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THE EVOLUTION OF INTERNATIONAL ARBITRATION IN INDIA: JUDICIALIZATION, GOVERNANCE, LEGITIMACY

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ABSTRACT

With the increase in international trade and commerce, there is also a growth in cross-border commercial disputes. Considering the indispensible requirement of an efficient mechanism to resolve disputes in today's era international arbitration has emerged as one of the most important and widely preferred option for resolving cross- border commercial disputes and preserving business relationships. With an immense influx of foreign investments, overseas trading and business transactions and open ended economic policies acting as a stimulant, international commercial disputes involving India are gradually expanding. This has gathered a massive focus from the international community on India's international arbitration regime. Due to certain contentious decisions given by the Indian judiciary in the last two decades, especially in cases entailing a foreign party, the international community has kept a close watch on the buildout of the laws pertaining to arbitration in India. The Indian judiciary has often been the subject of criticism for its interference in international arbitration and extra territorial application of municipal laws in foreign seated arbitration matters. The paper presents a critical analysis of the Indian Arbitration jurisprudence in context of the International Commercial Arbitration.

INTRODUCTION

On the above note, the recent developments in the jurisprudence of arbitration through various court judgments clearly reflect the assistance of the judiciary in facilitating India to adopt the best international practices. A pro- arbitration approach has been adopted by the Indian courts, which have helped in transmuting the landscape of arbitration in India. From year 2012 to 2019, the Indian Supreme Court has pronounced various landmark rulings taking a much desired pro-arbitration attitude such as declaring the Indian arbitration law was seat- centric, referring non-signatories to an arbitration agreement wherein the disputes are resolved through arbitration, defining the sweep of public policy in both domestic as well as in foreign seated arbitration. In furtherance of this approach, measures have been taken by the Indian government in supporting the cause of 'ease of doing business in India' and after two scrubbed attempts in 2001 and 2010 to

amend the arbitration law, finally in 2015 the Arbitration and Conciliation (Amendment) Act [hereinafter '2015 Amendment Act'] was passed by the Indian Parliament, with additions to the amendments incorporated by the Arbitration and Conciliation (Amendment) Ordinance, 2015. Consequently, the 2015 Amendment Act came into effect from October 23, 2015. It is prospective in nature and is applicable to arbitral as well as court proceedings which have commenced on or after October 23, 2015. However, the amendment to Section 36, which pertains to removing the implied autonomic stay on execution of the arbitral awards, applied retrospectively because of its procedural nature. The 2015 Act was well received and significantly improved the efficiency of arbitration law in Indian setup.

Subsequently, for reviewing the institutionalizing of the arbitration mechanism in India, a high level committee under the chairmanship of retired Supreme Court judge Justice B.N. Srikrishna was set up. It was establish to mainly identify the blockades to the development of institutional arbitration, examine specific issues affecting the landscape of Indian arbitration and prepare a roadmap for making India a robust centre for both international and domestic arbitration. On the recommendation of this committee reports, the Arbitration and Conciliation (Amendment) Bill, 2018 was proposed and the same was passed by Lok Sabha. However, the bill lapsed while pending in the Rajya Sabha. Subsequently, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced and successfully enacted as the Arbitration and Conciliation (Amendment) Act, 2019 [hereinafter '2019 Amendment Act']. The aim behind bringing this legislation is to make India a hub of institutional arbitration for domestic as well international arbitration.

INDIAN ARBITRATION REGIME

1) History of Arbitration Jurisprudence in India

Until the enactment of Arbitration and Conciliation Act, 1996 [hereinafter '1996 Act'] the law governing arbitration in India consisted mainly of three statutes:

i. The Arbitration (Protocol and Convention) Act, 1937
ii. The Indian Arbitration Act, 1940 and,
iii. The Foreign Awards (Recognition and Enforcement) Act, 1961

The Indian Arbitration Act, 1940 was the general law governing arbitration in India and had resemblance to the English Arbitration Act of 1934.

2) Backdrop of the Arbitration and Conciliation Act, 1996

In the view of the rising concerns and with the primary objective of encouraging the practice of arbitration as a cost and time efficient mechanism for the settlement of commercial disputes in both national and international spheres, in 1996, India adopted a new legislation based on the 'Model Law' in form of 1996 Act. The Act also aimed to provide a speedy and effectual dispute resolution mechanism in the existing judicial system which was already tainted by the inordinate delays and backlog of cases.

3) Scheme of the 1996 Act

The Act has been divided into three significant parts. Part I of the Act deals with the arbitration in the domestic sphere and ICA when the arbitration is seated in India, which means that an arbitration seated in India between two parties one of which is an Indian and another a foreign party, through defined as ICA is treated akin to a domestic arbitration. Part II of the Act deals exclusively with the foreign awards and their enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and Convention on the Execution of Foreign Arbitral Awards, 1927. Part III of the Act is a statutory manifestation of conciliation provisions. In Part I, section 8 regulates the commencement of arbitration while Section 3 to 6, 10 to 26, and 28-33 govern the conduct of arbitration proceeding, Section 34 regulated the challenge to the arbitral award and Section 35 &36 regulate the recognition and enforcement of the award. Other sections are ancillary provisions that either assist the arbitral proceedings or are structurally necessary. The Courts acknowledged that Chapters III to VI, specifically Sections10 to 33 of the Act, contains a crucial procedural law which the parties do have the autonomy to opt out of. These chapters of Part I form the part of the proper law, thus making them non- derogable by parties,

subjected to Part I, even by the means of contract.[1] On the same line, no provisions of Part II can be derogated, not even by the means of contract.[2]

As already mentioned above, the intention behind the enactment of this Act is to provide a speedy and cost effective mechanism for resolving dispute which would provide finality to the parties in their dispute. A number of judicial pronouncements ensure that the preferred seat in any cross-border contract was always a heavily negotiated point and more often than not, ended up being in New York, Singapore or London, which are considered to be the established global arbitration centers. Foreign investors and big corporates doing business in India were not ready to take any risks with the Indian legal system in such kind of circumstances.

4) Arbitration and Conciliation (Amendment) Act, 2015

The modifications introduced by the 2015 Act have definitely made significant changes in the rightful direction to bring more clarity and precision in the several issues with regard to the objectives of the Act. It provided for the stringent timelines for the completion as well as the execution of the arbitral proceedings by a fast track mechanism. Moreover, the Act has introduced the incorporating of the new provisions in addition to the amendments to the existing provisions governing the process of appointment of an arbitrator. It also provides for the grounds of challenging the appointment of arbitrator for the lack of independence and impartiality. As a welcome move, the Act provides for assistance from Indian Courts, even in foreign seated arbitration cases, in the form of interim relief before the actual commencement of the proceedings. Moreover, with the incorporation of the 'cost follow the event' regime in the Act, it has been brought in parallel with the accepted international standards. The process of enforcement and execution under the Act has also been streamlined so that the challenge petitions do not operated as an automated stay on the process of execution.

Following are some of the snapshots to the major amendments introduced by the 2015 Amendment Act:

i. Pre- Arbitral Proceedings

a) Independence and impartiality

[1]Anita Garg v. Glencore Grain Rotterdam B.V., 2011 (4) ARBLR 59 (Delhi).
[2]Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc., 2012 (9) SCC 552.

- Application of the parties pertaining to the appointment of the arbitrator shall be disposed of within a period of sixty days from date of service of notice against the opposite party.
- A well detailed schedule on ineligibility of arbitrators has been put in place in the Act.

b) Interim reliefs

- Parties have been granted discretion with regard to the foreign- seated arbitration to approach Indian courts for aid in foreign seated arbitration.
- Under Section 9, in cases of ICA seated in India as well as outside, applications shall be made directly before the High Courts.
- All the interim reliefs granted by the arbitral tribunals seated in India are deemed to be the orders of the court which will be enforceable in the new regime.
- Post grant of interim relief, arbitration proceedings must commence within the period of 90 days, it may extend to any further time as determined by the court.

ii. <u>Arbitral Proceedings</u>

a) Expeditious disposal of the cases

- A timeline of 12 months has been prescribed for completion of arbitration proceedings seated in India
- Expeditious disposal of applications along with indicatory timelines for filing the arbitration applications before courts in relation to interim reliefs, appointment and challenge petitions.
- Embodiment of fast track procedure of arbitration to resolve certain dispute within 6 months

b) Costs of Proceedings

- "*Costs follow the event*" regime has been introduced.
- Detailed provisions have been inserted pertaining to the determination of costs by the arbitral tribunal seated in India.

iii. Post- arbitral Proceedings

a) Enforcements and Challenge

- The grounds, on which an arbitral award could be challenged in the case of an ICA seated in India, have been narrowed.
- As per Section 34, the petition challenging such an award should be filed directly to the High Court in case of ICA seated in India, which should be disposed, in any event, within a period of one year from date on which notice is served against the opposite party.
- Upon filing a challenge petition under Section 34, it shall not be deemed to have an automatic effect of stay on the execution of the award. For the same, an order has to be passed by the Court expressly staying the execution proceedings.

5) Arbitration and Conciliation (Amendment) Act, 2019

As mentioned above, it is the result of the incorporation of the suggestions provided by the BN Srikrishna Committee. The 2019 Amendment Act brings about several key changes to the Indian arbitration landscape, which are discussed below:

- The 2019 Act, seeks to establish an independent statutory body, the Arbitration Council of India (hereinafter 'ACI' which would exercise the powers such as grading arbitral institutions, recognizing professional institutes that provide accreditation to arbitrators, issuing recommendations and guidelines for institutions.
- The 2019 Act amends the 2015 Act by empowering the Supreme Court and High Courts to designate any arbitral institution which have been accredited by the ACI with the power to appoint arbitrators. However the same has you been notified yet.
- The 2015 Act provided the time- limit 12 months which was extendable upto the period of 18 months with due consent of the parties for the completion of an arbitration proceedings from the date the arbitral tribunal enters upon reference. The 2019 Act amends the start date of this time limit by 6 months before which statement of claim and defence are to be filed.

- On the above lines, the 2019 Act, excludes ICA from this time-limit to complete arbitration proceedings.
- The 2019 Act also introduces explicit provisions on confidentiality of arbitration proceeding and grants immunity of arbitrators.
- Furthermore, it prescribes minimum qualification for a person to be appointed as an arbitrator under the Eighth schedule.
- Most importantly, the 2019 Act clarifies the scope of the applicability of the 2015 Act. It provides that the 2015 Amendment Act, which entered into force on 23 October, 2015 is applicable to both arbitral and to such court proceedings which emanate from such arbitral proceedings. This scope, which was enshrined under Section 87 of the 2015 Act, has now been struck down by the Apex Court.[3]

On August 30, 2019, the Central Government notified sections 1, 4-9, 11-13, and 15 of the 2019 Amendment Act. The notified amendments include amendments relating to the timeline for arbitration, confidentiality and applicability of the 2015 Act. However it should be kept in mind that these provisions pertaining to the ACI have not been notified yet.

INTERNATIONAL COMMERCIAL ARBITRATION: MEANING

Section 2(i) (f) of the Act defines an ICA as a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident, or is a foreign body corporate or is company, association or body of individuals whose central management or control is in the hands of a foreign party. Thus, as per the Indian law, an arbitration case with a seat in India, but involves a foreign party will also be regarded as an ICA and will be subject to Part I of the Act. However, where an ICA is held outside India, Part I has no applicability and provisions of Part II comes into picture.

The 2019 Amendment Act has deleted the words ‘a company’ from the purview of the definition thereby, hence restricting the definition of ICA only to the body of individuals or association.

[3]Hindustan Construction Company Limited v. Union of India, (2018) 6 SCC 287.

Therefore, making it clear that for a company having a place of incorporation in India, its central management and control would be irrelevant as far as the determination of being an ICA is concerned. The scope of this section has been determined by the Apex Court in the case of *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*[4] wherein it was concluded that 'a company incorporated in India can only have Indian nationality for the purpose of this Act'. Although, the companies controlled by the foreign hands as a foreign body corporate falls under the jurisdiction of this Act, the Supreme Court has excluded its application to the companies registered in India and having Indian nationality. Hence, in case a corporation poses dual nationality, one based on foreign control and another on the registration in India, for the purpose of the 2019 Act, such corporation would not be regarded as a foreign corporation.[5]

ARBITRABILITY UNDER INDIAN LAW

Arbitrability is one of the issues where the contractual and jurisdictional facets of the ICA meet head on. It basically involves the question as to what types of issues can and cannot be submitted to arbitration. The concept has been discussed in detail by the Apex Court in the case of *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*,[6] wherein the Court proposed different meaning of the term 'Arbitrability' in different context as **(i)** disputes being capable of adjudicated through arbitration, **(ii)** disputes covered under the arbitration agreement and **(iii)** disputes that have referred to arbitration by the parties. It stated that in principle, any dispute that can be decided by a civil court can also be resolved through arbitration. However, certain disputes may, by necessary implication, stands excluded from resolution by a private forum. It includes: ***(i)*** disputes relating to rights and liabilities which arises out of criminal offences, ***(ii)*** matrimonial disputes involving issues like divorce, judicial separation, restitution of conjugal rights or child custody, ***(iii)*** matter relating to guardianship, ***(iv)*** matter relating to insolvency and winding up, ***(v)*** testamentary matters and ***(vi)*** matter relating to tenancy or eviction governed by special statutes. In cases wherein,

[4]TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.
[5]Larsen & Turbo Ltd. SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority, 2018 SCC Online SC 1910.
[6] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., 2011 (5) SCC 532.

serious fraud and malpractices are alleged, such matter can only be settled by the court and not by the means of arbitration.[7] However the Supreme Court in *Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi*[8] held that allegations of fraud are not a bar to refer parties to a foreign seated arbitration and that the only exception are those which are specified in Section 45 i.e. in cases where the arbitration agreement is either ***(i)*** null and void, ***(ii)*** nullified or ***(iii)*** incapable of being performed. Thus, it seemed that though allegations of fraud are not arbitrable in ICA's with a seat in India, the same bar would not be applicable to ICAs with a foreign seat.[9] From the above discussion question might arise that whether the *Swiss Timing Ltd case*[10] overruled the ruling of *N Radhakrishnan.*[11]*?* The answer has been provided by the Supreme Court in the case of *A. Ayyasamy case*[12] wherein the Court illuminated that only frauds of simple nature are arbitrable. Moreover, the Court held that ***(i)*** allegations of fraud are arbitrable unless they are of serious and complex nature, ***(ii)*** unless fraud alleged is against the arbitration agreement, there is no hindrance in the arbitrability of fraud. Hence, the decision in Swiss Timing did not overrule N. Radhakrishnan, it differentiated between "fraud simpliciter" and "serious fraud" and concluding that while 'serious fraud is best left to be determined by the court, simple fraud can be examined by the arbitrator.[13] The Court further carved out two working tests to determine the distinction between them which are as follows: ***(i)*** does this plea pervade the entire contract, especially the arbitration agreement, rendering it null and void, ***(ii)*** whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.[14] However any dispute arising out of the Trust Deeds and the Indian Trusts Act, 1882 cannot be submitted to arbitration.[15]

[7] N. Radhakrishnan v. Maestro Engineers, 2010 (1) SCC 72.
[8] Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi, 2014 (6) SCC 677.
[9] World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd., AIR 2014 SC 968.
[10] Supra note 8
[11] Supra note 7
[12] A. Ayyasamy v. A Paramasivam & Ors., (2016) 10 SCC 386.
[13]Ameet Lalchand Shah v. Rishabh Enterprises & Ors., 2018 SCC Online SC 1487.
[14] Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710.
[15]Vimal Shah & Ors. v. Jayesh Shah, (2016) 8 SCC 788.

INTERNATIONAL COMMERCIAL ARBITRATION WITH SEAT IN INDIA

The laws applicable to International Commercial Arbitration when the seat of arbitration is in India are as follow:

1) Notice of Arbitration

The proceedings of arbitration are deemed to be commenced with the notice of arbitration requires the other party to take measures pertaining to the arbitration or do something on his part in such matter. A notice of arbitration has to be served to the other party, requesting the dispute to be referred to arbitration as per the provision of Section 21 of the Act. The date of commencement in accordance with the said section is crucial with regards to the applicability of the 2015 Amendment Act. In the event, the date of commencement is post October 23, 2015; the provisions of 2015 Act will apply.

2) Referral to arbitration proceedings

As per the scheme of the Act, the courts can refer the parties to arbitration if the subject matter of the dispute is governed by the arbitration agreement under Part I. Section 8 provides that if a matter is submitted to a judicial authority which is subject to an arbitration agreement, upon an application by one of the party, the judicial authority is bound to refer the dispute to the arbitration. Recently, it has been held that there is no requirement of filling a formal application seeking a specific prayer for reference, as long as the party raised an objection on the maintainability of the suit in light of an arbitration clause.[16] However such arbitration agreement which contains the arbitration clause must be sufficiently stamped in the local state where the arbitration takes place, in absence of which the court cannot appoint an arbitrator.[17]

The 2015 Amendment Act narrows the scope of the judicial intervention in deciding the prima facie existence of a valid arbitration agreement, thereby reducing the threshold to refer a matter before the court. In this regard, an arbitration agreement has to be considered as valid if there is merely the incorporation of another document/ clause (relating to arbitration) by reference or even

[16]Caravel Shipping Services Pvt. Ltd. v. Premier Sea Foods Exim Pvt. Ltd., 2018 SCC Online SC 2417; Parasramka Holding Pvt. Ltd. & Ors. v. Ambience Pvt. Ltd. & Anr., 2018 SCC OnLine Del 6573.
[17]Garware Wall Ropes v. Coastal Marine Construction & Engineering Ltd., (2019) 9 SCC 209; S. Satyanarayana v. West Quay Multiport Pvt. Ltd., 2016 (2) ALLMR 280.

if there is any general reference to a standard form of the contract of one party. In situations like such intention of the parties/ consensus ad idem is crucial, even if the same is apparent from their conduct.

Moreover, taking heed from the ruling of Supreme Court in Chloro Controls[18] which was only applicable to the foreign seated arbitrations, the definition of word 'party' to an arbitration agreement has been expanded by the virtue of 2015 Amendment to include persons claiming through or under such party, especially when there is a clear intention of the parties to bind both signatory as well as non- signatory parties.[19] Hence, even a non- signatory party may also participate in arbitration proceedings as long as it is a necessary and proper party to the agreement[20], depending on the nature of reliefs claimed by or against such party.[21] In case wherein a judicial authority rejects the request to refer a particular matter to arbitration, the parties are entitled to appeal against such refusal in the court on which statute confers jurisdiction to hear such appeals.[22]

3) Interim Reliefs

The parties can seek interim relief from courts and arbitral tribunals by virtue of Sections 9 and 17 of the Act respectively. A party, before or during an arbitral proceeding or at any time after the making of the arbitral award but before its enforcement, may apply to a court for seeking interim reliefs and measures, including temporary injunctions under Section 9. Furthermore, the arbitral tribunal, in accordance with Section 17 can also issue interim order of protection or ask a party to provide needful security in connection with the matter of the dispute. However the powers of arbitral tribunal were narrower, as compared to the powers of court under Section 9. The 2015 Amendment Act has been significant changes with respect to the grant of interim relief in arbitration proceedings commenced after October 23, 2015.

i. Interim reliefs under Section 9

[18]Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
[19]M/s SEI Adhavan Power Private Limited v. M/s Jinneng Clean Energy Technology Limited, OA, 2018 (4) CTC 464.
[20]Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531.
[21]Suman Baburao Thapa v. Jigar K. Mehta and Ors., (2018) 3 AIR Bom R 215.
[22] Emaar MGF Land Limited & Anr. v. Aftab Singh, 2017 SCC OnLine Del 11437.

If an arbitral tribunal has been constituted, an application for interim protection under Section 9 will not be provided by the court unless the courts find extraneous circumstances which may render the remedy provided under Section 17 void. Post that, the arbitral proceedings must commence within a period of 90 days from the date of interim protection order or within such time as the court may determine.

ii. Interim reliefs under Section 17

The section 17 has been amended to provide the same powers to the arbitral tribunals which are vested with civil courts in relation to grant of interim relief. The arbitral tribunal will have powers to grant interim relief post the award but prior to its execution. Moreover, for an arbitration seated in India, the order passed by tribunal will have the same effect as an order of the Court and will be enforceable by the virtue of Code of Civil Procedure, 1908, as if it were an order of the court. The 2015 Act, gave tribunals power to grant interim relief during the arbitral proceedings or any time after making such an award but prior to it is enforced as per section 36. However, this created ambiguity as once the final award is granted the tribunal becomes 'functus officio'. However, this has been resolved in the 2019 Amendment Act wherein the words "*or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36"* are omitted from Section 17 of the Act.

4) Appointment of Arbitrators

The parties are free to agree on a procedure for appointing the arbitrators. The agreement can provide for a tribunal consisting of three arbitrators, in which each party will appoint one arbitrator and those two arbitrators will appoint the third one who will act as the presiding officer.[23] In case one of the parties fails to appoint an arbitrator within 30 days, or if the presiding arbitrator has not been appointed within 30 days, the party can request the pertinent High Court or the Apex Court to appoint one.[24] The 2015 Amendment also empowers the Supreme Court in an Indian- seated ICA and the HCs in domestic arbitration to examine the prima facie existence of an arbitration agreement at the time of making such appointment.[25] However, the question of arbitrability of the issue would only be decided by the arbitral tribunals and not the courts, they must confine their

[23]The Arbitration and Conciliation Act, 1996. § 11, cl. (6).
[24]*Id*.
[25]The Arbitration and Conciliation (Amendment) Act, 2015 § 11, cl. (6A).

inquiry to the existence of an arbitration agreement.[26] This has been expressly provided under Section 11 (6A) of the Act, which is to be understood in a narrow sense.[27] There have always been concerns with respect to the delays in appointments of arbitrators, due to existing framework. The time frame for such an appointment was usually 12 to 18 months which the 2015 Amendment Act seeks to address by introducing a concrete timeline and clarifying the procedure of appointment to be an exercise of administrative power by the courts. In cases of conflict of appointment of arbitrators under provisions of any special Act and the Arbitration Act, the former being a special law, would have an overriding effect on a general law.[28]

5) Challenge to Appointment of Arbitrator

Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. If there are circumstances due to which these can be challenged, he/ she must disclose the state of affairs leading to his/her appointment.[29]. Appointment of an arbitrator can be challenged only if: ***(i)*** circumstances subsist, that give rise to justifiable doubts pertaining to the independence of impartiality of the arbitrator and ***(ii)*** the arbitrator does not possess the qualifications agreed upon by the parties. The 2015 Amendment Act provides a form, meant for the disclosure in the new 5th schedule. Such a disclosure is in consonance with the internationally accepted practices to be followed for any arbitration proceedings commenced on or after October 23, 2015. Non disclosure can lead to serious consequences for the arbitrator, including termination of his/ her mandate, even if he/she has not been assigned work or given remuneration for the same by the concerned party.[30] However, it is to be noted that the challenge to the appointment has to be decided by the arbitrator himself, if he/she does not accept the challenge, the proceedings can continue and the arbitrator can make arbitral award. The Supreme Court in *TRF Ltd. v. Energo Engineering Projects Ltd.*[31] held that the Courts can be approached to plead the statutory disqualifications of an arbitrator under the provision of 1996 Act, and that is not mandatory to approach the arbitrator for such a relief. Moreover, it was held that when the designated arbitrator under the contract delegated his powers to other arbitrator, he/ she would lose his/her authority to preside or nominate an arbitrator if he/she

[26]Picasso Digital Media Pvt. Ltd. v. Pick- A- Cent Consultancy Service Pvt. Ltd., 2016 SCC OnLine Del 5581.
[27]Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman, AIR 2019 SC 4284.
[28]National Highways Authority of India v. Sayedabad Tea Company, 2019 SCC OnLine SC 1102.
[29]The Arbitration and Conciliation Act, 1996 § 12, cl. (1).
[30]C & C Construction Ltd. v. Ircon International Ltd., 2018 SCC OnLine Del 9240.
[31]TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377.

stands disqualified under the amended provisions of the Act. In *HRD Corporation v. GAIL (India) Ltd.*,[32] the Apex Court set forth certain important principles of law, such as: ***[i]*** if the arbitrator has already passed an award in an earlier arbitration case between the same parties pertaining to the same dispute that does not mean that there are justifiable grounds for challenging his impartiality under clause 6 of Fifth schedule and ***[ii]*** while a challenge based on the 5th schedule can be decided only on the basis of the facts and circumstances of a particular case and can be brought before the court post-award, one based on the 7th Schedule renders the arbitrator ineligible ispo facto and can be brought pre-award. However, in such cases, the application for setting aside the arbitral award can be made under Section 34 of the Act.[33] Hence, even if arbitrator does not accept the challenge to his/her appointment, the other party cannot stall further arbitration proceedings by rushing to the court. The arbitration can proceed and challenge can only be made after the award is decided.

6) Mandate of the Arbitrator in Proceedings

A promising component of the Indian arbitration is the jurisprudence relating to the mandate of an arbitrator. This mandate however, expires in case an award is not delivered within the time limit stipulated by the parties in the arbitration agreement.[34] The 2015 Amendment Act ratified the loophole that existed since the inception. The provision earlier only dealt with the expiration of the mandate of an arbitrator and did not mention anything about the re-appointment. For arbitration proceedings commencing after October 23, 2015, a fresh application for appointment need not to be filed in case of termination and substitution may be made. This will assuredly help parties to ensure a time bound process while entering into contract and enthralling the arbitrator to deliver the award within the specified timelines.

7) Challenge to the Jurisdiction

By the virtue of Section 16 of the Act and the doctrine of '*competence- competence*' an arbitral tribunal is empowered to rule on its own jurisdiction, which also includes ruling on any objection with the respect to the existence or validity of the arbitration agreement. Even the Apex Court in *S.B.P and Co. v. Patel Engineering Ltd*.,[35] held that where the parties themselves agreed for the

[32]HRD Corporation v. GAIL (India) Limited, 2017 (10) SCALE 371.
[33]The Arbitration and Conciliation Act, 1996 § 13, cl. (5).
[34]NBCC Ltd. v. J.G. Engineering Pvt. Ltd., (2010) 2 SCC 385.
[35]S.B.P & Co. v. Patel Engineering Ltd., 2005 (8) SCC 618.

constitution of an arbitral tribunal without any judicial intervention, the arbitral tribunal could determine all jurisdictional claims by exercising its powers of competence-competence under section 16.

8) Conduct Of Arbitral Proceedings

i. Flexibility in respect of Procedure, Place and Language

The arbitral tribunal should follow the principles of natural justice in the proceedings.[36] The arbitral tribunal is not bound by the provisions of the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872.[37] The parties to the arbitration are free to agree on the procedure,[38] place,[39] and language[40] to be followed by the Arbitral tribunal. However, if they don't agree to the same, it will be as determined by the arbitral tribunal. The tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence.[41] Recently, the Apex Court, in the case of *Brahmani River Pellets v. Kamachi*,[42] held 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 to the exclusion of all other courts. In this case, the contract specified that the venue of arbitration. In *BGS Soma JV v. NHPC*,[43] the Supreme Court held that "*whenever there is the designation of a place of arbitration in an arbitration clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the venue is really the seat of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place"*. By virtue of this judgment the Court overruled the Delhi High Court's ruling in the case of *Antrix Corporation Ltd. v. Devas Multimedia*

[36]The Arbitration and Conciliation Act, 1996 § 18.
[37]*Id*., § 19, cl. (1).
[38]*Id*., cl. (3).
[39]*Id*., § 20.
[40]*Id*., § 22.
[41]*Id*., § 19, cl. (4).
[42]Brahmani River Pellets v. Kamachi Industries Ltd., 2019 SCC OnLine SC 929.
[43]BGS Soma JV v. NHPC, 2020 SCC OnLine SC 305.

Pvt. Ltd.,[44] wherein the division bench held that *"only if the parties confer exclusive jurisdiction as well as the seat of the arbitration to a designated place, the territorial court of that designated place would have exclusive jurisdiction, otherwise the jurisdiction will be decided on the basis of the subject matter and the seat of arbitration."*

Furthermore, in the recent case of *L&T Finance Ltd. v. Manoj Pathak,*[45] the Delhi High Court identified the test applicable to determine a seat of arbitration proceedings which are the tri-fecta of propositions pertaining to the domestic arbitration:

a. a stated venue is the seat of arbitration unless there are clear indication that the place mentioned in an agreement is just a mere venue, a meeting place of convenience, and not the seat,
b. where there is an unqualified nomination of a seat (without specifying the place as a mere venue), it is upon the courts to decide where the seat is situated that would have exclusive jurisdiction, and
c. it is only in situations where no seat/venue is named or where it is clearly mentioned that the stated place is merely a place of convenience for meetings, that any other consideration of jurisdiction may arise, such as cause of action.

ii. Submission of Statement of Claim and Defense

The claimant should submit the statement of claims, points of issue and the relief and the remedy sought while on the other hand the respondent should state his defense in respect of these particulars. In pertaining to same all relevant documents must be submitted. The claims or defense can be altered or supplemented at any time.[46] The 2015 Act provides for the application that can be made to the arbitral tribunal for counterclaim/ set-off to be adjudicated upon in the same arbitration proceedings without requiring a fresh one.[47] Under the amended Section 25 of the Act, the arbitral tribunal is empowered in treating the right to defendant to file the statement of defense as fortified under certain special

[44]Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., 2018 SCC OnLine Del 9338.
[45]L &T Finance Ltd. v. Manoj Pathak, 2020 SCC OnLine Bom 177.
[46]The Arbitration and Conciliation Act, 1996 § 23.
[47]The Arbitration and Conciliation (Amendment) Act, 2015 § 23, cl. (2A).

circumstances.[48] The newly amendment Act 2019 has introduced a new timeline to file the claims and defense statements which however may result in depriving the parties flexibility and would effectively require them to file their complete pleading at the very onset of the arbitration.

9) Hearing and Written Proceedings

After the submission of the pleadings, unless the parties agree otherwise, the arbitral tribunal can decide whether there will be an oral hearing or whether proceedings can be conducted on the basis of documents and other material evidence.[49] However, for an expeditious settlement of the dispute a proviso has been introduced by the virtue of 2015 Amendment Act on the conduct of oral proceeding, which requires the parties to furnish sufficient cause in order to seek adjournments, in default of which the tribunal can impose fines including exemplary costs.

The time limit was also been streamline and arbitrators were mandated to complete the entire arbitration proceeding within a period of 12 months from the date the tribunal enters upon the reference. A six month extension might be granted to the arbitrator which needs to be consensual form both the parties[50], beyond which the extension can only be allowed by the permission of the court[51] or else the proceedings shall stand terminated.[52] The 2019 Amendment Act further brought down this time limit to 6 months for completion of arbitral proceedings and also modified the start date of 12 months period to the date on which the statement of claim and defense are completed. Further, it exempted ICA from these time-limits which comes with a proviso stating that the award in ICA may be made as expeditiously as possible and an endeavour may be made to dispose off the matter within 12 months from the date of completion of pleadings.

10) Fast Track Procedure

The Amendment Act, 2015 has inserted new provision to accelerate the process of settlement of dispute solely based on the documents, written pleadings and submissions filed by the parties without any oral hearing unless otherwise requested by the parties and are subject to the agreement

[48] *Id*., § 25, cl. (b).
[49] *Id*., § 24.
[50] *Id*., §29A, cl. (3).
[51] *Id*., cl. (5).
[52] *Id*., cl. (4).

between them.[53] For the same purpose, the arbitral tribunal consists of only one arbitrator who shall be chosen by the parties mutually.[54] The time limit for making the award in this case is a period of 6 months from the date the tribunal enters upon the reference.[55]

11) Settlement & the Law of Limitation

Under the 2015 Act, it is permissible for parties to arrive at a mutual settlement even in middle of arbitral proceedings. Moreover, the tribunal itself can make an effort to bring parties on a mutual agreement, even in the absence of any provision in the arbitration agreement, with the express consent of the parties, mediate or conciliate with the parties.[56] If it happens, the arbitration proceedings shall be terminated. However, if the parties do not agree, the settlement can be recorded in the form of an award on agreed terms, which is known as consent award which has the same force as any other arbitral award.[57]

The Limitation Act, 1963 is applicable to arbitration under Part I. For this purpose, date on which the aggrieved party requests the other party to refer the matter to arbitrator shall be considered. The arbitration cannot sustain if the claims is barred under Limitation Act on that day.[58] However, if the arbitration award is set aside by court, time spent will be excluded for the purpose of Limitation Act will be excluded, which provides an opportunity to parties freshly initiate an action without being barred under Limitation Act.

12) Arbitral Award & Interest and Cost of Arbitration

The decision of an arbitral tribunal is termed as an 'arbitral award'. It includes interim awards excluding interim order passed by arbitral tribunals under Section 17. The decision of arbitral tribunal will be by the majority.[59] An arbitral award shall be in writing and signed by all the

[53] *Id*., § 29B, cl. (3).
[54] The Arbitration and Conciliation (Amendment) Act, 2015 § 29B, cl. (2).
[55] *Id*., § 29B, cl. (4).
[56] The Arbitration and Conciliation Act, 1996 § 30.
[57] *Id*.
[58] *Id*., § 43, cl. (2).
[59] *Id*., § 29.

members of the tribunal,[60] and reasoned[61]. Furthermore, it should mention the date and place where it is made and a copy of award should be provided to both the parties.[62]

The interest rate payable on damages and costs awarded shall be 18% per annum, calculated from the date of the award to the date of payment. However, after the 2015 Amendment, interest payable changed to '2% higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment'.[63] The tribunal is entitled to decide the cost and share of each party, [64] to which if they don't adhere may lead to the refusal in delivering the award.[65] Also in such cases, if any party decides to approach the court, it will ask for a deposit from the parties and on such deposit, the award will be delivered by the tribunal. Hence, a regime for costs has been established which is applicable to both arbitration as well the litigations arising out of it.

13) Challenges to Awards

Section 34 of the Act, provides for the manner and grounds for challenging the award of arbitral tribunal. The challenge has to be filed before the expiry of 3 months from the date of receipts of the arbitral award which can be extended to 30 months subject to the sufficient cause has been provided for condonation of delay. Under section 34 of the Act, a party is entitled to challenge the arbitral awards on the grounds as: ***(i)*** incapacity of the parties, ***(ii)*** agreement is void, ***(iii)*** award contains the decision on matters beyond the scope of the arbitration agreement ***(iv)*** composition of arbitral tribunal or procedure was not in accordance with the arbitration agreement, ***(v)*** the subject matter of dispute cannot be settled by arbitration under Indian law, or ***(vi)*** the enforcement of the award would be contrary to Indian public policy.

i. Interpretation of Public Policy under the Act

There have been significant discussions and debates on the scope of 'public policy' under the Act. Following a series of judgments on the interpretation of this term, the 2015 Amendment Act has incorporated an explanation to section 34 of the Act, which clarifies the meaning of public policy as only ***(i)*** if the making of award was induced or affected by fraud or corruption

[60] *Id*.,§ 31, cl. (1)
[61] *Id*.,§ 31, cl. (3).
[62] *Id*.,§ 31, cl. (7) (b).
[63] The Arbitration and Conciliation (Amendment) Act, 2015, § 31, cl. (7) (b).
[64] *Id*.,§ .31, cl. (8).
[65] *Id*., § 39.

or was in violation of Section 71 or 85, or ***(ii)*** if award made is in direct contravention with the fundamental policy of Indian law, or ***(iii)*** contravenes to the basic notions of morality or justice. The 2015 Amendment Act clarifies that an awards will not be liable to be set aside merely on the ground of erroneous application of law or by re-appreciation of evidence.[66] The court will not review the merits of the case in deciding whether the award is in contravention to any fundamental policy of Indian law[67] and unless it's absolutely necessary, courts should generally refrain from any intervention.[68] The Apex Court in the case of *Associate Builders v. DDA*[69] laid down principles which provide guidance as to what constitutes 'public policy' under the Act, which are as follows;

i. a decision based on no evidence or which disregard the vital evidence would be perverse and contrary to the fundamental policy of Indian law which is a facet of Public Policy of India under Section 48 (2) (b),
ii. a decision which was passed in contravention of 'judicial approach would be contrary to the fundamental policy of Indian law which is a facet of Public Policy under Section 48 (2) (b),
iii. if an arbitral award is without any acceptable reason or justification which would shock the judicial conscience and consequently it would be contrary to the principles of justice.

The 2015 Amendment Act came up with a newly added section providing that the award may be abate if the court finds that it is vitiated by the patent illegality which appears on the face of the award in case of domestic arbitration. For ICA, seated in India, it has been kept outside the purview of arbitral challenge.[70] A challenge can only be raised after providing prior notice to the opposite party, which is directory in nature.[71] The Supreme Court interpretated the term "patent illegality to include:[72]

[66]The Arbitration and Conciliation (Amendment) Act, 2015 §34, cl. (2A).
[67]*Id*., § 48, cl. (2).
[68]Emkay Global Financial Services Ltd. v. Girdhar Sondhi, (2018) 9 SCC 49.
[69]Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.
[70]Supra note 66.
[71]State of Bihar v. Bihar Rajya Bhumi Vikas Bank, (2018) 9 SCC 472.
[72]Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI), 2019 SCC OnLine SC 677.

i. Patent illegality appearing on the face of the award, is something which goes into the root of the matter and is not a merely an erroneous application of law. Any contravention of a statute not lined to public policy or public interest cannot be brought in by the backdoor for setting aside an award on the ground of patent illegality.
ii. unreasoned decision by the arbitrator.
iii. if the arbitrator construes the contract in a manner no prudent or fair minded person would do.

Recently, in the case of *BCCI v. Kochi Cricket Pvt. Ltd.*,[73] the Apex Court held that the amendment Act will apply to those arbitral proceedings as well as court proceedings which commenced on or after October 23, 2015. It particularly provided that amended Section 36 would even apply to pending applications under Section 34 for setting aside an arbitral award. Though the 2019 Amendment Act introduced a new Section 87 which modifies the interpretation of the applicability of the 2015 Amendment Act, has been struck down for being unconstitutional.[74] Furthermore, any insolvency resolution process under Insolvency and Bankruptcy Code, 2016 cannot be initiated if there has been already a pending application under Section 34 of the Act.[75]

14) Appeals

An appeal is allowed only in exceptional circumstances under the Act. The aggrieved party can approach the court only after an arbitral award is made or in case of order passed under Section 17 of the Act, after the order is passed, and even a third party, who is directly or indirectly been affected by interim measures granted by the arbitral tribunal, will have a remedy of an appeal under Section 37.[76] An appeal lies from the following orders, and from no others, to the court authorized by law to hear appeals from original decrees of the court passing the order: ***(i)*** granting or refusing any measure under Section 9, ***(ii)*** setting aside or refusing to set aside an arbitral award under Section 34.[77] However the Apex Court recently held that the parties may appeal against the award to an appellate arbitral tribunal, which implies that the scope of appeal in such cases is far wider

[73]BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.
[74]National Aluminum Company Ltd. (NALCO) v. Presstel & Fabrications (P) Ltd., (2004) 1 SCC 250.
[75]K. Kishan v. Vijay Nirman Company Pvt. Ltd., 2018 SCC OnLine SC 1013.
[76]Prabhat Steel Traders v. Excel Metal Proessors, 2018 SCC OnLine Bom 2347.
[77]The Arbitration and Conciliation Act, 1996 § 37.

than an appeal to a court.[78] The 2015 Amendment Act has further widened the scope of appeal by including the order refusing to refer the parties to arbitration under Section 8 of the Act. The provision of appeal is also applicable from an order of the arbitral tribunal which: ***(i)*** is accepting the plea referred to in sub section (2) or (3) of Section 16, or ***(ii)*** is granting or refusing an interim relief under Section 17. However no second appeal lie from any order passed under this section but it will nowhere affect the right of the parties to appeal in Supreme Court.

15) Enforcement & Execution of an Award

The enforcement as well as the execution of arbitral awards, both domestic and foreign is governed by the Act read with provisions of CPC. While the former acts as a substantive law, the latter provides for the procedure that is required to be followed when seeking execution of an award. An arbitral award is final and binding upon both the parties as well as persons claiming under them,[79] and thus becomes enforceable unless challenged.[80]

For the execution of an arbitral award the procedure has been laid down in Order XXI of the Code of Civil Procedure, 1908. It lays down the detailed procedure followed for the enforcement of the decrees. All proceedings in execution are commenced by an application for execution.[81] The execution of a decree against the property of the judgment debtor can be affected in two ways i.e. ***(i)*** attachment and ***(ii)*** sale, to which the courts have been granted discretion to impose conditions.

INTERNATIONAL COMMERCIAL ARBITRATION HAVING SEAT IN A RECIPROCATING COUNTRY

Post the decision of Supreme Court in *BALCO*,[82] the arbitration law in India has been made seat-centric. The decision was given a prospective effect and therefore applied to only arbitration agreements executed on or after September 6, 2012. The 2015 Amendment Act clearly states that

[78]Centrotrade Minerals & Metal v. Hindustan Copper, 2016 (12) SCALE 1015.
[79]The Arbitration and Conciliation Act, 1996 § 35.
[80]*Id*., § 34.
[81]IMAX Corporation v. E-City Entertainment Pvt. Ltd.,2017 SCC OnLine SC 239; Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd., (2015) 9 SCC 172.
[82]Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Inc., 2012 (9) SCC 552.

Part I of the Act will not be applicable to foreign seated arbitration except sections 9, 27 and 37 which has been reiterated by courts in many cases.[83] Part II of the Act is applicable to all foreign awards sought to be enforced in India and to refer parties to arbitration when the arbitration has a seat outside India. Part II dealing with foreign awards is divided into 2 chapters, Chapter I that deals with foreign awards delivered by the signatory territories to the New York Convention which have reciprocity with India, while chapter 2 deals with foreign awards delivered under the Geneva Convention.

A foreign award is defined as an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made on or after 11th day of October, 1960 in pursuance of an agreement in writing for arbitration, to which the convention set forth in the first schedule applies and in one of such territories as the Central Government being satisfied that reciprocal provisions made may, by notification in the official gazette, declare to be territories to which the said convention applies.[84]

Thus, even if a country is a signatory to the New York Convention does not automatically mean that award passed in such country would be enforceable in India unless the Central government further notifies that country to be a territory to which this convention applies.[85] Till date about 48 countries have been notified by the Indian Government.

1) Referring parties to arbitration under Part II

Under Section 45 of the Act, a judicial authority has been authorized to refer those parties to arbitration, who under Section 44 have entered into an arbitration agreement. The section draws a parallel to Article II (3) of the New York Convention and an in depth reading of section 45 clearly shows that it is mandatory for the judicial authority to refer parties to the arbitration. Section 45 begins with a non-obstante clause, which gives it an overriding effect over anything contrary contained in Part I or CPC. It empowers the judiciary to specifically enforce the arbitration

[83]Katra Holdings v. Corsair Investments LLC, 2017 SCC OnLine SC 239; Government of West Bengal v. Chatterjee Petrochem, 2017 SCC OnLine Bom 8480.
[84]National Ability S.A. v. Tinna Oil Chemicals Ltd., 2008 (3) ArbLR 37.
[85]Bhatia International v. Bulk Trading, AIR 2002 SC 1432.

agreement between the parties. However, the court has to be satisfied in toto that there agreement is legally valid, operative and capable of being performed.[86]

Recently, the Apex Court in *Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc.*,[87]held that the expression person claiming through or under as enshrined under section 45, would mean and include multi and multi-party agreements which means that even non-signatory parties to some of the agreements can pray and be referred to arbitration. The ruling has widespread implication for foreign investors and same has been reiterated further in number of cases.[88]

2) Enforcement and execution of foreign awards

Whenever a party is seeking enforcement of a NY Convention award, an application to the court of competent jurisdiction shall be made by the applicant with the required documents. There are several conditions to be followed for a foreign arbitral award to be enforceable which are as follow:

i. Commercial transaction[89]: the term 'commercial' should be literally construed as having regard to manifold activated which are an integral part of international trade.
ii. Written form of agreement
iii. Agreement must be legally valid[90]
iv. Award must be unambiguous[91]

3) Grounds for refusing the enforcement of a foreign award

Under section 48 of the Act, in case of a New York Convention award, an Indian court can reject to enforce a foreign award if it falls within the scope of following statutory defenses: ***(i)*** incapacity of the parties, ***(ii)*** agreement is void, ***(iii)*** awards contains decisions on matters beyond the scope of arbitration agreement, ***(iv)*** composition of arbitral tribunal or the procedure was ultra vires of the agreement, ***(v)*** award has been set aside or suspended by competent authority of the country in

[86]Korp Gerns (India) Pvt. Ltd. v. Precious Diamond Ltd., 2007 (3) ArbLR 32.
[87]Chloro Controls Pvt. Ltd. v. Severn Trent Water Purification Inc., 2013 (1) SCC 641; Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., AIR 2019 SC 4449.
[88]Electronics Corporation of India Ltd. v. Union of India, (2011) 3 SCC 404; Dow Chemical v. Isover Saint Gobain, 110 JDI 899 (1983).
[89]RM Investment & Trading v. Boeing, AIR 1994 SC 1136.
[90]Khardah Company v. Raymon & Co. (India), AIR 1962 SC 1136; Vizgoz Oils and Fats Pte. Ltd. v. National Agricultural Marketing Federation of India, 2016 SCC OnLine Del 6203.
[91]Koch Navigation v. Hindustan Petroleum Corp., AIR 1989 SC 2198.

which it was made, ***(vi)*** subject matter cannot be settled through Indian arbitration law or, ***(vii)*** enforcement of award would be contrary to Indian public policy.

The term 'public policy' has already been explained in detail above paras. Moreover Apex Court[92] ruled that enforcement of a foreign award would be refused on the ground that it is against the principles of Indian public policy if it would be contrary to: ***(i)*** fundamental policy of India or, ***(ii)*** interest of India or, ***(iii)*** justice or morality.[93]

4) Appealable orders

An appeal can be filed by a party against the orders passed under Section 45 and 48 by virtue of section 50 of the Act. However, there is no provision of second appeal or latent patent appeal against the order passed under this section.[94] These orders are only appealable under Article 136 of the Indian Constitution, to which discretion lies completely with the Court to consider the same.[95]

THE WAY FORWARD

1) Conundrum surrounding foreign seat of arbitration

So there still exists a conundrum surrounding two Indian parties having a foreign seat of arbitration. Though this issue has already been addressed by a number of High Courts, still there is no clarity on the capability of two Indian parties to choose a foreign seat of arbitration. The Bombay High court expressed a view that two Indian parties choosing a foreign seat and law to govern the arbitration agreement may be considered as opposed to public policy of the country.[96]

The Madhya Pradesh High Court ruled that two Indian parties can conduct arbitration in a foreign seat under the English law,[97] for which they relied on the ruling of the Apex Court in Atlas Exports

[92]Renusagar Power Co. Ltd. v. General Electric Co., (1994) 2 Arb LR 405.
[93]Shri Lal Mohan Ltd. v. Proqetto Grano Spa, 2013 (8) SCALE 480.
[94]Jindal Exports Ltd. v. Fuerst Day Lawson Ltd., (2011) 8 SCC 333.
[95]Shin- Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234.
[96]Addhar Mercantile Pvt. Ltd.v. Shree Jagdamba Agrico Exports Pvt. Ltd., 2015 SCC OnLine Bom 7752.
[97]Sasan Power Ltd. v. North America Coal Corporation India Pvt. Ltd., (2016) 10 SCC 813.

Case[98] wherein the Court held that two Indian parties by way of mutual contract can have a foreign seated arbitration, although it was in context of 1940 Act. The same ruling of MP High Court has been reiterated by the Delhi High Court.[99] However, one must also take into consideration the ruling in case of *TDM Infrastructure,*[100] wherein it was held that two Indian parties cannot derogated from Indian law by consenting to conduct arbitration with a foreign seat and foreign law, but as it was a judgment under Section 11, there are question on its precedential value.[101]

Therefore, it can be clearly seen that there are judgments of various High Courts but there is no ruling of the Apex Court which will resolve this conundrum surrounding two Indian parties who opted for foreign seat of arbitration.

2) Issues in the 2019 Amendment Act

The 2019 Amendment Act also has missed the opportunity to provide adequate exceptions to the obligation of confidentiality, which may give rise to multiple issues. For example, the following situations would require a disclosure and would not strictly fall within the scope of exception proposed in the 2019 Amendment Act: ***(i)*** proceedings under Section 9, 11, 14, 27 and 34 of the act, ***(ii)*** where in one party wishes to initiate criminal cases along with the arbitration, ***(iii)*** where party files for an anti- arbitration injunction before civil court, ***(iv)*** where one party approaches to a government regulator on certain facts which also gives rise to a contractual dispute, ***(v)*** where information is proposed to be shared with third party experts (such as forensic, accounting, delay, or quantum experts); or ***(vi)*** where information is required to be shared with a third-party funder to obtain funding for a claim.

Moreover, due to inconsistency in the statute, the 8th schedule could be interpretated to indicate that foreign legal professionals cannot act as arbitrators in India, as for the purpose of this schedule is for the person to be advocate within the meaning of the Indian Advocates Act, 1961. However, it has not been notified yet.

3) Arbitrability of consumer disputes

[98]Atlas Exports Industries v. Kotak & Company, (1997) 7 SCC 61.
[99]GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd., 2017 SCC OnLine Del 11625.
[100]TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271.
[101]West Bengal v. Associated Contractors, (2015) 1 SCC 32.

An arbitration clause in an agreement cannot circumscribe the jurisdiction of the National Consumer Dispute Resolution Commission (NDRC), notwithstanding the amendments made to section 8 of the Act, which is a non- obstante clause. However, since the consumer forums are the specially designated authorities to deal with consumer issues, their jurisdiction cannot be oust by this section.[102]

4) Arbitrability of oppression and mismanagement cases

The disputes involving oppression and mismanagement are out of the scope for settlement through arbitration, and must be adjudicated only by a judicial authority. However, if the judicial authority finds out that the petition is mala fide or vexatious and if filed only with an intention to defeat an arbitration clause, the dispute will be referred to arbitration.[103]

CONCLUSION

It is very important for any fast growing economy to have a reliable stable dispute resolution process in order to be able to attract foreign investment. Considering the extreme backlog in the Indian Courts, commercial players both in India as well as abroad have developed a strong preference to settle dispute via peaceful means as arbitration. Despite being one of the signatories of the New York Convention, India has not always been parallel with the best accepted international practices. However, last five years have seen a drastic change in its approach towards arbitration. Courts as well as the legislatures have acted with an aim to bring Indian arbitration law at par with international law. With such a pro- arbitration approach of the court and the 2015 & 2019 Amendments Act in place, there is a reason to look forward to these practices being adapted and incorporated in the Indian arbitration jurisprudence in the near future which means that exciting times are ahead and our courts are ready to take on several matters dealing with the interpretation of the new Amendment Acts.

[102] Aftab Singh v. Emaar MGF Land Limited, 2018 SCC OnLine SC 2771.
[103]Rakesh Malhotra v. Rajinder Kumar Malhotra, (2015) 2 Comp LJ 288 (Bom).