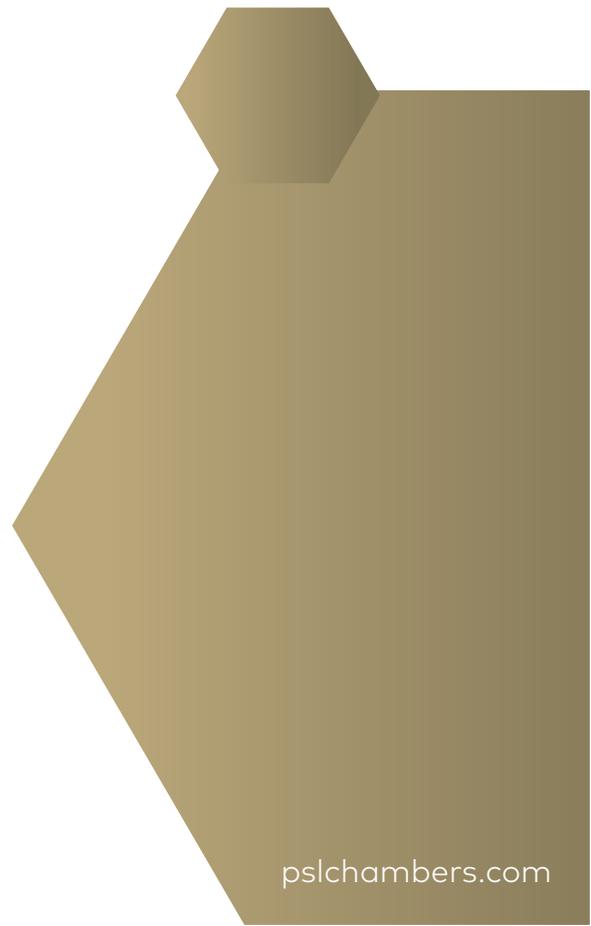




ADVOCATES & SOLICITORS

# ARBITRATION DIARY 2020



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ARBITRATION DIARY  
2020

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# INTRODUCTION

*When will mankind be convinced and agree to settle their difficulties by arbitration?*  
*- Benjamin Franklin*

As someone rightly said 'Knowledge is Empowerment'.

We at PSL take knowledge building very seriously and we believe in sharing it with everyone.

As part of our continued endeavor to author, and disseminate works in the areas of our core competence, we are releasing the Arbitration Diary. This diary is a compilation of articles we wrote as part of our #LockdownSeries, which contains short and concise articles on various topics relating to arbitration. The reason we wanted the articles to be short was so that the readers could get a quick overview of the topic.

We hope that that this Arbitration Diary will be a useful ready reckoner on arbitration and covered areas. We will be happy to discuss those and more areas in depth, do write to us.

*Copyright Disclaimer: The copyright in this Arbitration Diary is vested to the firm.*

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# 1

## Introduction to Law of Arbitration in India

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International Commercial Arbitration (ICA) in India is governed by the Arbitration and Conciliation Act, 1996 (Act) which recognizes the rights of parties to enter into ICA where the dispute arises out of commercial legal relationship, whether contractual or not. There have been two legislative amendments to the Act viz. 2015 amendment and the 2019 amendment. The background and circumstance that led to the two amendments are discussed below.

For an arbitration to be ICA, at least one of the parties must be a foreign entity or a juristic entity having its central management or exercise of control in a foreign country. In arbitration, the parties are free to determine the seat and choice of law that would be applicable to their contractual relationships and arising disputes.

The Act deals with the domestic arbitration and ICA under separate parts. Part I of the Act lays down exhaustive framework to facilitate the procedural aspects in the domestic set up and Part II provides for the enforcement of foreign arbitral awards within the Indian jurisdiction. It does so by providing for the enforcement of awards governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) under Chapter I of Part II of the Act and for those governed by the Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) under Chapter II of Part II of the Act.

In both instances, parties to the arbitral award must move the Court for enforcement of the award and establish that doing so would not be contrary to the public policy of India. The Act provides for limited grounds under which enforcement of foreign arbitral awards may be refused, such as that the arbitral award was set at nullity in the jurisdiction where it was passed or was passed contrary to the law to which it was subject or that it was obtained by fraud, coercion or undue influence etc.

The law commission of India, while evaluating the Act in 2014 and early 2015, noted a peculiar trend where the Indian Courts by giving an expansive definition to 'public policy' indulged in reexamination of facts and frequently interfered with arbitral awards on the grounds of patent illegality and public policy. Accordingly, in its 246<sup>th</sup> Report and the Supplementary Report to 246<sup>th</sup> Report on amendments to the Act, the law commission recommended that the gamut of public policy in the context of ICA should be limited to exclude patent illegality. The law commission also recommended that the concept of 'public policy' should be narrowly interpreted in both domestic arbitration as well as ICA.

Further, there were several recommendations made with a view to promote India as a preferred seat of arbitration, including extending applicability of provisions of Part I relating to seeking interim measures, taking of evidence and appeals to foreign seated arbitrations as well. Accordingly, the Act was amended by Arbitration and Conciliation (Amendment) Act, 2015.

Subsequently, a high level committee chaired by Justice B.N. Srikrishna was constituted with an aim to examine the existing regime and suggest a way forward to make India the next big hub for domestic and international arbitration (HLC).

Incorporating the recommendations made by the HLC in its Report of July 2017, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted to further amend the Act. Now, though speedy disposal is encouraged, strict timelines for completion of ICA proceedings that were inserted by the 2015 amendment have been removed. Further, in case parties to an ICA are unable to appoint an arbitrator, they may approach the Supreme Court for such appointment.

Judicial precedents spanning over the course of two decades, three reports by law committees and two legislative amendments to the Act are all marked by a proactive approach of the stakeholders to streamline the process of arbitration in India to suit the contemporary landscape, facilitate ease of parties and reinforcing their confidence in the arbitral regime in India.

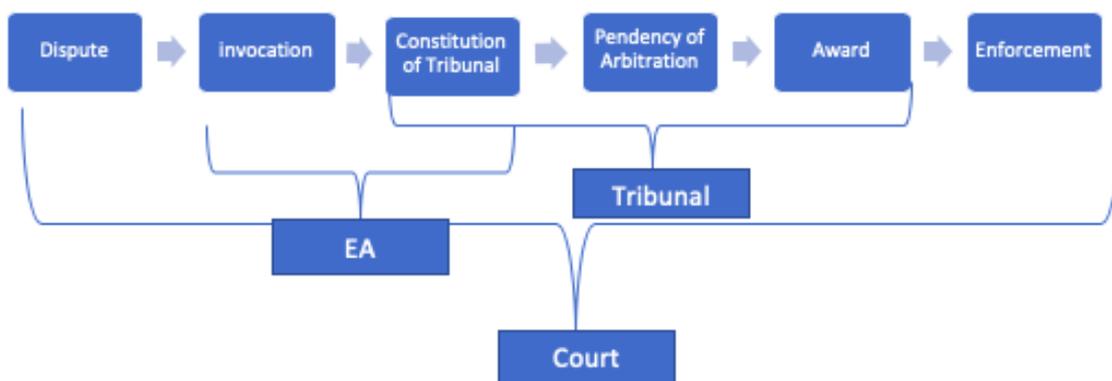
# 2 Emergency Arbitration: To be or not to be (*Enforced*)

## 1. Introduction

Indian arbitration landscape has seen exceptional growth in recent times. The legislature and judiciary in India have continued to show a pro-arbitration stance in the past decade. Given that Emergency Arbitration proceedings are becoming increasingly popular, especially in International Commercial Arbitration, it becomes imperative to ascertain if Indian legal system provides the means to keep pace with such provisional measures. This article seeks to analyze the Indian Legislative and Judicial landscape for emergency arbitration (hereinafter "EA"), particularly in reference to foreign seated international commercial arbitrations, which may see increased focus due to current economic situation.

## 2. Emergency Arbitration: A subset of Interim Reliefs

EA proceedings are envisaged for grant of provisional/ interim reliefs after the arbitration has been invoked, but the tribunal is yet to be constituted.



## 3. Position under Indian Law

Arbitration in India is governed by Arbitration and Conciliation Act, 1996 (*"the Act"*). Part I of the Act (section 2 to 43), barring a few provisions as exceptions<sup>1</sup> applies only to arbitrations seated in India; part II applies to foreign awards and governs their enforcement in India in consonance with the New York Convention. Section 9 of the Act, which is also applicable to foreign seated arbitrations, provides for interim measures by the court prior to the invocation, during the arbitration process and even post the award has been made (prior to the enforcement and only by the successful party).

<sup>1</sup> By virtue of proviso to section 2(2) of the Act: section 9 (interim measure of protection), section 27 (court's assistance in taking evidence), section 37(1)(a) (appeal from an order refusing to enforce an arbitration agreement) and section 37(3) (no right of a second appeal) from Part I also apply to foreign seated arbitrations.

However, the Act does not explicitly recognize EA proceedings or EA decisions. Under the Act, the definition of an arbitral award includes an interim award<sup>2</sup>, but the definition is silent about the status of decisions passed in EA proceedings. The Law Commission of India in its 246<sup>th</sup> report had recommended the recognition of emergency arbitration in India by suggesting an amendment of the definition of an "Arbitral Tribunal"<sup>3</sup> to include an "Emergency Arbitrator"<sup>4</sup>. This recommendation however was not effectuated in the 2015 Amendment. Thereafter, a *High Level Committee to Review the Institutionalization of Arbitration Mechanism in India* also reiterated the need for recognition of EA in its report submitted to the Government of India by recommending amendments in definition of an arbitral award and insertion of definition of an "Emergency Award"<sup>5</sup>. However, none of these recommendations have been implemented so far.

Another issue pertains to the nature of an EA decision and the implications of categorizing it as an "order" or an "award". For instance, under SIAC Rules, the EA decision is categorized as an award.<sup>6</sup> One might argue that since EA decisions are subject to modification and rescindment by the arbitral tribunal and hence are not conclusive determination of issues between the parties, the same are akin to interim measures and should not be accorded the status of an award. The requisite clarity on the said aspect is essential from the point of view of the enforcement of an EA decision when the party refuses to comply, i.e. will such a decision be enforced as an award or an interim measure by the national courts. So, the question of enforcement of an interim "order" as against an "award" passed under EA proceedings is another live challenge which needs legislative attention.

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<sup>2</sup> Section 2(1)(c) of the Act

<sup>3</sup> Section 2(1)(d) of the Act.

<sup>4</sup> The Commission has, therefore, recommended the addition of Explanation 2 to section 11(6A) of the Act with the hope that High Courts and the Supreme 10 Court, while acting in the exercise of their jurisdiction under section 11 of the Act will take steps to encourage the parties to refer their disputes to institutionalised arbitration. Similarly, the Commission seeks to accord legislative sanction to rules of institutional arbitration which recognise the concept of an "emergency arbitrator" – and the same has been done by broadening the definition of an "arbitral tribunal" under section 2(d).

<sup>5</sup> Recommendations 1. Clause (c) of sub-section (1) of section 2 of the ACA may be amended to add the words "an emergency award" after the words "an interim award". 2. Clause (d) of sub-section (1) of section 2 of the ACA may be amended to add the words "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;" after the words "...panel of arbitrators". 3. An emergency award may be defined as "an award made by an emergency arbitrator".

<sup>6</sup> Rule 1.3: "Award" includes a partial, interim or final award and an award of an Emergency Arbitrator;

#### 4. Enforceability of EA Decisions in India

##### 4.1 In a foreign seated arbitration:

As stated above, the enforcement of foreign awards in India is governed by the Part II of the Act, which is based on the New York convention. The Act in consonance with the New York convention provides that an arbitral award in order to be enforced must be "*binding*" on the parties. It may be argued that this does not require the award to be "*final*" in order to be enforced, as long as it is "*binding*" and hence would cover an EA award, even though the same is the nature of interim relief, subject to modification by the Tribunal.

The Bombay High Court in *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. & Ors.*<sup>7</sup> impliedly recognised an EA award as enforceable under Section 48 of the Act and granted interim relief akin to the one passed in EA proceedings under Section 9 of the Act. The Delhi High Court, on the other hand, in *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd.*<sup>8</sup> observed that in absence of any provisions *pari materia* to Article 17H (which contains express provisions for enforcement of interim measures) of the UNCITRAL Model Law, in relation to foreign seated arbitrations, the emergency award passed by the arbitral tribunal cannot be enforced under the Act and the only method for enforcing the same would be for petitioner to file a suit. It is pertinent to mention here that both these decisions relate to EA decisions passed under the SIAC Rules, where an EA decision is recognised as an "*award*".

##### 4.2 In an Indian seated arbitration:

One may argue that an emergency award/ order is in the nature of an interim relief by the tribunal in terms of Section 17 of the Act. Section 17(2) of the Act stipulates that any interim order passed by a tribunal, shall have the same effect as an order passed by a Court and is enforceable under the provisions of the Code of Civil Procedure, 1908. But there is no such provision in Part II of the Act, to enable enforcement of interim orders (not in the nature of interim awards), passed by a tribunal in a foreign seated arbitrations.

Further, the Supreme Court in *Alka Chandewar vs. Shamshul Ishrar Khan*<sup>9</sup> gave an indirect route to seek such enforcement by holding that a party not complying with an interim order of a

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<sup>7</sup> Arbitration Petition No. 1062 of 2012, decided on 22.01.2014 - BOMHC)

<sup>8</sup> O.M.P.(I) (Comm.) 23/2015, CCP(O) 59/2016 and IA Nos. 25949/2015, 2179/2016

<sup>9</sup> S.L.P.(Civil) No.3576 of 2016

tribunal can be held liable for contempt of court under Section 27(5)<sup>10</sup> of the Act. This decision, though rendered in relation to a domestic arbitration can be extended to an interim order passed in a foreign seated arbitration, by virtue of the 2015 amendment which makes Section 27 of the Act applicable to foreign seated arbitrations.

## 5. Conclusion

To sum up, there is a legislative lacuna under the Indian law with respect to emergency arbitration proceedings. Having said that, there are indirect ways to enforce the decisions rendered by emergency arbitrator, which are as follows:

### Indian seated arbitration:

- As an interim award/ order under Section 17 of the Act to be enforced under provisions of CPC akin to order by court.
- Through contempt proceedings under Section 27(5) of the Act.

### Foreign seated arbitration:

- Through contempt proceedings under Section 27(5) of the Act.
- By filing an application under section 9 for interim measures from court in India.
- By initiating enforcement proceedings under Part II of the Act (still to be tested).

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<sup>10</sup> Section 27. Court assistance in taking evidence

*(5) Persons failing to attend in accordance with such process, or making any other fault, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court."*

# 3 Consolidation of Arbitrations under Different Institutional Rules

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Arbitration is a creature of a contract and a right to arbitrate also arises out of a contract. Generally, parties who enter into an arbitration agreement are only entitled to arbitrate amongst themselves. The essence of arbitration is party autonomy which allow the parties to a contract to choose the institution and the law as per their choice to adjudicate upon the disputes between them. However, a party, not a signatory to the contract containing arbitration clause, may also be subjected to arbitration under certain circumstances. Different arbitrations arising out of different contracts may be consolidated and conducted under a single arbitration depending upon the institution or law under which the arbitrations are being carried out.

Due to commercial transactions becoming exceedingly complex, the issues arising out of such a contract have also become complex. Multiple contracts and sub-contracts are entered into in furtherance of a single transaction sometimes separately and sometimes under one mother agreement. Further, when these contracts are drafted there are instances where such agreements have arbitration clauses to be administered by different arbitral institutions. However, there is no provision under the law for consolidation of arbitration proceedings despite the fact that the issues or disputes may be interlinked and may not be properly/holistically adjudicated, if they are adjudicated separately under different arbitrations.

To get rid of the complexities that may arise in aforesaid circumstances, various arbitral institutions and laws allow the consolidation of arbitral proceedings arising out of different contracts. Such consolidation may not be viable under all circumstances, however, in certain situations it may be advantageous to consolidate multiple arbitrations under different contracts into a single arbitral proceeding. Consolidation of proceedings evades the possibility of inconsistencies that may arise if the same issues or overlapping issues are adjudicated differently by different arbitral tribunals.

Below are few arbitral institutions that allow the consolidation of proceedings:

(i) International Chamber of Commerce<sup>11</sup> ("ICC")

The arbitration rules allow for consolidation of proceedings if the parties agree to such consolidation or the International Court of Arbitration deems it fit to consolidate the arbitrations based on the facts and circumstances of the case.

(ii) Singapore International Arbitration Centre ("SIAC")

The SIAC rules of arbitration allow both joinder<sup>12</sup> and consolidation<sup>13</sup> of arbitral proceedings. However, such request for joinder and consolidation has to be made prior to the constitution of Arbitral Tribunal. The threshold for consolidation under the rules require that all the parties agree to such consolidation and the agreements are compatible, i.e. disputes arise out of the same legal relationship; the disputes arise out of contracts consisting of a principle contract and its ancillary contract; or the disputes arise out of the same transaction or series of transactions. However, there have been instances where the Registrar has agreed for consolidation and joinder even when one of the parties objects to the same, thus consent is not a *sine qua non* for such consolidation/ joinder.

(iii) London Court of International Arbitration ("LCIA")

LCIA's latest rules also provide for consolidation<sup>14</sup> under the additional powers of the Tribunal however, an approval from the LCIA Court needs to be sought and parties need to agree to it in writing. The rules provide that arbitration agreements need to be compatible and involve same disputing parties. However, such consolidation shall be prior to formation of Tribunal or if Tribunal is already in place, the Tribunal should have the same arbitrators.

(iv) Delhi International Arbitration Centre ("DIAC")

The DIAC Rules are one of the few institutional rules in India that allow consolidation<sup>15</sup> of proceedings. The rules provide that if the disputes are identical and/or between same parties and/or between parties having common interest the arbitrations may be consolidated on the hearing fixed for terms of reference. Additionally, consolidation may also be done if disputes arise out of separate contracts but relate to same transaction.

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<sup>11</sup> Article 10 of ICC's Arbitration Rules.

<sup>12</sup> Rule 7 of SIAC Rules.

<sup>13</sup> Rule 8 of SIAC Rules.

<sup>14</sup> Article 22.1 (ix) and (x) of LCIA Rules, 2014.

<sup>15</sup> Rule 6 of DIAC Rules.

In the interest of convenience, cost saving and to achieve the purpose of arbitrations i.e. speedy and efficient adjudication of disputes, the courts have also in all major jurisdictions in India and abroad allowed the consolidation of arbitrations or instead allowed the tribunals to adjudicate on this issue if the law or arbitral institutional rules are silent in this regard. That being said, there is no hard and fast rule and consolidation completely depends on the facts and circumstances of a case. Consolidation may not be beneficial at all times and it always depends whether the merits of the case warrant so.

As discussed above, not all arbitral institutions or rules allow consolidation of arbitrations and hence, parties while entering into contracts should keep this in mind while choosing the institution or law as per which the parties wish to get their disputes adjudicated. Consolidation usually reduces the time and costs involved with arbitrations and further avoid duplicity or inconsistency in decisions which decide same or similar disputes, which may sometimes arise out of different agreements or under the same transaction.

# 4 Expert-Tease Me: The Importance of Experts in Arbitrations

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The rise of international trade over the years has been accompanied with the consequential increase in the number of disputes being referred to arbitration. The subject matters of disputes are wide ranging across industries such as construction, nuclear, manufacturing, power supply, technology *et al* and the contracts underlying the dispute may be governed by one or more law. This has led to the importance of experts being recognised by both, the parties and arbitral tribunals.

Experts in an Arbitration can take the following role:

1. **Technical Expert Witness** i.e. experts who opine and testify on technical aspects relating to the subject-matter of the dispute *viz.* industry specific technical expert. Such experts may testify on the various critical aspects including causes of delays to a project, defective product design, changes to design standards and consequences thereof *et al*;
2. **Quantum Expert Witness** i.e. experts who provide a quantum assessment of the loss which is incurred a party in monetary terms, this includes evaluation of accounts, economic data, damages to ascertain quantification of loss; and
3. **Legal Experts Witness** i.e. experts who opine and testify on issues from different jurisdictions which are unfamiliar to the tribunal. This is especially used in the event there are multiple facets laws governing the dispute, which can be due to the different nationality of the parties.

An expert may be appointed by a party or the tribunal and such appointment is governed by the law of the seat. Various national legislations<sup>16</sup> as well as the UNCITRAL Model Law<sup>17</sup> and institutionalised rules<sup>18</sup>, give the tribunal the power to appoint an arbitrator unless agreed otherwise by the parties.

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<sup>16</sup> Section 26, The Arbitration and Conciliation Act, 1996 [Republic of India]; Article 34, Arbitration Law, 2003 [Republic of Japan], Article 34, Federal Law No. (6) of 2018 of Arbitration [United Arab Emirates].

<sup>17</sup> Article 26, UNCITRAL Model Law.

<sup>18</sup> Rule 26, Singapore International Arbitration Centre Rules, 2016; Article 21, LCAI Rules, 2014, Article 25, ICC Rules on Arbitration, IBA Rules on the Taking of Evidence in International Arbitration, 2010.

A party may appoint an expert to advise the party either behind the scenes or as an independent witness before the tribunal. Experts appointed to advise behind the scenes can play a crucial role in developing a claim or defence and are an extension of the party itself. Experts may also be useful in preventing the dispute as well and can play a huge role in achieving settlement of disputes *per se*. On the other hand, a party may appoint an expert to present evidence before the tribunal, who is required to be independent and impartial while giving his report. A fundamental issue arising out of use of party appointed experts is the disagreements between the opinion rendered different party appointed experts.

Additionally or as an alternative to experts being appointed by a party, the tribunal may appoint an expert to assist itself. A tribunal appointed expert may also help in reconciling different approaches taken by the party appointed experts. However, tribunals must be careful while relying on such an experts report, as it cannot delegate its decision-making function to the expert. In fact the tribunals, in order to reconcile the different approaches taken by party appointed experts, also make such experts question each other, which is something like an equivalent of cross examination of the expert witness. In such situations, the last man standing wins.

However, as Montek Mayal, Senior Managing Director, India Practice Leader – Economic Consulting, states: "*majority of expert appointments today in international arbitration are really party appointments. Tribunals remain careful with their own appointments.*"

Another alternative to party or tribunal appointed experts is to appoint an expert as an arbitrator. However, this may turn out to be difficult as the parties can seldom reach a consensus on the area of expertise. Another difficulty which may arise in this is the effectiveness of the 'adjudication' done by an expert arbitrator, as it becomes difficult for an arbitrator from a non-legal background to ascertain the probative value of an evidence which is rendered by either of the party, which is the basis of appreciation of evidence.

Experts often play a crucial role in arbitrations, especially when there are technical issues involved. A strong expert report coupled with a solid expert testimony, can make significant impact to a party's claim. Therefore, while engaging an expert, one should keep the following in consideration:

1. **Qualification:** One should take into consideration the expert's qualification, experience, credibility and reputation in the relevant field. The expert must have sufficient experience and knowledge in the field in which he is to present his report.

2. **Independence and Impartiality:** The expert should be independent from the parties, their legal advisors and the arbitral tribunal. This assumes significance importance as an expert is required to give a statement of independence in his report<sup>19</sup>.
3. **Prior Experience:** Whether or not the expert has any previous experience as an expert witness, as the party has the right to cross-examine an expert, whether it be party or tribunal appointed expert.
4. **Stage at which the expert is to be appointed:** Parties can engage experts at various stages of an arbitration proceeding. It is advised to engage an expert early on as such an expert can work with the counsel to develop a strong claim that can be supported by the expert's evidence.

All in all, experts must be appointed after due care and consideration, as their report and testimony can prove to be a turning point in the arbitration. As Montek further observes: *"there has been a consistent rise in the use and acceptance of experts globally – particularly, in larger, commercial and investment disputes. This has been influenced by both an increase in the complexity of commercial transactions and valuation issues and a greater need for well substantiated, independent assessment of economic losses."*

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<sup>19</sup> See Article 5.2.c of IBA

# 5 Court Granted Interim Reliefs in Arbitrations- Section 9

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## (I) Introduction

Interim relief in any judicial or quasi-judicial proceeding is an integral part thereof and the parties to the proceedings take recourse to it, if required, in order to meet the ends of justice and to preclude the opposite party from acting prejudicially and frustrate the subject matter of the proceeding. The Arbitration and Conciliation Act, 1996 (The Act) is no exception and Section 9 thereof allows the Court/Arbitral Tribunal to grant the interim relief to the applicant should the need so arise.

Before adverting to the contents and finer nuances of the provision, it would be worthwhile to analyse the structure of the Act to deliberate upon in a better light. The Act is bifurcated in 2 parts - Part I deals with domestic arbitration and Part II deals with international commercial arbitration. Interestingly, Section 9 is contained Part-I and was, hitherto, the subject of intense debate as regards its application upon international commercial arbitrations.

## (II) Section 9 - A Generic Overview

It is noteworthy that an arbitration proceeding is dependent upon an agreement between the parties and not akin to other judicial and quasi-judicial proceedings where a matter traces the steps from cradle to the grave before the same forum. As such, when it comes to interim relief in an arbitration proceeding, both the civil court and the arbitral tribunal have their role to play, albeit, in their own respective domains.

The Act accords the right to the parties to apply for interim relief either before, during or after the proceedings on the grounds specified in the provision. Clause (i) of Section 9 provides for the relief for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings. Clause (ii) thereof provides for interim measure of protection and enumerates a list of reliefs which could be granted, like, (a) the preservation, interim custody or sale of any goods which are subject-matter of the arbitration agreement, (b) securing the amount of dispute in the arbitration, (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the arbitration, or as to which, any question may arise therein, (d) interim injunction or the appointment of a receiver.

It is important to note that the list mentioned above is only an inclusive list of the reliefs which can be granted. The Legislature has been conscious that not all circumstances and reliefs could

be foreseen and stipulated. Hence, the concerned fora are empowered to grant such other interim reliefs which may deem just and convenient to it in the facts and circumstances of the case.

However, during the arbitral proceeding, courts refrain from entertaining the applications save for exceptional circumstances where it feels that the relief granted by the tribunal may not be adequate or efficacious. It is noteworthy that before and during the proceeding, either of the parties may apply for interim relief but, after the award has been passed, only the party in whose favour the award has been passed can apply under Section 9, but before the award has been enforced, in order to protect the subject matter of the award.

But, without prejudice to the above, it is worthwhile to note that, unless the circumstances warrant the application thereof, the provisions of Section 9 are usually, and primarily, aimed at protecting the interests of the parties to the dispute before the arbitral tribunal is constituted and, as such, the parties are allowed to approach the Courts for the relief. However, this does not mean downplaying the authority of the Tribunal. Once the Tribunal is constituted, the interim relief which has been granted by the Court is open to be re-evaluated by the Tribunal and, should it decide against it, the Tribunal is empowered to vacate the order to prevent misuse thereof.

### (III) Applicability of Section 9 on Part-II proceedings

Given that Section 9 is contained in Part-I of the Act, its applicability on Part-II, which deals with international commercial arbitration, was the subject of many an intense debate till the amendment of 2015. Prior thereto, the power of Indian Courts to grant interim relief in foreign seated arbitrations was unclear owing to the divergent views taken by the Courts. For ex: the Hon'ble Supreme Court, in *Bhatia International vs Bulk Trading S.A.*, (2002) 4 SCC 105, expanded the wingspan and empowered the Indian Courts to grant interim reliefs in foreign seated arbitrations. However, in *Bharat Aluminium Co. vs Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 (*BALCO*), the Constitution Bench of the Supreme Court overruled *Bhatia International* (*supra*) and held that Section 9 is not applicable to the foreign seated arbitrations.

This, indeed, exposed the *BALCO* judgment to criticism and analysis, primarily, because, for the want of applicability of Section 9 on Part-II, the parties would be rendered devoid of an interim relief when it is most required. However, the amendment has settled the issue by allowing Indian Courts to pass interim orders in the international commercial arbitrations.

The Arbitration and Conciliation (Amendment) Ordinance, 2015 incorporated the oft needed amendment in the Act and added a proviso to Section 2(2) of the Act. Prior thereto, as per the

provision of Section 2(2), Section 9 was applicable only when the place of arbitration was in India. However, after the proviso, the scope of Section 9, along with Sections 27, 37(1)(a) and 37(3), has been widened and is also made applicable to the international commercial arbitration. This, indeed, is subject to the agreement between the parties and applicable to the place the arbitral award made or to be made wherein is recognized and enforceable under Part II of the Ordinance.

#### (IV) The essentials required to get an interim relief under Section 9

Interim relief in any proceeding whatsoever is intended only for sparing circumstances to meet the ends of justice and arbitration is so exception.

There cannot be any strait-jacket list of circumstances and essentials which can call for the grant of interim relief. It depends upon the facts and circumstances of the case but, mainly, to prevent irreparable damage to any of the parties to the dispute and to meet the ends of justice. However, for the sake of example, the following could be listed to give a broad idea:

- a) To secure the subject matter of the dispute. For ex: if the subject matter of the dispute is of a perishable nature, the same may be required to be dealt with immediately or else the dispute would be rendered infructuous during the course of the proceeding.
- b) To prevent one party from acting to the prejudice of the other. For ex: if there is reasonable apprehension that one party may tamper with the evidence, it may be injuncted from so to do in order to meet the ends of justice.

A party to the dispute cannot apply for an interim relief as a matter of right. It is an extraordinary power of the forum to be exercised only in extraordinary circumstances so as to be able to do complete justice in the *lis* presented before it. Hence, the party applying for the interim relief is required to establish that the requisite parameters exist which, if not accommodated by the forum, would render the whole proceeding futile.

## (V) Conclusion

Although, granted the statutory force, the applicability of Section 9 is, still, subject to the basic tenet of the law of arbitration i.e. agreement between the parties. The same would be applicable only if it is not excluded by the parties by agreement. Express exclusion is as the name suggests but implied exclusion of Section 9 depends upon the facts and circumstances of the case and would be ascertained by the Courts.

Further, the amendment does not accord a blanket applicability of Section 9 on international commercial arbitrations. There are certain circumstances which impede the same. For ex: Section 9 would not apply to foreign arbitrations if they take place in a country the arbitration awards whereof are not recognized under Indian law.

In addition to the above, the amendment has also left some areas to be desired. While empowering the Indian Courts to pass interim reliefs in international commercial arbitrations, the amendment does not make a provision for the enforcement in India of the interim orders passed by the foreign Courts and Tribunals which would have been a welcome inclusion.

In view of the fact that the legislature has woken up and taken notice, it can be, comfortably, presumed that, not so long in future, we would see the gaps filled up and Indian arbitration law standing its ground on international standards.

## 6 The Saga of Appointment of Arbitrators: End in Sight?

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Appointment of arbitrators has always been a contentious issue between the parties. Qualification, experience, impartiality, and independence are few of the issues which crop up as soon as dispute arises, and the question of the appointment comes to fore.

Indian arbitration landscape has developed over time, and the core principle of party autonomy in agreeing to the procedure of appointment of the arbitrator has been continuously subjected to statutory amendments and judicial review.

The arbitral tribunal, typically, comprises of either a single-member or a panel of three members. These appointments, subject to the terms of the arbitration agreement, are either made by parties with mutual consent or only one party unilaterally who retains the right of appointment under the contract. Further, the power of appointment is also exercised by courts under Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act'), in line with the terms of the arbitration agreement, the same being an administrative action of the court.

Even before the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 ('2015 Amendment') right of unilateral appointment was considered by various courts and courts have, time and again, held that unilateral appointment is not an unfettered right. An employee of the appointee who has been connected to the subject-matter of the dispute cannot be appointed, given the import of Section 12 (pre-2015 amendment) of the Act.

Then in a significant overhaul of the Act by the Parliament in 2015, Red and Orange List of the *IBA Guidelines on Conflict of Interest in International Arbitration* was inserted as a schedule to the Act, and Section 12 was amended. These lists contain relationships between the parties, arbitrators, subject-matter and counsels whereby people having relationships falling under the Red List [Non-Waivable], incorporated under Schedule V of the Act, are prohibited from acting as an Arbitrator in the subject arbitration. Further, relationships falling under Orange List [Waivable], incorporated under Schedule VII of the Act, gives justifiable *doubts* as to the independence and impartiality of the arbitrator and parties are at liberty to waive the objection to the same by mutual agreement.

While the 2015 Amendment was declared prospective *vide* Section 26 of the 2015 Amendment, the Hon'ble Supreme Court remained inconclusive as to the applicability of the amended Section 12 and the Schedules on existing arbitrations that were invoked pre-amendment.

The amendment to Section 12 to the Act was considered by the Supreme Court in *Voestalpine Schienen Gmbh v. Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665. The Supreme Court highlighted the distinction between the concept of 'independence' and 'impartiality'. It further held that time has come to send positive signals to the international business community to create a healthy arbitration environment and a conducive arbitration culture in this country. The court also opined that Schedule V and VII needs to act as a 'guide' to the already existing principle of impartiality and independence.

Subsequently, the Supreme Court in *Board of Control for Cricket in India v. Kochi Cricket Private Limited & Others* (2018) 6 SCC 287, hinted that amendments to the provisions of the Act, which are clarificatory might have retrospective effect. This, along with the question as to whether the court while appointing an arbitrator can deviate from the procedure prescribed under the agreement, were considered by the Supreme Court in the case of *Union of India v. Parmar Construction Company* 2019 SCC OnLine SC 442, which I had the opportunity to argue at length for the Respondent. Unfortunately, the arguments advanced on behalf of the Respondent did not find favor with the court, and it held that the first resort of the court, under Section 11, should be to follow the procedure provided under the arbitration agreement. The Hon'ble Supreme Court further held that amended Section 12 of the Act would not apply to arbitrations initiated before the amendment.

For appointments made in arbitrations, invoked post 2015 amendment, a three-judge bench of the Supreme Court in *TRF Limited v. Energo Engineering Projects Ltd.* (2017) 8 SCC 377, decisively ruled against unilateral appointments of arbitrators. The court held that a person who is himself barred from becoming an arbitrator, in light of Section 12 of the amended Act, cannot even appoint an arbitrator. However, various High Courts still distinguished TRF judgments on facts and continued to follow the procedure provided under the agreement, including unilateral appointments.

It was finally in *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.* 2019 (6) ArbLR132 (SC), that Division Bench of the Supreme Court went a step further and held that all arbitration agreements which contain a clause for the unilateral appointment of an arbitrator by one party is in the teeth of Section 12 of the Act and are null and void. It also implied that the court, while appointing an arbitrator under Section 11 need not follow the procedure laid down under the arbitration agreement in case it requires only one party to suggest the name. However, while the court in *Perkins* cited *Voestalpine*, it left the question of the legality of the selection of an arbitrator from a panel suggested by the other party open. This issue was answered by the Hon'ble Bombay High Court in *Lite Bite Foods Pvt. Ltd. v. Airports Authority of India* 2019 SCC

*OnLine Bom 5163. The court interpreted Perkins to hold that suggestion of a narrow panel and other party's obligation to choose an arbitrator from that list, too, is impermissible.*

*While the community was welcoming the Perkins judgment, shortly after that, three Judges Bench of the Supreme Court in Central Organisation For Railways Electrification v. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company 2019 SCC OnLine SC 1635, held that a panel of five arbitrators appointed by the Ministry of Railways, comprising their current and past employees, was valid and enforceable even when all the three arbitrators for the panel could be from the same five names suggested. The Supreme Court based its decision on the logic that the power to appoint an arbitrator by one party was counter-balanced by an equal power in favor of the other party to choose from a list. Surprisingly, while the court relied upon Perkins, TRF, and Voestalpine, the decision seems to run contrary to them.*

Presently, the situation remains as it is, and there remains a logical ambiguity on the legality of the appointments by one party when it suggests a panel of limited names to the other party. Further, what also remains to be seen is the impact of Perkins judgment on appointments made under Section 11 by courts interregnum *Parmar Constructions* and *Perkins*.

In our belief, the time is not far when the legislature or the court will settle the controversy and put a conclusive end to this saga aligning itself to the international best practices and norms.

The wait, however, I hope, will not be too long!

# 7 The Standard of Independence and Impartiality of an Arbitrator and Conflict of Interests Surrounding It

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The right to independent and impartial resolution of disputes is a core tenet of an arbitration process. The need for effective standards in relation to the independence and impartiality of an arbitrator is emanated from the *IBA Guidelines on Conflicts of Interest in International Arbitration* ('IBA guidelines'). The emphasis on standards of independence and impartiality of arbitrators has also been encapsulated under several other international rules and conventions like the UNCITRAL Arbitration Rules<sup>20</sup>, ICSID Convention and its Arbitration Rules<sup>21</sup>, SCC Arbitration Rules<sup>22</sup> as well as the ICC Arbitration Rules<sup>23</sup>.

With the advent of exceptional growth of international arbitration in recent times, the IBA recognized and analyzed the conflicts of interest surrounding the standard of independence and impartiality in international arbitrations. The IBA with an object to minimize unnecessary disclosures and withdrawals by arbitrators constituted a group of experts to compose guidelines on conflicts of interest in international arbitration<sup>24</sup> to be harmonize the standard of independence and impartiality in international arbitration<sup>25</sup>.

The IBA guidelines are particularly structured in two parts:

- i. the first part consists of general standards expressing the principles that should guide arbitrators, parties and arbitral institutions when deliberating over possible bias; and
- ii. the second part consists of a list of specific situations meant to serve as practical guidance.

The said list is divided into three parts namely – a Red List, an Orange List and a Green List. The red list describes situations in which an arbitrator should not accept appointment or withdraw if already appointed. However, the IBA guidelines regards certain situations described in the red list as non-waivable, such as when there is an identity between a party and the arbitrator, or the arbitrator has a significant financial interest in one of the parties or the outcome of the case. On the other hand, the orange list is a non-exhaustive enumeration of specific situations, which, in

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<sup>20</sup> Article 9 of 1976 UNCITRAL Arbitration Rules and Article 11 of 2010 UNCITRAL Arbitration Rules.

<sup>21</sup> Article 14(1) and Article 57 of the ICSID Convention read with Article 6(2) of the ICSID Arbitration Rules.

<sup>22</sup> Article 14(2) and Article 15(1), SCC Arbitration Rules.

<sup>23</sup> Article 7 and Article 11 of ICC Arbitration Rules.

<sup>24</sup> Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration at Page. 3 – 4.

<sup>25</sup> Introduction to the IBA Guidelines on Conflicts of Interest in International Arbitration at Page. 4.

the eyes of the parties may give rise to justifiable doubts as to the impartiality or independence of the arbitrator. According to the IBA guidelines the arbitrator has a duty towards the parties to disclose situations falling under the Orange list. On account of situations enlisted under the Orange List, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. The IBA general standard provides for a limitation period of 30 days to the parties to raise objections. Such situations include previous services for one of the parties within the past three years and relationships between an arbitrator and a co-arbitrator or counsel. Lastly, the Green List describes situations under which the IBA guidelines do not recommend disclosure let alone withdrawal by the arbitrator. These situations include previously expressed legal opinions and previous services by the arbitrator's law firm against one party in an unrelated matter without the involvement of the arbitrator. The Green List also includes situations described in the Orange List such as previous services for one of the parties when more than three years have passed.<sup>26</sup>

The Government of India with an intend to maintain the pro-arbitration stance in India decided to amend the Arbitration and Conciliation Act, 1996 by introducing the Arbitration and Conciliation (Amendment) Bill, 2015 in the Parliament. The said amendments were based on the recommendations by the Law Commission of India in its 246<sup>th</sup> Report<sup>27</sup> in light of the general standards formulated under the IBA Guidelines laying the principles that should guide arbitrators, parties and arbitral tribunal in deliberating over issues of possible bias and suggestions received from stake holders.

In an attempt to make arbitration a preferred mode of settlement of commercial disputes and making India a hub of international commercial arbitration, amendment to Section 12<sup>28</sup>, as per the new law makes the declaration on the part of the arbitrator about his independence and impartiality more onerous. A Fifth Schedule has been inserted vide the amendment, which lists the exhaustive grounds that would give rise to justifiable doubt to independence and impartiality of an arbitrator. Any person beyond the purview of the grounds as stipulated under the Fifth Schedule is likely to be independent and impartial in all respects. Additionally, another schedule i.e. the Seventh Schedule has been added and a provision has been inserted categorically stating that notwithstanding any prior agreement of the parties, if the arbitrator's relationship with the parties or the counsel or the subject matter of dispute falls in any of the categories mentioned in the Seventh Schedule, the such an arbitrator is ineligible to be appointed as an arbitrator, i.e. the

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<sup>26</sup> Lawson, D. A., Impartiality and Independence in International Arbitration – Commentary on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration, ASA Bulletin Vol. 23, No. 1, 2005, Kluwer International 2005 at Page 35.

<sup>27</sup> <http://lawcommissionofindia.nic.in/reports/Report246.pdf>

<sup>28</sup> Section 12, Arbitration and Conciliation (Amendment) Ordinance, 2015.

said arbitrator is *de jure* ineligible. However, subsequent to disputes having arisen, parties may by expressly entering into a written agreement waive the applicability of this provision. Thus, it would not be possible for departmental authorities to appoint their employees or consultants as arbitrators in arbitrations.

The aforesaid amendment to section 12 of the Arbitration and Conciliation Act, 1996 makes the declaration by the arbitrator about his independence and impartiality more realistic as compared to a bare formality under the previous regime. The IBA Guidelines lead amendment to Section 12 has evolved in uplifting the standards of independence and impartiality in India as evident from the recent decision by the Hon'ble Supreme Court in *Perkins Eastman Architects DPC & Anr v. HSCC (India) Ltd.*<sup>29</sup> which declared that unilateral appointment of a sole arbitrator is impermissible, which wasn't the case pre-amendment. The amendments have provided more clarity with respect to the standards of impartiality and independence. It will be interesting to see how the Indian judiciary deals with other ancillary issues arising out of said shift in stance.

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<sup>29</sup> Arbitration Application No. 32 of 2019.



## Enforcement of Foreign Awards in India

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### (I) Introduction: -

The ever-growing and rapid development of trade and commerce has witnessed a consistent and uninterrupted increase in cross-border transactions. As a result of this surge in cross border trade and transactions there has also been a correlative and corresponding rise in cross borders disputes. This growth in international cross-border disputes required the creation of an efficient and effective method for their resolution.

It was found that there was a broad consensus amongst industry leaders and jurist scholars that the answer to the conundrum posed by the increase in the number of disputes lay in international commercial arbitrations. The acceptance of international commercial arbitration was further strengthened as parties involved in cross-border disputes were usually unwilling to have matters resolved by the court systems of another disputing party.

However the setting up of a dispute resolution mechanism and passing of an award is only half the battle, the true success of international commercial arbitration as a method for dispute resolution can only be adjudged by the effective execution of the award in the territory where the subject matter of the dispute is located. If awards cannot be executed to put an end to ongoing disputes by securing the interests or assets of successful parties, the practical effect would be the failure of international commercial arbitration as a method for cross border disputes. Thus, enforcement of an award is as important a part of any international commercial arbitration as the arbitral proceedings themselves.

### (II) Enforcement of An Award in India: -

India is a signatory to the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"). Broadly speaking if an award is received by a party from a country which is signatory to either of the abovementioned conventions and has been notified as a convention country by India, then in such case an award would be enforceable in India subject to it withstanding the tests laid down for enforcement in the Indian Arbitration and Conciliation Act, 1996 ("Arbitration Act").

Section 48 of the Arbitration Act lays down the circumstances under which a Court to which an application for execution of an award has been made, *may* refuse the enforcement of the

award. It is also pertinent to state that the grounds mentioned in section 48 are exhaustive in nature.

The abovementioned circumstances to oppose execution of an award under Section 48 are as under:

- The parties to the agreement were under some incapacity and/or the agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
- The award deals with a difference 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:
- Composition of the Arbitral Authority or Procedure was not in conformity with the agreement of the parties or the law of the land where the arbitration took place.
- Award is not binding on the parties or has been set aside by a competent authority where the award was made.
- The subject-matter of the difference is not capable of settlement by arbitration under the law of India
- The enforcement of the award would be contrary to the public policy of India

The language of section 48 of the Arbitration Act makes it clear that the enforcement of a foreign award "may" be refused instead of the words "shall" be refused. The use of this language clearly evidences the intention of the legislature to provide the Court with a power to overrule and disregard the defence put up by the contesting party even if they are successful in establishing the existence of one of the conditions laid down in section 48 of the Arbitration Act.

It is also necessary to clarify that the powers of the Court to refuse enforcement of an award under section 48 of the Arbitration Act, are not one of an appellate court, it is a universally accepted principle that the Court before which the enforcement is sought should not delve into the merits of the award or into questions of any mistake of facts or in law committed by the Arbitrator/ Arbitral Tribunal.

Once the Court before which the enforcement proceedings are filed is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that domestic Court.

(III) **Appropriate Court for Enforcement:** -

As per the clauses of the Arbitration Act a 'court' would mean the principal Civil Court having original jurisdiction to decide the question forming the subject matter of the arbitration if the same was the subject matter of a suit.

In light of the above it is apparent that an award holder can initiate execution proceedings before any court in India within whose jurisdiction the assets/ interests that are the subject matter of the dispute are located. To further reduce ensure the expeditious enforcement of foreign awards the legislature has formed various commercial courts under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 ("Commercial Courts Act"), that in most cases have the jurisdiction to hear such matters.

(IV) **Conclusion:** -

The rapid growth and development witnessed in India since the opening up of the economy post the 1991 reforms has made India as a regional powerhouse and on the path to become a global commercial superpower. This growth in the commercial sector however have burdened and, in some cases, crippled the judiciary with a heavy backlog of cases and matters often taking decades to be resolved. It has long been a sore point with international investors that any disputes which arise in or require enforcement of awards against assets and interests located in India usually take a large amount of time and the same was not conducive to the establishment and growth of trade and commerce. However, changes have been made to make India a more investor friendly jurisdiction. The pro-arbitration approach of the courts are evident from the recent spate of judgements propounding the limited role to be played by courts in the enforcement of foreign awards. The passing of the 2015 and 2019 amendments to the Arbitration Act along with the establishment of the commercial courts as mentioned earlier have been lauded as developments that have aligned India with the prevailing jurisprudence and best practices in the field of Arbitration globally.

# 9 Is it Time for India to Ratify the CISG? - The Damages Regime under the CISG

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## *Food for Thought!*

This article, as it stood before, was only focused on understanding the regime of claiming damages under the United Nation Convention of International Sale of Goods, 1980 ('CISG'). But now this pandemic has compelled me to discuss another issue which exists in India in relation to the CISG, i.e. India has not ratified the CISG. While dealing transnationally, Indian buyers and sellers, are still bound by the Indian Sale of Goods Act, 1930 ; unless the Indian party has expressly opted for CISG being the relevant law governing the relationship of parties in a contract for international sale of goods.

Usually the countries which have ratified the CISG, have one set of rules governing the law of domestic sales in their country and another set of rules governing the law of international sales. The latter is effectuated through adoption of CISG in their domestic legislation for international sales. If India ratifies and subsequently adopts the CISG, India could only apply it to its domestic law of international sales.

This pandemic apart from causing immense pain and problems has also opened and will open many avenues for foreign investments and trade in India. Therefore, for the ease of trade and given the wide acceptance of CISG, it is probably time for India to ratify the CISG. As the same would result in both legal as well as trade advantages for India.

I would discuss in detail the pros and cons of ratification of CISG by India, in my next article. However, according to me, one the biggest pros of CISG is that the damages regime under the CISG is best suited for modern day international trade, as opposed to the Indian Sale of Goods Act which was enacted in the year 1930. Hence, the discussion in this article on the damages regime under the CISG becomes relevant.

## **Introduction- Damages Regime under the CISG**

There has been a stark increase in cross-border disputes due to globalization and the ever attenuating borders. Thus, the use of international conventions for governance of contract of international sale of goods such as CISG become increasingly useful, as they provides for a neutral law which can govern the contractual disputes between the parties as well as their rights and obligations.

Except to a very limited extent<sup>30</sup>, CISG only governs the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such contract, and does not govern the validity of the contract itself<sup>31</sup>.

This article provides a broad understanding of the damages regime under the CISG, therefore, for the purpose of this article, it is assumed that (1) CISG is applicable to the parties, (2) the parties have entered into a valid contract of international sale of goods in terms of CISG, and (3) disputes have arisen between the parties.

There are 2 types of breaches under the CISG, (I) fundamental breach of contract<sup>32</sup> and (II) any other/ordinary breach of contract i.e. any breach which is not fundamental. Therefore, this article is also divided into these 2 parts as the treatment of such breaches is different and the remedies available to either of the parties also differ:

#### (I) Fundamental Breach of Contract under CISG

1. A breach is fundamental if its results in such detriment to the other party so as to substantially deprive of what he is entitled to expect under the contract<sup>33</sup>.
2. For a breach of contract to be fundamental it must concern either the essential content of the contract, the goods, or the payment of the price concerned, and it must lead to serious consequences to the economic goal pursued by the parties<sup>34</sup>. Such a breach results in a *substantial deprivation* of what the aggrieved party expected to receive under the contract<sup>35</sup>.
3. For example, in an Austrian-Chinese dispute over unfit scaffoldings non-conforming to the sample, an ICC arbitral tribunal held it to be a fundamental breach of contract, since the costs for sorting out the defects would have been substantial compared to the total purchase price<sup>36</sup>. This has been held to be the case even where the goods suffered from serious and irreparable defect although they were

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<sup>30</sup> Eg. Articles 8, 11, 12, 13 et al, CISG.

<sup>31</sup> Article 4, CISG.

<sup>32</sup> Article 25 of CISG.

<sup>33</sup> *Id.*

<sup>34</sup> Chengwei, Liu “The Concept of Fundamental Breach: Perspectives from the CISG, UNIDROIT Principles & PECL and case law, May 2005”; and Bundesgericht, Switzerland, 15 September 2000 (FCF S.A. v. Adriafile Commerciale S.r.l), available on the Internet at [www.bger.ch](http://www.bger.ch).

<sup>35</sup> Leonardo Graffi, “Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention”: *Revue de droit des affaires internationales / International Business Law Journal*(2003) No. 3, 338-349 (Forum Européen de la Communication) Paris, p. 338 <<http://www.cisg.law.pace.edu/cisg/biblio/graffi.html>>; and Cour de Cassation, 13 September 2011 *Production line case*, 09-70305, Available at: <http://cisgw3.law.pace.edu/cases/110913f1.html>.

<sup>36</sup> ICC, 1994, *Scaffold fittings case*, ICC Arbitration Case No. 7531 of 1994, Available at: <http://cisgw3.law.pace.edu/cases/947531i1.html>.

still useable to some extent<sup>37</sup>.

4. The Swiss Federal Supreme Court in a case where the applicable law was CISG, held the breach to be fundamental when even after numerous attempts to correct problems, packaging machine reached only one-third of the contractually agreed level of production; thus, resulting in substantial loss of production to the buyer of the machine<sup>38</sup>.
5. Therefore, for a breach to be fundamental it should be a breach of the most basic obligation of either of the party. For example, for a seller, non-supply of goods promised under the contract or supply of substantially defective/non-conforming goods is a fundamental breach of contract; whereas for a buyer non-payment of agreed sum is a fundamental breach of contract.
6. Fundamental breach of contract, gives the aggrieved party an additional<sup>39</sup> right to avoid the performance of the contract<sup>40</sup> and consequently, the remedy/claim of restitution<sup>41</sup>.
7. Avoidance of contract releases both parties from their obligations under it, subject to damages which may be due. Further, both parties must restate each other and return whatever benefit it incurred due to the contract performance by the other<sup>42</sup>.
8. Avoidance of contract may not be possible in certain circumstances<sup>43</sup>. The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.<sup>44</sup> One situation in which this general rule is not applicable is if the said impossibility is not due to the buyer's act or omission<sup>45</sup>.

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<sup>37</sup> Austria, Oberlandesgericht, 1 July 1994, CLOUT case No. 107, Innsbruck, Austria.

<sup>38</sup> Bundesgericht, Switzerland, 18 May 2009] [Federal Supreme Court], *Internationales Handelsrecht* 2010, 27 <http://cisgw3.law.pace.edu/cases/090518s1.html>.

<sup>39</sup> In addition to claiming damages for a breach as detailed in Section II of this article.

<sup>40</sup> Article 49 (avoidance by buyer) and Article 64 (avoidance by seller), CISG.

<sup>41</sup> Section V of Chapter V, CISG- Article 81-84, CISG.

<sup>42</sup> Article 81, CISG.

<sup>43</sup> Article 82, CISG.

<sup>44</sup> Article 82 (1), CISG.

<sup>45</sup> Article 82 (2)(a), CISG.

9. Further, if the contract is avoided and if, in a reasonable manner and time, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable in terms of Art. 74<sup>46</sup>.

## (II) Ordinary breach of Contract under CISG

1. Art. 45(1)(b) CISG stipulates that the buyer is entitled to request damages whenever the seller fails to perform *any* of his obligations<sup>47</sup>.
2. Obligations of seller are detailed under the contract between the parties as well as CISG and include delivery of the goods, handover any documents relating to them and transfer the property in the goods, as required under the contract or CISG<sup>48</sup>.
3. Art. 45(2) CISG clarifies that the buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
4. Similarly, the Art. 61 (1)(b) CISG stipulates that the seller is entitled to request damages whenever the buyer fails to perform *any* of his obligations.<sup>49</sup>
5. Obligations of the buyer are detailed under the contract between the parties as well as CISG and include payment of price and take delivery of the goods as required by the contract or CISG<sup>50</sup>.
6. Art. 61 (2) CISG clarifies that the seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
7. The amount of damages requested under the CISG should be calculated, as a general rule, pursuant to Art. 74 which stipulates that damages for breach of contract consist of a sum equal to the loss, including loss of profit, that the aggrieved party suffered as a consequence of the breach. Art. 74 is to be interpreted liberally to compensate an aggrieved party for all disadvantages

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<sup>46</sup> Article 75, CISG.

<sup>47</sup> Section III of Chapter II, CISG.

<sup>48</sup> Chapter II of CISG, and Article 30, CISG.

<sup>49</sup> Article 61, CISG.

<sup>50</sup> Chapter III of CISG, and Article 53, CISG.

suffered as a result of the breach, however, these are subject to limitations imposed by the doctrines of foreseeability<sup>51</sup> and mitigation<sup>52</sup>.

8. The principle of full compensation for breach of contract established by Art. 74 is expressed in many national laws, set forth in both the UNIDROIT Principles and the Principles of European Contract Law (PECL). It is also consistent with decisions of many international tribunals<sup>53</sup>.
9. Thus, in order to establish a claim for damages, the aggrieved party must prove that the following criteria are met, viz. (1) there must be a financial loss, (2) there must be a causal link between acts/omissions giving rise to the claim and the aforesaid financial loss, (3) this causal link must be adequate, (4) that at the time of conclusion of the contract and in the light of the circumstances of the case, such losses were foreseeable, and (5) the party claiming breach had taken reasonable measures to mitigate its loss<sup>54</sup>.
10. Art. 77 has been interpreted as a statement of "public policy against waste," imposing a duty to mitigate losses and, according to commentator Vilus, a duty to cooperate in case of breach<sup>55</sup>. Under Art. 77, the breaching party bears the burden of proving that party claiming breach did not reasonably mitigate its losses. The party claiming breach must show that it mitigated avoidable losses as well as fulfilled its duty to cooperate in good faith by taking "reasonable" measures to mitigate loss.

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<sup>51</sup> Article 74, CISG.

<sup>52</sup> Article 77, CISG.

<sup>53</sup> Articles 74 and 77, CISG; Cl. 1.1 of CISG Advisory Council Opinion No. 6.

<sup>54</sup> *Id.*

<sup>55</sup> VILUS, Jelena, *Provisions Common to the Obligations of the Seller and the Buyer International Sale of Goods: Dubrovnik Lectures*, Oceana, 1986; and OPIE, Elisabeth, *Commentary on the Manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG*, January 2005.

### (III) Conclusion

In view of the above, it becomes clear that depending upon the facts and circumstances, the aggrieved party can claim fundamental breach of contract giving rise to avoidance of contract and the consequential remedy of restitution or can claim an ordinary breach of contract and consequential damages for such a breach, or both. It also becomes clear that a claim of avoidance of contract due to fundamental breach of contract does not preclude a claim of damages for the very same breach. Therefore, a party can claim restitution for rightful avoidance of contract as well as damages for the loss resulting due to such a breach by the breaching party.

# 10 Unpleasant Surprise of Exclusion of Liability for Damages in International Sales Contracts

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## Introduction

The use of Standard Terms in international sales contracts is quite common and such terms are typically prepared in advance for general and repeated use by one party and often used without negotiation with the counter party. Such terms are often incorporated into the contract by reference to supplement the specifically negotiated terms and differ across various industries and sectors. It has been observed that majority of standard form contracts used globally contain clauses having the effect of restricting, limiting or excluding liability of a defaulting party to pay damages in some form or the other as a measure to allocate contractual risks. While such clauses are usually enforceable across civil and common law jurisdictions with varying degrees and exceptions, interpretation and enforceability of atypical clauses raises certain contentious issues, which is the subject of brief analysis in this note. Due to prevalent application of the *UN Convention on Contracts for the International Sale of Goods, 1980*<sup>56</sup> (CISG) worldwide in international sales, we seek to examine validity of 'surprise terms' which stipulate exclusion or restriction of liability of a defaulting party for damages on the anvil of principles envisaged under CISG.

For signatory nations, the CISG governs contracts for the sale of commercial goods between parties whose places of business are in different countries. The CISG can also be specified by contracting parties as the choice of law to govern substantive rights and obligations in lieu of municipal law. Thus, CISG rules can govern international contracts even if one or both parties are from non-signatory states. When a dispute arises out of a contract for sale of goods between parties from contracting states, the CISG will apply to the dispute unless the parties contractually exclude its application. Several eminent ICC, SIAC and CIETAC arbitral tribunals as well as national courts across various legal systems have relied on CISG jurisprudence to substantively decide international sales disputes with great authority.

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<sup>56</sup> CISG formulates uniform rules with respect to international commercial transactions and was intended to be a uniform and fair set of rules for contracts for the international sale of goods to prevent parties to an international transaction from having to analyze the various national or international laws to determine the law applicable to the contract. As on date, 89 nation states are signatories to the CISG, notably excluding the United Kingdom, India, Hong Kong and Taiwan as non-signatories.

## What are 'surprising terms'?

In some cases, an exemption or limitation of liability is a necessary condition to the performance of risky ventures. It is often required to make the risk insurable. It may also benefit the other party in the form of a price reduction and facilitate international trade. Such clauses perform a useful function of anticipating future contingencies that may hinder or prevent performance, establish procedures for the making claims and provide for allocation of risks between contractual parties. Where a party has unambiguously communicated to the counter party that it wishes the agreement to be subject to its standard terms, then the standard terms should be applicable, unless such incorporation is clearly disagreed after having a reasonable opportunity to take notice of the contents of the standard terms. Where the Standard Terms of a party have been successfully incorporated into a contract, the counter party is bound by those terms whether it has read them or not or is aware of their contents or not. An important exception to this rule, however, states that, notwithstanding the acceptance of Standard Terms, a party would not be bound by them as their content, language or presentation is of such character that it could not be reasonably expected by it.<sup>57</sup> Therefore, where the terms are of such a nature that the other party could not reasonably have expected them, such 'surprising terms' should not bind the parties. An example of this maybe a term which completely exonerates a defaulting party from any monetary liability or otherwise.

## Approach to Interpretation

As with other terms and conditions of a business contract, limitation and exclusion clauses are generally governed by the fundamental principles of modern contract law, namely: a) the freedom of contract (party autonomy); b) good faith and fair dealing (reasonableness); and c) public policy (which include mandatory national rules). However, where the terms are of such a nature that the other party could not reasonably have expected them, such surprising terms should not form part of the consensus between the parties. This is not a validity issue but a contract formation issue and therefore falls within the scope of the CISG. It is simply not a risk that can be ascribed to the party in such circumstances as the same will be onerous and inequitable. If the party using the standard terms wishes to include such terms, it needs to specifically inform the other party of their existence and inclusion.

Courts and arbitral tribunals generally rely on the interpretation of provisions dealing with the formation and interpretation of contracts under the CISG namely Article 8(2), which embodies the principle of reasonableness to test the validity of such terms. A term contained in Standard

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<sup>57</sup> UNIDROIT Principles of International Commercial Contracts 2010 ("UNIDROIT Principles") Article 2.1.20.

Terms may come as a surprise to a party by reason of its content when it is such that a reasonable businessperson would be shocked by inclusion of it. Interpretation of a contract depends upon common intention of parties and preliminary negotiations between parties are the relevant circumstances to be applied to determine such common intention. According to Article 7(1), international character of the CISG, uniformity of application and good faith should be the basis for interpretation of terms under the CISG. This provision encompasses the principle of good faith and fair dealing in international commerce.<sup>58</sup>

### Limits to Enforcement

Despite the principle of full compensation embodied in the CISG under Article 74, the extent of damages is regulated by most legal systems and most often self-regulated by contracting parties through allocation of risk and monetary liability. Given the width of the parties' freedom to allocate their risks and liabilities in a manner which modifies the remedies regime established in Article 6 of the CISG, the interpretation of the protection mechanisms set forth in the otherwise applicable law or rules of law must follow the priority of freedom of contract. It is pertinent to note that limitation or exclusion of liability clauses are subject to specific regulation in several legal systems and precedents suggest that courts and tribunals in various jurisdictions have attempted to protect a contracting party by means of judicial or legislative principles designed to make it difficult to exclude liability under certain specific circumstances. Generally, a clause seeking to limit or exclude a defaulting party's liability for breach must not leave the innocent party without any remedies to enforce its contractual rights. A non-exhaustive list of principles evolved across various legal systems and jurisdictions to invalidate exclusion of liability clauses is laid down below:<sup>59</sup>

- When non-performance is the result of fraudulent or willful breach or gross negligence
- When it concerns the very substance of the obligation or a fundamental obligation
- Where it relates to the breach of obligations deriving from mandatory norms
- When it is unreasonable
- When it concerns the liability for death or personal injuries
- When it runs foul to the general principles of domestic legislation concerning "unfair terms" or if such clauses cause "grossly unfair" results
- When it is unconscionable

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<sup>58</sup> CISG-AC Opinion No. 13, R.7

<sup>59</sup> CISG- AC Opinion No. 17, R. 4(a)

Thus, it may be seen that invalidation of such restrictive clauses by the competent state court or arbitral tribunal is the most common protection mechanism against abusive limitation of liability clauses and the principles highlighted above generally guide such decisions. However, it must be noted that CISG provides the background against which the validity of an exemption or limitation of liability clause must be assessed for international sales contracts. Thus, the unfairness tainting the validity of a limitation clause must be determined qua fairness in international trade and not with reference to domestic rules of contractual interpretation. The same reasoning applies to a limitation of liability clause concerning the breach of a fundamental or substantial contractual obligation i.e. a fundamental breach must be determined in view of the principles established by the CISG.

To conclude, the interpretation of the validity of protection mechanisms set forth in the otherwise applicable law or rules of law must observe the principles of reasonableness and freedom of contract underlying the CISG while deciding the validity and enforceability of exclusion of liability clauses in international sales contracts. Yet, one may sometimes observe a dichotomy in the approach of national courts and arbitration tribunals across common and civil law jurisdictions, influenced by their distinct legal traditions and judicial principles. However, the dynamism of these approaches nevertheless tacitly underscores the cardinal theme of CISG and its interpretational adventurousism to promote uniformity in interpretation and enforcement of international sales contracts.

# 11 Anti-Arbitration Injunction: Indian Perspective<sup>60</sup>

Anti-arbitration injunction is considered as an extraordinary remedy, which acts *in personam* against the party who is restrained from proceeding with or commencing arbitration proceedings against the counter-party who sought the injunction, in breach of agreement executed between the parties.

In the late 19<sup>th</sup> and early 20<sup>th</sup> century, the legal fraternity suggested that when a claim in arbitration fell outside an existing arbitration agreement, the court has no power to restrain it, since, as such, an arbitration did not amount to an infringement of a legal or equitable right<sup>61</sup>. Notwithstanding, the above, that the parties could still restrain the arbitration by contesting that the arbitration agreement was void and voidable, or has been discharged by frustration or the terms of the agreement are not complied with<sup>62</sup>.

Later, with the developing jurisprudence, the courts took a more pragmatic view that an anti-arbitration injunction can be granted in response to a *breach of an agreement not to arbitrate, an arbitration of an issue that is res-judicata, a breach of an exclusive jurisdiction agreement*.

Though the Arbitration and Conciliation Act, 1996 (the "Act"), does not provide a statutory definition to the concept of "Anti-arbitration injunction", however, the concept has been recognised and interpreted by Indian courts in several cases. Section 9 of the Act deals with grant of interim relief by the court. It provides that any time before or during or after the arbitral proceedings, the court shall have the same power of making an order as it has for, and in relation to any proceedings before it. In other words, the power of the civil court, even in respect of an arbitral subject matter, is only limited to the general powers of a court to pass interim measures in other proceedings. It may be noted that this is how the Civil Procedure Code (in particular, Order XXXIX), is indirectly connected to the arbitral process though otherwise the Act expressly excludes the application of the provisions of Civil Procedure Code in the conduct of arbitral proceedings, with a view to avoid formalism and the consequent delay<sup>63</sup>.

<sup>60</sup> Author by Love Kumar Gupta, Associate

<sup>61</sup> *The North London Railway Co v The Great Northern Railway Co* (1883) 11 QBD 30; *Wood v Lillies* (1892) 61 LJ Ch 158; *Steamship Den of Airline Co Ltd v Mitsui and Co Ltd* (1912) 17 Com Cas 116

<sup>62</sup> *Malmesbury Railway Co v Budd* (1876) 2 Ch D 113; *Beddow v Beddow* (1878) 9 Ch D 89.

<sup>63</sup> s 19(2) ('The arbitral tribunal shall not be bound by the provisions of the Code of Civil Procedure, 1908'). Order XXXIX of the Indian Civil Procedure Code deals with temporary injunctions.

That while dealing with the concept of 'anti-arbitration injunction' in the case of *MC. Donalds India Private Limited vs Vikram Bakshi*<sup>64</sup>, the Delhi High Court referred to the case of *Modi Entertainment Network and Another v. W.S.G. Cricket Pte. Ltd.*<sup>65</sup>, in which the Supreme Court has laid down the principles governing the 'anti-suit injunction' and observed those principles will not necessarily apply to an anti-arbitration injunction. The court observed that mere existence and the possibility of multiple proceedings is not sufficient to render the proceedings vexatious or oppressive and arbitration agreement inoperative or incapable to be performed. The court further held that if the arbitration agreement was taken to be one which was covered under Section 44 of the Act, the arbitration proceeding could not be injuncted because the same was neither null or void, inoperative or incapable of being performed. Given to 2015 amendment in Section 8 of the Act, which has retrospective applicability, it is now a mandate to refer the parties to arbitration unless the court finds that prima facie no valid arbitration agreement exists. Thus, "*while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act*".

Further, *MC. Donalds India Private Limited (supra)*, referred the case of *World Sport Group (Mauritius) Limited v. MSM Satellite (Singapore) Pte. Ltd.*<sup>66</sup>, in which the Supreme Court has ascertained the meaning of the expression "*agreement to be null or void, inoperative or incapable of being performed*", and observed that null and void means when the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence; inoperative or incapable of being performed means where the arbitration agreement has ceased to have effect, such as the case of revocation by the parties or mere existence of multiple proceedings is not sufficient to render the arbitration agreement inoperative. Thus, unless and until a party seeking an anti-arbitration injunction can demonstrably show that the arbitration agreement is null and void, inoperative or incapable of being performed, no such relief can be granted in the suit or as an interim measure under the Act.

In the case of *Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS & others*<sup>67</sup>, the Calcutta High Court granted an anti-arbitration injunction in favor of Kolkata Port Trust (KPT) restraining Louis Dreyfus Armatures SAS (LDA), a French Company, from perusing any claim against KPT in the Investment Arbitration they had initiated against the Republic of

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<sup>64</sup> 2016 SCC OnLine Del 3949

<sup>65</sup> 2003 (1) Arb. LR 533 (SC)

<sup>66</sup> 2014 (11) SCC 639

<sup>67</sup> *Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS & others* 2014 SCC OnLine Cal 17695

India under the Bilateral Investment Treaty between India and France. It was strongly contented by the LDA that as per Supreme Court decision in *Venture Global Engineering v Satyam Computer Services Ltd*<sup>68</sup> that the general principles of Part I of the Act will apply to Part II and thus Section 5 (of part I) will also be applicable to foreign arbitrations and hence there should be minimal judicial intervention in foreign arbitrations<sup>69</sup>.

The Calcutta High Court, while agreeing with the view that section 5 of the Act would be applicable to all arbitrations, irrespective of whether it is domestic or international arbitration was of the opinion that section 5 of the Act cannot in anyway curb the power expressly vested in the court under section 45 of the Act. Accordingly, it held that the Indian courts have the power to grant anti-arbitration injunction and also laid down the circumstances under which such injunctions may be granted i.e., (i). *When a court of the view that no arbitration agreement exists between the parties.* ; (ii) *If the arbitration agreement is null and void, inoperative and incapable of being performed;* (iii) *Continuation of foreign arbitration proceedings might be oppressive or vexatious or unconscionable.*

It would be noticed that the point (i) and (ii) extracted above, essentially flow from Section 45 of the Act<sup>70</sup> applicable in cases of foreign arbitration, wherein point (iii) would be generally applicable and anti-arbitration injunction could be granted if the continuation of the foreign arbitration proceedings would be oppressive, vexatious or unconscionable.

Further, in the case "*Himachal Sorang Power Private Limited v/s. NCC Infrastructure Holdings Limited*"<sup>71</sup>, the Hon'ble High Court of Delhi referred to the order in *Republic of India through Ministry of Defence Vs. Agusta Westland International Ltd.*<sup>72</sup> Which held that that suit for anti-arbitration injunction was maintainable, however, High Court observed that the power has to be exercised sparingly. It was further observed that that principles governing anti-suit injunction may not necessarily apply to anti-arbitration injunction and set out the following limited parameters to grant the prayer of an anti-arbitration injunction:

- (i) *"The principles governing anti-suit injunction are not identical to those that govern an anti-arbitration injunction.*

<sup>68</sup> (2010) 8 SCC 660

<sup>69</sup> *Board of Trustees of the Port of Kolkata page 5, para 14*

<sup>70</sup> **45 Power of judicial authority to refer parties to arbitration.** —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

<sup>71</sup> *Himachal Sorang Power Pvt. v/s. NCC Infrastructure Holdings Limited* MANU/DE/0936/2019

<sup>72</sup> (2019) SCOnline Del 6419

- (ii) *Court's are slow in granting an anti-arbitration injunction unless it comes to the conclusion that the proceeding initiated is vexatious and/ or oppressive.*
- (iii) *The Court which has supervisory jurisdiction or even personal jurisdiction over parties has the power to disallow commencement of fresh proceedings on the ground of res judicata or constructive res judicata. If persuaded to do so the Court could hold such proceeding to be vexatious and/ or oppressive. This bar could obtain in respect of an issue of law or fact or even a mixed question of law and fact.*
- (iv) *The fact that in the assessment of the Court a trial would be required would be a factor which would weigh against the grant of an anti-arbitration injunction.*
- (v) *The aggrieved should be encouraged to approach either the Arbitral Tribunal or the Court which has the supervisory jurisdiction in the matter. An endeavor should be made to support and aid arbitration rather than allow parties to move away from the chosen adjudicatory process."*

## Conclusion

The issue of anti-arbitration injunction in India has not been authoritatively resolved so far by any decision of the Supreme Court. The question remains the same: to what extent should the court intervene in arbitration process? The limited judicial intervention by the High Court of Calcutta in *Board of Trustees of the Port of Kolkata* case and High Court of Delhi in *MC. Donalds India Private Limited* case and Himachal Sorang Power Private Limited case the courts are increasingly recognizing the line somewhere in middle, to maintain a balance or an equilibrium in use of power to grant anti-arbitration injunction in appropriate circumstances.

