LAW ON ARBITRATION AND CONCILIATION IN INDIA

INDEX

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CHAPTER 1
INTRODUCTION

In India, ADR methods have a very ancient legacy. Indian civilization expressly encouraged the settlement of differences by Tribunals chosen by the parties themselves. An equivalent of it in the old Indian system is the 'Peoples Court' known as the 'Panchayat'. The position outside India was akin in the sense; submission of disputes to the decision of private persons was recognized under the Roman law known by the name of Compromysm (compromise), arbitration was a mode of settling controversies much favored in the civil law of the continent. The Greeks attached particular importance to arbitration. The attitude of English law towards arbitration has been fluctuating from stiff opposition to moderate welcome. The Common Law Courts looked jealously at agreements to submit disputes to extra-judicial determination.

The word "Arbiter" was originally used as a non-technical designation of a person to whom controversy was referred for decision irrespective of any law. Subsequently the word "Arbiter" has been attached to a technical name of a person selected with reference to an established system for friendly determination of controversies, which though not a judicial process is yet to be regulated by law by implication. Arbitration is a term derived from the nomenclature of Roman law. It

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is applied to an arrangement for taking, and abiding by judgment of a selected person in some disputed matter instead of carrying it to the established Courts of justice.

Before the enactment of Arbitration and Conciliation Act,1996 the statutory provisions on arbitration in India were contained in three different enactments, namely, The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 laid down the framework within which domestic arbitration was concluded in India, while the other two Acts dealt with foreign awards. The Arbitration and Conciliation Act, 1996 has repealed The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961.

The Arbitration and Conciliation Act, 1996 also defines the law relating to conciliation providing for matters connected therewith and incidental thereto on the basis of Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985.

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This modern law seeks to provide for an effective mode of settlement of disputes between the parties, both for domestic and for international commercial arbitration. Thus, an elaborate codified recognition to the concept of arbitration and conciliation is given in India by the enactment of The Arbitration and Conciliation Act, 1996. Its emergence is one of the most significant movements, both in terms of judicial reforms as well as conflict management. The alternative dispute redressal methods like arbitration, conciliation, mediation, and their hybrids have become a global necessity and the study on its utility is undeniable.

Arbitration is seen to be speedier, more informal and cheaper than conventional judicial procedure. They provide a forum more convenient to the parties who can choose the time, place and procedure, for conducting the preferred dispute redressal process. Further, where the dispute concerns a technical matter, the parties have the opportunity to select the expert who possesses appropriate special qualifications or skills in that trade. In the ***State of J & K Vs. DevDuttPandit (1999) 7 SCC 339*** it was observed that the alternative dispute redressal methods have to be looked up to with all earnest so that the litigant public has a faith in the speedy process of resolving their disputes with these processes.

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CHAPTER 2
LITIGATION AND ARBITRATION

LITIGATION:

'Litigation' is a Judicial controversy, a contest in a Court of law; a judicial proceeding for the purpose of enforcing a right. In ***Vide Mury Exportation VsKhaitan and Sons case (AIR 1956 Cal 644, 648)***, it was held that, litigation and arbitration are both methods of resolving disputes, one in a Court of law while the other through a private Tribunal.

Litigation is a Public Process. The Courts has the dignity, authority and attract public confidence. Free Legal aid is available in cases of litigation. In this process, any party can institute litigation. It follows adversarial procedure, thus formal and inflexible Rules and Procedures are strictly followed. In litigations, parties to the dispute have no voice in selection of adjudicators, Judge or Jury. Adjudicators apply the laws and the decisions of the High Court and Supreme Court are precedents for the subordinate Courts. Remedy in the form of appeal against decisions of the Court is available to the disputed parties. Remedies may include compensatory and punitive damages, injunctive relief.

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The complete process of litigation is generally expensive. In many cases, differences between the parties to the dispute are so highlighted that the parties sometimes take extreme positions in that adversarial atmosphere. Litigation usually ends in winning, loosing situation and compromise are rare, thus causing concern, anxiety and stress. Litigation is a process where justice is delayed due to the various auxiliary factors from the part of Litigants, Advocates and Judges along with the procedural complications involved in the process of litigation.

ARBITRATION:

'Arbitration' is a private process, as the initiation of arbitration is under an agreement. It may be less adversarial, less formal, and flexible with the adoption of simpler procedures. Arbitration does not follow any formal rules of evidence.

The findings are limited to some documents, specifically when there are no interrogatories or depositions. Generally, the disputed parties select the Arbitrators. The Arbitrator/s are selected based on their qualification and expertise. Their decisions do not formally set precedents to any other arbitration.

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Section 29A of the Act, requires that all arbitrations must be completed within 1 year of the arbitral tribunal being constituted. This period is extendable by the parties' agreement by up to 6 months i.e. a total of 18 months.

In the event that such an award has not been rendered within 18 months, the parties may approach the appropriate Court which may grant an extension if it is satisfied that the delay is on account of a sufficient cause, failing which the mandate of the arbitrators is terminated. The process of Arbitration is therefore expedited and extremely quick.

Vacation of award is generally limited to arbitrator's misconduct and bias. Arbitrators normally are empowered to grant compensatory damages including provisional relief. All these factors usually reduce costs and make way for delivery of quick justice.

The process of 'Conciliation' and 'Mediation' is distinguishable from Arbitration as the disputed party's willingness to submit to mediation or conciliation does not bind them to accept the recommendation of the conciliation or mediator but an arbitrator's award, by contrast, is binding on the parties.

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DIFFERENCE BETWEEN LITIGATION AND ARBITRATION

	Arbitration	**Litigation**
Type of Proceeding	Private - between the two parties	Public - in a courtroom
Type of Proceeding	Civil - private	Civil and criminal
Evidence allowed	Limited evidentiary process	Rules of evidence allowed
Appointment of Arbitrator	Parties select arbitrator/as mentioned in the Agreement (Section 11 of the Act)	As per the assignments Court appoints judge parties have limited input
Formality	Informal	Formal
Appeal	Usually binding; no appeal possible (except as stated in Section 34 of the Act)	Appeal possible
Use of attorneys	At the discretion of parties; limited	Extensive use of attorneys

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Time involved	Section 29A of the Act (as amended) requires that all arbitrations must be completed within 1 year of the arbitral tribunal being constituted.	Must wait for the case to be scheduled and therefore time consuming.
Costs	Fee for the arbitrator, attorneys	Court costs, attorney fees; costly.

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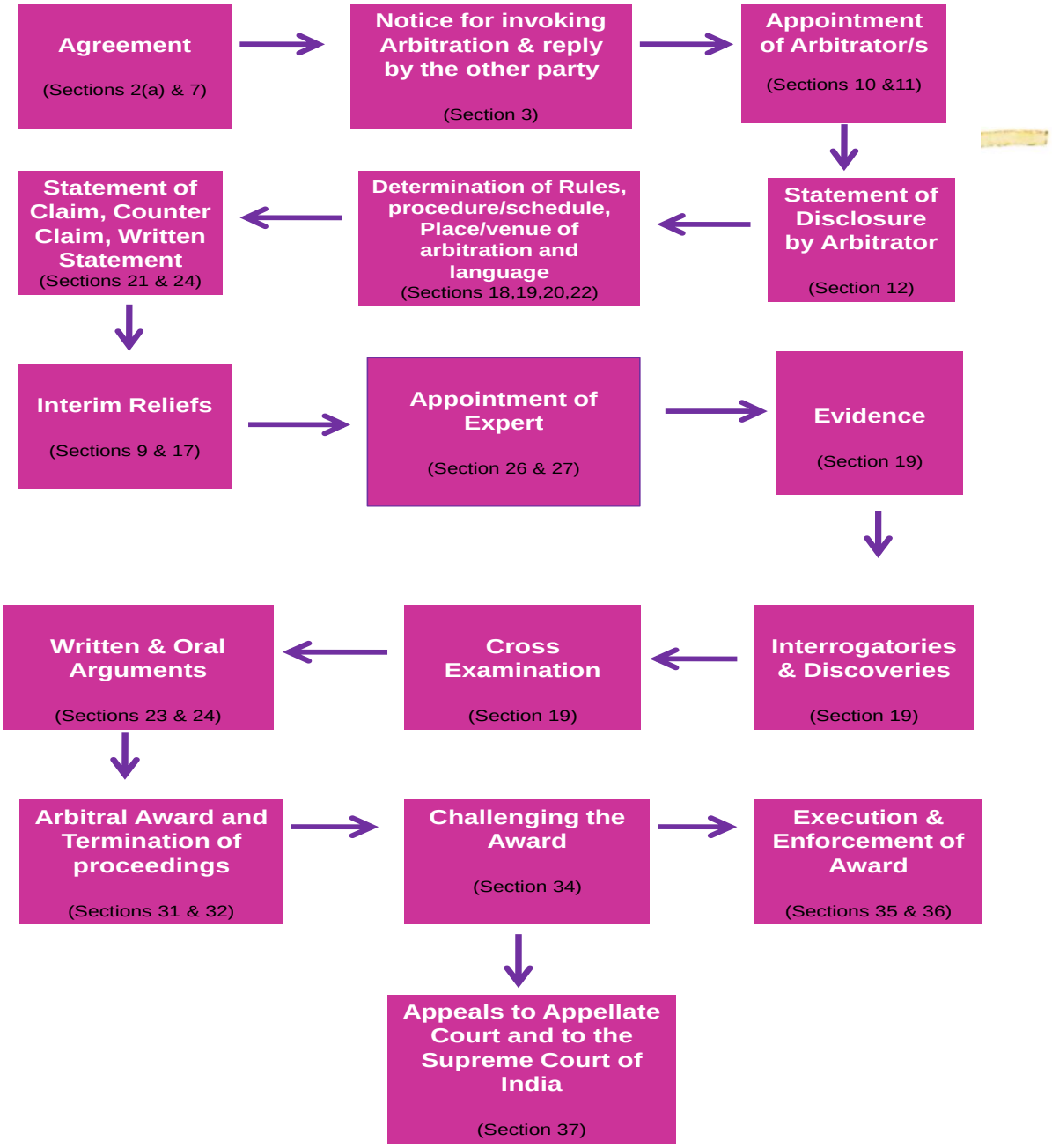
CHAPTER 3
THE PROCEDURE



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CHAPTER 4
THE ACT

With a view to give effect the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign awards and to define the law relating to conciliation, the Arbitration and Conciliation Bill 1995 was introduced in the Rajya Sabha on 16th May 1995. The Arbitration and Conciliation Act, 1996 received the Presidential assent and was brought into force from 16 August 1996,the Act being a continuation of the Ordinance is deemed to have been effective from 25 January 1996 when the first Ordinance came into force. The long title of this Act replicates that, the object of the Act is to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

In an attempt to make arbitration a preferred mode of settlement of commercial disputes and making India a hub of international commercial arbitration, the President of India on 23rd October 2015 promulgated an Ordinance (Arbitration and Conciliation (Amendment) Ordinance, 2015) amending the Arbitration and Conciliation Act, 1996.

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The Arbitration and Conciliation Amendment Act 2019 came into force with effect from 9th August 2019**.**

AMENDMENTS IN 2015

1. The amended law makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'. In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction. Accordingly, in an international commercial arbitration, as per the new law, district court will have no jurisdiction and the parties can expect speedier and efficacious determination of any issue directly by the High court which is better equipped in terms of handling commercial disputes.

2. **Amendment of Section 2(2):** A proviso to Section 2(2) has been added which envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27(taking of evidence), and Section 37(1)(a),

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37(3) shall also apply to international commercial arbitrations, even if the seat of arbitration is outside India, meaning thereby that the new law has tried to strike a kind of balance between the situations created by the judgments of Bhatia International and Balco v. Kaiser. Now Section 2(2) envisages that Part-I shall apply where the place of arbitration is in India and that provisions of Sections 9, 27, 37(1) (a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India unless parties to the arbitration agreement have agreed to the contrary.

3. **Amendment to Section 8:** (Reference of parties to the dispute to arbitration): In Section 8, which mandates any judicial authority to refer the parties to arbitration in respect of an action brought before it, which is subject matter of arbitration agreement. The sub-section(1) has been amended envisaging that notwithstanding any judgment, decree or order of the Supreme Court or any court, the judicial authority shall refer the parties to the arbitration unless it finds that prima facie no valid arbitration agreement exists. A provision has also been made enabling the party, who applies for reference of the matter to arbitration, to apply to the Court for a direction of production of the arbitration agreement or certified copy thereof in the event the parties applying for reference of the disputes to arbitration is

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not in the possession of the arbitration agreement and the opposite party has the same.

4. **Amendment to Section 9 (Interim Measures):** The amended section envisages that if the Court passes an interim measure of protection under the section before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine. Also, that the Court shall not entertain any application under section 9 unless it finds that circumstances exist which may not render the remedy under Section 17 efficacious. The above amendments to Section 9 are certainly aimed at ensuring that parties ultimately resort to arbitration process and get their disputes settled on merit through arbitration. The exercise of power under Section 9 after constitution of the tribunal has been made more onerous and the same can be exercised only in circumstances where remedy under Section 17, appears to be non-efficacious to the Court concerned.

5. **Amendment to Section 11 (Appointment of Arbitrators):** In so far as section 11, "appointment of arbitrators" is concerned, the new law makes it incumbent upon the Supreme Court or the High Court or person designated

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by them to dispute of the application for appointment of arbitrators within 60 days from the date of service of notice on the opposite party. As per the new Act, the expression 'Chief Justice of India' and 'Chief Justice of High Court' used in earlier provision have been replaced with Supreme Court or as the case may be, High Court, respectively. The decision made by the Supreme Court or the High Court or person designated by them have been made final and only an appeal to Supreme Court by way of Special Leave Petition can lie from such an order for appointment of arbitrator. The new law also attempts to fix limits on the fee payable to the arbitrator and empowers the high court to frame such rule as may be necessary considering the rates specified in Fourth Schedule.

6. **Amendment to Section 12:** Amendment to Section 12, as per the new law makes the declaration on the part of the arbitration about his independence and impartiality more onerous. A Schedule has been inserted (Fifth Schedule) which lists the grounds that would give rise to justifiable doubt to independence and impartiality of arbitrator and the circumstances given in Fifth Schedule are very exhaustive. Any person not falling under any of the grounds mentioned in the Fifth Schedule is likely to be independent and impartial in all respects. Also, another schedule (seventh schedule) is added

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and a provision has been inserted that notwithstanding any prior agreement of the parties, if the arbitrator's relationship with the parties or the counsel or the subject matter of dispute falls in any of the categories mentioned in the seventh schedule, it would act as an ineligibility to act as an arbitrator. However, subsequent to disputes having arisen, parties may by expressly entering into a written agreement waive the applicability of this provision. In view of this, it would not be possible for Government bodies to appoint their employees or consultants as arbitrators in arbitrations concerning the said Government bodies.

7. **Amendment to Section 14:** Amendment of Section 14 aimed at filling a gap in the earlier provision, which only provided for termination of mandate of the arbitrator. If any of the eventualities mentioned in sub-section (1) arises. The new law also provides for termination of mandate of arbitration and substitution and his/her substitution by another one.

8. **Amendment to Section 17 (Interim Measures by Arbitral tribunal):** The old Act had lacunae where the interim orders of the tribunal were not enforceable. The Amendment removes that lacunae and stipulates that an arbitral tribunal under Section 17 of the Act shall have the same powers that

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are available to a court under Section 9 and that the interim order passed by an arbitral tribunal would be enforceable as if it is an order of a court. The new amendment also clarifies that if an arbitral tribunal is constituted, the Courts should not entertain applications under Section 9 barring exceptional circumstances.

9. **Amendment to Section 23:** The new law empowers the Respondent in the proceedings to submit counter claim or plead a set-off and hence falling within the scope of arbitration agreement.

10. **Amendment to Section 24:** It requires the arbitral tribunal to hold the hearing for presentation of evidence or oral arguments on day to day basis, and mandates the tribunal not to grant any adjournments unless sufficient causes shown. It further empowers the tribunal the tribunal to impose exemplary cost where adjournment is sought without any sufficient cost.

11. **Insertions of new Section 29A and 29B(Time limit for arbitral award and Fast Track Procedure):** To address the criticism that the arbitration regime in India is a long drawn process defying the very existence of the arbitration act, the Amended Act envisages to provide for time bound

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arbitrations. Under the amended act, an award shall be made by the arbitral tribunal within 12 months from the date it enters upon reference. This period can be extended to a further period of maximum 6 months by the consent of the parties, after which the mandate of the arbitrator shall terminate, unless the Court extends it for sufficient cause or on such other terms it may deem fit. Also, while extending the said period, the Court may order reduction of fees of arbitrator by upto 5% for each month such delay for reasons attributable to the arbitrator. Also, the application for extension of time shall be disposed of by Court within 60 days from the date of notice to the opposite party. The Ordinance also provides that the parties at any stage of arbitral proceeding may opt for a fast track procedure for settlement of dispute, where the tribunal shall have to make an award within a period of 6 months. The tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without oral hearing, unless the parties request for or if the tribunal considers it necessary for clarifying certain issues. Where the tribunal decides the dispute within 6 months, provided additional fees can be paid to the arbitrator with the consent of the parties.

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12. **Amendment to Section 25:** The new Act empowers the tribunal to treat Respondent's failure to communicate his statement of defence as forfeiture of his right to file such statement of defence. However, the tribunal will continue the proceedings without treating such failure as admission of the allegations made by the Claimant.

13. **Amendment to section 28:** The new law requires the tribunal to take into account the terms of contract and trade usages applicable to the transaction. In the earlier law, the arbitral tribunal was mandated to decide disputes in accordance with the terms of the contract and to take into account the trade usages applicable to the transaction. To that extent, the new law seeks to relieve the arbitrators from strictly adhering to the terms of the contract while deciding the case. However, the arbitrator can still not ignore the terms of the contract. Therefore, the new amendment seems to bring in an element of discretion in favour of the arbitrators while making of an award.

14. **Amendment to Section 31**: This provides for levy of future interest in the absence of any decision of the arbitrator, on the awarded amount @2% higher than current rate of interest prevalent on the date of award. The

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current rate of interest has been assigned the same meaning as assigned to the expression under Clause (b) of Section 2[1] of the Interest Act, 1978.

15. In **addition**, the new Act lays down detailed parameters for deciding cost, besides providing that an agreement between the parties, that the whole or part of the cost of arbitration is to be paid by the party shall be effective only if such an agreement is made after the dispute in question had arisen. Therefore, a generic clause in the agreement stating that cost shall be shared by the parties equally, will not inhibit the tribunal from passing the decision as to costs and making one of the parties to the proceedings to bear whole or as a part of such cost, as may be decided by the tribunal.

16. **Amendment of Section 34 (Limiting the gamut of Public Policy of India):** As per the new amendment, an award passed in an international arbitration, can only be set aside on the ground that it is against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention with the fundamental policy of Indian law; (iii) it is in conflict with basic notions of morality and justice. The present amendment has clarified that the additional ground of "patently illegality" to challenge an award can only be taken for domestic arbitrations

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and not international arbitrations. Further, the amendment provides that the domestic awards can be challenged on the ground of patent illegality on the face of the award but the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. The new Act also provides that an application for setting aside of an award can be filed only after issuing prior notice to the other party. The party filing the application has to file an affidavit along with the application endorsing compliance with the requirement of service of prior notice on the other party. A time limit of one year from the date of service of the advance notice on the other parties has been fixed for disposal of the application under Section 34. Significantly, there is no provision in the new Act which empowers the court or the parties to extend the aforesaid limit of one year for disposal of the application under Section 34.

17. **Amendment to Section 36 (Stay on enforcement of award):** The Ordinance provides that an award would not be stayed automatically by merely filing an application for setting aside the award under Section 34. There has to be a specific order from the Court staying the execution of award on an application made for the said purpose by one of the parties. The Ordinance aims to remove the lacunae that existed in the previous Act where

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pending an application under Section 34 for setting aside of arbitral award, there was an automatic stay on the operation of the award. The new law also empowers the Court to grant stay on operation of arbitral award for payment of money subject to condition of deposit of whole or a part of the awarded amount.

18. **Amendment to Section 37:** Under Section 37(1), the new law makes provision for filing of an appeal against an order of judicial authority refusing to refer the parties to arbitration under Section 8.

19. As regards enforcement of certain foreign awards, the new law seeks to add explanation of Sections 48 and 57 thereby clarifying as to when an award shall be considered to be in conflict within public policy of India. The parameters are the same as are provided under Section 34. Similarly, the expression "Court" used in Sections 47 and 56 have been defined to mean only the High Court of competent jurisdiction.

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Amendments in 2019

1. **Part IA (Section 43A to Section 43M)**: The amendment act introduces regulatory mechanism in the field of arbitration and provides for adding Part IA (Section 43A to Section 43M) to the Act, which makes provision of constitution of Arbitration Council of India ("Council"). The Council shall take necessary measures to promote and encourage arbitration, mediation, conciliation and other alternative dispute resolution mechanism and for that purpose frame policy guideline for the establishment, operation and maintenance of uniform professional standard in respect of matters relating to arbitration. The Council of India shall frame policy for grading the arbitral institutions and shall make policies guidelines etc. to ensure satisfactory levels of arbitrations and conciliations.

2. **Appointment of Arbitrator – Section 11**

i. The function of appointment of arbitrator, which were till date were being performed by Supreme Court of India or the High Court, will now be performed by arbitral institutions to be designated by Supreme Court and High Courts. Supreme Court of India will designate the

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arbitral institution for appointment of arbitrator (s) in international commercial arbitration whereas the High Courts will designate arbitral institutions within their respective jurisdictions for appointing arbitrators in cases of domestic arbitrations. In case there is no arbitral institution within jurisdiction of a High Court, such High Court can maintain a panel of arbitrators to perform the functions of arbitral institution.

ii. The arbitral institutions to be designated by Supreme Court or the High Court would be those which have been graded by the Council. The arbitral institution is mandated to dispose of an application for appointment of arbitrator within 30 days from the date of service of notice on the opposite party. The arbitral institutions shall determine fee of the arbitrators as per the rate specified in Fourth Schedule in case of domestic arbitrations unless parties have agreed for payment of fee as per rules of an arbitral institution. Fee provided in the Fourth Schedule shall not apply in case of international commercial arbitration.

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iii. The amendment to Section 11 have provided for deletion of Section 11 (6A) as well as Section 11 (7) but retains provision of Section 11 (6B). The net effect is that arbitral institutions shall not perform any judicial function while appointing the arbitrators. With deletion of Section 11 (6A), arbitral institution is not confined to examining only the existence of an agreement between the parties while appointing the arbitrator. As Section 11 (7), attaching finality to the decision on appointment of arbitrator, has also been deleted, present amendment opens up avenues for challenging the decision on appointment of arbitrator(s) by way of proceedings other than filing Special Leave Petition before Supreme Court of India.

3. **Timeline for making the award- Section 29A and Section 23**

i. The amendment takes the international commercial arbitrations out of the time limitations provided under Section 29A (1).

ii. The amended Act introduces Section 23 (4), which provides that statement of claim and Statement of defense shall be completed within a period of six months from the date the arbitrator received notice of their appointment.

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iii. Time period of one year for making of the award as provided under Section 29A(1) shall begin from the date of completion of pleadings (statement of claim and statement of defense) only. Therefore, six month is the maximum time permissible for completion of pleading and the time period of one year for making of award shall commence irrespective of non-completion of pleadings within the said period. Conversely, if the pleading are completed before six months, the time period of one year for making of award shall commence forthwith the completion of the pleading. Notably, the time spent in filing of rejoinder [in cases without any counter claims) or rejoinder to counter claim (in cases with counter claims) will not be considered as time spent in completion of pleading under Section 23 (4)].

iv. The amendment also provides that during the period an application for enlargement of time for making of award is pending before the court under Section 29 (5), the mandate of the arbitrator shall continue till disposal of the application. This amendment will help the tribunal to continue the proceedings

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without waiting for court's decision on enlargement of time for making of award under Section 29(5).

4. **Prospective application of amendments introduced by Amendment Act of 2015**

   i. The amendment act introduces Section 87 to provide that 2015 amendments shall not apply with arbitration proceedings commenced before 23rd October, 2015. Similarly, 2015 amendments shall not apply to court proceedings arising out of or in relation to arbitration proceedings commenced before 23rd October, 2015 irrespective of whether such court proceedings were commenced prior to or after 23rd October, 2015.

   ii. 2015 amendment shall only apply to arbitration proceedings commenced on or after 23rd October, 2015 and to the court proceedings arising out of or in relation to the arbitration proceedings commenced on or after 23rd October, 2015.

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5. **Section 17:** Amendment to Section 17 provides that arbitral tribunal shall have no power to pass any interim measures after making the award. In such a situation, interim protection can be sought only from the court.

6. **Section 34**: Amendment to Section 34 clarifies that at the stage of challenging the award, court will not see any material other than record of the arbitral tribunal. This amendment shall help in cases where the courts in some part of the country record evidence at the stage of petition under Section 34 of the Act. Now Act provides that recording of evidence is not permissible.

7. **In Section 37** of the principal Act, expression "Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie……" has been incorporated in Section 37 (1). This is aimed restricting the scope of appeal and preventing courts from exercising power under any other provision of law for the time being in force against any orders (appealable or not in terms of Section 37 of the Act) that may be passed in relation to the arbitration proceedings.

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8. **The Amendment Act introduces Sections 42A & 42B** respectively. Section 42A provides for maintaining confidentiality of arbitration proceedings by the arbitrators, arbitral institutions and the parties to arbitration, where Section 42B protects the arbitrators from any legal proceedings against acts done in good faith.

9. **Schedule 8** has been added which provides for qualification of the arbitrators. However, it appears that such qualifications are meant for those arbitrators who would be associated with the arbitral institutions and not the arbitrators who are appointed by the parties directly, without interference of the arbitral institutions.

10. The Amendment Act 2019 has been published in the gazette only for general information. Section 1(2) provides that the Amendment Act shall come into force on such date as the Central Government may by notification appoint. It further provides that Central Government can appoint different dates for different provision of this Act.

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CHAPTER 5
THE AGREEMENT

Section 7 of the Arbitration and Conciliation Act defines arbitration agreement as an agreement by the parties to refer to arbitration all or some disputes which have arisen or will arise on a future date between them with reference to a defined legal relationship, whether contractual or not. Section 7 further enumerates that an arbitration agreement can be in the form of a separate agreement or in the form of an arbitration clause in the contract.

An Arbitration agreement is made by any two parties entering into a contract by which any disputes arising between them with regard to the contract agreement is to be resolved, without going to the Courts and with the help of an Arbitrator. The agreement should mention who should select the arbitrator, regarding what kind of dispute the Arbitrator should give decision, the place of arbitration, etc.

The parties need to sign the Arbitration Agreement and the decision shall be binding on the parties. Arbitration agreement is like a contingent contract, and therefore the agreement comes into being or become enforceable contingent to the

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happening of a dispute between the parties. It is only enforceable in case there arises a dispute between the parties.

Essentials of an Arbitration Agreement:

The existence of a dispute is an essential condition for arbitration. Where parties have effectively settled their disputes, they cannot refute the settlement and invoke an arbitration clause.

1. **Written Agreement**

   An arbitration agreement must be in writing. As per Section 7 (4) of the Act, arbitration agreement is considered to be in writing, if it is contained in:

   i. A document signed by the parties;

   ii. An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

   iii. An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not defined by another.

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2. **Intention**

   Intention of the parties is of prime importance. The intention of the parties to refer their dispute to arbitration should be clearly evident from the arbitration agreement.

3. **Signature**

   An arbitration agreement needs to be duly signed and stamped by the parties. The agreement may be in the form of a signed document by both the parties containing all the terms.

Attributes of an Arbitration Agreement:

1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.
2. That the jurisdiction of the tribunal to decide the rights of the parties must derive from their consent, or from an order of the Court or from a statute, the terms of which make it clear that the process is to be arbitration.
3. The agreement must contemplate that substantive rights of the parties will be determined by the arbitration tribunal.

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4. That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal being fair and equal to both sides.
5. The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law.
6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

Points To Remember While Drafting an Arbitration Agreement:

1. **Seat of Arbitration** – This clause specifies the seat of arbitration. The seat of arbitration determines the procedural laws that govern the arbitration procedure.

2. **Procedure for Appointing Arbitrators** – Section 11 of the Arbitration and Conciliation Act talks about the appointment of arbitrators. It provides that a person of any nationality may be appointed as an arbitrator, unless otherwise agreed by the parties. The parties are free to agree on a procedure for appointing the arbitrator(s). If the parties fail to reach an agreement, in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the two arbitrators shall thereafter appoint a third arbitrator, who shall be the

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presiding arbitrator. The appointment of parties may be by the parties themselves, or by the designated authority or by the arbitral institutions. In places where the dispute involves international commercial transaction, then the arbitrator to be appointed shall not be of the same nationality as the parties to the dispute.

3. **Language of Arbitration** – It is important to mention the language of arbitration in the agreement itself. Choosing the language of arbitration is also very cost effective, because it would save from paying exorbitant fees to the translators.

4. **Number of Arbitrators** – According to Section 10 of the Arbitration and Conciliation Act of 1996, parties can determine the number of arbitrators, provided that the number is an odd number. Failing to determine the number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator.

5. **Type of Arbitration** – Parties can choose between Institutional or Ad hoc arbitrations. If the parties choose the former, then they have to be bound by the rules of the arbitration institutions. All these institutions have their own set of rules for arbitration and these rules would be applicable to arbitral

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proceedings conducted by them. Whereas, in case of Ad-hoc arbitrations, arbitrations are both agreed to and arranged by the parties themselves. No help is sought from the arbitral institutions in Ad-hoc arbitrations.

6. **Governing Law** – This is the law that governs the main point of contention between the parties to a dispute. It is even known as the substantive law. The parties should mention the law they want to be governed by, failing which may give way to disputes in the future.

7. **Name and Address of the Arbitral Institution** – If the parties to the dispute are referring their disputes to an arbitration centre/institute, it is important that the name and address of the arbitration facility is mentioned in clear and unambiguous words. Such inadvertent mistakes can lead to the nullification of the arbitration clause.

CASE LAWS:

The Oriental Insurance Co. Ltd. and Ors. Vs. Dicitex Furnishing Ltd. Dt. 13.11.2019 in CA 8550 of 2019

The Supreme Court held that an arbitration clause can be invoked by an aggrieved party pursuant to execution of no objection certificates or discharge vouchers. The Supreme Court while upholding the concept of economic duress dealt in the case

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of *Associated Construction Vs. Pawanhans Helicopters Ltd* and *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.* observed that a court which is required to ensure that an arbitrable dispute exists, has to be *prima facie* convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding (about the finality of the discharge and its effect as satisfaction) final, thus, precluding the applicant of its right event to approach a civil court.

Mahanagar Telephone Nigam Limited Vs. Canara Bank &Ors. Dt. 08.08.2019 in CA 6202-6205 of 2019

The Supreme Court, while invoking the doctrine of "Group Companies" permitted a non-signatory to an arbitration agreement to participate in the arbitration proceedings.

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The Supreme Court observed 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.

In the instant case, the Supreme Court observed that there was enough factual background to suggest that the parties intended to bind the non-signatory party to the arbitration proceedings.

M/S. Icomm Tele Ltc. v. Punjab State Water Supply & Sewage Board & Anr ***dated 11.03.2019 in Civil Appeal No. 2713 of 2019.***

This case decides whether an arbitral clause can have a prior condition to deposit 10% of the claim *amount for invoking arbitration.*

The Supreme Court held that arbitration is an important alternative dispute resolution process which is to be encouraged because of the high pendency of cases in courts and the cost of litigation. Further, it was held that deterring a party from invoking this alternative dispute resolution process by a pre-deposit of 10%

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would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive. For the said reason, this said clause was struck down.

M/S Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burmandt 05.09.2019 in Civil Appeal No. 7023/2019.

The Supreme Court held that Section 11 (6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense. With these observations, the court overruled the judgment in United India Insurance Company Limited vs. Antique Art Exports Pvt. Ltd.

Brahmani River Pellets Limited v. Kamachi Industries Limited *dated 25.07.2019 in Civil Appeal No. 5850 of 2019*

This case decided whether the Madras High Court could exercise jurisdiction under Section 11 (6) of the Arbitration and Conciliation Act, 1996 despite the fact that the agreement contains the clause that venue of Arbitration shall be Bhubaneswar.

The Supreme Court held that where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. As the parties agreed to

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have the "venue" of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) of the Act. Since only Orissa High Court will have the jurisdiction to entertain the petition filed under Section 11(6) of the Act.

Food Corporation of India vs. National Collateral Management Services Limited *dated 04.11.2019 in Civil Appeal No. 8338 of 2017*

This case decided whether a Clause in an Agreement for Settlement of Disputes can be construed as an Arbitration Clause

The Supreme Court held that a clause that merely refers disputes between the parties to the Chairman and Managing Director for settlement cannot be construed as an Arbitration clause.

Glencore International AG v. M/S Shree Ganesh Metals & Anr. dated 14.11.2019 in FAO (OS) (COMM) 195/2017

This case decided whether an Arbitration Clause of an Earlier Contract can be incorporated by Reference in a Subsequent Contract.

The Court held that a standard form of contract is a 'take it or leave it' contract which does not leave scope for any negotiation with respect to its terms and conditions. The subsequent contract was not a standard form of contract since the

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parties negotiated the terms of the contract and the arbitration clause contained in the subsequent contract was at variance with the arbitration clause of the earlier contract. The court also took note of the fact that in the subsequent contract there was no categorical mention of the arbitration clause contained in the earlier contract and there was nothing on record to show that Respondent gave its acceptance to enter into a subsequent contract as per terms and conditions of the earlier contract. For the foregoing reasons, it was held that the arbitration clause of the earlier agreement would not apply to disputes which have arisen between the parties under the subsequent agreement.

Krishna Construction v. Fakhruddin Memorial Cooperative Group Housing Society (REGD.) dated 29.08.2019 in C.S. (Comm.) 33/2019

This case decided whether the Arbitration Clause Perished after the Original Contract was substituted by a new Agreement.

The Court held that the parties having expressly agreed that all previous agreements stand nullified, the parties intended not to be bound by anything contained in the earlier agreement including the arbitration clause.

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M/S MAKRO V. THE NEW INDIA ASSURANCE CO. LTD. & ANR.dated 24.09.2019 in ARB. P. 416/2019

This case decided whether the Arbitration Clause can be invoked after full and final settlement of Dispute.

The court reiterated all that needs to be seen at the time of deciding an application under Section 11(6) of the Act is the existence of the Arbitration Agreement. Further, it was held that the defence of full and final settlement of a claim will not be considered by the Court while examining the petition under Section 11(6) of the Act.

Wapcos Ltd. v. Salma Dam Joint Venture & ANR. ***dated 14.11.2019 arising out of SLP C No. 7979 of 2019***

This case decided whether the amendment of Agreement has the effect of Undoing and Abrogating the Arbitration Clause predicated in the Contract

The Supreme Court held that in a commercial world it is not unknown that the parties amend the original contract and even give up their claims under the subsisting agreement. Further, it was held that where the parties consciously and with full understanding executed AoA whereby the contractor gave up all his claims and consented to the new arrangement specified in AoA including that there will be no arbitration for the settlement of any claims by the contractor in future.

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After adopting that path, it will not be open to the contractor to now take recourse to the arbitration process or to resurrect the claim which has been resolved in terms of the amended agreement.

Ayurved Pvt. Ltd. v. N. K. Sharma, Proprietor ***dated 02.08.2019 in Arb. A. (Comm.) 61/2018***

This case decided whether the arbitration can interpret the terms of the Agreement by the subsequent conduct of the parties.

The court held that if the terms of the agreement do not present an ambiguous circumstance then one would have to decipher the intent of the parties by examining the plain terms of the agreement, however, where there is ambiguity, then there is no better interpretative tool to ascertain the intent of the parties than the subsequent conduct of the parties.

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CHAPTER 6

TERRITORIAL JURISDICTION IN ARBITRATION

It is the seat of arbitration which would claim exclusive jurisdiction in case of domestic arbitration. There could not be straight jacket formula to determine the question and the answered lies in the interpretation of the agreement. The intention with respect to the seat of Arbitration should therefore be clearly and categorically mentioned in the Agreement.

Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc (2012)

The Supreme Court of India deliver a ruling on the role of Indian courts in international arbitrations seated outside India. Overruling the controversial decision of Bhatia International v Bulk Trading (2002), the Supreme Court held that Indian courts do not have supervisory authority over international arbitrations taking place outside India. The Court examined and defined the scope of Indian Arbitration and Conciliation Act, 1996 ("Arbitration Act") and clarified the concept of seat of arbitration under the Indian law. The Court also unequivocally affirmed that the Arbitration Act adopted the territorial principle of the

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UNCITRAL Model Law and accepted the views of leading experts in international arbitration on Article V(1)(e) of the New York Convention.

Indus Mobile Distribution Private Limited vsDatawind Innovations Private Limited (2017) (2017) 7 SCC 678

The Supreme Court held that assignment of a seat of arbitration is akin to conferment of an exclusive jurisdiction clause. Therefore, even when there is a neutral seat of arbitration, and cause of action is somewhere else, courts in the seat of arbitration would enjoy exclusive jurisdiction. This should prevent the multiplicity of proceedings and/or forum shopping.

BSG SGS Soma JV vs NHPC (2019)

The Supreme Court held that an appeal against an order transferring proceedings under Section 34 of the Arbitration Act is not maintainable under Section 37 of the act. The designation of a seat confers exclusive jurisdiction on the courts of said seat and a place of arbitration – regardless of its designation as a seat, venue or place – is the juridical seat of arbitration unless there is an indication to the contrary.

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Union of India vs Hardy Exploration (2018)

The Court ruled that the 'venue' of an arbitration could not, *ipso facto*, be considered to be its 'seat' and that the 'place' could be equated with 'seat' only if it had no conditions precedent attached to it: "*The term 'place' does not* ipso facto *become equivalent to 'seat', and only when one of the conditions precedent is satisfied can the 'place' take the position of 'seat'. On the other hand, however, the term 'venue' can become 'seat' if something else is added to it as a concomitant.*" On the facts before it, the Court ruled that since the arbitration agreement did not provide for a seat, the determination of the seat would have to be made by the arbitral tribunal. The Court held that merely because the arbitrator had "*held the meeting at Kuala Lumpur and signed the award… does not amount to determination… The sittings at various places are relatable to venue. It cannot be equated with the seat of arbitration or place of arbitration…*" On this basis, the Court set aside the decision of the Delhi High Court and found that Indian courts would have jurisdiction to entertain the Section 34 Challenge.

MankastuImpex Pvt. Ltd. Vs Airvisual Ltd. (2020)

Eventually, the conclusion reached was that, on a reading of the agreement, it is apparent that the parties intended Hong Kong to not only be the "venue" of arbitration but also the "seat". Thus, relying on Indus Mobile Distribution (P) Ltd.

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v. Datawind Innovations (P) Ltd., it was held that since the "seat" of arbitration proceedings is Hong Kong, the applicable law is the law of Hong Kong, and a section 11 application does not lie with the Supreme Court of India. The applicable law clause, which stated that the governing law for the agreement shall be Indian law, was distinguished on the construction of the clause and due to section 2(2) of the Act, which excludes the application of section 11 to international commercial arbitrations seated outside India.

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CHAPTER: 7
NOTICE: SECTION 21

Section 21 of the act reads as under:

"21. ***Commencement of the arbitral proceedings unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute to be referred to arbitration is received by the Respondent*****"***

A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of the arbitration proceedings would be the date on which the recipient of the notice receives from the Claimant, a request for referring the disputes to arbitration.

The reasons why notice under Section 21 of the Act is mandatory in nature is five-fold:

i. The parties to the Arbitration Agreement against whom a claim is made should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the dispute between the parties may thus be narrowed down.

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ii. Such a notice provides an opportunity to the recipient of the notice to identify if the claims are time barred or is barred by law of estopped or is untenable in view of the factual matrix of the dispute between the parties.

iii. Such notice identifies the procedure to be adopted for the conduct of the arbitral proceedings/ and appointment of an arbitrator. Unless, there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure for the appointment of an arbitrator, other procedures as envisaged in the arbitration clause have been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties; there has to be consensus between the parties. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

iv. Even if the notice under Section 21 of the act permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be

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'disqualified' to act as an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the Claimant may be persuaded to appoint a qualified person.

v. The purposes of Section 11(6) of the Act, without the notice under the Section 21 of the Act, a party seeking reference of disputes to the arbitration will be unable to demonstrate that there was a failure by one party to adhere to procedure and accede to the request for the appointment of an arbitrator. The trigger for the court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

CASE LAWS:

Alupro Buildings Systems Pvt Ltd Vs. Ozone Overseas Pvt Ltd

The Delhi High Court held that the provisions under Section 21 of the Act are mandatory in nature and cannot be dispensed with and forms the preceding act in initiation and reference of the disputes between the parties. It was further held that the provisions of Section 21 are not limited only for the purpose of determining limitation and a party cannot straight away file a claim before the Arbitrator without issuing the notice under Section 21 of the Arbitration and Conciliation Act.

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The judgment infused mandatory overtones to the provisions of Section 21 and held it to be a paramount procedure for the initiation of the arbitration process between the parties and dispensing with same could be one of the grounds for challenge of the award under Section 34 of the Act. The date of the reference of the disputes to arbitration under Section 21 shall be the date from which the limitation will start running for the purposes of computation of limitation under **Section 43(2)** of the Act. The Court 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, preceding the reference of disputes to arbitration is mandatory.

In other words, without such notice, the arbitration proceedings that are commenced would be unsuitable in law. The Court further clarified that mere acceptance of supplies by a party on the basis of invoices mentioning an arbitration clause would not amount to acceptance by the party of such arbitration clause. The Court clarified that there could not be an arbitration agreement by implication and a mere endorsement of receipt of goods on such invoices cannot lead to an inference that a party agreed to the arbitration agreement which could be validly invoked. The present case raised objections under Section 34 of the Act to an

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award rendered by an arbitrator, unilaterally appointed by the Respondent, without invoking arbitration under the terms of Section 21 of the Act. The 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.

Oil Industry Development Board v. Godrej & Boyce Mfg. Co. Ltd. dated 16.09.2019 in O.M.P. 601/2012

The Court held that it is not mandatory for a party raising a counterclaim to put the other party on notice of the same prior to the arbitration proceedings or to issue a formal notice invoking arbitration in respect of the said counterclaim.

Surendra Pal & ANR.v. True Zone Buildwell Pvt. Ltd. dated 07/08/2019 in O.M.P. 11/2018

The Court held that as per Section 17 of the Limitation Act, 1963, the period of limitation would begin to run on the discovery of the fraud and the aggrieved party is required to invoke arbitration within a period of 3 years from the discovery of the fraud. The court held that intervening events would not extend the period of limitation.

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CHAPTER: 8
JUDICIAL INTERVENTION TO REFER THE PARTIES TO ARBITRATION

Section 8 of the Act denotes a provision which provides for limited judicial intervention and furthers the objective by directing the parties to get involved in arbitration on the basis of the arbitration agreement in case of Domestic Arbitration.

Sections 45 and 54 of this Act relate to International Commercial Arbitration under the New York Convention Awards and the Geneva Convention Awards respectively dealt with under Part-II of the Act

A. Condition Precedent Stipulated under Section 8

Section 8 of the Arbitration and Conciliation Act is peremptory in nature. It provides that a judicial authority shall, on the basis of the arbitration agreement between the parties, direct the parties to go for arbitration. It also enlists conditions precedent, which need fulfillment before a reference can be made as per the terms of the Act.

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In ***P. Anand Gajapathi Raju & Ors. v. P.V.G. Raju (Died) & Ors***., while iterating the periphery of Section 8 of the 1996 Act, the Supreme Court said that "*The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the action is the same as the subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. .... The language of Section 8 is per-emptory.*"

The following factors are to be considered before entertaining an application under Section 8 of the Act:

Whether it can be made applicable to a civil dispute:

The Supreme Court while answering the aforesaid question in ***H. Srinivas Pai and Anr.v. H.V. Pai (D) thr. L.Rs. and Ors.***, said that "The Act applies to domestic arbitrations, international commercial arbitrations and conciliations. The applicability of the Act does not depend upon the dispute being a commercial

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dispute. Reference to arbitration and arbitability depends upon the existence of an arbitration agreement, and not upon the question whether it is a civil dispute or commercial dispute. There can be arbitration agreements in non-commercial civil disputes also."

The presence of arbitration agreement is another pre-requisite for seeking a reference under Section 8.4 Section 7 of the Act provides the diameter of the term "arbitration agreement".

The importance of arbitration agreement, for seeking a reference under Section 8, was emphasized by the Supreme Court in ***Smt. Kalpana Kothari v. Smt. SudhaYadav and ors.*** wherein the Court said that,

> *"As long as the Arbitration clause exists, having recourse to Civil Court for adjudication of disputes envisaged to be resolved through arbitral process or getting any orders of the nature from Civil Court for appointment of Receiver or prohibitory orders without evincing any intention to have recourse to arbitration in terms of the agreement may not arise."*

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Whether the validity of the arbitration clause can be disputed before the Court, in front of which an application for reference is made.

The answer to the question was laid in the negative by the Supreme Court in ***Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums***. The Court in this case held that if the existence of the arbitration clause is admitted, in view of the mandatory language of Section 8 of the Act, the courts ought to refer the dispute to arbitration.

The Supreme Court, while raising a presumption for the validity of an arbitration clause in an agreement, in ***India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.***, said that the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement.

Section 8 further mandates that the subject matter of the dispute is the same as the subject matter of the arbitration agreement. While articulating on this pre-requisite, the Supreme Court in ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr***., said that "The relevant language used in Section 8 is-"in a matter which is the subject matter of an arbitration agreement".

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The Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement."

An application under Section 8(1) cannot be entertained unless accompanied by original arbitration agreement or a certified copy thereof. Laying emphasis on section 8(2) for the grant of reference, the Supreme Court in ***The Branch Manager, Magma Leasing and Finance Limited and Anr.v. PotluriMadhavilata and Anr.***said that "An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied: (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof."

B. Implied Inclusion under Section 8

Though not implicit in the reading of Section 8 of the Act, the Court in the case of ***Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd***. brought in the competence of the arbitral tribunal as one of the grounds for the grant of reference.

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The proposition that Section 8, despite providing the explicit grounds on which reference can be made, also lays down the implicit ground of competence of the Arbitral Tribunal, was also read in the affirmative by the Court in the case of ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*** wherein it was held that where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act.

Effect of the Arbitration and Conciliation (Amendment) Ordinance, 2015:

The 2015 Ordinance amended Section 8 by stipulating that joinder of non-signatories to an arbitration agreement was not permissible. Further amendment to Section 8 requires that the judicial authority compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause prima-facie exists.

Section 8 of the Act denotes a provision which limits judicial intervention in the process of arbitration. However, the judiciary has drawn exception to the extent of intervention on the basis of the arbitrability of the subject matter and the

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competence of the arbitral tribunal to deal with it. Section 8 of the Act still acts as a saving beacon for arbitration and forms the basis for forcing the parties in cases of domestic arbitrations to adopt the model of arbitration where there exists an arbitration agreement.

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CHAPTER 9
POWERS OF COURT TO GRANT INTERIM MEASURES

Section 9 of the Act, provides opportunity to the parties to an Arbitration Agreement, to not only seek relief before or during the commencement of the arbitral proceedings but also after the passing of the arbitral award, provided such relief is sought by the parties before the enforcement of the award. However, in cases where third party rights are getting affected, only a court can grant such reliefs. Such third party to the Arbitration Agreement can always avail the remedy in law and approach the Court to resolve and claim the damages for the grievance arisen with the parties to the Arbitration Agreement, showing separate cause of action and engage into litigation in its own individual capacity but not under the ambit of the Arbitration Agreement to which it was never part of. A third party to an Arbitration Agreement has no Locus Standi to seek a remedy from the Court under Section 9 of the Act since it is not a party to the Arbitration Agreement in the first place.

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Interim measures ordered by arbitral tribunal set out in Section 17 of the Act, are essentially based on Article 17 of the Model Law. The operation of this provision is triggered only at the request of a party to the arbitral proceedings, only after the constitution of the tribunal. A party may seek interim reliefs up to the point in time at which an award is made by the tribunal.

For assessing the powers of the court to grant interim measures under Section 9 of the Act vis-à-vis powers of the arbitral tribunal under Section 17 of the Act, the introduction of the following clause to Section 9 of the Act merits discussion:

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

Thus, to avoid prejudice to any party subsequent to the constitution of the arbitral tribunal, courts have begun to refrain themselves from making orders under Section 9 of the Act.

However, subsequent to the amendments in Section 9 of the Act, the court can grant interim measures in the following circumstances:

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- Prior to the constitution of the tribunal
- After the award has been made and prior to its enforcement.
- when an application is made before a court under Section 9(1) of the Act after the award is made but yet to be enforced, the court shall bear in mind that it is a stage where the arbitral tribunal has ceased to function. The court has to adopt a liberal approach in such circumstances.
- In the course of the arbitral proceedings, after the constitution of the tribunal, when an interim measure granted by the tribunal would not be efficacious. In granting interim reliefs in such cases, courts assess the relevant facts and circumstances with precision including instances like the lethargic manner of arbitrators in granting interim reliefs in respect of assets rendering the remedy inefficacious. Some courts have been of the view that courts would be required to adopt a strict approach in entertaining such applications under Section 9, in the course of the arbitral proceedings.

As explained above, another significant aspect is the time-line introduced vide the Amendment Act 2015. Section 9(2) of the Act provides that:

"Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section

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(1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine."

The insertion of such a time-bound mechanism aims at regulating of the role of the courts in granting interim measures once the arbitral tribunal has been constituted as it was deemed suitable to empower the tribunal to hear all interim applications, upon its constitution. After all, once the arbitral tribunal is seized of the matter it is most appropriate for the tribunal to hear all interim applications.

CASE LAWS:

M Ashraf v. Kasim VK 2018 SCC Online Ker 4913 The Division Bench of the Kerala High Court observed that when an application is made before a court under Section 9(1) of the Act after the award is made but yet to be enforced, the court shall bear in mind that it is a stage where the arbitral tribunal has ceased to function. Courts would be required to adopt a strict approach in entertaining such applications under Section 9, in the course of the arbitral proceedings.

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SREI Equipment Finance Limited (Sefl) v. Ray Infra Services Private Limited & Anr., 2016 SCC OnLine Cal 676

In the course of the arbitral proceedings, after the constitution of the tribunal, when an interim measure granted by the tribunal would not be efficacious. In granting interim reliefs in such cases, courts assess the relevant facts and circumstances with precision including instances like the lethargic manner of arbitrators in granting interim reliefs in respect of assets rendering the remedy inefficacious.

Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd., 2017 SCC OnLine Del 7226.

It was disputed as to whether the court before which an application for interim measures is pending, would have to relegate the same to the arbitral tribunal upon its constitution. The Delhi High Court was of the view that - to avoid a situation where a party is left without an interim relief in respect of proceedings for interim measures pending before a court which have not been transferred to the tribunal after its constitution, the court may continue with the same and grant appropriate reliefs, where necessary.

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Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd. (2018) 1 AIR Bom R 1.

('Court' as defined in 'Explanation' to Section 47 which would be the Court having jurisdiction to entertain the Section 9 petition…")

Interim Reliefs in case of foreign awards - Pursuant to an award being passed, applications under Section 9 of the Act may be filed for seeking interim measures against dissipation or alienation of assets in India, even if the place or seat of arbitration is outside India. In such cases, the court having jurisdiction over the subject matter of the arbitral award (assets of the party against which such measures are being sought) may be considered as the appropriate court.

Delta Construction Systems Ltd., Hyderabad v. M/S Narmada Cement Company Ltd, Mumbai (2002) 2 BomLR 225:

The Bombay High Court held that court would not be bound by the provisions contained in the Order XXXVIII Rule 5 while granting a relief under Section 9 of the Act.

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National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd. AIR 2004 Bom 136 Bombay High Court held that while seeking an order for securing the amount in dispute, the petitioner would not need to satisfy the requirements of Order XXXVIII Rule 5.

Steel Authority of India v. AMCI Pvt Ltd(2011) 3 Arb LR 502 The Delhi High Court took the view that principles contained in Order XXXVIII Rule 5 would only serve as guiding principles for the exercise of power by the court. A party seeking reliefs under Section 9 would essentially have to satisfy the court that the furnishing of security was paramount to safeguard its interests

Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd AIR 2007 SC 2563 the apex court was of the opinion that "well known rules" of the CPC would have to be kept in mind while granting interim reliefs under Section 9. Therefore, the principles such as (i) prima facie case, (ii) balance of convenience, and (iii) irreparable injury would have to be kept in mind while granting an injunction. The apex court stopped short of stating that specific standards under Order XXXVIII Rule 5 and Order XXXIX Rule 1 and 2 would apply.

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Nimbus Communications Limited v. Board of Control for Cricket in India and Another 2012 (5) BomCR 114 interpreted *Adhunik Steels* to come to the conclusion that standards for grant of interim reliefs under Section 9 would not be completely independent of the principles in the CPC.

ITI v Siemens Public Communication (2002) 5 SCC 510 The Supreme Court held that though there was no mention of applicability of the CPC to arbitral proceedings in the Act, the provisions of the CPC could be read in by a court exercising its powers during any proceedings arising out of the Act.

Bombay High Court in case of ***Tata Capital Financial Services Limited vs. Deccan Chronicles Holdings Ltd. 2013 (3) Bom.C.R. 205***,has held that the Court can grant interim measuresunder section 9 (2) (b), (d) and (e) even if the properties or things arenot the subject matter of the dispute in arbitration. It is held under Order XXXIV Rule 14 of the Code of Civil Procedure, 1908 that there is no bar in filing a money claim even by the mortgagee notwithstanding contained under Order II Rule 2 of the Code of Civil Procedure. It is for the claimant to decide whether to file a money claim before the Arbitral Tribunal and file a separate suit

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for enforcement of the mortgage after complying with the provisions of Order II Rule 2 of the Code of Civil Procedure. Proceedings under section 9 for interim measures cannot be equated with the proceedings filed in a pending suit for referring the parties to arbitration under section 8 of the Arbitration & Conciliation Act, 1996.

Ratnam Ayer vs. Jacki K.Shroff 2013 (5) Bom.C.R. 144 The Court should be satisfied while granting interim measures under section 9 read with Order XXXVIII Rule 5 that there are reasonable chances of decree in favour of the petitioner and grant of just or valid claim is not sufficient.

Goldstar Metal Solutions vs. DattaramGajananKavtankar, (2013) 3 AIR Bombay R-529 The Court is bound to decide the existence of the arbitration agreement before proceeding with the application under section 9 on merits.

WelspunInfrateck Ltd. vs. Ashok Khurana, 2014 (3) Bom.C.R.624 The parties not parties to the arbitration agreement can still be impleaded in an application under section 9 if they are likely to be affected by the reliefs claimed in the application under section 9.

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Rameshkumar N. Chordiya vs. Principal District Judge, AIR 2014, Bombay 1The application for stay of the arbitration proceedings not maintainable under section 9 of the Arbitration Act read with section 151 of the Code of Civil Procedure.

Konkola CopperMines (PLC) vs. Stewarts and Lloyds of India Ltd, 2013 (5) Bom.C.R. 29If the place of arbitration is in India, Part-I of the Arbitration Act, including section 9 would be applicable.

Rajesh M. Mahtani vs. R.M. Khan, 2013 (6) Bom.C.R. 607There is no provision for stay of the arbitration proceeding. Mere allegation of fraud and/or misappropriation of amount not supported by material particulars not sufficient.

Tata Capital Services Ltd. vs. Ramasarup Industries Limited, 2013 (6) Bom.C.R. 230. The steps taken to enforce the consent order passedunder section 9 are not barred under section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985. The proceedings under section 9 cannot be equated with a suit contemplated under section 22of the said Act.

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Rockwood Hotels Resort Ltd. Vs Starwood Asia Pacific Hotels & Resort Ltd. (2013) 4 LJ SOFT 48The parties agree to have seat of arbitration at Singapore and governed by SIAC Rules - Section 9 cannot be resorted to. Bombay High Court has no jurisdiction to entertain the petition under section 9 in this circumstances.

Spice Digital Ltd. vs. Vistaas Digital Media Pvt. Ltd., (2012) 114, Bombay Law Report 3696 No injunction can be granted under section 9 if the specific relief cannot be granted in terms of section 41(e) of the Specific Relief Act. The contract which is determinable cannot be specifically enforced.

Firm Ashok Traders vs. Gurumukh Das Saluja, (2004) 3 SCC 155When an application under section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to arbitral proceedings. In case of Firm Ashok Traders vs. Gurumukh Das Saluja, (2004) 3 SCC 155**,** the Supreme Court held that a party invoking section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and/or positively going to commence within a reasonable time.

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Minochar A. Irani vs. Deenyar S. Jehani, 2014 (6) Bom.C.R. 504 Bombay High Court**,** has held that a party who has no intention to ultimately refer the dispute to arbitration and seek final relief cannot be permitted to seek interim relief. Interim relief is in aid of final relief.

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CHAPTER 10

APPOINTMENT OF ARBITRATOR

The Arbitration and Conciliation Act grants the liberty to the parties to appoint an arbitrator mutually. The Act provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number. However, if the parties fail to do so, the arbitral tribunal shall consist of a sole arbitrator.

The procedure in relation to appointment of arbitrator(s) is provided under Section 11 of the Act. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. The aforesaid section also deals with the contingency wherein the parties fail to appoint an arbitrator mutually.

In such a situation, the appointment shall be made, upon request of a party, by the Supreme Court or any person or institution designated by such Court, in the case of an International Commercial arbitration or by High Court or any person or institution designated by such Court, in case of a domestic arbitration.

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Before the appointment of arbitrator is made, the concerned Court or the person or institution designated by such Court is required to seek a disclosure in writing from the prospective arbitrator in terms of Section 12(1) of the Act and also give due regard to any qualifications required for the arbitrator by the agreement of the parties and the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

It may be noted that under Section 12(1) of the Act, an obligation has been cast upon the prospective arbitrator to make an express disclosure on (a) circumstances which are likely to give rise to justifiable doubts regarding his independence or impartiality; or (b) grounds which may affect his ability to complete the arbitration within 12 (twelve) months. The purpose of this provision is to secure the appointment of an unbiased and impartial arbitrator.

Fifth Schedule to the Act (Annexure-A) contains a list of grounds giving rise to justifiable doubts as to the independence or impartiality of an arbitrator. The Seventh Schedule (Annexure-B) lays the grounds which make a person ineligible to be appointed as an arbitrator.

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Effect of the 2015 Amendment on Section 11 of the Act

- Clarified that the power under Section 11 ACA, 1996 could be exercised by any judge of Supreme Court ("SC") or High Court ("HC")
- Restricted scope of examination by the Court only to the "existence of arbitration agreement".
- Clarified that the delegation by SC or HC to any person or institution would "not be a delegation of judicial power" so as to facilitate institutional arbitration.
- An order passed under Section 11 of the Act was not subject to any appeal.
- Obligated the Court to endeavour to expeditiously dispose of the application within 60 days of service to opponents.
- Inserted provisions to ensure neutrality and rationalise fees of arbitrator.

In Perkins Eastman Architects DPC & Anr. versus HSCC (India) Ltd., Arbitration Application No. 32 of 2019, the Supreme Court while dealing with an application under Section 11(6) read with Section 11(12)(a) of the Arbitration Act has held that a person who has an interest in the outcome or decision of the disputes must not have the power to appoint a sole arbitrator.

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In Uttarakhand Purv Sainik Kalyan Nigam Limited Versus Northern Coal Field Limited reported in 2019 (6) Arb. LR 237 (SC) the Hon'ble Supreme Court of India set aside a judgment of the High Court of Madhya Pradesh rejecting an application for appointment of arbitrator under Section 11 of the Arbitration and Conciliation Act on the ground that claims of the petitioner- contractor were barred by limitation. The Hon'ble Supreme Court held that after the 2015 amendments to the Act, court is only required to examine the existence of arbitration agreement. All other preliminary or threshold issues are to be decided by the arbitral tribunal under Section 16 of the Act.

In WAPCOS Ltd. vs Salma Dam Joint Venture & Another; 2019 (6) Arb. LR 247 (SC)reversing the judgement of Delhi High Court, the Supreme Court held that once parties consciously and with full understanding executed an amendment of agreement ("AOA"), whereby the contractor gave up all his claims and consented to the new arrangement specified in AOA including that there will be no arbitration for the settlement of any claims by the contractor in future, it is not open for the contractor to take recourse to arbitration process or to resurrect the claim which has been resolved in terms of the amended agreement. Accordingly, the Arbitration Petition for appointment of arbitrator was dismissed.

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In UOI Vs. BM Construction Company; 2019 (6) Arb. LR 284 (SC) the Supreme Court refused to accept the plea that by singing a "no claim" certificate the contractor is barred from demanding arbitration. Leaving the merits of the contention for the arbitral tribunal to decide, the Supreme Court directed for appointment of arbitrator as per the parameters provided in the contract and set aside appointment of independent arbitrator by the High Court.

Maintainability of the Application under Section 11

Even though Section 11(6A), inserted by the 2015 Amendment, says that courts shall "*confine to the examination of the existence of an arbitration agreement*", a fairly large number of categories of cases have evolved in which the Court has to look at more than merely the existence of an arbitration agreement.

National Highway Authority of India v. Sayedabad Tea Company 2019 SCCOnline SC 1102. The National Highways Act, 1956, being a special law, providing for appointment of arbitrator 'exclusively' by the central government under Section 3G(5) of the Act, excludes the application of Section 11 of the ACA, 1996. Accordingly an application under Section 11 of the ACA, 1996 is not maintainable for disputes arising under the said Act.

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Porwal Sales v. Flame Control Industries Ltd. 2019 SCC Online Bom. 1628In the context of the Micro, Small and Medium Enterprises Development Act, 2006("MSMED Act") the Bombay HC has held that where an application/reference is already made to the Facilitation Council invoking Section 18(1) of the MSMED Act, an application under Section 11 of the ACA, 1996 would not be maintainable. However, where no application/reference has been made under Section 18(1) of the MSMED Act, the jurisdiction of the Court to entertain an application u/s 11 of the ACA, 1996 cannot be excluded.

UttarkhandPurvSainikKalyan Nigam Ltd. V. Northern Coal Field Ltd. 2019 SCCOnline SC 1518.Subsequent to the insertion of S. 11(6A) of the ACA, 1996 the Court can no longer consider questions of limitation of the claim u/s 11 of the Act.

SatyanayanChinta v. Marvel Realtors 2019 SCC Online Bom.2292 at Pr.10 & 11. (Marvel Realtors)Whether the Court can entertain an objection that the application under Section 11 of the ACA, 1996 is itself barred by limitation. While decisions prior to the 2015 amendment have held that the application would have to be filed within 3 years from the date of the cause of action arising (i.e. expiry of

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30 days from the notice invoking arbitration) under Article 137 of the Limitation Act, 1963 and that this issue could be examined by the Court under Section 11 of the Act the position post the 2015 amendment is unclear. However a recent decision of the Bombay High Court in ***Marvel Realtors*** appears to suggest that the position will continue to remain the same even post the 2015 Amendment to the Act.

One category consists of cases which by their very inherent nature, are incapable of arbitration, such as criminal offences, matrimonial disputes etc. It is this category which is covered by S.2(3) of the Arbitration Act.

In ***Emaar MGF Land Ltd v. Aftab Singh 2018 SCC Online SC 2771*** it is stated that there may be a commercial agreement between two parties that all issues pertaining to a transaction are to be decided as per the arbitration clause in the agreement. In case a cheque is dishonoured by one party to the transaction, despite the arbitration agreement, the party aggrieved has to approach the criminal court.

These are mainly rights in rem, as explained in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others, (2011) 5 SCC 532***, which held that (at SCC p. 546, para 35) "*Adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy.*

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Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may, by necessary implication stand excluded from the purview of private fora…" and laid down 6 categories of non-arbitrable matters relating to rights in rem.

Ayyasamy v. Paramasivam (2016) 10 SCC 386, "*In VimalKishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788, this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act*."

In ***Olympus Superstructures Pvt Ltd. v. Meena Vijay Khetan and Ors.1999 (5) SCC 651,*** the Court held that an arbitrator has the power and jurisdiction to grant specific performance of contracts relating to immovable property. The Court further clarified that while matters like criminal offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto may be referred to arbitration.

In ***Himangi Enterprises v. Kamaljeet Singh (2017) 10 SCC 706***, the Court, relying on ***Booz Allen***, held that landlord-tenant disputes are non-arbitrable even if the agreement so provides.

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Another category consists of those cases which, by their nature, are amenable to arbitration, but which the Legislature has intended to keep non-arbitrable or at least not exclusively arbitrable. For example, consumer and telecom disputes. In consumer disputes, Section 3 of the Consumer Protection Act 1986 says that the remedy under the Act is in addition to and not in derogation of other remedies; therefore it can go on simultaneously.

However, in 2 recent judgments – (1) ***Emaar*** (supra) and (2) ***Rosedale Developers Private Limited VsAghore Bhattacharya And Others***, (2018) 11 SCC 337, despite the amended Section 8(1) reading "*notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that, prima facie, no valid arbitration agreement exists",* the Supreme Court has held that a Section 8 application is not maintainable once a consumer complaint has been filed.

There are, of course, innumerable judgments saying the same thing before the 2015 amendment and now, it is clear that even post-amendment, there is no change to this position.

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Yet another category is those cases where the dispute between the parties obviously does not relate to the disputes covered by the arbitration clause. In this connection, note that the words "*in a matter which is the subject of an arbitration agreement"* are unchanged from the unamended Section 8, and therefore, the stress laid on the interpretation of these words in the ***Sukanya Holdings*** judgment will still apply when it says that "*15.…Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced — "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8.*"

Even in ***DuroFelguera***, the Supreme Court held that: *"48. ... it needs to be seen if the agreement contains a clause which provides for arbitration* ***pertaining to the disputes*** *which have arisen between the parties to the agreement."* This was also the question framed and answered by the Supreme Court as Question No.2 at Para 34 of the *Booz Allen* judgment which follows *Sukanya.*

In ***Brightstar Telecommunications India Ltd. v. Iworld Digital Solutions Pvt Ltd Arb P.662/2017***, the dispute was admittedly in relation to trade in IPhones, whereas the arbitration clause related to Beetel landlines. In such a case, the Delhi

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High Court held, it would be absurd to refer parties to arbitration since the dispute is "as to a matter" which is obviously outside the contemplation of the arbitral clause. This is a clear indication that subject matter of the dispute has to be seen vis-à-vis the arbitration clause, even if both are inherently arbitrable.

Yet another thing that has to be looked into, is that the arbitration agreement is really a valid and enforceable agreement in terms of S.7 of the Arbitration Act. For example in ***Vimal Shah v. Dinesh Shah* (2016) 8 SCC 788** it was held that not only are disputes relating to a trust non-arbitrable by nature, but also the so-called arbitration clause in the Trust Deed, even though it definitely exists, is not a valid and enforceable agreement in terms of S.7 of the Arbitration Act since there is no element of agreement, offer and acceptance, meeting of minds or signature by both parties. A Trust Deed, like a Will, is only an expression of a wish by the settlor and is signed only by the settlor.

The application of these rules runs into practical difficulties when there are multiple parties as well as multiple contracts. Some contracts may have an arbitration clause while others do not, and some may have different sets of parties as signatories. In ***Indowind v. Wescare (2010) 5 SCC 306***, a two-judge bench of the Supreme Court had said that a company which is not party to an arbitration agreement with the claimant cannot be made party to an arbitration, even if both

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companies have common Directors or shareholders since they have separate legal existence.

In ***Chloro Controls (2013) 1 SCC 641***, a three-judge bench of the Supreme Court, in the author's opinion, essentially overruled ***Indowind*** (supra), explaining and applying the concepts of "group of companies", "composite contracts", "commonality of purpose", "direct relationship to the party", intention to be bound and a mother agreement supported by ancillary agreements, to lay down certain circumstances in which a company not a party to an arbitration agreement could be subjected to arbitration. The Court also interpreted the expression "claiming through or under" appearing in S.45, which expression is now inserted in S.8 by the 2015 amendment.

In ***Cheran Properties Ltd. Kasturi and Sons Ltd*** **2018 SCC Online SC 431** also, the Supreme Court traces the entire history on the subject and applies the principles laid down in ***Chloro Controls*** and interpreted the expression "parties and persons claiming under them" appearing in S.35 in the same way as the expression in S.8 and 45, to say that this will cover a company which is a nominee of shares of another company which is a party to the mother agreement. English commentators

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such as Redfern and Hunter in their book have said that this is an acceptable deviation from the strict requirement of an agreement being in writing between two parties, embodied in S.7 of our Act.

In ***DuroFelguera***, the case was held to stand on a different footing since there was no overarching mother agreement and all the five different packages as well as the corporate guarantee were independent contracts that did not depend on the terms and conditions of the original package nor on the memorandum of understanding executed between the parties.

The Bombay High Court in ***Neelkanth Mansions 2018 SCC Online Bom 5970***, even though there were group companies, a mother agreement and a commonality of purpose, it was held that there was no intention of the affiliates to be bound, mainly because the mother agreement specifically provided that in order to be bound, the affiliate has to execute a Deed of Adherence, which admittedly had not been done. Therefore, even this is distinguishable on facts. This shows that, the principle which was enunciated in ***Chloro Controls*** and recently reiterated in ***Cheran Properties*** is still good law and the judgments in ***Duro*** and ***Neelkanth Mansions*** do not detract from it**.**

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In ***Ameet Lalchand Shah Rishabh Enterprises* 2018 SCC Online SC 487**, the Court, applying the "business efficacy" principle of ***Ayyasamy,*** referred the parties to arbitration. This case turned on its own facts, and the author very humbly submits that it seems to be wrongly decided on those facts.

JagdishChander v Ramesh Chander (2007) 5 SCC 719 is another example of a so-called arbitration clause that was held not to be a binding arbitration clause. In that case, the clause said '*if the parties so determine'* there would be a reference to arbitration, and therefore the Supreme Court held that the clause contemplated a further determination, rendering it non-mandatory.

Voltas Ltd v MP Entertainment* 2016 SCC Online Bom 7664**, a judgment by a single judge of the Bombay High Court rendered after the 2015 Amendment, reflects that this approach is still valid, though in the author's humble opinion, it has wrongly applied the principle to the facts of that case. In ***Voltas, the clause provided "*In case of any dispute during the execution of the work and if the matter is referred to Arbitration then it will be resolved by…"* The single judge held, applying ***JagdishChander*** (supra), that this also is not a binding arbitration clause as it is an "optional" clause since parties may or may not refer to arbitration and at best it contemplates the possibility of parties agreeing to submit to arbitration.

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This is clearly wrong, since in ***Voltas*** (supra), unlike ***JagdishChander***, there was no prior determination required and the word "if" was indeed superfluous. In every arbitration clause, the word "*if*" has to be read in, as there is never any certainty that the parties will have disputes and that they will refer them to arbitration. The clause always provides the procedure only if those things happen.

If the arbitral clause itself provides for certain excepted matters or conditions for reference, those must be strictly construed. For example, in ***United India Insurance Company Ltd v. Hyudai Engineering*** **2018 SCC Online SC 1045**, relying on ***Oriental Insurance v. Narbheram Power*** **(2018) 6 SCC 534** the Court refused to refer the parties since liability was not admitted and the clause stated that only if liability was admitted, only then reference could be made to arbitration to decide the quantum.

Therefore, the trend of judicial pronouncements after the 2015 Amendment clearly shows that despite the strict language of Section 11(6A) commanding Courts to firmly affix blinkers to their eyes, at the end of the day, a common sense approach still has to be followed by Courts when deciding on whether to refer parties to arbitration. Whether or not this is what Parliament intended is anybody's guess, but in the author's opinion, it is a correct approach that will ultimately bring to fruition what parties must have intended and also avoid unnecessary litigation.

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CHAPTER 11

POWER OF ARBITRATOR TO DELEGATE HIS DUTIES & APPOINTMENT OF EXPERTS

The Arbitration and Conciliation Act, 1996 does not make any special reference as to the power of arbitrator to delegate his duties in a proceeding. However, under Section 6 of the Act reference has been made as to the taking of Administrative Assistance in an arbitration proceeding. Along with this, under Sections 26 and 27, an arbitrator has been empowered to seek assistance from experts and from the court.

Section 6 of the Act reads as "*In order to facilitate the conduct of an arbitration proceeding, the parties, or the arbitral tribunal with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.*"

This section provides freedom to the parties to choose suitable experts in arbitration as and when required to facilitate smooth conduct of the arbitration. In the context of Section 6 "***administrative assistance***" includes services in respect of arbitration such as receiving and sending communications, arranging meeting, translation, interpretation etc.

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Section 26 lays down provision about appointment of expert by the arbitral tribunal for the purpose of obtaining expert evidence on the matters in issue. Section 26 empowers the arbitral tribunal to appoint one or more experts to take their reports on specific issues relating to the matter before it. However, the reports of the experts are merely advisory in nature; the arbitral tribunal decides the dispute and not the experts. The experts only provide assistance to the arbitral tribunal in matters in which their reports are sought for coming to a decision by the arbitral tribunal.

Sub-section (1) Clause (a) vests the arbitral tribunal with the power to order a party to provide the necessary information as to a matter to the experts. Moreover they can order a party to produce relevant documents, goods or other property for inspection/instruction of the expert. Sub-section(2) that the expert may participate in an oral hearing if the parties so request for interrogating and testifying expert evidences. Thus sub-section(2) of Section 26 affirms the Principle of Natural Justice as embodied in Section 18 of the Act. Section 23(3) provides that if the parties so requests, the expert shall make any documents available to the parties for their examination on which the expert report is relied.

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Relevancy of opinion of Expert in a dispute:

Sections 45-51 of the Indian Evidence Act deals with the relevancy of third parties in a suit.

Section 45 states that "When the court has to form an opinion upon a point of foreign law or of science or art, or in questions as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts."

Folokes v. Chadal (1782) 3 Doug. K.B. 157.To take the assistance from experts in solving an issue has been an old tradition of the courts. In some matters, there is need of professional or technical skill which the courts do not always possess. In such cases the opinion of experts becomes crucial. When the court has to determine the cause of a ship-wreck or an air-crash, there may be many technical causes behind it and, therefore, the court will need the assistance of technicians, they being better acquainted with such cases.

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MurariLal v. Stat of M.P., AIR 1980 SC 531.The above section permits only the opinion of an expert to be cited in evidence. The weight that ought to be attached to the opinion of an expert is a different matter from its relevancy. The Act only provides about the relevancy of expert opinion but gives no guidance as to its value. However, it is settled legal position that ordinarily an expert opinion needs no corroboration, it cannot be treated to the same class of evidence as that of an accomplice and insist upon corroboration.

Ramnathan v. State of Tamilnadu, AIR 1978 SC 1204.An expert should be an independent person and not an associate of the company in whose favour his opinion was expressed.

Section 46 of the Indian Evidence Act, 1872 provides that facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of expert, when such opinions are relevant. The effect of the provision is that when the opinion of expert is relevant and has been cited, any fact which will either support his opinion or contradict it will also become relevant. It is to be noted that the provisions of the Indian Evidence Act, 1872 do not apply to the arbitral

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proceedings in strict sense. But, in the context of arbitration, Section 26 of the Arbitration and Conciliation Act, 1996 deals with experts appointed by arbitral tribunal. The Arbitral Tribunal is empowered but not obliged to take experts.

Arbitral Tribunal can Seek Assistance of Legal Experts:

Under Section 26, the arbitral tribunal can with the prior consent of the parties may seek assistance of legal experts in an arbitration proceeding. This section specifically empowers the arbitral tribunal to appoint one or more experts and to report to the arbitral tribunal on specific issues to be determined by the Arbitral tribunal.

Section 27 of the Act:

Under Sec.27 the arbitral tribunal can seek assistance of the court in taking evidence by sue motu or on request of a party. The arbitral tribunal no power to issue summon to persons except the disputing parties in the arbitration. Thus, in order to facilitate smooth conduct of an arbitration proceeding an arbitrator with the prior consent of the parties can delegate his functions to experts for their assistance in solving the dispute. The expert may be legal or a technical expert depending upon the nature of the issue to be decided.

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CHAPTER 12

EXTENSION OF TIME UNDER SECTION 29A OF THE ARBITRATION ACT & THE LIMITED SCOPE OF EXAMINATION BY THE COURT

One of the major areas of concern that the Arbitration and Conciliation (Amendment) Act, 2015 ('**Amendment Act'**) sought to address was the malaise of delayed adjudication that had bedeviled the majority of arbitration proceedings in India.

Two possible avenues were open to the legislature in this regard *viz*. a soft approach built upon incorporating a 'pious hope' provision underlining the desirability of early conclusion of the arbitral proceedings on the one hand, and a harder approach focusing on inviolable time-limits and the incentivization, monetary or otherwise, of swift completion of arbitration proceedings on the other.

By introducing **Section 29A** through the Amendment Act, it is evident that the legislature has largely opted for the latter approach.

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In a nutshell, Section 29A of the Amendment Act mandates that an arbitral tribunal is required to render an arbitral award within a period of twelve months from the date on which the arbitral tribunal is constituted, subject to a further extension of a maximum period of six months by consent between the parties.

By virtue of the Arbitration and Conciliation (Amendment) Act, 2019 ('**2019 Amendment Act**'), a further period of up to six months was added for the purpose of completion of pleadings, thereby effectively requiring an award to be passed within a period of eighteen months from the date on which the arbitral tribunal was constituted, subject to a further extension of a maximum period of six months by consent between the parties.

Therefore, as the position stands today, upon failure to render the arbitral award within this period of twenty four months (in case an extension of six months is agreed to between the parties) or eighteen months (in case the parties are unable to agree upon an extension), the mandate of the arbitral tribunal would terminate, and it would be unable to proceed further with the matter irrespective of the stage the proceedings would be at.

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The only avenue for the revival and/or continuation of the arbitral proceedings in this regard would be to approach the competent Court with an application under Section 29A(5) of the Arbitration and Conciliation Act, 1996 ('**Arbitration Act**') seeking extension of time for completion of the arbitral proceedings ('**application for extension**'). While adjudicating upon such a request, a Court is competent to impose costs on a party as also direct a reduction in the professional fees of the arbitral tribunal, if it were to specifically attribute responsibility for the delay in the conduct of the arbitral proceedings to the concerned entity(s), while ultimately extending the time for completion of the arbitration proceedings.

However, in a case where the Court finds the arbitration proceedings conducted by the arbitral tribunal to be completely unconducive to a structured and timely completion of the arbitration process, the Court may very well exercise an option to substitute one or all of the arbitrators, and if one or all of the arbitrators are so substituted by the Court, then the arbitration proceedings would continue from the stage already reached and on the basis of the evidence and material already on record.

As would be evident from the above, when the time for rendering the award has expired, the adjudication of the application for extension is critical for the

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continuation of the proceedings. At the said stage, the parties would have invested significantly in the arbitration proceedings in the form of financial expenditure and man-hours, and an adverse decision in the form of the substitution of the arbitral tribunal, particularly when the proceedings are at an advanced stage such as the parties having already commenced oral arguments, could effectively set the arbitration back by many months as also lead to the attendant wastage of resources.

Though the further amendment to Section 29(A)(4) by the 2019 Amendment Act now mandates that the arbitration proceedings shall continue during the pendency of an application for extension before the Court has provided some succour by ensuring that the arbitration proceedings are not unnecessarily paused and derailed for the period when an application for extension is pending consideration before the Court, the ultimate fate of the continuing proceedings would still rest on the result of the final adjudication by the Court.

Considering the stakes involved, and the very real statutory possibility of the Court substituting the arbitral tribunal, it is but natural for a disgruntled party that has serious reservations about continuing with the arbitration proceedings to attempt to utilize this opportunity to get rid of an ostensibly unfavourable arbitral tribunal or arbitrator on issues completely unrelated to the aspect of delay.

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For instance, a party apprehending that a particular arbitrator or the arbitral tribunal as a whole is biased against it, or that any decision taken by the arbitral tribunal in matters of procedure or on the merits at an interim stage may seriously disadvantage it, would attempt to use this as an opportunity to try and have the unpalatable arbitral tribunal or arbitrator substituted by the Court.

In the aforesaid background, what is of significance for the purpose of the present piece is the scope of the adjudication which the Court undertakes while considering an application for extension, and which scope is seemingly articulated in Section 29(A)(5) of the Arbitration Act as under:

"*(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and* ***may be granted only for sufficient cause*** *and on such terms and conditions as may be imposed by the Court*."

As is evident, the usage of the somewhat nebulous term "sufficient cause" in the context of the extension of time results in some ambiguity. Would the term "sufficient cause" refer only to the aspect of delay or would it also encompass within itself other elements which may give the Court serious food for thought as to the manner in which the arbitral tribunal has conducted the proceedings?

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It is evident that adopting the latter approach could, in many cases, result in an application for extension resulting in a mini-trial pertaining to the conduct of the arbitration proceedings by the arbitral tribunal till the date of the filing of the application for extension before the Court.

This would inevitably be coupled with a minute examination of each and every action or decision taken by the arbitral tribunal during the course of the proceedings, all from the prism of whether the Court, on an overall conspectus of the proceedings, is satisfied that "sufficient cause" has been demonstrated to extend the tenure of the arbitral tribunal.

In the aforesaid background, if one were to undertake a review of the judicial precedents on the issue, the Courts appear to have unanimously veered towards an extremely restrictive understanding of the term "sufficient cause" as appearing in Section 29A by inter-linking it with the element of delay alone. The High Court of Delhi in ***NCC Ltd. v. Union of India*** has unequivocally held that Section 29A of the Arbitration Act is intended to counter the delay in the conclusion of arbitration proceedings alone, and cannot be sought to be utilized for the achievement of objectives that are alien to the said purpose in the following words:

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

The Court then further went on to observe that an allegation that the arbitral tribunal was biased against the resisting party would not be a relevant factor which would detain the Court while considering an application for extension in the following words:

> "*14. As far as the grievance of the respondents that the conduct of the arbitration proceedings are biased is concerned, the same cannot be the subject matter of the present proceedings. The respondents have also filed an application under Section 13 of the Act before the Arbitrator, which is pending adjudication. This Court, therefore,*

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refrains from making any observation on the said application. Even otherwise, in term of Section 13(4) of the Act, in case the said application is decided against the respondents, the remedy provided to the respondents would be to challenge the same alongwith the ultimate Award passed by the Arbitrator."

In a similar vein, in an unreported decision in ***Orissa Concrete and Allied Industries Ltd. v. Union of India & Anr.***, the High Court of Delhi observed as under while brushing aside the resistance to an application for extension on the ground that the arbitral tribunal had allegedly not afforded the resisting party a sufficient opportunity of hearing:

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

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The aforesaid principle was further reiterated by the High Court of Delhi in ***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India***.

The High Court of Bombay in ***FCA India Automobiles Pvt. Ltd. v. Torque Motor Cars Pvt. Ltd. & Anr.***, while granting the extension prayed for, refused to examine the correctness of various orders passed by the arbitral tribunal relating to fixation of fees and rejection of the application for termination of mandate filed by the resisting party under Sections 12 and 13 of the Arbitration Act, by holding the same to be beyond the purview of examination under Section 29A.

The High Court of Gujarat in ***NileshRamanbhai Patel &Ors.v. BhanubhaiRamanbhai Patel*** has pertinently observed that Section 29A of the Arbitration Act represents a complete code in itself.

An examination of the aforesaid precedents would categorically demonstrate that the scope of adjudication in an application for extension under Section 29A pertains only to the aspect of delay.

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Insofar as other issues such as alleged bias and/or incorrect decisions on the merits or on matters of procedure by the arbitral tribunal are concerned, the applicable relevant provisions of the Arbitration Act would have to be taken recourse to by the parties, and these grievances cannot be sought to be dovetailed into and made part of the arsenal when seeking to resist an application for extension.

It is evident that such an approach is not only in line with the legislative intent behind the incorporation of Section 29(A), which was to eschew delay rather than to enable a review by the Court of the conduct of the proceedings by the arbitral tribunal at the said stage. Yet further, it also facilitates an early adjudication of the application for extension of time which is statutorily intended, in a directory sense, to be disposed of within a period of sixty days.

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CHAPTER 13

INTERROGATORIES, LETTERS TO PRODUCE & DISCOVERIES

WHAT ARE INTERROGATORIES AND DISCOVERY BY INTERROGATORIES?

- Interrogatories are covered under Section 30 and Order XI Rule 1 to 11, 21 and 22 of the Code of Civil Procedure, 1908.
- Interrogatories are a set of questions which a party administers on the other party with the leave of the Court.
- The party to whom interrogatories are administered, must answer them in writing and on oath. The party to whom interrogatories are administered, discovers or discloses by his affidavit, in answer to the interrogatories, the nature of its case. This is called Discovery by Interrogatories.
- Interrogatories have to be confined to the facts which are relevant to the matters in question but not as to conclusions of law, inference from facts or construction of words or documents.

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- The Application for leave to administer interrogatories is as a rule made *ex parte* and the Court shall decide the said application within 7 days from its filing. (Rule 2)
- Interrogatories shall be in Form 2 of Appendix C. (Rule 4)

PURPOSE OF INTERROGATORIES

- To ascertain the nature of the opponent's case or the material facts constituting his case
- To support one's own case, either (1)Directly, by obtaining admissions, or (2) Indirectly, by destroying the opponent's case.

TYPES OF INTERROGATORIES THAT MAY NOT BE ALLOWED

- Interrogatories for obtaining discovery of facts, may not be allowed, which
  - constitute the evidence of the opposite party
  - contain any confidential or privileged communication
  - involve disclosures injurious to public interests
- Interrogatories in the nature of fishing or roving enquiries are not allowed.

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INTERROGATION OF A BODY CORPORATE

- Where the party to be interrogated is a body corporate, the interrogatories should specify the officer or member on whom the interrogatories are to be served. (Rule 5)

OBJECTIONS TO INTERROGATORIES BY ANSWER CAN BE MADE ON FOLLOWING GROUNDS, IF THE INTERROGATORY IS: (RULE 6)

- Scandalous
- Irrelevant
- Not exhibited bonafide
- Premature i.e. not material at that stage
- Privileged communications
- Any other ground such as provided under Rule 7 or the answers are likely to be incriminating in offences.

- These objections must be taken by the answering party in its affidavit of answers to the interrogatories in Form No. 2, Appendix C. (Rule 8&9)

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SETTING ASIDE AND STRIKING OFF INTERROGATORIES CAN BE MADE ON THE FOLLOWING GROUNDS (RULE 7)

- Unreasonably or vexatiously exhibited
- Prolix, Oppressive, Unnecessary or Scandalous

- The Application for setting aside or striking off interrogatories shall be made within 7 days after service of interrogatories.

INTERROGATORIES NOT ANSWER SUFFICIENTLY OR BE INSUFFICIENTLY ANSWERED (RULE 11)

- If the interrogatories are not answered or insufficiently answered, then the interrogating party may apply to the Court for an order requiring the other party to answer or answer further.
- The Court may direct the party to answer either by affidavit or by *viva voce* examination.

CONSEQUENCE OF FAILURE TO ANSWER INTERROGATORIES (RULE 21)

If a party fails to comply with an order to answer interrogatories, then:

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- If the failing party is a Plaintiff, its suit is to be dismissed for want of prosecution
- If the failing party is a Defendant, its defense to be struck out and be placed in a position as if it had not defended.
- The party which served the interrogatories may apply to the Court for an order to this effect.
- The Court shall pass such order after notice to the other party and giving them an opportunity of being heard.

The production of documentary evidence holds major importance towards the outcome of any commercial dispute. Production of documents is necessary as it helps the tribunal to deliver a reasoned award. Parties submit the documents to the arbitral tribunal to support their claim, counter claim or defense. The problem usually arises when parties rely on the documents which are in the possession of the opposite party.

Section 27 of the Act deals with evidence, however there is no specific provision giving powers to the arbitral tribunal to order for discoveries and production of documents. Section 19 gives power to the tribunal to determine the rules of procedure.

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Thyssen Krupp Werkstoffe GMBH v. Steel Authority of India it was held that though there is no specific provision under the Arbitration and Conciliation, 1996 specifically conferring power on the arbitrator to direct discovery, the arbitrator has absolute power and flexibility to conduct the proceeding as he may consider appropriate and is not bound by the Indian Evidence Act, 1872 and Code of Civil Procedure, 1908. Further, it was held that Section 27 of the Arbitration and Conciliation Act, 1996 only deals with third-party discovery and not with the discovery of parties.

Delta Distilleries Limited v. United Sprits Limited, AIR 2014 SCC 13, The Supreme Court further interpreted that the term "any person" in Section 27(2) (c) of the Act of 1996 is wide enough to cover not merely the witnesses, but also the parties to the proceeding. The Hon'ble Supreme Court of India held, "It cannot be ignored that the tribunal is required to make an award on the merits of the claim placed before it. For that purpose, if any evidence becomes necessary the tribunal ought to have the power to get the evidence".

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Silor Associates S.A. V Bharat Heavy Electrical Limited 213(2014)DLT312

"There is nothing in the Act to contra indicate the existence of jurisdiction/power in the tribunal to require the parties to produce documents, exhibits or other evidence, as the arbitral tribunal may determine. The aforesaid provision has the effect of vesting the tribunal with much greater autonomy in the matter of regulating its procedure for conduct of the arbitration proceedings, than that exercised by a civil court-which is bound by the rigour of the Code of Civil Procedure (CPC) and the Indian Evidence Act. The scheme contained in Section 19 of the Act is not to denude the arbitral tribunal of its power to regulate its procedure for effective and expeditious conduct of the arbitration proceedings in a transparent and fair manner. On the contrary, the legislative intent appears to be vest the arbitral tribunal with autonomy and flexibility in the matter of conduct of its proceedings so as to expedite the proceedings and cut the procedural wrangles witnessed in courts - which are governed by the CPC and the Evidence Act."

"Therefore, it is evident that the arbitral tribunal is empowered on its own, without taking resort to Section 27 of the Act, to direct, a party to produce documents, and upon the failure to comply with the tribunals direction to produce documents, the aggrieved party-who is aggrieved by the non production of documents, may either require the arbitral tribunal to draw an adverse inference against the defaulting party, or may choose to require the arbitral tribunal to enforce the direction to

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produce the relevant document with the assistance of the court by resort to Section 27 of the Act."

Bharat Heavy Electrical Limited v Silor Associates S.A2014(3)ARBLR522(Delhi) the Division Bench of Delhi High Court while concurring with the view taken by the Ld, Single Judge held, "thus, if an application is filed before a tribunal requiring a party before the tribunal to produce a document in its power and possession, the tribunal would be competent to deal with the same without any reference being made to a court."

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CHAPTER 14

SETTING ASIDE AN AWARD & JUDICIAL INTERVENTION

The Arbitration Act of 1940 provide three kinds of remedies against arbitral awards namely, rectification, remission and setting aside of the Arbitral Award. However the present position is different in the sense that that now the remedies have been clubbed into two. Moreover the Arbitral Tribunal under the 1996 cannot review an Award on its own, the aggrieved party who has suffered on account of the Arbitral Award is required to challenge it according to the Law prescribed, and if the aggrieved party fails to apply under section 34 for setting aside the Award, then a de novo inquiry is not bound to arise on its own.

The Supreme Court ***in Indu Engineerinering and Textiles Ltd. v. Delhi Development Authority (2001)3 SCR 916*** has remarked that "an arbitrator is a judge appointed by the parties and as such an award passed by him is not lightly interfered with." However, since the main aim of the Award is to render legitimate award in the interest of justice, hence the Court is vested with the power to keep a vigil on the Arbitrator's actions. Keeping this aim in mind the law provides certain remedies against the Arbitral Awards.

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Section 34 of the Arbitration and Conciliation Act, 1996 gives the Court or the Judiciary the power to intervene in the Arbitration process for the purpose of setting aside the Award rendered by the Arbitration Tribunal. This section deals with the procedure for the application and also the grounds for setting aside the arbitral Award. Moreover, the limitation period has also been set within which the application has to be filed with the Court.

Grounds for setting aside an Award

Section 34 of the 1996 Act is in consonance to Article 34 of the UNCITRAL Model Law and also to section 30 of the Arbitration Act, 1940. However the scope of section 34 is limited in consideration to section 30 of the Arbitration Act, 1940 ***(P. Gopal Raju v. Secretary, Govt. of India, Ministry of Urban Development, New Delhi, AIR 2006 (NOC) 1566 (Kar))***. The basis on which an Award can be challenged under section 34 are limited, moreover the term "Public Policy of India" is devoid of any specific definition under the 1996 Act.

Section 34(2) (a) of the Arbitration and Conciliation Act, 1996 mentions certain grounds on account of which the Court can set aside the arbitral award, if the party proves that:

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I. a party was under some incapacity,

II. the arbitration agreement is not valid in accordance with the Law to which the parties to the Agreement have subjected it

III. no proper notice of the appointment of the arbitrator or the proceeding had been given to it

IV. the dispute dealt by the arbitral award does not fall within the terms of the submission to arbitration, or the award contains a decision beyond the scope of the submission to arbitration.

V. the composition of the tribunal was not in accordance with the agreement of the parties.

Moreover under section 34 (2) (b) of the Act the court may set aside the Award if:

I. the subject matter of the dispute cannot be settled by means of Arbitration

II. the Arbitral award is in conflict with the public policy of India.

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Amendments brought in Section 34 under The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) ordinance, 2015 brings about significant modifications in the Act, with the object of speeding the arbitration procedure and reducing intervention by the courts thereby making India a more attractive destination for foreign investors and improving the ease of doing business in India. In ***Municipal Corporation of Greater Mumbai v. Prestress Products (India)(2003) 4 RAJ 363 (Bom)*** it was held that the amended was made with the object of reducing judicial intervention.

Public Policy

The term "Public policy" found no definition in Act and hence the term remained ambiguous. Due to the non precise definition of the term public policy, the term had a wide meaning thereby giving the courts the liberty to interpret it according to their understanding. The expression is taken to imply larger public interest or public good. However this gives an abstract explanation of the term without giving a precise meaning to it. Hence the explanation appended to sub- clause (ii) by means of the amendment Act has defined the scope and meaning of the expression where the arbitration award shall be contemplated to be against public policy if the award was persuaded by fraud or corruption or in violation of the fundamental

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policy of India Law or the basic notions of the policy morality and justice. In ***Rail India Technical And Economic Services Ltd v Ravi Constructions (2003) 4 RAJ 394*** the court opined that the enforcement of an arbitral Award is to be declined as being against public policy if it is against the fundamental policy of India Law, country's interests and its sense of justice and morality. The expression "Public policy" has been interpreted differently and the scope and meaning of the term has been a topic of debate amongst many practitioners and academicians.

The first case where the scope of public policy was enumerated was in ***Renusagar Power Co. Ltd v. General Electric Co. 1994 SCC Supl. (1) 644*** where the Court gave a restricted meaning to the expression public policy in an international Commercial arbitration case where an award could be refused only when the award is against (1) fundamental policy of India (2) interest of India (3) justice or morality.

However the Supreme Court giving a broader meaning to the term "public policy" in ***ONGC Ltd v. Saw Pipes Ltd (2003) 5 SCC 705: AIR 2003 SC 2629*** explaining the concept of "public policy of India" said that it has not been defined in the Act and is vague and is likely to be interpreted widely or narrowly depending on the context in which it is being use.

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The Law commission in its 246th Report made suggestions so as to make the application for setting aside an arbitral award restricted on grounds of public policy and to apply only when the award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of morality.

The Law Commission was the first to suggest the amendment and its suggestion was thereby incorporated in the Amendment Act. The amendment was brought into effect so as to limit the judicial intervention of Courts in Arbitration. This is so because the main idea for adopting arbitration as a means for settling disputes is speedy resolution of disputes and if Courts are involved in the process then it will only add to the pendency and cots of the parties to arbitration. Moreover the amendment has also appended explanation 2 to sub-clause (ii) by virtue of which when an aggrieved party applies for setting aside an arbitral award on grounds of fundamental policy of Indian Law the courts are now barred from going into the worth of the case.

Constitutional Validity of Section 34

In TPI v Union of India (2001) 2 AD (Del) 21 a writ petition was presented where the Petitioner contended that there must be a right to challenge an arbitral award on

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merits and if it were not so then section 34 was to be rendered unconstitutional. However the Court dismissing the petition stated that the subject matter was not related to judicial review of a tribunal decision created under any statute or administrative action. Arbitration being an alternate form of dispute settlement is chosen by parties by the free consent of the parties and the arbitrator's determination is accepted by the parties by reciprocal agreement which varies from the common judicial medium otherwise available to the parties. The parties are not under any compulsion of any Statute which compels them to resort to arbitration if a dispute arises. Hence in such an event where the parties have themselves chosen the arbitrator and the forum, there is no necessity to make a provision for appeal against the award rendered by the arbitrator. Here the legislature is authorized to set the grounds for challenging the award and the parties are to challenge the award only on those grounds. On the other hand if the Court is given the authority to re-examine the correctness if the award, the proceedings would be useless.

Patently Illegal

The Amendment to the Arbitration and Conciliation Act, 1996 has also included Section 2A which provides for patent illegality which is an additional ground for setting aside an arbitral award. This ground will be applicable only to arbitrations taking place in India and not to International Commercial Arbitrations as can be

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interpreted from the wording of the section which says "other than International commercial arbitration". "Error of Law apparent on the face of the record" in Administrative Law has been regarded as one of the grounds for invalidating a judicial or quasi judicial matter under the writ of certiorari. In Arbitration, if an arbitral award is inconsistent with any of the provisions of the Arbitration and Conciliation Act, 1996 then it would amount to a patent error on its face. Such decision or an award is a nullity and would not have any effect on law and hence can be declared as void, incapable of being enforced.

Such award according to Lord Radcliff as held in ***Smith v. East Elloe [1956] 1 All E.R. 855 CRL*** "bears a brand of invalidity on its forehead." Though this is a ground for setting aside an arbitral award by the Court, nevertheless the person against whom such award has been rendered can itself resist the execution of such an award. The concept of public policy implies matters which are of common good to the people and in the interest of people. The notion as to what constitutes common good for people or what is in interest of people and what is harmful or injurious to the common people has been a matter of debate and has differed at different times. But an award that is patently in violation of a statute or a statutory provision and can be inferred on the face of the award, such award cannot be said to be in the interest of the common people or for the good of the people. Moreover

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such an award would apparently have negative impact on the administration of justice and hence it can set aside as patently illegal if it is contrary to:

a. fundamental policy of India

b. the interest of India

c. justice or morality

d. if it is patently illegal

A final decree can be disputed only on restricted number grounds such as lack of jurisdiction or nullity. But where the Appellate Court is exercising revisional jurisdiction and a decree is challenged before such a court, then the jurisdiction of such court is broader in scope. Therefore where the credibility of an award has been questioned on ground of "public policy of India" a broader meaning is to be appended so that the award passed by the Tribunal which is patently illegal could be set aside as held in ***Natural Gas Corp. Ltd v. SAW Pipes Ltd AIR 2003 SC 2629 (264)***.

The Supreme Court in ***Associate Builder's v. Delhi Development Authority 2014 (4) ARBLR 307(SC)*** has elaborated as to what constitutes patent illegality. According to the Court patent illegality shall include:

I. fraud or corruption

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II. Contravention of substantive law III. error of law by the arbitrator

III. contravention of the arbitration and Conciliation Act, 1996 itself

IV. the arbitrator fails to give consideration to the terms of the contract and usages of trade under section 28(3) of the Act

V. Arbitrator fails to give a reason for his decision.

Moreover a proviso is also appended to subsection 2A which states that if the court believes that there is an erroneous application of Law, this cannot be a sole basis for setting aside the award. Under the Act of 1996, an award can only be questioned under section 34 of the Act. Mere erroneous finding by itself cannot be the subject matter to the award passed, as held in ***Shanska Cementation India Ltd, Mumbai v. BajranglalAgarwal 2003 AIH 3735 (3741) (Bom)***.

Intimation of A Notice to the Other Party

The Amendment has incorporated another subsection 5 which requires that an application can be made only after intimating a notice to the other party along with an affidavit by the applicant endorsing his compliance with the requirement of sending a notice. The main idea behind incorporating sub-section 5 is to intimate the party in whose support the award has been passed of the action which is being taken by the party filing an application for setting aside the award. Moreover this is

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also in consonance of the principle that a party to a suit shall have the right to receive a notice of any action being taken by the other party so as to prepare himself of such action.

Time Limit for Disposal of Application Another significant incorporation is the addition of subsection 6 to section 34 which provides the time limit for disposal of the application.

The main intention behind incorporating this sub section is to promote speedy resolution of disputes keeping in mind the number of cases arising in commercial arbitration. Hence subsection 5 provides for disposing the application as expeditiously as possible before the expiry of one year from the date on which a notice was given to the other party.

Hence the Courts are required to adhere to the time limit and dispose of the application as soon as possible thus keeping up the object of speedy resolution of disputes. The main object of resolution of disputes through the process of arbitration is speedy resolution of disputes and this is the prime reason that people resort to arbitration rather than lengthy court proceedings. It is not an unknown fact that court proceeding in India take a long time for resolving disputes, and when a

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party brings an application under section 34 of the Act before the court for setting aside the award, the other party is again exposed to such a risk of delay.

Keeping this situation in mind the amendment has been made where the Court has to dispose the application before the expiry of one year. Hence the maximum delay which the court can make in disposing the application is one year.

Curtailment of Judicial Intervention One of the essential objectives in enacting the Arbitration and Conciliation act, 1996 was to restrict the scope of intervention by Courts. Moreover with the Arbitration and conciliation (Amendment) Act, 2015, judicial intervention has further been curtailed where the ambit of public policy has been limited and an award is considered in conflict with public policy of India if :

i. the making of the award was persuaded or affected by fraud or corruption
ii. it is against the fundamental policy of Indian Law
iii. it is in contravention with the most basic notions of morality or justice.

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These grounds have also been enumerated by the Supreme Court in the case of ***McDermott International Inc. v. Burn Standards Co. Ltd. (2006) 11 SCC 181*** where the Court opined that the Arbitration and Conciliation Act of 1996 in order to ensure fairness, makes the court a supervising agency for review of the arbitral award. Further the Court stated that the Court can intervene only in certain instances like in case of fraud or bias by the arbitrators or violation of natural justice and so on. The court can only put an end to an the award thereby enabling the parties to bring a fresh arbitration if it is desired. Moreover the aim of the provision is to keep the supervisory role of the court to a restricted level. This in fact is justified since the parties to the arbitration by opting for arbitration make a conscious decision not to include the court's jurisdiction so as to ensure expediency and finality. Moreover in the case of ***Sangyong Enginnering and Construction v. National Highways Authority of India F.A.O. (OS) Comm. 82/2016*** the Division Bench of Delhi High Court dismissing the petition filed by the applicant under section 34 of the Act, stated that a court is not to interfere with an arbitral award if a contract can be interpreted in two ways only on the ground that the court holds the other view. In this case the order of the single judge was challenged by the appellant where the single judge had dismissed the Appellant's petition under Section 34 of the Arbitration and Conciliation Act, 1996 for setting

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aside the arbitral award. Here the Court also stated that the Arbitrator's view could not be substituted by the Court's own view.

In Union of India v. Popular Construction Company AIR 2001 SC 4010 a question arose as to whether section 5 of the Limitation Act would be applicable under section 34 for applying for setting aside an arbitration award. The Court while arriving at a conclusion examined the past history and purpose of the act and also what was the intent of the legislature while framing the Law. One of the cardinal purpose of the Act was to reduce intervention by courts in the arbitration process. This objective is apparent in section 5 of the Arbitration and conciliation Act, 1996. Moreover the intention of the legislature can be deduced from the wording of the proviso of section 34 (3) which says "but not thereafter". Hence it was held that the expression would prevent the application of section 5 of the Limitation Act due to the apparent exclusion within the meaning of section 29 (2) of the Limitation Act.

Moreover the 2005 Amendment Act has substituted section 36 of the Act, by virtue of which if the time limit within which the applicant has to apply has expired, then the Award shall be enforced in the same manner as if it were a decree of a court under the Code of Civil Procedure, 1908.

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The time limit for applying for setting aside the award has been provided to ensure speedy resolution of litigation. However making strict application of the limitation period may result in preventing an honest applicant from making an application for setting aside the award due to genuine impediments which might have prevented him from making an application within the prescribed time limit. Hence procedural Law should not be allowed to defeat the right granted by substantive law.

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CHAPTER 15
ENFORCEMENT OF AWARD

1. **Enforcement of Domestic Awards:**

An award holder would have to wait for a period of three months after the receipt of the award prior to applying for enforcement and execution. During the intervening period, the award may be challenged in accordance with Section 34 of the Act. After expiry of the aforesaid period, if a court finds the award to be enforceable, at the stage of execution, there can be no further challenge as to the validity of the arbitral award. Prior to the recent Arbitration and Conciliation (Amendment) Act, an application for setting aside an award would tantamount to a stay on proceedings for execution of the award. However, by virtue of the Amendment Act, a party challenging an award would have to move a separate application in order to seek a stay on the execution of an award.

2. **Enforcement of Foreign Awards:**

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention") as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva

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Convention"). If a party receives a binding award from a country which is a signatory to the New York Convention or the Geneva Convention and the award is made in a territory which has been notified as a convention country by India, the award would then be enforceable in India. The enforcement of a foreign award in India is a two-stage process which is initiated by filing an execution petition. Initially, a court would determine whether the award adhered to the requirements of the Act. Once an award is found to be enforceable it may be enforced like a decree of that court. However, at this stage parties would have to be mindful of the various challenges that may arise such as objections taken by the opposite party, and requirements such as filing original/ authenticated copy of the award and the underlying agreement before the court.

Requirements for enforcement of foreign awards

- Original award or a duly authenticated copy in the manner required by the country where it is made.
- Original agreement or duly certified copy.
- Evidence necessary to prove the award is a foreign award, wherever applicable.

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- Section 47 of the Act provides that the above "shall" be produced before the court, at the time of the application for enforcement of the foreign award. However, in a recent judgment, the Supreme Court of India interpreted that the word "shall" appearing in Section 47 of the Act relating to the production of the evidence as specified in the provision at the time of application has to be read as "may".

- It further observed that such an interpretation would mean that a party applying for enforcement of the award need not necessarily produce before the court a document mentioned therein "at the time of the application". Nonetheless, it further clarified that such interpretation of the word "shall" as "may" is restricted "only to the initial stage of the filing of the application and not thereafter."

3. Conditions for enforcement of arbitral awards – domestic and foreign

Enforcement of a foreign award may be refused and a domestic award may be set aside if it is proven that:

- The parties to the agreement were under some incapacity

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- The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made (especially in case of foreign awards).
- There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings or the party against whom the award was rendered was otherwise unable to present his case.
- Award is ultra vires the agreement or submission to arbitration.
- Award contains decisions on matters beyond the scope of submission to arbitration
- Composition of the arbitral authority or the arbitral procedure is ultra vires agreement
- Composition of the arbitral authority or the arbitral procedure is not in accordance with the law of the country where the arbitration took place.
- The award (specifically a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.
- Subject matter of the dispute is not capable of settlement by arbitration under Indian law
- Enforcement of the award would be contrary to the public policy of India.

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4. **Stamping and registration requirements of awards – domestic and foreign**

Domestic Awards

The Indian Stamp Act 1899 provides for stamping of arbitral awards with specific stamp duties and Section 35 provides that an award which is unstamped or is insufficiently stamped is inadmissible for any purpose, which may be validated on payment of the deficiency and penalty (provided it was original).

Issues relating to the stamping and registration of an award or documentation thereof, may be raised at the stage of enforcement under the Act. (M. Anasuya Devi and Anr v. M. Manik Reddy and Ors). The Supreme Court had also observed that the requirement of stamping an award and registration is within the ambit of Section 47 of the CPC and not covered by Section 34 of the Act.

The quantum of stamp duty to be paid would vary from state to state depending on where the award is made. Currently, as per the Maharashtra Stamp Act, the stamp duty for arbitral awards stands at five hundred rupees in Maharashtra; and in case of Delhi, as per Schedule 1A to the Stamp (Delhi Amendment) Act 2001, the stamp duty is calculated at roughly 0.1% of the value of the property to which the

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award relates. Under Section 17 of the Registration Act, 1908 an award has to be compulsorily registered if it affects immovable property, failing which, it shall be rendered invalid.

Foreign Awards

As far as foreign awards are concerned, the Supreme Court of India has categorically held that a foreign award is not liable to be stamped. **M/S. Shri Ram EPC Limited v Rioglass Solar SA (2018) SCC Online 147.**

Previously, the Delhi High Court in **Naval Gent Maritime Ltd v ShivnathRaiHarnarain (I) Ltd.**, had observed that a foreign award would not require registration and can be enforced as a decree, and the issue of stamp duty cannot stand in the way of deciding whether the award is enforceable or not.

A similar approach had been adopted by the Bombay High Court in the case of **Vitol S.A v. Bhatia International Limited** and the **High Court of Madhya Pradesh in Narayan Trading Co. v. Abcom Trading Pvt. Ltd**.

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5. Enforcement of arbitral awards: Appropriate forum & limitation

The Supreme Court in its recent ruling in, Sundaram Finance Ltd. v. Abdul Samad and Anr (2018) 3 SCC 622 clarified that an award holder can initiate execution proceedings before any court in India where assets are located. In case the subject-matter of the arbitration is of a specified value,14 commercial courts established under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015 ("Commercial Courts Act") would have jurisdiction, as given below:

I. Award arising out of an India seated arbitration (being an international commercial arbitration)

By virtue of the Commercial Courts Act and the Amendment Act, the Commercial Division of a High Court where assets of the opposite party lie shall have jurisdiction for applications relating to enforcement of such awards if the subject matter is money. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction, i.e., where the opposite party resides or carries on business or personally works for gain.

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II. Award arising out of an India seated arbitration (not being an international commercial arbitration)

As per the Commercial Courts Act and the Amendment Act, for such cases, the appropriate court would be the Commercial Court exercising such jurisdiction which would ordinarily lie before any principal Civil Court of original jurisdiction in a district, as well as the Commercial Division of a High Court in exercise of its ordinary original civil jurisdiction.

III. Foreign Awards

Where the subject matter is money, the Commercial Division of any High Court in India where assets of the opposite party lie shall have jurisdiction. In case of any other subject matter, Commercial Division of a High Court which would have jurisdiction as if the subject matter of the award was a subject matter of a suit shall have jurisdiction.

A. Limitation period for enforcement of awards

i. Domestic awards

Since arbitral awards are deemed as decrees for the purposes of enforcement (as observed by the Supreme Court in M**/s UmeshGoel v. Himachal Pradesh**

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Cooperative Group Housing Society, the Limitation Act 1963 applies to arbitrations. The limitation period for enforcement of such an award is twelve years.

ii. Foreign awards

The Act provides that certain conditions (as listed above) have to be assessed prior to enforcement of a foreign award, and where the court is satisfied that the foreign award is enforceable, the award would be deemed to be a decree of that court. The Supreme Court in **M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd 2001 (6) SCC 356**, held that under the Act a foreign award is already stamped as the decree. It observed that, "In one proceeding there may be different stages". In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again." **M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd. 2001 (6) SCC 356.**

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Compania Naviera 'Sodnoc' v. Bharat Refineries Ltd. AIR 2007 Mad 251; Imax Corporation v. E-City Entertainment (I) Pvt. Ltd. and Ors., Commercial Arbitration Petition No. 414 of 2018 (Bombay High Court, decided on 13 November 2019) Accordingly, courts have been of the view that the limitation period for enforcement of a foreign award would be the limitation period for execution of decrees, i.e., twelve years.

6. How Courts Examine Awards: Execution of decrees in India

- The grounds of challenge enlisted are exhaustive and courts cannot expand the grounds for refusal of enforcement.

- Executing court cannot re-examine the award apart from satisfying itself on a superficial basis about the award.

- Executing court cannot examine the merits of the case.

- The exercise is not an "appeal" on merits against order of tribunal, but merely review.

- Accordingly, the court has to first make enquiry as to enforceability of award and secondly hold that it is enforceable and thereafter enforce it.

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- Once an award is found to be enforceable by a court, it would be enforced like a

Enforcement of Decrees in India

On a decree being passed, execution proceedings can be initiated for enforcement of the decree. Section 36 to 74 and Order XXI of the CPC set out the provisions in respect of execution.

The person in whose favour a decree has been passed or an order capable of execution has been made is known as a "decree-holder" while the person against whom a decree has been passed or an order capable of execution has been made is known as a "judgment-debtor**".**

7. **Enforcement of domestic decrees in India: Appropriate forum & limitation**

I. Appropriate forum

The proceedings to execute a decree must be initiated, in the first instance, before the court which passed it. Where appropriate, such court may transfer the decree to another court for execution for various reasons including the locus of the judgment

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debtor or the locus of the property against which the decree is sought to be executed.

II. Limitation Period

As per the Limitation Act 1963, the period of limitation for the execution of a decree (other than a decree granting a mandatory injunction, in which case, it is three years) is twelve years from the date of the decree. However, an application for execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

8. Enforcement of foreign judgments in India

Section 2(6) of the CPC defines "foreign judgment" as *"the judgment of a foreign Court,"* which refers to a Court situated outside India and not established or continued by the authority of the Central Government.

At the time of enforcement of foreign judgments in India, two situations may arise depending on whether the foreign judgment is passed by a court in: (i). A reciprocating country; (ii). A non-reciprocating country. A party seeking enforcement of a decree of a court in a reciprocating country is required to file execution proceedings in India while in case of a decree from a non-reciprocating

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country, a fresh suit has to be filed before the relevant court in India. The time limit for filing a suit for enforcement for such foreign judgments is three years from such judgment being delivered.

The first major step towards enforcement of foreign judgments in India is, to file execution proceedings, which is done by following the procedure, as envisaged under Section 44A and Order XXI of the CPC.

REGARDING THE "COURT" BEFORE WHICH AN EXECUTION PETITION IS TO BE FILED:

***Janardhan Mohandas RajanPillai and Anr.v. Madhubhai Patel and Ors.*, AIR 2003 Bom 490**The Bombay High Court has an established view that Section 44A clearly gives jurisdiction to the Bombay High Court which, for the purposes of execution of the decree, would be considered as the District Court.

***Messer Griesheim Gmbh v. Goyal MG Gases Pvt. Ltd.* (2013) 139 DRJ 556**

However, the Delhi High Court has an unsettled view. On reference to Section 5(2) of the Delhi High Courts Act 1966, notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in every suit the value of which

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exceeds rupees two crores. Thus, a Single Judge of the Delhi High Court had observed that for avoiding *"unnecessary confusion…There is no legal impediment … to approach the High Court in the first instance for execution of the decree of a value of more than Rs. 20 lakhs, as in the instant case."*

***Goyal MG Gases Pvt. Ltd. v. Messer GriesheimGmbh*(judgment passed on 1 July 2014 in EFA (OS) 3 of 2014)**

However, it was set aside by the Division Bench of the Delhi High Court which observed that *"the legislature has vested such 'District Court' the power to execute the 'foreign decree' as if it had been passed by itself"* and not the Delhi High Court.

SLP (C) No. 22539/2014 (order dated 1 September 2014)

This judgment was further appealed before the Supreme Court of India, which has granted a stay on the judgment of the Division Bench. This is now pending before the Supreme Court for final disposal.

II. Requirements for enforcement of foreign judgment

Under Section 44A of the CPC, where a 'certified copy of decree' of any of the superior courts of any reciprocating territory has been filed in a district court, the

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decree may be executed in India as if it had been passed by the district court. For proceeding with the execution, the certified copy of the decree shall be filed along with a 'certificate' from such superior court stating the extent, if any, to which the decree has been satisfied or adjusted. Such certificate shall be deemed as the conclusive proof of the extent of such satisfaction or adjustment.

III. Grounds of challenge to enforcement of foreign judgments

Section 13 of the CPC provides that a foreign judgment may operate as res judicata by being conclusive with respect to any matter adjudicated upon thereby (which does not include the reasons laid down in the foreign judgment). However, this shall not be applicable where:

a. It has not been pronounced by a Court of competent jurisdiction. While ascertaining competence of a foreign court, it has to be established that the concerned court is vested with jurisdiction in terms of its pecuniary and territorial limits, as well as rules of private international law.

b. It has not been given on the merits of the case;

c. It appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;

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d. The proceedings in which the judgment was obtained are opposed to natural justice;

e. It has been obtained by fraud;

f. It sustains a claim founded on a breach of any law in force in India

IV. Judicial Approach

Raj RajendraSardarMaloji v. Sri Shankar Saran **AIR 1962 SC 1737;** ***R.M.V. VellachiAchi v. R.M.A. RamanathanChettiar*****AIR 1973 Mad. 141** Courts have been consistent of the view that a party would not be bound by the jurisdiction of a foreign court if it has not submitted to such jurisdiction of the foreign court.

Chormal Balchand Firm v. Kasturi Chand **AIR 1938 Cal 511**Whether a party has voluntarily submitted to the jurisdiction of the foreign court, would depend on the facts and circumstances of the concerned case, for example, if a defendant appears in the court where the suit is instituted and questions both the jurisdiction and challenges the action on merits, he is said to have submitted to the jurisdiction voluntarily.

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***RamanathanChettiar v. KalimuthuPillai*AIR 1914 Mad. 556** Generally, as noted by the Madras High Court, the following denote instances of submission to the jurisdiction of the foreign court:

- Where the person is a subject of the foreign country in which the judgment has been obtained against him on prior occasions.
- Where he is a resident in foreign country when the action is commenced.
- Where a person selects the foreign court as the forum for taking action in the capacity of a plaintiff, in which forum he is sued later
- Where the party on summons voluntarily appears
- Where by an agreement a person has contracted to submit himself to the forum in which the judgment is obtained.

***Woollen Mills v. Standard Wool (U.K.) Ltd*(2001) 5 SCC 265** a judgment would be considered to be given on merits if some evidence (oral and/or documentary) is adduced on behalf of the plaintiffs.

The Orissa High Court in ***TrilochanChoudhury v. DayanidhiPatra*AIR 1961 Ori136**,observed that a judgment, however, brief, would be enforceable if it is based on a consideration of evidence.

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Similarly, the Bombay High Court, in ***Marine Geotechnics LLC, v. Coastal Marine Construction & Engineering Ltd*** **(2014) 3 AIR Bom R 193**held that ex parte decrees would also be valid. Judgments which follow summary procedure or otherwise shall not be considered as judgments given on merits of the case if there has been no examination of the evidence.

HSBC Bank USA v. Silverline Technologies Ltd **AIR 2006 Bom 134**Further, judgments based on consent or terms of settlement are also considered valid as being given on merits of the case. However, cases where the decree results from the sheer absence of the defendant either by way of penalty or in a formal manner, the judgment may not be one based on the merits of the case.

Similarly, the Supreme Court in *R. Vishwanathan v. Rukn – Ul- Mulk Syed Abdul Wajid***AIR 1963 SC 1**, observed that enforcement of a foreign judgment would be vitiated on non-observance of the judicial process, i.e. if the court rendering the judgment fails to observe the minimum requirements of natural justice.

Thus, it is required that parties are given reasonable notice and adequate opportunity of presenting their respective cases. Additionally, a foreign judgment would be rendered unenforceable if the foreign court was imposed upon or tricked

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into giving the judgment ***SankaranGovindan v. Lakshmi Bharathi& Others*** **AIR 1974 SC 1764; Satya v. Teja Singh AIR 1975 SC 105.**

9. Enforcement of foreign judgments from non-reciprocating countries

In case of a foreign judgment from a non-reciprocating country, it can be enforced only by filing a suit upon the judgment. The party is left with the option to sue on the basis of the foreign judgment or on the original cause of action in the domestic court or both. The resultant decree would thereafter be executed in India. Where a suit on a foreign judgment is dismissed on merits, no further application shall lie for the execution of such foreign judgment as it had merged in the decree which dismissed such suit for execution. In an event a decree is passed in favour of the party filing such a suit for enforcing the foreign judgment, it may proceed to execute it.

I. Requirements for enforcement of foreign judgments from non-reciprocating territories

A certified copy of the foreign judgment would have to be filed along with the plaint. This judgment would have evidentiary value, and be certified in manner, as required under Section 86 of the Evidence Act 1872 ("Evidence Act"). Further, an

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additional certificate by a representative of the Central Government of India in the foreign country is required under Section 86 of the Evidence Act.

The procedure stipulated under Section 86 of the Evidence Act does not exclude other modes of proof, e.g. deposition of an official as to what took place in his presence in the court of the foreign jurisdiction (subject to the requirements of the Evidence Act).

In any event, as a preliminary requirement, such foreign judgments sought to be executed in India have to satisfy the tests prescribed under Section 13 of the CPC.

II. Procedure for execution of foreign judgments from non-reciprocating territories

Filing a fresh suit in the relevant court of jurisdiction in India

A suit is instituted by filing a 'plaint' in a manner prescribed under Orders VI and VII of the CPC in a court of competent jurisdiction, along with the payment of appropriate court fees.

Under Order V of the CPC, notice is issued to the defendant summoning his appearance and directing him to file his reply within a specified date.

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After the plaintiff has instituted the suit and notified the defendant, the defendant is required to file its written statement, along with a set-off or counter claim, if any, in the court within 90 days of service of the summons. This is governed by Order VIII of the CPC.

After the parties complete the pleadings in the suit, the court frames the issues under Order XIV of the CPC, which is followed by the production, admission and denial of evidence. Thereafter, the examination and recording of evidence (documentary and/or oral) is completed.

After the hearing of a matter is completed, the judgment is pronounced in open court. Within fifteen days of the pronouncement of a judgment, the concerned court draws up the decree. If a defendant does not appear when the suit is called for hearing, irrespective of summons being duly served on him, the court may make an order that the suit be heard *ex parte*.

Fresh suit filed under Commercial Courts Act

In case the dispute is commercial in nature and of a specified value (as discussed earlier), a suit under the Commercial Courts Act would be initiated.

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In all such commercial disputes of specified value, a party may make an application (with a notice being issued to the opposite party) for summary judgment requesting the court to decide on the claim underlying the commercial dispute without recording oral evidence.

Prior to issues being framed the court may pass a summary judgment on consideration of the following:

- the plaintiff has no real prospect of succeeding on the claim or the defendant has no real prospect of successfully defending the claim, as the case may be; and
- there is no other compelling reason why the claim should not be disposed of before recording the oral evidence.

When it appears to a court that a judgment creditor may succeed but it is improbable that it will do so, it can pass a conditional order against the judgment debtor including, but not limited to, a condition requiring the judgment debtor to deposit a sum of money as security for the judgment.

Execution proceedings

The resultant decree would be enforced like a decree of that court which rendered the same. The modes of execution are elaborated below.

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Note: UAE was notified as a reciprocating territory by India, vide notification dated 17 January 2020.

III. Enforcement of foreign judgments in India: Limitation

Article 101 of the Limitation Act 1963 provides for the period of limitation for suits upon a foreign judgment as 'three years from the date of the judgment'. As per the Limitation Act 1963, the period of limitation for the execution of a decree, so passed, (other than a decree granting a mandatory injunction, in which case, it is three years) is 'twelve years from the date of the decree'.

11. Modes of Execution

Since foreign awards, domestic awards and foreign judgments (from reciprocating countries) are to be executed in India as a decree passed by an Indian court, the modes of execution for foreign awards and judgments and domestic awards and judgments are also common.

On an application made by the decree-holder for execution of the decree/ award (whether foreign or domestic), the court may order the execution of the decree / award by one or more of the following modes:

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- by delivery of any property specifically decreed
- by attachment and sale or by sale without attachment of any property
- by arrest and detention in prison
- by appointing a receiver
- by any other manner as the nature of the relief granted may require.

In case of decrees involving payment of money, execution by detention in prison shall be ordered only after the judgment debtor is given an opportunity of showing cause as to why he should not be imprisoned. In doing so, the court has to record in writing and be satisfied that the judgment debtor would obstruct or delay the execution of the decree. An executing court cannot go behind the decree, that is, it does not have the power to modify the terms of the decree and must take it as it stands. In case there are multiple decree-holders, the assets, after deducting the costs of realization, shall be distributed among all such persons.

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CHAPTER 16
ARBITRATION AND CONTEMPT

One of the major lacunas existing in the Act prior to the commencement of the Amendment Act of 2015 was the unenforceability of order/directions passed by a tribunal. Under section 17, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Prior to amendment, the section was quite open-textured in the scope of reliefs that could be provided; it permitted the tribunal to issue any interim measure of protection.

However, courts and arbitral tribunals took the view that the scope of the interim measures that may be granted under Section 17 was more limited than that under Section 9. Despite the arbitral tribunal's power to issue interim measures, the fact that the Act did not provide for a method of enforcing any interim relief granted meant that there were doubts regarding efficacy of the arbitral process. **M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619, Sri Krishan v. Anand (2009) 3 Arb LR 447 (Del)**. Therefore parties chose to approach the courts rather than continue with the arbitration proceedings.

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The Amendment Act has introduced much needed changes with respect to grant of interim reliefs by an arbitral tribunal and has brought clarity on the kind of reliefs that may be granted.

The Delhi High Court had attempted to find a suitable legislative basis for enforcing the orders of an arbitral tribunal under section 17 of the Act. In the judgment of ***Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del) (followed in Indiabulls Financial Services v. Jubilee Plots OMP Nos 452-453/2009 (Order dated 18.08.2009)*** the Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be "making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings" under section 27 (5) of Act, being the only mechanism for enforcing its orders.

The Supreme Court ("Court"), **in AlkaChandewar ("Appellant") v ShamshulIshrar Khan** ("Respondent") held that under Section 27(5) of the Arbitration and Conciliation Act, 1996 ("Act") any non-compliance of an arbitral tribunal's order or conduct amounting to contempt during the course of the arbitration proceedings can be referred to the appropriate court to be tried under the Contempt of Courts Act, 1971.

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The Sole Arbitrator passed an interim order dated October 7, 2010 **("Order")** under Section 17 of the Act directing the Respondent not to dispose any further flats without the leave of the Arbitral Tribunal. The Respondent allegedly was in breach of the said Order. The Arbitral Tribunal by an order dated May 5, 2014 referred the aforesaid contempt of the Order to the High Court to pass necessary orders under Section 27(5) of the Act. The High Court held that Section 27(5) of the Act does not empower an Arbitral Tribunal to make a representation to the Court for contempt of interim orders unless it relates to taking of evidence. The Supreme Court in the present case dealt with the scope and ambit of Section 27 (5) of the Act, specifically whether non-compliance with any order/direction of an Arbitral Tribunal would fall within its scope. The Appellant argued that Sections 9 and 17 being alternative remedies available to the parties during the conduct of arbitration proceedings, if orders made under Section 17 were deemed unenforceable or unactionable then the same would be rendered otiose. They also argued that Section 27 of the Act does not leave any doubt as to the scope and ambit of the Court's power to punish for contempt of orders made by the Arbitral Tribunal. The Respondent contented that the marginal note of Section 27 made it clear that Section 27(5) would only apply to assistance in taking evidence and not to any other contempt that may be committed. It was further highlighted that this

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lacuna in the law has now been filled pursuant to the 246th Law Commission Report, inserting Section 17(2) by the Amendment Act of 2015.

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The Court held that:

a. A literal interpretation of Section 27(5) would show that there are different categories of actions which can be referred to a court by a tribunal for contempt proceedings. One of those categories is the general and wide category of "*any other default*". Further, the Section is not confined to a person being guilty of contempt only when failing to attend in accordance with the process of taking evidence as the Section specifically states that persons guilty "*of any contempt to the Arbitral Tribunal during the conduct of the Arbitral proceedings*" shall be subject to contempt proceedings.

b. It is well settled that a marginal note in a statute was used to understand the general drift of the section only when the plain meaning of the words of the statute were ambiguous. This was not the case in the present situation and therefore the marginal note in section 27 would not alter the purport of the section.

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c. Per the modern rule of interpretation of statutes, the object of providing a party with the right to approach an Arbitral Tribunal instead of the Court for interim reliefs would be stultified if interim orders passed by such a Tribunal are deemed toothless. It is to give teeth to such orders that an express provision has been made in Section 27(5) of the Act.

d. The Court observed that the Supreme Court in *M/s Ambalal Sarabhai Enterprises vs. M/s AmritLal& Co. & Anr.* had held that parties to arbitration proceedings had to choose between applying for interim relief before the Tribunal under Section 17 or before the Court under Section 9. Such an election would be meaningless if interim orders passed by the Arbitral Tribunal were held to be unactionable, as all parties would then go only to the Court, which would render Section 17 a dead letter.

e. However, since an order passed by an arbitral tribunal was unenforceable therefore sub-section (2) to Section 17 was added by the Amendment Act of 2015, so that the cumbersome procedure of an Arbitral Tribunal having to apply every time to the High Court for contempt of its orders would no longer be necessary. Such orders would now be deemed to be orders of the

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Court for all purposes and would be enforced under the Civil Procedure Code, 1908 in the same manner as if they were orders of the Court.

The Supreme Court has through the present judgment confirmed the above position of law (in relation to arbitrations being conducted under the regime as applicable prior to 2015 amendment). Supreme Court clarified that parties can be punished for contempt for any action/default in complying with Tribunal's order or during the conduct of the proceedings and not merely restricted to taking evidence.

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CHAPTER 17
OVERLAP BETWEEN INSOLVENCY CODE AND ARBITRATION LAW

Arbitral awards are treated as orders of a court and can be enforced as such, under the Civil Procedure Code, 1908 (CPC), subject to defences under the Arbitration and Conciliation Act, 1996. The Insolvency and Bankruptcy Code, 2016 (code), perhaps inadvertently has become an alternative to the enforcement of arbitral awards. The code, which is a time bound process and results in the sale or liquidation of a company is triggered when default on a debt can be demonstrated. The code contemplates two main categories of debt, financial and operational. Arbitral awards and other orders have been summarily considered as evidence of debt according to the rules made under the code, without requiring argument in court proceedings.

The code therefore could become a major way of recovering monies due under an award in addition to the more usual means of enforcement, such as under the New York Convention, the UNCITRAL Model Law, the Arbitration Act and the CPC. This perhaps unintended overlap of arbitration law and the code raises the question of whether the code, being a more time bound and serious threat to a company, can be used to enforce awards when a comprehensive statutory mechanism for the

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enforcement of awards already exists. In theory, an award involving a debt could be challenged, and stayed or enforced without opposition by the debtor in the relevant court under the Arbitration Act, while the National Company Law Tribunal (NCLT) simultaneously admits insolvency proceedings against the debtor on the basis of the same award. This anomaly arises only as a result of a strict and narrow application of the code, looking only at the fact that a debt default exists. This presents serious questions of judicial overreach, forum-shopping and parallel proceedings.

This anomaly has indirectly been addressed in recent decisions that appear to take the view that code proceedings cannot be brought only for the purposes of enforcement of an award. These cases rely on section 65 of the code, which effectively prevents the code being used only for recovery of debt. Proceedings under the code must be for the purposes of resolution of the insolvency of a company as a whole, and not merely to recover the awarded sums. While there are no objective criteria for deciding whether proceedings under the code have been brought for resolution of insolvency as opposed to mere debt recovery, the National Company Law Appellate Tribunal (NCLAT) has analysed the conduct of parties in specific cases to answer this issue.

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In three decisions in December 2019, the NCLAT dismissed applications brought by respective lenders HDFC Bank, Dena Bank and the International Asset Reconstruction Company holding that the awards, whether or not the subject of simultaneous execution proceedings under the CPC, were barred by section 65 as involving debt recovery only. The conduct of the applicants justified this treatment of award holders. The financial creditors resorted to arbitration or other proceedings in the first instance rather than applying to the NCLT under the code. This showed that the creditors themselves considered recovery to be possible against the debtors on the presumption that a creditor will not file fruitless proceedings. These were not therefore situations involving insolvency of the debtors, only, at best, wilful failures of solvent companies to pay monies due under an award.

The situation would however be different, where the debt is generated by and subsequent to an award or order. This means that the debt will be an operational debt as opposed to a financial debt. Financial debts usually exist before the award in the form of loans, unconditional put options and so on, and are merely confirmed in or by the award or order.

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With operational debts, provided that there is no attempted simultaneous execution of the award under the CPC, it is possible for award holders to be seen as genuine insolvency applicants under the code. However, when the award is considered to be a financial debt any code proceedings for the same debt could be seen as an application only for debt recovery and not for the resolution of an insolvent company.

The scope and application of section 65 remain aspects of the code that have yet to be addressed by the Supreme Court. It can be argued that this provision is the only barrier against the code becoming a recovery mechanism for each and every arbitral award against a corporate entity. Nonetheless, strategies pursued by award holders, especially where they also wish to be treated as financial creditors under the code, will have to be carefully tailored to take this issue into account.

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CHAPTER 18
BLOCKCHAIN& AI: IS THE COCKTAIL RIGHT FOR CONDUCT OF ARBITRATION

Typically when we talk about blockchain in Arbitration, it resonates with resolving blockchain disputes using Arbitration. However, what the author is focusing on in this article is the use of blockchain in the process of arbitration to make it more efficient and free from the unnecessary indulgence of any stakeholder.

Arbitration process can be broadly broken down into six essential ingredients. Four are procedural aspects and two are legislative. The procedural ones are; submission of Pleadings, interim measures, taking of evidence and preparation of award. Two legislative are; security of data and the challenge & enforcement of Award. Blockchain with some ingredients of Artificial Intelligence can make the arbitration process flawless and absolutely free from the dynamics of human arbitrariness.

Research by: Adv. Shaista Pathan, Partner
Mentor : Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner

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The Arbitral Procedure

1. ***Notice of Arbitration.*** The process of arbitration begins with the notice of arbitration by the Claimant. It is not critical if the parties did not expressly agree to the conduct of arbitration using blockchain. A submission agreement could suffice that. Based on method adopted in the contract, Claimant having met the conditions of dispute resolution clause, can send the notice of arbitration. Claimant will require to create a digital platform using simple blockchain algorithm. This platform will be replicated at the respondent's place of operation such that the arbitration can be conducted smoothly. It's like an app where both parties exchange information. Parties can agree to use single server at either party's premise or have independent servers. We will call this the blockchain. This blockchain needs to be provided to all stakeholders in an arbitration.
2.

2. Appointment of Arbitrator. Once the notice of arbitration has been sent, appointment of tribunal/ Arbitrator can be done on the blockchain. The tribunal is part of this blockchain and exchange of documents, emails and messages etc. are

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all recorded automatically and replicated at all stakeholders computers, without the involvement of any third party. The case management conference can be done online using integrated video conferencing facility of blockchain which gets automatically recorded, transcribed and filed at the computers of all stakeholders in original and this cannot be manipulated. Even the calls to parties can be done using integrated VoIP calling facility and recorded automatically. Also, the terms of reference set out between the parties can be programmed as self executing smart legal contracts, to be resolved as the arbitration progresses. Each of these self executing SLCs will continue to get resolved as the documents are filed and witness statements are exchanged. The tool can advice on the shifting burden of proof to assist the Arbitrator.

3. The Pleadings. The Pleadings viz. statement of claim, statement of defence, counter claim, reply to counter claim, and further submissions etc. can be submitted online and are automatically served to the parties & the tribunal and an acknowledgement is automatically generated. This ensures time bound submissions. Any delays will automatically be penalised in terms of time or cost penalty prescribed by the tribunal or as agreed by the parties. The procedural orders and communication by the tribunal will be auto delivered to both parties and

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their representatives, mitigating the fear of ex-parte communication and lapse of due process.

4. Interim Measures. Interim measures when sought from courts can be either executed on the blockchain if the judicial system of a particular jurisdiction allows for seamless digital interface with the petitioners computers. If not, the court orders can be subsequently executed offline by the tribunal, as the case maybe. In case of automated interface with judicial system, the execution of court orders can happen immediately if the jurisdiction's administrative machinery is using blockchain. Otherwise, even offline execution can be done without interference of the parties.

5. Taking of Evidence & Preparation of Award. Taking of evidence and preparation of award, is where blockchain can be very efficient. Submission of witness statements, submission of documents and exhibits or any other evidence can be done by the parties online and they are automatically delivered to all stakeholders. Artificial Intelligence can carry out the role of document forensics and statistical detective, identifying instances of fraud and statistical mismatch. Witness conferencing, cross examination and taking of oral evidence can be easily done using integrated video conferencing suites or even if hearings are done

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physically, they can still be transferred on blockchain and stacked for procedural integrity. Statements of expert witnesses, oral submission by experts and expert communications can be done using integrated suites and recorded on blockchain. Best part is where all oral submissions get transcribed in real time and are available to the counsel during witness cross examination can enhance time efficiency and as a result reduce costs in Arbitration hearings. Artificial Intelligence with gesture recognition tools can advice the counsel if witness is lying. Moreover there is no scope of manipulating or denying anything said during the course of gathering evidence and proving witnesses.

THE SETTLEMENT AVERAGES

One of the critical propositions of this article is the Settlement Average. Before, during or after completion of hearings, the Artificial Intelligence based self executing tool will continue to provide both parties an opportunity to independently assess the outcome of the Arbitration and get to known what is the amount of settling the dispute at any point before or during the Arbitration. This is subject to parties prior acceptance of the proposition to settlement averages, the AI tool will continue to advice the parties without the involvement of third party or the tribunal. This will happen without anybody knowing what the other party sees.

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This can not only prevent parties from getting into any frivolous claims but also proactively predict the outcome of arbitration and likely damages based on historical data in order to settle it.

BRIEFS, TRANSCRIPTIONS & DOCUMENT MANAGEMENT

Blockchain based arbitration can quickly and efficiently provide synopses and briefs of large arbitration awards from the archives, for example in cases of voluminous investment arbitrations. The case laws quoted by the parties or sought by the tribunal can be quickly looked up and a smart brief generated for the benefit of all stakeholders. The AI tools will undertake the digital document management and arrange the documents in chronological order with auto indexing and hyperlinking of all exhibits and references. Even the witness statements and transcription of oral exhibits can be hyper linked to where they have been quoted. The blockchain tools will assist tribunals with the preparation of awards and ensure that all necessary ingredients to make the award reasoned and enforceable have been taken care of. The blockchain tools can also assist in preparation of settlement agreements and consent awards where applicable.

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There will be no need of tribunal secretaries or arbitrators relying on third party for preparation of award. No need for scrutiny by institutions or experts. In fact the blockchain will continue to prepare the award from beginning and as the arbitration progresses. When the blockchain keeps the tribunal informed of the due process and documents & exhibits are all temper proof and auto-linked, the probability of an award being set aside will be negligible. The tool will ensure that the award has all the necessary ingredients including the date, place and digital signature of the arbitrator.

Security of Data

Blockchain is the safest way of storing information because each block is replicated and authenticated by all stakeholders. The provision to change or delete any data does not exist until authenticated by all stakeholders. Since there is no third party involved, there is no network administrator or supervisor, the possibility of data breach is negligible. It's not easy to hack a blockchain network because unless the login is authenticated by all stakeholders the hacker cannot enter.

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If somebody employs Quantum servers to hack into a lets say large value investor state arbitration on blockchain, it will be disappointed because the random key generator can reset login credentials and prompt stakeholders to reset their passwords on detection of an attempted breach.

Enforceability

Will the awards prepared using blockchain, and an arbitration conducted using blockchain& artificial intelligence be acceptable by the courts? This question can be answered in the positive for most of the jurisdictions in the world. Besides, the procedure followed is as per the lex-arbtri. In fact, since there cannot be any allegations of fraud by the parties or mishandling by the tribunal, the chances of an award being set aside on procedural lapses is minimal. Since the provision of appeal does not exist in Arbitration, and award cannot be challenged on merits of the case and there being no judicial review, it is essential that local courts promote blockchain based arbitrations. The enforcement of awards coming out of blockchain will be more simpler, and free from arbitrariness of the tribunals and the courts.

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CONCLUSION

In conclusion, the present disposition of COVID and Work From Home, has provided the right opportunity for stakeholders to adopt blockchain based arbitration. It's now or never. Certain companies are applying blockchain technology for dispute resolution. However, it is too little and too late. As the businesses switch to blockchain, dispute resolution must also catch up. And now is the right time. Because, resolution of disputes is the fundamental right, and must continue notwithstanding the challenges.

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