# III.

## DOCTRINE OF ARBITRAL IMMUNITY: IS IT *CARTE BLANCHE*?

Sameer Jain & Vivek Joshi[1]

**Abstract:** The authors of this article describe the importance of the independence and impartiality clause in the context of arbitration and how it came to be significant in the Indian context. They also clarified the rationale behind adopting the language on arbitrator immunity, which gives arbitrators protection from legal action. The law does not give prima facie support for the doctrine of arbitral immunity, but the exceptions provided are more focused on the arbitrator's actions or omissions that have the potential to be detrimental to the arbitral process, despite the fact that the elements of good faith remain a grey area and nothing is absolute. Therefore, arbitrators need not use caution when making rulings, but there must be an element of caution that comes along with the same.

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[1] Sameer Jain is the Founder & Managing Partner at PSL Advocates & Solicitors and Vivek Joshi is an Associate at PSL Advocates & Solicitors.

## INTRODUCTION

Independence and impartiality are perhaps considered to be the heart and soul of the arbitration proceedings that depicts the hallmarks of a good arbitrator and essence of a seamless proceeding. Instances where serious allegations are casted on the independence of the arbitrator, the same have the effect to derail the entire arbitration itself. In similar vein, there must not be instances wherein the arbitrator is put under the fear of being held liable for damages or any legal actions against him as a consequence of the decisions that he makes in good faith and as being duty bound to adjudicate the disputes before him.

Some interesting observations in this regard were made by Lord Denning in his opinion in *Sirros v. Moore*[2] wherein he observed:

> *Just like judges, '[an arbitrator] should be able to work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'…He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind.'*

Essentially, arbitrators like judges, should be able to work without fear. To prevent trembling fingers of an arbitrator, the doctrine of arbitral immunity has now become the preferred 'way-out' or the 'safest defence' whereby arbitrators can claim safeguards from a legal action against them. Significantly, whilst the constituents of good faith remain a grey area, it may be safely construed to encompass all acts/decisions taken by the arbitrator in furtherance of his/her mandate and during the course of the arbitral proceedings, while following the substantive procedure of law and exercising his discretion judiciously.

The Indian law has only recently adopted the doctrine of arbitral immunity inasmuch as the concept stands codified under Section 42B of the Arbitration and Conciliation Act, 1996 (**"the Act"**).[3] Section 42B of the Act which was inserted vide the Arbitration and Conciliation (Amendment) Act, 2019[4] (**"2019 Amendment Act"**), and it provides that the arbitrator will not be liable for any decisions taken by him during the course of the arbitral proceedings and ones that are taken in good faith. From the first blush, it appears that the draftsmen intended to provide a blanket ban on the parties from pursuing any legal recourse directly or in-directly against the arbitrator. However, a deeper analysis would reveal that the Act itself provides for certain exceptions that can be read along with the doctrine of arbitral immunity. The following sections

[2] [1975] 1 QB 118.
[3] The Arbitration and Conciliation Act, 1996, § 42B, No. 26, Acts of Parliament, 1996 (India).
[4] The Arbitration and Conciliation (Amendment) Act, 2019, § 9, No. 33, Acts of Parliament, 2019 (India).

of this article will steer across the various provisions and their respective stipulations that can be read as exceptions to the doctrine of arbitral immunity.

## CONCEPT OF ARBITRAL IMMUNITY

The first instance of judicial immunity developed in common law jurisdictions dates back to the year 1607 when Lord Coke had opined that King's Bench were immune from being sued in courts for the acts performed in their judicial capacity.[5] In this light, the foundations of judicial immunity have been extended to arbitral immunity given the statutory appointment and judicial functions performed by arbitrators in discharge of their duties.

Any aggrieved party is at liberty to take appropriate recourse in law and agitate all grievances therein. In this regard, there exist ample legislative avenues to do so. However, bringing an arbitrator before a court of law for any decision that was taken in good faith by them would tantamount to exceeding the scope of judicial discipline itself. Thus, there lies no reason or scope for arbitrators to defend suits brought against them by disgruntled parties. To safeguard the arbitrators from such frivolous and vile attempts of the parties, the doctrine of arbitral immunity holds immense relevance in today's day and age. Time and again the courts in India have deprecated the practice of making the arbitrator a party to the challenge proceedings. In *Kothari Industrial Corporation Ltd. v. M/s. Southern Petrochemicals Industries Corporation Limited & Anr.*[6], the Hon'ble Madras High Court had observed as follows:

> *"It is a pernicious practice in this court to implead arbitrators or arbitral tribunals when there is no need to do so. Often, arbitrators are embarrassed upon receipt of notice. It is only in a rare case when a personal allegation is made against an arbitrator may such arbitrator be impleaded. Just as in case of a revision or an appeal the lower forum or the Judge manning the lower forum is not impleaded as a party, in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, the arbitrator or the members of the arbitral tribunal are utterly unnecessary parties unless specific personal allegations are levelled against them that would require such persons to answer the allegations."*

Apart from safeguarding the arbitrators from any legal actions taken against them by the parties, it must be seen from the perspective and touchstone of sanctity of decisions passed by them as well. To this extent, arbitral immunity may also be regarded as stronger than the judicial immunity. This is solely premised on the fact that decision passed by an arbitrator in the form of an arbitral award is subjected to judicial review on extremely narrow and limited grounds. Given the pro-enforcement stance being adopted by a plethora of jurisdictions, there is an inherent trend that

[5] Prathima R. Appaji, *Arbitral Immunity: Justification and Scope in Arbitration Institutions*, 1 IJAL 63 (2012).
[6] MANU/TN/7023/2021.

courts lean in favour of enforcement of arbitral awards rather than setting aside the same. On the other hand, judicial decisions passed by courts are routinely appealed before higher courts as a matter of right or by craving leave by depicting requisite grounds. Thus, arbitral immunity is only strengthened by this very fact that the sanctity of decisions are preserved, directly enforced and less susceptible to being set aside. At the same time, this creates an obligation of independence and impartiality much stronger on the arbitrator.

There lies much more to the concept of arbitral immunity but has been generally overlooked. In cases where the arbitrator has been appointed by mutual consent of the disputing parties, there lies no room for either party to question the arbitrator about any decision that has been taken in good faith and bring a legal action against him for the same. If the concept of party autonomy is desired to be knit in the very fabric of arbitration, it also remains paramount that the arbitrator is given the freedom to make any decision regarding the dispute and within the terms of reference without hesitating or about the ramifications of the decision. This freedom of decision making must not be taken away from the arbitrator at all, until and unless the arbitrator himself decides that he does not have jurisdiction to rule in a specific dispute[7] or is rendered *de jure* or *de facto* unable to perform his functions, as provided under the Act.[8]

Notably, arbitral immunity now stands codified under the Act by virtue of Section 42B that safeguards the arbitrator from any action that was done in good faith. This was recently brought in the arbitration sphere in India vide the 2019 Amendment Act.[9] Pertinently, protection of the arbitrators was already encapsulated under various rules of the arbitral institutions[10], however the same now stands codified by virtue of the 2019 Amendment Act and in the law of the land, which would apply to every Indian seated arbitration.

However, the Indian law provides far more than what meets the eye. It is perhaps a misconception that the arbitrator possesses blanket immunity from all actions done in good faith.

## EXCEPTIONS

The underlying objective of exploring the possible exceptions is aimed at bringing forward certain cases wherein the arbitrators could be held liable for certain acts and may also attract

[7] The Arbitration and Conciliation Act, 1996, § 16, No. 26, Acts of Parliament, 1996 (India).
[8] The Arbitration and Conciliation Act, 1996, § 14(1)(a), No. 26, Acts of Parliament, 1996 (India).
[9] *Supra* note 3.
[10] Mumbai Centre for International Arbitration, Rule 34, MCIA Rules, 2016 (June 18, 2022, 1:00 PM), https://mcia.org.in/mcia-rules/english-pdf/; Nani Palkhivala Arbitration Centre, Rule 54, Rules to Regulate Arbitration (June 18, 2022, 1:05 PM) http://www.nparbitration.com/Documents/pdf/NPAC-Rules-Book.pdf; Delhi International Arbitration Centre, Rule 35 DIAC Rules, 2018 (June 18, 2022, 1:10 PM) http://dhcdiac.nic.in/wp-content/uploads/2020/01/DIAC-Arbitration-Proceedings-Rules-2018.pdf.

consequences. However, it is apposite to note that there exist no direct exceptions to the doctrine of arbitral immunity but these exceptions are more towards actions/omissions of the arbitrator that have the degree of being detrimental to the arbitral process.

### *1. De jure or de facto inability of the Arbitrator*

Section 14 of the Act prescribes the conditions wherein the mandate of the arbitrator is liable to terminated and the erstwhile arbitrator would be substituted. One of the foremost pre-conditions is the *de jure* (in accordance with law) or *de facto* (by the very fact) inability of the arbitrator to perform his statutory functions.[11] The *de jure* or *de facto* inability of the arbitrator to discharge his functions also points to usurping the arbitral immunity since the objective of Section 14 of the Act is aimed at removal of the existing arbitrator and effectuate a substitution of the arbitrator.

Interestingly, Section 14 of the Act does not operate *in silo* from other provisions of the Act. Section 14 is closely and intricately linked with Section 12(5) of the Act that provides for the inability of the arbitrator in case he falls under any of the categories specified under the seventh schedule of the Act that would render him ineligible.[12] Therefore, lack of proper disclosure from the arbitrator's end could attract the consequences under Section 12(5) of the Act, save and except in cases where the parties consciously waive the applicability by an express agreement in writing as prescribed under the *proviso* to Section 12(5) of the Act.

Thus, any overt act which might be constituted as bias, would be a basis for arbitrator's removal that is squarely addressed under Section 12(5) of the Act. Pertinently, once the consequences of Section 12(5) are attracted, Section 14(1)(a) becomes the applicable provision that renders the arbitrator *de jure* unable to perform his functions.

### *2. Failure to pass the award within the timelines stipulated in the Act*

The second exception includes the imposition of monetary penalty on the arbitrator. In accordance with the proviso to Section 29A(4), if the court finds that the proceedings have been delayed for reasons attributable to the arbitral tribunal, then a reduction of the fee may be ordered that does not exceed 5% for each month of the delay.[13]

[11] *Supra* note 6.
[12] The Arbitration and Conciliation Act, 1996, § 12(5), No. 26, Acts of Parliament, 1996 (India).
[13] The Arbitration and Conciliation Act, 1996, § 29A(4), No. 26, Acts of Parliament, 1996 (India).

The proviso is perhaps one of the most stringent penalties that the arbitrator could be penalized with under the Act, considering the fact that arbitral immunity will not be applicable in such cases. Even though a reasonable opportunity is contemplated by the Act, the imposition of monetary deductions is noteworthy from the perspective of usurping the arbitral immunity.

The failure of an arbitrator in not passing the award within a reasonable timeline has been considered to be a serious fallacy in the arbitration regime in India. In-fact, the Hon'ble Delhi High Court in *Director General, Central Reserve Police Force v. Fibroplast Marine Pvt. Ltd.*[14] has recognized the inordinate and unexplained delay in passing of the award to be against the Public Policy of India and susceptible to set-aside the award. This reflects the pro-arbitration stance in India and also treating the failure of the arbitrator to comply with the timelines as a serious issue.

### *3. Failure to act in accordance with the mandate and causing inordinate delay*

Another notable provision attracting the usurping of the arbitral immunity is codified under Section 14 of the Act wherein the mandate of the arbitrator can be terminated if he fails to act without undue delay.[15] Pertinently, termination of the mandate of the arbitrator is akin to stripping him with all authority, immediately thereafter the protection under Section 42B of the Act is no more available. If the competent court determines that the arbitrator caused inordinate delay, the mandate will be terminated as postulated under Section 14 of the Act.

Recently, in *Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal*[16], it was asserted that the Ld. Sole Arbitrator had caused undue delay in conducting the arbitral proceedings that prompted one of the parties to allege termination of his mandate. Whilst the Hon'ble Supreme Court refrained from returning any findings on the merits of the allegations, the same was remitted back to the concerned court to be determined in accordance with the law. This is another instance which shows that the courts in India are not prone to brushing aside such allegations without any consideration.

### *4. Fraud and Corruption*

The captioned grounds have, perhaps, been one of the most debatable grounds under the Act for resisting an award by the award-debtor either under Section 34 or even under Section 36 of the Act, after the Arbitration and Conciliation (Amendment) Act, 2021 (**"2021 Amendment Act"**).

[14] Central Reserve Police Force v. Fibroplast Marine (P) Ltd., 2022 SCC OnLine Del 1335.
[15] *Supra* note 5.
[16] Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, 2022 SCC OnLine SC 556.

Interestingly, proving fraud at the stage of Section 34 of the Act is challenging for the award-debtor given the fact that courts would look to preserve the sanctity of the arbitral award and only permit very narrow grounds for making an interference. *Albeit*, this position has now been substantially altered due to the insertion of new provisions that provide an unconditional stay on the award where the award-debtor is *prima facie* able to depict fraud or corruption.[17] Therefore, the 2021 Amendment Act has certainly given rise to certain concerning aspects.

Coming to the concerning part, the same arises in a twofold manner i.e., (i) an unconditional stay on the award that runs contrary to the well settled position of law and (ii) questioning the arbitrator's decision on serious grounds that could have manifold ramifications.

Whilst addressing the former, the judgment in *Hindustan Construction Company v. Union of India*[18] holds relevance since it disregarded the practice of automatic stay on arbitral awards. Moreover, the threshold for deciding the constituents of *prima facie* case would again be subjected to judicial scrutiny in the near future.

The latter would involve raising serious questions on the integrity and independent decision making of the arbitrator since the courts under Section 34 would have to dig deeper into discerning the element of fraud or corruption through reviewing the merits (that is strictly prohibited). Therefore, a roving inquiry by the courts under Section 34 to determine the element of fraud would usurp the arbitral immunity and, in many ways, eventually reopen the entire docket of the case. Further, to take recourse of this provision, it is imperative for the party alleging fraud and corruption, to demonstrate it with the help of cogent and/or direct or circumstantial evidence. Thus, grounds such as fraud and corruption carry a heavy baggage that has the ability to take away the layer of immunity conferred on the arbitrator, thus seriously looked down upon.

### *5. Protection from only acts/omissions done in discharge of duties*

Significantly, even from a bare perusal of Section 42B of the Act, it can be inferred that only actions/omissions done in discharge of the duties are exempted from any consequences. Thus, any personal act that may have civil/penal consequences are not exempted. Therefore, the concept of arbitral immunity to be understood as blanket immunity is perhaps incorrect and comes with its own caveats as addressed hereinabove.

[17] The Arbitration and Conciliation Act, 1996, § 36(3), No. 26, Acts of Parliament, 1996 (India).
[18] Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.

## CONCLUSION

Granting blanket immunity to the arbitrator(s) is certainly not the right approach given the influential factors that come along with it. However, in many ways, the doctrine of arbitral immunity remains more inclined towards the perceptions rather than technicalities. In other words, it is only a school of thought that arbitral immunity is *carte blanche*. There are several factors that could usurp the same. Therefore, it is not that arbitrators must beware whilst making decisions but there must be an element of caution that comes along with the same. Moreover, it must be appreciated that parties do not benefit from extending immunity to arbitrators. If a court forms an opinion to terminate the mandate of the arbitrator due to failure or non-performance, the fault lies at the end of the arbitrator and parties are made to litigate before several judicial forums creating a 'no-win' situation.