NOTES ON
DISPUTE
RESOLUTION
PRACTICE

LOCKDOWN EDITION

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PREFACE

The lockdown as I see it, was a forced vacation for all of us. It took us a while to realize that even beyond the lockdown, daily life ahead will be full of limitations. These are certainly very challenging times for all of us and legal fraternity has been adversely impacted in unimaginable proportions. However, we found several ways to keep ourselves sufficiently stimulated and engaged through various webinars, and in this endeavor, distinguished members of Arbitration India Group and Indian Arbitration Forum came together to organize some of the finest webinar sessions on crucial topics of Dispute resolution. The highpoint of these webinars was the choice of speakers and reference notes prepared by various young practitioners moderating the webinars. Now that we are almost at the fag end of the webinar season-1, I am making an attempt to put all these extremely well-researched notes which were made to assist the speakers and to enlighten the audience in form of an E-book. Once again I must express my deepest gratitude to all the distinguished speakers and the dynamic moderators for shaping this invaluable pool of knowledge. I will fail in my duty if I do not thank people behind the scenes for their relentless support in putting all this together. I would like to thank Ajay Thomas, Pallavi Saluja, Raj Panchmatia, Tejas Karia, Vyapak Desai, Gautam Bhardwaj, Vikas Mahendra, Montek Mayal, Manavendra Mishra, Prateek Bagaria, Aman Nandrajog, Tariq Khan, Divyansha Agrawal, Avani Gupta, Yashraj Samant, Kartik Lahoti & Rahul Maheshwari for their inputs and efforts in anchoring this initiative.

While many have lost hope in webinars and are claiming to be victims of 'Death by webinar' syndrome, it is for the remaining survivors to derive some benefit out of this project and share some feedback for season-2 if and when that happens.

Shashank Garg

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ENFORCEMENT OF FOREIGN AWARDS IN INDIA

In India, the scheme for enforcement of foreign awards is provided in Part - II of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act"). Section 44 of the Arbitration Act defines a foreign award as "an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after 11 October 1960". For an arbitral award to be considered as a foreign award under Section 44 of the Arbitration Act, the said award is required to be made pursuant to a written arbitration agreement to which the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention, 1958" or "NYC") applies and in a country which the Central Government has notified as per Section 44.

While India has adopted a pro-enforcement approach with foreign arbitral awards, it is important to understand the legislative background and the development of law over the years since 1923.

A. HISTORICAL BACKGROUND

a. Geneva Protocol, 1923

The Geneva Protocol of 1923 was drawn up on the initiative of the International Chamber of Commerce ("ICC") under the auspices of the League of Nations. The Geneva Protocol had two objectives, firstly, to make arbitration agreements, and arbitration clauses in particular, enforceable internationally; and secondly, to ensure that awards made pursuant to such arbitration agreements are enforced in the territory of the State in which they were made.

The Geneva Protocol of 1923 was followed by the Geneva Convention of 1927 ("Geneva Convention"). The Geneva Convention widened the scope of the

Geneva Protocol of 1923 and provided the recognition and enforcement of protocol awards within the territory of contracting States.

India was a signatory to the Geneva Protocol of 1923 and also the Geneva Convention of 1927. To implement its obligations, India enacted the Arbitration (Protocol & Convention) Act, 1937. As noticed in *Renusagar Power Co. Ltd. vs. General Electric Co.*¹,

"a number of problems were encountered in the operation of the aforesaid Geneva treaties inasmuch as there were limitations in relation to their field of application and under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and in order to show that the awards had become final in its country of origin the successful party was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country before it could go ahead and enforce the award in the courts of the place of enforcement".²

b. Convention on Recognition and Enforcement of Foreign Awards, 1958 (New York Convention)

Thereafter in 1953, the ICC promoted a treaty to govern international commercial arbitration, which led to the adoption of the Convention on Recognition and Enforcement of Foreign Awards, 1958 ("NYC"). The NYC sought to overcome the issues of the Geneva Convention by providing an effective and simpler method for recognition and enforcement of foreign awards. India became an early signatory to the NYC (signed in 1958 and ratified in 1960).

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¹ Renusagar Power Co. Ltd. vs. General Electric Co., (1994) Supp (1) SCC 644.

² Ibid.

The NYC provides for a much simpler and effective method of obtaining recognition and enforcement of foreign awards and it replaces the Geneva Convention as between the States which are parties to both the Conventions.

Article V of the NYC enumerates certain well-defined grounds on which an award may be refused to be recognized and enforced. Under Article V(2)(b), a foreign award may not be enforced if the award is contrary to the public policy of the country where the award is sought to be enforced.

The Government of India gave statutory recognition to the NYC by enacting the Foreign Awards (Recommendation and Enforcement) Act, 1961 ("1961 Act"). Section 7 of the 1961 Act was identical to Article V of the NYC. Under Section 7(1)(b)(ii), a foreign award may not be enforced if the enforcement of that award was "contrary to public policy".

Thereafter, in 1985, the United Nations Commission on International Trade Law ("UNICTRAL"), a core body of the United Nations, came out with the Model Law on International Commercial Arbitration ("Model Law"). The Model Law was a legislative template for countries across the world seeking to develop their arbitral regimes.

Accordingly, in 1996, India enacted the Arbitration Act to consolidate and amend the law relating to domestic arbitration (those seated in India), international commercial arbitration (those also seated in India but where one of the parties is foreign [Section 2(1)(f)]) and the enforcement of foreign arbitral awards (those under the NYC or Geneva Convention). The Preamble of the Arbitration Act also confirms that the statute was made "taking into account the" Model Law.

B. THE ARBITRATION ACT

The Arbitration Act is divided into four parts, namely - Part I, "Arbitration"; Part II, "Enforcement of Certain Foreign Awards"; Part III, "Conciliation"; and Part IV,

"Supplementary Provisions". The Supreme Court has held that Part I and Part II of the Arbitration Act are mutually exclusive of each other and that there shall be no overlapping between Part I and Part II of the Arbitration Act.³

Part II of the Arbitration Act provides for the "enforcement of certain foreign awards". Chapter I of Part II deals with the enforcement of foreign awards to which the NYC applies and Chapter II of Part II deals with the enforcement of foreign arbitral awards to which the Geneva Convention applies.

As per Section 47 of the Arbitration Act, a foreign award holder seeking enforcement of an award in India must file a petition, under Section 47 read with Section 49 of the Arbitration Act, in the High Court within whose jurisdiction the award debtor or its assets are located. It also mandates certain documents to be produced before the Court, while applying for enforcement. However, the Supreme Court vide its judgment in the matter of *PEC Limited v. Austbulk Shipping SDN BHD'*, eased the requirement of document production at the initial stage of filing by observing that a party applying for the enforcement of a foreign award need not necessarily produce the documents mentioned in Section 47 "at the time of the application".

Further, the Supreme Court has also held that under the Arbitration Act, a foreign award "is already stamped as a decree" and therefore, the process of enforcement and execution of a foreign award can be done in the same proceeding.⁶ The Supreme Court also clarified that every foreign award, which is final, is to be enforced "as if it were a decree of the court".

On the other hand, the party resisting the enforcement is required to prove that the foreign award should not be accorded recognition on account of the existence of one or more of the conditions under Section 48 of the Arbitration Act – where the

³ Bharat Alumunium Co. v. Kaiser Aluminiun Technical Service Inc, (2012) 9 SCC 522

⁴ PEC Limited v. Austbulk Shipping SDN BHD, (2019) 11 SCC 620.

⁵ Ibid.

⁶ Fuerst Day Lawson Ltd v. Jindal Exports Ltd., (2001) 6 SCC 356; Shriram EPC Limited vs. Rioglass Solar SA, (2018) 18 SCC 313.

Court *may* refuse enforcement if the grounds under Section 48 have been established.

C. LEGAL POSITION IN INDIA

As highlighted below, the Arbitration Act was amended by the Arbitration and Conciliation Amendment Act, 2015 ("Amendment Act"). Before highlighting these amendments, it would be useful to set out the position of law and decisions of the Courts prior to the Amendment Act.

a. Position Prior to the Amendment Act of 2015

As early as in 1994, the Supreme Court (three-judge bench) in *Renusagar* held that the phrase "public policy" as it appears in Section 7(i)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, had been used in a "narrower sense" - therefore, in order to attract the bar of public policy, the enforcement of a foreign award "must invoke something more than the violation of the law of India". Enforcement thus, could only be refused if the award was found to be contrary to (i) fundamental policy of Indian law; or (ii) interests of India; or (iii) justice or morality.

The Supreme Court also held that the NYC did not envisage refusal of recognition and enforcement of a foreign award on the grounds of it being contrary to the law of the country where enforcement was sought. Further, while interpreting "public policy" under the 1961 Act, the Supreme Court held that it must be construed in the sense the doctrine of public policy is applied in the field of private international law.

However, peculiarly, the Supreme Court (two-judge bench) in 2011 in *Phulchand Exports v. OOO Patriot*, ("**Phulchand**"), while relying on *ONGC v. SAW Pipes*⁸

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⁷ Phulchand Exports v. OOO Patriot, (2011) 10 SCC 300.

⁸ ONGC v. SAW Pipes, (2003) 5 SCC 705.

("Saw Pipes") (a decision where the award was challenged under Part I - Section 34), interpreted Section 48(2)(b) in the same vein as Section 34 of the Arbitration Act. It did so by holding that a foreign award could be set aside if "it is patently illegal". The implication of the *Phulchand* judgment was that a foreign award, at the time of enforcement, was susceptible to challenge on the same ground as a domestic award.

Subsequently, in 2013, the Supreme Court (three-judge bench) in *Shri Lal Mahal Ltd. v. Progetto Grano SPA*^{*}, ("Shri Lal Mahal") while overruling *Phulchand*, stated that the wide interpretation given in the case of *Saw Pipes* to the expression "*public policy of India*" was in the context of a domestic award facing challenge under Section 34 and the same was certainly not applicable if the award were a foreign award, challenged under Section 48. The Supreme Court clarified that although the same expression "*public policy of India*" is used in Part I (Section 34) and Part II (Section 48), it has to be applied differently. Its application for the purpose of a foreign award under Section 48 is more limited as opposed to when it is used in the context of a domestic award. The unarticulated premise appears to be that this is because a foreign award has already been challenged at the seat court, or become final (when not challenged), in contrast to a domestic award, which is challenged under Section 34.

The Supreme Court in *Shri Lal Mahal* also held that the scope of the defence of public policy as explained in *Renusagar*, "would apply equally" to the defence of public policy under Section 48(2)(b) of the Arbitration Act. The Court also held that it was impermissible for a court to have a "second look" at the foreign award under Section 48 and that the scope of inquiry under Section 48 does not permit a "review of the foreign award on merits". It was also clarified that while considering the enforceability of foreign awards, the court "does not exercise appellate jurisdiction over the foreign award" nor does the court enquire as to whether, while

⁹ Shri Lal Mahal Ltd. v. Progetto Grano SPA, (2014) 2 SCC 433.

rendering a foreign award, "some error has been committed". Lastly, the Supreme Court reiterated the three grounds as highlighted in *Renusagar*, i.e.

- (i) the fundamental policy of Indian law; or
- (ii) interests of India; or
- (iii) justice or morality, under which the enforcement of a foreign award could be refused under Section 48.

246th Law Commission Report

On 5 August 2014, the 246th report of the Law Commission of India - "Amendments to the Arbitration and Conciliation Act 1996" ("LC Report") suggested several significant amendments to the Arbitration Act. The principal object was to make the Arbitration Act more effective and in line with international standards. One of the primary objects of the LC Report was aimed at boosting the confidence of foreign investors by ensuring that arbitration matters are dealt with expeditiously; one of their main concerns being the inordinate delay in Indian courts and arbitration tribunals in resolving the disputes. In order to minimize judicial interference, the Law Commission recommended that the definition of "public policy" must be restricted and be brought in line with what was held by the Supreme Court in Renusagar.

However, after the LC Report, the Supreme Court (three-judge bench) on 14 September 2014 in *ONGC v. Western Geco*¹⁰ ("Western Geco"), examined the question "[w]hat then would constitute the 'Fundamental policy of Indian Law" under Section 34 of the Arbitration Act and held that

- (i) judicial approach
- (ii) principles of natural justice and

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¹⁰ ONGC v. Western Geco, (2014) 9 SCC 263.

(iii) rationality of reasonableness (Wednesbury principles)

"must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law".

After the decision of Western Geco and due to the "deleterious effect" of the judgment, the Law Commission of India, in February 2015, issued a Supplementary Report to the LC Report. The Law Commission noted that the Supreme Court's ruling in Western Geco undermines the recommendations made in the LC Report and accordingly, recommended that further clarifications are required in Section 48 of the Arbitration Act to ensure that the ground of "fundamental policy of Indian law" is narrowly construed.

Based on the recommendations, Section 48(2)(b) of the Arbitration Act was amended¹¹ and the scope of the public policy defence was further narrowed by crystalizing the meaning of "public policy of India". Further, the "interest of India" as one of the grounds under the public policy was removed for being vague and susceptible to interpretational misuse, more so when it came to objections to the enforcement of a foreign award. The amendment also inserted an explanation which clarified that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. The amendments, therefore, gave statutory recognition to the judgment of the Supreme Court in *Shri Lal Mahal*.

b. Position after the Amendment Act

After the amendment, various courts, while taking forward the legislative intent of the Arbitration Act and the amendments made thereafter, have limited the interference in the enforcement of foreign awards. The Delhi High Court in *Cruz City 1 Mauritius Holdings vs. Unitech Limited*¹² ("Cruz City"), read fundamental

¹¹ The ordinance (dated 23 October 2015) was promulgated into the Amendment Act which received the President's assent on 31 December 2015 and is dated 1 January 2016.

¹² Cruz City 1 Mauritius Holdings vs. Unitech Limited, 2017 SCC Online Del 7810.

policy of Indian law to connote the "basic and substratal rational values and application of allegedly disparate standards in determining breach etc., further held that the expression "was otherwise unable to present his case" occurring in Section 48(1)(b), and which reflects a natural-justice safeguard, "cannot be given an expansive meaning".

Continuing with the pro-enforcement approach, on 13 February 2020, the Supreme Court (three-judge bench) in *Prysmian* reiterated the narrow scope of interference and under Section 48. In *Prysmian* the Supreme Court also agreed with reasoning of *Cruz City* that a foreign award may be enforced even if its inconsistent with the provisions of an Indian statute (i.e. the Foreign Exchange Management Act, 1999).

What is equally noteworthy is the Supreme Court's final paragraph in *Prysmian*. It sends out a strong message and crystalizes India's approach in relation to the enforcement of foreign awards. The Supreme Court imposed a cost of INR 50 lakhs on the petitioner in *Prysmian* for "indulging in a speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick." The Court also held that "[w]e have no doubt whatsoever that all the pleas taken by the Appellants are, in reality, pleas going to the unfairness of the conclusions reached by the award, which is plainly a foray into the merits of the matter, and which is plainly proscribed by Section 48 of the Arbitration Act read with the New York Convention".

That being so, there have also been cases¹³ (both before and after the Amendment Act) where enforcement of foreign awards has been refused. Understandably so, these cases are not many in number. For instance, in *Campos Brothers*, the Delhi High Court refused enforcement of a foreign award principally on the ground that it was in violation of the principles of natural justice and contrary to the public

DRJ 371 ("Agritrade International")

¹³ Campos Brothers Farms vs. Matru Bhumi Supply Chain Pvt. Ltd, (2019) SCC Online Del 8350 ("Campos Brothers"); National Agricultural Co-operative Marketing Federation of India Ltd vs. Cinergy Corporation Pte Ltd, OMP 243 of 2008, Delhi High Court; Agritrade International Pte Ltd vs. National Agricultural Co-operative Marketing Federation of India Ltd, 2012 (128)

policy of India as stated in sub-Section 2(b) read with Explanation 1(iii) of Section 48 of the Arbitration Act. The tribunal, in this case, failed to take into consideration the submissions made by one of the parties, and the foreign award had incorrectly recorded that no submission/filing had been made (which the respondent, in this case, rebutted with proof of receipt by the tribunal). In another case of *Agritrade International* (which is pre-amendment judgment), the enforcement of the foreign award was rejected on two grounds –

- (i) under Section 48(2)(a) of the Arbitration Act, since the dispute was not capable of arbitration in the absence of an arbitration agreement; and
- (ii) under Section 48(2)(b) of the Arbitration Act (unamended) since the foreign award was not based on any evidence.

On 22nd April 2020, a three-judge bench of the Supreme in *National Agricultural Cooperative Marketing Federation of India vs. Alimenta S.A.*¹⁴, passed a judgment refusing to enforce a foreign award on the ground of it being contrary to the public policy of India.

In this case, the arbitration was invoked on 13 February 1981. The award was rendered on 15 November 1989 by which the National Agricultural Cooperative Marketing Federation of India ("NAFED") was directed to pay damages to Alimenta. Against the said award, an appeal was filed before the Board of Appeal by NAFED wherein its request to be represented by its solicitors was rejected. On 14 September 1990, the Board of Appeal enhanced the interest component in the award despite there being no appeal by Alimenta in this regard.

Also, the nominee arbitrator of Alimenta represented it before the Board of Appeal.

Thereafter in 1993, Alimenta filed a petition (Suit No. 1885 of 1993) under Sections 5 and 6 of the 1961 Act wherein the Delhi High Court ruled against

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¹⁴ National Agricultural Cooperative Marketing Federation of India vs. Alimenta S.A, Civil Appeal No. 667 of 2012.

NAFED and held the award to be enforceable. After a few rounds of litigation, Alimenta filed an execution petition (No.204 of 2002) seeking execution of the decree passed in Suit No.1885 of 1993, which was allowed.

The issues before the Supreme Court were as follows:

- (i) whether NAFED was unable to comply with its contractual obligation to export groundnut due to the Government's refusal?;
- (ii) whether NAFED could have been held liable to be in breach of contract and pay damages in view of Clause 14 of the Agreement?; and
- (iii) whether enforcement of the award was against the public policy of India?

The Supreme Court held that since there was a Government letter prohibiting the export of commodities and further, that Clause 14 of the Agreement provided for cancellation in the event of any prohibition of the export or any other executive or legislative Act by or on behalf the Government of the country of origin, the Agreement between NAFED and Alimenta became void in view of Section 32 of the Indian Contract Act, 1872.

After observing the above, the Supreme Court discussed the scope of interference under Section 7 of the 1961 Act and discussed as to when an award can be said to be contrary to the public policy. In this regard, the Supreme Court discussed the observations made in *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.* 1986 (3) SCC 156; *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp. (1) SCC 644; *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705; *Shri Lal Mahal Limited v. Progetto Grano Spa*, (2014) 2 SCC 433; *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49; and *Ssanyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*, (2019) 8 SCALE 41 and held as under:

- "68. It is apparent from abovementioned decisions as to the enforceability of foreign awards, Clause 14 of FOSFA Agreement and as per the law applicable in India, no export could have taken place without the permission of the Government, and the NAFED was unable to supply. as it did not have any permission in the season 1980-81 to effect the supply, it required the permission of the Government. The matter is such which pertains to the fundamental policy of India and parties were aware of it, and contracted that in such an exigency as provided in clause 14, the Agreement shall be cancelled for the supply which could not be made. It became void under section 32 of the Contract Act on happening of contingency. Thus, it was not open because of the clear terms of the Arbitration Agreement to saddle the liability upon the NAFED to pay damages as the contract became void. There was no permission to export commodity of the previous year in the next season, and then the Government declined permission to NAFED to supply. Thus, it would be against the fundamental public policy of India to enforce such an award, any supply made then would contravene the public policy of India relating to export for which permission of the Government of India was necessary.
- 69. In our considered opinion, the award could not be said to be enforceable, given the provisions contained in Section 7(1)(b)(ii) of the Foreign Awards Act. As per the test laid down in Renusagar (supra), its enforcement would be against the fundamental policy of Indian Law and the basic concept of justice. Thus, we hold that award is unenforceable, and the High Court erred in law in holding otherwise in a perfunctory manner."

Though the Supreme Court found it unnecessary to go into other issues in view of it concluding that the award is not enforceable, as regards the other issues raised, i.e. denial of legal representation before the Board of Appeal, the nominee

arbitrator himself representing Alimenta and arbitrary enhancement of interest by the Board of Appeal, it observed:

- "70. Though in view of the finding above, it is not necessary to go into other questions. ...
- 74. It is not disputed that before the Arbitration Tribunal, the rule debars legal representation; hence the submission as to nonrepresentation before the Tribunal, cannot be accepted. However, in appeal due to refusal to permit representation through a legal firm, the NAFED was not able to point out the prejudice caused to it. In the absence of proof of prejudice caused due to nonrepresentation by a Legal Representative and to show that it was disabled to put forth its views, we cannot set aside the award on the ground that it would have been proper to allow the assistance of a Legal Representative. Thus, we are not inclined to render the award unenforceable on the aforesaid ground.
- 78. The Arbitrator appeared at the appellate stage, though, as per the Indian Law and the ethical standards, the Arbitrator could not have appeared at the second stage to defend arbitration award passed by him, and should have kept aloof. However, no concrete material has been placed on record to substantiate the objection as to prevailing practice and law in U.K. at the relevant time. Hence, we are not inclined to decide the issue in this case. Suffice it to observe that Arbitrator is supposed to follow ethical standards, and, in our considered view, ought not to have defended arbitration award passed by him in the subsequent judicial proceedings.
- 80. Resultantly, the award is ex facie illegal, and in contravention of fundamental law, no export without permission of the Government was permissible and without the consent of the Government quota

could not have been forwarded to next season. The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India. On the happening of contingency agreed to by the parties in Clause 14 of the FOSFA Agreement the contract was rendered unenforceable under section 32 of the Contract Act. As such the NAFED could not have been held liable to pay damages under foreign award."

On 2nd June, 2020, the Supreme Court of India, the bench comprising of Justice R.F. Nariman, Justice S. Ravindra Bhat and Justice V. Ramasubramanian, in the case of *M/S. Centrotrade Minerals And Metals Inc. V. Hindustan Copper Ltd*^{1,5} held that in case of a two-tier arbitration agreement, the Foreign Arbitral Award can be executed. In this case, clause 14 of the agreement contained a two-tier arbitration agreement by which the first tier was to be settled by arbitration in India. If either party disagrees with the result, that party will have the right to appeal to a second arbitration to be held by the ICC in London. This judgment was followed by two other judgments on the matter.

The judgment in *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited*⁶, ended in a split decision between Justice S.B. Sinha and Justice Tarun Chatterjee which regarded the permissibility of a multi-tier arbitration procedure in the first round. After setting out the facts of the case, S.B. Sinha, J. held that a two tier clause of the kind contained in clause 14 of this agreement is *non est* in the eye of law and would be invalid under Section 23 of the Indian Contract Act. In this view of the matter, the foreign award could not be enforced in India, and Centrotrade's appeal was therefore dismissed. Justice Chatterjee, on the other hand, decided that the two-tier arbitration process was valid and permissible in Indian law; that the ICC arbitrator sat in an appeal against the award of the Indian arbitrator; that the ICC award was a foreign award; but that since HCL was not

¹⁵ Civil Appeal No.2562 OF 2006.

^{16 (2006) 11} SCC 245.

given a proper opportunity to present its case before the ICC arbitrator, Centrotrade's appeal would have to be dismissed and HCL's appeal allowed.

This was followed by a judgment delivered by a three-judge bench comprising of Justice Madan Lokur, Justice DY Chandrachud and Justice Agrawal which upheld the legality of a two-tier arbitration mechanism in way of the arbitral award and in the second round of proceeding which was decided on December 15, 2016 (reported in (2017) 2 SCC 228). The court decided the question of "Whether a settlement of disputes or differences through a two-tier arbitration procedure as provided for in Clause 14 of the contract between the parties is permissible under the laws of India?" and answered the same in affirmative. However the bench did not answer the second question i.e "Assuming that a two-tier arbitration procedure is permissible under the laws of India, whether the award rendered in the appellate arbitration being a "foreign award" is liable to be enforced under the provisions of Section 48 of the Arbitration and Conciliation Act, 1996 at the instance of Centrotrade? If so, what is the relief that Centrotrade is entitled to?" and the appeal was listed again for consideration of the second question.

Relying on the facts of the case, the bench decided that the respondent did not participate in the arbitral proceedings, even though invited to do so. It is only on 09.08.2001, when the learned arbitrator informed the parties that he is proceeding with the award, that on 11.08.2001, the learned arbitrator received a fax from attorneys for HCL, requesting for an extension of one month's time to put in their defence. It was further noticed that the respondent wanted to stall the arbitral proceedings by approaching the Courts in Rajasthan and having succeeded partially, at least till February 2001, the conduct of the respondent leaves much to be called for. Despite being informed time and again to appear before the Tribunal and submit their response and evidence in support thereof, it is only after the arbitrator indicated that he was going to pass an award that the respondent's attorneys woke up and started asking for time to present their response. The arbitrator cannot be faulted on this ground as given the authorities referred to by

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us hereinabove, the arbitrator is in control of the arbitral proceedings and procedural orders which give time limits must be strictly adhered to. Further, it was also decided HCL chose not to appear before the arbitrator and thereafter chose to submit documents and legal submissions outside the timelines granted by the arbitrator. Lastly, it was decided that even otherwise, remanding the matter to the ICC arbitrator to pass a fresh award is clearly outside the jurisdiction of an enforcing court under Section 48 of the 1996 Act.

APPOINTMENT OF ARBITRATORS

A. GROWTH OF ARBITRATION IN INDIA

The first direct law on the subject of arbitration was the Indian Arbitration Act, 1899, with a limited applicability to the presidency towns of Calcutta, Bombay and Madras. Subsequently, the Code of Civil Procedure, 1908 ("CPC") came into force wherein the Second Schedule was completely devoted to arbitration.

Thereafter, the Arbitration Act, 1940 ("1940 Act"), the first major consolidated legislation governing the subject was enacted. The 1940 Act repealed the Indian Arbitration Act, 1899 and the related provisions in the CPC including the Second Schedule. The working of the 1940 Act was not satisfactory and the same was subject of adverse comments by different High Courts and the Hon'ble Supreme Court in several cases.

The Hon'ble Supreme Court in *Food Corporation of India v. Joginderpal Mohinderpal*, (1989) 2 SCC 347, observed that the law of arbitration shall be made simple, less technical and more responsible to actual realities of the situation. It must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done.

The procedure of alternative dispute redressal system during the 1940 Act was time consuming, complex and expensive. In the year 1991 (after the liberalisation of economy), it was considered that an efficient system of alternative resolution of disputes appears to be a pre-requisite to attract and sustain foreign investment in India. With a view to eradicate all the prevailing lacunas of the alternative dispute redressal system, the Arbitration and Conciliation Act, 1996 ("Act") was enacted to cover domestic arbitrations, enforcement of foreign awards and conciliation.

The Act was enacted with the aim to trim delays and latches in the prevailing arbitral process; minimise the supervisory role played by the courts and the enforcement of arbitral awards. Further, the Act also provides for international commercial arbitration as well as conciliation.

The Act consolidates and amends the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation and for matters incidental thereto.

B. THE LAW COMMISSION REPORTS

a. 176th Report of the Law Commission

In the year 2001, Justice B.P. Jeevan Reddy, Chairman of Law Commission of India submitted a report along with the Arbitration and Conciliation (Amendment) Bill, 1996 to the Minister of Law, Justice and Corporate Affairs to undertake a comprehensive review of the Act in view of various shortcomings observed in the working of the Act.

The UNCITRAL Model Law on the basis of which the Act was enacted was mainly intended to enable various countries to have a common model for 'International Commercial Arbitration', but the Act had made provisions of such a Model Law applicable also to cases of purely domestic arbitration between Indian nationals. Therefore, certain difficulties had arisen in the implementation of the said Act.

Several other aspects including dissenting judgements by various High Courts about the difficulties in the working of the Act was also noticed by the Law Commission for which the Law Commission made its recommendations for bringing amendments to the Act. The Law Commission Report also highlighted various representations received by the Government of India regarding the interference of Courts after making of the arbitral award. The Law Commission Report also proposed to introduce a provision similar to Section 99 of the CPC that arbitral

awards should not be interfered with unless substantial prejudice is shown.

The Law Commission Report also pointed out that divergent views have been expressed as to the stage at which jurisdictional issues could be decided and also as to whether orders of the Chief Justice of India or his nominee or that of the Chief Justice of the High Court or his nominee, as the case may be, appointing an arbitrator should be treated as administrative orders or as judicial orders. Treating the orders under Section 11 of the Act as administrative has led to several writ petitions being filed before various High Courts raising jurisdictional grounds and consequently stay of arbitration proceedings being obtained. While discussing the above, the Law Commission also discussed whether the Chief Justice of India or the Chief Justice of the High Court are "persona designata" and the exclusion of remedy available under Article 226 of the Constitution of India, 1950.

It was further pointed out that there are diverging views as to the mandatory nature of the timelines prescribed by Sections 11(4) and (5) of the Act. It was also stated that Section 11(6) of the Act does not stipulate any time limit.

Besides discussing the advantages and disadvantages of an order under Section 11 of the Act to be an administrative or judicial order, the Law Commission Report also discussed the difficulties which arise, if the preliminary issues are not decided under Section 11 of the Act. The Report also discussed that preliminary issues are to be decided only if some conditions are satisfied.

In addition to the above, the Report also discussed the grounds of challenge to the appointment of arbitrators and therefore, more details were proposed to be disclosed by the proposed arbitrators under Section 12 of the Act.

In the year 2003, the Government decided to accept almost all the recommendations of the Law Commission Report and subsequently the Amendment Bill was introduced in the Rajya Sabha. Subsequently, in 2004 "the Justice Saraf Committee on Arbitration" was set up under the chairmanship of Dr.

Justice B.P. Saraf to review the recommendations of the 176th Report of the Law Commission. Based on the Committee's suggestion, the Amendment Bill was withdrawn. It was stated that there still remains sufficient room for the court intervention in the arbitral proceedings. The Justice Saraf Committee gave its detailed report in the year 2005.

Thereafter, based on the Justice Saraf Committee report, the Arbitration and Conciliation (Amendment) Bill, 2003 was referred to the Departmental Related Standing Committee on the Personnel, Public Grievances, Law and Justice for study and analysis. The Committee submitted its report to the Parliament on 4th August 2005.

b. 246th Report Of The Law Commission

In the year 2014, the Ministry of Law and Justice, requested the Law Commission to undertake a study of the Amendment proposed to the Act. Pursuant to such reference, the Law Commission of India under the chairmanship of Hon'ble Justice A.P. Shah constituted an expert committee to study the proposed amendments and accordingly made suggestions. Following are some of the observation made by the Commission, in brief, with regard to amendment of the Act.

- It was stated that one must examine "arbitration" as a method of dispute resolution that aims to provide an effective and efficient alternative to traditional dispute resolution through court.
- Delays are inherent in arbitration process and the costs of arbitration can be tremendous for which a quick alternative dispute resolution in the country has been frustrated.
- The institutional arbitration could be distinctively advantageous in resolving disputes. However, the Act neither promotes nor discourages parties to consider institutional arbitration. Therefore, definite attempts should be

made to encourage the culture of institutional arbitration in India.

- There is a complain of high costs associated with arbitration, more particularly, the *ad hoc* arbitration. It was observed that there was an arbitrary, unilateral and disproportionate fixation of fees by many arbitrators. Therefore, as a cost-effective solution for dispute resolution, the need of a mechanism to rationalise the fee structure for arbitrations is emphasised by the Commission.
- The Commission has emphasised on proper conduct of arbitral proceedings and observed that the arbitral proceedings should not be a replica of Court proceedings. The arbitration tribunals should use the existing provisions in the Act to reduce delays. The culture of frequent adjournments should be kept in check.
- A balance between the scope of judicial intervention and judicial restraint
 has to be achieved since judicial interventions in arbitration proceedings add
 significantly to the delays in arbitration proceedings.

The Law Commission *vide* Chapter III of the 246th Report proposed the following key amendments:

- The Preamble to the Act was proposed to be amended in order to further demonstrate and reaffirm the Act's focus on achieving objectives of fairness, speed and economy in resolution of disputes through arbitration.
- Amendments in relation to cost: By proposing insertion of Section 6A into the parent Act, the Commission suggested that in relation to an arbitration proceeding or any proceeding under the provisions of the Act, the Court/arbitral tribunal, notwithstanding anything contained in the CPC has the discretion to determine whether costs are payable by one party to another and the amount of those costs, when they are to be paid. Costs include the fees and expenses of the arbitrators/Courts and witnesses, legal fees and expenses, any administration fees of the institution supervising the

arbitration, and other expenses incurred in connection with the arbitral/court proceedings and the arbitral award. It was expected that such a provision will disincentivize frivolous proceedings and inequitable conduct.

- <u>Amendment to Section 7:</u> Suggestions were made to clarify that only when the nature of the dispute is arbitrable in the first place, the same can be referred to arbitration under the Act.
- <u>Interim Measures:</u> Further, the Commission also suggested certain amendments in the Section 9 of the Act, to ensure timely initiation of arbitration proceedings by a party who is granted an interim measure, and to reduce the role of the Court in relation to grant of interim measures once an arbitral tribunal has been constituted.
- Appointment of arbitrators: Section 11 of the Act is proposed to be amended to the effect that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power, an affirmative judicial finding regarding the existence of arbitration agreement and the administrative act of appointing arbitrator are final and non-appealable. It was also proposed that the High Courts should be given liberty to frame their own rule in relation to the fees of the arbitration in accordance with the Sixth Schedule of the Act. Amendments in order to ascertain the independence or impartiality of the arbitrators were suggested in Section 12 of the Act.
- Amendment to Section 12: Fourth and Seventh Schedules should be added to Section 12, as reference to determine justifiable doubts as to the independence or impartiality of the arbitrator and disclosures to be made by the arbitrator are envisaged respectively.
- Amendment to Section 14: Section 14 of the Act was proposed to be amended in light of the principle of natural justice and thereby an interested person cannot be appointed as an arbitrator. The suggestion being that if the arbitrator's relationship with a party(ies), counsel or subject matter of dispute

falls under one of the categories set out in the Fifth Schedule, such an arbitrator shall be unable to perform his function.

- Amendment to Section 16: It was suggested by the Commission that Section 16 of the Act shall be amended to the extent that the arbitrator shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc.
- Amendment to Section 17: The Commission recommended certain amendments in Section 17 of the Act to provide an arbitral tribunal the same powers as a civil Court in relation to grant of interim measures. Such provision, as per the Commission, will force the defaulting parties to approach the arbitral tribunal for interim relief once the tribunal has been constituted. An arbitral tribunal should continue to have powers to grant interim relief post-award.
- The Commission recommended addition of Sections 34(5) and 48(4) which required that an application under those sections shall be disposed of expeditiously and in any event within a period of one year from the date of service of the notice.

The Law Commission of India submitted its 246th Report in August 2014. Soon thereafter, in the month of October 2015, the President of India promulgated an ordinance to bring into force number of those amendments recommended by the Law Commission to the Arbitration and Conciliation Act, 1996 and ultimately the Arbitration and Conciliation (Amendment) Act, 2015 came into force on 23rd October 2015. Despite some deviations, the Amendment Act was largely in consonance with the Law Commission Report.

C. THE AMENDMENTS

a. Arbitration And Conciliation (Amendment) Act, 2015

In order tackle the delay before the Court, the Arbitration and Conciliation (Amendment) Act, 2015 ("2015 Amendment") amended Section 11 to the extent that the delegation of power of appointment shall not be regarded as a judicial act. This was to substantially cut down the time taken at the threshold of the arbitration, arising from the failure of a party to appoint an arbitrator. Section 11(6A) was also added vide the 2015 Amendment which read as follows: "(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

In addition to the above, *vide* the 2015 Amendment it was also specified that the High Courts while framing the rules for the determination of the fees of the arbitral tribunal and the manner of such payment shall refer to the rates of the fee specified in the Fourth Schedule to the Act brought by the 2015 Amendment.

Furthermore, Section 12(5) was also inserted *vide* the 2015 Amendment whereby the neutrality of the arbitrators was given utmost importance. Section 12(5) also stated that a person having "relationship" as specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator.

The 2015 Amendment *inter alia* made the above-mentioned amendments making the manner of appointment of arbitrators as impartial and neutral as possible. These amendments to Section 11 and 12 of the parent Act aided in avoiding any "justifiable doubts" as to the appointment of an arbitrator.

b. Arbitration And Conciliation (Amendment) Bill, 2019

A High-Level Committee was established to review the institutionalisation of arbitration mechanism under the Chairmanship of Justice B.N. Srikrishna, Retired Judge, Supreme Court of India. The said Committee submitted its report in July 2017 on the findings of the Committee with respect to institutional arbitration in

India.

Consequently, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister of Law on 15th July 2019. It sought to amend the then prevailing Act inter alia to deal with framing policies for grading arbitral institutions and accrediting arbitrators. The Arbitration and Conciliation (Amendment) Bill, 2019 was passed by the Rajya Sabha on 18th July 2019.

Subsequently, on August 2019, the President of India gave its assent to the amendments to the Arbitration and Conciliation Act, 1996 ("2019 Amendment"). Section 11 of the Act as amended by the 2019 Amendment gave powers to the Hon'ble Supreme Court (in cases of international commercial arbitration) and the High Court (in cases other than international commercial arbitrations) to designate arbitral institutions for the purpose of appointment of arbitrators. The 2019 Amendment further entails that in case the arbitral institution is not available, the Chief Justice of the concerned High Court shall appoint the arbitrator from the panel of arbitrators.

Accordingly, sub-section 3A was added to Section 11 vide 2019 Amendment which reads as under: "(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators."

Additionally, an entire Part 1A was inserted in the parent Act, which specifically dealt with establishing the Arbitration Council of India. Part 1A (which incorporated Section 43A to 43 J) empowers the Central Government to establish the Arbitration Council of India. The Arbitration Council of India is inter alia entrusted with grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and calibre of the arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations. It is pertinent to state that Section 43J of Part 1A specified the qualifications, experience and norms for accreditation of arbitrators were specified. A notable amendment to Act was also the deletion of Section 11(6A) from the Act (as amended in 2015). Succinctly, vide the 2019 Amendment the Courts and the legislature finally concluded that the proceedings under Section 11 of the Arbitration Act are judicial in nature.

Further, the 2019 Amendment to the Act aimed at institutionalising the arbitration in India, this may attract foreign parties to choose India as the seat in their arbitration agreements.

D. RECENT JUDGEMENTS

The arbitration law in India over the years has developed not only through the legislative intend and enactments but the Courts have had a major role to play in the development. This is evident from the fact that the Courts on this subject-matter have interpreted the legislative intent embedded in the 2015 Amendment and also established relevant precedents to be followed in the times to come. Some of the landmark judgements post the 2015 Amendment are discussed below:

• Voestilpine Schienen Gmbh v Delhi Metro Rail Corp. Ltd.": One of the first key judgements that was passed by the Hon'ble Supreme Court subsequent to the enactment of the 2015 Amendment, was in the case of

¹⁷ Voestilpine Schienen Gmbh v Delhi Metro Rail Corp. Ltd., (2017) 4 SCC 665

Voestilpine. The judgement highlighted the essential traits of arbitrators being independence and impartiality and the need for a rule against bias. The Court made reference to the Seventh Schedule which provides for conditions that may render an arbitrator un-independent or un-impartial. It was held that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which is applied to all judicial and quasi-judicial proceedings. The rational is that even though an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. The arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. It held that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with a party in dispute, he would be treated as ineligible to act as an arbitrator. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilizing their expertise when they act as arbitrators.

• TRF Ltd. v Energo Engineering Projects Ltd.¹⁸: While the Hon'ble Court in Voestilpine held simply because an arbitrator is appointed out of a panel maintained by the DMRC, such person not necessarily being related to associated with DMRC, would not disqualify such an appointment in view of the disqualifications provided in Schedule Seven of the Act, the Hon'ble Court in TRF- Energo held that a person interested in the outcome of the dispute cannot act as an arbitrator in the proceedings, having been so

¹⁸ TRF Ltd. v Energo Engineering Projects Ltd., (2017) 8 SCC 377

disqualified by the 2015 Amendment to the Act. Therefore, any person nominated by such a person would also not be entitled to act as an arbitrator.

• Duro Felguera v Gangavaram Port Ltd.¹⁹: The Hon'ble Court in Voestilpine and TRF-Energo discussed on who can be appointed as an arbitrator in accordance with the 2015 Amendment. In Duro Felguera it held that as per the amended Section 11(6A) of the Act the power of Court is confined only to examine the existence of the arbitration agreement. The order passed under Section 11(6) of the Act shall not be appealable and thus finality is attached to the order passed under this section. The scope and ambit of powers under Section 11(6) of the Act as interpreted in Patel Engg.; and Boghara Polyfab have been statutorily superseded, narrowed and curbed.

State of West Bengal v. Sarkar and Sarkar²⁰: While the Hon'ble Court was dealing with the powers and scope of appointment of arbitrators, it dealt through this judgement with the nature of appointment under Section 11 of the Act. The Hon'ble Court held that appointment of an arbitral tribunal by a High Court under Section 11 of the Act, is based on the powers conferred on the High Court by the Act through Section 11 of the Act which appointment is irrespective of the arbitration clause entered into by the parties. Such an order by the High Court cannot be challenged by either party under Section 16 of the Act.

• SP Singhla v State of Himachal Pradesh²¹ - [Proceedings commenced pre-2015 Amendment]: This judgement though post 2015 Amendment held in facts of the case that an employee of one of the parties, as provided in the contract, could be appointed as arbitrator. It held that there was no merit in

¹⁹ Duro Felguera v Gangavaram Port Ltd., (2017) 9 SCC 729

²⁰ State of West Bengal v. Sarkar and Sarkar, (2018) 12 SCC 736

²¹ SP Singhla v State of Himachal Pradesh, (2019) 2 SCC 488

the objection to the appointment on the ground of the arbitrator being in employment of the concerned Department. The Supreme Court referring to its judgements held that arbitration clauses in government contracts providing that an employee of the department will be the sole arbitrator are neither void nor unenforceable. The arbitrator being an employee of one of the parties is not *ipso facto* a ground to presume bias or lack of independence on part of the arbitrator. However, it was held that such appointments should be made vigilantly and responsibly, appointing an arbitrator who is in a position to conduct proceedings efficiently and without compromising other duties. In the instant case, the SE, Arbitration Circle, HPPWD, who was appointed as the sole arbitrator, regularly does arbitration devoting time to the arbitration proceedings.

This judgement talks of the essentials of an arbitration agreement and the pre-condition of there being a valid and binding arbitration agreement for an arbitrator to be appointed by the Court under Section 11. The Hon'ble Court held that when an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. It was observed that, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. The Supreme Court further held that therefore, even a plain reading of Section 11(6A) of the Act, when read with Section 7(2) of the Act and Section 2(h) of the Indian Contract Act, 1872 would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that decision titled as SMS Tea Estates [SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66| passed by the Supreme Court has, in no manner, been touched by

²² Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209

the amendment of Section 11(6A).

- Perkins Eastman Architects DPC v HSCC (India) Ltd.²³: A much talked about judgment, wherein the Court while expounding the law post TRF-Energo (supra) held unilateral appointment of arbitrator to be bad in law. It was held that a party to the agreement would be disentitled to make any appointment of an arbitrator on its own since in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Such an exclusive and unilateral power of appointment is in contravention of the provisions of the Act. Resultantly, an appointment made following such a procedure would be de hors the Arbitration Act.
- Central Organisation for Railway Electrification v M/S ECI-SPIC-SMO-MCML (IV)²⁴: While Perkins (supra) was seen as putting the issue of unilateral appointments to rest, in a subsequent judgement the Hon'ble Supreme Court distinguishing the judgement in Perkins (supra) held that in case of appointment of an arbitrator from a panel of arbitrators, the nomination is not bad, and the parties having agreed to such a procedure are bound to follow the same. It has been further held in the said judgement that even a High Court when appointing an arbitrator under such a clause has to appoint an arbitrator from the panel of arbitrators. The issue of unilateral appointments is thus again left ambiguous depending on the clause being interpreted by Courts and we still do not have one fixed view on the same.
- United India Insurance Co. Ltd. v Antique Art Exports Pvt. Ltd.²⁵ [Overruled]: This case, though later overruled, added another development and interpretation on the power of a Court to appointment an arbitrator,

²³ Perkins Eastman Architects DPC v HSCC (India) Ltd., (2019) SCC Online SC 1517

²⁴ Central Organisation for Railway Electrification v M/S ECI-SPIC-SMO-MCML (IV), (2019) SCC Online SC 1635

²⁵ United India Insurance Co. Ltd. v Antique Art Exports Pvt. Ltd., (2019) 5 SCC 362

while dealing with and applying the existing law on the issue. The Hon'ble Court held that the exposition in *Duro Felguera (supra)* is a general observation about the effect of the amended provisions. This Court took note of sub-section (6A) introduced by Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted. Prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction. It must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the Arbitrator for adjudication.

• Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman*: The judgement resettled the existing principles on the power of a Court under Section 11 to appoint an arbitrator and overruled its decision in the case of Antique Arts (supra). The Hon'ble Court held that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd.] as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be

²⁶ Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714

understood in the narrow sense as has been laid down in the judgment in *Duro Felguera*. The said judgement, therefore, overruled the judgment in *Antique Art Exports (P) Ltd.*

- Proddatur Cable TV Digi Services v SITI Cable Network Ltd.": The Hon'ble High Court of Delhi following Perkins (supra) and the existing principles of the power of a Court under Section 11 of the Act, held that the underlying principle in arbitration no doubt is party autonomy but at the same time fairness, transparency and impartiality are virtues which are equally important. Thus, following the ratio of the judgment in the case of Perkins (supra), a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law. Interestingly, the Hon'ble High Court applied Perkins (supra) retrospectively in a petition made to Court, albeit in an ongoing arbitration and that too at an advance stage. The Hon'ble Court applying Perkins (supra) substituted the arbitrator in ongoing proceedings.
- Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.²⁸:

 The Hon'ble Court in this recent judgement summarized, emphasized and interpreted the nature and scope of powers of a Court under Section 11 for the appointment of an arbitrator. The Hon'ble Court held that all claims/disputes between the parties, including the issue of limitation, are to be adjudicated by the arbitral tribunal. The allegation of fraud, existence of arbitration agreement (or the absence thereof) can be decided by the Court under Section 11 of the Act.

The 2015 Amendment Act brought about a significant change in the appointment process under Section 11: first, the default power of appointment shifted from the

²⁷ Proddatur Cable TV Digi Services v SITI Cable Network Ltd., (2020) SCC Online Del 350

²⁸ Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455

Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under sub-section (6-A) of Section 11 of Act was confined to the examination of the existence of the arbitration agreement at the pre-reference stage. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in *Patel Engg.* defined the scope of power of the Chief Justice under Section 11 of the Act. The Court held that the scope of power exercised under Section 11 of the Act was to first decide:

- (i) whether there was a valid arbitration agreement; and
- (ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and
- (iii) whether the party making the motion had approached the appropriate High Court.

Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in *Patel Engg*. was followed by this Court in *Boghara Polyfab*, *Master Construction*²⁹ and other decisions. By virtue of the *non obstante* clause incorporated in Section 11(6-A), previous judgments rendered in *Patel Engg*. and *Boghara Polyfab*, were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

In view of the legislative mandate contained in Section 11(6-A), the Court is now

²⁹ Boghara Polyfab, Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349

required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *kompetenz-kompetenz* principle.

The doctrine of *kompetenz-kompetenz* is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

E. COMPARATIVE CHART OF AMENDMENTS TO SECTION 11

1996	2015	2019
11. Appointment of	11. Appointment of	11. Appointment of
arbitrators	arbitrators	arbitrators
(1) A person of any	(1) A person of any nationality	(1) A person of any
nationality may be an	may be an arbitrator, unless	nationality may be an
arbitrator, unless otherwise	otherwise agreed by the parties.	arbitrator, unless
agreed by the parties.		otherwise agreed by the
(2) Subject to sub-section (6),	(2) Subject to sub-section (6),	parties.
the parties are free to agree	the parties are free to agree on	(2) Subject to sub-section
on a procedure for	a procedure for appointing the	(6), the parties are free to
appointing the arbitrator or	arbitrator or arbitrators.	agree on a procedure for

arbitrators.

- (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
- (4) If the appointment procedure in sub-section (3) applies and—
- (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, appointment shall be made, upon request of a party, by the Chief Justice or any institution person or designated by him.

- (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
- (4) If the appointment procedure in sub-section (3) applies and—
- (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court

- appointing the arbitrator or arbitrators.
- (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
- (3A)The Supreme Court and the High Court shall have the designate, power to arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a

- (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
- (6) Where, under an appointment procedure agreed upon by the parties,—
- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that

- (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court
- (6) Where, under an appointment procedure agreed upon by the parties,— (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the **Supreme**
- panel of arbitrators for discharging the functions and duties of arbitral institution and anv reference the to arbitrator be shall deemed to be an arbitral institution for the purposes of this section the and arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Iustice of the concerned High Court may, from time to time, review the panel of arbitrators.
- (4) If the appointment procedure in sub-section (3) applies and—(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
- (b) the two appointed

procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or any person or institution designated by him is final.
- (8) The Chief Justice or any person or institution designated by him in appointing an arbitrator, shall have due regard to— (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) the considerations as are likely to secure the appointment of an independent and impartial

Court or, as the case may be, the High Court or any person or institution designated by such Court to necessary measure, unless the agreement on the appointment provides procedure other for securing means the appointment.

- (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.
- (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High

arbitrators fail to agree on the third arbitrator within thirty days from the date of their the appointment, appointment shall be made, on an application of the party, by the arbitral institution designated the bv Supreme Court, in case international of commercial arbitration. or by the High Court, in case of arbitrations other than international commercial arbitration. as the case may be

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an

arbitrator

- (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
- (10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to him.
- (11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant

Court.

- (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3 the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.
- (8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—
- (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) the contents of the disclosure and other

application of the party in accordance with the provisions contained in sub-section (4)

- (6) Where, under an appointment procedure agreed upon by the parties,—
- (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution. fails perform any function entrusted to him or it under that procedure, the appointment shall be made, on an application of the party, by the institution arbitral designated the bv Supreme Court, in case of international

sub-section shall alone be competent to decide on the request.

- (12) (a) Where the matters referred to in sub- sections (4), (5), (7), (8) and (10) arise in an international commercial arbitration, the reference to the "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India" and
- Where (b) the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to the Chief Justice of

considerations as are likely to secure the appointment of an independent and impartial arbitrator.

- (9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
- (10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by subsection (4) or sub-section (5) or sub-section (6), to it.
- (11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High

commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

- (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.
- (8) The arbitral institution referred to in sub-sections (4), (5) and (6), before appointing an arbitrator, shall seek a disclosure in writing

that High Court.

Courts or their designates, different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

- (12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and
- (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the

from the prospective arbitrator in terms of subsection (1) of section 12, and have due regard to—

- (a) any qualifications required for the arbitrator by the agreement of the parties; and
- (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
- (9)In the case appointment of sole or third arbitrator in an international commercial arbitration, the arbitral institution designated by the Supreme Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties different belong to

principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.

- An (13)application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.
- (14)For the purpose determination of the fees of the tribunal arbitral and the manner of its payment to the arbitral tribunal. the High Court may frame such rules as may be necessary, after taking into consideration the rates **Fourth** specified the in

nationalities.

- (11) Where more than one request has been made under sub-section (4) or sub-section (5) or section sub-(6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.
- (12) Where the matter referred to in subsections (4), (5), (6) and (8) arise in international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral designated institution under sub-section (3A).
- (13) An application made under this section

Schedule. Explanation — For the removal of doubts, it is hereby clarified that this subsection shall not apply to international commercial

arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.

11A. **Power** of Central Government to amend Fourth Schedule. - (1) If the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Schedule Fourth and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of

for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

Explanation – For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of thirty days which may be comprised in one session or in successive two more sessions, and if, before the of the expiry session immediately following the session successive or the sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by the both Houses of Parliament.

an arbitral institution.

11A. Power of Central Government to amend Fourth Schedule.—(1) If the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, amend the Fourth Schedule and the Fourth thereupon Schedule shall deemed to have been amended accordingly.

A copy of every notification proposed to be issued under subsection (1), shall be laid draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two successive more or sessions, and if, before the expiry of the session immediately following

	the session or th
	successive session
	aforesaid, both House
	agree in disapproving th
	issue of the notification
	or both Houses agree is
	making any modification
	in the notification, th
	notification shall not b
	issued or, as the case ma
	be, shall be issued only i
	such modified form a
	may be agreed upon b
	the both Houses of
	Parliament.

LIST OF CASES ON ANTI ARBITRATION INJUNCTION IN INDIA AND UK

A. <u>LIST OF CASE LAWS ON ANTI-ARBITRATION INJUNCTION IN</u> INDIA

- a. Refusal of Injunction
- Kvaerner Cementation India Ltd. vs. Bajranglal Agarwal, (2012) 5 SCC 214
 judgment dated 21 March 2001 (3 Judges)
- LMJ International Limited vs. Sleepwell Industries Co. Ltd, (2012) SCC
 Online Cal 10733 judgment dated 28 September 2012 (2 Judges author Justice Soumen Sen)
- 3. Sancorp Confectionary Pvt. Ltd vs. Gumlink A/S, (2013) 197 DLT 781 judgment dated 19 October 2012 (Single Judge Justice VK Jain)
- Chatterjee Petrochem Company vs. Haldia Petrochemicals Limited, (2014)
 SCC 574 judgment dated 10 December 2013 (2 Judges author Justice V. Gopal Gowda)
- 5. World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) Pte Limited, (2014) 11 SCC 639 judgment dated 24 January 2014 (2 Judgesauthor A.K. Patnaik)
- Mcdonald's India Private Limited vs. Vikram Bakshi, (2016) SCC Online
 Del 3949 judgment dated 21 July 2016 (2 Judges author Justice Badar Durez Ahmad)
- 7. Lafarge India Pvt Ltd vs. Emami Realty Ltd & Anr, (2016) SCC Online Cal

- **4964** judgment dated 15 September 2016 (2 Judges author Justice Jyotirmay Bhattacharya)
- Union of India vs. Vodafone Group PLC, United Kingdom, (2018) SCC
 Online Del 8842 judgment dated 7 May 2018 (Single Judge Justice Manmohan)
- 9. Ravi Arya & Ors. vs. Palmview Overseas Ltd & Ors, Suit (L) No. 1676 of 2018, Bombay High Court judgment dated 17 December 2018 [Note: Appeal against this judgment being Appeal (L) No. 585 of 2018 was dismissed by the Division Bench vide judgment dated 12 February 2019. The Special Leave Petition against the DB judgment (SLP (c) No. 6424 of 2019) was dismissed by Supreme Court vide order dated 11 March 2019.]
- 10. National Aluminum Company Ltd. vs. Subhash Infra Engineers Pvt. Ltd.,
 2019 SCC Online SC 1091 judgment dated 23 August 2019 (2 Judges author Justice R. Subhash Reddy)
- 11. Himachal Sorang Power Private Limited and Another vs. NCC Infrastructure Holdings Limited, 2019 SCC Online Del 7575 judgment dated 13 March 2019 (Single Judge Justice Rajiv Shakder)
- 12. Bina Modi vs. Lalit Modi, CS(OS) 84/2020, Delhi High Court judgment dated 3 March 2020 (Single Judge Justice Rajiv Sahai Endlaw)

b. Grant of Injunction

Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS
 & Ors., (2014) SCC Online Cal 17695 - judgment dated 29 September 2014
 (Single Judge - Justice Soumen Sen)

B. <u>LIST OF CASE LAWS ON ANTI-ARBITRATION INJUNCTION IN</u> UK

- a. Refusal of Injunction
- Internet Fzco & Ors vs. Ansol Limited & Ors, [2007] EWHC 226 (Comm)
 judgment dated 9 February 2007 (High Court of Justice Queen's Bench Division Commercial Court)
- JJarvis & Sons Ltd vs. Blue Circle Dartford Estates Ltd, [2007] EWHC 1262
 (TCC) judgment dated 8 May 2007 (Queen's Bench Division)
- Amtrust Europe Limited vs. Trust Risk Group SpA, [2015] EWHC 1927
 (Comm) judgment dated 8 July 2015 (High Court of Justice Queen's Bench Division Commercial Court)
- 4. Sana Hassib Sabbagh vs. Wael Said Khoury & Ors, [2019] EWCA Civ 1219
 judgment dated 12 July 2019 (Court of Appeal)

b. Grant of Injunction

- 1. Nigel Peter Albon vs. Naza Motor Trading Sdn Bhd. [2007] EWHC 665 (Ch) judgment dated 29 March 2007 (High Court of Justice, Chancery Division) [Note: The Appeal against this judgment was dismissed by the Court of Appeal vide judgment dated 6 November 2017 (cited as Nigel Peter Albon vs. Naza Motor Trading Sdn Bhd., [2007] EWCA Civ 1124)]
- Excalibur Ventures LLC vs. Texas Keystone Inc., [2011] EWHC 624
 (Comm) judgment dated 28 June 2011 (High Court of Justice Queen's Bench Division Commercial Court)

C. LIST OF CASE LAWS ON ANTI-SUIT INJUNCTION IN UK

- 1. Airbus Industrie G.I.E vs. Patel & Others, [1998] UKHL 12 judgment dated 2 April 1998 (House of Lords)
- 2. Glencore International AG vs. Exter Shipping Ltd, [2002] EWCA Civ 528
 judgment dated 18 April 2002 (Court of Appeal (Civil Division))
- 3. Star Reefers Pool Inc vs. JFC Group Co. Ltd, [2012] EWCA Civ 14 judgment dated 20 January 2012 (Court of Appeal (Civil Division))

PLEADINGS: BACK TO THE BASICS

A. <u>INTRODUCTION</u>

The essence of pleadings lies in harmoniously answering three questions:

- 1. What am I saying?
- 2. Why am I saying?
- 3. What am I required to say?

B. EVOLUTION OF PLEADINGS

a. The Formulary Procedure

This procedure covered the later days of the Roman Republic and the early days of the Roman Empire.

The Defendant would be summoned and a preliminary hearing would take place before the Praetor i.e., a high-ranking magistrate. From this hearing, the agenda for trial would emerge.

The agenda was expressed as a 'formula' i.e., a written statement setting out in brief language of the issue between the parties and which authorized the Judge to condemn the Defendant if the allegations against the Defendant appeared proven.

A 'formula' consisted of six parts:

- 1. *Nominatio:* The appointment of a Judge.
- 2. *Intentio:* The Plaintiff's statement of case.
- 3. *Condemnatio:* The authority given to the Judge to either bind the Defendant to a certain sum or to absolve him.
- 4. *Demonstratio:* This was used only in unliquidated, *in personam* claims, and stated the facts out of which the claim arose.

Notes on dispute resolution practice

5. Exceptio and replicatio: If the Defendant wished to raise a specific defence,

he would do so in an exceptio. If the Plaintiff was desirous of refuting the

defence, he could file a replicatio, explaining why the defence was not valid.

6. *Praescriptio:* This limited the issue to the matter in hand, thereby preventing

the Plaintiff from bringing another case against the Defendant on a similar

issue.

b. The Libellary Procedure

Under the Roman Empire, the process of applying for a formula was given up

and the powers of the Praetor were limited. The entire proceedings were before

a Magistrate whose function was to apply the law. The parties submitted their

claims to the Magistrate without the formal making of an issue and with only a

short statement, or libellus of the ground of suit. It is this system which is now

in vogue in most jurisdictions.

c. High Middle Ages

In the 12th century, the advent of the jury as a more rational way of settling civil

disputes brought pleadings with it. This was in light of the fact that the jury had

to know what issues it had to decide. The pleadings served another function,

too, inasmuch as they disclosed whether the issue was one of fact for the jury or

one of law for the Judge to determine. Pleadings were conducted orally in Court

and moderated by the Judge until the 15th or 16th century.

The Plaintiff would first set out the facts of his complaint known as the

'declaration', 'narration' or 'count'. In his defence, the Defendant would

traverse, demur, or confess and avoid.

d. Modern Practice: Current Common Law System

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The system of pleading developed in the English Courts of common law after the Norman Conquest. In common law, there are two main stages of the suit distinct from one another – (i) Pleadings; & (ii) Trial. If a party does not act at the appointed stage, it loses its opportunity and may be later precluded from doing what it might otherwise have done.

Nowadays, the focus on pleadings is predominant except for a class of cases such as family disputes relating to partition and succession, inasmuch as all commercial disputes are litigated on written documents such as a contract or a series of communication exchanged between the parties.

C. NEED AND IMPORTANCE OF PLEADINGS

a. Why are pleadings required?

- 1. To define the ambit of the dispute.
- 2. To enable all concerned parties to know what facts have to be established.
- 3. For the concise identification of the issues so that each side knows in advance the nature of the factual testimony that will be adduced.
- 4. To enable the forum administering justice between contending parties to first ascertain the subject of controversy before it can decide it i.e., the Judge must know what kind of action he is trying.

Objective and Purpose

- 1. Pleadings show, at a glance, the vital averments.
- 2. Pleadings show, at a glance, which vital averments are disputed.
- 3. Pleadings enable issues to be settled almost immediately and without going into the details of the particular averments.

"The whole object of pleadings is to bring the parties to an issue, and [...] to prevent the issue [from] being enlarged which would prevent either party knowing, when the cause came on for trial, what the real point to be discussed and decide was. In fact, the whole meaning of the system is to narrow the parties to definite issue, and thereby to diminish expenses and delay, especially as regards the amount of testimony required on either side at the hearing."

- Thorp v. Holdsworth, (1876) 3 Ch.D. 637

"It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities."

- Ram Sarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555

b. Importance of Pleadings

Pleadings manifest and assert their influence throughout the entire process of litigation. This can be elaborated by referring to some important functions that pleadings accord:

- 1. Pleadings define the issues between the parties.
- 2. Pleadings also contain the particulars of the allegations in respect of which further and better particulars may be requested or ordered.
- 3. They limit the ambit and range of discovery of documents and queries in the form of interrogatories.

- 4. They demonstrate ex facie whether a cause of action or defence is disclosed.
- 5. They provide a guide for the proper mode of trial.
- 6. They provide the basis for the defence of res judicata in subsequent proceedings

"In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

- Bharat Singh v. State of Haryana 1988 (4) SCC 534

c. Essentials of Good Pleadings

It is often said that good pleadings consist of four elements - good matter, pleaded in good form, in apt time, and in due order.

- 1. Good matter includes all facts and circumstances necessary to constitute the cause of action or the ground of defence, and no more.
- 2. Good form, in the context of pleadings, postulates that the facts should be stated logically in their natural order with certainty i.e., clearly and distinctly, so that the party who has to answer, as well as the Court may

readily understand allegations, and ambiguous and doubtful statements, argumentative matter, and matter similarly defective is avoided.

- 3. Apt time is a question of limitation.
- 4. Due order is a question of proper arrangement.

"A party is not well served if his pleading is drafted in a hurried, shoddy, slipshod, unthinking manner, on the basis that whatever is stated in the pleading will do and may be developed by particulars or discovery or evidence at the trial or may be amended in due course; and, conversely, a party is well served whose pleading states his case with clarity and precision, with full particulars and details, with understanding of the law, an insight into the substantive rights of the parties, and intelligent anticipation of how the case of the party will need to be prepared and presented to the court. The one kind of pleading lays bare the weakness of the party's case: the other kind clothes it with strength and substance. The drafting of a pleading is the equivalent of laying the foundation on which to build the claim or defence of a party, and as the foundation is laid, whether badly or well and truly, so will the claim or defence be weak and fall or be well sustained and upheld. Pleadings should therefore be drafted with all due care and circumspection, and they require the exercise of much skill and not a little art, to fulfil their whole function."

- Bullen, Leake and Jacob's Precedents of Pleadings 17 (1975)

"Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric. These basic rules were developed long ago and have stood the test of time because they serve the vital purpose of identifying the matters which each party will need to prove by evidence at trial."

- Tchenguiz v Grant Thornton UK LLP [2015] EWHC 405 (Comm)

D. STATUTORY BASIS: CODE OF CIVIL PROCEDURE, 1908

The objective behind incorporating specific provisions regarding pleadings was to introduce scientific and efficient pleadings in place of loose, prolix and pointless ones which had been deplored as a serious defect in Indian litigation.

Order II Rule 1 requires the suit to be drafted so that by a single decision all subjects in dispute are decided to prevent further litigation concerning them.

Order VII Rule 1(e) requires that the plaint contain the acts constituting the cause of action and when it arose.

Order VII Rule 3 requires, where the subject-matter of the suit is immovable property, that the plaint contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint to specify such boundaries or numbers.

Order VII Rule 5 requires that the plaint demonstrate that the Defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the Plaintiff's demand.

Order VII Rule 6 requires, where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint to show the ground upon which exemption from such law is claimed. The Court may permit the Plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint.

Order VI Rule 2 requires that every pleading contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which they are to be proved. The provision also requires pleadings, where necessary, to be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

Order VI Rule 4 requires particulars to be given in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary. Order VI Rule 6 requires any condition precedent, the performance or occurrence of which is intended to be contested, to be distinctly specified in the pleading by the Plaintiff or Defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the Plaintiff or Defendant shall be implied in his pleading.

Order VI Rule 8 states that where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Order VI Rule 9 states that wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Order VI Rule 10 states that wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Order VI Rule 12 states that wherever any contract or any relation between any person is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail.

Pleadings in today's context

"[T]he word 'pleading' which is a generic term to describe the formalized process by which each party states its case prior to trial, has virtually led to the demise of the word 'pleading' and it would be more appropriate to call the modern day pleadings as 'statement of case' of the litigating parties.

In today's context, Order VI Rule 9 is by far the most important rule. It requires a party to state the effect of the contents of any documents which are material. In effect, this provision also requires pleadings to be virtually the same as highlighted by the Supreme Court in Bharat Singh's case [supra]."

- Rothenberger India Pvt. Ltd. v. M/s Ramsagar Constructions & Anr. 2016

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E. PLEADINGS AND EVIDENCE

It is pertinent to note that pleadings, by defining the issues, also define the scope of the evidence. This is on account of the fact that in civil cases, the evidence that can be admitted is necessarily linked, with what are known as facts in issue. Besides, the adversary system of trial necessitates clear and complete pleadings so that the Court may derive the best assistance from the parties.

F. DEFENDANT'S PLEADING

The Defendant in his pleadings must state with brevity, the facts that demolish the cause of action brought forth by the Plaintiff, if the Defendant is confessing and avoiding or making positive allegations. On the other hand, if the Defendant is merely traversing, the Defendant should do so specifically.

EXAMINATION IN CHIEF AND CROSS EXAMINATION IN A CIVIL SUIT

A. EXAMINATION-IN-CHIEF:

Section 137 of the Indian Evidence Act, 1872 (hereinafter referred to as IEA for ease of reference) provides that the examination of a witness by the party who calls him shall be called his examination-in-chief.

• Affidavits In Lieu Of Examination-In-Chief

Order XVIII Rule 4 of the Code of Civil Procedure, 1908 (hereinafter referred to as CPC for ease of reference), provides that in every case, the examination-in-chief of a witness shall be on an affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

• Matters To Which Affidavits Shall Be Confined

Order XIX Rule 3, CPC mandates that Affidavits by way of examination-inchief shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated.

• Evidence may be given of facts in issue and relevant facts

Section 5 of the IEA provides that evidence may be given in a suit or other proceeding about the existence or non-existence of every fact in issue and relevant facts as defined under the IEA.

- What Not To Be Included In An Affidavit Hearsay, Arguments, Mere Reproduction Of Pleadings
- That what is expressly ruled out from inclusion as per Order XIX Rule 3, CPC are contents which might be in the nature of hearsay or arguments or legal submissions/grounds. In fact, sub rule (2) of Order XIX Rule 3 provides for imposition of costs by a party of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, unless the Court otherwise directs, be paid by the party filing the same.
- To the same intent, Order XIX Rule 5 provides that Court may, in its discretion, for reasons to be recorded in writing (i) redact or order the redaction of such portions of the affidavit of examination-in-chief as do not, in its view, constitute evidence; or (ii) return or reject an affidavit of examination-in-chief as not constituting admissible evidence

• Format of Affidavits in lieu of examination of chief

Order XIX Rule 6 provides the format and guidelines for affidavit of evidence.

Leading question are Not permitted

Leading questions, as defined in Section 141 of IEA are those that direct the witness to an answer, and are not open-ended and by virtue of Section 142 of IEA leading questions are not permitted in examination in chief.

B. PROVING OF DOCUMENTS

• In all human affairs, absolute certainty is a myth - Prof. Brett said: 'all exactness is fake'. E.L. Dorando's theory of 'absolute proof' being unattainable, law accepts probability as a substitute. Section 3 of the Indian

Evidence Act defines proof as whereafter considering the matters before it, the Court considers its existence so probable that a prudent man ought, under the circumstances presented, act upon the supposition that it exists. Way back in the decision reported as 1958 SCR 328 Mubarak Ali Ahmed v State of Bombay, the Supreme Court had observed that the proof of genuineness of a document is a proof of the authorship of the document and four guiding principles to provide authorship of a document were laid down:

- (i) Direct evidence by a person who saw the document being scribbed or signatures being affixed.
- (ii) Internal evidence afforded by the contents of the document itself where the disputed document purports to be a link in the chain of correspondence, some links being proved to the satisfaction of the Court.
- (iii) General circumstances enwombing the document in an appropriate case where it is established that the document constitutes a link in the chain of correspondence and from this authorship may be determined.
- (iv) Expert evidence i.e. handwriting expert.
- These days, documents are generally electronically created and stored. How to prove the genuineness of electronic documents? The flavour of electronically created documents are numerous:
 - (i) Emails
 - (ii) Webpages
 - (iii) Text messages
 - (iv) Digital voice recordings
 - (v) Date base compilations
 - (vi) Digital photographs
 - (vii) Digital videos

- (viii) Computer logs- call records.
- Section 2(c) of the Information Technology Act, 2000 defines electronic record to mean: data record or date generated as an image or sound; stored, received or sent in an electronic form microfilm or computer generated micro record. Communications such as emails, digital photographs etc.
- As per the Evidence Act, Sections 61 65 are relevant for they deal with proof of contents of documents, primary and secondary evidence with emphasis on proof of documents by primary evidence with the contours of secondary evidence being as per Section 65. Section 65A and 65B deal with proof of electronic records.
- Issues of custody, interpolation etc apart from denial of authorship arise and the proof of authenticity has to be determined on the same principles of probative value which were expounded in Mubarak Ali's case. Since digital evidence exists in intangible form, it is easy to be modified but difficult to be destroyed.
- Section 6 to 36 of the Evidence Act which are in Part 1 lay down when a fact becomes a relevant fact to prove a fact-in-issue and one must keep in mind Section 22A.
- Pertaining to an electronic record, the proponent of the evidence has to explain the process or system used to obtain the document. The nature of the hardware features, built in safeguards and how it was stored and maintained. Who operated or controlled the hardware which either generated or stored the evidence. Forensic analysis may be resorted to for retrieval of hidden or deleted data. But this is cumbersome and expensive

and therefore, Courts have been falling back on the common sense principles for proof of electronic evidence. In the decision reported as 241 F.R.D. 585 Lorraine v Markel, American Insurance Company, the Court of Appeals laid emphasis on the probative value principles.

- In analysing the admissibility and proof of electronic documents it is best to treat it as originating from same source as non-electronic record.
- The judgment reported as Trimex International FZE Limited v Vedanta Aluminium Ltd. is an authority which guides the judicial approach regarding proof of the existence and the source i.e. authorship of an electronic evidence. It was a case where there was no signed agreement between the parties and the Court was called to infer the existence of an agreement and the material was emails, telexes, telegrams which were unsigned and a few letters bearing signatures. In the decision reported as Shakti Bhog Foods Ltd. v. Kola Shipping Ltd. ⁸¹, the original carter Party Agreement inter alia containing the arbitration agreement was not filed by the Claimant but the fixtures frequently recorded in the telex or fax recapitulating the terms finally agreed were relied upon by the Court to determine the contents of the Charter Party Agreement. In fact, in the decision reported as AIR 2005 SC 3820, the famous Parliament House attack case the Supreme Court held that even de hors Section 65B of Evidence Act, the electronic evidence can be proved in terms of the common law principles codified in the law of Evidence Act.

C. CROSS EXAMINATION

³⁰ Trimex International FZE Limited v Vedanta Aluminium Ltd., (2010) 3 SCC 1

³¹ Shakti Bhog Foods Ltd. v. Kola Shipping Ltd., (2009) 2 SCC 134

• "Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. A lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it."

John Henry Wigmore

• "It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-inchief, the objects of which are: (1) to destroy or weaken the evidentiary value of the witness of his adversary; (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party; (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

- Kartar Singh v State of Punjab, (1994) 3 SCC 569

• Section 137 of the IEA defines Cross-examination as the examination of a witness by the adverse party.

• Scope of cross examination

- Need not be confined to the facts to which the witness testified on his examination-in-chief (Section 138, IEA).
- Can include leading question (Section 143, IEA)
- Any question which tests the veracity of the witness [Section 146(1)],
- To discover who the witness is and what is his/her position in life [Section 146(2)]
- To shake the witness's credit, by injuring his character, although the answer to such questions might tend directly or indirectly to

criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture [Section 146(3)]

• What to be avoided

It's often remarked that in a cross examination, what is more important than what you ask is what you don't ask. There are some don'ts of a Cross Examination that are based on what the Courts are likely to disallow and some based on prudence.

- Never ask a question you don't know the answer to.
- Do not ask a question related to a point of law, the witness is being deposed for his factual knowledge and not knowledge of law.
- Do not make your end point obvious to the witness.
- Do not argue with the witness. When needed, request the Judge to rein the witness for you.
- Do not give the witness an opportunity to explain loopholes or admissions in his examination-in-chief and refrain from asking questions on parts of examination-in-chief that help your case.

• Introduction of Documents in Cross Examination

Order 7 Rule 14(4), Order 8 Rule 1 (A) (4), as well as Order 13 Rule 1(3) of Civil Procedure Code provide that the provisions requiring parties to file documents along with their pleadings and/or before the settlement of issues do not apply to documents produced for the cross examination of the witnesses of the other party. To the same effect, Section 145 of the Evidence Act also permits documents to be put to the witnesses, though it does not provide whether such documents should be already on the court record or can be produced / shown for the first time.

Thus, the position that emerges is that a witness can be put a document that is produced for the first time in cross examination.

If the witness to whom the said document is put, identifies his handwriting / signature or any writing / signatures of any other person on the said document or otherwise admits the said documents, the same poses no problem, because then the document stands admitted into evidence. However, the question arises as to what is the course to be followed if the witness denies the said document. Is the document to be kept on the court file or to be returned to the party producing the same? The aforesaid question was answered by the Hon'ble Delhi High Court in the case of Subash Chander v Shri Bhagwan Yadav (paras 10-12)

Suggestions - A Suggestion is putting a statement of your case to the witness. While suggestions are of great importance in a criminal trial, their necessity or relevance in civil law is debated.

"20. ...The practice of giving suggestions in cross examination to witnesses is of criminal trials where there are no pleadings and the defense is built up by giving such suggestions. However unfortunately the said practice of criminal trials has crept into the civil trials also to the extent that most of the cross examinations being in the form of suggestions alone and which take considerable time. The purport of cross examination is to challenge the testimony and / or to falsify the witness or his credit worthiness and not to give suggestions to the effect that each and every deposition in examination-in-chief is false. Similarly, a party in a civil trial is not required to in cross examination put its case to the witness as the same as aforesaid already exists in the pleadings."

Sher Mohammad v. Mohan Magotra³²:

- Suggestion can work against you - do not give to many suggestions as these are essentially your admissions and you will be bound by it.

³² Sher Mohammad v. Mohan Magotra, 202 (2013) DLT 708

- Furthermore avoid routine suggestion like "you are deposing falsely" when the witness has in fact made admissions favourable to your case.

• Role of the witness' lawyer - what objections can be raised.

The lawyer of a witness under cross-examination also plays an important role and can raise objections with regard to any questions that is impermissible under law or is irrelevant. Order XVIII Rule 11 CPC provides the manner in which Questions can be objected to and allowed by the Court and requires the Court to take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Remarks on demeanour of witnesses

Order XVIII Rule 12 empowers the Court to record such remarks as it thinks material in respect of the demeanour of any witness while under examination.

SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Introduction

This Note is divided into 4 parts, (A) Journey of Section 34- Amendment and Grounds as on date; (B) Judicial approach to Section 34; (C) Comparison of Section 34 of the Act to Article 34 of the UNCITRAL Model Law; and (D) Comparison of Section 34 (domestic award) to Section 48 (foreign award) of the Act.

A. JOURNEY OF SECTION 34- AMENDMENT AND GROUNDS AS ON DATE:

a. Journey of Section 34

The Section 34, as it stands today, has been amended by both the Arbitration and Conciliation (Amendment) Act, 2015 as well as by the Arbitration and Conciliation (Amendment) Act, 2019. The following depiction of the provision, would give a more holistic view of the legislative evolution of the Section. The colour coding adopted for the same is:

- Original Provision as introduced under the 1996 Act: **BLACK**
- Insertion/substitution by legislative amendment: GREEN
- Deletion by legislative amendment: **RED**

Section 34. Application for setting aside arbitral awards.

- 1. Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
- 2. An arbitral award may be set aside by the Court only if—
- (a) the party making the application furnishes proof that ³³[establishes on the basis of the record of the arbitral tribunal that]—
 - (i) a party was under some incapacity, or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
 - Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

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³³ Subs. by Act 33 of 2019, s. 7, for "furnishes proof that" (w.e.f. 30-8-2019).

(b) the Court finds that—

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

 Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 7.5 or section 81.

³⁴[Explanation 1 - For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (ii) it is in contravention with the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

³⁵[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also 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:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

³⁴ Subs. by Act 3 of 2016, s. 18, for the Explanation (w.e.f. 23-10-2015).

³⁵ Ins. by s. 18, ibid. (w.e.f. 23-10-2015).

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

- 4. On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.
- 5. ³⁶[An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.
- 6. An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]

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³⁶ Ins. by Act 3 of 2016, s. 18 (w.e.f. 23-10-2015).

d. Grounds for Challenging the Arbitral Award as on date:

- 1. The parties to the agreement are under some incapacity;
- 2. The arbitration agreement is invalid;
- 3. The party challenging the award was unable to present its case;
- 4. The award contains decisions on matters beyond the scope of terms of the submission to arbitration;
- 5. The composition of the arbitral authority or the arbitral procedure was not in accordance with the arbitration agreement;
- 6. The subject matter of dispute cannot be settled by arbitration under Indian law; or
- 7. The enforcement of the award would be contrary to Indian public policy.

B. JUDICIAL APPROACH TO SECTION 34 OF THE ACT:

Year	Case Law	Holding/Relevance	
2001	Union of India v	Section 14 of the Limitation Act, 1963 and not	
	Popular Construction	its Section 5 was held to be applicable to	
	Company, AIR 2001	applications under Section 34 of the Act.	
	SC 4010		
2001	TPI Limited v Union	Constitutional validity of Section 34 of the Act,	
	of India, (2001) 2 AD	challenged for not allowing appeal on merits,	
	(Del) 21	was upheld since under arbitration agreement	
		parties agree to be bound by arbitrator's	
		decision; legislature did not include the same as	
		a ground despite having power to do so, and; to	
		allow review on merit would render arbitral	
		process futile.	
2003	Oil and Natural Gas	Wide interpretation given to ground of "public	
	Corporation Ltd. v	policy" to include within itself "patent illegality".	

5 SCC 705 committed an error of law. 2012 Bharat Aluminium This case overruled the decisions in Bharat Company and Ors. v International v Bulk Trading S. A. (2002) 4.5 Kaiser Aluminium 105 and Venture Global Engineering v Sats	CCC vam to
Company and Ors. v International v Bulk Trading S. A. (2002) 4.5	CCC vam to
	vam o to
Kaiser Aluminium 105 and Venture Global Engineering v Saty) to
Technical Services Computer Services Ltd (2008) 4 SCC 190	
Inc. and Ors, 2012 (3) hold that Part I of the Act does not apply	' to
ARBLR 515 (SC) foreign seated arbitrations as adopting the or	her
interpretation would amount to giving ex	tra-
territorial application of the Act which was	not
the intention of the legislature	
2014 ONGC Limited v It expanded the scope of "public policy"	to
Western Geco include fundamental principles of administe	ing
International Limited, justice including (a) judicial approach;	(b)
(2014) 9 SCC 263 principles of natural justice; and	(c)
Wednesbury principle of reasonableness.	
2015 Associate Builders v While relying on various decisions include	ing
Delhi Development Renusagar Power Co. Limited v Gen	eral
Authority, (2015) 3 Electric Company 1994 Supp (1) SCC 644	and
SCC 49 ONGC Limited v Western Geco Internation	nal
Limited, and having analyzed the v	ride
interpretation of the term in Oil and Nat	ıral
Gas Corporation Ltd. v Saw Pipes Ltd. (200	3) 5
SCC 705, the Court restricted the ambit of	the
term "public policy" and further discussed	the
scope of "Fundamental Policy of Indian La	w",
"Interest of India", "justice and morality"	and

		"patent illegality" as a ground for challenge
		under Section 34 of the Act.
2018	BCCI v Kochi Cricket	Amended Section 36 (no automatic stay) applies
2010	Pvt. Ltd., (2018) 6	
	SCC 287	date of commencement of the Arbitration
	SCC 207	Amendment Act, 2015.
		Amendment Act, 2010.
2018	The State Of Bihar &	Requirement of servicing notice under Section
	Ors. v Bihar Rajya	34(5) of the Act was directory and not
	Bhumi Vikas Bank	mandatory since its non-service was of no
	Samiti, Civil Appeal	consequence and the purpose was only to
	No. 7314 of 2018	expedite justice; not to scuttle it.
2018	Lion Engineering	The expression "public policy" under Section
	Consultants v State Of	34 refers to both, central as well as state laws.
	Madhya Pradesh &	Further, there is no bar against raising a
	Ors., (2018) 16 SCC	jurisdictional challenge under Section 34 of the
	758	Act even if it was not raised under Section 16 of
		the Act.
2018		
		Union of India & Another (2011) 5 SCC 758,
	Indian Oil Petronas	the court held that an award adjudicating claims,
	Pvt Ltd O.M.P.	which are excepted matters would violate
	(Comm) 5/2016	Sections 34 (2)(a)(iv) and 34(2)(b) of the Act.
	(Delhi HC)	

2018	Radha Chemicals v	Court cannot remand the matter to arbitrator
	Union of India Civil,	while deciding an application under Section 34
	Appeal No. 10386 of	of the Act. Further, power to defer arbitration
	2018	under Section 34(5) can be used only upon a
		request of party in cases specified under the
		Section.
2019	Delhi Metro Rail	Where the tribunal while passing an award
	Corporation Ltd. v	ignored vital evidence relating to default by a
	Delhi Airport Metro	party and rather, held the same to be irrelavant
	Express Private	and inconsequential without any reason, the
	Limited, FAO(OS)	Court found the award to be 'shocking to its
	(COMM) 58/2018 &	conscience' and set it aside.
	CM Nos. 13434/2018,	
	17581/2018 &	
	31531/2018	
2019	MMTC Ltd. v M/s	Scope of interference under Section 37 cannot
-	Vedanta Ltd. (Civil	travel beyond the restrictions laid down under
	Appeal No.	Section 34. While interpreting the terms of a
	1862/2014)	contract, factors like conduct of parties and
		correspondences exchanged would also be
		relevant and it is within the Arbitrator's
		jurisdiction to consider the same.
2019	Cinevistaas Limited v	A final adjudication of claim by an order of the
	Prasar Bharati, 2019	tribunal would constitute an 'interim award' and
	SCC Online Del 7071	be open to challenge under Section 34 of the
		Act.

2019	Ssangyong	While dealing with patent illegality, Court would		
	Enginnering and	not interfere with award merely because		
	Construction v	arbitrator adopted one of the many possible		
	National Highways	interpretations simply because court prefers		
	Authority of India,	another one to it. Further, any unilateral change		
	2019(3) ARBLR 152	in terms of contract by the arbitrator is violative		
	(SC)	of the most basic notions of justice under		
		Section 34 of the Act.		
2019	Anilkumar Jinabhai	Limitation period under Section 34(3) of the		
	Patel (D) v	Act would start only from the date of signed		
	Pravinchandra	copy of the award was delivered to the party		
	Jinabhai Patel Civil	making the application for setting aside the		
	Appeal No. 3313 of	award. Combined interpretation of Section		
	2018 arising out of	34(3) and Section 31(5) of the Act.		
	SLP (C) No.15668 of			
	2012			
2019	Canara Nidhi Ltd. v	While relying on Emkay Global Financial		
	M.	Services ltd. v Girdhar Sondhi (2018) 9 SCC 49,		
	Shashikala, (2019) 9	the Supreme Court held that parties will be		
	SCC 462	permitted only in exceptional cases under		
		Section 34 of the Act to adduce additional		
		evidence beyond the arbitral record by way of		
		affidavits and cross-examination of witnesses.		
2019	Calcutta HC State of	Award bereft of reasons and not indicating		
	West Bengal v Bharat	application of mind by arbitrator is violative of		
	Vanijya Eastern	public policy.		

	Private Limited, 2019	
	SCC Online Cal 3605	
2019	SMS Ltd. v. Konkan	The award was set aside as the formula applied
	Railway Corporation	for grant of claim for machinery, manpower and
	Ltd., O.M.P.	overhead is perverse. While doing so, the Delhi
	(COMM) 279/2017	High Court relied on the decision of the
		Supreme Court in Associate Builders v DDA
		(2015) 3 SCC 49 and Ssangyong Enginnering
		and Construction v National Highways
		Authority of India, 2019(3) ARBLR 152 (SC),
		to hold that the finding of the arbitral tribunal
		can be interfered with under Section 34 of the
		Act, if such finding are contract or perverse and
		the tribunal has not adopted a judicial approach.
2020	South Asia Marine	This was an appeal to Supreme Court against an
	Engineering	order of the Gauhati High Court under Section
	Engineering	orger of the Catalant 111311 Court ander Section
	Constructions Ltd.	37 of the Act. The award was set-aside by the
	Constructions Ltd.	
	Constructions Ltd.	37 of the Act. The award was set-aside by the
	Constructions Ltd. (SEAMEC Ltd.) v. Oil	37 of the Act. The award was set-aside by the single judge bench and the appeal against the
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil and Appeal No. 673	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was dismissed and the Supreme Court did not
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil and Appeal No. 673	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was dismissed and the Supreme Court did not interfere with the order under Section 37 by the
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil and Appeal No. 673	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was dismissed and the Supreme Court did not interfere with the order under Section 37 by the
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil and Appeal No. 673	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was dismissed and the Supreme Court did not interfere with the order under Section 37 by the High Court.
	Constructions Ltd. (SEAMEC Ltd.) v. Oil India Ltd., Civil and Appeal No. 673	37 of the Act. The award was set-aside by the single judge bench and the appeal against the said order was also dismissed. The appeal was dismissed and the Supreme Court did not interfere with the order under Section 37 by the High Court. Held: "The existence of such a clause shows that

C. COMPARISON OF SECTION 34 OF THE ACT TO ARTICLE 34 OF THE UNCITRAL MODEL LAW:

Article 34 (2)(a)	Section 34(2)(a)	Comparison
Challenging party	Challenging party must	Burden of proof on the
'furnishes proof' of:	'establish' from arbitral	challenging party is
	record:	greater under the Act as
		compared to that under
		the UNCITRAL Model
		Law.
(i) party incapacity	(i) party incapacity	
OR	(ii) arbitration agreement	
Arbitration agreement	invalid under applicable	
invalid under applicable	law	
law		
(ii) improper notice of	(iii) improper notice of	
arbitrator appointment	arbitrator appointment	
or arbitral proceedings	or arbitral case	
OR	OR	
Party otherwise unable to	Party otherwise unable to	Grounds of challenge
present its case	present its case	under both the
(iii) Arbitral award passed	(iv) Arbitral award passed	provisions are same
on a dispute (a) not	on a dispute (I) not	
contemplated by or (b)	contemplated by or (II)	
falling outside terms of or	falling outside terms of or	
(c) beyond the scope of	(III) beyond the scope of	
submission to arbitration	submission to arbitration.	
(iv) (I) tribunal's	(v) (I) tribunal's	
composition or (II)	composition or (II)	

Notes on dispute resolution practice

tribunal's procedure was	tribunal's procedure was	
not in accordance with	not in accordance with	
arbitral agreement or the	arbitral agreement or the	
UNCITRAL Model	Act.	
Law.		

D. <u>COMPARISON</u> OF <u>SECTION</u> 34 (<u>DOMESTIC</u> <u>AWARD</u>) TO <u>SECTION</u> 48 (<u>FOREIGN AWARD</u>) OF THE ACT:

Nature of ground	Section 34(2)(a)	Section 48(1)	
	Challenging party must 'establish' from arbitral record:	_	
Party Incompetence	(i) party incapacity	(a)party incapacity OR	
OR Jurisdictional issue due to agreement invalidity	ii) arbitration agreement invalid under applicable law	arbitration agreement invalid under applicable law	
Due Process Or Procedure	(iii) improper notice of arbitrator appointment or arbitral proceedings	(b) improper notice of arbitrator appointment or arbitral proceedings	
	OR Party otherwise unable to present its case	OR Party otherwise unable to present its case	

Subject Matter scope	(iv) Arbitral award passed (c) Arbitral award pa		
of tribunal's	on a 'dispute' (I) not	on a 'difference' (a) not	
jurisdiction	contemplated by or (II)	contemplated by or (b)	
	falling outside terms of or	falling outside terms of or	
	(III) beyond the scope of	(c) beyond the scope of	
	submission to arbitration.	submission to arbitration.	
Due Process	(v) (I) tribunal's	(d) (I) tribunal's	
	. ,		
Or	composition or (II)	composition or (II)	
Procedure	tribunal's procedure was	tribunal's procedure was	
	not in accordance with	not in accordance with	
	arbitral agreement or the	arbitral agreement or law	
	Act	of the country where	
		arbitration was conducted	
Finality of Award	-	(e) award has (I) not yet	
under seat law		become binding or (II)	
		been set aside or	
		suspended by under the	
		law of the country under	
		which award was made.	
Residuary ground to	_	_	
be allowed at Court's			
discretion			
discretion	Section 34(2)(b)	Section 48(2)	
	2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2 2	200000	
	Court find that:	Court find that:	

Nature of subject	Subject matter is non-	Subject matter is non-	
matter of dispute	arbitrable under applicable	arbitrable under Indian	
	law	Law	
	(*)		
Contrary to Indian	(i) award contrary to public	(a) award contrary to	
Law and Policy	policy of India -	public policy of India -	
Note: In Shri Lal			
Mahal v Progetto	• induced by fraud,	• induced by fraud,	
Grano Spa, (2014) 2	corruption or	corruption or	
SCC 433 (foreign	violates Section 76	violates Section 76	
award) it was held that	or 81; OR	or 81; OR	
scope of public policy	contravenes	• contravenes	
under Section 48 was	fundamental policy	fundamental policy	
narrower than the	of Indian Law	of Indian Law	
wider scope available	conflicts with most basic	conflicts with most basic	
for Section 34	notions of morality or	notions of morality or	
discussed in ONGC v.	justice	justice	
Saw Pipes Limited;			
(2003) 5 SCC 705.			

INTERIM MEASURES vis-à-vis SECTION 9

A. <u>INTRODUCTION</u>

In any jurisdiction, an indispensable requirement is that of the existence of a statutory structure relating to grant of interim reliefs. It forms an integral part of our Arbitration regime as well. Section 9 of the Arbitration and Conciliation Act, 1996 provides for the powers available with the Court and Section 17 of the Act, enshrines the powers of granting interim reliefs to the Arbitral Tribunal. Needless to add, these are exceptional powers given under the Act and are used cautiously but liberally where warranted.

Interestingly, one of the only provisions³⁷ throughout the Act, having "ETC." that too in the Marginal note itself; signifying the wide import of the powers of given under this section to the Court to meet the ends of justice (of course with the caveat of the party being entitled to the same).

Section 9 extends its reaches to Part II, International Commercial Arbitrations as well by virtue of insertion of proviso to sub-clause (2) of Section 2 of the Act vide the mega-2015 Amendment to the Act –

"[(2) This Part shall apply where the place of arbitration is in India:

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]"³⁸

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³⁷ Even Section 17 does not use the word, 'etc.'.

³⁸ By Act 3 of 2016, sec. 2 (w.e.f 23.10.2015) 2 Ins. by Act 3 of 2016, sec. 2 (w.e.f. 23.10.2015).

The amendment was a refreshing pro-arbitration act, especially in light of the BALCO's³⁹ overruling of Bhatia International⁴⁰ in so far as the inapplicability of Section 9 to foreign seated arbitrations.

Notwithstanding the wide powers envisaged under Section 9 of the Act, the Court is cautious of exercising it in cases prior to the commencement of Arbitration and only in extreme cases where the remedy under Section 17 is not efficacious, will the Court delve into granting interim relief, post commencement of arbitration proceedings.

Needless to add, upon constitution of Tribunal the interim relief/s so granted by the Court are open to be modified or vacated as the case maybe upon a Section 17 application to prevent misuse thereof, as the Tribunal may deem fit for reasons provided therein.

The newly substituted Section 17⁴¹ is identically worded [except as correctly omitted portion of the phrase 'AFTER making of the Award'⁴² and the powers of the Tribunal to grant interim reliefs have been brought at par with Section 9 powers of the Court. A breath of fresh air also came about in clarifying the enforceability of the interim reliefs granted enforceable as any Orders of the Court.

The Delhi High Court in some of its recent judgments, in cases prior to the constitution of the Arbitral Tribunal, has maintained the stand of putting the ball in the Tribunal's Court by treating any Section 9 petition as a Section 17 Application to be taken up the Tribunal after its constitution and granting the

³⁹ Bharat Aluminium Co. vs Kaiser Aluminium Technical Services Inc. (BALCO), (2012) 9 SCC 552

⁴⁰ Bhatia International vs Bulk Trading S.A., (2002) 4 SCC 105.

⁴¹ Amendment to S. 17 of the 1996 Act; See Section 27 of the old Arbitration Act, 1940.

⁴² 4. In section 17 of the principal Act, in sub-section (1), the words and figures "or at any time after the making of the arbitral award but before it is enforced in accordance with section 36" shall be omitted. Omitted vide the 2018 Amendment Act, because the AT becomes *functus Officio* post Award'

interim measure/s (under S. 9 of the Act as required qua the respective case/s) in the interregnum, till the hearing and decision in the said S. 17 application by the Tribunal.⁴³

B. GUIDING PRINCIPLES OF GRANTING INJUNCTIONS

The Madras High Court speaking through **K** Govindarajan in one of its early judgments, in Hairtha Finance Ltd. vs Atv Projects India Ltd.⁴⁴ laid out 3 aspects to be considered while invoking Section 9 petition.

- "10. From the above it is clear that to invoke Section 9 of the Act -
- (i) There should be a dispute which had arisen with respect to the subject matter in the agreement and referable to the arbitral Tribunal.
- (ii) There has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application under Section 9 of the Act. The issuance of a notice in a given case is sufficient to establish the manifest intention to have the dispute referred to an arbitral Tribunal. But it is also not necessary that notice as contemplated under Section 21 of the Act invoking arbitration clause must be issued to the opposite party before filing the application under Section 9 could be filed. But, if an application is made in such circumstances under Section 9 of the Act, the Court must satisfy that the arbitration agreement is in existence and the applicant intends to take the dispute to arbitration.
- (iii) Apart from this, the application can be entertained under Section 9 of the Act before this Court only if in a given case the subject matter of the arbitration comes within the original civil jurisdiction, both pecuniary and territorial."

⁴³ IRB Ahmedabad V adodara Super Express Tollway P. Ltd.v NHAI, 2019 SCC OnLine Del 10577; Raghuvir Buildcon Pvt. Ltd. v. Ircon Internation Ltd. 2019 SCC OnLine Del 10578; Asheesh Chaudhary v. Sunit Suri and Others 2019 SCC OnLine Del 10356

⁴⁴ Hairtha Finance Ltd. v. Atv Projects India Ltd, 2003 (2) ArbLR 376 Madras

Principles of granting any interim relief by the Court under Section 9 of the Act, beseeches the application of the guiding norms and well recognized principles governing the grant of interim injunctions under Order 38, Rule 5, and Order 39 Rule 1 & 2 and on basic tenets of the principles enshrined under the CPC, 1908 qua the same, to be exercised ex debito justitiae and in the interest of justice. The principles that guide Section 9 petitions are equally applicable to those to be granted under Section 17.

The Case Table* below further elucidates on these principles as applied by the Court.

C. PROVISION

The initial position of the provision/s granting interim reliefs before the enactment of the 1996 Act, was succinctly detailed out in **Sundaram Finance Ltd. v. NEPC** India Ltd.⁴⁷, observing –

"12. The position under the Arbitration Act, 1940 was that a party could commence proceedings in court by moving an application under Section 20 for appointment of an arbitrator and simultaneously it could move an application for interim relief under the Second Schedule read with Section 41(b) of the 1940 Act. The 1996 Act does not contain a provision similar to Section 20 of the 1940 Act. Nor is Section 9 or Section 17 similar to Section 41(b) and the Second Schedule to the 1940 Act. Section 8 of the new Act is not in pari materia with Section 20 of the 1940 Act. It is only if in an action

⁴⁵ Arvind Constructions v. Kalinga Mining Corporation and Others (2007) 6 SCC 798; National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd. AIR 2004 Bom 136; Om Sakthi Renergies Limited v. Megatech Control Limited (2006) 2 Arb LR 186 (Madras HC) – "It is true that the provisions like Order 38 Rule 5 or Order 39 Rules 1 and 2 of the Code of Civil Procedure are not contained in the Arbitration and Conciliation Act, 1996 but its principles will be applicable as has been held by the Supreme Court in M/s. ITI Ltd., Vs. M/s. Siemens Public Communications Network Ltd."

⁴⁶ Bombay High Court Yusuf Khan v. Prajita Developers Pvt. Ltd Arbitration Petition No. 1012 of 2018, (dated 25.03 2019)—'The decision of the Division Bench in the case of Nimbus Communications (supra) was followed by me in the case of Mahaguj Collieries Ltd. (supra), wherein I have held that after Amendment of Section 17, the principles laid down in the decision of the Division Bench in the case of Nimbus Communications (supra) would equally apply to the Arbitral Tribunal, whilst exercising powers under Section 17 and more particularly Section 17(1)(ii)(b) of the Act."

⁴⁷ Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479

which is pending before the court that a party applies that the matter is the subject of an arbitration agreement does the court get jurisdiction to refer the parties to arbitration. The said provision does not contemplate, unlike Section 20 of the 1940 Act, a party applying to a court for appointing an arbitrator when no matter is pending before the court. Under the 1996 Act, appointment of arbitrator/s is made as per the provision of Section 11 which does not require the court to pass a judicial order appointing arbitrator/s. The High Court was, therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act."

Interim Relief provisions from their origin to extant under the Indian Arbitration Act/s-

- ❖ The Old Arbitration Act, 1940 BLUE
- ❖ Provision as under the original 1996 Act **BLACK**
- ❖ SUBSTITUTION/ INSERTION vide the 2015/2018 amendments are marked in GREEN
- ❖ DELETION vide the 2015/2018 amendments are marked in **RED**.

BOLD - Emphasis supplied

THE OLD ARBITRATION ACT, 1940

18. Power of Court to pass interim orders.

(1) Notwithstanding anything contained in section 17, at any time after the filing of

the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary. (2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

41. Procedure and powers of Court.

Subject to the provisions of this Act and of rules made there under-

- (a) the provisions of- the Code of Civil Procedure, 1908, (5 of 1908) shall apply to all proceedings before the Court, and to all appeals, under this Act, and
- (b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

The SECOND SCHEDULE of the Arbitration Act, 1940 POWERS OF COURT

- 1. The preservation, interim custody or sale of any goods which are the subjectmatter of the reference.
- 2. Securing the amount in difference in the reference.
- 3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
- 4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

THE ARBITRATION & CONCILIATION ACT, 1996 (as amended till date)

9. Interim measures etc. by Court –

- [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a Court-
- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely:-
- (a) the preservation, interim custody or sale of any goods which are the subjectmatter of the arbitration agreement;
- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the Court to be just and convenient,
- and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.
- (2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral

proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

It is imperative to provide the Kerala High Court's terse exposition in **M** Ashraf v. Kasim VK⁴⁸, of the Courts entertaining an application under Section 9(1) of the Act, at the three different stages –

"9. Exercise of power by the Court under Section 9(1) of the Act is contemplated at three stages: (1) before commencement of arbitral proceedings (2) during arbitral proceedings and (3) at any time after passing of the arbitral award but before it is enforced. Exercise of power by the Arbitral Tribunal under Section 17(1) of the Act is contemplated at two stages: (1) during arbitral proceedings and (2) at any time after making of the award but before it is enforced.

10. The approach of the Court in entertaining an application under Section 9(1) of the Act, at the three different stages mentioned above, shall not be the same. At the <u>first stage</u>, that is, before commencement of arbitral proceedings, evidently, the restriction provided under Section 9(3) of the Act against entertaining an application under Section 9(1), does not apply. This is for the reason that, at that stage, the Arbitral Tribunal does not exist and no question of exercise of power by it under Section 17(1) of the Act then arises. The decisions of the Apex Court in Sundaram Finance Ltd. v. NEPC India Ltd., (1999) 2 SCC 479, Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155and the decision of this Court in Board of Trustees of Port of Cochin v. Jaisu Shipping Company, 2012 (1) KLT

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⁴⁸ M Ashraf v. Kasim VK, 2018 SCC Online Ker 4913

217 provide necessary guidelines regarding exercise of power by the Court under Section 9(1) of the Act, before commencement of arbitral proceedings."

11. At the <u>second stage</u>, that is, during arbitral proceedings, the Court shall adopt a strict approach in entertaining an application under Section 9(1) of the Act. The party who approaches the Court at that stage with an application under Section 9(1) of the Act shall be required by the Court to satisfy the court regarding the <u>existence of circumstances which would render the remedy provided to him under Section 17 not efficacious.</u> He shall plead the circumstances which may render that remedy not efficacious. He should be able to convince the Court why he could not approach the Arbitral Tribunal and obtain interim relief under Section 17(1) of the Act.

12. When an application under Section 9(1) of the Act is made by a party at the third stage, that is, after the passing of the award but before it is enforced, the Court shall bear in mind that it is a stage where the Arbitral Tribunal has ceased to function. Except in cases provided under Section 33 of the Act, the Arbitral Tribunal would have then ceased to function. The unsuccessful party may then take hasty steps to alienate or dispose of the property which was the subject matter of dispute. The successful party may then approach the Court with an application under Section 9(1) of the Act for granting interim relief. In such circumstances, it would not be proper for the Court to reject the application merely on the ground that he has got efficacious remedy under Section 17 of the Act. The Court has to adopt a liberal approach in such circumstances. When interim relief is sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the subject matter of dispute or the fruits of the proceedings till the enforcement of the award. Interim measure of protection, then sought, is a step in aid of enforcement of the award. It is intended to ensure that the award is not rendered illusory by the opposite party. In such circumstances, when urgent relief is required, especially by a party who is successful in the arbitral proceedings,

remedy under Section 17 of the Act may not be efficacious because the Arbitral Tribunal may not be then actually functioning. It may also be possible that the Arbitrator is not readily available. When an application under Section 9(1) of the Act is made by a party after the passing of the award but before it is enforced, the Court has to consider all these circumstances. Of course, the party who approaches the Court has to enlighten the Court with regard to such or similar circumstances."

D. <u>COMPARATIVE PROVISIONS IN UNCITRAL</u>, <u>ENGLISH LAW</u>, SIAC, ICC (LATEST EDITIONS)

ENGLISH	UNCITRAL MODEL	SIAC Rules 2016	ICC
Arbitration	LAW 1985 (By Court)	(by AT)	(by AT)
Act 1996			
(By Court)			
Section 44	Section 9	Rule 30:	Article 28:
Court powers	Arbitration agreement	Interim and	Conservatory and
exercisable in	and interim measures	Emergency Relief	Interim Measures.
support of arbitral	by Court.		
proceedings.		30.1 The Tribunal	1) Unless the
	It is not incompatible	may, at the request of	parties have
(1) Unless otherwise	with an arbitration	a party, issue an order	otherwise agreed, as
agreed by the parties,	agreement for a party to	or an Award granting	soon as the file has
the court has for the	request, before or	an injunction or any	been transmitted to
purposes of and in	during arbitral	other interim relief it	it, the arbitral
relation to arbitral	proceedings, from a	deems appropriate.	tribunal may, at the
proceedings the same	court an interim	The Tribunal may	request of a party,
power of making	measure of protection	order the party	order any interim
orders about the	and for a court to grant	requesting interim	or conservatory
matters listed below	such measure.	relief to provide	measure it deems

as it has for the
purposes of and in
relation to legal
proceedings.
(2) Those matters
are-
(a) the taking of the
evidence of witnesses;
(b)the preservation of
evidence;
(c)making orders
relating to property
which is the subject of
the proceedings or as
to which any question
arises in the
proceedings—
(i) for the inspection,
photographing,
preservation custody
or detention of the
property, or
(ii)ordering that
samples be taken
from, or any
observation be made
of or experiment
conducted upon, the

Section 5.

Court-ordered interim

measures

Article 17 J.

Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power accordance with its own procedures consideration of the of specific features international arbitration.

appropriate security in connection with the relief sought.

30.2 A party that wishes to seek emergency interim relief prior to the constitution of the Tribunal may apply such relief for the pursuant to procedures set forth in Schedule 1.

30.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.

SCHEDULE 1

Point 8

appropriate. The tribunal arbitral make may the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, the as arbitral tribunal considers appropriate.

2) Before the file is transmitted to the arbitral tribunal. and in appropriate circumstances even thereafter, the parties may apply to competent any judicial authority interim for or conservatory The measures.

property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d)the sale of any goods the subject of the proceedings;

(e)the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court the may, on application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for purpose the of preserving evidence or assets.

The Emergency Arbitrator shall have the power to order or relief that he deems implementation of necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written infringement or a submissions by the The parties. Emergency Arbitrator shall give summary reasons for his decision in writing. The Emergency Arbitrator may modify vacate the preliminary order, the interim order Award for good cause

POINT 12

The parties agree that an order or Award by an Emergency Arbitrator pursuant to

application of party to a judicial authority for such any interim measures or for the any such measures ordered bv an arbitral tribunal shall not be deemed be an waiver of the arbitration agreement and shall affect the not relevant powers reserved the to arbitral tribunal. Any such application and any measures taken by iudicial the authority must be notified without delav the to Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

- (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
- (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
- (6) If the court so orders, an order made by it under this section shall cease to

this Schedule 1 shall be binding on the parties from the date it made. undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.

SCHEDULE 1 POINT 10

The Emergency
Arbitrator shall have
no power to act after
the Tribunal is
constituted. The
Tribunal may
reconsider, modify or
vacate any interim
order or Award issued

Notes on dispute resolution practice

have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.

by the Emergency
Arbitrator, including a
ruling on his own
jurisdiction. The
Tribunal is not bound
by the reasons given
by the Emergency
Arbitrator.

SCHEDULE 1 POINT 10

Any interim order or Award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.

E. JURISPRUDENCE

Year	Case Citation	Ratio	
	CACEC 1 1 111	040 A . [G 10 G 1G1 11]	
	CASES under the old 1940 Act [Sec 18 r.w. Second Schedule]		
1972	Air Foam Industries P.	In a judgment ahead of its time, the Delhi High court	
	Ltd v. Union of India	allowed the application of the applicant under	
	AIR 1973 Del 253	Section 41 and Schedule II of the Arbitration Act	
		read with Order 39, Rule 2 and Section 151 of the	
		CPC, restraining the Union of India from effecting	
		recovery of the amounts claimed to be due from the	
		other pending bills of the petitioner. It expounded	
		the law holding that -	
		"22. Lastly Mrs. Pappu laid much stress on the	
		"sanctity of the contract" and urged that it is the duty	
		of the court to uphold the clause. I am not prepared	
		to accept this argument. <u>If the contract is</u>	
		sanctimonious it does not mean that the action of the	
		court under the Second Schedule read with Section	
		41 of the Arbitration Act is profane and a Civil	
		Court is powerless in the face of this clause and is	
		unable to make any order even when it finds that the	
		action of one of the parties to the contract is wholly	
		arbitrary and unjustified. The "powers of court" set	
		out in the Second Schedule are conferred on a Civil	
		Court in order to do what is just and reasonable in	
		the circumstances and it can make ancillary orders	
		to that end. This does not mean that the courts no	
		longer insist on the binding force of contracts	
		deliberately made. It only means that they will not	
		allow the words, in which they happen to be phrased,	
		to become tyrannical masters.	

		23. In situation such as this it is the function of the
		court to see that what is just and right is done to the
		parties <u>until the arbitrator gives his award."</u>
1984	Supreme Court	The Apex court in a case involving a contractor
	HMK Ansari & Co v.	seeking an injunction under Section 41 read with
	Union of India	Second Schedule of the Arbitration Act and Order
	AIR 1984 SC 29	39 Rules 1-2 read with Section 151 CPC asking the
		court to restrain the Union of India from
		appropriating or withholding or recovering the
		amount claimed from its other bills in any manner
		whatsoever, held - "The court has got the power to
		pass an order of injunction only for the purpose of
		and in relation to arbitration proceedings' before the
		Court.""It was not open to the Court to pass the
		interim injunction restraining the respondent from
		withholding the amount due to the appellant under
		pending bills in respect of other contract".
		The law laid down by the Supreme Court was that
		Section 41 (a) makes only the procedural rules of
		CPC applicable to the proceedings in Court under
		the Arbitration Act. An order of attachment before
		judgment under Order 38 Rule 5 CPC is not a
		matter of mere procedure. The source of that power
		is in 41(b) and not 41(a) of the Arbitration Act, 1940.

1993	Rashtriya Ch	emicals and
	Fertilizers	Ltd vs
	Fertichem	
	S.A.,	Geneva,
	Switzerland	
	and others.	
	(1993) SCO	C OnLine
	Bom 374	

The Bombay high court while interpreting S. 18(1) and (2) of the Arbitration Act, 1940 held that the Powers of the Court to pass interim Order under section 18 are much wider than those available under Order 38, Rule 5, Civil Procedure Code, however such power is discretionary and has to be exercised only when circumstances so warrant.

CASES under the 1996 Act [prior to the 2015 Amendment]

1999 Sundaram Finance Ltd.
v. NEPC India Ltd.
(1999) 2 SCC 479

The Supreme Court decided the issue whether the Court under Section 9 has the jurisdiction to pass interim orders even before arbitral proceedings commence before an arbitrator is appointed.

The court gave literal interpretation to the then Section 9 worded as "before or during the arbitral proceedings", being the material words contemplating two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. "Any other interpretation, like the one given by the High Court, will have the effect of rendering the word "before" in Section only 9 as redundant. This is clearly not permissible. Not does the language warrants such an interpretation but it was necessary to have such a provision in the interest of justice." It further held that, "but for such a provision, no party would have

		a right to apply for interim measure before notice
		under Section 21 is received by the respondent."
2002	Delta Constructions v	The Bombay High Court held that the "power of the
	Narmada Cement	court to secure the amount in dispute under
	(2002) 2 BomLR 225	arbitration is not hedged by the predicates as set out
		in Order 38. All that the court must be satisfied is
		that an interim measure is required."
		In other words, the party coming to the court must
		show that if it is not 'secured, the Award which it may
		obtain cannot be enforced on account of acts of a
		party pending arbitral process.
2004	Ashok Traders vs.	The Apex court took into consideration the old 1940
	Gurumukh Das Saluja	Act, the new 1996 Act and Sundaram's judgment
	A.I.R. 2004 SC 1433	(supra) and observed that - "Para 13. A & C Act,
		1996, is a long leap in the direction of alternate
		dispute resolution systems. It is based on
		UNCITRAL Model. The decided cases under the
		preceding Act of 1940 have to be applied with
		caution for determining the issues arising for
		decision under the new Act. An application under
		Section 9 under the scheme of A & C Act is not
		a suit. <u>Undoubtedly, such application results in</u>
		initiation of civil proceedings but can it be said that a
		party filing an application under Section 9 of the Act
		is enforcing a right arising from a contract? 'Party' is
		defined in Clause (h) of Sub-section (1) of Section 2
		of A & C Act to mean a party to an arbitration
		agreement. So, the right conferred by Section 9 is on
		a party to an arbitration agreement. The time or the

		stage for invoking the jurisdiction of Court under
		Section 9 can be (i) before, or (ii) during arbitral
		proceedings, or (iii) at any time after the making of
		the arbitral award but before it is enforced in
		accordance with Section 36. With the
		pronouncement of this Court in Sundaram Finance
		Ltd. v. NEPC India Ltd MANU/SC/0012/1999:
		[1999]1SCR89 the doubts stand cleared and set at
		rest and it is not necessary that arbitral proceedings
		must be pending or at least a notice invoking
		arbitration clause must have been issued before an
		application under Section 9 is filed."
2007	Adhunik Steels Ltd. v.	The Supreme Court clarified while dealing with the
	Orissa Manganese and	interim powers of the Courts under the Arbitration
	Minerals Pvt. Ltd.	Act observing that "we feel that it would not be
	AIR 2007 SC 2563	correct to say that the power under Section 9 of the
		Act is totally independent of the well-known
		principles governing the grant of an interim
		injunction that generally govern the courts in this
		connection."
2011	VF Services (UK) Ltd. v.	The court held that relief under Sec 9 is not available
	Union of India,	in contracts which are determinable and a prayer to
	OMP No. 658 of 2011	specifically enforce them cannot be granted, in view
	Del HC	of Sec 14(1)(c) read with s. 41 of the Specific Relief
		Act.
		[See also Rajasthan Breweries Ltd. v. the Stroh
		Brewery Ltd., 2000 (55) DRJ 68 (Del HC).]

circumscribing one. It held -*10. The principle is that when the Court decides a petition under Section 9, the principles which have been laid down in the Code of Civil Procedure, 1908 for the grant of interlocutory reliefs furnish a guide to the Court. Similarly, in an application for attachment, the underlying basis of Order XXXVIII Rule 5 would have to be borne in mind. At the same time, it needs to be noted that the rigors of every procedural provision of the CPC cannot be put into place to defeat the grant of relief which would subserve the paramount interests of the justice. The object of preserving the efficacy of arbitration as an effective form of dispute resolution must be duly fulfilled. This would necessarily mean that in deciding an application under Section 9, the Court would while bearing in mind the fundamental principles underlying the provisions of the CPC, at the same time, have the discretion to mould the relief in appropriate cases to secure the ends of justice and to preserve the sanctity of the arbitral process." 2013 Dirk India Private Limited v. Maharashtra State Electricity Generation benefit since Section 9 proceedings cannot be	2013	Deccan Chronicle	The Bombay High Court through Justice
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Limited postulates application under Section 9 only by the v. Maharashtra State party seeking enforcement of the Award and for its Electricity Generation benefit since Section 9 proceedings cannot be			preserve the sanctity of the arbitral process."
v. Maharashtra State party seeking enforcement of the Award and for its Electricity Generation benefit since Section 9 proceedings cannot be	2013	Dirk India Private	The Bombay High Court clarified that Section 9
Electricity Generation benefit since Section 9 proceedings cannot be		Limited	postulates application under Section 9 only by the
		v. Maharashtra State	party seeking enforcement of the Award and for its
Co. substituted for a Section 34 proceedings. It observed,		Electricity Generation	benefit since Section 9 proceedings cannot be
		Co.	substituted for a Section 34 proceedings. It observed,

Ltd.

(Appeal No.114 of 2013

In Arbitration Petition

No.355 Of 2011,

decided on 19.03.2013)

"Despite this, the learned Single Judge was completely in error in proceeding to decide as to what interim order could be passed to govern the rights of the parties pending the final hearing of the petition under Section 34. The learned Single Judge ought to have decided the preliminary issue as to the maintainability of the petition under Section 9, particularly having come to the conclusion prima facie that there was substance in the objection to the maintainability of the petition. On the issue of maintainability, we hold that the petition which was filed under Section 9 by DIPL was not maintainable and ought not to have been entertained."

CASES post 2015 Amendment of the 1996 Act

2016 Natrip Implementation
Society v. IVRCL Ltd.
2016 SCC Online Del
5023

The Hon'ble Delhi High Court rejected the Appeal, on grounds of no allegation having been brought to the attention of the court that the judgment debtor was dispersing its assets or acting in a manner so as to frustrate the enforcement of the award that may be passed. While laying down the guiding principles for adjudicating a Section 9 petition as well as a Section 17 application (as then recently amended), it stated – "In order for the court to exercise its powers under Order XXXVIII Rule 5 of the CPC, it is necessary that twin conditions be satisfied. First, that the plaintiff establishes a reasonably strong prima facie case for succeeding in

the suit; and second, that the court is prima facie satisfied that the defendant is acting in a manner so as to defeat the realisation of the decree that ultimately may be passed. The object of Sections 9(1)(ii)(b) and 17(1)(ii)(b) of the Act is similar to the object of order XXXVIII Rule 5 of the CPC. The Arbitral Tribunal while exercising powers under Section 17(1)(ii)(b) of the Act or the Court while exercising power under Section 9(1)(ii)(b) of the Act must be satisfied that it is necessary to pass order to secure the amount in dispute. Such orders cannot be passed mechanically. Further, the object of the order would be to prevent the party against whom the claim has been made from dispersing its assets or from acting in a manner to so as to frustrate the award that may be passed.

[See also <u>Motor & General Finance Ltd. v. Bravo</u> <u>Hotels Pvt. Ltd.</u> 2018 (2) ArbLR 50 (Delhi), para 15; Steel Authority of India Ltd. V. AMCI PTY Ltd. 2011 VII AD (Delhi) 644, para 44]

2017 Trammo Dmcc vs

Nagarjuna Fertilizers.

Commercial Arbitration

Petition (Lodg) No. 359

OF 2017

Decided on 9 October,

2017

The Bombay High court while marrying Section with the object of enforcement of a foreign award observed that - "The purpose and object of the amended provisions of the 2015 Act must certainly prevail over a narrow interpretation which would defeat the purpose and object of the 2015 amendment Act. The petitioner who holds monetary awards against the respondent would be

		prevented from approaching the court for interim
		reliefs where the assets of the respondent are
		available within the jurisdiction of this Court. As
		clearly seen from observations in paragraph 97 of the
		Bharat Aluminium Company Vs. Kaiser
		Aluminium Technical (BALCO) (supra), then in
		Brace Transport Corporation of Monrovia,
		Bermuda Vs. Orient Middle East Lines Ltd., Saudi
		Arabia & Ors. (supra), Wireless Developers Inc. Vs.
		Indiagames Limited (supra), and Tata International
		Ltd. Vs. Trisuns Chemical Industry Limited (supra),
		the Court would have territorial jurisdiction if the
		monies/the bank accounts are located within the
		jurisdiction of the Court. The legislature would not
		envisage a situation that a party can invoke
		jurisdiction of the Court to enforce a monetary
		award under S. 47 and 49 of the Act, however,
		for any relief of the nature Sec 9 inter alia
		contemplates the jurisdiction of the same Court
		would not be available. This would create a
		complete incongruity in giving effect to the
		provisions of Sec 9 in a situation as in the present
		case and defeat the legislative intent.
2017	V.K. Sood Engineers	In a case of a section 9 petition being filed during the
	and	pendency of the Arbitration proceedings, the Court
	Contractors v. Northern	allowed the same observing that the petitioners had
	Railways,	made out a prima facie case to show that the act of
	2017 SCC Online Del	the respondents in withholding the dues of the
	9211	petitioner on account of alleged liability of another

		separate entity M/s.Vaneet Kumar Sood Engineers
		and Contractors-DDS (JV), is prima facie illegal.
		Reiterating the principles laid out earlier by several
		high court judgments, it held that - "The
		principles for grant of injunction order under
		Section 9 of the Act are well known. The Division
		Bench of this High Court in the case of Anantji Gas
		Service v. Indian Oil Corporation, 2014 SCC
		OnLine Del 3732 held as follows:-
		"10. The law is well settled that the power granted to
		the Civil Court under Section 9 of the Act is akin to
		Order 39 Rules 1 & 2 of CPC, 1908 and therefore
		the court has to satisfy itself that the petitioner has
		established the three <u>cardinal principles of prima</u>
		facie case, balance of convenience and irreparable
		loss in case no protection is extended by way of
		interim measure under Section 9 of the Act. Vide
		Adhunik Steels Ltd. v. Orissa Mangenese and
		Minerals Pvt. Ltd., (2007) 7 SCC 125 and Arvind
		Constructions Co. (P) Ltd. v. Kalinga Mining
		Corporation (2007) 6 SCC 798."
2018	Parsoli Motor Works	The Delhi High Court held that injunctions that
	(P)	cannot be granted under Section 41 of the Specific
	Ltd. v. BMW India P	Relief Act, cannot be granted under Section 9 of
	Ltd. 2018 SCC Online	Arbitration Act, 1996 either.
	Del 6556	
2018	Heligo Charters Private	POSTAWARD -
	Limited v. Aircon	The Bombay High Court, allowed a foreign party to
	Beibars FZE,	secure the Indian award debtor's assets, pending

	2018 SCC Online Bom	enforcement of the foreign award in India, and held
	1388	that "operation of provisions of Section 9 cannot be
		excluded in absence of a specific agreement to the
		contrary".
2018	M/s. Eptisa Servicios De	In a thought-provoking case the Delhi High Court in
	Ingeniera S.L vs.	a section 9 petition granted the order since the
	National Highways &	petitioner was able to make out a prima facie case
	Infrastructure	in its favour highlighting that the Impugned
	Development Corp.	Termination notice had been issued prior to the
	Ltd.	expiry of the cure period and therefore, was not in
	2018 SCC OnLine Del	compliance with Clause 2.9.1 (a) of the GCC and
	12053	accordingly the respondent was restrained from
		giving effect to the Impugned Termination Notice
		dated 27.08.2018 during the pendency of the
		arbitration proceedings initiated by the petitioner by
		its above-mentioned notice.
2019	Allied Medical Ltd. Vs.	Interestingly, the Court rejected any injunction
	Uttar Pradesh Health	from being blacklisted on account of the
	Systems Strengthening	petitioners having concealed material facts from
	Project	the court and held that "It is a well settled principle
	FAO 68/2019 and CM	of law that while seeking discretionary relief of
	No. 8294/19 Decided	injunction the parties must approach the court with
	On: 25.03.2019	clean hands by disclosing each and every material
		fact."
2019	CVCIGP II Client	LCIA
2019	CVCIGP II Client Rosehill Limited Vs.	LCIA The court refused to entertain a Section 9 petition,

	O.M.P. 172/2012	Petitioners not showing any inclination for the last
	Decided On:	so many years to proceed with the arbitration
	08.03.2019	with diligence, under the aegis of LCIA, which led
		the claim itself stand withdrawn (as per the e-mail
		dated 3rd January, 2019, sent by the LCIA).
2019	ECI-Nayak (JV) Vs.	In a Petition under Section 9 of A&C Act for
	Ircon International Ltd.	restraining the party from terminating the Contract
	OMP (I) (COMM)	and from levying liquidated damages, the Court held
	223/2019 Decided On:	it to be a matter to be considered by the Arbitral
	22.07.2019	Tribunal and observed that "this Court in exercise of
		its power under Section 9 of the Act and on the basis
		of the pleadings of the parties cannot restrain the
		respondent no. 1 from exercising its contractual
		right. In my opinion, the petitioner has not been able
		to make out a prima facie case for exercise of such
		jurisdiction."
2020	Inter Ads Exhibition	The Court refused to restraining the Respondent to
	Pvt. Ltd v. Busworld	give effect to a termination notice as the contract was
	International	determinable and that since the obligations under
	Cooperative.	the contract, cannot be enforced due to the legal bar
	2020 SCC OnLine Del	under 14(d) of SRA, consequently, S. 41(e) prevents
	351	this Court from granting any injunction.
2020	Kanti Bijlee Utpadan	The Court refused to grant interim relief qua
	Nigam Ltd v. GSCO	encashment of BGs since the only two exceptions
	Infrastructure 2020 SCC	under which the Court can grant injunction of BGs,
	OnLine Del 299 & L&T	as detailed in <i>Hindustan Construction Co.</i> (AIR
	v. Experion Developers	2006 Delhi 169), being egregious fraud and
	1	

	SCC OnLine Del 299	applicable to the instant case. No ground made out
	& 11549	of special equities as well.
2020	Ashwani Minda. v. U-	SIAC & Sec 9
	Shin Ltd.	An excellent judgment rendered by the Delhi High
	OMP (I) (COMM.)	Court refusing the Sec. 9 petition, & distinguishing
	90/2020	the case of Raffle Design held as follows - "It is in
	MANU/DE/1043/2020	this background that the observation was made by
	Decided On:	the Court in Raffle Design (supra) para 105, which is
	12.05.2020	being so heavily relied upon by the learned
		counsel for the Applicants and reads as:
		"105. However, in my view, a party seeking
		interim measures cannot be precluded from doing
		so only for the reason that it had obtained a similar
		order from an arbitral tribunal. Needless to state
		that the question whether the interim orders
		should be granted under section 9 of the Act or not
		would have to be considered by the Courts
		independent of the orders passed by the arbitral
		tribunal. Recourse to Section 9 of the Act is not
		available for the purpose of enforcing the orders of
		the arbitral tribunal; but that does not mean that
		the Court cannot independently apply its mind and
		grant interim relief in cases where it is warranted."
		Therefore, two factors distinguish the said case from
		the present one. Firstly, in that case, there was no
		Clause in the Dispute Resolution Mechanism by
		which the parties had excluded the applicability of

Section 9 of the Act and secondly, unlike in the present case, the Rules governing the Arbitration were SIAC Rules, which permit the parties to approach the Courts for interim relief. Parties had agreed that it would not be incompatible for them to approach the Courts for interim relief. Petition is not maintainable in this Court and is accordingly dismissed."

9(1)(e) Residuary power - "such other interim measure of protection as may appear to the court to be just and convenient."

2019	Ishvakoo (India) Pvt.	The Court exercised its powers under the clause (e)
	Ltd.	of S. 9(1) of the Act in a case where the Arbitral
	Vs. National Projects	Tribunal in its Award was unaware of the fact that
	Construction	the bank guarantees had already been encashed and
	Corporation	had not returned any finding on keeping the Bank
	Ltd.	guarantee alive in pursuance of the High Court's
	O.M.P. (I) (COMM.)	Order. It observed that - "Given this position, in my
	57/2019	view, if I were to permit the respondent to continue
	Decided On:	to hold on the money, it would not only result in the
	05.04.2019	respondent unjustly enriching itself but would also
		be contrary to the purpose and object with which
		order dated 15.12.2015 was passed by this Court
		when arbitration had not commenced."
2019	Bhubaneshwar	In a petition filed under S. 9, seeking relief, inter alia,
	Expressways	payment of rent by the Respondent to the petitioner
	Pvt. Ltd. v. NHAI	that Court invoked 9(1)(e) to grant the same opining
	2020 (1) ArbLR 144	- "19. We are therefore of the opinion that while
	(Delhi)	exercising the powers under Section 9 of the Act, the

Court can certainly be guided by the principles of Order XV-A and Order XXXIX Rule 10 of CPC. The same view was expressed by another Division Bench of this Court in the case of Value Source Mercantile Ltd. (supra). The relevant portion of the said judgment reads:

"13. Section 9 of the Arbitration Act uses the expression "interim measure of protection" as distinct from the expression "temporary injunction" used in Order XXXIX Rules 1&2 of the CPC. Rather. "interim injunction" in Section 9 (ii) (d) is only one of the matters prescribed in Section 9 (ii) (a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for "interim measure of protection". Section 9(ii)(e) is a residuary power empowering the Court to issue/direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder "shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it"."

See also Welspun Infratech v. Ashok Khurana 2014 (2) Arb LR 520 (Bom) 22. ibid 23. Value Advisory Services v ZTE Corporation (2009) 3 Arb LR 315]

On sub-section (2) providing limitation of 90 days

2018 NGC Network

India With regard to the 90 days time period, the Court Pvt. Ltd. Vs. Orangefish | held - "that the 2018 Arbitration Agreement had Entertainment Pvt. Ltd.
O.M.P. (I) (COMM.)
326/2018 Decided On:
18.09.2018

come to an end because the Arbitral Tribunal was not constituted within 30 days, to my mind, this is an argument which is thoroughly misconceived. The petitioner had, as is evident from a narration of events set out above, taken every possible step for appointment of an Arbitrator beginning with placing its request with the DIAC qua the same on 06.04.2018, which was a date that fell well before the expiry of 30 days from the date of execution of the 2018 Arbitration Agreement."

2019

Neeru Jain v. Jasmine Buildmart Pvt. Ltd 2019 SCC OnLine Del 10731 52. Petitioners must take steps for constitution of the Arbitral Tribunal as the present interim order shall remain in operation only for the period as prescribed in Section 9(2) of the Act. The parties are at liberty to move an application under Section 17 of the Act before the Arbitral Tribunal and the Tribunal will be free to pass such other and further orders on such an application being made.

The Court allowed the Sec 9 petition and restrained the Resp. from executing Sale Deeds in respect of the Apartments, which were the subject matter of the petitions and also restraining from parting with the possession, in any manner, observing that the that if the subject Apartments are not preserved, irreparable prejudice will be caused to the petitioners who have been able to set up a, *prima*

Notes	on disp	ute reso	lution	practice

		with an anomal resolution practice		
		facie, case in their favour for grant of ar		
		interlocutory injunction.		
		Reliance was placed upon the first principles of		
		granting interlocutory injunctions as determined by		
		the Supreme Court in Dorab Cawasji Warden		
		(1990) 2 SCC 117) to observe that power to grant		
		injunction would include undoing acts illegally done		
		or restoration of what is wrongfully taken from the		
		complaining party.		
On	sub-section (3) where remed	y provided under section 17 is NOT efficacious.		
2019	Bhubaneshwar	The Court applied sub-section (9) of sec 0 to come		
2019		The Court applied sub-section (3) of sec 9 to case		
	Expressways	where though the petitioner had filed an application		
	Pvt. Ltd.	under S.17 of the Act before the Tribunal, but the		
	v. NHAI	Tribunal could not function on account of one of the		
	2020 (1) ArbLR 144	Co-Arbitrators recusing. Thus, "It is settled law that		
	(Delhi)	if the alternative remedy is not <u>efficacious</u> and a party		
		is suffering loss and hardship, it can certainly avail		
		the remedy available to it, which in the present case		
		is a petition under S. 9 of the Act."		
2020	Hero Wind Energy	A case where the court held that the subject matter		
	Private	of the dispute in question was relatable to an O & M		
	Limited Vs. Inox	Agreement, wherein a dispute connected therewith		
	Renewables Ltd.	was pending before the Arbitral Tribunal and		
	O.M.P. (I) (COMM.)	therefore the Section 9 petition was not maintainable		
	429/2019 Decided On:	pursuant to sub-Section 9(3) of the Act.		

16.03.2020

2019	Manbhupinder Singh	In a recent hard-hitting judgment, the Gujarat
	Atwal vs Neeraj	High Court lambasted the petitioners for invoking
	Kumarpal Shah	section 9 petition and imposed cost by holding that
	C/MCA/90/2019	-"10.2 The total sequence of events and the conduct
	Decided on 21 June,	of the applicant has contributed only to bring the
	2019	dispute resolution remedy of arbitration under the
	Gujarat High Court	Arbitration Act, to a disrepute10.3 The facts and
		circumstances not only reveal the above sorry state
		of affairs, the present application came to be filed by
		the applicant invoking Section 9 of the Act when the
		new Arbitral Tribunal was already constituted. The
		members of the Tribunal and the Presiding
		Arbitrator were appointed by the parties and
		application under Section 17 of the Act of the
		applicant was also pending. In the cumulative
		circumstances obtained above, the present
		proceeding could be said to be hardly bona fide and
		partakes abuse of process of law. 11. Therefore,
		while dismissing the present application, cost is
		required to be ordered."
2020	M/S Tata Advanced	The Delhi High Court while dealing with an appeal
	Systems	against an interim order passed by the Tribunal
	Ltd. M/S. Telexcell	observed that the Tribunal had the powers to direct
	Information Systems	a party to furnish a BG but had wrongly exercised
	Ltd.	the power in the absence of a s. 17 application filed,
	ARB. A. (COMM.)	in this instant case and as -
	29/2019	
	Decided on 14.05.2020	"as a matter of record, <u>no application was filed by the</u>
		Respondent under Section 17 of the Act. While the
	1	<u> </u>

Respondent may be right in contending that mentioning of a wrong provision of Law or nonmentioning of a correct provision, cannot be fatal to grant of relief, if otherwise warranted, but in the present case the question is not of form but of substance. Respondent had not even sought the relief granted by the Tribunal. More importantly, since there was no application under Section 17 of the Act, Respondent had neither set up a case that the Appellant was about to remove his assets from the limits of the jurisdiction of the Tribunal, with intent to obstruct or delay the fruits of the Award coming to the Respondent in case he succeeded nor was any prima facie case made out. Since there was no application and thus no pleadings, Appellant did not have the opportunity to satisfy the Tribunal about its financial condition or bonafides that it would not fritter away its assets. Claims of the Respondent were disputed by the Appellant and it had no occasion to rebut the existence of prima facie case in favour of the Respondent herein. In the absence of any application under Section 17 of the Act with the necessary averments, in my view, the Tribunal was not justified in passing the Impugned Order.

M/S Halliburton Offshore Services Inc. v. Vedanta Limited & Anr. (May 2020)

The latest order qua Section 9 got passed by the Delhi High Court on 29.05.2020, titled *M/S Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.*.⁴⁹

Interestingly, the case dealt with the COVID-19 crisis, wherein a Contractor had filed a Section 9 petition detailing force Majeure reasons of pandemic for the delay in completion of project milestones and sought and had attained the interim direction to the employer restraining it from encashing the Bank guarantees. The Court thereafter in this Order vacated the ad-interim injunction granted earlier, finding that *it was prior to the completion of pleadings by the parties and does not deserve to be continued in favour of the Contractor*, since it was prima facie visible that the Contractor did not adhere to the deadlines for completion of the work and the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India.

Construing the Force Majeure clause narrowly, it held that it does not afford any shelter to the Contractor, at this stage of Section 9 petition and left it to the Arbitrator to decide it finally in the Award, observing that –

"Factum of lockdown is not disputed, however, since the Project was delayed prior to the outbreak of the epidemic, the Contractor is not entitled to seek shelter under the Force Majeure clause. It is further submitted that the question whether the Force Majeure is rightly invoked or not is itself a contractual dispute, which is beyond the scope of a section 9 petition."

F. <u>INTERPLAY</u> between Institutional Emergency Arbitration (EA) provisions and Indian Courts Interim measures (S. 9)

As of date, all the Institutions around the world have Emergency Arbitrator provisions in their Rules and procedures. They have not been placed there for

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⁴⁹ M/S Halliburton Offshore Services Inc. v. Vedanta Limited & Anr., O.M.P (I) (COMM.) No. 88/2020

ornamental value but serve an important purpose. Several international commercial arbitrations having parties with assets scattered all around the globe and are grappling with the jurisdictional predicament to seek the interim injunctions, if and when required, from which if these national courts. Emergency arbitrations comes as a limited panacea to these troubles whereby the interim measure is sought and if granted under the EA provisions, can thereafter be enforced in the courts of those jurisdictions where the assets are located, subject to the statutory national laws prevailing therein.

Unfortunately, the recently amended Indian Arbitration Act is conspicuously absent of such EA provisions. The Law Commissions 246th Report (dt 05.08.2014) did try and ameliorate this condition proposing an amendment to the Act, amending Section 2(d) as – Section 2(d): "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator. But none of the Amendments – 2015, 2018, 2019 have adopted this recommendation.

Some of the Indian Arbitral Institutions are the only silver lining in the dark clouds by having incorporated such provisions in their Rules. The Table highlights the almost identically worded provisions-

DIAC	ICC	ICA	MCIA
DIAC Arbitration	Court of	International	Mumbai Centre
Rules, III	Arbitration of the	Commercial	for International
"Emergency	International	Arbitration under	Arbitration
Arbitration".	Commerce-India,	Section 33 r/w	(Rules) 2016,
S. 18A provides	under Article 29	Section 36(3)	under Section 3
for EA measures	of the 'Arbitration		

for parties	and ADR Rules'	provides the	w.e.f 15 June
needing urgent	read with	provisions of EA	2016 provides
interim OR	Appendix V	Arbitrator.	one of the
conservatory	provides the		Indian
measures that	EA provisions	33. Emergency	Institutional set of
cannot await the		Arbitrator: - Rules	EA provisions,
constitution of		of International	entailing the
an arbitral		Commercial	powers of EAs.
tribunal.		Arbitration, with	
		Effect on & from	
		1.4.14	

The ticklish issue is not just in recognizing the existence of these Emergency Arbitrator provisions and corollary orders, but in their enforcement. As of date, The justification of such enforcement is spearheaded by 2 cases of the Delhi High Court in *Raffles Design International India P. Ltd.. Educomp Professional Education Ltd.*, and the Bombay High Court in *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors., Arbitration Petition.*

The Delhi High Court in *Raffles* in a Section 9 application filed alleging one party's contravention of the orders passed in the Emergency Award, held the Section 9 petition as maintainable, where the EA award was seated at Singapore, relying upon the amended proviso to Section 2(2) of the Act, extending the jurisdictional applicability to foreign seated arbitrations as well.

The Bombay high Court in *HSBC* followed suit in yet another Singapore seated, SIAC administered EA Interim Award and allowed section 9 petition ingeniously

⁵⁰ Raffles Design International India P. Ltd.. Educomp Professional Education Ltd., O.M.P (I) (Comm.) 23/2015, CCP(O) 59/201607.10.2016

⁵¹ HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors., Arbitration Petition No. 1062/2012 dated 22.01.2014.

observing that - "89. In so far as judgment of this court in case of Jindal Drugs (supra) relied upon by Mr. Rohatgi, learned senior counsel that unless petitioner files an application for enforcement of foreign award in this court, respondents cannot challenge the validity of such award is concerned, in my view, since present application filed under section 9 of the Arbitration Act by the petitioner is not for enforcement of the interim award or jurisdictional award rendered by the arbitral tribunal but the petitioner seeks interim measures against the respondents, independently, parties by agreement having excluded the applicability of part I of the arbitration Act except section 9, the petitioner is thus entitled to invoke section 9 for interim measures. In my view petitioner has not bypassed any mandatory conditions of enforceability required by section 48 of the Act. Reliance placed on the judgment of this Court in case of Jindal Drugs (supra) is thus misplaced."

CHALLENGES AND ISSUES IN THE PRACTICE OF ARBITRATION IN INDIA

A. POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT (SECTION 8)

Section 8 deals with an important "negative" effect of an arbitration agreement. The agreement to submit a certain matter to arbitration means that this matter shall not be heard and decided upon by any court, irrespective of whether this exclusion is expressed in the agreement. If, nevertheless, a party starts litigation the court shall refer the parties to arbitration unless it finds the agreement to be null and void, inoperative or incapable of being performed.⁵² It is intended to make arbitration agreements effective and prevent a party from going to court contrary to his own agreement. Where parties have agreed to refer disputes to Arbitration, the Court should, as far as possible, give an opportunity for resolution of disputes through arbitration rather than the process of Court.

The Courts should see that the parties are bound by the terms and sanctity of the contract.⁵³ However, the "validity of the Arbitration Agreement" needs to be tested by the Court before referring the Parties to Arbitration.

The Hon'ble Supreme Court in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*⁵⁴ has laid down the essentials to be seen by the Court before referring the parties to arbitration, which are as follows:

- (i) whether there is an arbitration agreement between the parties;
- (ii) whether all the parties to the suit are parties to the arbitration agreement;

⁵² Justice R S Bachawat's Law of Arbitration & Conciliation, 6th ed

⁵³ Union of India v. Surjit Singh, AIR 1970 SC 189, State of Punjah v. Geeta Iron & Brass Works, AIR 1978 SC 1608, Ramji Dayawala & Sons Pvt. Ltd. v. Invest Import, AIR 1981 SC 2085

⁵⁴ Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2001) 5 SCC 532

- (iii) whether the disputes which are the subject matter of the dispute fall within the scope of the arbitration agreement;
- (iv) whether defendants had applied under this section before submitting his first statement on the substance of the dispute; and
- (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.

The role of the Court while hearing an application under Section 8, if the criteria are fulfilled, is to refer the parties to arbitration and not get into the merits of the matter.⁵⁵ When the existence of an arbitration agreement is proved, the question whether the arbitration agreement is attracted to the facts of a given case is a question which has to be decided not by the civil court but by the arbitrator himself.⁵⁶

The Hon'ble Supreme Court, in the case of *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Another* has held that the suit should be in respect to "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. However, in case a suit has been initiated "as to a matter" which lies outside the arbitration agreement and is also between parties, some of whom are not parties to the arbitration agreement, in such a case an application under Section 8 is not maintainable. It was further held that it would be difficult to bifurcate the cause of action or subject-matter of the suit between parties who are signatory to the arbitration agreement and those who are not. Also, having part of the cause of action decided by an arbitral tribunal and part by a civil court would lead to unnecessary delay in the proceedings and increase in the cost of litigation.

The condition that the other party moves the court for referring the party to arbitration before it submits his first statement on the substance of the dispute

⁵⁵ Bharat Heavy Electricals Ltd. v. Kalpana Gears Pvt. Ltd. [2003 (4) MPLJ 473]

⁵⁶ Nicholas Piramal India Ltd. v. Zenith Drugs & Allied Agencies Pvt. Ltd. [AIR 2008 NOC 1897]

⁵⁷ Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr. [(2003) 5 SCC 532]

creates a right in the person bringing the action to have the dispute adjudicated by court, once the other party has submitted his first statement of defence. But if the party who wants the matter to be referred to arbitration applies to the court after submission of his statement and the party who brought the action does not object, there is no bar on the court referring the parties to arbitration.⁵⁸

The Hon'ble Supreme Court in the case of *Ananthesh Bhakta represented by Mother Usha A. Bhakta & Ors. v. Nayana S. Bhakta & Ors*⁵⁹ has held that the Court shall not consider any application filed by the party under Section 8(1) unless it is accompanied by the original arbitration agreement or duly certified copy. However, bringing the original arbitration agreement on record at the time when the court is considering the application shall not entail rejection of the application under Section 8(2).

In a situation when the other party does not file either the original arbitration agreement nor a copy or does it file any other documentary evidence at all to show the existence of an arbitration agreement including an application to refer the disputes to arbitration, the Court would draw an adverse inference in such a case and the dispute in such a case cannot be referred to arbitration. Such conduct on the party shows its intent not to have the disputes adjudicated by arbitration.

The phrase "which is the subject of an arbitration agreement" does not necessarily require that the agreement must be already in existence before the action is brought in the court. The phrase also connotes an arbitration agreement having been brought into existence while the action is pending.

Where disputes have arisen between the parties to an agreement, the same have to be settled by the named arbitrator and the court under this section does not have any other option but to direct the parties to present the themselves before the

⁵⁸ AP Anand Gajapathi Raju v. PVG Raju, (2000) 4 SCC 539

⁵⁹ Ananthesh Bhakta represented by Mother Usha A. Bhakta & Ors. v. Nayana S. Bhakta & Ors., (2017) 5 SCC 185

⁶⁰ Om Prakash Sharma v. HP Tourism Development Corporation, AIR 2013 HP 46

named arbitrator. ⁶¹ The court while dealing with an application under Section 8 of the Arbitration & Conciliation Act cannot grant injunction restraining the arbitral tribunal from proceeding with the arbitral proceedings. ⁶²

Pertinently, the remedy as provided under a special enactment, such as the Consumer Protection Act is not taken away by the presence and operation of an arbitration agreement and a subsequent application made under Section 8 of the Act.⁶³

In an international commercial arbitration, a party cannot take recourse under this section instead of section 45 because scope of powers under section 45 are not identical with that of section 8.⁶⁴

B. <u>INTERIM RELIEFS (SECTIONS 9 AND 17)</u>

In the case of *Bhatia International v. Bulk Trading S.A. and Another*⁶⁵, it was held that Part I of the 1996 Act will apply even to arbitrations seated outside India unless it was expressly or impliedly excluded. In a similar vein, the Supreme Court gave the judgment in *Venture Global Engineering v Satyam Computer Services Ltd.*⁶⁶

This issue was thereafter, settled in *Bharat Aluminium and Co. v. Kaiser Aluminium and Co.,* or in which the Supreme Court held that Part I of the Act does not apply to Part II of the Act. As per the judgement in BALCO, the Courts in India could not entertain interim applications under Section 9 of the Act in foreign seated arbitrations which were governed by Part II of the Act.

⁶¹ Escotel Mobile Communications Ltd. v. Union of India, 1998 (2) ArbLR 384

⁶² Pappu Rice Mills v. Punjab State Co-operative Supply and Marketing Federation Ltd., AIR 2000 P&H 276

⁶³ Saipriya Estates v. VVL Sujatha, 2008 (2) ArbLR 585

⁶⁴ Leoranal v. RB Business Promotion Pvt. Ltd., 2002 (3) RAJ 24 (SC)

⁶⁵ Bhatia International v. Bulk Trading S.A. and Another (2002) 4 SCC 105

⁶⁶ Venture Global Engineering v Satyam Computer Services Ltd, (2008) 4 SCC 190

⁶⁷ Bharat Aluminium and Co. v. Kaiser Aluminium and Co., (2012) 9 SCC 552

The Arbitration and Conciliation (Amendment) Act, 2015 introduced a proviso to Section 2(2) which provided that subject to an agreement to the contrary, the provisions of Sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitrations. Thus, Section 9 applications can be filed in cases which are governed by part II of the Act.

The Amendment Act of 2015 renumbered Section 9 of the 1996 Act as sub-section (1) and the following sub-sections were inserted:

- "(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
- (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.".

As per the amended Section 9, if the Court passes an interim order before the commencement of arbitral proceedings, the arbitral proceedings must commence within 90 days from the making of such an order, or within a time specified by the Court. Further, it was clarified that once the arbitral tribunal is constituted, the Court shall not entertain an application under section 9 unless the court feels that the arbitral tribunal will not be able to grant the same remedy, thereby, minimizing the intervention of the Court.

Additionally, Section 17 of the Act was also amended and teeth were given to the orders passed by the arbitral tribunals. The amendment gave the arbitral tribunals all powers of the Courts under Section 9 thereby, vesting arbitral tribunals with wider powers to grant interim reliefs. It is noteworthy that any party to the

arbitration agreement seeking an interim relief can make a cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant."

In Wind World (India) Ltd. v. Enercon GmbH and Ors. the Bombay High Court held that "The Court dealing with a petition under section 34 is not capable of granting any further relief to the party which challenges the Award. If an application is made at the instance of such an unsuccessful party under section 9, there will not be any occasion to grant any interim measure which will be in the aid of the execution of the arbitral Award as such a party will not be entitled to seek enforcement under section 36."

The Hon'ble Supreme Court in the matter of *Ashok Traders vs. Gurumukh Das Saluja*⁶⁰ has observed "....For the moment suffice it to say that the right conferred by Section 9 cannot be said to be one arising out of a contract. The qualification which the person invoking jurisdiction of the Court under Section 9 must possess is of being a party to an arbitration agreement A person not party to an arbitration agreement cannot enter the Court for protection under Section 9. This has relevance only to his locus standi as an applicant."

An application under section 9 can be filed in a court as defined in Section 2(1)(e) of the Act that can either be a District Court or a High Court having 'original jurisdiction', which would have the jurisdiction to decide the subject matter of the arbitration as if the same were the subject matter of a civil suit.

An appeal from an order granting or refusing to grant any such interim measure under Section 9 can be made under Section 37(1) of the Act. Similarly, an appeal

⁶⁸ Wind World (India) Ltd. v. Enercon GmbH and Ors, 2017 SCC OnLine Bom 1147

⁶⁹ Ashok Traders vs. Gurumukh Das Saluja, A.I.R. 2004 SC 1433

against an order passed by the Arbitral Tribunal under Section 17 can be made under Section 37(2) of the Act.

In *APM Air Cargo Terminal Services & Anr. v. Celebi Delhi Cargo Terminal Management India Pvt Limited & Anr.*70, the Delhi High Court held that the qualification which the person, invoking jurisdiction of the Court under Section 9, must possess is of being "party" to an arbitration agreement and a person not party to an arbitration agreement cannot enter the Court seeking protection under Section 9 of the Arbitration and Conciliation Act, 1996. The Court rejected the petition under Section 9 of Arbitration and Conciliation Act, 1996 as not maintainable since no arbitration agreement could be demonstrated to be in existence between the parties.

In *Parsoli Motor Works (P) Ltd. v. BMW India P Ltd.*²¹ the Delhi High Court held that injunctions that cannot be granted under Section 41 of the Specific Relief Act, cannot be granted under Section 9 of Arbitration Act, 1996 either.

In *State of Gujarat... v. Amber Builders*² the Supreme Court held that on a conjoint reading of the Acts together, it is clear that the powers vested in the Tribunal in terms of Section 17 of the A&C Act are concerned, such powers can be exercised by Arbitral Tribunal constituted under the Gujarat Act because there is no inconsistency in these two Acts as far as the grant of interim relief is concerned. The court opined that the judgment rendered in Gangotri Enterprises Limited v Union of India is per incuriam as it relies upon Raman Iron Foundry which has been specifically overruled by three judges bench in the case of H.M. Kamaluddin Ansari.

⁷⁰ APM Air Cargo Terminal Services & Anr. v. Celebi Delhi Cargo Terminal Management India Pvt Limited & Anr., O.M.P.
(I) (COMM) 204/2019

⁷¹ Parsoli Motor Works (P) Ltd. v. BMW India P Ltd, 2018 SCC Online Del 6556

⁷² State of Gujarat... v. Amber Builders, Civil Appeal No. 8307 of 2019

C. BACKGROUND OF SECTION 29-A: TIME FOR MAKING AN **AWARD**

In brief, Section 29-A, which was introduced by Arbitration and Conciliation (Amendment) Act, 2015, to ensure expeditious and cost-effective disposal of arbitral matters, with minimal judicial intervention. The very recent Arbitration and Conciliation (Amendment) Act, 2019 has introduced some significant changes to then application under section 9 during the course of the arbitral proceedings. However, after the passing of the arbitral award, only the party which is seeking enforcement of the arbitral award can file an application as per Section 9 (ii) of the Act.

Arbitration and Conciliation Act, 1996, with the sole intent to ensure compliance of time bound practice of the arbitral proceedings before the Tribunal.

SECTION 29-A UNDER 2015 SECTION **AMENDMENT AMENDMENT**

the award shall be made within a date when the arbitral tribunal enters upon reference. (The arbitral tribunal shall be deemed to have entered upon reference on the date on which the have received notice, in writing, of their appointment)

Section 29-A (1) provided that Section 29-A (1) provides that the in award matters other than period of 12 months from the international commercial arbitration shall be made by arbitral tribunal within a period of 12 months from the date of completion of pleadings under sub-section (4) of Section 23. (Section 23(4) provides that the completion of arbitrator or all the arbitrators pleadings shall be done in 6 months from the date of appointment of arbitrator)

29-A

UNDER

2019

Notes on dispute resolution practice

Provided that the award in the matter
of <i>international</i>
commercial arbitration may be made
as expeditiously as possible and
endeavour may be made to dispose of
the matter within a period of 12
months from the date of completion of
pleadings under sub-section (4) of
Section 23.
Proviso to sub-section 4 have been
inserted which provides that the
inserted which provides that the mandate of the arbitrator shall
-

<u>Timeline in Section 29-A Under Arbitration And Conciliation</u> (Amendment) Act, 2019

1.	Time period for	i. The award in domestic arbitration
	passing award	shall be made within 12 months from
	under S29-A(1)	the completion of pleadings. (Section
		23(4) provides that the completion of
		pleadings shall be done in 6 months
		from the date of appointment of
		arbitrator(s)).
		ii. Award in the matter of <i>international</i>
		commercial arbitration may be made
		as expeditiously as possible and
		endeavour may be made to dispose of

Notes on dispute resolution practice

			the matter within a period of 12 months from the date of completion of pleadings.
2.	Under S 29-A(2)	i.	If the arbitral tribunal passes an award within a period of 6 months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal is entitled to an additional fee, as the parties may agree.
3.	Under S 29-A(3) (Extension of time period upon consent of both the parties.)	i.	Both the parties by contest shall extend the period <i>not more than 6 months.</i>
4.	Under S 29-A(4) (Further extension)	i.	Court can further extend the period.
5.	Under S 29-A(5) (Process of further extension)	i.	Application may be made for extension under sub-section (4), showing sufficient cause.
6.	Under S 29-A(9)	i.	The application for extension of time period filed under sub- section (5) shall be disposed by the court within a period of 60 days from the date of service of notice on opposite party

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Amendments in Section 29-A - Retrospective or Prospective in nature

Two judgments have been passed earlier this year by the Hon'ble Delhi High Court, both having contradicting views with respect to the applicability of the new time-line introduced by the amendment.

The Hon'ble Delhi Court vide order dated 23.01.2020 in the matter *Shapoorji Pallonji and Co. Pvt. Ltd. vs Jindal India Thermal Power Limited*³ decided on the applicability of Section 29-A under the 2019 amendment to an arbitral proceedings commenced prior to the 2019 amendment. Considering the facts in the said case, the arbitral tribunal entered upon reference on 26.05.2018. As per the unamended section of 29-A(1), the time period for completion of the award would have ended on 26.05.2019.

However, the court while considering Section 29-A(1) of the Amended Act, which came into effect from 09.08.2019, opined that period of conclusion of the arbitration proceedings in terms of Sections 23(4) and 29-A(1) is up to 25.11.2019, i.e. 6 months for completion of pleadings and 12 months thereafter for the rest of the proceedings. Further, the court noted that as per Section 29-A(3), the parties are empowered to extend the period by 6 months which they had consented to. The time period could now be extended up to 23.05.2020.

The Hon'ble Court, while passing this order, was of the view that "amended sections 23(4) and 29-A(1) of the Arbitration and Conciliation Act, being procedural law, would apply to the pending arbitrations as on the date of

⁷³ Shapoorji Pallonji and Co. Pvt. Ltd. vs Jindal India Thermal Power Limited, O.M.P (MISC.)(COMM.) 512/2019

amendment and therefore, the time period for conclusion of arbitration proceedings has not yet expired".

The Hon'ble Delhi Court in the matter MBL Infrastructures Ltd. vs. Rites *Limited*⁴ gave a contrary view to the abovementioned judgment. A petition under Section 29-A(1) of the Arbitration and Conciliation Act, 1996 ('Act') seeking extension of time for completion of arbitral proceeding and passing of Award was made. The arbitral tribunal entered upon reference on 14.03.2018 and the statutory period of 12 months under the unamended section 29A(1) of the Act expired on 13.03.2019. The timeline was further extended by another six months by the mutual consent of both the parties and the final deadline was set for 13.09.2019 vide order dated 04.05.2019. Thereafter, timeline was further extended after permission by a court vide order dated 06.09.2019 until 12.03.2020. Further, in the present petition for extension, it was contended that the amended timeline under section 29A should be applicable to the present arbitrations proceedings and, accordingly, the original timeline for the arbitration would have expired on 13.08.2019, i.e., 12 months from the completion of the pleadings in that matter. The Hon'ble Court while considering the aforesaid observed that "it is evident" from a bare perusal of the Notification that it does not have a retrospective effect. In the present case, the statutory period of 12 months under the unamended Section 29A of the Act expired on 13.03.2019 since under the unamended provision, period of 12 months was to reckon from the date the Arbitral Tribunal entered upon reference. Thereafter, subsequent extensions were given either by the Tribunal or by this Court. In my view, therefore, the Notification will not apply to the facts of the present case and the extension granted by this Court vide order dated 06.09.2019 would be valid." From the said order dated 10.02.2020, it appears that there is no presumption regarding applicability of amended sections 23(4) and 29-A of the 2019 Act to the pending arbitrations as on the date of 2019 amendment.

⁷⁴ MBL Infrastructures Ltd. vs. Rites Limited, O.MP.(MISC.)(COMM.) 56/2020

Apart from the above issue, the High Court of Delhi in *NCC Ltd. v. Union of India*⁷⁵ unequivocally held that Section 29A of the Arbitration Act is intended to counter the delay in the conclusion of arbitration proceedings alone, and cannot be sought to be utilized for the achievement of objectives that are alien to the said purpose in the following words:

"11. Section 29A of the Act is intended to sensitize the parties as also the Arbitral Tribunal to aim for culmination of the arbitration proceedings expeditiously. It is with this legislative intent, Section 29A was introduced in the Act by way of the Arbitration and Conciliation (Amendment) Act, 2015. This provision is not intended for a party to seek substitution of an Arbitrator only because the party has apprehension about the conduct of the arbitration proceedings by the said Arbitrator. The only ground for removal of the Arbitrator under Section 29A of the Act can be the failure of the Arbitrator to proceed expeditiously in the adjudication process."

"14. As far as the grievance of the respondents that the conduct of the arbitration proceedings are biased is concerned, the same cannot be the subject matter of the present proceedings. The respondents have also filed an application under Section 13 of the Act before the Arbitrator, which is pending adjudication. This Court, therefore, refrains from making any observation on the said application. Even otherwise, in term of Section 13(4) of the Act, in case the said application is decided against the respondents, the remedy provided to the respondents would be to challenge the same alongwith the ultimate Award passed by the Arbitrator."

⁷⁵ NCC Ltd. v. Union of India, 2018 SCC OnLine Del 12699

In a similar vein, in an unreported decision in *Orissa Concrete and Allied Industries Ltd. v. Union of India & Anr.*, the High Court of Delhi observed as under-

"In my view, any issue with respect to the conduct of the Arbitration Proceedings, except the one relating to the expeditious disposal of the Arbitration Proceedings, cannot be raised by the respondent at this stage. These contentions can be raised by the respondent before the Arbitrator himself or in an application under Section 34 of the Act while challenging the award passed by the Arbitrator, if the respondent is aggrieved of the same. In exercise of power under Section 29A(5) of the Act, the Court is only to see if there is sufficient cause shown to extend the time for making of the award."

The aforesaid principle was further reiterated by the High Court of Delhi in *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India*, that adjudication in an application for extension under Section 29A pertains only to the aspect of delay.

Jurisdiction of Court [as defined under Section 2 (1)(e) of the Act] to entertain an application for extension of time or the power to substitute Arbitrators under Section 29A

In *State of West Bengal v. Associated Contractors*⁷ the Supreme Court had interpreted the word "court" under section 2-(1)-(e) of the Arbitration Act to mean only the High Court having civil jurisdiction, or the principal civil courts, as the case

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⁷⁶ Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India, 2018 SCC OnLine Del 10184

⁷⁷ State of West Bengal v. Associated Contractors, (2015) 1 SCC 32

may be. The Supreme Court further held that no other courts, including the Supreme Court, could be contemplated under section 2-(1)-(e) of the Arbitration Act.

In *Bhanubahi Ramanbhai Patel v. Nilesh Ramanbhai Patel*^{*} the High Court of Gujarat (Gujarat High Court) considered whether the expression 'Court' in the context of Section 29A can be understood as referred in Section 2(1)(e) of the Act. It was questioned whether there was any intention of the legislature to vest the Civil Court with the power to make appointment of arbitrators by substituting the arbitrators appointed by the High Court under Section 11 of the Act. On the one hand, the Supreme Court has been given the exclusive power to appoint an arbitrator in terms of section 11(4) of the Arbitration Act and, on the other hand, the power of the Supreme Court, to substitute and extend the mandate of the same arbitrator has been taken away by Section 2-(1)-(e) and vested to the subordinate High Courts.

Similar question was raised before the Bombay High Court in *Cabra Instalaciones Y Servicios, S.A. v Maharashtra State Electricity Distribution Company Limited*⁹. The High Court concluded that in the case of international commercial arbitrations, it did not have the jurisdiction to pass any orders under Section 29A and such power would lie only with the Supreme Court. Noticing that Section 29A also provided for the substitution of the arbitral tribunal by the concerned Court while considering an application for extension of time, the High Court opined that this would be the exclusive power and jurisdiction of the Supreme Court.

A conflicting view was however taken in *M/s. URC Construction (Private) Ltd. v M/s. BEML Ltd.*⁸⁰ by the High Court of Kerala and it was held that in view of

⁷⁸ Bhanubahi Ramanbhai Patel v. Nilesh Ramanbhai Patel, Misc. Civil Appeal Petition No. 1 of 2018

⁷⁹ Cabra Instalaciones Y Servicios, S.A. v Maharashtra State Electricity Distribution Company Limited, Commercial Arbitration Petition (L) Nos. 814-818 of 2019

⁸⁰ M/s. URC Construction (Private) Ltd. v M/s. BEML Ltd, (2017) 4 KLT 1140

Section 2(1)(e) of the Act, in the case of domestic arbitrations, the application for extension of time under Section 29A would lie to the principal Civil Court since the High Court of Kerala did not possess original civil jurisdiction.

Recently, in *Tecnimont Spa & Anr. v National Fertilizers Limited*²¹ this issue also came up for consideration before the Supreme Court. However, no decision was arrived at as the Petition was finally withdrawn by the petitioners with the request that liberty may be granted to the petitioners to approach the Delhi High Court once again. The request was accepted by the Supreme Court and the matter was restored to the file of the Delhi High Court. Finally, the time limit for passing the arbitral award was extended by the Delhi High Court in view of the order passed by the Supreme Court.

D. <u>SECTION 42A: CONFIDENTIALITY OF ARBITRATION</u> <u>PROCEEDINGS</u>

Confidentiality has been part of the Alternative Dispute Resolution (ADR) since a long time. That is to say, one of the apparent virtues of ADR is its process which is viewed as confidential. It is in fact an attribute which makes Arbitration preferred dispute resolution mechanism. Prior to the Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment), confidentiality as a concept was statutorily applicable only in conciliation under Section 75 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). A high-level committee chaired by Justice B. N. Srikrishna (Retd.) suggested strengthening the Arbitration Act including providing for confidentiality.

Section 42A introduced by the 2019 Amendment, mirrors the language of Section 75 of the Arbitration Act relating to confidentiality in conciliation.

⁸¹ Tecnimont Spa & Anr. v National Fertilizers Limited, MA No. 2743/2018 in Arbitration Case (C) No. 24/2016

"42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award."

While stipulating confidentiality in the Arbitration Act is a welcome step, the language of Section 42A is likely to raise certain issues, which may require judicial interpretation.

The only exception provided in Section 42A of the Arbitration Act is limited to the disclosure of award for its implementation and enforcement. The natural corollary to this is that nothing that has transpired in an arbitration proceeding (including the pleadings filed, evidence-led and arguments advanced etc.) can be relied upon in the Court proceedings. The legislators have specifically added "all" before the words "arbitral proceedings" in the Section, which essentially covers anything and everything that has transpired before the arbitral tribunal.

This Section is likely to overstep on an essential feature of Arbitration - "Party Autonomy". Under the Act, parties have a choice of opting for either Ad hoc Arbitration or Institutional Arbitrations. If the former is opted for, the parties have a choice to insert a confidentiality clause in the Agreement and if the latter is opted for, they can always select those Institutional Rules that have confidentiality obligation. However, given that Section 42A begins with a non-obstante clause even if the parties agreed otherwise, it makes this provision mandatory for them. It must not be forgotten that Arbitration is after all a contractual creation. Party autonomy must be given the value it truly deserves in such a dispute resolution mechanism.

It is noteworthy that there is no penalty for non-compliance of Section 42A, thus, there is no check to effectively implement confidentiality obligations. Although it may be argued that this provision is merely directory, not mandatory in nature.

Section 42A carves a limited exception of "implementation and enforcement of an award". This exception fails to take into account many instances, which would require disclosure of the arbitration proceedings, such as:

- (i) An application under Section 9 of the Arbitration Act for interim measures during the pendency of arbitration;
- (ii) An application under Section 14 of the Arbitration Act for termination of the mandate of an arbitrator;
- (iii) Appeal against an order under Section 17 of the Arbitration Act for interim measures granted by the arbitral tribunal;
- (iv) An application under Section 27 of the Arbitration Act for the assistance of Court for evidence before the arbitral tribunal;

As regards who would be bound by the confidentiality under Section 42A of the Arbitration Act, it only provides for a limited list of entities who are required to maintain confidentiality. The provision does not recognize many other entities who can also breach confidentiality, like Witnesses (fact or expert); Tribunal Secretary, etc.

E. SECTION 43: APPLICATION OF LIMITATION ACT IN ARBITRATION

Vigilantibus non dormientibus jura subveniunt i.e., the laws aid the vigilant and not those who slumber. This is one of the principles underlying the Limitation Act, 1963 ("Limitation Act") which prescribes a maximum period within which a person is required to bring forth his claim. The principal law relating to the Law of Limitation in India is the Limitation Act of 1963.

Applicability of Limitation Act,1963 for arbitrations seated in India is specifically provided in Section 43 of the Act which is analogous to Section 37 of the Arbitration Act, 1940.

"43. Limitation. - (1) The Limitation [1] Act, 1963 (36 of 1963), shall, apply to arbitrations as it applies to proceedings in court. (2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21. (3) Where an arbitration agreement to submit further disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper. (4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

To determine the period of limitation of a dispute, Section 43 and Section 21 of the Arbitration and Conciliation Act have to be read together. Section 21 defines the commencement of Arbitration proceedings and Section 43 provides for the applicability of Limitation Act for arbitration proceedings. If an arbitration is not commenced, by issuing a notice for arbitration within the limitation period from

the date of accrual of right to sue, then the claim will become a time barred claim. The judgment of the Supreme Court of India in *Voltas Limited v. Rolta India Limited*, is an example, where a multi-million counter-claim of a party in arbitration was dismissed on the ground of being filed after the expiry of the limitation period.

The doctrine of LAP-Limitation and Prescription is based on two extensive considerations, i.e. (a) That the right not exercised for a long time is non-existence; (b) That the rights in property and rights in general should not be in a state of constant uncertainty, doubt and suspense.

Section 43(1) provides that for the purposes of Part I, arbitration proceedings are similar to court proceedings, therefore, Section 43(1) makes provisions of the Limitation Act, 1963 applicable to arbitration proceedings in the same manner as they apply to the proceedings of a court. Section 43(2) provides that for the purposes of this section and the Limitation Act, 1963, the arbitration shall be deemed to have commenced on the date referred in Section 21. It is settled by the Hon'ble Supreme Court in *Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta*⁸² that the date, on which the cause of arbitration accrued, the period of limitation begins to run.

Even though Section 43(1) of the 1996 Act makes the limitation Act, 1963 applicable to the arbitrations, it would only operate in areas which are not covered by 1996 Act. The 1996 Act being a special enactment with respect to the matters relating to arbitration, the period of limitation prescribed therein would govern the proceedings, and the provisions of Limitation Act, 1963 would stand excluded to that extent. Some of the sections which specifically provided period of limitation are Section 8, 11, 13, 29A, 33(3), 33(4), 34(3), etc.

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⁸² Panchu Gopal Bose vs. Board of Trustees for Port of Calcutta, AIR 1994 SC 1615

In the case of *Union of India vs. Popular Construction Company*^{§3}, the Hon'ble Supreme Court held that "the history and scheme of the 1996 Act support the conclusion that the time-limit prescribed under Section 34 to challenge an award is absolute and unextendible by Court under Section 5 of the Limitation Act".

Since, Arbitration and Conciliation Act, 1996 is a special law within the meaning of Section 29(2) of the Limitation Act, 1963 and hence, it can provide different over-riding limitation period for certain purposes.

F. INTRODUCTION OF NEW PART - IA

India's efforts to encourage dispute resolution through arbitration and become a major arbitration hub had long been impeded by the judicial interpretation of certain provisions of its arbitration legislation and excessive court involvement in the arbitral process. The 2015 amendments to the Act were therefore focused on undoing the effect of such judicial precedent and limiting judicial intervention.

The promotion of institutional arbitration in India by strengthening Indian arbitral institutions has also been identified as being critical to encouraging dispute resolution through arbitration. Though various arbitral institutions have been set up in India, particularly in the last five years, they have not been preferred by parties, who have leaned in favour of ad hoc arbitration or arbitrations administered by arbitral institutions located abroad. It was in this context that the High-Level Committee ("Committee") was set up by the Ministry of Law and Justice, vide order dated 13.01.2017 to identify the roadblocks to the development of institutional arbitration, examine specific issues affecting the Indian arbitration landscape, and

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⁸³ Union of India vs. Popular Construction Company, 2001 8 SCC 470

prepare a roadmap for making India "a robust centre for international and domestic arbitration."⁸⁴

The High Level Committee submitted its Report on 30.07.2017. The Committee has recommended certain amendments to the Act to minimise the need to approach the Courts for appointment of arbitrators. After examination of the said recommendations with a view to make India a hub of institutional arbitration for both domestic and international arbitration, it was decided to amend the Arbitration and Conciliation Act, 1996. With a view to strengthen institutional arbitration in the country, the Committee, inter alia, has found that various reasons contribute to the sustained popularity of ad hoc arbitration over institutional arbitration in India. Some of the reasons that can be identified for this are related to the lack of sufficient supporting infrastructure for institutional arbitration, such as skilled and experienced arbitrators on panels of arbitral institutions, a wellqualified arbitration bar, effective monitoring by existing arbitral institutions, and internationally and domestically recognized arbitral institutions that cater to parties' needs adequately. Other reasons are related to the perception of India as a seat that is 'arbitration-unfriendly', although that perception is slowly changing. In order to encourage arbitration, and particularly institutional arbitration, there needs to be a change on both these fronts.

Further the Committee also recommended the following:

a. Arbitration Promotion Council of India - An autonomous body styled the Arbitration Promotion Council of India (hereinafter referred to as "APCI")

⁸⁴ Press Information Bureau Press Release, 'Constitution of high level committee to review Institutionalization of Arbitration Mechanism in India', 29.12.2016, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959 (accessed on 08.05.2020).

and having representation from various stakeholders may be set up by amendment to the Act for grading arbitral institutions in India.

- **b.** Accreditation of arbitrators The APCI may recognize professional institutes providing for accreditation of arbitrators. Accreditation may be made a condition for acting as an arbitrator in disputes arising out of commercial contracts entered into by the government and its agencies.
- c. Creation of a specialist arbitration bar Measures may be taken to facilitate the creation of an arbitration bar by providing for admission of advocates on the rolls of the APCI as arbitration lawyers, encouraging the establishment of fora of young arbitration practitioners, and providing courses in arbitration law and practice in law schools and universities in India.
- d. Creation of a specialist arbitration bench Judges hearing arbitration matters should be provided with periodic refresher courses in arbitration law and practice. These courses could be conducted by the National Judicial Academy and the respective state judicial academies.
- e. Role of the government and the legislature in promoting institutional arbitration Measures to promote institutional arbitration such as facilitating the construction of integrated infrastructure for arbitration in major commercial hubs, adopting arbitration policies providing for institutional arbitration in commercial disputes involving the government, amending the ACA swiftly to keep abreast of developments in arbitration law and practice internationally, etc. may be adopted.
- f. The International Centre for Alternative Dispute Resolution The ICADR should be taken over and be re-branded as the India Arbitration Centre in

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keeping with its character as a flagship arbitral institution. There must be a complete revamp of its governance structure to include only experts of repute who can lend credibility and respectability to the institution.

Another salient feature of the Arbitration and Conciliation (Amendment) Act, 2019, is to establish and incorporate of an independent body namely, the Arbitration Council of India for the purpose of grading of arbitral institutions and accreditation of arbitrators, etc.⁸⁵

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⁸⁵ Statement of Object and Reasons, The Arbitration and Conciliation (Amendment) Bill, 2019, [Bill No. XXI of 2019]

CLAIM OF DAMAGES UNDER INDIAN CONTRACT ACT, 1872

The concept of the compensation for loss suffered is an important aspect of the any Commercial Transaction. In fact, the significance of the concept is such that it has been expressly dealt with in Chapter - VI of the Indian Contract Act, 1872.

Under the said Chapter of the Indian Contract, compensation is contemplated in two scenario. First is under Section 73 - where the parties have not pre decided the compensation to be paid in case of the Contract being broken. The Second scenario is dealt under Section 74 of the Act - wherein the parties have already provided for a fixed amount in case of a breach of the Contract.

The essential elements of the jurisprudence pertaining to compensation for Damages/loss have been highlighted below:-

The concept of Compensation for breach is premised on two well know principles which can be divided into categories on the basis the outlook which the claim is made. The First principle if that Expectation principle. As per the said principle, the party not in default must be put in a position, as far as money can do so, in which he would have been in case the Contract had been performed. Thus, it seeks to place the parties in the same place which they would have been in case the default had never happened. The other basis on which compensation can be claimed is the Reliance Principle. The said Principle is premised on the rationale that the party may be put in the position which he would have been have had the Contract never been performed. This principle essentially seeks to compensate the non-defaulting party for the expenditure which he may incurred while performing the Contract. The damages cannot be claimed ordinarily on both the principles in the

same claim as the same would amount to double counting. The party must choose which position does it want to be placed in.

Prior to a claim of damages of compensation being made under Section 73, there must be a concluded Contract in existence. In case the interaction between the parties does not result in concluded Contract, a claim for the damages is not maintainable.⁸⁶

Compensation is payable only in case of loss suffered by a party. In case, no loss is suffered there cannot be any question of any damages or compensation. *Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136*

The Plaintiff has to establish breach from the other contracting party. A loss caused by a Third Party or in the absence of any default on the part of the other Party to the Contract cannot give rise to a claim of the compensation from the other Contracting Party.

Furthermore, there has to be a causal connection between the defaulting party's breach of contract and the loss caused to the plaintiff. Where the loss caused is not related to the breach by the other party, the same cannot form a basis for the claim for losses. 87

The Compensation which can be awarded is for losses which occurred in the usual and natural course of things. This principle has been accepted by the Courts as well as statutorily recognised by including the same in the provision of Section 73. The basis of the said principle is that party claiming the damages, merits to be compensated for damages which the parties could have contemplated to occur in

⁸⁶ Vedanta Ltd. v. Emirates Trading Agency, (2017) 13 SCC 243.

⁸⁷ Kanchan Udyog Ltd. v. United Spirits Ltd., (2017) 8 SCC 237

case of breach. Any remote or indirect damage which did not arise naturally in the usual course of things from the breach or which the parties knew when they made the contract to be likely to result from the breach, will not be awarded.⁸⁸

There may arise a situation where several factors, including the breach of defaulting party, which were involved in the transaction resulting in the loss being claimed. In such case, the compensation can be claimed from the defaulting party provided it's breach was the dominant factors which resulted in the loss.⁸⁹

It is also pertinent to note that while the party which has not breached the Contract is expected to be compensated for the loss or damage, the right for compensation is not absolute or unhindered. The Party suffering is still required to take reasonable steps to mitigate or reduce the losses caused by the breach of the other party. What amounts to reasonable steps would have to be ascertained in the facts of each case. Thus, the loss or damage shall not be considered / compensation to the extent the same could have been shall not be given to the extent the same could have been avoided by the party claiming the damages.⁹⁰

The issue of actual computation of damages is dependent on actual facts and circumstances of the case. There are several methods which have been developed for computing damages. Which method is applicable or suitable would depend on the nature of transaction and claims raised.

Compensation as contemplated under the Indian Contract Act, can broadly be classified into two categories:- (a) Liquidated Damages:- where the parties have in the Contract itself stated the maximum amount or a sum which would be payable

⁸⁸ Hadley v. Baxendale, (1854) 9 EX 341, Pannalal Jankidas v. Mohanlal and Ors. AIR 1951 SC 144

⁸⁹ Pannalal Jankidas v. Mohanlal and Ors., AIR 1951 SC 144

⁹⁰ Murlidhar Chiranjilal v. Harishchandra Dwarkadas and Ors., AIR 1962 SC 366; M. Lachia Setty and Sons Ltd. and Ors. v. Coffee Board, Bangalore, AIR 1981 SC 162

⁹¹ M. N Gangappa v. Atmakur nagabhishanam Setty & Co, 1973 (3) SCC405.

in case of breach by either of the parties, which is dealt with under Section 74 of the Act, (b) Unliquidated Damages: where the sum has not been pre-decided by the parties and recorded in the Contract.

As state above, Stipulated damages have been provided for under Section 74 of the Act. Where a contract has been broken, and a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, to receive from the party who has broken the contract a reasonable compensation not exceeding the amount so named. It is pertinent to note that even where such an amount is agreed by the parties, the non-defaulting party is not automatically entitled to the amount in case of breach. Such an amount is maximum limit and amount to be awarded is to be a reasonable amount not exceeding such amount.

Another aspect while considering the amount mentioned or provision in the Agreement for stipulated damages, is that, if the said stipulation is by way of the penalty, the same will not be enforced. The words 'reasonable amount' and 'not exceeding such amount' make it clear that even though an amount may have been provided for but the amount to be awarded has to be reasonable amount, with the maximum limit of the amount provided in the Agreement. The rationale behind such stipulation goes back to the basic principle that awarding of damages is compensation to the non-defaulting party for the loss suffered and not any windfall for such a party. ⁹²

An interesting aspect to be considered in the current commercial scenario is the provision for forfeiture of earnest money submitted would hit by Section 74 or not. Merely because an amount has been paid or identified as Earnest Money does not

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⁹² Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405; Kailash Nath Associates v. Delhi Development Authority & Anr, (2015) 4 SCC 136

entitle any party to claim that the same was in the form of stipulated damages. Section 74 would go to show that in order to forfeit the sum deposited by the contracting party as "earnest money" or "security" for the due performance of the contract, it is necessary that the contract must contain a stipulation of forfeiture. In other words, a right to forfeit being a contractual right and penal in nature, the parties to a contract must agree to stipulate a term in the contract in that behalf. A fortiori, if there is no stipulation in the contract of forfeiture, there is no such right available to the party to forfeit the sum."

Subject to the provision being made for forfeiture, the Apex Court has held that forfeiture would be covered under the other part of Section 74 being: "or if the contract contains any other stipulation by way of penalty". The Hon'ble Court observed there is no warrant for the assumption made by some of the High Courts in India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited.⁹⁴

Irrespective of stipulations in the form of liquidated damages, and despite the wording of Section 74 to the affect "whether or not actual damage or loss is proven to have been caused by it" would not dispense with the establishment of proof in toto for a claim of liquidated damages. This emanates from the understanding that the reasonable compensation agreed upon as liquidated damages in case of breach of contract is in respect of some loss or injury; thus, the existence of loss or injury is indispensable for such claim of liquidated damages.⁹⁵

It must also be considered that the expression "whether or not actual damage or loss is proved to have been caused there by" is intended to cover different classes

⁹³ Suresh Kumar Wadhwa v. State of M.P., 2017 (16) SC C 757

⁹⁴ Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405

⁹⁵ Kailash Nath Associates v. Delhi Development Authority, 2015 (4) SCC 136, ONGC v. Saw Pipes (2003) 5 SCC 705

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of contracts which come before the courts. In case of breach of some contracts it may be impossible for the court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established Rules. Where the court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

Claim for damages, their sustainability and computation form a material aspect of any litigation pertaining to a breach on Contracts. Hence, all the above aspect must be thoroughly examined prior to raising such claims and initiating proceedings.