* arbitration agreement – its validity is of no consequence and is for the arbitral tribunals to determine, based on evaluation of relevant evidence.

#### Definition of “Party”

It is also worth noting that Section 8 of the Amended Act also allows “*any person claiming through or under him [the party to an arbitration agreement]*” to file an application under this Section. Given the change in the language of the provision to allow a party and “*any person claiming through/ under him*” to file an application for a reference to arbitration, judicial authorities now have an option to allow non-signatories to be joined as parties in appropriate cases.

While this amendment expands the definition of the term ‘party’ under Section 8 of the Act, the definition of ‘party’ has not been altered in relation to other provisions of the Amended Act, such as Sections 9 and 11.

#### Time frame to file an application under Section 8

Previously, the Act provided that an application under Section 8 shall be filed “*not later than when submitting his first statement on the substance of the dispute.*”

The Amendment Act has clarified the timeline to file an application by substituting “*not later than when*” with “*not later than the date of submitting his first statement on the substance of the dispute.*” The court has interpreted the impact of this change in language in *Parasramka Holdings*.<sup>13</sup>

<sup>13</sup> *Parasramka Holdings Pvt. Ltd. & Ors. v. Ambience Private Ltd. & Anr.*, SCC OnLine Del 6573

**KEY DECISION**

In *Parasramka Holdings*,<sup>14</sup> a preliminary objection highlighting the existence of an arbitration clause was made in the written statement of a suit, filed before the courts.

The Delhi High Court adjudicated upon the question whether the said preliminary objection in the written statement could be treated as an application to refer disputes to arbitration under the amended Section 8. The question arose in light of the change in language in relation to application for reference to arbitration in Section 8(1) of the Act, from “*not later than when submitting his first statement on the substance of the dispute*” to “*not later than the date of submitting his first statement on the substance of the dispute*”.

Mindful of the limited change in the language of the section and the pro-arbitration Statement of Objects and Reasons of the Amendment Act, the Delhi High Court found that a preliminary objection in the written statement to bring to the court’s notice the existence of an arbitration clause, would be treated as an application under Section 8 of the Amended Act.

**Applicability of the amendments to Section 8**

The Amendment Act expressly provides that the amendments to Section 8(1) of the Amended Act are applicable notwithstanding any judicial precedent. By expressly providing for the applicability of the amendments under this provision, the legislature has ruled out the possibility of conflict with contrary judicial precedents.

**INTERIM MEASURES BY COURT**

The legislature has taken steps to ensure that interim measures can only be granted if parties really intend to pursue arbitration. Under the newly inserted Section 9 (2), the Amended Act provides that in the event a petition is filed in courts to obtain interim relief prior to initiation of arbitration, the party filing such petition shall commence the arbitration within a period of 90 days from the date it has obtained an order of interim relief.

The Amendment Act has also sought to rule out unnecessary intervention of courts during arbitral proceedings. As per the newly inserted 9 (3) of the Amended Act, once an arbitral tribunal has been constituted, the court shall not entertain an application for interim relief unless it finds that the interim relief sought from the arbitral tribunal under Section 17 of the Amended Act would not be efficacious.

In our experience, in the presence of a valid arbitration agreement between the parties, the courts are consciously referring applications filed under section 9 of the Amended Act before the court, to an arbitral tribunal under section 17 of the Amended Act. As time is of essence, while making an order converting the application filed under section 9 of the Amended Act to an application under section 17 of the Act, the courts are even appointing the arbitrator with the consent of the parties.

The Calcutta High Court, in *Bishnu Kumar*,<sup>15</sup> clarified that the court’s power under Section 9 (3) is not automatically barred by constitution of an arbitral tribunal and that the court may grant relief if it finds that an order of interim relief by the tribunal would be inefficacious.

<sup>14</sup> *Parasramka Holdings Pvt. Ltd. & Ors. v. Ambience Private Ltd. & Anr.*, SCC OnLine Del 6573

<sup>15</sup> *Bishnu Kumar Yadav v. M.L. Soni & Sons & Ors.*, AIR 2016 Cal 47



## INTERIM MEASURES PENDING ENFORCEMENT OF FOREIGN AWARDS

Adopting the pro-arbitration spirit of the Amended Act, the Bombay High Court in the case of *Aircon Beibars*<sup>16</sup> has secured the amounts due from a judgment debtor under a foreign award, pending enforcement of the award in India, by way of Section 9 of the Amended Act. The Bombay High Court through this order sought to ensure that the interests of a foreign award holders are protected pending enforcement.

In *TRAMMO DMCC*<sup>17</sup>, the Bombay High Court allowed the holder of a foreign award to apply for interim relief in the court which enjoyed jurisdiction over the assets of the judgment debtor. The decision saves the award holder from the unnecessary hassle of deciding which court to approach, i.e. the court which enjoys jurisdiction over subject matter of arbitration or the court which enjoys jurisdiction over the location of the assets to be used for enforcement.

## EMERGENCY ARBITRATIONS

While the Amendment Act has sought to reduce the scope of the court's role in granting interim relief in relation to arbitrations, it has failed to codify a globally recognised concept of emergency arbitrations, which, under various institutional arbitration rules, can be approached for interim relief before the arbitral tribunal is appointed. This omission in recognising emergency arbitrators and the awards granted by them is conspicuous, given that institutional arbitration rules in India provide for emergency arbitrations for e.g. Mumbai Center for International Arbitration ("**MCIA**") Rules, 2016 and Indian Council for Arbitration Rules, 2005.

While Indian courts have granted interim reliefs in relation to foreign seated arbitrations under Section 9 of the Act, in cases of enforcement of interim reliefs in a foreign seated emergency arbitration, for example in *Raffles Design*<sup>18</sup> and *Avitel*<sup>19</sup>, the courts till date have ruled that eventually a suit may have to be filed in Indian courts for seeking enforcement of such awards, or the courts may consider granting similar interim relief as the emergency arbitrator, after scrutinizing the merits of the interim relief sought, under a separate Section 9 application filed in Indian courts.

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<sup>16</sup> *Aircon Beibars FZE v. Heligo Charters Pvt. Ltd.*, 2017 SCC Online Bom 631

<sup>17</sup> *Trammo DMCC (formerly Known as Transammonia DMCC) v. Nagarjuna Fertilizers & Chemicals Ltd.*, 2017 SCC OnLine Bom 8676

<sup>18</sup> *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.*, 2016 SCC OnLine Del 5521

<sup>19</sup> *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studios Ltd. & Ors.*, 2014 SCC OnLine Bom 102

## CONSTITUTION OF THE ARBITRAL TRIBUNAL

The Amended Act now provides a robust process for the constitution of an arbitral tribunal by the courts. The process for appointment of arbitrators, the grounds to challenge an appointment, and the scope of intervention of the courts have been amended with an aim to constitute a fair and impartial tribunal.

### APPOINTMENT OF ARBITRATORS

Section 11 of the Amended Act has introduced much desired changes in relation to the process of appointment of a tribunal by the courts and this in turn has positively affected the timeline of arbitral proceedings.

#### Appointing Authority

Prior to the Amendment Act, a party could request the “*Chief Justice*” to take necessary measures to constitute the tribunal. The Amendment Act has now replaced the words “*Chief Justice*” with either “*Supreme Court*” or “*High Court*” for cases involving international arbitrations and domestic arbitrations respectively.

#### Timeline and Right to Appeal

The Supreme Court or High Court must endeavour to dispose of an application for appointment of arbitrator within 60 days. In our recent experience, while the courts have not been able to adhere to the strict timeline of 60 days, they are making every effort to dispose of the applications for appointing arbitrators expeditiously. Further, the decision of the Supreme Court or the High Court under Section 11 of the Amended Act is final, and the parties do not have a right to appeal.

#### Disclosure

Before appointing an arbitrator, the Supreme Court or the High Court must obtain a disclosure in writing from the prospective arbitrator regarding their independence and impartiality status, in accordance with Section 12 of the Amended Act.

#### Fees of the Tribunal

High Courts have also been empowered to frame rules to determine a tribunal’s fee after taking into consideration the rates specified in the Fourth Schedule of the Amended Act.

#### Scope of the Courts: Confine itself to ‘examine the existence of an arbitration agreement’

Finally, Section 11 (6-A) of the Amended Act provides that while considering an application for appointment of an arbitrator, the Supreme Court or High Court (as the case may be) shall confine itself to “*examine the existence of an arbitration agreement*”.

Following the amendments carried out in relation to appointment of the arbitral tribunal, *Duro Felguera*<sup>20</sup> was one of the very first cases before the Supreme Court. The Supreme Court embraced the spirit of Section 11 and decided that its role should be restricted to simply examining whether there exists an arbitration agreement between parties, as opposed to the power under the earlier Section 11(6), which had become considerably wide in view of the earlier judicial pronouncements and the courts had started examining the validity of the arbitration agreements at the stage of appointing the tribunal.

<sup>20</sup> *M/s. Duro Felguera S.A. v. M/s. Gangavaram Port Ltd.*, (2017) 9 SCC 729

By limiting the scope of the court's jurisdiction specifically to examining the existence of an arbitration agreement and setting a time limit for courts to dispose an application for appointment along with excluding right to appeal against the decision of the courts, the Amended Act has sought to reduce the time spent on the initial stages of arbitration.

## **GROUND TO CHALLENGE THE APPOINTMENT OF ARBITRATORS**

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The Amendment Act has introduced much needed additions to Section 12 of the Act by expressly mandating prospective arbitrators to make certain disclosures in writing and providing the circumstances under which an arbitrator would be ineligible for appointment.

### **Disclosures**

The Amended Act mandates a prospective arbitrator to disclose the following in writing:

- the existence of any past or present relationship with either of the parties or the subject matter of the dispute which is likely to give rise to justifiable doubts as to his independence and impartiality; and
- any circumstances which are likely to affect the proposed arbitrator's ability to complete the entire arbitration within 12 months.

### **Independence and Impartiality**

The grounds which may give rise to justifiable doubts as to the independence or impartiality of an arbitrator have been stated in the Fifth Schedule to the Amended Act. These grounds can be relied on by the parties, upon the arbitrators' disclosure, for challenging the appointment of the arbitrator(s). Further, the Seventh Schedule of the Amended Act provides grounds which, if found to exist upon disclosure, bar the appointment of such arbitrator(s).

The amendments to Section 12 of the Act, which import the grounds for justifiable doubt and the ineligibility criteria from the International Bar Association Guidelines on Independence and Impartiality of Arbitrators, is an instance of the legislature's intent of meeting internationally accepted standards.

**KEY DECISIONS**

In *TRF Limited*,<sup>21</sup> the arbitration agreement between the parties provided for the appointment of a party's Managing Director ("MD") as the sole arbitrator, and further provided that should the MD be indisposed, he could nominate another arbitrator to adjudicate the disputes between the parties. The Supreme Court held that as per the Amended Act, the MD would be ineligible to act as an arbitrator, and therefore he was consequently precluded from nominating another arbitrator.

In *Bharat Broadband*,<sup>22</sup> the Delhi High Court held that the parties could challenge appointment of arbitrators even when the grounds for ineligibility were revealed after the appointment. However, because, in this case, the parties knowingly appointed the respondent's Chief Managing Director as an arbitrator and, despite knowing his ineligibility under the Amended Act, filed their pleadings in the arbitration, the court concluded that parties' conduct amounted to waiver of the derogable provision (which bars appointment of management personnel as arbitrators). The court distinguished *TRF Limited*<sup>23</sup> and held that by nominating the arbitrator, participating in the arbitration proceedings without objecting to the appointment, and filing pleadings before the arbitrator, the parties waived the applicability of Section 12 through an express agreement in writing.

Following on, the Delhi High Court in *D.K. Gupta*<sup>24</sup> allowed the unilateral appointment of an arbitrator by one of the parties' representative, who was the contractually agreed appointing authority (and not the mandated arbitrator himself). The decision of the Delhi High Court brings to light an unresolved issue which the Amendment Act failed to address, i.e. unilateral appointment of tribunals by one of the parties to the dispute. Based on *D.K. Gupta*,<sup>25</sup> the position in India remains that one of the parties can be contractually agreed as the sole nominating authority for the arbitrator(s).

In *Voestalpine Schienen*,<sup>26</sup> the Supreme Court clarified that the Amended Act does not bar appointment of retired officers (i.e. officers of any government department, public sector undertaking, and statutory corporation) as arbitrators. However, the retired officers must not be related to the government undertaking or party to the dispute. The court suggested that the panels from which arbitrators are chosen, should be broad based and should include persons with a legal background.

In *Assignia-VIL*,<sup>27</sup> the Delhi High Court rejected the party's proposal to appoint its own employee as an arbitrator as the same would be contrary to the Amended Act. Thus, while the courts have upheld the provisions of the Amended Act, they have also been cautious to ensure that the parties do not employ the amended provisions as a ploy to avoid arbitration agreements.

<sup>21</sup> *TRF Ltd. v. Energo Engineering Projects Ltd.*, 2017 (8) SCC 377

<sup>22</sup> *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, 2017 SCC OnLine Del 11905

<sup>23</sup> *TRF Ltd. v. Energo Engineering Projects Ltd.*, 2017 (8) SCC 377

<sup>24</sup> *D.K. Gupta & Anr. v. Renu Munjal*, 2017 SCC OnLine Del 12385

<sup>25</sup> *D.K. Gupta & Anr. v. Renu Munjal*, 2017 SCC OnLine Del 12385

<sup>26</sup> *Voestalpine Schienen GMBH v Delhi Metro Rail Corporation Ltd.*, 2017 SCC OnLine SC 172

<sup>27</sup> *Assignia-VIL JV v. Rail Vikas Nigam Limited*, 2016 SCC OnLine Del 2567

## FAILURE OR IMPOSSIBILITY OF AN ARBITRATOR TO ACT

Section 14 of the Act, as it originally stood, provided only for the termination of the mandate of the arbitrator in the event of failure or impossibility of the arbitrator to act, and not for the substitution of the arbitrator. Therefore, in the earlier scenario, a party had to file a separate application under Section 11 of the Act to seek appointment of a new arbitrator thereby prolonging proceedings.

However, Section 14 of the Amended Act now provides for substitution of the arbitrator with a new arbitrator once the arbitrator becomes *de facto* or *de jure* incapable of performing his/her duties.

### KEY DECISIONS

In relation to this amendment, the Supreme Court in *HRD Corporation*,<sup>28</sup> observed that if an arbitrator is found to be ineligible under the Seventh Schedule of the Amended Act, such ineligibility would go to the root of his appointment. The Supreme Court held that since the ineligible arbitrator would *de jure* lack inherent jurisdiction, an application to terminate his mandate is to be filed in court.

While the parties have been spared from pursuing two proceedings, (first for terminating the mandate of the arbitrator and second for appointing a substitute arbitrator in place of the arbitrator whose mandate has been terminated) there remains ambiguity about what is the criteria for an arbitrator to be "*de jure unable to perform his functions*".

<sup>28</sup> *HRD Corporation v. GAIL (India) Ltd.*, 2017 SCC OnLine SC 1024

## POWERS OF THE TRIBUNAL

The Amendment Act has empowered the tribunal to grant the same interim measures as the courts. By extending the powers of the courts to the tribunal, the intervention of courts for securing interim measures has reduced considerably.

The powers of the tribunal with respect to the conduct of arbitral proceedings and the regime for awarding costs in arbitral proceedings have also been amended to allow the apportionment of costs to be based on the success or failure of a party in the arbitration, unless the parties agree otherwise.

### INTERIM MEASURES BY TRIBUNAL

Given the absence of any procedure to enforce an order passed under Section 17 of the un-amended Act, parties often sought intervention of the courts under Section 9 of the Act to effectively secure interim relief.

The Amendment Act has extended the powers of the court to grant interim measures (on matters set out under Section 9 of the Amended Act) to the arbitral tribunal. Complementing this change, Section 17 has also been amended to provide that an order of interim relief from an arbitral tribunal shall be deemed to be an order of the court and shall be enforceable under the Code of Civil Procedure, 1908 ("CPC"), in the same manner as if it were an order of the court.

### KEY DECISIONS

The high courts have been forthcoming in upholding the interim reliefs granted by arbitral tribunals in view of Section 17(1) of the Amended Act.

In *NTPC Limited*<sup>29</sup> and *Delhi State*,<sup>30</sup> the Delhi High Court upheld the mandatory injunction granted by the tribunal. In *Lanco Infrastructure*,<sup>31</sup> the Delhi High Court took note of the tribunal's powers under the amended Section 17 to grant reliefs to secure amounts in disputes. In *Enercon GmbH*,<sup>32</sup> the Bombay High Court reiterated that an arbitral tribunal's power to grant interim relief is like that of courts.

In keeping with the spirit of the Amendment Act, the Supreme Court in *Alka Chandewar*,<sup>33</sup> enforced an interim order granted under the pre-Amendment Act. The court noted that a party's failure to comply with tribunal's interim order amounted to a contempt of its orders. Hence, it is evident that the courts are increasingly inclined to adopt a pro-enforcement approach towards interim measures granted in arbitrations.

### STATEMENT OF CLAIM & DEFENCE

The Amendment Act has inserted sub-section 2-A in Section 23 of the Act, which allows the respondent in an arbitration, in support of his case, to file a counter claim or plead a set-off, against the claimant's claims which were to be adjudicated upon by the tribunal, provided such counterclaim or set-off was within the scope of the arbitration agreement. This amendment clarifies and codifies the practice already followed internationally, to avoid multiplicity of proceedings.

<sup>29</sup> *NTPC Ltd. v. Jindal ITF Ltd. & Ors.*, 2017 SCC OnLine Del 11219

<sup>30</sup> *Delhi State Industrial & Infrastructure v. PNC Delhi Industrial Infra Private Ltd.*, ARB. A. (COMM.) 17/2017, Delhi High Court

<sup>31</sup> *Lanco Infrastructure Ltd. v. Hindustan Construction Co. Ltd.*, 2016 SCC OnLine Del 5365

<sup>32</sup> *Enercon GmbH & Ors. v. Yogesh Mehra & Ors.*, 2017 SCC OnLine Bom 1744

<sup>33</sup> *Alka Chandewar v. Shamshul Ishrar Khan*, 2017 SCC OnLine SC 758

**KEY DECISION**

In *Kolkata Metropolitan*,<sup>34</sup> the arbitrator had held that the counter-claims of the respondent were not maintainable as they were not referred to the engineer-in-charge in terms of the contract. The Calcutta High Court upheld the respondent's right to file a counter claim in its statement of defence before the arbitrator and rejected the arbitrator's finding that such counter claim was not maintainable.

**HEARING & WRITTEN PROCEEDINGS**

In furtherance of expeditious completion of proceedings, a proviso has been introduced to Section 24 of the Amended Act, which requires the tribunal to hold, as far as possible, oral hearings for the presentation of evidence or oral arguments on a day-to-day basis.

The proviso also bestows discretion upon the tribunal to impose costs on parties who seek frivolous adjournments. This is a positive addition to assist in stemming delays in arbitrations conducted in India.

**PARTY'S DEFAULT**

In a step towards ensuring expeditious completion of arbitral proceedings, stricter timelines have been introduced through Section 25(b) of the Amended Act. The provision now provides that - if the respondent fails to file its statement of defence in accordance with the procedural time table, the tribunal shall have the discretion to treat the right of the respondent to file its statement of defence as having been forfeited.

**RULES APPLICABLE TO THE SUBSTANCE OF THE DISPUTE**

Under the Section 28 of the un-amended Act, if an award was not '*in accordance with*' the terms of the contract such an award was *ipso facto* '*patently illegal*'. Section 28, as it originally stood, required the tribunal to strictly decide "*in accordance with the terms of the contract*" and by considering the usages of trade.

The legislature has now amended Section 28 of the Act and done away with the requirement for an award to be "*in accordance with the terms of the contract*"; instead the tribunal while making an award is required to "*take into account the terms of the contract and the trade usages applicable to the transaction*".

Given that "*terms of the contract*" and "*trade usages applicable*" have been put on an equivalent footing, it remains to be seen whether the tribunals will now "*take into account*" both these conditions while making an award. Moreover, the decision of the tribunal in case of a conflict and the extent to which the tribunals will "*take into account*" the terms of contract and trade usages applicable remains to be seen.

<sup>34</sup> *Kolkata Metropolitan Development Authority v. Hindustan Construction Co. Ltd.*, Arbitration Petition No. 957 of 2016, Calcutta High Court

**KEY DECISION**

In *Sri Chittaranjan Maity*,<sup>35</sup> the issue which arose for consideration before the Supreme Court was whether the arbitral tribunal was justified in awarding interest on delayed payments, when the contract itself prohibited awarding interest. The Supreme Court rectified the claim amount awarded by the arbitral tribunal by relying on Section 31 (7) (a)<sup>36</sup> of the Amended Act. In *Susaka Pvt. Ltd.*,<sup>37</sup> the Supreme Court further clarified that if a party does not raise the plea that the contract prohibits awarding interest, before the arbitral tribunal, the party shall be hit by the principle of waiver and precluded from raising such plea at a later stage, i.e. at the time of challenge.

**REGIME FOR COSTS**

Paving the way for a framework to fairly allocate costs in arbitration proceedings, Section 31-A of the Amended Act provides for costs of arbitration to be determined by the arbitral tribunal. An arbitral tribunal now has the discretion to levy costs, and the time at which the same are to be remitted. The Amended Act further provides that a tribunal can follow the general rule that costs follow the award but may decide otherwise for reasons to be recorded in writing.

The Amended Act specifies what can be included under the umbrella of costs and stipulates the factors which must be taken into consideration by the tribunal, to determine the costs. These factors include the conduct of the parties; whether a party has partly succeeded in a case; whether the party has a frivolous counterclaim leading to a delay in disposal of arbitral proceedings; and whether any reasonable offer to settle the disputes is made by a party and refused by the other party. This brings Indian arbitration further in line with international norms.

In our experience, Indian tribunals are increasingly awarding costs which reflect the changes brought about under the Amended Act.

**Change in Post Award Interest**

The post award interest in the Act, prior to the amendment, prescribed that an award shall carry post award interest at the rate of 18% from the date of the award to the date of the payment, unless the award directs otherwise.

Section 31(7) of the Amended Act has revised the applicable rate of interest and now provides that an arbitral award shall, unless the award otherwise directs, carry interest from the date of award to the date of payment, at the rate of two percent (2%) higher than the "current rate of interest"<sup>38</sup> prevalent on the date of award.

<sup>35</sup> *Sri Chittaranjan Maity. v. Union of India*, (2017) 9 SCC 611

<sup>36</sup> Section 31, Arbitration and Conciliation Act, 1996 "Form and contents of arbitral award.. 7(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, 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."

<sup>37</sup> *Union of India v. Susaka (P) Ltd*, (2018) 2 SCC 182

<sup>38</sup> As defined under Section 2(b) of the Interest Act, 1978



## CHANGES IN CONDUCT OF ARBITRAL PROCEEDINGS

With some arbitrations spanning over 4-5 years, statutory provisions for strict time lines to be adhered for completing arbitrations became a need of the hour. To address concerns over the time which ad hoc arbitrations were taking in India, the legislature has introduced Section 29-A of the Amended Act, which provides a time limit of 12 months for the completion of arbitral proceedings. In a positive step towards incorporating features of institutional arbitration into the Amended Act, the Amended Act has also introduced Fast Track procedure for arbitration in India, which provides a six month timeline to deliver the award, if parties wish to adopt Fast Track arbitrations.

### TIME LIMIT FOR ARBITRAL AWARD

The time-period of 12 months for completion of arbitral proceedings will begin from the date on which the arbitral tribunal enters upon reference and can be extended by a further period of 6 months with the consent of both parties.

However, if the award is not rendered within the said 12 months or within the additional 6 months thereafter, the mandate of the arbitrator(s) shall terminate unless the time period is extended by the court, on an application by either party, only for sufficient cause and on such terms and conditions as may be imposed by the court – prior to or after the expiry of the period so specified. The court, while granting the extension beyond the period of 18 months, can also direct a reduction in the arbitral tribunal's fees if it finds that the arbitral proceedings were delayed because of events attributable to the tribunal.

While the provision is a bold and ambitious amendment, it is peculiar to the extent that it requires parties to approach the already over-burdened courts to seek an extension for arbitration beyond 18 months.

### KEY DECISION

In *Omaxe Infrastructure*<sup>39</sup> the Delhi High Court granted a further six-month extension sought by the parties under Section 29-A and disposed of the application within 3 days. This decision of the court puts to rest (to a limited extent) a general concern that it may prove overly time-consuming to obtain the required extension from courts in India.

Post the amendment, in most of the ongoing arbitrations, time lines are largely being met. Arbitrators are wary of being taken to court and therefore, adjournments are not being granted easily. As against weekend arbitrations, now a spurt of arbitrations is being conducted on a day to day basis. Even parties are wary of the outcome of not following the time frame.

<sup>39</sup> *Omaxe Infrastructure & Construction Ltd. v. Union of India and Ors.*, 2017 SCC Online Del 11511

## **FAST TRACK ARBITRATION**

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The Amendment Act has introduced Section 29-B which provides for a fast track procedure for arbitrations. Under this provision, notwithstanding anything contained in the Act, the parties may opt for fast track arbitral proceedings where a sole arbitrator must deliver the arbitral award within six months of appointment of the arbitrator. The procedure adopted is generally restricted to document only proceedings, with oral hearings requested by the arbitrator only when necessary.

Section 29-B is a codification of a procedure that is predominantly featured in prominent arbitral institutions. However, its utility and effectiveness remain to be tested in the Indian scenario since the time within which an award is to be pronounced in regular arbitral proceedings has already been capped by Section 29-A of the Amended Act.

## CHALLENGE TO AN ARBITRAL AWARD

Section 34 of the Amended Act has provided much needed clarity on the grounds to challenge an arbitral award and has introduced a new provision to allow courts to set aside a domestic award if it is vitiated by '*patent illegality*'.

### **An award in conflict with '*Public Policy*'**

Section 34(2)(b)(ii) of the un-amended Act, which provided that an award in conflict with the "*public policy of India*" shall be set aside, had become a subject matter of debate due to the ambiguity regarding the interpretation of "*public policy*".

Section 34 of the Amended Act has clarified that an award can be said to be in conflict with the "*public policy of India*" only if, (a) the making of the award was affected or induced by fraud or corruption; (b) the award is in contravention of the fundamental policy of law in India; and (c) if the award conflicts with basic notions of morality or justice.

Explanation 2 to Section 34(2) (b) of the Amended Act further provides that there can be no review on merits by a court for determining whether the award is in contravention with the "*fundamental policy of Indian law*".

The amendments introduced to Section 34 are substantive in nature, expressly setting out the conditions that govern a challenge to a domestic award. An express exclusion of a review of merits by the courts in determining whether the award contravenes the "*fundamental policy of India law*" is a welcome step as it greatly aids in finalizing settlement of disputes through the arbitral award and discourages frivolous ongoing litigations, post an award.

### **Introduction of '*Patent Illegality*'**

The newly inserted sub-section (2-A) in Section 34 of the Act, provides that an award arising out of arbitrations, other than international commercial arbitrations, may be set aside by the court if the court finds that the award is vitiated by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) clarifies that an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence.

Therefore, the courts have taken a pro-arbitration approach by limiting the scope of review on the ground of patent illegality, and by dismissing applications which seek re-appreciation of evidence.

### **Procedure to file an application under Section 34**

An application for setting aside an award can only be filed before a court after issuing prior notice to the other party and requires that an application under Section 34 needs to be accompanied by an affidavit affirming compliance of the said provisions.

### **Time frame to dispose applications**

In its effort to ensure timely disposal of applications under Section 34 of the Amended Act, the legislature has introduced a time frame of one year for courts to expeditiously dispose applications filed under Section 34.

## KEY DECISIONS

**Conflict with Public Policy of India**

In *Silver Resorts*,<sup>40</sup> the Delhi High Court was presented with an application under Section 34 of the Amended Act, wherein the petitioner assailed the admissibility of certain evidence based on the procedure followed by the arbitrator while also submitting that the arbitrator had failed to fully appreciate the information placed before him, which would have led to different inferences. While the court addressed each of the contentions of the petitioner, and found no merit, the court noted that there was no compulsion for it to have done so in the present proceedings. The court proceeded to state that the amended portions of Section 34(2)(b)(ii) should be read considering the Supreme Court's pre-amendment rulings in *Oil & Natural Gas*<sup>41</sup> and *Associate Builders*<sup>42</sup>. The court then held that while examining a challenge laid on the ground of conflict with public policy of India, it is neither open to the court to sit in appeal over a tribunal's decision, nor to supplant its views over that of the tribunal. The application under Section 34 was accordingly dismissed with costs.

**Re-appreciation of Evidence**

In *Bombay Dyeing*,<sup>43</sup> the court declined to set aside an award as the same would have resulted in reappreciating the evidence produced by the parties before the arbitrator. The court held that an arbitrator's interpretation of certain clauses of an agreement cannot simply be substituted with the court's interpretation of the same. The petitioner's application having been based on the ground that the arbitrator had rendered wrong finding of facts, was declined as the court was of the opinion that the award was a reasoned award which considered all relevant facts and evidence.

**Award on the point of limitation is amenable to challenge under Section 34 of the Act**

In *Indian Farmers Fertilizer*,<sup>44</sup> the issue which arose for consideration before the Supreme Court was whether an award on the point of limitation is an interim award and amenable to challenge under Section 34; or whether a decision on the point of limitation would go to the root of jurisdiction and therefore be covered within the ambit of Section 16 of the Amended Act. The Supreme Court held that an award on the issue of limitation is an interim award, which being an arbitral award, could be challenged separately and independently under Section 34 of the Amended Act. The apex court recommended amending Section 34 of the Amended Act, in order to consolidate all interim awards along with the final award, so that upon the delivery of the final arbitral award, a single challenge is filed under Section 34 rather than multiple challenges as, "*Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense.*"

**Foreign Seated Arbitrations**

The Bombay High Court, in *Katra Holdings*,<sup>45</sup> while dismissing the application filed for challenging an award for want of jurisdiction, imposed costs of Rs.5 lacs on the petitioner on the ground that Part-I of the Act was not applicable as the arbitration was seated outside India. In the present case the arbitration was seated in New York.

Based on the above judgements, it is clear that Indian courts are increasingly becoming non-interventionist, and supporting the arbitration process by bringing finality and closure on awards.

<sup>40</sup> *Silver Resorts Hotel India Pvt. Ltd. v. Wimberly Allison Tong & Goo (UK)*, 2016 SCC OnLine Del 3914

<sup>41</sup> *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.* (2014) 9 SCC 263

<sup>42</sup> *Associate Builder v. Delhi Development Authority*, (2015) 3 SCC 49

<sup>43</sup> *Bombay Dyeing and Manufacturing Company Limited v. Knight Frank Property Services Limited*, decided on 14 March 2018, Bombay High Court

<sup>44</sup> *Indian Farmers Fertilizer Co-operative Limited v. Bhadra Products*, 2018 SCC OnLine SC 38

<sup>45</sup> *Katra Holdings Ltd. v. Corsair Investments LLC & Ors.*, (2017) SCC OnLine Bom 8480

## ENFORCEMENT OF AWARDS

Prior to the Amendment Act, the filing of a petition under Section 34 of the Act operated as a stay on the execution of the award until the disposal of the petition. A separate application seeking stay of enforcement of the award was not required.

The Amended Section 36 now provides that unless the court expressly grants a stay on the operation of the award, mere filing of an application to set aside the arbitral award will not render the award unenforceable.

Under Section 36(3) of the Amended Act, upon filing an application for stay of the operation of the arbitral award, the courts have been granted discretion to impose conditions prior to granting a stay.

However, no appeal lies against a decision of the court under Section 36(3) of the Amended Act, and an aggrieved party will have to file a special leave petition under Article 136 of the Constitution of India.

By disallowing an automatic stay on enforcement of an award, by a mere challenge under Section 34, and by giving discretion to the courts to impose conditions while disposing an application seeking stay of an award, the legislature has sought to dissuade judgment debtors from seeking a stay of an arbitral award on frivolous grounds. This, read with the narrow grounds based on which an award can be challenged, shows the legislature's intent to uphold the finality of arbitral awards.

### KEY DECISIONS

In *Punjab State*,<sup>46</sup> the Supreme Court determined whether the executing court could determine factual objections. The Supreme Court clarified that an arbitral award is given the status of a decree of a civil court and should be enforced by applying Order XXI of CPC for execution of a decree, and any other provisions of the CPC which deals with the same. The Supreme Court reiterated the settled position of law, that an executing court can only execute the decree and cannot hold any factual inquiry that can have the effect of nullifying the decree itself. The Supreme Court observed that an executing court should restrict its review only to jurisdictional issues and ought not to conduct a factual inquiry.

#### Applicability of the amended Section 36

Recently, in *Board of Control for Cricket in India*,<sup>47</sup> the Supreme Court decided the question whether the amended Section 36 of the Act would apply to appeals filed under Section 34 of the Act before the date of commencement of the Amendment Act, i.e. 23 October 2015, in view of Section 26 thereof which specifically states that the amendments are to apply prospectively to "arbitral proceedings" as well as court proceedings in relation to arbitrations, commenced after the Amendment Act. The Supreme Court interpreted Section 26 of the Amendment Act and held that court proceedings arising from arbitrations were distinct from arbitral proceedings before an arbitral tribunal. The Supreme Court held that the amended Section 36 would be applicable to applications filed under Section 34 of the Act (i.e. court proceedings), even if such applications were filed before the date of commencement of the Amendment Act. This decision is particularly applicable to Section 36 of the Act and therefore it remains to be seen whether the courts will apply the ratio of this judgment to other provisions of the Amended Act, and give them retrospective effect.

<sup>46</sup> *Punjab State Civil Supplies Corporation Ltd. v. Atwal Rice and General Mills*, (2017) 8 SCC 116

<sup>47</sup> *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.*, Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

## CONDITIONS FOR ENFORCEMENT OF FOREIGN AWARD

The Amended Act now provides that while considering whether a foreign award should be enforced in India, the test to determine whether the award is in contravention with the fundamental policy of India shall not entail a review on the merits of the dispute.<sup>48</sup> This change reinforces the aim of non-interference with the enforceability of a foreign award.

The Amended Act now clarifies the scope of review under Section 48 (2) (b), on the grounds of public policy. Explanation 1 to Section 48(2) (b) expressly mandates that an award will conflict with the public policy of India only if:

- the making of the award was induced or affected by fraud or corruption; or
- the award is in contravention with the fundamental policy of Indian law; or
- the award is in conflict with the basic notions of morality and justice.

This amendment is clarificatory in nature, and reaffirms the judicial interpretation laid down by the courts, in recent times.

### KEY DECISIONS

The courts have recognized that the grounds for resisting enforcement of foreign award in India are narrow. In *Cruz City*,<sup>49</sup> the Delhi High Court while upholding a foreign award (allegedly in violation of provisions of Foreign Exchange and Management Act, 1999 (“FEMA”)), noted that the violation of specific provisions of an enactment is not synonymous with violation of public policy of India.

In *NTT Docomo*,<sup>50</sup> the award holder sought to enforce a foreign award for damages in India. The Reserve Bank of India (“RBI”) filed an intervention application before the Delhi High Court to challenge the enforcement on the ground that the award facilitated the acquisition of shares by an Indian company from a foreign company, in a manner which would be in contravention of the provisions of FEMA. The Delhi High Court rejected the application and held that there is no provision in law which permits the RBI to intervene in a petition seeking enforcement of an arbitral award to which the RBI is not a party. The court aligned with the finding of the tribunal that the award was simply in the nature of damages, and therefore RBI permission was not a prerequisite to allow enforcement.

In *Daiichi Sankyo*,<sup>51</sup> the issue which arose before the Delhi High Court was whether a foreign award for consequential damages cannot be enforced as it is hit by the exclusion provided in Section 48(1)(c) of the Act. The Delhi High Court endorsed the policy of minimal intervention of the courts and allowed the enforcement of the foreign award. The court observed that the damages awarded by the tribunal did not constitute consequential damages, and in any event the phrase ‘consequential damages’ would have to be read conjointly with the other phrases used in the clause, namely, punitive, exemplary and multiple. It could not have been intended to exclude damages to put the petitioner in the same position as it would have been had the contract been performed.

<sup>48</sup> Explanation to sub-section (2) of Section 48 and to sub-section (1) of Section 57 of the Amended Act

<sup>49</sup> *Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, 2017 SCC OnLine Del 7810

<sup>50</sup> *NTT Docomo Inc. v. Tata Sons Ltd.*, 2017 SCC OnLine Del 8078

<sup>51</sup> *Daiichi Sankyo Company Limited v. Malvinder Mohan Singh and Ors.*, 2018 SCC OnLine Del 6869

## FURTHER DEVELOPMENTS

### PROPOSED ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

The Union Cabinet on 7 March 2018, approved the Bill. The Bill aims to amend the Act to improve institutional arbitrations in India by establishing an independent body to lay down standards, make the arbitration process more party friendly, cost effective, and to ensure timely disposal of arbitration cases.

The Bill has proposed to allow parties to directly approach arbitral institutions designated by the Supreme Court for international commercial arbitration and in other cases the concerned High Courts, for the appointment of arbitrators.

#### Formation of the Arbitration Council of India

The Bill provides for creation of an independent body namely the Arbitration Council of India (“ACI”) to grade arbitral institution and accredit arbitrators by laying down norms, and take all such steps as may be necessary, to promote arbitration, conciliation, mediation and other ADR Mechanism. The ACI shall be a body corporate and shall maintain an electronic depository of all arbitral awards.

#### Timeline for Arbitrations

The Bill proposes to amend sub section (1) of Section 29-A to exclude international arbitrations from the bounds of timeline, and to amend the timeline to make an arbitral award in other arbitrations within 12 months from the completion of the pleadings by the parties.

#### Confidentiality & Immunity to Arbitrators

The Bill also proposes the insertion of a new Section 42A in the Act, which will mandate arbitrators and arbitral institutions to ensure confidentiality of all arbitral proceedings except the award. A proposed Section 42B seeks to protect arbitrators from suits or other legal proceedings, for any act or omission, done in good faith in the course of arbitration proceedings.

#### Applicability of the Amendment Act

With the proposed insertion of Section 87 in the Act, the legislature also seeks to clarify the issues surrounding the applicability of the Amendment Act. The bill proposes that unless parties agree, the Amendment Act shall apply only to arbitral proceedings including related court proceedings, which commenced on or after the date the Amendment Act came into force.

As highlighted above, the Supreme Court in *Board of Control for Cricket in India*<sup>52</sup> held that the amended Section 36, would be applicable to applications filed under Section 34 of the Act (i.e. court proceedings), even if such applications were filed before the date of commencement of the Amendment Act. Interestingly, the Supreme Court has directed the legislature to reconsider Section 87 of the Bill in light of its decision in *Board of Control for Cricket in India*.<sup>53</sup> While the Bill has been passed by the Cabinet, if enacted, this Bill will contradict the ruling of the Supreme Court with respect to applications filed under Section 34 of the Act.

<sup>52</sup> *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.*, Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

<sup>53</sup> *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Ors.*, Civil Appeal Nos. 2789-2880 of 2018 [arising out of SLP (C) Nos. 19545-19546 of 2016]

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## CONCLUSION

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The Amendment Act, coupled with the efforts made by the Indian courts, is facilitating India's image makeover as an arbitration friendly jurisdiction. Not only have the Indian courts consciously implemented the provisions of the Amendment Act, they have adopted and extended the pro-arbitration stance to the un-amended provisions of the Act which helps bolster arbitration practice in India.

For example, the apex court's decision in *Centrotrade Minerals*,<sup>54</sup> upholding the validity of two-tiered arbitration structure which provided for an appellate arbitration reaffirms the principle of party autonomy. The Delhi High Court's decision in *GMR Energy*,<sup>55</sup> recognising the arbitral tribunal's competence to pierce the corporate veil to include non-signatories to an arbitration, shows the courts' inclination towards globally recognised concept of minimal intervention in arbitral process. Further, the courts inclination to involve arbitral institutes in the proceedings is visible from Supreme Court's decision in *Sun Pharmaceuticals*,<sup>56</sup> wherein the court directed MCIA to appoint an arbitrator in an international commercial dispute. The apex court herein delegated its appointment powers to an "institution designated by such Court" as per the Amendment Act.

The foregoing decisions are welcome additions to the jurisprudence on the law of arbitration in India and read with the Amended Act, they visibly reflect the efforts of both, the judiciary and the government, to make India an arbitration friendly jurisdiction.

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<sup>54</sup> *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 228

<sup>55</sup> *GMR Energy Limited v. Doosan Power Systems India Private Limited*, 2017 SCC Online Del 11625

<sup>56</sup> *Sun Pharmaceutical Industries Ltd., Mumbai v. M/s Falma Organics Ltd. Nigeria*, 2017 SCC OnLine SC 1200



## ELP's ARBITRATION PRACTICE

The Arbitration, Litigation and Dispute Resolution Practice at ELP consists of a team of over 50 lawyers, with 15 lawyers dedicated to its arbitration practice. ELP has been globally recognised for its robust arbitration practice. Our approach is to understand the clients' businesses and the commercial exigencies that lead them to a dispute and consequently devise a comprehensive strategy from the outset of every dispute.

Our practice is built on the strength of a team that is well regarded for the depth of its legal knowledge and research skills, and is also equally appreciated for its advocacy. We often play a dual role of Solicitor and Counsel, which not only sets us apart from other practices in India, but additionally, also helps in controlling the client's legal costs. Senior members of ELP's arbitration team are recognised by various publications for their work in the field of arbitration, and for their client delivery.

We represent clients across different forums, both in India and internationally, and have represented clients in proceedings before various arbitral institutions including the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), LCIA India, Singapore International Arbitration Centre (SIAC), London Maritime Arbitrators Association (LMAA), GAFTA, Kuala Lumpur Regional Centre for Arbitration (KLRC), etc. as well as in Ad-hoc proceedings around the world.



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