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# India Arbitration Primer

## Latest developments in Indian Arbitration Law

December 2022

# Preface

The idea for this Primer was conceived during one of our internal team discussions. We felt the need to have a systematic mechanism for updating ourselves on arbitration developments in India on a regular basis. What started as an exercise of putting summaries of case law under different topics eventually took the shape of this Primer that you are reading now. It is then that we decided to share the Primer with people outside JSA so that it can be of benefit to practitioners, students and even judges. We hope that it can assist in quickly identifying the latest judgments on a particular issue in the Indian arbitration context.

The contributors to the Primer have read through each of the judgments multiple times to give you the ratio of the judgment in a concise and easy-to-understand form.

This being our first effort, there may be omissions or slips – we request you to condone these, as we will constantly strive to improve in successive versions of this Primer.

The Primer is updated with case law up to November 15, 2022, when we finally put the Primer into printing.

**Dheeraj Nair**
**Partner**

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"I prefer this way of resolving conflict."

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# Decoding "Seat", "Venue" and "Place" in Arbitration

## What is the seat? How is it different from venue or place?

The seat of arbitration is a juridical concept, which refers to the legal home of the arbitration. It determines the procedural law applicable to the arbitration.

Courts of the seat have exclusive jurisdiction over the conduct of arbitration except in relation to certain ancillary matters such as stay of court proceedings in favour of arbitration, grant of interim relief, and enforcement of the arbitral award. As a result, the seat of arbitration has primary jurisdiction over the arbitration, with the jurisdiction of all other states being secondary.[1] Thus, the seat is the "centre of gravity" of the arbitration,[2] or the anchor for the arbitration.

The venue of arbitration on the other hand is merely a geographical location where parties and/ or the arbitral tribunal may meet or hold hearings. It has no legal significance for the arbitration.

The place of arbitration may refer to either seat or venue. The Arbitration and Conciliation Act, 1996 ("**Act**") notably does not use the terms "seat" or "venue", but instead uses the term "place of arbitration" in Section 20. The term "place of arbitration" itself carries two distinct meanings – the use of such term in Section 20(1) and 20(2) signifies the seat of the arbitration whereas in Section 20(3), it signifies the geographical location where hearings may be conducted.[3]

## Determination of the "seat" in arbitration agreements

Despite the importance of the choice of seat in arbitration agreements, arbitration agreements often contain clauses that are poorly worded, causing ambiguities in interpretation. Many arbitration agreements use the terms "seat", "venue" or "place" interchangeably. In such a case, it is left to either the courts or the arbitral tribunal to determine the seat of the arbitration. The determination of the seat of arbitration has posed significant challenges for Indian courts, with the result that there is no consistent jurisprudence on this issue.

## Recent decisions of the Supreme Court on determination of the "seat"

The Supreme Court of India ("**Supreme Court**") has rendered some significant rulings on the choice of seat of arbitration.

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[1] Indu Malhotra, *Commentary on the Law of Arbitration* (4th edn., 2020) at p. 624.
[2] Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th edn., 2009).
[3] *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited*, (2017) 7 SCC 678.

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## Union of India v. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472

In this case, the parties had entered into a production sharing contract containing an arbitration clause. The arbitration clause provided that the *"venue of conciliation or arbitration proceedings… unless the parties otherwise agree, shall be Kuala Lumpur…"* and that *"[a]rbitration proceedings shall be conducted in accordance with the UNCITRAL Model Law on International Commercial Arbitration of 1985…".*

Union of India challenged the arbitral award rendered in the arbitration proceedings under Section 34 of the Act before the Delhi High Court, on the basis that the arbitration clause did not specify the seat of arbitration and specified only the venue of arbitration i.e. Kuala Lumpur. Accordingly, Union of India argued that New Delhi was the seat of arbitration. This was contested by Hardy Exploration.

The Supreme Court held that the choice of Kuala Lumpur as the venue did not mean that Kuala Lumpur was the seat of the arbitration. It held that the mere choice of venue could not by itself be considered as a choice of the seat of arbitration; instead, a venue could become the seat if "***something else is added to it as a concomitant***". However, the Supreme Court did not identify what additional factors would be considered by it to determine whether the choice of venue is to be treated as a choice of the seat of the arbitration.

## Brahmani River Pellets Limited v. Kamachi Industries Limited, (2020) 5 SCC 462

In this case, the Supreme Court deviated from the decision in ***Hardy Exploration***, holding that the parties' choice of the "venue of arbitration" is really that of the seat of the arbitration. The Supreme Court did not consider it necessary to examine whether there were any other factors which pointed to such designation of venue being in reality a designation of seat. However, this decision offers very little guidance as there is no reasoning given for the deviation from ***Hardy Exploration***.

## BGS SGS Soma JV v. NHPC Limited, (2020) 4 SCC 234

The Supreme Court again had an opportunity to consider the choice of seat of arbitration in this case. In this case, the arbitration agreement provided that the "*arbitration proceedings shall be held at New Delhi/Faridabad*…".

The Supreme Court in ***Soma JV*** held its earlier decision in ***Hardy Exploration*** to be per incuriam since it did not follow an earlier five-judge bench decision in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services***,[4] which approved the "*Shashoua principle*".

[4] (2012) 9 SCC 552.

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The Shashoua principle refers to a principle articulated in a 2009 decision of the England & Wales High Court in ***Roger Shashoua and Ors. v. Mukesh Sharma***.[5] In ***Roger Shashoua***, the High Court held the parties' choice of venue as London to be a choice of the seat of the arbitration, in light of: (a) the express choice of London, a well-known seat of arbitration as the arbitration venue; (b) non-designation of any place as the seat; (c) the choice of a supranational body of rules governing the arbitration; and (d) the absence of any contrary indicia.

The Supreme Court adopted the *Shashoua* principle and laid down the following tests for determining the seat:

1. Where the arbitration clause contains a choice of a place as the venue of arbitration proceedings, the use of the expression "arbitration proceedings" signifies that the entire proceedings would be held at such place, as opposed to one or more hearings. In such case, the chosen venue is really the seat of the arbitration.

2. Where the arbitration clause contains wording such as "*tribunals are to meet at or have witnesses, experts or the parties*" where only hearings are to be conducted at such place, it would lead to the conclusion that, other things being consistent, the chosen venue is not the seat of the arbitration.

3. Where the arbitration clause contains wording such as "*arbitration proceedings shall be held at*" at a particular venue, this would indicate that the arbitration proceedings are anchored at such venue and accordingly, such venue is the seat of the arbitration.

4. In all these cases above, there must be no other "s*ignificant contrary indicia*" which suggest that the chosen venue is merely a geographically convenient place for meeting and not the seat of the arbitration.

5. In the context of an international arbitration, if a supranational body of rules is to govern the arbitration, then this would be a further indication that the venue is really the seat of the arbitration. Similarly, in the context of a domestic arbitration, the choice of the Act to govern arbitral proceedings would point towards the choice of venue being in reality a choice of seat.

The tests laid down in ***Soma JV*** and ***Hardy Exploration*** are contradictory to each other – while ***Hardy Exploration*** stipulates that a choice of venue cannot be considered as a choice of seat unless there are additional indicia supporting such conclusion, ***Soma JV*** stipulates that a choice of venue is the choice of seat, unless there are significant indicia contradicting such conclusion.

## Mankastu Impex Private Limited v. Airvisual Limited, (2020) 5 SCC 399

In this case, the parties (an Indian company and a Hong Kong company) had entered into a memorandum of understanding containing an arbitration clause ("**MoU**"). The MoU stipulated Indian law as the governing law, and that courts at New Delhi have jurisdiction. Further, the MoU provided for resolution of disputes by way of "*arbitration administered in Hong Kong*", and expressly stated that the "*place of arbitration shall be Hong Kong*."

[5] [2009] EWHC 957 (Comm).

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Once disputes arose between the parties, Mankastu approached the Supreme Court under Section 11(6) of the Act for the appointment of a sole arbitrator. Mankastu contended that since the MoU provides for Indian law to be the governing law, and courts at New Delhi to have jurisdiction, the seat of the arbitration was New Delhi. Mankastu, relying on ***Hardy Exploration***, argued that Hong Kong was only the venue for arbitration, and not the seat.

Airvisual, relying on ***Soma JV***, contended that Hong Kong was the seat of arbitration on the basis that the arbitration agreement in the MoU provided for arbitration administered in Hong Kong, and that the place of arbitration was Hong Kong.

The Supreme Court refused to decide whether ***Hardy Exploration*** or ***Soma JV*** laid down the correct position of law. Instead, it noted that the mere reference to Hong Kong as the "place of arbitration" did not signify that parties had chosen Hong Kong as the seat of the arbitration. Instead, the parties' intention had to be determined by examining the rest of the arbitration agreement and their conduct. The Supreme Court noted that use of the words "*arbitration administered in Hong Kong*" in the rest of the arbitration agreement clearly indicated that the seat of the arbitration was Hong Kong and that Hong Kong law was the procedural law. Accordingly, Indian courts did not have jurisdiction.

The Supreme Court in ***Mankastu Impex*** appears to have adopted an approach similar to the one adopted by the bench in ***Hardy Exploration***. However, it remained unclear as to which of the tests is to be adopted – the test in ***Hardy Exploration*** or the test in ***Soma JV***.

### PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited, (2021) 7 SCC 1

In this case, the Supreme Court attempted to resolve the contradiction between the tests in ***Hardy Exploration*** and ***Soma JV*** by clarifying the position in ***Mankastu Impex***. The Supreme Court drew a parallel between the parties' arbitration agreement which provided for the dispute to be "*resolved in Zurich*" in accordance with the Rules of Conciliation and Arbitration of the ICC and the arbitration agreement in ***Mankastu Impex*** which provided for arbitration "*administered in Hong Kong*". Thus, the seat of the arbitration was held to be Zurich.

However, this does not fully resolve the contradiction between the tests in ***Hardy Exploration*** and ***Soma JV***, as ***Mankastu Impex*** relies on two factors – the choice of the place of arbitration as Hong Kong, and "administration" of the arbitration. In contrast, there is only one factor that the Supreme Court considered in ***PASL Wind Solutions*** – the parties' agreement for the dispute to be "*resolved in Zurich*".

## Drafting arbitration clauses

In the absence of clear guidance from the Supreme Court on determination of the seat of arbitration, it would be advisable to use language that clearly shows the intent of the parties. Parties should expressly specify the "seat" of the arbitration, rather than use terms such as "place of arbitration" or "venue of arbitration".

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## Can the seat be shifted?

### Inox Renewables Limited v. Jayesh Electricals Limited, 2021 SCC OnLine SC 448

The Supreme Court considered whether the parties could shift the seat without a written agreement and which courts would have supervisory jurisdiction over the arbitration.

The Supreme Court held that there was no requirement of a written instrument for shifting of the seat, if the contract in which the arbitration agreement is contained does not require amendments or modifications to be in writing to be effective. In doing so, the Supreme Court distinguished its earlier decision in ***Videocon Industries Limited v. Union of India and Anr***.,[6] as being limited to its facts – there, the contract contained a clause requiring amendments or modifications to be in writing.

The Supreme Court also pointed to an observation of the arbitrator wherein it was recorded that by mutual agreement, Jaipur as a "venue" has gone and has been replaced by Ahmedabad as the "place of arbitration". The Supreme Court held that the shifting of the venue in this case really meant the shifting of the place of arbitration with reference to Section 20(1) of the Act i.e. the seat of arbitration.

The Supreme Court by relying on its earlier decision in ***Indus Mobile*** also held that the moment the seat was mutually agreed by the parties as Ahmedabad instead of Jaipur, it is akin to an exclusive jurisdiction clause, thereby vesting the courts at Ahmedabad with exclusive jurisdiction to deal with the arbitration.

### BBR (India) (P) Ltd. v. S.P. Singla Constructions (P) Ltd., 2022 SCC OnLine SC 642

The Supreme Court considered the issue of whether the change in place of conducting arbitration due to appointment of new arbitrator will shift the 'jurisdictional seat of arbitration'. In this case, the arbitration agreement did not stipulate the seat or the venue of the arbitration. Accordingly, the sole arbitrator determined the venue of the proceedings.

The Supreme Court, relying on ***Soma JV***, held that the reference to the venue of the proceedings was really a reference to the seat of the arbitration. The Supreme Court held that the seat once fixed by the arbitral tribunal under Section 20(2), should remain static and fixed, whereas the venue of arbitration can change and move to a new location in terms of Section 20(3). Such a change in venue does not change the seat of arbitration. The court held that subsequent hearings or proceedings at a different location other than the place fixed by the arbitrator as the seat of arbitration should not be treated as a change or relocation of jurisdictional 'seat'.

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[6] (2011) 6 SCC 161.

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# Arbitration Agreement

## What is an arbitration agreement?

An arbitration agreement is defined in Section 7 of the Act as an agreement to submit to arbitration all or certain existing or future disputes between parties in respect of a "*defined legal relationship, whether contractual or not*." An arbitration agreement could provide for resolution of non-contractual disputes, including torts.[7]

The wording of the arbitration agreement/ arbitration clause is significant, as it determines whether parties have executed an arbitration agreement, or instead provided for some other mode of dispute resolution or settlement. Recently, the Supreme Court rendered some notable decisions on what constitutes an arbitration agreement.

### Food Corporation of India v. National Collateral Management Services Limited, (2020) 19 SCC 464

The Supreme Court held that clauses which merely provide that any disputes shall be referred to Chairman and Managing Director of Food Corporation of India / Principal for "settlement", whose decision shall be final and binding on both Food Corporation of India/ Principal and the Agent, cannot be construed as an arbitration agreement.

The Supreme Court relied upon its earlier judgment in ***P. Dasaratharama Reddy Complex v. Government of Karnataka and Anr.***,[8] wherein it held that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if the following conditions are met:

1. it provides for or contemplates reference of disputes or differences by either party to a private forum, other than a court or tribunal;

2. it provides, expressly or by implication, for an enquiry by such private forum after providing due opportunity to both parties to put forth their cases; and

3. it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both parties would abide by such decision.

### Caravel Shipping Services Private Limited v. Premier Sea Foods Exim Private Limited, (2019) 11 SCC 461

The Supreme Court held that an arbitration clause printed on a bill of lading will be binding between the parties. Relying on the judgment in ***Jugal Kishore Rameshwar Das v. Mrs. Goolbai Hormusji,***[9] the Supreme Court held that an arbitration agreement needs to be in writing. However, it need not be signed.

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[7] See Gary B. Born, *International Arbitration: Law and Practice* (2nd edn., 2016) at p. 95; Indu Malhotra, *Malhotra's Commentary on the Law of Arbitration* (4th edn., 2020) at p. 289.

[8] (2014) 2 SCC 201.

[9] (1955) 2 SCR 857.

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### Babanrao Rajaram Pund v. Samarth Builders & Developers & Anr., 2022 SCC OnLine SC 1165

The Supreme Court held that while enforcing an arbitration agreement, the focus should be on substance of the agreement. Where the intention of parties to arbitrate their disputes is clear, the absence of express words demonstrating the parties' agreement that the decision of the arbitral tribunal will be binding on them, cannot "*legitimize the annulment of arbitration clause*".[10]

## Choosing between two arbitration agreements

### Balasore Alloys Limited v. Medima LLC, (2020) 9 SCC 136

The parties had entered into an umbrella agreement containing an arbitration clause as well as several purchase orders that contained separate arbitration clauses.

The issue before the Supreme Court was which of the two arbitration agreements would apply where both were in relation to the same dispute. Relying on its earlier decision in ***Olympus Superstructures Pvt Ltd v. Meena Vijay Khetan***[11], the Supreme Court held that in such situations, both the arbitration clauses must be harmonised and reconciled. Further, such an arbitration clause should be invoked which covers all the disputes raised. Accordingly, in this case the umbrella agreement was given effect to as the disputes fell under the same.

## Construction of arbitration agreements

Indian courts have held that a pragmatic or common-sense approach must be adopted in the construction of arbitration agreements, so as to give effect to the parties' intention to arbitrate. When parties enter into an arbitration agreement for resolution of any disputes, they do so with knowledge and expectation of the efficacy of the arbitral process. They cannot be taken to have intended that some disputes should be resolved by courts, whereas the others would be left to arbitration.

The above principle was considered in the concurring judgment of Chandrachud J. (as then) in ***A. Ayyasamy v. A. Paramasivam and Ors***.[12] Accordingly, the words "arising out of", or "in respect of", or "in connection with", or "in relation to", used in the arbitration agreement are to be given a broad interpretation.[13]

[10] See also *Mahanadi Coalfields Ltd. & Anr. v. IVRCL AMR Joint Venture*, 2022 SCC OnLine SC 960.
[11] (1999) 5 SCC 651.
[12] (2016) 10 SCC 386.
[13] *Renusagar Power Co. Ltd. v. General Electric Co. Ltd.*, (1984) 4 SCC 679; *Doypack Systems Private Limited v. Union of India and Ors*., (1988) 2 SCC 299; *Giriraj Garg v. Coal India Ltd*., (2019) 5 SCC 192.

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# Arbitrability

## What is arbitrability?

The concept of arbitrability requires an examination into whether the dispute may be resolved by arbitration, or by civil courts alone. Arbitrability is divided into subjective arbitrability (arbitrability *rationae personae*) and objective arbitrability (arbitrability *rationae materiae*).

Subjective arbitrability deals with the capacity of a person to enter into an arbitration agreement and participate in arbitration proceedings, whereas objective arbitrability deals with whether the subject matter of the dispute is capable of being arbitrated.

The category of arbitrable disputes varies across jurisdictions, with all jurisdictions keeping certain types of disputes outside the purview of arbitration either because of "*their public importance or a perceived need for judicial protections.*" [14]

The landmark judgement on arbitrability in India is ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors.***[15] Broadly, disputes which affect rights *in rem* are non-arbitrable. Disputes which affect rights *in personam* or subordinate rights *in personam* arising out of rights *in rem* are arbitrable. In ***Booz Allen***, the Supreme Court listed certain categories of non-arbitrable disputes under Indian law such as insolvency, matrimonial disputes and guardianship matters etc. This list has been subsequently added to by the Supreme Court.[16]

## Recent decisions of the Supreme Court on arbitrability

### Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710

The issue of arbitrability of fraud had been a subject of much debate before Indian courts. Eventually, in ***Ayyasamy***, the Supreme Court settled the issue by holding that mere allegations of fraud would not be sufficient to decline referral of a dispute to arbitration. However, a court may refuse to refer a dispute to arbitration where serious allegations of fraud, making out a criminal offence of fraud, have been raised, or where complicated allegations have been raised necessitating an adjudication by courts. The decision in ***Ayyasamy*** was recently followed by the Supreme Court in ***Rashid Raza*** which reiterated the working test laid down in ***Ayyasamy*** in cases of pleas of fraud.

[14] Gary B. Born, *International Arbitration: Law and Practice* (2nd edn., 2016) at p. 87.
[15] (2011) 5 SCC 532.
[16] *Vimal Kishor Shah & Ors. v. Jayesh Dinesh Shah & Ors.*, (2016) 8 SCC 788; *Emaar MGF Land Limited v. Aftab Singh*, (2019) 12 SCC 751.

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### Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 and Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties and Others, (2021) 4 SCC 786

The rulings in ***Ayyasamy*** and ***Rashid Raza*** have been reiterated by the Supreme Court in ***Avitel Post Studioz*** and ***Deccan Paper Mills***. The Supreme Court held that if the subject matter of the agreement fell within Section 17 (*fraud*) of the Indian Contract Act, 1872, or involves fraud in the performance of the contract, which would amount to deceit, the subject matter would be arbitrable since it is a civil wrong. Simply because a transaction has "criminal overtones", this does not make the subject matter non-arbitrable.

In ***Deccan Paper Mills***, the Supreme Court also held that arbitral tribunals are empowered to grant relief of cancellation of documents as long as the proceedings are *in personam* and not *in rem*. In doing so, the Supreme Court reiterated its earlier decision in ***Olympus Superstructures*** on the arbitral tribunal's power to grant specific relief.

### Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1

In ***Booz Allen**,* the Supreme Court had included eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction amongst the category of non-arbitrable disputes. In 2017, a two-judge bench of the Supreme Court in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia**,*[17] while dealing with a dispute alleged to be governed by the Delhi Rent Act, 1955, held that even if the provisions of such statute were not applicable, it would not mean that the provisions of the Act would be applicable. The Supreme Court had held that "*the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the Civil Court and not by the arbitrator*." This effectively meant that all tenancy disputes governed by the provisions of the Transfer of Property Act, 1882 ("**TP Act**") were to be considered non-arbitrable.

In ***Vidya Drolia***, a three-judge bench of the Supreme Court overruled the decision in ***Himangni Enterprises*** and held that disputes governed by the TP Act are arbitrable as they are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. The Supreme Court also clarified that landlord-tenant disputes governed by rent control legislation would continue to be non-arbitrable since a specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations.[18]

The Supreme Court laid down a fourfold test for determining when the subject matter of a dispute is non-arbitrable:

1. when the cause of action and subject matter of the dispute relate to actions *in rem*, and do not involve subordinate rights *in personam* that arise from rights *in rem*.
2. when the cause of action and subject matter of the dispute affect third party rights, have effect towards all, require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

[17] (2017) 10 SCC 706.
[18] See also *Suresh Shah v. Hipad Technology India Private Limited*, (2021) 1 SCC 529.

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3. when the cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence, adjudication by a private tribunal would not be enforceable; and
4. when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statutory provisions.

The Supreme Court also overruled the full court judgment of the Delhi High Court in ***HDFC Bank Ltd. v. Satpal Singh Bakshi***[19] and held that claims covered by the Recovery of Debts and Bankruptcy Act, 1993 ("**DRT Act**") are non-arbitrable on account of the implied prohibition in the DRT Act against the waiver of the debt recovery tribunal's jurisdiction. The Supreme Court observed that if claims of banks and financial institutions covered under the DRT Act are considered to be arbitrable, it would deprive these institutions of the specific rights under the DRT Act. The DRT Act overrides the contractual right to arbitration.

## Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund and Others, (2021) 6 SCC 436

The Supreme Court considered the arbitrability of insolvency disputes. The issue was the maintainability of an application under Section 8 of the Act (seeking reference to arbitration) filed in a proceeding under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

Relying on the judgment in ***Vidya Drolia***, the Supreme Court held that insolvency and intracompany disputes are actions *in rem* requiring adjudication in a centralised forum. In other words, they are non-arbitrable. However, an insolvency dispute is said to be a proceeding *in rem* only after the insolvency petition filed is admitted by the National Company Law Tribunal ("**NCLT**").

The Supreme Court further held that if an application under Section 8 of the Act is made before NCLT hearing an application under Section 7 of the IBC, the NCLT is duty bound to first decide the application under Section 7 of the IBC. The natural consequence of the consideration of the application under Section 7 of the IBC would befall the application filed under Section 8 of the Act.

The NCLT need not separately consider the application filed under Section 8 in case the application under Section 7 of the IBC is dismissed as the parties are in any case free to secure appointment of the arbitral tribunal.

[19] (2013) 134 DRJ 566 (Del).

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# Arbitration under Special Statutes

In addition to the Act, there exist certain statutes which contain arbitration mechanisms for dispute resolution in matters covered by such statutes. These statutes are aimed at providing effective redressal of disputes in a particular segment or sector through special provisions on arbitration. These statutes are considered as special laws which supersede the general provisions of the Act or the parties' arbitration agreement. Examples of such special statutes include the Micro, Small and Medium Enterprises Development Act, 2006 ("**MSME Act**"), the Telegraph Act, 1885 and the Electricity Act, 2003.

## Overriding effect of special statutes

### Silpi Industries and Ors. v. Kerala State Road Transport Corporation and Anr., 2021 SCC OnLine SC 439

The Supreme Court held that the MSME Act, being a special statute, has overriding effect vis-à-vis the Act, which is a general statute. Accordingly, even if there was an arbitration agreement between the parties, if a seller is governed by the MSME Act, the seller could approach the competent authority under the MSME Act. The statutory provisions and the mechanism provided under the MSME Act would prevail over the arbitration agreement.

Further, the Supreme Court held that the Limitation Act, 1963 ("**Limitation Act**") was applicable to proceedings under the MSME Act.

It was also observed that a counterclaim is maintainable in arbitration proceedings held under the MSME Act, as otherwise it would lead to parallel proceedings in different fora in respect of the same transaction.

### Jharkhand Urja Vikas Nigam Ltd v. State of Rajasthan and Others, 2021 SCC OnLine SC 1257

The Supreme Court considered the interplay between the provisions of the Act and the provisions of Section 18 of the MSME Act (which provides for conciliation, failing which the disputes are to be referred to arbitration). The Supreme Court was considering a challenge to an award passed by the Rajasthan Micro & Small Industries Facilitation Council, Jaipur ("**Council**") on the first day of conciliation proceedings deciding the dispute, on account of the failure of the party to appear.

The Supreme Court held that Sections 18(2) and 18(3) of the MSME Act makes it clear that the MSME Council is obliged to conduct conciliation, to which Sections 65 to 81 of the Act apply. If conciliation fails, then the Council can resolve the matter either on its own or refer it to any arbitral institution. The Council has to arbitrate the dispute and then pass an award, in accordance with the provisions of the Act.

Where conciliation fails, the Council has to commence arbitration proceedings to adjudicate and pass an award – these steps cannot be combined. On this basis, the Supreme Court set aside the "award" and directed the Council to refer the matter for arbitration.

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## Gujarat State Civil Supplies Corpn. Ltd. v. Mahakali Foods (P) Ltd., 2022 SCC OnLine SC 1492

While deciding the overriding effect of the MSME Act over the Act, the Supreme Court in ***Gujarat State Civil Supplies*** held that –

1. Chapter-V of the MSME Act overrides the provisions of the Act.
2. The Council which initiates conciliation proceedings would be entitled to act as an arbitrator notwithstanding Section 80 of the Act which bars conciliators from acting as arbitrators in arbitrations pertaining to the same dispute forming the subject to the conciliation proceedings.
3. The Council acting as an arbitrator would be governed by the Act and would be competent to rule on its own jurisdiction under Section 16 of the Act.
4. A party who does not fall within the definition of 'supplier' in Section 2 (n) of the MSME Act on the date of entering into contract cannot seek any benefit as the 'supplier' under the MSME Act. If the party obtains registration subsequently, it would only have prospective effect and would apply to the supply of goods and services subsequent to the registration.

## Tirupati Steels v. Shubh Industrial Components and Another, (2022) 7 SCC 429

The Supreme Court considered whether the provision of pre-deposit of 75% of the awarded amount as per Section 19 of the MSME Act when challenging the arbitral award under Section 34 is a mandatory or directory provision. The Court, while relying on ***Goodyear (India) Ltd. vs. Norton Intech Rubbers***[20] held that the pre-deposit of 75% of the awarded amount as per Section 19 of the MSME Act is mandatory to challenge an arbitral award.

## Vaishno Enterprises v. Hamilton Medical AG & Another, 2022 SCC OnLine SC 355

Enterprises which obtained registration under the MSME Act after entering into an arbitration agreement would not be covered under the MSME Act.

## Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal, (2022) 6 SCC 496

The Supreme Court considered Section 7B of the Telegraph Act, 1885 which provides for arbitration of disputes and whether it ousts the jurisdiction of the consumer forum in deciding a dispute between a telecom company and a consumer. The Court relied on ***Emaar MGF Land Ltd. v. Aftab Singh***[21] and held that the fact that the remedy of arbitration under the Telegraph Act is of a statutory nature, would not oust the jurisdiction of the consumer forum. An ouster of jurisdiction cannot be lightly assumed unless express words are used or such a consequence follows by necessary implication.

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[20] (2012) 6 SCC 345.
[21] (2019) 12 SCC 751.

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### Bihar Industrial Area Development Authority v. Rama Kant Singh, (2022) 4 SCC 489

In this case, while there was no arbitration clause in the agreement between the parties, the parties had submitted the disputes to arbitration within the contours of the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 ("**Bihar Act**"). The Supreme Court considered which legislation would prevail in the event of conflict between the Bihar Act and the Act.

The Supreme Court held that since there was no arbitration clause in the agreement between the parties, the provisions of the Act shall have no application and the Bihar Act shall prevail to the extent of any conflict.

## Appointment of arbitrators under special statutes

### Chief General Manager (IPC), M.P. Power Trading Co. Ltd. and Ors. v. Narmada Equipments Pvt. Ltd, 2021 SCC OnLine SC 255

The Supreme Court held that an application under Section 11(6) of the Act cannot be sustained in respect of a dispute between a licensee and a generating company, in view of the provisions of Section 86 of the Electricity Act, 2003.

The Supreme Court relied upon its earlier judgment in ***Gujarat Urja Vikas Nigam Limited v. Essar Power Limited***[22] where it was held that Section 86(1)(f) of the Electricity Act is a specific provision which overrides the general provision under Section 11(6) of the Act.

The Supreme Court further held that a plea regarding inherent lack of jurisdiction under Section 11 of the Act to appoint an arbitrator can be taken at any stage, including in collateral proceedings. A defect of lack of jurisdiction is not curable even by the consent of parties.

[22] (2008) 4 SCC 755.

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# Non-Signatories as parties to the Arbitration

## When can non-signatories be made parties?

Generally, only parties to an arbitration agreement can be impleaded as parties to an arbitration arising out of such agreement. The Supreme Court in ***Sukanya Holdings Pvt. Ltd v. Jayesh H. Pandya & Anr.***[23] held that where an application seeking referral of disputes to arbitration is made under Section 8 of the Act, only parties to an arbitration agreement could be referred to arbitration. Where disputes involved signatories as well as non-signatories, there could not be any bifurcation of causes of action.

In contrast, in the context of an application under Section 45 of the Act, the Supreme Court in ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.***[24] recognised the group of companies doctrine to implead non-signatories also. This was on account of the difference in the language of the unamended Section 8 (which only included parties) vis-à-vis Section 45 (which included parties as well as persons claiming through or under such party).

The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**") made significant changes to Section 8 of the Act, by introducing the phrase "*any person claiming through or under him*". Thus, Section 8 of the Act was brought on par with Section 45 of the Act, paving the way for referring even non-signatories to arbitration.

Post the 2015 Amendment Act, the jurisprudence of the Supreme Court[25] on referral of non-signatories to arbitration which was developed in the context of Section 45 was extended to Section 8 as well. Accordingly, the "group of companies doctrine" employed by Indian courts under Section 45 to refer a non-signatory to arbitration was adopted in the context of a Section 8 application as well.

### Mahanagar Telephone Nigam Ltd. v. Canara Bank and Others, (2020) 12 SCC 767

The Supreme Court extended the "group of companies doctrine" in ***Chloro Controls*** in the context of a Section 45 application to refer a non-signatory to arbitration. The "group of companies doctrine" provides that "*a non-signatory may be bound by an arbitration agreement where the parent or holding company, or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts*".

[23] (2003) 5 SCC 531.
[24] (2013) 1 SCC 641.
[25] *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr*., (2018) 15 SCC 678; *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors*., (2013) 1 SCC 641; *Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited and Another*, (2019) 7 SCC 62.

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The Supreme Court laid down the following test for invocation of the “group of companies doctrine”:

1. clear / common intention of parties to bind the signatory as well as non-signatory(ies);
2. direct relationship between the party which is a signatory to the arbitration agreement and the non-signatory;
3. tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality;
4. direct commonality of the subject matter; and
5. the composite nature of the transaction between the parties.

### Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. and Another, (2022) 8 SCC 42

The Supreme Court reiterated the deep-rooted existence of the group of companies doctrine in the Indian context. It was held that the following factors may be considered when deciding whether a non-signatory company within a group of companies would be bound by the arbitration agreement:

1. mutual intent of the parties;
2. relationship of a non-signatory to a party which is a signatory to the agreement;
3. commonality of subject matter;
4. composite nature of the transaction; and
5. performance of the contract.

### Cox and Kings Ltd. v. SAP India (P) (Ltd.) and Another, (2022) 8 SCC 1

The Supreme Court, while examining the group of companies doctrine, doubted the correctness of the doctrine laid down in ***Chloro Controls*** vis-à-vis principles of party autonomy. The Supreme Court raised questions on whether joining of non-signatories through the application of the doctrine ignores the commercial realities of separate legal personality of companies.

The following questions were referred to a larger bench to provide clarity:

1. Whether phrase ‘claiming through or under’ in Sections 8 and 11 could be interpreted to include ‘group of companies’ doctrine?
2. Whether the ‘group of companies’ doctrine in ***Chloro Controls*** and subsequent judgments are valid in law?
3. Whether the group of companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision?
4. Whether the group of companies doctrine should continue to be invoked on the basis of the principle of ‘single economic reality’?

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5. Whether the group of companies doctrine should be construed as a means of interpreting the implied consent or intent to arbitrate between the parties?

6. Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the group of companies doctrine into operation even in the absence of implied consent?

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# Grant of interim measures of protection by courts

## Interim measures of protection

Section 9 of the Act deals with the power of courts to grant interim measures in aid of arbitration for preserving the subject matter of the arbitration. An application under Section 9 of the Act may be filed before the commencement of arbitral proceedings, during such proceedings and post-grant of the arbitral award.[26] Courts across India routinely exercise powers under this section to grant relief(s), which are just and convenient.

The orders granted in exercise of such power range from orders for maintaining status quo, orders for / against invocation of guarantees, orders securing the amount in dispute by way of guarantees[27] or symbolic possession of property,[28] and even orders securing properties which are not the subject matter of dispute by appointing a receiver.[29] Courts have the discretion to mould reliefs in accordance with the specific facts and circumstances to "*preserve sanctity of the arbitral process*".[30]

## Applicability of principles laid down under the Code of Civil Procedure, 1908 ("CPC") to Section 9

In ***Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation & Ors***.[31], the Supreme Court held that while the Act does not lay down any special procedure for exercise of power under Section 9, the general rules governing the grant of interim injunction are also attracted to an application under Section 9 of the Act.

Similarly, in ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.***,[32] the Supreme Court reiterated that power under Section 9 of the Act cannot be exercised without considering the "*well known principles governing the grant of an interim injunction that generally govern the courts*". Thus, the requirements of prima facie case, balance of convenience and irreparable injury have to be considered by courts before granting relief under Section 9. This principle has been followed subsequently in numerous judgements granting interim orders under Section 9.

[26] *Sundaram Finance Ltd. v. NEPC India Ltd*., (1999) 2 SCC 479.
[27] *Delta Construction Systems Ltd., Hyderabad v. Narmada Cement Company Ltd., Mumbai*, 2001 SCC OnLine Bom 630.
[28]*Karvy Financial Services Ltd v. Progressive Construction Ltd*., Arbitration Petition No. 1162 of 2014, (judgment dated December 24, 2014 of the Bombay High Court).
[29] *Tata Capital Financial Services Ltd. v. M/s. Deccan Chronicle Holdings Ltd. & Anr.*, 2013 SCC OnLine Bom 307. See also *Welspun Infratech Ltd. v. Ashok Khurana & Ors.*, 2014 SCC OnLine Bom 39.
[30] Indu Malhotra, *Commentary on the Law of Arbitration* (4th edn., 2020) at p. 414.
[31] (2007) 6 SCC 798.
[32] (2007) 7 SCC 125.

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The Supreme Court in ***Essar House Private Limited v. Arcellor Mittal Nippon Steel India Limited***,[33] emphasised that courts exercising powers under Section 9 of the Act cannot ignore the basic principles of the CPC, but they are not strictly bound by the rigours of the CPC. Demonstrating proof of actual attempt to remove/ dispose of property so as to frustrate the arbitration proceedings is not necessary for the grant of relief under Section 9.

## Is it necessary to issue a notice invoking arbitration before an application under Section 9 is filed?

The Supreme Court in ***Sundaram Finance Ltd. v. NEPC India Ltd***.[34] answered this question in the negative. However, where a party has sought interim relief under Section 9 prior to issuing a notice of arbitration, "*there has to be manifest intention*" by such party to commence arbitral proceedings. The court will also have to be satisfied that (a) there exists a valid arbitration agreement; and (b) the applicant intends to take the dispute to arbitration.

The 2015 Amendment Act introduced sub-section (2) in Section 9 which mandates that arbitral proceedings shall be commenced within 90 days from the date of the interim order where an application under Section 9 has been made before issuing a notice of arbitration.

## Third parties and Section 9 proceedings

This issue can be divided into two: (a) whether a third party can file an application under Section 9; and (b) whether interim orders can be sought against third parties under Section 9.

An application under Section 9 can only be made by a party to the arbitration agreement or a person claiming through or under such party. In ***Firm Ashok Traders and Anr. v. Gurumukh Das Saluja & Ors.***,[35] the Supreme Court held that a person who is not a party to the arbitration agreement does not have *locus standi* to approach the court for relief under Section 9.

As far as obtaining interim orders against third parties is concerned, the Delhi High Court has expressed a view that the court's power under Section 9 is analogous to the power of a civil court to pass an order in respect of a third party.[36] No hard and fast rule can be laid down for issuance of interim orders against third parties, and the same depends on the facts of each case.

## Maintainability of Section 9 applications after the constitution of the arbitral tribunal

Section 9(3) of the Act, inserted by way of the 2015 Amendment Act, provides that after the constitution of the arbitral tribunal, a court shall not entertain an application under Section 9 unless it finds that in the circumstances of the case, the remedy under Section 17 would not be efficacious.

[33] 2022 SCC OnLine SC 1219.
[34] (1999) 2 SCC 479.
[35] (2004) 3 SCC 155.
[36] *Value Advisory Services v. ZTE Corporation and Ors.*, 2009 SCC OnLine Del 1961; *Gatx India Private Limited v. Arshiya Rail Infrastructure Limited and Anr.*, 2014 SCC OnLine Del 4181.

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The Supreme Court in its judgment in ***Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd***.[37] held that the arbitral tribunal's power to grant interim relief under Section 17 is the same as the court's power, and the remedy under Section 17 is as efficacious as the remedy under Section 9(1).

The Supreme Court held that even after the 2015 amendments, an application for interim measures of protection may be filed under Section 9, before the commencement of arbitration proceedings, during arbitration proceedings or post the award, but before its enforcement. The court has to then examine whether the remedy under Section 17 is efficacious.

Courts should not take up applications for interim relief following the constitution of the arbitral tribunal, except in cases where (i) there is impediment in approaching the arbitral tribunal; or (ii) the interim relief cannot be expeditiously obtained from the arbitral tribunal.

This applies even in cases where the application has been filed before the constitution of the arbitral tribunal. However, by the time the arbitral tribunal is constituted, if the court has already taken up the application for consideration (i.e. entertained the application) and the court has applied its mind, then it can proceed to adjudicate the application. In such a case, the court need not consider whether remedy under Section 17 is efficacious or not. Of course, before the constitution of the arbitral tribunal, the court is obliged to exercise its power under Section 9.[38]

How do you determine whether the remedy under Section 17 is efficacious or not? Indian courts have provided limited guidance in this regard.

In ***Energo Engineering Projects Ltd. v. TRF Ltd.***,[39] the Delhi High Court entertained an application under Section 9 where the arbitral tribunal was not functional on account of a special leave petition before the Supreme Court challenging its constitution. The Delhi High Court noted that the same was a circumstance which rendered the remedy under Section 17 uncertain and not efficacious.

In ***SREI Equipment Finance Limited v. Ray Infra Services Private Limited***[40] the Calcutta High Court granted interim relief as the lethargic pace of the conduct of the arbitration was considered as defeating the remedy under Section 17 of the Act. However, the Gujarat High Court in ***Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah***[41] held that the delay caused by the applicants in the arbitration proceedings cannot be considered as a circumstance that renders the remedy under Section 17 inefficacious.

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[37] 2021 SCC OnLine SC 718.

[38] In this regard, the Supreme Court disagreed with the Delhi High Court's view in *Avantha Holdings Limited v. Vistra ITCL India Limited,* 2020 SCC OnLine Del 1717.

[39] 2016 SCC OnLine Del 6560.

[40] 2016 SCC Online Cal 6765.

[41] (2019) 4 GLR 3229.

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## Section 9 and stamping of arbitration agreements

The primary requirement for granting relief under Section 9 is the existence of a valid arbitration agreement. To determine the validity of the arbitration agreement, various aspects of the arbitration agreement are analysed. One of the aspects considered is the adequate payment of stamp duty. In ***NN Global Mercantile Private Limited v. Indo-Unique Flame Limited and Ors***.[42] the Supreme Court considered this issue.

### NN Global Mercantile Private Limited v. Indo-Unique Flame Limited and Others, (2021) 4 SCC 379

The Supreme Court held that since the arbitration agreement contained in a contract is an independent contract, separable from the main contract and stamp duty is not payable on the arbitration agreement. Non-payment of stamp duty on the main contract would not invalidate the arbitration clause or render it unenforceable. In this regard, the Supreme Court overruled its earlier decisions in ***SMS Tea Estates (P) Limited v. Chandmari Tea Co. (P) Limited***[43] and ***Garware Wall Ropes v. Coastal Marine Constructions and Engineering Ltd.***[44] The issue has been referred to a larger bench.

The ruling in ***SMS Tea Estates*** with respect to registration of the agreement continues to stand.

The Supreme Court held that non-payment of stamp duty would not invalidate the main contract and is a curable deficiency.

A court hearing an application under Section 11 of the Act can impound the contract and direct the parties to cure the defect before the arbitral tribunal adjudicates the disputes.

Similarly, in a reference under Section 8, while the judicial authority can make the reference to arbitration if the subject matter of the dispute is covered by an arbitration agreement, it will have to direct the parties to pay the deficit stamp duty.

In case of an application for interim relief under Section 9, the court can grant ad-interim relief to safeguard the subject-matter of the arbitration irrespective of whether the contract is adequately stamped. However, the court would then have to impound the contract and direct the party to make payment of requisite stamp duty.

### Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd., (2022) 7 SCC 662

The Supreme Court held that even if a document is alleged to be inadequately stamped, courts can appoint an arbitrator under Section 11. In cases where stamp duty has been paid, the courts cannot review the sufficiency of stamp duty under Section 11(6).

[42] 2021 SCC OnLine SC 13.
[43] (2011) 14 SCC 66.
[44] (2019) 9 SCC 209.

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### Weatherford Oil Tool Middle East Limited v. Baker Hughes Singapore Pte., 2022 SCC OnLine SC 1464

The Supreme Court noted that the issue of non-payment of stamp duty and its impact on the arbitration clause has been referred to a Constitution bench in ***NN Global Mercantile Private Limited***. However, it was held that merely because the issue is sub-judice, arbitrations arising out of unstamped agreements cannot be stopped. The Supreme Court affirmed that the arbitration agreement can be enforced pending payment of stamp duty on the main contract.

## Section 9 and determinable contracts

The Specific Relief Act, 1963 ("**SRA**") provides the legal mechanism for contract enforcement in India. When a contract is determinable, specific performance of the contract cannot be granted.

In 2000, the Division Bench of the Delhi High Court in ***Rajasthan Breweries Ltd. v. The Stroh Brewery Company***[45] held that it would be wrong in the eyes of the law to grant an injunction where the contract was by its very nature, determinable. The Division Bench took the aforesaid position by reading Sections 14(1)(c) and 41 of the unamended SRA. A single judge of the Delhi High Court in ***Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid***[46] reiterated the principles laid down in ***Rajasthan Breweries***, after traversing through the law since then.

### Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid, 2020 SCC OnLine Del 351

In ***Inter Ads Exhibition***, Inter Ads filed a Section 9 Application for reinstating the contract terminated by BusWorld and setting aside the termination notice on the ground that Busworld did not follow the procedure for termination of the contract as provided in the joint venture agreement.

The Delhi High Court held that the clauses in the joint venture agreement showed that such agreement was determinable. Once a determinable contract is terminated, the court cannot revive or restore it. The defaulting party cannot seek specific performance of such contract.

The Delhi High Court further held that a determination of the legality of the termination of the contract is not within the domain of a court exercising jurisdiction under Section 9, and only the arbitral tribunal can decide the same. If the arbitral tribunal holds that the termination of the contract was wrongful, there will be an adequate remedy in the form of damages.

[45] 2000 SCC OnLine Del 481.
[46] 2020 SCC OnLine Del 351.

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### Chetan Iron LLP v. NRC Ltd., AIR 2022 Bom 104

The Bombay High Court held that the court exercising powers under Section 9 cannot direct specific performance of a determinable contract. The principles contained in Section 14(d) read with Section 41(e) of the SRA are applicable even where the court is considering whether to grant interim measures under Section 9. The court (under Section 9) or the arbitral tribunal (under Section 17) cannot grant interim measures continuing the operation of a contract which is determinable or has been terminated, as it would tantamount to rewriting the contract.

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# Appointment of Arbitrators

## Power of courts to appoint arbitrators

Section 11 of the Act provides the default procedure for appointment of arbitrators where parties have not agreed upon the procedure for such appointment, or where such agreed procedure fails. Under Section 11, the High Court (in case of domestic arbitrations) and the Supreme Court (in case of international commercial arbitrations) is empowered to appoint arbitrators.

In the following paragraphs, we discuss judicial developments on Section 11.

## Unilateral appointment of arbitrators

### Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760

In this case, the Supreme Court held that where the arbitration agreement contained a clause permitting one party to appoint a sole arbitrator, such party being a person having an interest in the dispute or its outcome, would be disentitled to appoint an arbitrator. In doing so, it extended the rationale in its earlier decision in ***TRF Limited v. Energo Engineering Projects Limited***[47] wherein it was held that a person disentitled to act as an arbitrator by operation of law could also not nominate another person to act as an arbitrator.

The Supreme Court held that there were two categories of cases – (i) where the managing director became ineligible by operation of law to act as an arbitrator, and he could not nominate another person to act as an arbitrator; and (ii) where the managing director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator.

In both categories, the appointment would be invalid since the person would have an interest in the outcome or decision, or a role in determining the course of the dispute resolution by appointing the arbitrator. However, cases where both parties could nominate arbitrators of their choice were different, as any advantage a party may have by nominating an arbitrator of its choice would be balanced by equal power with the other party.

### Central Organization for Railway Electrification v. M/s ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712

The Supreme Court was concerned with the issue of appointment of an arbitrator by the appellant. As per the arbitration clause, the appellant was to send a list of proposed arbitrators to the respondent, from which the respondent was to select two names for constitution of the arbitral tribunal. Out of the two names sent by the respondent, the General Manager of the appellant had to choose one person to be the arbitrator as nominated by the respondent.

[47] (2017) 8 SCC 377.

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The Supreme Court distinguished ***TRF Limited***, and applied ***Perkins Eastman***, holding that in the instant case, the respondent had been given the power to select two names from out of the four names in the list suggested by the appellant. Thus, the appellant's power to nominate the arbitrator was counter-balanced by the choice given to the respondent to select 2 names out of the 4 names suggested by the appellant.

The correctness of this decision has been doubted by a three-judge bench of the Supreme Court in ***Union of India v. Tantia Constructions Limited***[48] which has referred the matter to a larger bench.[49]

## Appointment of employees / retired employees as arbitrators

### Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited and Others v. Ajay Sales & Suppliers, 2021 SCC OnLine SC 730

The Supreme Court held that the appointment of the petitioner's chairman as the arbitrator cannot be permitted under Section 12(5) read with the Seventh Schedule to the Act. Even though the Seventh Schedule to the Act does not specifically mention 'Chairman', the chairman would still fall in the same category as paragraphs 1, 2, 5 and 12 of the Seventh Schedule which pertain to the arbitrator's relationship with one of the parties.

The fact that the respondents participated in proceedings before such chairman is of no-consequence. The ineligibility of the person can only be removed under the proviso to Section 12(5) i.e. if, subsequent to the disputes having arisen, the parties agree to waive the application of Section 12(5) by an express written agreement.

### Haryana Space Application Centre v. Pan India Consultants (P) Ltd., (2021) 3 SCC 103

The Supreme Court held that the appointment of the Principal Secretary, Government of Haryana as the nominee arbitrator of Haryana Space Application Centre, a nodal agency of the Government of Haryana is invalid under Section 12(5) read with the Seventh Schedule. Such person was ineligible to be appointed as an arbitrator on account of the controlling influence he would have over one of the disputing parties. It was held that Section 12(5) dealing with the ineligibility of appointment of an arbitrator, is a mandatory and non-derogable provision.

### Ellora Paper Mills Ltd. v. State of Madhya Pradesh, (2022) 3 SCC 1

The Supreme Court held the appointment of the officers of respondent state as arbitrators to be invalid under Section 12(5) read with the Seventh Schedule. This was a case where the appointment had been made much prior to the 2015 amendment (in 2001) but the arbitral proceedings could not commence. The Supreme Court also held that the only way in which such ineligibility can be removed is that parties, after disputes have arisen between them, waive the applicability of Section 12(5) by an express agreement in writing.

[48] 2021 SCC OnLine SC 271.
[49] See also *JSW Steel Limited vs. South-Western Railway and Anr.*, SLP(C) No. 9462 / 2022.

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### The Government of Haryana PWD Haryana (B and R) Branch v. G.F. Toll Road Pvt. Ltd. and Ors., (2019) 3 SCC 505

The Supreme Court was concerned with the issue of whether an employee of the state who has been retired for 10 years could be appointed as an arbitrator. The Supreme Court held that the Act does not disqualify former employees from being appointed as arbitrators, as long as there are no justifiable doubts regarding their independence or impartiality. The fact that the employee had been in the employment of the State of Haryana over 10 years ago meant that any allegation of bias was untenable.

This position was also followed in ***Central Organization for Railway Electrification***, wherein the Supreme Court observed that Section 12(5) of the Act does not bar appointment of a retired employee as an arbitrator.

## Forfeiture of the right to appoint arbitrators

### SAP India Pvt. Ltd. v. Cox & Kings Ltd., 2019 SCC OnLine Bom 722

The Bombay High Court was concerned with an application under Section 11 read with Sections 14 and 15 of the Act, whereby SAP had sought the appointment of a substitute arbitrator on behalf of Cox & Kings, in place of the arbitrator previously appointed under Section 11(6) of the Act.

The Bombay High Court held that the failure of Cox & Kings to nominate an arbitrator and consequent appointment by the Bombay High Court under Section 11(6) amounts to forfeiture of its right by Cox & Kings.

The Bombay High Court further held that "*rebirth of a right which stood forfeited also cannot be conceived for other two primary reasons, firstly for the reason that this would amount to a clear waiver of right as recognised by Section 4 of the Act, and secondly and most importantly the law would not permit sanctity of judicial procedure adopted in the court passing an order under Section 11(6) of the Act to be obliterated, diluted, taken away or being extinguished, merely because there is vacancy on the arbitral tribunal. Once the initial appointment itself is under the orders of the Court, there is no question of waived rights or forfeited rights being revived or resurrected for the purposes of either Section 14 and 15 of the Act.*"

The Supreme Court upheld the Bombay High Court's decision.[50]

### Durga Welding Works v. Chief Engineer, Railway Electrification, (2022) 3 SCC 98

The parties in this case had mutually agreed on the appointment of an arbitrator after filing of a Section 11 application (which was never pursued). The Supreme Court noted that it is settled law that the High Court alone holds jurisdiction to appoint an arbitrator in exercise of power under Section 11(6) after the application has been filed and the respondents' right to appoint an arbitrator is forfeited. However, in the peculiar facts and circumstances of the case, the refusal of High Court to appoint the arbitrator was upheld.

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[50] *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*, SLP (C) No.12076/2019, Order dated May 15, 2019.

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## Termination of mandate of an arbitrator under a Section 11 application

### Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, 2022 SCC OnLine SC 556

In this case, both the parties appointed a sole arbitrator to resolve certain family disputes by consent. The arbitration got delayed and one of the parties filed an application under Section 14(1)(a) of the Act seeking removal of the arbitrator on the ground of his inability to conclude the proceedings within time. The district court dismissed the case. This was challenged before the High Court.

While the challenge was pending, one party also filed an application under section 11(6) of the Act requesting termination of the mandate of the sole arbitrator and seeking appointment of a fresh arbitrator. The High Court allowed the application and, in exercise of powers under Section 11(6) terminated the mandate of the sole arbitrator and appointed a fresh arbitrator.

The Supreme Court held that a dispute/ controversy on the mandate of the arbitrator being terminated on the ground mentioned in Section 14(1)(a) cannot be decided on an application filed under Section 11(6). It held that the High Court can exercise jurisdiction under Section 11(6) only if there is a written arbitration clause and not otherwise. In the present case, the parties had appointed the sole arbitrator by mutual consent, and not under a written arbitration clause.

Further, the Supreme Court held that the challenge to the arbitrator must be made before the tribunal itself under Section 13 or before the court under Section 14.

## Substitution of an arbitrator under Section 15

### Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate, (2019) 3 SCC 282

This case concerned a challenge to the appointment of an arbitrator by the Rajasthan High Court in place of the arbitrator appointed by the parties. In accordance with the arbitration agreement, the parties appointed the chairman-cum-managing director of the Rajasthan Small Industries Corporation to act as the sole arbitrator by mutual consent. However, Ganesh Containers subsequently raised doubts regarding impartiality of such arbitrator by way of an application, which was allowed by the High Court.

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The Supreme Court held that where Ganesh Containers had participated in the entire arbitration proceedings, acquiesced in the proceedings and even expressed full faith in the arbitrator, it was estopped from challenging the appointment of the arbitrator on grounds of alleged bias. The Court held that "*mere neglect of an arbitrator to act or delay in passing the award by itself cannot be the ground to appoint another arbitrator in deviation from the terms agreed to by the parties.*"

The Supreme Court further held that the Rajasthan High Court was not right in appointing the arbitrator. Section 11(6) only takes effect when there is a failure on the part of the party to appoint an arbitrator in terms of the arbitration agreement. Hence, the Rajasthan High Court should not have appointed an arbitrator in view of the agreement between the parties.

The Supreme Court also dealt with the issue of whether by virtue of Section 12 of the amended Act, the Managing Director was ineligible to act as an arbitrator. The Supreme Court held that parties cannot seek recourse to the amended Section 12 since the 2015 Amendment Act could not be applied retrospectively. Since the arbitral proceedings had commenced in 2009, much before the 2015 Amendment Act, the amended Section 12 did not apply.

## Appointment in violation of procedure in the arbitration agreement

### Union of India v. Parmar Construction Company, (2019) 15 SCC 682

The Supreme Court considered whether it is permissible for the High Court in exercise of powers under Section 11(6) to directly make an appointment of an independent arbitrator without, in the first instance, ensuring that the remedies provided under the arbitration agreement are exhausted.

The Supreme Court answered this in the negative, holding that "*before any other alternative is resorted to, agreed procedure has to be given its precedence and the terms of the agreement has to be given its due effect as agreed by the parties to the extent possible.*" Further, the court while appointing an arbitrator under Section 11(6) of the Act is required to give due regard to the parties' agreement as to qualifications required by the arbitrator as well as other considerations so as to ensure appointment of an independent and impartial arbitrator.

## Power of courts to examine the existence of the arbitration agreement

When dealing with an application under Section 11, the relevant court is empowered to examine the existence of a valid arbitration agreement. The scope of such judicial scrutiny has been the subject of much debate, and in recent years, been considerably reduced through judicial and legislative developments.

### Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714

The Supreme Court held that while examining an application under Section 11 of the Act, the question of whether accord and satisfaction has taken place cannot be looked into by the court. Section 11(6A) is confined only to the examination of the existence of an arbitration agreement. The scope of enquiry is limited as has been held in ***Duro Felguera, SA v. Gangavaram Port Ltd.***[51]

[51] (2017) 9 SCC 729.

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which held that courts only need to see "*whether an arbitration agreement exists—nothing more, nothing less*."

The intention behind the introduction of Section 11(6A) is to minimize judicial interference in the appointment of arbitrators. On this basis, the Supreme Court in ***Mayavati Trading*** also overruled its previous judgment in ***United India Insurance Co. Limited v. Antique Art Exports Private Limited***[52] wherein it had considered the issue of accord and satisfaction at the stage of Section 11.

### Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1

In ***Vidya Drolia***, the Supreme Court held that the scope of judicial review under Sections 8 and Section 11 of the Act are identical "*but extremely limited and restricted*" to a prima facie examination of the existence of the arbitration agreement. Thus, the court can refuse to refer a party to arbitration or refuse to appoint an arbitrator only in cases where – (i) the court is certain that there does not exist a valid arbitration agreement between the parties, or (ii) the disputes/subject matter is not arbitrable.

The Supreme Court has narrowed down the scope for court intervention at the stage of Sections 8 or 11 of the Act, except in cases where it is "*manifestly and ex facie certain*" that the arbitration agreement does not exist or is invalid, or the dispute is "demonstrably" non-arbitrable. Where prima facie review would be inconclusive or inadequate in the absence of a detailed examination, the final determination should be done by the arbitral tribunal.

### Pravin Electricals Private Limited v. Galaxy Infra and Engineering Private Limited, (2021) 5 SCC 671

The Supreme Court followed the decision in ***Vidya Drolia*** to hold that the court is only required to undertake a prima facie review of the existence of the arbitration agreement. An in-depth consideration of the same is required to be undertaken by the arbitrator who shall consider documentary evidence as well as testimony from witnesses.

The Supreme Court also noted that by virtue of the 2015 Amendment Act, the scope of review under Section 8 and 11 has been brought on par. However, there is no provision whereby refusal to refer parties to arbitration could be challenged under the Act, whereas a similar order refusing to refer parties to arbitration under Section 8 is appealable under Section 37. Therefore, the Supreme Court recommended the legislature to make suitable amendments to remove the inconsistency.

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[52] (2019) 5 SCC 362.

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### Sanjiv Prakash v. Seema Kukreja and others, (2021) 9 SCC 732

In this case, the question was whether the arbitration agreement under a memorandum of understanding ("**MOU**") had been superseded by a share purchase agreement that was executed between the parties and a third entity.

The Supreme Court, relying on its judgments in ***Vidya Drolia*** and ***Mayavati Trading,*** observed that scope of judicial review under Sections 8 and 11 of the Act is limited. The issue of whether the MOU containing the arbitration agreement has been superseded is a matter of trial wherein detailed examination of facts would be essential. Therefore, the issue was required to be referred to the arbitral tribunal.

The Supreme Court also held that the court's exercise under Section 11 is not a mechanical one aimed at simply looking the existence of an arbitration agreement. Even if there is an arbitration agreement, the court has the power to decline to refer the matter to arbitration "*if the dispute in question does not correlate to the [arbitration] agreement*."

### Indian Oil Corporation Ltd. v. NCC Ltd., 2022 SCC OnLine SC 896

Relying on ***Vidya Drolia***, the Supreme Court held that if parties have expressly contemplated to keep certain disputes out of the scope of arbitration, such disputes cannot be referred to arbitration.[53] The court may refuse to make a reference where the disputes are manifestly non-arbitrable.

## Limitation period for filing applications under Section 11

### Bharat Sanchar Nigam Ltd. and Anr. v. M/s. Nortel Networks India Pvt. Ltd., (2021) 5 SCC 738

The Supreme Court held that the limitation period for filing an application under Section 11 of the Act would be governed by the residuary Article 137 of the Limitation Act. Accordingly, the application would have to be filed within 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days from the issuance of the notice of arbitration, whichever is earlier.[54]

The Supreme Court further held that limitation was not a jurisdictional issue but rather an issue of admissibility. Placing reliance on ***Vidya Drolia***, the Supreme Court went on to hold that where it is clear without doubt that claims are ex facie barred by limitation, the court may refuse to appoint an arbitrator or make a reference to arbitration.

The Supreme Court in ***Secunderabad Cantonment Board v. B. Ramachandraiah & Sons***[55] reiterated this position.

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[53] See also *Emaar India v. Tarun Aggarwal*, 2022 SCC OnLine SC 1328.
[54] See also *Vishram Varu and Co. v. Union of India*, 2022 SCC OnLine SC 487.
[55] 2021 SCC OnLine SC 219.

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## Second application for appointment of arbitrator

### V. Sreenivasa Reddy v. B.L. Rathnamma, 2021 SCC OnLine SC 294

The Supreme Court dealt with the issue as to whether it is open to a party to reapproach courts for the appointment of an arbitrator after having withdrawn its first application for such appointment on the grounds of a proposed settlement. The Supreme Court also dealt with whether it could be said that a dispute subsisted if the proposed settlement did not fructify.

The Supreme Court after observing that there was no concluded settlement between the parties, held that there is a dispute that required resolution through arbitration. In such cases, the second application would not be barred by the principles of res judicata. There was no abandonment of part of any claim nor was there a conclusive adjudication of the dispute between the same parties on merits to constitute res judicata.

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# Kompetenz-Kompetenz

## Arbitral tribunals to decide their own jurisdiction

It is a well-accepted principle in arbitration that arbitral tribunals are competent to decide their own jurisdiction and can consider questions as to existence or validity of the arbitration agreement while doing so. This competence of the arbitral tribunals to decide on their own jurisdiction is enshrined in Section 16 of the Act.

The competence of arbitral tribunals to decide their own jurisdiction is not exclusive[56] i.e. courts continue to have jurisdiction to decide questions of existence or validity of the arbitration agreement.

### National Aluminium Co. Limited v. Subhash Infra Engineers Pvt. Ltd. and Another, (2020) 15 SCC 557

The Supreme Court was concerned with a suit challenging the existence of an arbitration agreement and seeking a restraint of the arbitral proceedings. The Supreme Court relying on an earlier decision in the case ***Kvaerner Cementation India Limited v. Bajranglal Agarwal and Anr.***[57] held that any objection with respect to existence or validity of the arbitration agreement can be raised only by way of an application under Section 16 of the Act and that a civil court does not have jurisdiction to go into these issues.

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

The Supreme Court in this case considered the correctness of the High Court decision rejecting an application under Section 11 of the Act on the basis that the claims made were barred by limitation. The Supreme Court held that the issue of limitation is to be adjudicated upon by the arbitrator. The Supreme Court based its reasoning on: (a) Section 11(6A) which requires the court to confine its examination to the existence of the arbitration agreement; (b) Section 16 which recognises the principle of *kompetenz-kompetenz*, and (c) the legislative policy to restrict judicial intervention at the pre-reference stage.

The exceptions to the doctrine of *kompetenz-kompetenz* are: (a) where the arbitration agreement is itself tainted as being procured by fraud or deception; or (b) where parties have entered into a draft agreement "*as an antecedent step prior to executing the final contract*".

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[56] *SBP and Co. v. Patel Engineering Ltd. & Anr.*, (2005) 6 SCC 618.
[57] (2012) 5 SCC 214.

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# Anti-Arbitration Injunctions

## What are anti-arbitration injunctions?

Anti-arbitration injunction are injunctions passed by courts restraining a party from commencing or continuing arbitration proceedings. The Supreme Court as well as various High Courts have held that a civil court has inherent jurisdiction to grant anti- arbitration injunctions, where the party seeking the injunction can demonstrate that the arbitration agreement is null and void or inoperative or incapable of being performed.[58]

Recently, the Delhi High Court revisited the question as to whether courts have jurisdiction to grant anti-arbitration injunctions.

### Bina Modi & Ors. v. Lalit Modi & Ors., 2020 SCC OnLine Del 901 (SJ); Bina Modi v. Lalit Modi & Ors., 2020 SCC OnLine Del 1678 (DB)

The Single Judge of the Delhi High Court in ***Bina Modi*** relied on the 2001 decision of the Supreme Court in the case of ***Kvaerner Cementation*** and held that suits for grant of anti-arbitration injunction suits are not maintainable in light of Section 16, whereby an arbitral tribunal can rule on its own jurisdiction.

The Single Judge of the Delhi High Court however failed to appreciate that the decision of the Supreme Court in ***Kvaerner Cementation*** has been implicitly overruled by a seven judge bench in ***SBP & Co v. Patel Engineering Limited***[59] where the Supreme Court rejected the argument that there is an exclusive conferment of jurisdiction on the arbitral tribunal to decide on the existence or validity of the arbitration agreement. Moreover, the Single Judge of the Delhi High Court also did not consider the decisions of the Supreme Court, wherein the jurisdiction of civil courts to grant anti- arbitration injunctions has been affirmed.

The Division Bench of the Delhi High Court disagreed with the Single Judge's view, and held that judicial intervention is permitted in cases where the disputes submitted for arbitration are non-arbitrable. The Division Bench distinguished the applicability of ***Kvaerner Cementation*** on the basis that it was not a case where the Supreme Court dealt with the validity of the arbitration agreement or relating to disputes that cannot be referred to arbitration. The Division Bench also held that ***Kvaerner Cementation*** did not deal with Section 2(3) of the Act, which constituted an exception to the principle of limited judicial intervention contained in Section 5 in the case of non-arbitrable disputes.

[58] *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd*., (2014) 11 SCC 639; *Chatterjee Petrochem Company v. Haldia Petrochemicals Limited*, 2014 (14) SCC 574.
[59] (2005) 8 SCC 618.

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## Balasore Alloys Ltd. v. Medima LLC, 2020 SCC OnLine Cal 1699

The Calcutta High Court in ***Balasore Alloys*** unequivocally held that a court has power to grant an anti-arbitration injunction, even against a foreign-seated arbitration. The Calcutta High Court placed reliance on ***SBP & Co.*** to hold that the arbitral tribunal does not have exclusive competence to rule on its own jurisdiction. The decision in ***Kvaerner Cementation*** was held to be implicitly overruled as it was decided prior to the decision in ***SBP & Co.***, which was decided by a larger bench.

The Calcutta High Court also held that the power to grant anti-arbitration injunctions is to be used "sparingly and with abundant caution", and in accordance with the principles laid down by the Supreme Court in ***Modi Entertainment Network v. WSG Cricket Pte. Ltd.***[60] in the context of anti-suit injunctions.

## Spentex Industries Limited v. Quinn Emmanuel Urquhart & Sullivan LLP, 2020 SCC OnLine Del 2484

The Delhi High Court refused to grant a declaration that the arbitration clause contained in an agreement for provision of legal services was null, void, inoperative and incapable of being performed. Since the arbitration proceedings were for recovery of money for professional services rendered, the same was a commercial legal relationship and would be covered by Section 44 of the Act. In doing so, the Delhi High Court implicitly accepted its jurisdiction to grant anti-arbitration injunctions, but declined to exercise such jurisdiction on specific facts.

[60] (2003) 4 SCC 341.

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# Exercise of powers under Section 17 by Arbitral Tribunals

## Arbitral tribunal's powers under Section 17

Section 17 of the Act recognises the power of arbitral tribunals to grant interim measures of protection during arbitral proceedings. The arbitral tribunal's powers are analogous to that of the court under Section 9. The arbitral tribunal can grant interim measures of protection, *inter alia*, preserving the subject matter of the arbitration agreement, securing the amount in dispute under the arbitration, interim injunction, appointment of receivers etc.

## Limitation on arbitral tribunal's powers under Section 17

While the powers of the arbitral tribunal under Section 17 are akin to that of the court under Section 9, there are a few critical differences.

*First*, the arbitral tribunal can grant interim relief under Section 17 only during the course of the arbitral proceedings, whereas a court under Section 9 can grant relief prior to or during the arbitral proceedings and after the making of the arbitral award. This is because the arbitral tribunal becomes *functus officio* once the arbitral award is passed.

*Second*, unlike the court under Section 9, the arbitral tribunal cannot grant interim relief against a third party.

*Third*, prior to the 2015 Amendment Act, the arbitral tribunal had no coercive powers to enforce its orders, although by judicial interpretation, a workaround was devised under Section 27(5) in the form of contempt proceedings.[61] However, the 2015 Amendment Act has inserted Section 17(2) in the Act providing that any orders of the arbitral tribunal under Section 17 shall be enforceable in the same manner as if it were an order of the court.

For caselaw on interplay between Sections 9 and 17, please see the section on Grant of Interim Measures of Protection by Courts.

### State of Gujarat & Anr. v. Amber Builders, (2020) 2 SCC 540

The Supreme Court held that the provisions of Part I of the Act would apply to all arbitrations seated in India, including statutory arbitrations under other statutes. However, if there is any inconsistency between the provisions of Part I of the Act and the provisions of the special enactment, the provisions of the special enactment will prevail. On the facts of the case, the Supreme Court held that since there was no inconsistency between the Act and the Gujarat Act, the powers vested in the arbitral tribunal under Section 17 could be exercised by it.

[61] *Kishan v. Anand,* 2009 (3) ArbLR 447; *Alka Chandewar v. Shamshul Ishrar Khan*, (2017) 16 SCC 119.

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# Emergency awards

## Enforcement of emergency awards

The rules of several arbitral institutions provide for emergency interim relief prior to the constitution of the arbitral tribunal. In such cases, an emergency arbitrator is appointed who passes orders providing relief to the parties. Such orders continue in effect till the arbitral tribunal is constituted, which may reconsider, modify or vacate such emergency award.

Certain jurisdictions expressly provide for the enforcement of emergency awards in their arbitration statutes. In India, there has been a debate around the enforcement of emergency awards since the Act does not explicitly deal with emergency awards. As a consequence, courts had been enforcing emergency awards through orders in a Section 9 application in the same terms as the emergency award.

The issue came to the forefront in an ongoing dispute between Amazon and Future Retail group regarding their shareholders' agreements and restrictive covenants therein. The Supreme Court of India finally rendered a landmark judgment, settling the debate on enforcement of emergency awards.

### Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Others, 2021 SCC OnLine SC 145

The Supreme Court held as follows:

1. The emergency award is made under Section 17(1) of the Act and can be enforced under Section 17(2) – full party autonomy is given under the Act for emergency arbitral procedures;
2. No appeal lies under Section 37 of the Act against an order enforcing an emergency award made under Section 17(2) of the Act.

Please note however that the above findings are applicable only in relation to arbitrations seated in India. Since Section 17 of the Act does not extend to arbitrations seated outside India, in case of international commercial arbitrations seated outside India, parties would have to take recourse to Section 9 of the Act.

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# Exercise of writ jurisdiction where arbitration clauses exist

In contractual matters involving the state or its instrumentality, the issue of exercise of writ jurisdiction under Article 226 of the Constitution of India, 1950 (“**Constitution**”) is an important one. In ***ABL International Limited v. Export Credit Guarantee Corporation of India***,[62] the Supreme Court held that that the plenary jurisdiction of High Court under Article 226 is available even in a case arising out of a contractual obligation. The existence of certain disputed questions of fact cannot be a ground for refusal to entertain a writ petition in all cases. A writ petition seeking consequential relief of monetary claim is also maintainable.

### Unitech Limited and Others v. Telengana State Industrial Infrastructure Corporation and Others, 2021 SCC OnLine SC 99

The Supreme Court, relying on the principles laid down in ***ABL International***, held that the presence of an arbitration clause in a contract between an instrumentality of state and a private party does not create an absolute bar to jurisdiction under Article 226 of the Constitution. If the state/ state instrumentality violates the mandate under Article 14 and fails to act fairly and reasonably, relief under plenary powers of Article 226 may be sought. It needs to be decided on a case-by-case basis whether recourse to such public law remedy can be justifiably invoked.

### Rapid Metrorail Gurgaon Limited v. Haryana Mass Rapid Transport Corporation Limited and Others, 2021 SCC OnLine SC 269

The Supreme Court emphasised that ordinarily the High Court in its jurisdiction under Article 226 should decline to entertain a dispute which is arbitrable or where remedies are available under Sections 9 or 17 of the Act. However, a writ court is fairly justified in entertaining a dispute involving an element of public law character or question arising out of public law functions, and when the forum chosen by the parties would not be in a position to grant appropriate relief although an alternate remedy of arbitration was available to the parties.

### Kelkar and Kelkar v. Hotel Pride Executive Pvt. Ltd., 2022 SCC OnLine SC 542

The Supreme Court set aside a decision of the Bombay High Court on the ground that when the statute provides a further remedy by way of appeal against the award and even against the order passed by the learned trial Court making the award a decree of the court, the High Court ought not have entertained the writ petition and ought not have set aside the award, in a writ petition under Articles 226 and 227 of the Constitution.

[62] (2004) 3 SCC 553.

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# Exercise of jurisdiction under Articles 136 and 227 against orders of Arbitral Tribunals

## Limited judicial intervention under the Act

A reading of the provisions of the Act makes it clear that it is a complete code and that judicial intervention is limited to the extent set out therein. With this idea in mind, the Act makes it clear that only certain orders of the court or arbitral tribunal are appealable under Section 37 and no others. However, this has not stopped parties from approaching the Supreme Court under Article 136 of the Constitution or the High Courts under Articles 226-227 of the Constitution.

### Deep Industries Limited v. Oil and Natural Gas Corporation Limited and Another, (2020) 15 SCC 706

This case dealt with the High Court's exercise of jurisdiction under Article 227 of the Constitution in relation to orders passed by an arbitral tribunal.

The Supreme Court held that Section 5 (which provides for limited judicial intervention in arbitration) and Section 37 (which provides for a limited right of appeal from certain orders alone) restrict the scope of interference in orders passed by an arbitral tribunal. Relying on its decision in ***SBP and Co.***, the Supreme Court reiterated that the object of limiting judicial intervention in arbitral proceedings will be defeated if High Courts entertain petitions under Article 226 and 227.

While judicial intervention under Article 227 cannot be completely excluded, this object of minimal judicial intervention should be kept in mind, such that "*interference should be restricted to orders that are passed which are patently lacking in inherent jurisdiction".* Where a court decides to exercise jurisdiction under Article 227, it should limit its scrutiny to jurisdictional errors only and not concern itself with the merits of the disputes between the parties.

The Supreme Court in ***Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Ors.***[63] relied on the decision in ***Deep Industries*** and reiterated that interference under Articles 226/227 of the Constitution is only possible if it is shown that party has exhibited 'bad faith', there are exceptional circumstances, or if the party is left remediless.

[63] (2020) 1 SCC 75.

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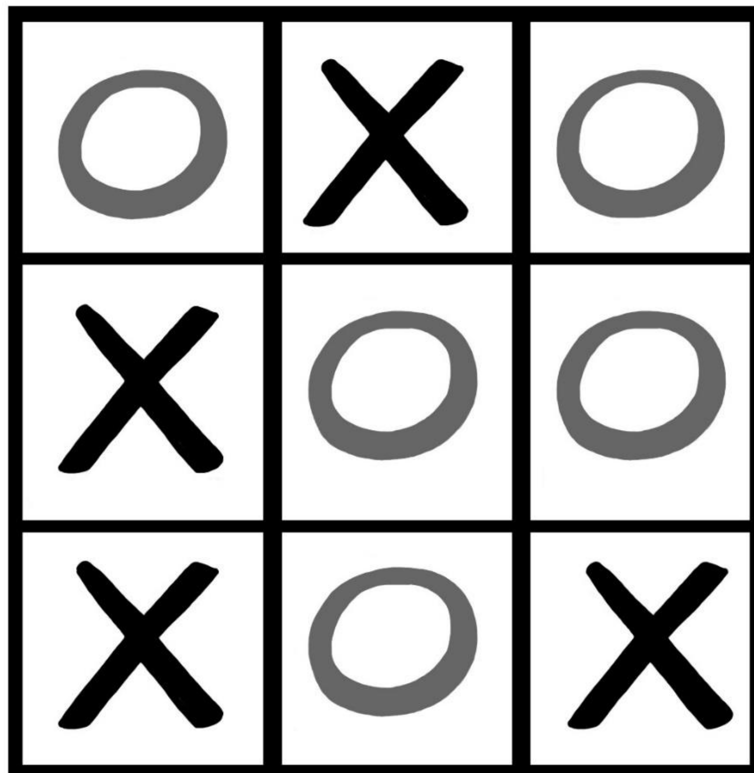
## Vijay Karia and Others v. Prysmian Cavi E Sistemi SRL and Others, (2020) 11 SCC 1

In ***Vijay Karia***, the Supreme Court, while discussing the scope of interference under Article 136 in the context of Section 48 of the Act, took note of the legislative policy of limited appeal in relation to foreign awards i.e. only orders refusing recognition and enforcement could be challenged. The Supreme Court observed that such limited appeal is provided in accordance with the legislative policy of having one bite at the cherry. Accordingly, the Supreme Court held that the "*jurisdiction under Article 136 should not be used to circumvent the legislative policy*". Further, the Supreme Court cautioned that exercise of jurisdiction under Article 136 should be very slow and that too in order to settle some unique position of law which has not been answered earlier by the Supreme Court.



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# Conduct of Arbitral Proceedings

## Procedure for arbitral proceedings

Subject to the mandatory provisions of the Act, parties to an arbitration are free to agree on the procedure to be followed in conducting the arbitral proceedings. Where parties have not agreed on such procedure, the arbitral proceedings may be conducted in a manner the arbitral tribunal considers appropriate.[64]

The arbitral tribunal is not bound to follow the procedure contained in the CPC or the Indian Evidence Act, 1872.[65] However, the arbitral tribunal is not precluded from adopting the basic principles contained in these statutes.[66] The basic principles of fair trial and evidence appreciation, which are derivatives of procedural law, are applicable to arbitral proceedings.

Parties to an arbitration are free to prescribe a time-limit for submission of the statement of claim and the statement of defence along with documents.[67] If the parties do not prescribe any time-limit mutually, the arbitral tribunal shall determine the period within which the parties would be required to file these statements.[68]

The Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**") provides an overall time period of 6 months from the date on which the arbitrator(s) received notice of their appointment for completion of pleadings. [69] The arbitral tribunal is empowered to allow amendment of the statement of claim or defence by the parties, except if the tribunal is of the opinion that there has been inordinate delay in filing the amendments/ supplements or if the parties have agreed otherwise.[70]

Unless otherwise agreed between the parties, the arbitral tribunal is empowered to decide whether to hold oral hearings for the presentation of the evidence or whether the proceedings shall be conducted on the basis of documents and other materials submitted by the parties before the tribunal.[71] Advance notice is to be given to the parties of any hearing or of any meeting of the arbitral tribunal for the inspection of documents, goods or other property.[72] All statements, documents and other information supplied, or applications filed before the arbitral tribunal by the parties are to be communicated to the other party.[73] Therefore, the basic principle that nothing should transpire behind the back of the parties is ensured.

[64] Section 19(2) of the Act.
[65] Section 19(1) of the Act.
[66] *Sahyadri Earthmovers v. L&T Finance Limited & Anr.,* 2011 SCC OnLine Bom 434.
[67] Section 23(1) and 23(2) of the Act.
[68] Unless otherwise agreed by the parties, the Claimant shall include in his statement of claim the facts in support of the claim, the points at issue and the relief sought. The Respondent shall state his defence in respect of these particulars and may also include counter-claims against the Claimant.
[69] Section 23(4) of the Act.
[70] Section 23(3) of the Act.
[71] Section 24(1) of the Act.
[72] Section 24(2) of the Act.
[73] Section 24(3) of the Act.

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## No special treatment to be given to the Government

Section 18 of the Act mandates arbitrators to perform their functions impartially by treating the parties equally and giving full opportunity to each party to present their case. Failure to provide a party with a full opportunity to present its case renders the award vulnerable to challenge under Section 34(2)(a)(iii) of the Act.

### Pam Developments Pvt. Ltd. v. State of West Bengal, (2019) 8 SCC 112

The Supreme Court considered whether while determining an application for stay under Section 36 of the Act, differential treatment is to be granted to the Government akin to the provisions of the CPC. The Supreme Court ruled in the negative, holding that Section 36 does not provide for any special treatment to the Government.

The Supreme Court observed that the provisions of the CPC will only act as directory or guiding factor in an arbitral proceeding. The Act is a self-contained code and the provisions of the CPC will apply only insofar as the same are not inconsistent with the spirit of the Act. While the CPC provides for a differential treatment to the government in certain cases, the same may not be so applicable while considering a case against the government under the Act. Therefore, the Supreme Court distinguished between the privileges granted under the CPC to the government as an entity which protects public interest as opposed to arbitration proceedings, where the government participates in a commercial capacity.

## Service of notice of arbitration – whether mandatory

Arbitral proceedings are commenced from the date of receipt of the claimant's request for referral of the dispute to arbitrations.[74] Such request is usually sent by way of a notice.

### Alupro Building Systems Pvt Ltd v. Ozone Overseas Pvt Ltd., 2017 SCC Online Del 7228

The Delhi High Court in ***Alupro Building*** held that in the absence of an agreement to the contrary, notice under Section 21 of the Act by the claimant invoking the arbitration clause and referring the disputes to arbitration is mandatory. Non-compliance of Section 21 of the Act rendered the arbitration proceedings unsustainable in law, vitiating the award as null and void and without any jurisdiction.

The Delhi High Court held that the notice under Section 21 of the Act has a five-fold significance:

1. Identification of claims by the parties and narrowing down of the disputes between the parties;
2. Identification of whether claims are time-barred by limitation;
3. Identification of the procedure to be adopted for the conduct of the arbitral proceedings and appointment of an arbitrator;
4. Identification of any disqualification of the arbitrator sought to be appointed; and

[74] Section 21 of the Act.

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5. Exercise of court's jurisdiction under Section 11 of the Act in case of failure to respond to the notice.

## Arbitral tribunal's jurisdiction to recall its order terminating proceedings

### SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited, (2018) 11 SCC 470

Sections 25 and 32 of the Act provide for termination of arbitral proceedings in two different scenarios. The Supreme Court in the case of ***SREI Infrastructure*** dealt with the distinction between termination of arbitral proceedings under Section 25(a) vis-à-vis Section 32(2)(c) of the Act. Under Section 25(a) of the Act, where parties do not agree otherwise, the arbitral tribunal shall terminate its proceedings in case of default of the claimant to file the statement of claim without sufficient cause. In contrast, under Section 32(2)(c) of the Act, an arbitral tribunal shall terminate proceedings if it finds that the continuation of the proceedings has for some reason become 'unnecessary' or 'impossible'.

The Supreme Court held that in the event an arbitral tribunal terminates the proceedings under Section 25 (a) of the Act, it has the power to recall its order, if sufficient cause is shown by the claimant for committing default in filing its statement of claim. However, the arbitrator does not have the authority to recall the proceedings terminated under Section 32 of the Act — the rationale being that the consequence of termination under Section 32 is Section 33(3) of the Act, which postulates for termination of the 'mandate of the arbitral tribunal', which is not the case of termination of proceedings under Section 25 of the Act. This has been reiterated in ***Sai Babu v. M/S Clariya Steels Private Limited***.[75]

## Court assistance in taking evidence

The arbitral tribunal has the power to direct a party before it to produce a document or provide evidence.[76] However, the arbitral tribunal does not have jurisdiction over third parties.

Section 27 provides assistance to the arbitral tribunal or parties in respect of third parties who may be required to be summoned as witnesses or in possession of documents which may be required to be produced in the arbitration.

[75] 2019 (5) SCJ 503.
[76] *Bharat Heavy Electricals Ltd. v. Silor Associates S.A.*, 2014 SCC OnLine Del 4442.

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The arbitral tribunal, or a party with approval of the tribunal, is empowered to apply to the courts for assistance in taking evidence.[77] The court, may in its discretion, execute the request by ordering any person to provide evidence to the arbitral tribunal directly or issue summons to the such person to appear before the tribunal.[78] The ambit of Section 27 has been held to include not just persons who are parties to the arbitral proceedings, but also third parties.[79] If any person fails to appear or adduce evidence or is guilty of any contempt before the arbitral tribunal, then such person shall be subject to such disadvantages, punishments or penalties, as they would incur for like offences in suits tried before courts.[80]

[77] Section 27(1) of the Act.
[78] Sections 27 (3) and 27(4) of the Act.
[79] *Delta Distilleries Ltd. v. United Spirits Ltd. & Anr.*, (2014) 1 SCC 113.
[80] Section 27(5) of the Act.

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# Laws applicable in an Arbitration

An arbitration proceeding may involve the application of multiple sets of laws – law governing the substantive issues in dispute (the law of the contract), law governing the arbitration agreement, law governing the arbitration proceedings (usually the same as the law of the seat), the law governing the parties' capacity to arbitrate, and the law of the place where enforcement is sought. These laws govern various aspects of arbitration and challenge to the award rendered, and its eventual enforcement.

In ***Government of India v. Vedanta Limited***,[81] the Supreme Court reiterated the various laws applicable to an international commercial arbitration:

1. The governing law of the contract – this law determines the substantive rights and obligations of the parties under the contract. Where parties have chosen the governing law of the contract, the dispute is decided in accordance with such law. In the absence of express choice of the parties, the governing law of the contract is determined by the arbitral tribunal in accordance with applicable conflict of law rules.

2. The law governing the arbitration agreement – this law is determined separately from the governing law of the contract, and deals with issues such as the validity and scope of the arbitration agreement, extent of party autonomy, the jurisdiction of the arbitral tribunal etc.

3. The curial law of the arbitration – the law of the seat of arbitration is the curial law of the arbitration. The curial law governs the procedure of the arbitration, including its commencement, appointment of arbitrators in a default scenario, grant of interim measures, collection of evidence, hearings and challenge to the award.

   Institutional rules for arbitration, such as the ICC Rules of Arbitration or the SIAC Rules (if chosen) apply along with the curial law to govern the procedure for the arbitration.

The law governing enforcement – this law governs the proceedings for recognition and enforcement of the award in other jurisdictions. The law governing enforcement is the *lex fori* (law of the forum where enforcement is sought). The *lex fori* determines the court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the available legal remedies for enforcement of the award.

## Law applicable to the substance of the dispute

Section 28 of the Act deals with the rules applicable to the substance of the dispute. Where the arbitration is seated in India, disputes, other than in international commercial arbitrations, shall be decided in accordance with Indian law. This refers to the substantive law governing the dispute.

[81] (2020) 10 SCC 1.

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## Can two Indian parties agree to apply foreign law to decide disputes?

This issue was discussed by the Supreme Court in the case of ***TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd***.[82] In this case, both parties were Indian. The arbitration clause provided that any disputes between the parties shall be referred to arbitration under the provisions of the Arbitration Act, 1940 and the venue for the arbitration shall be New Delhi. TDM Infrastructure approached the Supreme Court for appointment of an arbitrator.

The Supreme Court held that since both parties were incorporated in India, the dispute was a domestic arbitration and therefore it did not have the jurisdiction to appoint an arbitrator. While doing so, the Supreme Court also observed that the intention of the legislature was clear that "*Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of India.*" However, this decision is of limited precedential value since the Supreme Court was deciding an application under Section 11 of the Act.

The Supreme Court in ***PASL Wind Solutions*** (discussed below) had an opportunity to consider this question, but did not give a conclusive answer. Instead, the Supreme Court observed that it is likely that two Indian parties will choose Indian law as the substantive law for disputes arising out of breach of contracts in India.

## Can two Indian parties choose a foreign seat of arbitration?

### PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd., (2021) 7 SCC 1

The Supreme Court finally resolved the issue of two Indian parties choosing a foreign seat of arbitration. Upholding the principle of party autonomy, the Supreme Court categorically held that nothing stands in the way of two Indian parties designating a foreign seat of arbitration. The Supreme Court held that party autonomy was "*the brooding and guiding spirit of arbitration*".

The Supreme Court considered the balance between the concept of freedom of contract and undeniable harm to the public and held that that there was no public harm in permitting two Indian parties from getting their disputes arbitrated at a neutral forum outside India. Consequently, such arbitrations would not run contrary to the public policy of India.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") would apply to any arbitration between any two parties in a territory outside India (i.e. foreign seat of arbitration), and the arbitration will be an 'International Commercial Arbitration' under Part II of the Act. The Court observed that the term 'international commercial' is a seat-centric concept. As a result, an award made in such arbitrations would be considered as a 'foreign award' which is enforceable in India under Part II of the Act.

[82] (2008) 14 SCC 271.

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The Supreme Court also held that parties to such foreign-seated arbitrations would still be able to seek interim relief under Section 9 of the Act. In this regard, the Supreme Court held that the expression "international commercial arbitration" used in Section 2(2) of the Act (which permits courts to grant relief under Section 9 in international commercial arbitrations seated outside India) was not to be given the meaning in Section 2(1)(f) i.e. an arbitration involving Indian and non-Indian parties. Instead, the term "international commercial arbitration" for this purpose refers to the arbitration being seated outside India.

## Requirement to take into account the terms of the contract

Earlier, Section 28(3) of the Act required the arbitral tribunal to decide the dispute "*in accordance with the terms of the contract*." In ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.,***[83] the Supreme Court held that any award passed by an arbitral tribunal which goes against the terms of the contract would contravene Section 28(3) of the Act, and the same would be a ground to set aside the award under Section 34.

The strict view taken in ***Saw Pipes*** was diluted through subsequent judicial precedent, including ***Associate Builders v. Delhi Development Authority***,[84] wherein the Supreme Court held that:

> "*An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of the contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do*."

To overcome the effect of ***Saw Pipes*** and to bring the law in line with ***Associate Builders***, Section 28(3) was amended by the 2015 Amendment Act to provide as follows:

> *"While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."*

Post the amendment, various courts have rendered judgments where they have liberally construed the terms of the contract.

### Ssangyong Engineering & Construction Ltd. v. National Highways Authority of India, (2019) 15 SCC 131

In ***Ssangyong***, the Supreme Court noted that the amended Section 28(3) followed the position laid down in ***Associate Builders***. Accordingly, the construction of the terms of the contract is a matter for the arbitrator to decide. Courts would not interfere with the same unless the construction adopted by the arbitrator is something no "*fair-minded or reasonable person*" would adopt. If the arbitrator goes beyond the scope of the contract and deals with matters not allotted to him, it is an error of jurisdiction, falling within the ground of patent illegality under Section 34(2A).

[83] (2003) 5 SCC 705.
[84] (2015) 3 SCC 49.

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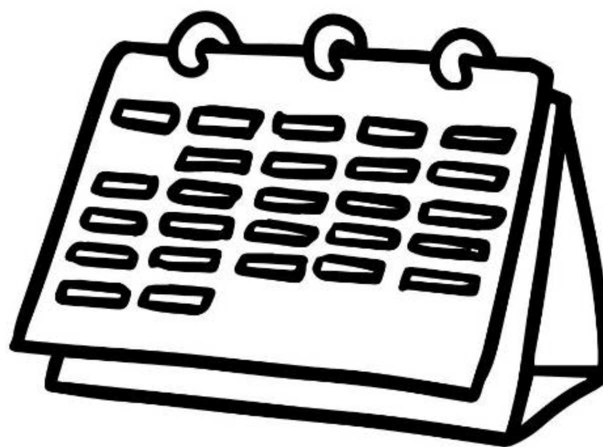
# Time limit for making an Arbitral Award

As per Section 29A, inserted in 2015, an award is required to be made within a period of 12 months from the date on which the tribunal enters upon the reference. A tribunal shall be deemed to have entered upon the reference on the date on which the sole arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

In 2019, Section 29A of the Act was amended to provide that the time limit of 12 months (extendable by further 6 months by parties) for making the award shall be counted from the date of completion of pleadings under Section 23(4). Further, an exemption from adherence to the time limit has been provided for international commercial arbitrations. However, in international commercial arbitrations, the proviso to Section 29A(1) provides that an endeavour has to be made to dispose of the matter within 12 months from the date of completion of pleadings.

A new proviso has been inserted in Section 29A(4) by which the mandate of the arbitrator shall continue during the pendency of an application to the court seeking extension of time under Section 29A(5). Another proviso has been inserted in Section 29A(4) giving the arbitrator an opportunity of being heard before his fees are reduced by the court for delay in proceedings attributable to the arbitral tribunal.



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# Interest and Costs

## Arbitral tribunal's power to award interest

### Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd., 2022 SCC OnLine SC 1127

The Supreme Court in ***Morgan Securities*** discussed its earlier judgment in ***Hyder Consulting (UK) Ltd. v. State of Orissa through Chief Engineer***,[85] and held that Section 31(7)(b) of the Act does not restrict the arbitrator's discretion in granting post-award interest. The arbitrator has the discretion to award post-award interest on a part of the 'sum', which includes principal and pre-award interest. It was further clarified that the words "*unless the award otherwise directs*" under Section 31(7)(b) of the Act only qualify the rate of interest, not additional components of interest (such as pre-award interest). Section 31(7)(b) of the Arbitration Act only provides that if the arbitrator does not grant post-award interest, then the award-holder is entitled to post-award interest at 18%, unless the award otherwise directs another rate of interest.

The Supreme Court in ***U.H.L Power Company Ltd. v. State of Himachal Pradesh***[86] also reiterated the position in ***Hyder Consulting*** holding that the arbitral tribunal is empowered to grant compound interest or interest on interest. The legal position has been reiterated by the Supreme Court in ***Indian Oil Corporation v. U.B. Engineering Ltd. and Anr.***[87]

## Determining interest payable

### Vedanta Ltd. v. Shenzen Shandong Nuclear Power Construction Co. Ltd (2019) 11 SCC 465

The Supreme Court laid down the guidelines to be followed by arbitrators while awarding interest. It held that the discretion to award interest has to be exercised reasonably. The following non-exhaustive factors have to be considered by the arbitral tribunal: *"(i) the 'loss of use' of the principal sum; (ii) the types of sums to which the Interest must apply; (iii) the time period over which interest should be awarded; (iv) the internationally prevailing rates of interest; (v) whether simple or compound rate of interest is to be applied; (vi) whether the rate of interest awarded is commercially prudent from an economic stand-point; (vii) the rates of inflation, (viii) proportionality of the count awarded as Interest to the principal sums awarded."*

Further, the Supreme Court in ***M/s. Raveechee & Co. v. Union of India***[88] has held that as a matter of general rule the arbitrator has the power to award interest *pendente lite* unless there is a clear and specific bar in the contract which prohibits grant of interest.

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[85] (2016) 6 SCC 362.
[86] (2022) 4 SCC 116.
[87] Civil Appeal Nos. 2921-2922 of 2022.
[88] (2018) 7 SCC 664.

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## Regime for costs

One notable amendment under the 2015 Amendment Act is the insertion of Section 31A which provides a framework for determination and allocation of costs of arbitration. Prior to this, Section 31(8) provided for fixation of costs of the arbitration by the arbitral tribunal. The 2015 Amendment Act also inserted the Fourth Schedule, which contained a model schedule of fees for arbitrators.

The Supreme Court in ***National Highways Authority of India v. Gayatri Jhansi Roadways Limited***[89] held that the Act does not preclude the parties from agreeing upon a fee schedule for the arbitrator(s). It held that the Sections 31(8) and 31A deals with the costs generally and not the arbitrator's fees. However, Section 31(8) and Section 31(A) of the Act does not govern contracts wherein a fee structure has already been laid down or mandate the use of the Fourth Schedule instead of the parties' agreement on fees. Therefore, where parties have agreed the fees of the arbitral tribunal, the arbitral tribunal is bound to follow such fees and not the fees laid down in the Fourth Schedule.

Thereafter, the High Court of Delhi in the case of ***G.S. Developers and Contractors Pvt. Ltd. v. Alpha Corp Development Pvt. Ltd. & Ors.***,[90] held that the Fourth Schedule to the Act is merely a guiding model and is not binding on arbitrators.

Finally, in ***Oil and Natural Gas Corporation Ltd. v. Afcons Gunanusa JV***,[91] the Supreme Court has held Fourth Schedule to be directory and not applicable to court appointed tribunals. It has held that ad hoc tribunals cannot unilaterally determine their own fees.

The Supreme Court interpreted the term 'sum in dispute' and laid down guidelines for fixation of fees at the stage of inception of the arbitration. It has been held that arbitrator fees shall be calculated separately for the claim and the counterclaim.

Besides this, the Court has also capped the maximum fee payable under the Fourth Schedule of the Act to INR 30,00,000 per arbitrator in case of a multi-arbitrator tribunal. In case of a sole arbitrator, an additional amount of 25% over and above the payable fee has been stipulated.

## Deposits as to costs

The arbitral tribunal is empowered to call upon parties to make payment or deposit towards advance for costs, which it expects will be incurred in respect of the claim submitted.[92] These advance costs are to be paid by both parties in equal shares, however, if one party fails to pay their share of the deposit, the other party may pay that share.[93]

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[89] (2020) 17 SCC 626.
[90] 2019 SCC OnLine Del 8844.
[91] Civil Appeal No. 5880 of 2022.
[92] Section 38(1) of the Act.
[93] Section 38(2) of the Act.

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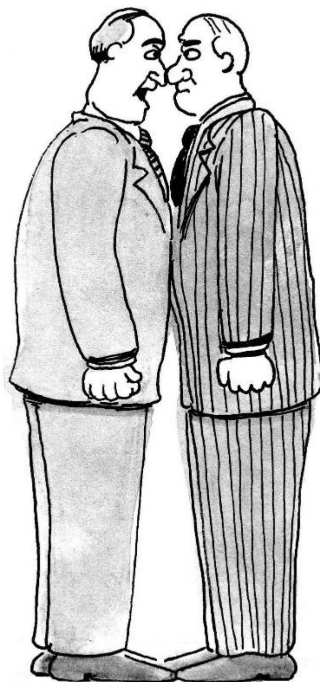
If the amount of deposit in respect of claims or counter-claim is not received from the parties, the arbitral tribunal may suspend or terminate the proceedings in respect of such claim or counter-claim. Upon termination of the arbitral proceedings, the arbitral tribunal is required to provide an account of the advance deposits received and refund the unspent balance to the parties.[94]

However, any clause in an arbitration agreement which mandates a pre-deposit of the amount claimed in the arbitration proceeding is not permitted. In ***M/S Icomm Tele Ltd v. Punjab State Water Supply & Sewerage Board & Anr.***,[95] the Supreme Court struck down such a clause, finding it to be arbitrary and resulting in a discouragement to arbitrate.

## Lien on the arbitral award

The arbitral tribunal has the power to exercise a lien on the arbitral award for any unpaid costs.[96] Where the arbitral tribunal has refused to deliver its award except on payment of costs demanded by it, a court may, where an application has been made to it, direct the applicant to effect payment in the court and only thereafter the arbitral tribunal may be directed to make the arbitral award available to parties. The parties may also apply to the court, where they consider that the arbitral tribunal has withheld the award without any good reason, or the costs or deposits fixed are excessive or unreasonable.[97]



"Do we see eye to eye on this matter?"

[94] Section 38(3) of the Act.
[95] (2019) 4 SCC 401.
[96] Section 39 of the Act.
[97] Section 39(2) of the Act.

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# Challenge to Domestic Arbitral Awards

## Grounds of challenge under Section 34 of the Act

Section 34 of the Act provides for the limited grounds under which an arbitral award made in India can be challenged. The 2015 Amendment Act introduced several amendments to Section 34 which, *inter alia,* limited the scope of challenge under the ground of "public policy".

### Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, (2019) 15 SCC 131

In ***Ssangyong***, the Supreme Court noted the legislative changes limiting the scope of judicial scrutiny under Section 34. On the various grounds available under Section 34, the Supreme Court held as follows:

1. **Party is unable to present its case**

   The Supreme Court explained the interplay between Sections 18, 24(3), 26 and Section 34(2)(a)(iii) of the Act. After referring to various international commentaries, the Supreme Court noted a few instances where the ground under Section 34(2)(a)(iii) can be invoked — where: (a) any party has not been given an opportunity to comment on the facts and legal grounds of the case; (b) materials have been taken behind the back of any party by the arbitral tribunal; and (c) a party has not been afforded opportunity to comment on any materials, evidence or arguments by the other party.

2. **Arbitral award is beyond the scope of the submission to arbitration**

   The Supreme Court held that this ground under Section 34(2)(a)(iv) must be construed narrowly. The grounds for challenge under Section 28(3) cannot be brought in as a ground under Section 34(2)(a)(iv). The ground under Section 34(2)(a)(iv) would be attracted when an arbitral award decides matters: (a) beyond the scope of the arbitration agreement; or (b) beyond the disputes referred to the arbitral tribunal.[98] However, any misinterpretation of the contract would not amount to an arbitral award being beyond the scope of submission to arbitration as long as such misinterpretation could be said to a dispute within the arbitration agreement or the reference to the arbitral tribunal.

3. **Scope of "public policy"**

   The Supreme Court held that the expression "*public policy*" in both Sections 34 and 48 is limited to: (a) "*fundamental policy of Indian law*"; and (b) "*most basic notions of justice or morality*".

[98] *State of Goa v. Praveen Enterprises,* (2012) 12 SCC 581.

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The scope of the expression "*fundamental policy of Indian law*" is restricted to its understanding in ***Renusagar Power Co. Ltd. v. General Electric Co.***[99] This would mean: (a) violation of a statute linked to public policy or public interest; (b) disregarding orders of superior courts in India; and (c) disregarding the binding effect of a judgment of a superior court. The wide import given to the expression "*fundamental policy of Indian law*" in ***Oil and Natural Gas Corporation Limited v. Western Geco International Limited***[100] and ***Associate Builders*** is no longer the position.[101]

The ground "*interest of India*" has been deleted and therefore, is no longer available as a ground for interference with arbitral awards.

A challenge to an arbitral award on the basis that the award conflicts with justice or morality has been restricted to where the award conflicts with "*most basic notions of morality or justice*" i.e. when the award shocks the conscience of the court. Morality would be determined on the basis of "*prevailing mores of the day*".

4. **Patent illegality**

Patent illegality has been inserted by way of Section 34(2A) as a ground for setting aside arbitral awards rendered in arbitrations involving only Indian parties (i.e. not international commercial arbitrations). Following the 2015 Amendment Act, patent illegality is no longer a ground for setting aside arbitral awards rendered in international commercial arbitrations.

Patent illegality has been referred to as the illegality which "*goes to the root of the matter*" and does not include erroneous application of law by an arbitral tribunal. Further, patent illegality cannot be used as a ground for re-appreciation of evidence by an appellate court. Violation of a substantive law of India is also by itself not a ground for setting aside an award.

The ground of "patent illegality" is attracted if no reasons are given for an award, if the view taken by an arbitrator while construing a contract is an impossible view, an arbitrator decides questions beyond a contract or the matters referred to arbitration, and if a perverse finding is arrived at based on no evidence, overlooking vital evidence, or based on documents taken as evidence without notice of the parties.

However, the Supreme Court noted that the construction of the terms of the contract is within the arbitrator's jurisdiction and courts would not interfere with the same unless the arbitrator adopts a construction that no *"fair-minded or reasonable person*" would adopt.[102]

[99] (1994) Supp (1) SCC 644.
[100] (2014) 9 SCC 263.
[101] Preceding the decision in *Ssangyong*, the Supreme Court in *MMTC v. M/s. Vedanta Ltd*., (2019) 4 SCC 163 had in passing mentioned Wednesbury principles of reasonableness as being covered within the scope of "*fundamental policy of Indian law*". However, the decision in *Ssangyong* passed subsequently is the latest position of law on the interpretation of Section 34.
[102] The Supreme Court in *State of Jharkhand & Ors. v. M/s. HSS Integrated SDN & Ors.*, (2019) 9 SCC 798 reiterated that grounds under Section 34 would not be attracted when the findings of the tribunal is plausible, particularly when such findings are neither perverse, nor contrary to evidence.

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The decisions in ***Associate Builders*** and ***Western Geco*** to the extent they permit interference with an arbitral award on the ground that the arbitrator has not adopted a judicial approach is no longer good law. Further, the decision in ***Associate Builders*** insofar as it states that a court may set aside an arbitral award if it is not fair, reasonable and objective is also no longer good law.

This position has been reiterated in ***PSA Sical Terminals Ltd. v. V.O. Chidambranar Port Trust***[103]*.* Additionally, the Supreme Court held that where the arbitral tribunal re-writes a contract for the parties, it would be in breach of fundamental principles of justice entitling a Court to interfere. Such case would be one which shocks the conscience of the court, and thus fall within the exceptional category.

### Patel Engineering Limited v. North Eastern Electric Power Corporation Ltd., (2020) 7 SCC 167

A three-judge bench of the Supreme Court affirmed the principle laid down in its earlier decision in ***Ssangyong*** to set aside a domestic award, passed after October 23, 2015, on the ground of "patent illegality".

### South East Asia Marine Engineering and Constructions Limited v. Oil India Limited, (2020) 5 SCC 164

The Supreme Court reiterated the law laid down in ***Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.***[104], wherein it was held that arbitral awards are not to be interfered with by courts in a "*casual or cavalier manner*". Courts should be circumspect and go by the arbitrator's view on the interpretation of the contract, unless the award is so perverse that it cannot be condoned by the court under Section 34.[105]

### Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131

The Supreme Court examined the contours of the court's power to review arbitral awards and held that the principal objective of the Act was to minimize the supervisory role of courts in arbitral processes, and that judicial interference with arbitral awards is limited to the grounds in Section 34 of the Act. The Supreme Court examined each provision and aspect of Section 34 in depth, especially the import of words used in the section such as "*public policy of India*", "*patent illegality*", and "*fundamental policy of India*" and how courts have interpreted such words in context of the Act.

The Supreme Court held that the contravention of a statute not linked to public policy or public interest cannot be a ground to set aside an arbitral award on grounds of being contradictory to fundamental policy of India or patent illegality.

[103] 2021 SCC OnLine SC 508.
[104] (2019) 20 SCC 1.
[105] A similar view was taken in *Anglo American Metallurgical Coal Pty Ltd. v. MMTC Ltd*., (2021) 3 SCC 308; *Welspun Specialty Solutions Limited v. ONGC*, (2022) 2 SCC 382; and *U.H.L Power Company Ltd v. State of Himachal Pradesh*, (2022) 4 SCC 116.

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The Supreme Court also reiterated that Section 34 of the Act does not permit courts to be a judge of evidence perused by the arbitrator in the course of arbitration proceedings.

### Atlanta Ltd. v. Union of India, (2022) 3 SCC 739

In this case, the Supreme Court reiterated the settled position that the arbitrator is the final arbiter of all disputes. It is not open for a party to challenge the award on the ground that the arbitrator has drawn his own conclusions or has failed to appreciate certain facts. The Supreme Court observed that by going into minute details of evidence with a magnifying glass, the court entertaining the Section 34 petition transgressed the limitations placed on it.

### Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, (2022) 4 SCC 463

In this case, parties had entered into two distinct agreements — a lease agreement and a dealership agreement in respect of a retail outlet for sale of petroleum products. When disputes arose, arbitration proceedings were commenced under the dealership agreement. The arbitral tribunal, however, passed an award on lease rental and lease duration — both issues pertaining to the lease agreement.

It was held that the award insofar as it pertains to lease rent and lease period was beyond the scope of competence of the arbitrator appointed under the dealership agreement. Such issues were not contemplated by the arbitration clause in the dealership agreement and did not fall within the terms of the submission to arbitration. The arbitral award was set aside insofar as the same dealt with disputes with regard to the lease agreement.

## Waiver of right to object

In ***Quippo Construction Equipment Ltd. v. Janardan Nirman Pvt. Ltd.***,[106] the Supreme Court held that a party, who did not participate in the arbitral proceedings or raise any objections therein must be deemed to have waived its right to raise objections. Such party cannot subsequently raise objections after the arbitral award is passed, at the stage of a Section 34 proceeding.

## Appeal under Section 34 not available for foreign awards

In ***Noy Vallesina Engg. SpA v. Jindal Drugs Ltd.***,[107] the Supreme Court settled the position that an appeal under Section 34 of the Act is not maintainable against a foreign award in a foreign seated-arbitration conducted in accordance with the ICC Rules, even if the award was passed prior to the decision in ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[108]

[106] (2020) 18 SCC 277.
[107] (2021) 1 SCC 382.
[108] (2012) 9 SCC 552.

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## Introduction of fresh evidence at the Section 34 stage

Prior to the 2019 Amendment Act, a party applying for setting aside the arbitral award had to "*furnish proof that*" the grounds set out in Section 34 had been made out. The 2019 Amendment Act substituted the words "*furnishes proof that*" contained in Section 34(2)(a), with the words "*establishes on the basis of the record of the arbitral tribunal that*".[109] This brings the position in line with the Supreme Court's decision in ***Fiza Developers & Inter-Trade P. Ltd. v. AMCI(I) Pvt. Ltd. & Anr***.[110] that proceedings under Section 34 should not be conducted in the same manner as civil suits, with framing of issues.

In September 2019, the Supreme Court considered the issue of adducing fresh evidence in Section 34 applications in the case of ***Canara Nidhi Limited v. M. Shashikala & Ors.***[111] The Supreme Court considered the 2019 Amendment Act, and affirmed the dictum laid down in ***Emkay Global Financial Services Ltd. v. Girdhar Sondhi***[112] that a Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

## Courts not to modify awards

In ***National Highways Authority of India v. M. Hakeem and Anr.***,[113] the Supreme Court held that Section 34 of the Act does not contain the power to modify an award. Nor is Section 34 jurisdiction akin to revisional jurisdiction under Section 115 of the CPC. The same principle has been reiterated in ***National Highways Authority of India v. P. Nagaraju & Anr.***[114]

## Remitting the matter back to arbitrator under Section 34(4)

In ***I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd.***,[115] the Supreme Court has clarified the scope of Section 34(4), while differentiating between 'reasons' and 'findings', to hold that Section 34(4) can be resorted to record reasons on a finding already given in the award or to fill gaps in the reasoning of the award. However, it cannot be used to remit the matter back to the arbitral tribunal in case of there being a patent illegality in the award itself due to absence of findings on contentious issues. Where there is no finding on a contentious issue, no amount of reasons can cure the defects in the award.

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[109] Based on the recommendations of Justice B.N. Srikrishna Committee's Report.
[110] (2009) 17 SCC 796.
[111] (2019) 9 SCC 462.
[112] In *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi*, (2018) 9 SCC 49, the Supreme Court held that in an application under Section 34, an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. "*However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties.*" As for the affidavits, the Supreme Court held that cross examination of persons swearing the affidavits should be permitted only if absolutely necessary, as a reading of affidavits filed would show a clear picture.
[113] (2021) 9 SCC 1.
[114] 2022 SCC OnLine SC 864.
[115] (2022) 3 SCC 121.

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The power of the Court under Section 34(4) is a discretionary power which is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning. The Court should consider the application under Section 34(4) keeping in mind the grounds of challenge raised in the Section 34(1) petition.

In ***Mutha Construction v. Strategic Brand Solutions Pvt. Ltd.***,[116] the Supreme Court has held that after setting aside an award, the court can remit the matter back to the same arbitrator, provided the parties mutually agree to the same. This view was reiterated in ***A. Parthasarathy v. E Springs Avenues Pvt. Ltd.***[117]

## Limitation period for challenging arbitral awards

An application for setting aside of the arbitral award has to be filed within a period of three months from the date on which the party filing the application has received the award.[118] Such period would commence only from the date on which a signed copy of the award has been delivered to the party challenging the award and not from the date of circulation of draft award.[119]

The timelines given in Section 34(3) have to be strictly adhered to. Section 34(3) provides that an application can be made within three months, only extendable by thirty days. No extension can be granted beyond thirty days and any condonation of delay beyond such period is in breach of the clear statutory mandate.[120]

### Chintels India Limited v. Bhayana Builders Private Limited, (2021) 4 SCC 602

The Supreme Court has held that an order refusing to condone delay in filing a Section 34 application can be challenged under Section 37(1)(c) of the Act. The Supreme Court overruled the law laid down by the Bombay High Court in ***State of Maharashtra v. Ramdas Construction Co.***[121] on the point that Section 37 cannot be invoked in cases where a Section 34 application is rejected on issues preceding the merits of the application.

[116] SLP (Civil) No. 1105 of 2022.
[117] 2022 SCC OnLine SC 719.
[118] The proviso to Section 34(3) provides that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.
[119] *Anilkumar Jinabhai Patel (D) v. Pravinchandra Jinabhai Patel,* (2018) 15 SCC 178; *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited,* (2021) 7 SCC 657.
[120] *M/s Simplex Infrastructure Ltd v. Union of India,* (2019) 2 SCC 455.
[121] (2006) 6 Mah LJ 678.

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### Mahindra and Mahindra Financial Services Ltd. v. Maheshbhai Tinabhai Rathod, (2022) 4 SCC 162

The main issue before the Supreme Court in this case was whether Section 5 of the Limitation Act is applicable to petitions filed under Section 34. The Supreme Court, relying on ***Union of India v. Popular Construction Co.***[122] and ***State of H.P. v. Himachal Techno Engineers***,[123] held that scope available for condonation of delay is self-contained in the proviso to Section 34(3) and Section 5 of the Limitation Act is not applicable to condone delay beyond period prescribed under Section 34(3).

## Application to adjourn proceedings under Section 34(4) of the Act

Under Section 34(4), the court adjourn proceedings for a certain period of time to provide the arbitral tribunal an opportunity to resume proceedings or to take any other action which will, in the arbitral tribunal's opinion, eliminate the grounds for setting aside the arbitral award. Such provision can be exercised only upon a written application made by a party to the arbitration proceedings, and courts cannot exercise such discretion *suo moto.*[124] Section 34(4) may be utilised by the court to cure defects where the arbitral award does not contain any reasoning, or if the award had some gap in the reasoning.[125]

[122] (2001) 8 SCC 470.
[123] (2010) 12 SCC 210.
[124] *Radha Chemicals v. Union of India,* (Civil Appeal No. 10386 of 2018, order dated October 10, 2018), relying upon *Kinnari Mullick v. Ghanshyam Das Damani*, (2018) 11 SCC 328.
[125] *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., (*2019) 20 SCC 1.

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# Finality and enforcement of Arbitral Awards

## Finality of arbitral awards

Section 35 of the Act states that subject to Part I, an arbitral award shall be final and binding on the parties and persons claiming under them respectively. In ***Cheran Properties***[126], the Supreme Court explained that the expression "*persons claiming under them*" in Section 35 is a legislative recognition of the doctrine that an arbitral award binds every person whose capacity or position is derived from (and is the same as) a party to the proceedings, irrespective of whether such person was a party to the arbitration agreement or the arbitral proceedings.

## Stay of operation of arbitral awards

The unamended Section 36 of the Act did not specifically address whether the operation of a domestic arbitral award would be stayed during the pendency of a challenge under Section 34. It merely provided for the enforcement of a domestic arbitral award upon the expiry of time prescribed for making an application to set aside the award under Section 34, or if such an application was made and had been refused.[127]

The 2015 Amendment Act substituted Section 36 in its entirety. The amended Section 36(2) stipulates that the mere filing of an application under Section 34 would not render a domestic arbitral award unenforceable. The stay of the operation of the award had to be specifically sought from, and granted by, the court. Therefore, the award-holder is at liberty to have the award enforced under Section 36, unless a court stayed the operation of an award.

However, there was no clarity on the applicability of the 2015 Amendment Act from its effective date of October 23, 2015 ("**Effective Date**").

After conflicting views of various High Courts, the controversy was finally settled by the Supreme Court in ***BCCI v. Kochi Cricket Pvt. Ltd.***[128]

In ***BCCI***, the Supreme Court held that the 2015 Amendment Act would apply to: (a) arbitration proceedings that had commenced on or after the Effective Date (unless parties agree otherwise), and (b) court proceedings that commenced on or after the Effective Date. Consequently, while challenging an arbitral award, the applicant therein is required to file a separate application to stay of the operation of the award, failing which the award-holder could proceed to enforce the award.

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[126] (2018) 16 SCC 413.

[127] In the case of *National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.,* (2004) 1 SCC 540, the Supreme Court held that a domestic arbitral award becomes "unexecutable" once it is challenged under Section 34, and that such "automatic suspension" would apply until the dismissal of the challenge proceedings.

[128] (2018) 6 SCC 287.

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Shortly thereafter, the 2019 Amendment Act introduced a new Section 87 in the Act which provided that the 2015 Amendment Act will apply prospectively to arbitration proceedings commenced on or after the Effective Date as well as to court proceedings in relation to such arbitration proceedings. It would not apply to court proceedings in respect of arbitration proceedings commenced prior to the Effective Date, irrespective of whether such court proceedings were pending as of the Effective Date or commenced thereafter. This amendment negated the effect of ***BCCI***.

The constitutional validity of Section 87 of the Act was challenged before the Supreme Court in ***Hindustan Construction Company Limited & Ors. v. Union of India & Ors***.[129] Section 87 was declared unconstitutional inasmuch as it was arbitrary. The Supreme Court held that the decision in ***BCCI*** will continue to apply, so as to make the salutary amendments made by the 2015 Amendment Act applicable to all court proceedings initiated after the Effective Date.

The position as on date is that there is no automatic stay on awards where an application under Section 34 was pending as on the Effective Date or where such application has been filed on or after the Effective Date.

The Arbitration and Conciliation Act (Amendment) Act, 2021 ("**2021 Amendment Act**") introduced a further proviso to Section 36(3) permitting the court to grant an unconditional stay of the award pending disposal of a challenge under Section 34 if it is satisfied that the arbitration agreement or the contract forming the basis of the award, or the making of the award was induced or effected by fraud or corruption.

## Deposit of amount awarded for a stay on enforcement

Recently, courts have become conscious of the effects of filing of an application under Section 34 of the Act, noting that in some instances, Section 34 is used as a delaying tactic. In such cases, there is a necessity to protect the subject matter of the award during the pendency of the Section 34 application by obtaining interim relief under Section 9 or by seeking deposit of the award amount as a condition for grant of stay under Section 36. Therefore, various courts have been taking a strict approach i.e. the courts demand/ allow the deposit of 100% of the principal amount of the award.

Recently, a Single Judge of the Delhi High Court considered the standards applicable for the deposit of principal amount. The Delhi High Court held that in only appropriate facts and circumstances, a deposit of 100% of the principal amount can be ordered.

### Power Mech Projects Ltd. v. Sepco Electric Power, 2020 SCC OnLine Del 2049

In this case, an application under Section 9 was filed by the award-creditor seeking deposit of 100% of the award. An application challenging the award under Section 34 was filed by the award-debtor. The Delhi High Court took up both applications together, and dealt with whether the deposit of 100% of the principal amount of the award is mandatory before hearing a petition under Section 34 of the Act.

[129] (2020) 17 SCC 324.

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The Court observed that it is not mandatory to insist on 100% deposit of award sum, before hearing the application under Section 34 or before staying the enforcement of the award. The deposit amount would depend on the facts of the case and is left to the discretion of the court.

The Court also relied on the judgment of the Supreme Court in ***Hindustan Construction Company Limited v. Union of India,***[130] whereby the Supreme Court held that post award Section 9 is a measure of protection and is a step in aid of the enforcement of the award. The award should not be "*rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement*."

"So it is written, so it shall be done."

[130] (2020) 17 SCC 324.

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# Appealable orders

## Limitation on filing appeals under Section 37 of the Act

Any appeal under Section 37 has to be filed within a period of 90 days, in accordance with Article 116 of the Limitation Act. In ***Borse Brothers*** (discussed below), a three-judge bench of the Supreme Court settled the law on the issue of condonation of delay in filing of appeals under Section 37 of the Act.

### Government of Maharashtra (Water Resources Department) v. Borse Brothers Engineers & Contractors Private Limited, (2021) 6 SCC 460

The Supreme Court observed that Section 5 of the Limitation Act, 1963 (on extension of prescribed period of limitation) would apply to appeals arising out of Section 37 of the Act and Section 13 (1A) of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 ("**Commercial Courts Act**").

Analysing the interplay between the Act, the Commercial Courts Act and the Limitation Act, 1963 the Supreme Court prescribed that delay beyond 90 days, 30 days or 60 days in filing of appeals under Section 37 of the Act can condoned (depending on the applicability of Section 13(1A) of the Commercial Courts Act and forum appealed to) by way of exception and not by way of rule. The Court delved into the interpretation of "sufficient cause" in the context of Section 5 of the Limitation Act, 1963 to observe that condonation of delay could only be 'by way of exception and not by way of rule'.

The Supreme Court, therefore, overturned its previous judgement of ***N V International v. State of Assam***[131], whereby a blanket application of 120 days limitation period without any condonation period under Section 34(3) of the Act applied to appeals under Section 37.

The Supreme Court observed that Section 5 of the Limitation Act, 1963 (on extension of prescribed period of limitation) would apply to appeals arising out of Section 37 of the Act and Section 13 (1A) of the Commercial Courts Act, 2015.

## Limited extent of interference permitted

In the case of ***MMTC v. M/s. Vedanta Ltd.***[132] the Supreme Court reiterated and summarised the scope of scrutiny under Section 37 of the Act. The Supreme Court noted that courts while exercising jurisdiction under Section 37 cannot go beyond the limited grounds for challenge under Section 34. They cannot review the award on merits and must confine themselves to ascertaining that the court exercising jurisdiction under Section 34 has not exceeded the scope of such provision. Courts have to be extremely circumspect while interfering with findings of the court under Section 34 where an arbitral award has been confirmed. This was reiterated in ***U.H.L Power Company Ltd*** and ***Haryana Tourism Ltd. v. Kandhari Beverages Ltd.***[133]

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[131] (2020) 2 SCC 109
[132] (2019) 4 SCC 163.
[133] (2022) 3 SCC 237.

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In ***Punjab State Civil Supplies Corporation Ltd. and Another v. Ramesh Kumar and Company and Others***,[134] the Supreme Court observed that the jurisdiction of the High Court under Section 37 of the Act is different from its jurisdiction in a first appeal from a decree in a civil suit. The Supreme Court held that the High Court under Section 37 ought to have reviewed whether the exercise undertaken by the first instance court in the challenge to the award was contrary to Section 34. Instead of doing so, the High Court interfered with the award and decreed the claim made in the arbitration, which was impermissible.

"We'll solve the conflict with a water pistol fight."

[134] 2021 SCC OnLine SC 1056.

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# Court having Jurisdiction over Arbitral Proceedings

Section 42 of the Act postulates that out of the various courts that may have jurisdiction as a 'Court' (as defined in Section 2(1)(e) of the Act), whichever Court is approached earlier shall have the jurisdiction over the entire arbitral proceedings to the exclusion of any other Court. Where a seat has been designated in the arbitration agreement, the courts of the seat shall have jurisdiction to the exclusion of any other court. Thus, Section 2(1)(e) is of relevance only in a scenario where a seat has not been stipulated.

Section 42 does not apply to all court proceedings with respect to an arbitration. The Supreme Court in ***State of West Bengal v. Associated Contractors***[135] has held that while applications under Section 9 and Section 11 of the Act fall within the purview of Section 42, applications under Sections 8 and 11 do not. The rationale was that applications made under Section 8 are made to judicial authorities and applications under Section 11 are made to the Chief Justice or his designate. The judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside the purview of Section 42 of the Act.

[135] (2015) 1 SCC 32.

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# Arbitrations seated outside India and enforcement of foreign awards

## Part II of the Act

Part II of the Act deals with referral of parties to arbitration in foreign-seated arbitrations and enforcement of certain foreign awards, covered either under:

1. Chapter I: New York Convention awards (Sections 44 to 52)
2. Chapter II: Geneva Convention awards (Sections 53 to 60)

However, Chapter II is not of much practical importance in the current scenario as Geneva Convention awards are rare. Accordingly, the discussion in this section is confined to enforcement of New York Convention awards.

***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***[136] is the most important judgement in the context of Part II of the Act. ***BALCO*** lays down the following principles:

1. Part I and Part II of the Act are mutually exclusive.
2. Principle of territoriality: Seat of arbitration would be the centre of gravity.
3. Distinction between "domestic award" and "foreign award", with domestic awards being awards rendered either in purely domestic arbitration or international commercial arbitrations seated in India.

The present discussion is focused on the extent of judicial intervention in international commercial arbitrations. Judicial intervention happens at two stages: (a) pre-award stage under Section 45; and (b) post-award stage under Sections 47 to 49.

## Judicial intervention at pre-award stage: Section 45

Section 45 mandates a judicial authority to refer parties to arbitration once the existence of an arbitration agreement brought to the attention of such judicial authority. Two important judicial developments under Section 45 have been in the context of: (a) group of companies doctrine; and (b) extent of judicial intervention: *prima facie* finding.

### Group of companies doctrine

The law of arbitration is based on the principle of party autonomy. As a general rule, an arbitration agreement is binding only on the parties thereto and not on strangers to such agreement. Accordingly, while exercising jurisdiction under Section 45, a judicial authority may generally only refer parties to the agreement to arbitration. However, non-signatories may also be made parties in certain circumstances.

[136] (2012) 9 SCC 552.

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In ***Chloro Controls***, the Supreme Court applied the group of companies doctrine to implead a non-signatory to the arbitration. The case concerned a joint venture agreement between an Indian group and a US corporate group. The parties entered into a shareholders' agreement, which contained an arbitration clause. The shareholders' agreement was the mother/principal agreement pursuant to which multiple ancillary agreements were executed between companies of both groups, some of which contained arbitration clauses, whereas others did not.

The Supreme Court examined Section 45 of the Act and noticed the phrase *"one of the parties or any person claiming through or under him".* Accordingly, it was held that while normally arbitration agreement binds only the parties thereto, in exceptional circumstances even non-signatories may be bound under the *"group of companies doctrine"*. The factors considered while applying the doctrine are:

a) Common intention;

b) Direct relationship of non-signatories and signatory to arbitration agreement;

c) Commonality of the subject matter; and

d) Composite nature of the transaction: performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements.

The 2015 Amendment Act introduced the phrase *"or any person claiming through or under him"* in Section 8 of the Act. Therefore, the scope of reference under Section 8 stands expanded, in parity with Section 45 of the Act.

Post the 2015 Amendment Act, the group of companies doctrine has been upheld in the context of domestic arbitrations as well.[137] The doctrine is given effect to in cases where there is a tight group structure with strong organizational and financial linkages to constitute a single economic unit. The Supreme Court has in ***Cox and Kings*** questioned the continued application of the group of companies doctrine, and referred the issue to a larger bench.

## Extent of judicial intervention: prima facie finding

The extent of judicial scrutiny to be exercised while referring the parties to arbitration has been a long-debated issue. The Supreme Court in ***Shin Etsu Chemical Company v. Aksh Optifibre Ltd.***[138] opined that while referring the parties to arbitration under Section 45, courts should only take a *prima facie* view as to the absence of vitiating factors and not hold a detailed trial. However, the said view was negated in ***Chloro Controls***. Before adverting to the same, it is essential to note that the issue of judicial intervention in pre-award scenarios arose in cases under Section 11 and Section 8 of the Act.

Two important judgements of the Supreme Court indicating the scope of interference while exercising jurisdiction under Section 11 of the Act are:

1. ***SBP and Co. v. Patel Engineering Ltd. and Anr***.[139]

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[137] *Ameet Lalchand Shah & Ors. v. Rishabh Enterprises and Anr*., (2018) 15 SCC 678; *Mahanagar Telephone Nigam Ltd. v. Canara Bank*, (2020) 12 SCC 767.
[138] (2005) 7 SCC 234.
[139] (2005) 8 SCC 618.

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2. ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd***.[140]

The above judgements categorised the preliminary issues to be decided as follows:

1. issues which the Chief Justice or his designate is bound to decide;
2. issues which Chief Justice or his designate may also decide; and
3. issues which should be left exclusively to the arbitral tribunal to decide.

In ***Chloro Controls***, the Supreme Court applied the above principles to Section 45 as well. Pertinently, the enhanced scope of judicial interference at a pre-award stage directly affected the arbitral tribunal's authority to decide its jurisdiction i.e. *kompetenz kompetenz*. In ***Chloro Controls***, the Supreme Court held that the absence of a provision akin to Section 16 (contained in Part I) in Part II of the Act is suggestive that courts must conclusively determine the question of validity of the arbitration agreement, if a plea is raised that the arbitration agreement is null and void, inoperative or incapable of being performed.

This was perceived as unnecessary intervention in the arbitration process. Accordingly, the Law Commission of India, in its 246th Report suggested amendments to restrict the scope of judicial intervention at a pre-arbitration stage. Such amendments were carried out to Sections 8 and 11 by the 2015 Amendment Act, but Section 45 remained untouched.

This resulted in inconsistent positions *vis-à-vis* Section 8 and Section 45. To remove such inconsistency, the High-Level Committee, set up under the chairmanship of Justice B. N. Srikrishna suggested an amendment to Section 45 to narrow the scope of judicial intervention. Accordingly, the words *"unless prima facie finds"* has been added by the 2019 Amendment Act. As such, the position of law as laid down in ***Shin Etsu*** has been restored. The Supreme Court in ***Mayavati Trading*** has noted such changed legislative position, aimed at curtailing the extent of judicial intervention at a pre-award stage.

## Judicial intervention at post-award stage: Sections 47 to 49

Sections 47 to 49 of the Act provide the regime for enforcement of foreign award. Section 47 deals with the evidence required for enforcement of a foreign award. Section 48 deals with grounds for resisting enforcement of a foreign award. Section 48 is in two broad parts:

1. Section 48(1) lists the grounds which a party resisting the enforcement must prove; and
2. Section 48 (2) lists grounds on which courts may *suo moto* refuse enforcement.

Section 48 (2) is further divided into two parts: (a) subject matter of the dispute is not arbitrable under the laws of India (see the section on Arbitrability); and (b) enforcement of the award would be contrary to public policy of India (discussed below).

[140] (2009) 1 SCC 267.

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The issue of public policy has for long been a bone of contention while enforcing a foreign award. One of the earliest judgements dealing with the issues of public policy while enforcing foreign awards is ***Renusagar****.* The Supreme Court held that the ground of public policy in case of foreign awards must be construed narrowly on the following three grounds:

1. contrary to fundamental policy of Indian law;
2. interests of India; and
3. justice or morality.

To understand the law under Section 48 as it stands today, reference is required to Section 34 of the Act. Though Section 34 and Section 48 operate in different spheres, public policy is a ground under both Sections to resist an award. Thus, the judicial development has been intertwined and often confusing.

In ***Saw Pipes,***[141] the Supreme Court expanded the definition of public policy to include "*patent illegality*" i.e. such illegality which goes to the root of the matter and is so unfair or unreasonable that it shocks the conscience of court. ***Saw Pipes*** was delivered under Section 34 of the Act. However, patent illegality as a ground was also adopted in proceedings under Section 48. Resultantly, the level of judicial intervention enhanced substantially. The said issue was the subject matter of significant judicial debate.[142]

Noticing the judicial developments, the Law Commission of India suggested substantive amendments to Section 34 and Section 48 to curtail the scope of judicial intervention in post award scenarios. Accordingly, the 2015 Amendment narrowed the scope of judicial intervention under Section 48 and reverted to the ***Renusagar*** position.

Patent illegality is no longer a ground to challenge enforcement of a foreign award under Section 48, although it is a ground under Section 34(2A) to challenge awards rendered in arbitrations seated in India (except international commercial arbitrations).

The following decisions of the Supreme Court take note of the legislative developments in this regard:

1. ***Ssyangyong Engineering & Construction Co. Ltd. v. NHAI***[143](discussed earlier in the context of Section 34)
2. ***Vijay Karia and Ors. v. Prysmian Cavi E Sistemi SRL and Ors.***[144] (in the context of Section 48)

[141] (2003) 5 SCC 705.
[142] *Phulchand Exports Ltd. v O.O.O. Patriot*, (2011) 10 SCC 300 overruled in *Shree Lal Mahal Ltd. v. Progetto Grano SPA*, (2014) 2 SCC 433.
[143] (2019) 15 SCC 131.
[144] (2020) 11 SCC 1.

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### Vijay Karia and Ors. v Prysmian Cavi E Sistemi SRL and Ors., (2020) 11 SCC 1

In ***Viay Karia***, the Supreme Court held that grounds to resist enforcement of foreign awards may be classified into three categories:

1. Grounds which affect the jurisdiction of arbitral tribunal;
2. Grounds which affect party interest alone; and
3. Grounds which affect the public policy of India.

The expression "may" in Section 48 can, depending upon the context mean "shall" or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. The Supreme Court held that in cases of grounds affecting jurisdiction of arbitral tribunal, the enforcement of foreign awards will be declined and there is no discretion. Whereas if enforcement is resisted on grounds which affect party interest alone, then even if such ground is made out, enforcement may not be refused if no prejudice is caused.

Coming to the ground of public policy, the Supreme Court held that there would be no discretion to enforce an award which is vitiated by fraud or corruption or which violates the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice.

### National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., (2020) 19 SCC 260

In this case, NAFED challenged the enforcement of an arbitral award against it in a dispute between NAFED and Alimenta regarding the export of a certain quantity of groundnuts. The Supreme Court, however, undertook a review on merits of the underlying dispute that formed the subject matter of the arbitration. The Supreme Court refused enforcement of the arbitral award on the basis that NAFED could not have exported the groundnuts in light of the export policy and a government order restricting export of groundnuts, and that the enforcement of the arbitral award in violation of such export policy and government order would be against public policy of India.

This judgment is criticised as expanding the scope of judicial scrutiny in enforcement of foreign arbitral awards.

### Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., (2020) 19 SCC 197

The Supreme Court considered the ground of "inability to present one's case" for refusing enforcement of an award. The Supreme Court held that where the arbitrator had given large number of opportunities to file documents and legal submissions, provided extensions of time to do so and considered the submissions made by the party even after such extension of time, such party could not argue that it was unable to present its case. Inability to present its case requires that the party was prevented from presenting its case (including furnishing of documents and legal submissions) due to matters outside its control. Where the party chose not

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to appear before the arbitrator and then chose to submit documents and legal submissions beyond the timelines granted to it, it cannot plead that it was unable to present its case.

## Enforcement of foreign awards against non-signatories

### Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited, (2022) 1 SCC 753

The Supreme Court held that a foreign award could be enforced against even a non-signatory to the arbitration agreement. The non-signatory is not entitled to challenge enforcement as it is not within the ambit of Section 48(1)(a) of the Act, which refers specifically to "parties to the agreement". This is in contrast with Section 44, which speaks of an arbitral award on differences between "persons".

In this case, once the arbitrator had applied the alter ego doctrine under the substantive law of the contract on the basis of oral and documentary evidence, the Supreme Court could not reappreciate such evidence in a challenge brought by the non-signatory under Section 48(1)(a) of the Act. Accordingly, the award would be binding on the non-signatory as well.

## Limitation

### Government of India v. Vedanta Limited and Others, (2020) 10 SCC 1

The Supreme Court examined the issue of limitation for filing an application seeking for enforcement of a foreign award and held that limitation would be governed by lex fori.

It held that the Act does not specify any period of limitation for filing an application for enforcement. Therefore, Article 137, being the residuary provision under the Limitation Act would apply to applications for enforcement, i.e. the period of limitation would be three years from the date of the right to apply.

The Supreme Court further held that Article 136 of the Limitation Act would not apply as the same only applies to enforcement of decrees or orders of any civil court. It observed that while domestic awards and foreign awards are deemed to be decrees for the purpose of enforcement, such legal fiction is to be limited to the purpose for which it was created. In this case, the deeming fiction was only to enable enforcement. Therefore, Article 136 of the Limitation Act cannot be applied to arbitral awards.

The Supreme Court also observed that an application for condonation of delay under Section 5 of the Limitation Act could still be filed in case an application for enforcement of an award could not be filed within limitation. This was since the Limitation Act only excludes the applicability of Section 5 for petitions filed under Order XXI of the CPC for execution of a decree and not an application for enforcement of an award.

The Supreme Court then held that the maintainability of an application for enforcement of an award (under Sections 47 and 49 of the Act) and the adjudication of any objections against enforcement (under Section 48 of the Act) ought to be decided in a common proceeding.

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It noted that the grounds for refusal of enforcement of a foreign award are exhaustive and held that enforcement must be refused only if it violates the State's most basic notions of morality and justice and there should be great hesitation in refusing enforcement unless it is obtained through corruption or fraud or undue means. There can be no reassessment of merits or evidence.

It finally held that the amendments to Section 48, which were carried out in 2016 would have prospective effect since they have the effect of altering the law despite being worded in the nature of a clarificatory explanation.

## Stamp duty

The Supreme Court in the judgment of ***Shriram EPC Limited v. Rioglass Solar S.A*.**[145] has held that there is no requirement of payment of stamp duty while enforcing foreign awards.

[145] (2018) 18 SCC 313.

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# Appealable orders in Foreign-Seated Arbitrations

Section 50 of the Act provides for a limited right of appeal against certain orders made by a court in foreign-seated arbitrations. However, after the enactment of the Commercial Courts Act, a question arose as to the interplay between Section 13 of the Commercial Courts Act and Section 50 of the Act. Section 13 of the Commercial Courts Act provides for challenge to the order, judgment or decree of a commercial court. As such, it was contended that Section 13 of the Commercial Courts Act provided a wider right of appeal in arbitration matters where the subject matter of the arbitration is a commercial dispute of specified value, and overrides Section 50 of the Act.

In ***Kandla Export Corporation and Ors. v. OCI Corporation and Ors***.[146], the Supreme Court, relying on the judgment in ***Fuerst Day Lawson v. Jindal Exports Limited***[147] held that Section 13 is a general provision vis-à-vis appeals under the Act, and would not apply to cases covered by Section 50 of the Act. Further, Section 13 only lays down the forum which would hear an appeal under Section 50 of the Act.

[146] (2018) 14 SCC 715.
[147] (2011) 8 SCC 333.

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