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ABOUT THE JOURNAL

Indian Review of International Arbitration ["**IRIArb**"] is a bi-annual publication of Maharashtra National Law University, Mumbai's Centre for Arbitration and Research. IRIArb accepts submissions on a rolling basis, and follows a double-blind peer review process. IRIArb is edited by professionals, is an open access journal, and is available for free of cost at www.iriarb.com. For any queries or feedback, you may write to the editors at iriarb@mnlumumbai.edu.in.

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AIMS AND SCOPE OF THE JOURNAL

IRIArb focuses on research in both academic and practical aspects of international commercial and investment arbitration, and other connected areas of law. With the aim to provide for a balance between research on contemporary developments, and analysis of long-standing issues in international arbitration, IRIArb is dedicated to being a catalyst towards the progress of international arbitration through the publication of reliable and useful literature in the area of arbitration. Creating a platform to facilitate dialogues among stakeholders, ranging from contributors from the highest legal foras to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.

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EDITORIAL

The impact of the Russia-Ukraine war has continued to affect arbitrations in 2023 and is expected to create further disputes in the second half of the year.[1] This will include international disputes arising as a result of supply chain disruptions and sanctions imposed by multiple states on Russia.[2] There may even be an increase in expropriation claims by non-state investors against Russia as evidenced by the recent expropriation claims raised by ExxonMobil.[3] There may be further problems in enforcing arbitral awards in Russia and various roadblocks in arbitration proceedings involving Russia.[4]

There has been a change in how arbitrations are conducted as a consequence of the boom in the technology sector in 2023.[5] Artificial intelligence ["**AI**"] has brought about this change and various AI tools are being used by arbitration practitioners.[6] Technology has also impacted arbitrations in terms of the kind of matters being referred to arbitration in 2023 as disputes over blockchain technologies are expected to increase.[7]

The recent crash of the Crypto market in 2022 has led to a multitude of arbitration disputes.[8] The recent judgement of the US Supreme Court wherein the court favoured arbitration over litigation to settle customer disputes of Coinbase is one such example.[9] Cryptocurrency-related disputes raise many complex questions regarding jurisdiction, applicable law, and parties to the dispute because of

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[1] Nicholas Lawn, and Helen Laufer, (2023) *Potential claims for compensation against Russia following its invasion of Ukraine part II : Claims relating to Russia's domestic measures against foreign investors*, *Lexology*. Available at: https://www.lexology.com/library/detail.aspx?g=dd97a8dd-9a56-4a6c-b1e4-2aecd16aac71 (Accessed: 26 June 2023).

[2] James Rogers, and Katie McDougall, (2022) *Impact of international sanctions on arbitral proceedings*, *Lexology*. Available at: https://www.lexology.com/commentary/arbitration-adr/international/norton-rose-fulbright/impact-of-international-sanctions-on-arbitral-proceedings (Accessed: 26 June 2023).

[3] Sabrina Valle, (2022) *Exclusive: Exxon exits Russia empty-handed with oil project 'unilaterally terminated'*, *Reuters*. Available at: https://www.reuters.com/business/energy/exclusive-exxon-exits-russia-empty-handed-with-oil-project-unilaterally-2022-10-17/ (Accessed: 26 June 2023).

[4] *Five international arbitration trends and topics for 2023 - Cleary Gottlieb*. Available at: https://www.clearygottlieb.com/-/media/files/alert-memos-2023/five-international-arbitration-trends-and-topics-for-2023.pdf (Accessed: 26 June 2023).

[5] Sam Brown Ling Ho (2023) *Tech arbitration trends 2023*, *Clifford Chance*. Available at: https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/02/tech-arbitration-trends-2023.html (Accessed: 26 June 2023).

[6] Andrea Seet, , *et al.* (2023) *Arbitration tech toolbox: Looking beyond the black box of AI in disputes over ai's use*, *Kluwer Arbitration Blog*. Available at: https://arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/ (Accessed: 26 June 2023).

[7] Sam Brown (2023) *Crypto Litigation & Arbitration Trends to Watch in 2023*, *Clifford Chance*. Available at: https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/01/crypto-litigation-arbitration-trends-to-watch-in-2023.html (Accessed: 26 June 2023).

[8] Rashi Maheshwari, (2023) *Why is the crypto market down in June 2023?*, *Forbes*. Available at: https://www.forbes.com/advisor/in/investing/cryptocurrency/why-crypto-market-is-down/ (Accessed: 26 June 2023).

[9] Coinbase Inc. v. Bielski, 599 U. S. (2023).

the decentralised nature of most of these currencies as well as their exchanges.[10] The ongoing dispute regarding Binance may bring clarity to many of these questions in the second half of 2023.[11]

2023 has also seen an increase in disputes regarding climate change.[12] Azerbaijan recently initiated arbitration proceedings against Armenia under the Bern Convention, 1982.[13] This is the first-ever inter-state arbitration initiated by a state under the convention. There may also be more arbitration proceedings under the Energy Charter Treaty ["**ECT**"]. However, given the number of states withdrawing from the ECT, the future of the treaty and its application in arbitrations remains to be seen.[14]

Along with the rise in the number and types of disputes being referred to arbitration, the first half of 2023 has also seen some significant judgements in international arbitration.

1) *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A*[15]

In this case, the US court held that the grounds for invalidating an arbitral award in the primary jurisdiction should be determined by domestic law, specifically Section10 of the Federal Arbitration Act, 1925 ["**FAA**"]. The court ruled that Article V of the New York Convention[16] does not govern the grounds for vacating an award in the primary jurisdiction, contrary to previous decisions. The court emphasized the importance of interpreting the treaty and statute based on their text and logic. This judgment is significant because it establishes the proper interpretation and application of the New York Convention and the FAA in determining the grounds for invalidating arbitral awards in the United States.

2) *Jan de Nul and Credendo v. Autonomous Port of Douala*[17]

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[10] *Supra* note 4.

[11] Sean McCarthy, *et al.* (2021) *The impending Binance Arbitration: A Primer on the world of cryptocurrencies, derivatives trading and decentralised finance on the blockchain*, *Kluwer Arbitration Blog*. Available at: https://arbitrationblog.kluwerarbitration.com/2021/10/13/the-impending-binance-arbitration-a-primer-on-the-world-of-cryptocurrencies-derivatives-trading-and-decentralised-finance-on-the-blockchain/ (Accessed: 26 June 2023).

[12] *Top trends in a Changing World International Arbitration in 2023*. Available at: https://www.freshfields.com/493257/globalassets/noindex/international-arbitration-top-trends-2023.pdf?epieditmode=false (Accessed: 26 June 2023).

[13] Jayde Pulford, Nigel Brook, and Zaneta Sedilekova, (2023) *Azerbaijan initiates first inter-state arbitration against Armenia*, *Lexology*. Available at: https://www.lexology.com/library/detail.aspx?g=9d7f193a-c465-4c27-ba8b-1536ef937b6d (Accessed: 26 June 2023).

[14] Wendler Carsten, Garcia Bel Marta and Petazzi Gregorio (2023) *Withdrawal from the ECT: One step forward, Two steps back?* Available at: https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2023/withdrawal-from-the-energy-charter-treaty/ (Accessed: 26 June 2023).

[15] 2023 WL 2922297, at 9 (11th Cir. 2023).

[16] Article V, The New York Convention.

[17] Jan de Nul and Credendo v. Autonomous Port of Douala - Judgment of the Paris Court of Appeal 22/00408 - 4 April 2023 on Jan de Nul and Credendo Export Credit Agency v. Port Autonome de Douala, ICC Case No. 24961/DDA.

In this case, the Paris Court of Appeal reviewed an action to annul a partial arbitral award dated December 21, 2020, under ICC reference no. 24961/DDA. The dispute involved a public contract between the Autonomous Port of [Locality 3] (PAD) and Jan de Nul (JDN) for dredging and maintenance works in the access channel to the Port of [Locality 3]. The PAD argued against the arbitral tribunal's jurisdiction based on the arbitration clause's ambiguity and the non-arbitrability of the tax matter. However, the court dismissed these arguments, determining that the clause indicated the parties' intent for ICC-administered institutional arbitration and that the tax matter fell within the arbitration agreement's scope. This judgment is significant as it clarifies the arbitration clause interpretation and confirms the arbitrability of tax matters in international disputes.

3) *Deutsche Telekom v. India*[18]

In this case, India obtained electromagnetic frequency bands from ITU and contracted with Devas Multimedia for S-band spectrum use. Deutsche Telekom AG, a subsidiary of Deutsche Telekom, invested in Devas and alleged a breach of the Germany-India BIT by India. Arbitration ensued, and the tribunal in Geneva found India in breach of fair and equitable treatment under the BIT. India challenged jurisdiction, but the Federal Supreme Court dismissed the review. The tribunal issued a final award for damages. India sought a review of the awards based on newly discovered facts. The Federal Supreme Court examined the admissibility and content of the review. This case is a landmark in international arbitration, addressing jurisdiction, fair treatment, and the review process.

In addition to these international judgments, there were many landmark judgements regarding arbitration in 2023 in the Indian context.

4) *Devas Employees Mauritius (P) Ltd. v. Antrix Corporation Ltd.*[19]

In this case the single-judge bench of the Delhi High Court set aside the award passed by the ICC under Section 34 of the Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"] based on fraud and opposing the public policy of India. The case ensued between Devas, a wholly owned government company and Antrix, the commercial arm of ISRO. The ICC award passed in the favour of Devas was set aside by the Delhi High Court on the grounds of patent illegality, fraud and conflict with the Indian public policy. The Court relied on the NCLAT decision that the relationship between Antrix and Devas Multimedia was a product of fraud perpetrated by Devas Multimedia and hence the arbitral award, would be infected with the poison of fraud.

[18] Deutsche Telekom v. India PCA Case No. 2014-10, Decision of the Swiss Federal Tribunal 4A_184/2022 on 8 March 2023.

[19] Devas Employees Mauritius (P) Ltd. v. Antrix Corporation Ltd. 2023 SCC OnLine Del 1608.

5) *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd.*[20]

In this case the five-judge Supreme Court bench delved into the issue of whether unstamped arbitration agreements are valid and the scope of the court's intervention under Section 11 of the Arbitration Act. In the appeal, the 3:2 majority overturned the decision and held that an unstamped or inadequately stamped arbitration agreement is not valid in law. An unstamped instrument, when it is required to be stamped is not a contract and not enforceable in law. On the second issue, the court held that it has the power to ascertain the existence of an arbitration agreement under Section 11. The Court, acting under Section 11, is bound to act under Sections 33 and 35 of the Stamp Act if the instrument is not stamped or insufficiently stamped.

6) *Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal*[21]

This case determined the question of whether Section 7B of the Indian Telegraphic Act, 1885, which provides for statutory arbitration ousts the jurisdiction of the Consumer Forum on the disputes relating to goods and services. The Supreme Court relying on the *Emaar MGF Land Ltd. v. Aftab Singh*[22] held that the Arbitration Act is to act in addition to and not in derogation of any provisions of any other enactment. Section 7B has a similar scheme as the Arbitration Act and hence it does not oust the jurisdiction of the Consumer forum.

It is amidst this backdrop of significant developments in the global landscape of Arbitration that the Indian Review of International Arbitration ["**IRIArb**"] brings Volume 3 of its first Issue. The issue contains contributions from around the world and features articles on issues relevant to arbitrations, such as stamping of arbitration agreements, unilateral appointments of arbitrators, the effect of awards after the annulment, and also includes two book reviews.

The article by Vyapak Desai and Shweta Sahu titled "*Unilateral Appointment of Arbitrators: Looking Beyond Perkins*" discusses the recent ruling by the Delhi High Court in *Envirad*,[23] declaring that unilateral appointment of arbitrators in public-sector contracts is unenforceable. Precedents like the *Perkins*[24] judgment and *Prodattur*[25] judgment have already established the legal position on this issue. The author expresses concerns about the complete prohibition of party autonomy in such cases, and instead suggests imposing limitations based on public policy or invoking unconscionability in specific cases. Balancing party autonomy, transparency, and fairness in arbitration is emphasized,

[20] N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. 2023 SCC OnLine SC 495.
[21] Vodafone Idea Cellular Ltd. v. Ajay Kumar Agarwal II(2022) CPJ1 (SC).
[22] Emaar MGF Land Limited v. Aftab Singh, 2018 SCC OnLine SC 2945.
[23] Envirad Projects Pvt. Ltd. v. NTPC Ltd., ARB.P. 27/2022 (India).
[24] Perkins Eastman Architects DPC v. HSCC (India) Ltd, 2019 SCC OnLine SC 1517 (India).
[25] Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267 DLT 51 (India).

along with the need for investigating potential bias and parties' willingness to agree to unilateral appointment clauses.

The article by Tariq Khan and Nooreen Sarna titled "*Enforcement of Awards Annulled at the Seat: International Perspective*" analyzes the treatment of awards annulled at the seat in different jurisdictions. It explores this issue from the perspective of French, British, American, and Indian courts. The article highlights how French courts deviate from the norm by enforcing annulled awards through case law, while American courts do not recognize annulled awards. It also discusses the approach of British courts, which is the opinion of the authors is balanced. Lastly, the article examines the Vijay Karia Judgment, which outlines grounds for non-enforcement of arbitral awards in India.

The paper by Nilovna Maelzer titled "*Arbitration & Conciliation (Amendment) Act, 2021: Return of Unconditional Stay on Enforcement of Awards - A Retrograde Step?*" discusses the 2021 amendment to the Arbitration Act, which adds fraud and corruption as grounds for seeking unconditional stay on award enforcement under Section 34. The author criticizes the retrospective application of the amendment and highlights the uncertainties it brings to award enforcement. The paper briefly explores the history of unconditional stay on enforcement in the Indian arbitration regime. Concluding remarks suggest measures to overcome this setback and address the challenges in enforcing challenged domestic arbitral awards.

The article by Vedaant Agarwal & Shivankar Sukul titled "*Feasibility & Legitimacy of Third-Party Extension of Arbitration Agreement in Indian Arbitration Regime*" explores the development of third-party extensions in India. It highlights the lack of recognition by the Indian judiciary and legislature regarding the distinctions between multi-party arbitration and multi-claim arbitration. The case of *Chloro Controls* examined to illustrate the court's conceptual ambiguity. The analysis also considers the 2015 amendment to Section 8 of the Arbitration Act, which attempted to address this issue but suffered from poor drafting. The authors hope that the recent case, *Cox & Kings*,[26] will provide clarity on these matters.

The article by Mr. Tejas Karia and Ms. Vrinda Pareek titled "*Stamping of Arbitration Agreements: Analysis of Evolving Indian Arbitration Landscape*" explores the evolving jurisprudence on whether arbitration agreements require stamp duty. It introduces the requirement to pay stamp duty and explains how arbitration agreements fall under the "Residuary Article" for stamp duty. The article highlights the importance of stamping instruments and the negative consequences of non-stamping. It discusses contradictory Supreme Court judgments and the current position on stamp duty payment

[26] Cox & Kings Ltd. v. SAP India Pvt. Ltd, Arbitration Petition, (Civil) No. 38/2020.

and enforceability of arbitration agreements. Lastly, the article concludes with the ramifications of the NN Global Reference Judgment, which established the existing jurisprudence on this matter.

Shashank Garg's book review of "*Commercial Arbitration in Australia under the Model Law*" by Doug Jones AO and Janet Walker CM highlights its authoritative and invaluable guidance for domestic arbitration. It discusses the adoption of the UNCITRAL Model Law on International Commercial Arbitration and its implications for domestic arbitrations in Australia. The review covers the third edition, including recent judicial pronouncements, and praises the comprehensive coverage of topics such as arbitration history, arbitrability, virtual hearings, consolidation of proceedings, and emergency award enforcement. The addition of Professor Janet Walker as a co-author is noted for its impact. Overall, the review states that the book is essential for judges, practitioners, and academics in Australian commercial arbitration.

In his book review, Dr. Christopher highlights the unique value of "*Arbitration in India: A Comprehensive Guide*" by Tariq Khan. He notes that as a leading expert in international arbitration, Khan presents a straightforward and comprehensive view of the arbitration process in India, making it accessible to readers from start to finish. The author in his review breaks down different sections of the book and provides a brief overview of each section. The author also appreciates the user-centric approach and how this book has allowed readers unfamiliar with arbitration in India to grasp the subject. The author concludes by emphasizing the book's value to both local and international practitioners and parties.

UNILATERAL APPOINTMENT OF ARBITRATORS: LOOKING BEYOND PERKINS

Vyapak Desai, Shweta Sahu & Ritika Bansal*

I. INTRODUCTION*

Recently, the Delhi High Court, in the case of *Envirad Projects Pvt. Ltd. v. NTPC Ltd.* ["***Envirad***"],[1] held that an arbitrator appointment procedure under an arbitration agreement which requires an interested party to appoint a sole arbitrator will be unenforceable in public-sector contracts. Following the judgment of the Supreme Court of India ["**Supreme Court**"] in *Perkins Eastman Architects DPC v. HSCC (India) Ltd* ["***Perkins***"],[2] this case highlights that it is now a settled position in India that such appointment procedures will no longer be enforceable across contracts, and that a court has the power to appoint an arbitrator instead in such cases. The Delhi High Court has adopted this approach in several cases[3] including the case of *Proddatur Cable TV Digi Services v. Siti Cable Network Limited* ["***Proddatur***"].[4]

It may, however, be time to reconsider whether such a settled position is desirable to begin with. A blanket ban on the unilateral appointment of sole arbitrators, without further analysis into the bargaining powers of the parties or any evidence of actual or evident partiality of nominated arbitrators, may be argued as infringing upon the principle of party autonomy.

II. PERKINS

In *Perkins*, the parties had entered into a contract for architectural designing and planning of the proposed All India Institute of Medical Sciences at Guntur, Andhra Pradesh in 2017. This contract provided for a detailed dispute resolution clause which held that

> "*except where the decision has become final, binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole*

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[1] Envirad Projects Pvt. Ltd. v. NTPC Ltd., ARB.P. 27/2022 (India).

[2] Perkins Eastman Architects DPC v. HSCC (India) Ltd, 2019 SCC OnLine SC 1517 (India).

[3] Mahalakshmi Infraprojects Private Ltd v. NTPC Ltd, ARB.P. 230/2020 (India); Neha Aviation Management Pvt. Ltd v. Air India SATS Airport Services Pvt. Ltd., Arb. P. 546/2019 (India); Bilva Knowledge Foundation and Ors. v. CL Educate Limited, Arb. P. 816/2019 (India).

[4] Proddatur Cable TV Digi Services v. Siti Cable Network Limited, (2020) 267 DLT 51 (India).

> *arbitrator appointed by the CMD (Chairman and Managing Director) HSCC within 30 days from the receipt of request from the Design Consultant*."

When a dispute arose between the parties in 2019, the applicant, Perkins Eastman, filed a request with the CMD of HSCC for the appointment of an arbitrator in accordance with the dispute resolution clause of the contract. Upon the CMD's failure to appoint an arbitrator within 30 days from the receipt of the request, Perkins Eastman filed an application under Section 11 of the Indian Arbitration & Conciliation Act, 1996 ["**Arbitration Act**"] seeking appointment of an arbitrator. On the 31st day, the CMD appointed an arbitrator.

The Supreme Court found that CMD's appointment of an arbitrator on the 31st day from the receipt of request from Perkins Eastman will not constitute a refraction of a magnitude that would require the exercise of the court's powers under Section 11 of the Act. However, the Supreme Court went on to find that the dispute resolution clause which provided for such unilateral appointment of a sole arbitrator by an interested party is invalid under Section 12(5) of the Act. The Supreme Court relied on the finding in *TRF Limited v. Energo Engineering Projects Limited* ["***TRF Limited***"][5] for this purpose:

> *"a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator."*
>
> *(emphasis supplied)*

In Perkins, the court held that a party making an appointment under such clauses will "*always have an element of exclusivity in determining or charting the course for dispute resolution*."[6] The Delhi High Court followed this approach in *Proddatur* and a number of subsequent cases.

III. SNAPSHOT OF JUDICIAL PRECEDENTS

In *Proddatur*, a dispute arose between the parties to a distribution agreement in 2018. The distribution agreement provided that any dispute between the parties "*shall at first be subjected to an attempt at resolution by mutual amicable discussion, failing which the same shall be referred for Arbitration by the sole arbitrator appointed by the Company* (i.e., Siti Cable)". When the dispute arose and the parties

[5] TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377 (India).
[6] *Ibid*.

could not amicably settle it, Siti Cable appointed a sole arbitrator in accordance with this dispute resolution clause. The appointed arbitrator issued a disclosure under Section 12 of Act and sought consent of Proddatur Cable for her appointment. However, the arbitrator continued with the proceedings despite Proddatur Cable's refusal to consent to her appointment.

Before the conclusion of these arbitration proceedings, the Supreme Court issued the *Perkins* judgment on November 26, 2019. Accordingly, Proddatur Cable filed an application before the arbitrator alleging that *Perkins* resulted in the *de jure* termination of the arbitrator's mandate. Upon the arbitrator's failure to recognise the termination of her mandate in the absence of a court order, Proddatur Cable filed an application with the Delhi High Court to seek such a judicial order. The Delhi High Court found that the *Perkins* ratio will clearly apply in this case and terminated the mandate of the arbitrator. The court held that like *Perkins*, the arbitration clause in *Proddatur* also permitted Siti Cable to unilaterally appoint a sole arbitrator. Accordingly, the Delhi High Court reiterated the *Perkins* ratio to hold that "*a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law*"[7] and termed the arbitration clause as invalid under Section 12(5) of the Act.

Similarly, in *Mahalakshmi Infraprojects Private Ltd v. NTPC Ltd* ["***Mahalaxmi***"]**,** the parties had entered into a contract with a dispute resolution clause which set out that

> "e*xcept where otherwise provided for in the contract all questions and disputes…shall be referred to the sole arbitration of the General Manager of NTPC Limited (Formerly National Thermal Power Corporation Ltd), and if the General Manager is unable/ or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director*".

The contract further provided that: (i) no person other than a person appointed by the CMD should act as arbitrator; (ii) the dispute shall not be referred to arbitration at all if no arbitrator is appointed by the CMD for any reason. The Delhi High Court found that this dispute resolution clause was violative of Section 12(5) of the Act for granting an exclusive right to appoint an arbitrator to one party.

In *Neha Aviation Management Pvt. Ltd v. Air India SATS Airport Services Pvt. Ltd* ["***Neha Aviation***"], the parties had entered into an agreement outsourcing manpower ground handling

[7] Proddatur, (2020) 267 DLT 51 at 23.

services at Indira Gandhi International Airport for a period of three years. The arbitration clause in the contract provided that any disputes between the parties would be resolved by an arbitrator appointed by the vice-president of the Respondent. The court, relying on *Perkins* and *Proddatur*, vitiated the arbitration clause by finding that such clauses violate Section 12 of the Act.

IV. ENVIRAD

In *Envirad*, the dispute stemmed from a contract entered between the parties pursuant to a tender awarded by the NTPC to Envirad Projects, a civil construction company, for the NTPC-Nanda Project in 2015. Owing to NTPC's alleged failure to pay Envirad Project's dues, Envirad Project commenced an arbitration under the arbitration clause of the contract in 2021. The arbitration clause of the contract provided that all

> "*disputes shall be referred to the sole arbitration of the General Manager of NTPC limited, and if General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the Chairman and Managing Director, NTPC Limited, willing to act as such Arbitrator*".

In light of this clause, Envirad Projects filed an application under Section 11(6) of the Act seeking the appointment of a sole arbitrator by the court to adjudicate this dispute.

The Delhi High Court allowed Envirad Project's petition. It held that the appointment procedure provided under the arbitration agreement is unenforceable in India in light of the Supreme Court's decision in *Perkins* which provided that "*no single party can be permitted to unilaterally appoint the Arbitrator, as it would defeat the purpose of unbiased adjudication of dispute between the parties*."[8] Accordingly, the court found that an arbitrator may be appointed by the court or by consensus of the parties in such cases.[9] Referring to *Mahalakshmi*, the court found that when such an unenforceable appointment procedure has been provided in a contract, the "*task of appointing an arbitrator devolves on the court*."[10] Therefore, the court appointed a retired justice as the sole arbitrator in this matter.

V. ANALYSIS AND WAY FORWARD

Envirad forms part of a series of judgments which seem to put forward a now-established position that any unilateral appointment of a sole arbitrator by an interested party is prohibited.[11] Without

[8] Envirad, ARB.P. 27/2022 at 8.
[9] *Ibid*.
[10] *Ibid*, at 9.
[11] TRF, (2017) 8 SCC 377; Perkins, 2019 SCC OnLine SC 1517.

conducting any further analysis on this issue, *Envirad* echoes the finding of *Perkins* and *Proddatur* that such an appointment procedure will "*always have an element of exclusivity*".[12] However, in *Perkins* as well as in *Proddatur*, the Supreme Court and the Delhi High Court respectively, reached this finding basis Section 12(5) of the Act even though the actual wordings of the section do not support any such prohibition.

Section 12(5) of the Act provides that "*any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator*". Further, the Seventh Schedule to the Act lists down situations when a person shall be ineligible to act as an arbitrator due to her relationship to the parties or the dispute, or due to any vested interest that she may have in the outcome of the dispute. These provisions, focused on an arbitrator's ineligibility, do not put down any restrictions on the appointing authority (i.e,. they do not require that the appointing authority is also a neutral party). This can be differentiated from countries such as Germany and Netherlands where the legislature has explicitly provided that a party may request the court to appoint an arbitrator when an arbitration agreement places one party at a disadvantage regarding the composition of the arbitral tribunal.[13]

Consequently, the courts in these cases advocate for a blanket ban on a unilateral appointment procedure basis an argument that a person ineligible to act as an arbitrator should necessarily be disqualified from acting as an appointing authority as well. A more suitable avenue for the courts to impose such a restriction might be under the public policy exception to enforcement of awards, under Section 34 of the Act, in the absence of a specific statutory prohibition under the Act. This would be similar to the position taken by the French courts which have refused enforcement of one-sided arbitrator appointment procedures in arbitration agreements owing to the principle of equality in their public policy.[14] During or before the commencement of arbitration proceedings, a court may also decide not to enforce such one-sided arbitration clauses when it is satisfied that the conditions for unconscionability of contract under Section 16 of the Indian Contract Act, 1872 are met.

This is more so as *Proddatur* disqualified an arbitrator when the petitioner did not seem to present any evidence that would suggest there were any concerns surrounding actual, evident or potential impartiality of the arbitrator. The arbitrator had, in fact, even provided a disclosure under Section 12 of the Act. *Proddatur*, therefore, discarded the principle of arbitration which requires courts to

[12] Proddatur, (2020) 267 DLT 51 at 8 citing Perkins, 2019 SCC OnLine SC 1517 at 21.
[13] § 1034(2), German Code of Civil Procedure, 1997; Art. 1028(1), Dutch Code of Civil Procedure, 2015.
[14] PT Ventures SGPS SA v. Vidatel Ltd, 19/10666 (Paris Court of Appeal, 2021).

presume that an arbitrator is independent unless proved otherwise. A factual enquiry into any potential or actual impartiality of an arbitrator as well as the willingness of the parties to enter into an agreement with a unilateral arbitrator appointment clause may, therefore, better balance the foundation principles of party autonomy, transparency and fairness in arbitration.

These judgments correctly note that arbitration clauses which allow for unilateral appointment of a sole arbitrator may be a product of unequal bargaining powers between the parties. In *Envirad*, the court could have noted the possibility of unequal bargaining power between the parties since most government construction contracts are in the form of standard form contracts which are accepted in entirety by the other party. However, the court merely accepted a blanket ban upon such appointment procedures in India without conducting any factual inquiry. A blanket ban fails to account for situations where such a clause may not be a product of inequity in bargaining powers. In such a situation, vitiating such clauses in carefully negotiated arbitration agreements between sophisticated parties may be a significant encroachment upon party autonomy. A fact-based inquiry into the bargaining powers of the parties may again be a better way to balance this principle of party autonomy with the need for fairness in the arbitration process.

Lastly, the Indian courts have taken a different position in arbitration agreements which provide for a "quasi-unilateral" appointment procedure.[15] For example, in *Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited* ["***Voestalpine***"],[16] the Supreme Court upheld an arbitration clause which required one of the parties to select an arbitrator from a list of arbitrators provided by the other party. This quasi-unilateral appointment in *Voestalpine* was upheld on the ground that it provided some authority to both parties in appointing an arbitrator. However, it is arguable whether a quasi-unilateral appointment procedure is likely to ensure impartiality of the arbitrator any more than a unilateral appointment procedure. It is possible that the responsible party curates a small list of potential arbitrators which consists of persons which are all closely related to the party – which may include its serving or former employees. This would effectively leave the other party with no real choice, and thereby it would not address the problem of "exclusivity".

For quasi-unilateral appointment procedures, the Indian courts have taken a fact-based inquiry to decide whether a panel selected by a party consists of sufficient impartial options for the other party

[15] Moazzam Khan & Tanisha Khanna, NPAC's Arbitration Review: Validity of unilateral Appointment of Arbitrators: Indian courts blow hot and cold, BAR AND BENCH (Oct. 4, 2022, 10:00 AM), https://www.barandbench.com/columns/validity-of-unilateral-appointment-of-arbitrators-indian-courts-blow-hot-and-cold.

[16] Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665 (India).

to have an actual choice.[17] Such a fact-based inquiry, which delves into actual concerns regarding independence and impartiality of potential arbitrators, is desirable. It might also be desirable for courts to conduct a similar factual inquiry for clauses where parties agree that one of the parties, or any other interested party, shall unilaterally appoint a sole arbitrator.

[17] The courts decide whether a panel curated by a party in such quasi-unilateral appointment clauses is "broad-based". Appointment through a broad panel has accordingly not been vitiated by the Supreme Court of India. Voestalpine, (2017) 4 SCC 665; Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML, (2020) 14 SCC 712 (India).

ENFORCEMENT OF AWARDS ANNULLED AT THE SEAT: INTERNATIONAL PERSPECTIVE

Tariq Khan and Nooreen Sarna; assisted by Raj Maitrey and Harleen Kaur Rait*

I. INTRODUCTION

The emphasis of the New York Convention has been to broaden the enforceability of arbitral awards.[1] The New York Convention removed the requirement of double exequatur.

As summarized by Lord Collins in In the *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,[2] the Geneva Convention had a requirement of getting a leave to enforce (an exequatur) before seeking enforcement of the award. After obtaining an exequatur, a similar order had to be obtained from the country where enforcement of the award was sought. The New York Convention did away with such requirements.

The New York Convention made important changes to make it easier to enforce arbitration awards. In the past, under the Geneva Convention, the party wanting to enforce an award had to prove certain conditions, like showing that the award was final in the country where it was issued. Some countries required an additional order called an exequatur to enforce the award in their jurisdiction. This meant going through a two-step process known as double exequatur. However, the New York Convention removed the need for double exequatur. Now, the burden of proving why an award should not be enforced lies on the party opposing enforcement. They have to provide specific and exhaustive reasons for non-enforcement.

As a result, while Article V(1)(e) of the New York Convention recognizes the seat court as being the appropriate forum to seek the setting aside of an arbitral award, the enforcement of an award under the New York Convention is not limited to any one specific jurisdiction. It also includes the jurisdiction of the places where the award debtor's assets are located. With the removal of *double*

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[1] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (3rd Ed. 2021), p. § 22.03.

[2] Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan [2011] 1 A.C. 763.

exequatur for the enforcement of arbitral awards, there is also no precondition for the award to be first recognized or enforced by the seat court for it to be enforced in other states.[3]

II. DUALITY OF TREATMENT AND POTENTIAL ISSUES

This duality in the treatment of an arbitral award by different courts gives rise to the potential for either simultaneous setting aside and enforcement actions pending before different courts, or enforcement actions for awards which the seat court has set aside.

In order to address scenarios where an award is, or has been, the subject of both setting aside proceedings and enforcement proceedings, Article V(1)(e) and Article VI of the New York Convention set out the following *"permissive"* provisions:[4]

i. Under Article V(1)(e) of the New York Convention, the recognition and enforcement of the award may be refused if the award 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.

ii. Under Article VI of the New York Convention, when an application for the setting aside of the award has been made, the decision on the enforcement of the award may be adjourned.

Therefore, the provisions of the New York Convention allow for the decision in the setting aside application made by the Seat Court to inform the court before which enforcement proceedings lie. The enforcing Court can exercise discretion to allow or refuse enforcement of the arbitral award even after its been set aside in the seat court. This is commented upon by Professor van den Berg: "*It is to be noted that the opening lines of both the first and the second paragraph of Article V employ a permissive rather than mandatory language: enforcement "may be" refused.*"[5] The scope of this discretion is a matter of significant debate, with different enforcing courts adopting varying views on whether the New York Convention imposes strict limitations on exercising or allows discretion. In this regard, the jurisprudence of the French, American and English courts is illustrative of divergent approaches to enforcing annulled or set-aside awards.

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[3] E. GAILLARD & J. SAVAGE (EDS.), FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶1676 (1999); UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (New York, 1958), 2016 Ed.; NADIA DARWAZEH, ARTICLE V (1)(E), IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 301, 306-07 (H. Kronke, P. Nacimiento et al. eds., 2010); ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 110 (P. Sanders ed., 2011).

[4] Europcar Italia, S.p.A. v. Maiellano Tours, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

[5] The New York Arbitration Convention of 1958 (1981).

III. DIFFERENT APPROACHES IN JURISDICTIONS

A. FRENCH COURTS

The French courts adopt the view that an award in international arbitration can still be enforced even if set aside at the seat.[6] This view is grounded in the fundamental principle that an arbitral award has no nationality of its own, and therefore, its annulment by one particular state would not affect its continuing existence in another state for the purpose of enforcement.[7]

Articles 1520 and 1525 of the French Code of Civil Procedure do not include the annulment of an arbitral award as a ground not to enforce arbitral awards[8]. The French courts rely on Article VII(1) of the New York Convention,[9] which allows an interested party to rely on the laws of the country in which he seeks to get the award enforced.

On this basis, the enforcing court is considered to have primary jurisdiction over the enforceability of the award, notwithstanding any prior setting aside of the arbitral award by the Seat Court. This approach stands to good reason in policy, as the automatic refusal to enforce the award simply because it has been set aside, as such an interpretation of Article V(1)(e) would bind the enforcing award to the tyranny of the Seat Court, without the ability of an independent review.

B. US COURTS

In stark contradiction to this approach, courts in the United States have refused to enforce awards that are set aside by the seat court for the precise reason that the award would cease to exist upon being lawfully set aside by the seat court.[10] In the oft-cited Baker Marine case, the Second Circuit upheld the District Court's decision to refuse the enforcement of an award that had been set aside at the seat of arbitration, Nigeria[11], as it was reluctant to "second-guess" and undermine the seat court's decision for fear of the risk of conflicting judgments. Although the jurisprudence from the United States is not

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[6] Société Pablak Ticaret Limited Sirketi v. Norsolor S.A. 83-11.355, French Cass (1984). Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV), 92- 15.137, French Cass (1994). Putrabali Adyamulia (Indonesia) v. Rena Holding, et al., 05-18.053, French Cass (2007). The Arab Republic of Egypt v. Chromalloy Aeroservices, Inc Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 14, 1997, 95/23025 (Fr.). See also, XXII Y. B. COMM. ARB. 691-695 (1997).

[7] CLIFFORD J. HENDEL AND MARÍA ANTONIA PÉREZ NOGALES, 'CHAPTER 12: ENFORCEMENT OF ANNULLED AWARDS: DIFFERENCES BETWEEN JURISDICTIONS AND RECENT INTERPRETATIONS', IN KATIA FACH GOMEZ AND ANA M. LOPEZ-RODRIGUEZ (EDS), 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES,(Kluwer Law International; Kluwer Law International 2019) pp. 187 – 204, pg. 194.

[8] *Code of Civil Procedure, Book IV, Arbitration*, in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 14 (Kluwer Law International 1984, Supplement No. 64, May 2011) (Jan Paulsson & Lise Bosman eds. 2018).

[9] Article VII(1), The New York Convention.

[10] Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd (1999) 191 F 3d 194; TermoRio SA ESP v Electranta, SP (2007) 487 F 3d 928.

[11] 191 F.3d 194, 196 (2nd Cir. 1999).

uniform, by and large, the Courts appear to be guided by this principle of judicial reciprocity and accept the annulment of an award by the seat Court unless shown to be against American public policy. [12]

C. ENGLISH COURTS

Compared to French and American jurisprudence, the English courts adopt a median and practical approach. In the decision of *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,[13] certain considerations for the exercise of the Court's discretion in enforcing an annulled award were outlined;[14] the enforcing court is permitted to consider the circumstances in which the original arbitration award was made and the reasons for it being annulled at the seat. The enforcing court would not be obstructed from creating their own perspective on the application of legal rules by foreign entities. Therefore, unlike the French and American Courts, appropriate deference would be paid to the decision of the seat court in setting aside an award at the time of its enforcement, without entirely being bound by such a ruling.

D. INDIAN COURTS

Consistent with a pro-arbitration approach, Indian Courts exercise limited discretion when assessing whether to refuse the enforcement of an award.[15] In the decision of *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others*,[16] the Supreme Court elaborated on the exercise of discretion when refusing to enforce an award under Section 48. The Supreme Court held that when it comes to resisting the enforcement of a foreign arbitration award under Section 48, the reasons can be grouped into three categories. First, some grounds question the jurisdiction (authority) of the arbitration proceedings. Second, some grounds only affect the interests of the parties involved. And third, there are grounds that relate to the public policy of India, as explained by Explanation 1 to Section 48(2).

If a ground is raised that challenges the very jurisdiction of the arbitration tribunal, such as the arbitration agreement not being valid under the applicable law agreed upon by the parties or the subject matter of the dispute not being suitable for arbitration under Indian law, it is clear that there

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[12] Steven Finizio & Santiago Bejarano, *Annulled Commisa v. Pemex arbitration award enforced*, LEXIS PSL ARBITRATION (2016);Getma Int'l v. Republic of Guinea, 862 F.3d 45 (D.C. Cir. 2017).

[13] [2011] 1 A.C. 763.

[14] Dowans Holdings SA and Anr v. Tanzania Electric Supply Co Ltd, 1539, UKHC (2011). Yukos Capital SARL v. OJSC Rosneft Oil Company, [2012] E.W.C.A. Civ 855

[15] Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) SCC OnLine Del 7810; Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others ("Karia") (2020) SCC Online 177.

[16] Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others ("Karia") (2020) SCC Online 177, ¶¶ 58-59.

is no room for discretion. Enforcement of a foreign award that was made without proper jurisdiction cannot be considered for enforcement, even if it may seem favourable in some other aspects.

In contrast, there may be some flexibility when the grounds used to resist the enforcement of a foreign arbitration award are related only to the interests of one of the parties involved. For example, suppose a party claims that they could not present their case before the arbitrator, but this ground can be waived or disregarded without causing harm to the party. In that case, a court may still enforce the foreign award even if this ground is proven.

Again, regarding the "public policy of India" ground, there is no discretion when enforcing an award influenced by fraud or corruption or violates the fundamental principles of Indian law, morality, or justice. In these cases, the court cannot exercise discretion and must refuse enforcement of the foreign award.

So, in the "may" in Section 48, depending on the context, it can mean "shall" or that that the court still has some residual discretion to enforce a foreign award, even if there are grounds to resist its enforcement. However, this discretion is limited to specific circumstances mentioned above, and the court needs to carefully balance various factors when deciding to enforce a foreign award

Given that an award could potentially be set aside at the seat court on grounds *"linked to party interest"*, which grounds may be seen as being insufficient to justify a refusal for enforcement, the approach of courts in India could potentially result in the enforcement of an award that has been annulled at its seat court.

IV. CONCLUSION

To conclude, Article V(1)(e) and Article VI of the New York Convention are interpreted differently in different jurisdictions. The French courts adopt a policy of enforcing an award even if it has been set aside at the seat court or setting aside proceedings are going on. On the other hand, American courts are reluctant to 'second guess' the seat court's decision and accept the award's annulment unless it is against American public policy. The English courts follow a median approach and are not bound by the seat court's ruling. However, certain considerations govern the English courts' discretion in enforcing annulled awards. Indian courts, by and large, do not exercise discretion when considering the enforcement of annulled awards. However, if an award has been set aside at the seat court on grounds 'linked to the party interest' as given in *Vijay Karia & Others v. Prysmian Cavi E Sistemi SRL and Others,* an annulled award may also be enforced in India.

ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2021: RETURN OF THE UNCONDITIONAL STAY ON ENFORCEMENT OF AWARDS- A RETROGRADE STEP?

Nilovna Maelzer: assisted by Shruti J Lohar*

I. INTRODUCTION

The Arbitration and Conciliation Act has been subjected to multiple amendments by the Parliament in an effort to make India a pro-arbitration hub. The ongoing stream of amendments, occurring at frequent intervals, would effectively eliminate any ambiguities and enhance the overall efficiency of the arbitral process.[1] However, some of these amendments have been severely criticized for failure to promote the cause of arbitration in India. The latest amendment to the Arbitration and Conciliation Act, 2021, follows the pattern of previous amendments by deviating from its original purpose. An important matter of concern is the recent introduction of a provision that permits an unconditional suspension of the enforcement of domestic awards while a challenge under S. 34 of the 1996 Arbitration and Conciliation Act is pending. This addition poses challenges and compromises the rigorous and demanding process of enforcing domestic awards.[2] Oscar Wilde once famously said: "*Experience is simply the name we give our mistakes"* and the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 can be seen as a response to the recurring challenges faced by litigants when enforcing domestic arbitral awards. The purpose of this amendment was to bring about a notable change in favour of enforcement by removing the automatic and unconditional suspension of the enforcement of domestic awards during the challenge proceedings under S. 34 of the Act.[3]

Regretfully however, in 2019, the Arbitration and Conciliation (Amendment) Act, 2019 was brought into force which sparked a vital debate in the arbitration circles for striking a discordant note. One of the significant drawbacks of the amendment was the inclusion of a provision that limited the applicability of the 2015 Amendment Act to future cases, thereby weakening the removal of the automatic and unconditional stay on the enforcement of domestic awards.[4] Fortunately, this setback of the 2019 Amendment Act was short-lived and soon the course was corrected by "*the Supreme*

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[1] Sumitra Bose, '*Unconditional Stay on Arbitral Awards: A Step back for Arbitrations in India*', THE LEGAL 500.COM, Accessed on: 10 March 2022, <:https://www.legal500.com/developments/thought-leadership/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/-:~:text=In that light, Section 36,the contract on which such-india>.

[2] Naresh Thacker & Samarth Saxena, '*Arbitration and Conciliation (Amendment) Act, 2021: The Final Word On Unconditional Stay On Enforcement Of Challenged Domestic Awards?*', Vol.4, IALR (2021).

[3] *Ibid.*

[4] *Ibid.*

*Court in Hindustan Construction Co. Ltd. v. Union of India ["**Hindustan Construction Co** "] wherein the relevant provisions of the 2019 Amendment Act were struck down as unconstitutional"*.[5] Just as it appeared that the dust seemed to have settled over this debate, the legislature introduced the Arbitration and Conciliation (Amendment) Ordinance, 2020 which came to be the Arbitration and Conciliation (Amendment) Act, 2021.[6] The 2021 Amendment Act brought retroactive changes to S. 36 of the Act and introduced the criterion of 'fraud or corruption' as a basis for requesting an unconditional stay on the enforcement of domestic awards.[7] The paper intends to highlight the ongoing shifts in legislative interpretation surrounding the recognition and enforcement of arbitral judgements in India and show how unsettled the situation still remains.

The paper attempts to shed light on the interaction between the Indian arbitration regime and the unconditional stay on implementation of arbitral rulings. It elucidates the ramifications that the 2021 amendment will have in great detail and also makes certain plausible arguments/ recommendations to rectify the amendment. The paper provides an examination of the appropriateness of retrospectively applying the 'fraud or corruption' standard introduced by the 2021 Amendment Act and the impact of the unconditional suspension on the enforcement of awards under both S. 36 and S. 34 while an application to set aside the award is still pending. Lastly, the author will put forth their concluding remarks, recommend certain measures that maybe used to overcome this setback and delineate the troubles which still lie ahead when seeking enforcement of challenged domestic arbitral awards.

II. EVOLUTION OF THE AUTOMATIC STAY PROVISION

The evolution of automatic stay provisions in the enforcement of arbitral awards in India has witnessed significant changes over the years. Initially, under the Arbitration and Conciliation Act, 1996, there was no automatic stay on the enforcement of arbitral awards. However, with subsequent amendments and judicial enunciations, the concept of automatic stay has emerged as it appears in the act today.In 2012, the Supreme Court of India, in the case of *National Aluminum Company Ltd. v. Pressteel & Fabrications Pvt. Ltd.*, ["***NALCO v. Pressteel***"][8] introduced the principle of an automatic

[5] Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.

[6] Nishith Desai Associates, '*International Commercial Arbitration: Law & Recent Developments in India*', NISHITH DESAI.COM, Accessed on: 10 March 2022, <Available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf >.

[7] *Ibid.*

[8] National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004) 1 SCC 540.

stay on enforcement by allowing award debtors to challenge arbitral awards before Indian courts. This decision enabled award debtors to seek a stay on enforcement by filing a challenge against the award.

Further developments took place with the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. This amendment aimed to expedite the enforcement of arbitral awards and discourage unwarranted delays. It introduced strict timelines for the disposal of applications seeking the setting aside or enforcement of arbitral awards. However, the 2015 amendment did not completely eliminate the possibility of an automatic stay.

The issue of automatic stay provisions in India came to the forefront with the Supreme Court's decision in the case of *BCCI v. Kochi Cricket Private Limited*[9] ["***BCCI v. Kochi***"] in 2018. The court held that any challenge to an arbitral award would automatically result in a stay on its enforcement, unless the party seeking enforcement demonstrates exceptional circumstances that warrant lifting the stay. This decision caused concerns about delays and the impact on the efficacy of arbitration in India.

To address these concerns, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted. This amendment aimed to strike a balance between the rights of award creditors and award debtors. It introduced changes to the automatic stay provisions, emphasizing that mere filing of a challenge to an award would not automatically stay its enforcement. The court would have discretion to grant a stay on enforcement after considering the circumstances of the case.

However, the automatic stay provisions continued to be a topic of debate and concern. The latest amendment, the Arbitration and Conciliation (Amendment) Act, 2021, brought some modifications to the automatic stay provisions. It introduced a requirement for *prima facie* evidence of fraud and corruption to be examined by the court in execution or enforcement proceedings. This provision aimed to prevent frivolous challenges and protect the integrity of arbitral awards.

Overall, the evolution of automatic stay provisions in the enforcement of arbitral awards in India reflects the efforts to strike a balance between the efficient enforcement of awards and safeguarding parties' rights to challenge awards under exceptional circumstances.

III. THE CONTROVERSY SURROUNDING S.36(3): AN ANALYSIS

[9] BCCI vs. Kochi Cricket Pt. Ltd. & Others., (2018) 6 SCC 287.

The changes effected to S.36 by the 2021 Amendment are regressive measures which alter the pro-arbitration regime that is sought to be encouraged in India. The Amendment has introduced an extra provision to S. 36(3), which mandates that if a court is initially convinced that the Arbitration Agreement or contract, forming the basis of the arbitral award, was affected by fraud or corruption, it must grant an unconditional suspension of the enforcement of that award.[10] The court can exercise this power pending disposal of a challenge under S.34.[11] By way of an explanation, The Ordinance has brought further clarity by specifying that the newly added provision to S. 36(3) will be applicable to all cases pertaining to arbitration proceedings, irrespective of whether the arbitration or court proceedings were initiated before or after the enactment of the 2015 amendment act.[12] This would mean that the amendment will have a retrospective application.

There appear to be several drawbacks in the 2021 amendment act, which pose a question as to the true intent of the amendment. As a result of which, the amendment continues to receive constant criticism and backlash from the arbitration community for stifling the cause of arbitration in India. Therefore, some of the most pertinent of these stumbling blocks are discussed and critically analyzed hereinafter.

A. ABSENCE OF A STRICT TEST TO ESTABLISH FRAUD AND CORRUPTION

The amendment has failed to offer a definition *stricto senso* and does not even lay down any test or guideline to establish what constitutes fraud and corruption. This indicates that the standards are extremely vague and arbitrary to say the least. Furthermore, with the inclusion of these grounds of stay, parties unhappy with the outcome will take every opportunity to claim that their contract or the final award is vitiated by fraud and/or corruption[13]. In *Swiss Timing Limited*[14]**,** the SC held "*that allegations of fraud or corruption in the contract would not undermine the arbitration agreement and all matters including the issue as to whether the main contract was void/voidable can be referred to*

[10] Pooja Chakrabarti and Kunal Dey, '*The Story of Arbitral Meddling- Analysing the Arbitration & Conciliation (Amendment) Ordinance,2020*', (Argus Partners.com), Accessed on: 15 March 2022, <Available at: https://www.argus-p.com/uploads/blog_article/download/1605776404_thesto~1.pdf>.

[11] the Arbitration & Conciliation (Amendment) Ordinance, 2020, § 2.

[12] *Supra* note *1* at 3.

[13] Ashish Dholakia and Ketan Gaur, Kaustubh Narendran, '*India's Arbitration & Conciliation (Amendment) Act,2021: A Wolf in Sheep's Clothing*', (Kluwer Arbitration.com), Accessed on: 15 March 2022, <Available at: http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/>.

[14] Swiss Timing Ltd. vs. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677.

arbitration"[15]. In *Ayysamy vs. Paramasivam*[16] and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd* "*the SC distinguished between fraud simpliciter and serious allegations of fraud, which destroy the entire contract, holding that only in the latter case would the dispute fall outside the competence of a tribunal*."[17] From a cursory reading, it appears that the amendment failed to make allowance for these considerations by not offering any clarity as to what claims if any will fall within the broad ambit of fraud and cross the threshold to merit the award of an 'unconditional stay'. "*The Supreme Court in the case of United Commercial Bank vs. Bank of India & Ors has held a prima facie case to mean that in the facts and circumstances of the case, there is a bona fide contention between the parties and a serious question is to be decided*".[18]

The 2021 Amendment is likely to become a tool in the hands of award debtors to thwart the award creditors from reaping the benefits of the award due to low and ambiguous standard of proof required to get an unconditional stay on enforcement, which will only add to the agony and misery of award creditors.

B. TOOL FOR UNNECESSARY DELAY AND JUDICIAL INTERVENTION

The amendment defeats the purpose of employing arbitration as a dispute settlement mechanism for its speedy disposal because the introduction of these additional grounds would empower the award debtor to challenge the award on the grounds of fraud and prevent the award creditor from realizing his interest from the award since an unconditional stay amounts to a blanket stay thereby hurting the pro-arbitration regime. Moreover, "*it makes the award more susceptible to litigation and judicial interference by allowing a prima facie review of the contract and the award and judicial intervention is antithetical to the very spirit of arbitration as enshrined in S. 5 of the act*"[19]. This would further add to the delay in enforcing arbitral awards in India making the whole process futile and counter-productive.

C. DILUTES THE EFFECT OF THE 2015 AMENDMENT ACT

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[15] Himanshu Shembekar, '*Unconditional Stay of Arbitral Awards in India: A Regressive Step'*, The American Review of International Arbitration (2022).

[16] A. Ayyasamy v A. Paramasivam and Others, (2016) 10 SCC 386.

[17] Avitel Post Studioz Limited and Ors.v. HSBC PI Holdings (Mauritius) Limited, (2020) SCC On Line SC 656.

[18] Sumitra Bose, '*Unconditional Stay on Arbitral Awards: A Step back for Arbitrations in India*', (The Legal500.com), Accessed on: 10 March 2022, <:https://www.legal500.com/developments/thought-leadership/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/-:~:text=In that light, Section 36,the contract on which such-india>.

[19] Shubham Joshi, '*Implications of the Arbitration & Conciliation (Amendment) Act,2021: Ensuring (Un)Ease of doing Business in India?*', (RGNUL Student Research Review), Accessed on: 18 March 2022, <Available at: http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/>.

One of the major motivations behind introducing the 2015 amendment was the SC's observation in NALCO v. Pressteel[20] that " *automatic stay jurisprudence left no discretion in the court to put the parties on terms which defeated the very objective of the alternate dispute resolution system".*[21] Significantly, it modified S. 36 to provide clarification that the act of filing a set-aside application under S. 34 would not automatically result in the stay of an award. Stays could only be granted if parties made applications before the courts, and such grants were not a matter of right but instead at the discretion of the court, which determined whether a stay was justified and, if so, its nature and conditions.[22]

It unduly permits award debtors to seek unconditional stays on pleading that award is seemingly entrenched in contracts/ agreements secured by fraud — this, while challenge under S.34 is pending. It is silent as to at what stage may this challenge arise. Is it when one merely alleges fraud or corruption, or is it after furnishing strong proof to the court in that regard? The phraseology when it '*prima facie* appears to the Court[23] *does* not evidence the requisite clarity.

D. IN CONFLICT WITH S.34

The amendment made in 2015 to S. 34(1)(b) provided clarification that awards would be considered contrary to the public policy of India if they were influenced or impacted by fraud or corruption during their creation.[24]

However, S.34 doesn't permit setting aside on the grounds of fraud or corruption. An applicant under S.36(3), is anyway eligible to file an application seeking stay of the award pleading grounds already adumbrated under S.34. The Ordinance also grants the right to an applicant to request an unconditional stay under S. 36(3) while a S. 34 application is pending, by asserting that the contract or arbitration agreement was influenced by fraud or corruption.[25]

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[20] *Supra* Note 8.

[21] *Supra* note 4 at 4.

[22] Raghav Kacker and Ruchi Chaudhary, '*Section.36 of the Arbitration & Conciliation Act,1996 as recently amended*', (Indiacorplaw.in), Accessed on: 18 March 2022, <Available at: https://indiacorplaw.in/2021/04/section-36-of-the-arbitration-and-conciliation-act-1996-as-recently-amended.html>.

[23] Proviso to S.36(3) inserted by Arbitration & Conciliation (Amendment) Act,2021.

[24] Tariq Khan, Accessed on: 18 March 2022 , '*Changing contours of Public Policy in India: Un-blinkering the unruly horse*', (Bar and Bench), <Available at: https://www.barandbench.com/columns/public-policy-india-arbitration-un-blinkering-unruly-horse>.

[25] *Supra* note 1 at 1.

The Amendment brings within its ambit wide-ranging contracts and agreements effected by fraud or corruption, though they're dissociable from their parent contracts regardless of that, it provides for an alternative avenue for award-debtors to challenge and approach the Courts for a stay.[26]

E. RETROSPECTIVE APPLICATION

The latter part of the 2021 Amendment, which adds an explanation to the proviso to S. 36 (3), declares that it is retrospectively applicable.

> "*In essence, it allows the parties the liberty to file an application under S. 36(3) of the Act and invoke the grounds of fraud or corruption contemplated by the additional proviso to S. 36(3) of the act in all court cases arising out of or in relation to arbitral proceedings, regardless of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015*".[27]

It entirely disregards the verdict of the SC in *Hindustan Construction Co.*,[28] holding

> "*the retrospective application of automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 amendment act, but also results in payments already made under the amended S.36 to award-holder to be reversed and is manifestly arbitrary*"'.[29]

In *BCCI vs. Kochi*[30] the SC echoed the same sentiment holding "*if there's any amendment made to a substantive law and they affect the rights and liabilities of the parties or in any way impose disability, then it must be prospective in nature*". This amendment would be a gateway to reopening of matters already concluded and settled resulting in catastrophic consequences and a flurry of S.36(3) applications.

IV. AUTOMATIC STAY PROVISIONS IN OTHER JURISDICTIONS

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[26] Abhinaya Sharma and Lakshmi Iyer, '*Enforcement of Domestic Awards: Practical Realities*', (SCC Online), Accessed on: 25 March 2022, <Available at: https://www.scconline.com/blog/post/2021/05/17/enforcement-of-domestic-award-practical-realities/>.

[27] Vanshika Rajpal, '*Critical Analysis of the Arbitration & Conciliation (Amendment) Act,2021*', (bnwjournal), Accessed on: 25 March 2022, <Available at: https://bnwjournal.com/2021/11/27/critical-analysis-of-the-arbitration-and-conciliation-amendment-act-2021/>, Accessed on: 25 March 2022

[28] *Supra* note *5 at 4*.

[29] Animesh Bordoloi and Hitoishi Sarkar, '*Decluttering the 2020 Amendment to Arbitration & Conciliation Act,1996*', (Indiacorplaw.in), Accessed on: 25 March 2022, <Available at: https://indiacorplaw.in/2021/01/decluttering-the-2020-amendment-to-the-arbitration-and-conciliation-act-1996.html>.

[30] *Supra* note 9.

Courts across the globe are consistently urged to approach the matter of stay on enforcement of arbitral awards with some trepidation. The significance of such a stance lies in recognizing the delicate balance between respecting the autonomy of arbitration and ensuring the fairness of the enforcement process. The international community recognizes the importance of upholding arbitral awards and promoting arbitration as a reliable dispute resolution mechanism. However, courts must exercise prudence when granting stays, as it can potentially undermine the finality and efficiency of the arbitration process. A careful assessment of the circumstances, including the grounds for setting aside the award, the potential harm to the parties involved, and the public interest, is essential. By embracing a measured approach, courts can strike a delicate equilibrium that maintains the integrity of arbitration while safeguarding the interests of justice.

The author recommends that Indian courts could obtain practicable insights from the development of law on this point in other jurisdictions. Discussed below are some state practices in this regard.

A. HONG KONG

The Hong Kong Court of First Instance granted a stay on the enforcement of the award in the case of L v. B, despite the fact that the arbitration took place in a foreign jurisdiction (the Bahamas) and legal proceedings were initiated to challenge the validity of the award.[31] The court asserted its jurisdiction over two pleas. The first plea was made by the applicant, who sought security for enforcing the award. The second plea was made by the respondent, who sought a stay on the enforcement of the award until the challenge to the award in the Bahamas was resolved.[32] The Court took note of the following legal principles:

i. The argument that the award is invalid—In cases where the arbitral award appears to be *prima facie* invalid upon initial examination, it is advisable to postpone proceedings and refrain from issuing any security orders. Conversely, if the award is valid and without any doubt, the court should either order immediate enforcement or require a significant amount of security to be provided and
ii. Ease or difficulty of enforcement of the award— The court took into account the potential challenges in enforcing the award if there were any delays. It recognized that the objections raised by the respondent at the curial seat were relatively minor, thereby staying the enforcement proceedings for four months. However, this stay was contingent upon the

[31] Sai Ramani Garimella and Gautam Mohanty, 'The Faux Pas of Automatic Stay Under the Indian Arbitration Act, 1996- The HCC Dictum, Two-Cherry Doctrine, and Beyond', Vol.21 Iss. 1, Pepperdine Dispute Resolution Law Joumal, <Available at: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1475&context=drlj>.
[32] *Ibid*.

respondent providing the requisite security within twenty-one days. Resultantly, the applicant was awarded security for costs on an indemnity basis.

B. U.K

In the case of *AIC Ltd. v. Federal Airports Authority of Nigeria*, an English court made the decision to postpone the enforcement of an award in England and require the provision of security while awaiting the outcome of a set-aside application in a foreign court.[33] The dispute involved an award made in Nigeria, sought to be enforced in England. The defendant sought a postponement of the proceedings until a resolution was reached in the Nigerian proceedings. S. 103(5) of the English Arbitration Act of 1996 grants the English court the power to defer the enforcement decision when an application to set aside or suspend an award is pending in the jurisdiction where the arbitration occurred.[34] In such cases, the court also has the power to impose the condition of providing security as a prerequisite for the adjournment.[35] In considering the likelihood of the defendant's successful challenge to invalidate the arbitral award and the need to safeguard against the potential impairment of its enforcement prospects in England, The court ruled that the adjournment would be conditional on the defendant providing security worth $24 million, which amounted to 50% of the award or roughly three years' worth of interest. This judgment established a significant framework for courts to consider when exercising their discretion in deciding applications for stay and adjournment.[36]

C. CANADA

After a commercial dispute has been resolved through an arbitral award, the parties involved have limited rights to challenge the award or seek its nullification under the Ontario Arbitration Act, 1991, S.O. 1991, c.17.[37] When an appeal or application challenging the arbitral award is ongoing, the Ontario courts temporarily stay the enforcement of the award, provided certain conditions are met. "*A decision of the Ontario Court of Appeal, DAC Group (Holdings) Ltd. v. Fuego Digital Media Inc., 2018, per Benotto J.A., confirms that an appeal of the conditional stay of the arbitral award is interlocutory in nature.*"[38]

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[33] Melanie Martin, 'English Court Adjourns Enforcement of Nigerian Arbitral Award', KLUWER ARB. BLOG, <Available at: http://arbitrationblog.kluwerarbitration.com/2019/10/14/english court-adjourns-enforcement-ofnigerianarbitralaward/?doing_wp_cron=1591390468.789436101913 4521484375 >.

[34] *Supra* note 29 at 9.

[35] *Ibid*.

[36] *Ibid*.

[37] Arbitration Act, 1991, S.O. 1991, c.17.

[38] Marco P. Falco, '*Appealing a Stay of Your Arbitral Award? Make Sure You're in the Right Place'*, <Available at: https://www.lexology.com/library/detail.aspx?g=a61aa7e2-c304-4836-9009-2df73cb8bfcb>.

D. FRANCE

In France, prior to the implementation of Decree 2011-48, challenge to an arbitral award or appeal of an order for enforcement would suspend the execution of the award (formerly governed by Article 1506 of the Code of Civil Procedure). According to the current law outlined in Article 1526 of the Code of Civil Procedure, proceedings to annul an award and appeals against an order for enforcement no longer automatically lead to a suspension of execution.[39]

Initiating legal action to set aside an award or appealing an enforcement order does not automatically suspend the enforcement of the award. However, the presiding judge in expedited proceedings (*référé*) or the pre-trial judge (*conseiller de la mise en état*), once assigned to the case, has the power, in exceptional situations where enforcing the award would significantly harm the rights of one of the parties, to temporarily halt the enforcement of the award or impose certain conditions on its enforcement.[40]

Therefore, in accordance with Article 1526 of the Code of Civil Procedure, a party may request a French judge to suspend the enforcement of an award or impose conditions on its enforcement. In order to obtain a favorable outcome in such a request, the petitioner must provide evidence that enforcing the international award would cause significant harm to its rights. The courts will assess these requests on an individual basis, and since the notion of severe harm to a party's rights is not precisely defined, the courts exercise a certain degree of discretion. The interpretation of this concept has evolved over time as determined by the courts.[41]

From a careful reading of the practice followed in other major jurisdictions, it appears that Courts are more often than not extremely cautious and circumspect in granting an unconditional stay on enforcement of Arbitral Awards. An award creditors' right to enforce is given primacy over an award debtors' right to challenge and seek an unconditional stay on enforcement and granting security is a measure to ensure that the award creditors right by way of the award is secured.

V. EFFECT OF UNCONDITIONAL STAYS ON THE INDIAN ARBITRATION LANDSCAPE

[39] Article 1526, Decree No. 2011-48 of 13 January 2011, <Available at: http://parisarbitration.com/wp-content/uploads/2017/02/EN-French-Law-on-Arbitration.pdf>.

[40] Luiza Saldanha, '*Seeking stay or amendment of enforcement of international awards: evolution of courts' approach*', <Available at: https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/seeking-stay-or-amendment-of-enforcement-of-international-awards-evolution-of-courts-approach-1#article>.

[41] *Ibid*.

Unconditional stays in the Indian arbitration landscape have been a cause for concern for litigants, businesses and Arbitration experts alike as they can result in unreasonable delays and hinder the progress of the arbitration. Swift resolution of disputes is vital for businesses as it promotes efficiency and cost reduction. When a court grants an unconditional stay, it undermines the efficacy and efficiency of arbitration as a method for resolving conflicts.

The notion of an 'unconditional stay' represents a comprehensive halt, posing a hindrance to India's aspirations of being a pro-arbitration nation. This is due to the present amendment's automatic stay on the enforcement of arbitral awards where any award-debtor alleges corruption. By forcing parties to file a lawsuit, a circumstance like this contradicts the primary goal of alternative conflict resolution systems.

Rather than leading the path towards enhancements, the recent (Amendment) Act of 2021 has reintroduced obstacles in the rights of the award-holder. This interference not only undermines the fundamental purpose of the arbitration mechanism but also contradicts the 2015 Amendment and significant rulings such as *BCCI v. Kochi* and *Hindustan Construction Co*. Consequently, the responsibility of striking a harmonious balance between contract integrity and award enforcement has once again fallen upon the judiciary.[42]

Due to the 2021 Amendment Act, execution or enforcement proceedings under the Act would typically require the Court to assess whether there is initial evidence suggesting fraud and corruption in the procurement of the contract or in the issuance of the award. Consequently, the 2021 Act reintroduces the need for judicial confirmation in order to enforce awards, which introduces an additional level of judicial examination. This can be seen as a backward step for the arbitration system in India.[43]

VI. RECOMMENDATIONS

In the light of the discussion above concerning the role and impact of the Arbitration & Conciliation (Amendment) Act, 2021 in India's arbitration and award enforcement landscape, the following recommendations may be made.

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42 Preetika Duggal, <Available at: https://www.linkedin.com/pulse/operation-automatic-stay-arbitral-awards-india-preetika-duggal/>.

43 Soumitra Bose, ' *Unconditional Stay of Arbitral Awards: A Step back for Arbitrations in India*', <Available at: https://tmtlaw.co.in/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/>.

i. Provide a strict test to establish Fraud and Corruption: offering a concrete definition and threshold of the terms fraud and corruption can go a long way in making the amendment a workable one and would be a welcome move inasmuch as it would aid in doing away with the ambiguities and controversy surrounding the unconditional stay of enforcement based on such vague standards and terminologies.

ii. Judicial Legislation: Albeit, law making is the solemn duty and domain of the legislature, many a times the legislature fails to keep pace with the needs of the legal fraternity or there might be circumstances where the laws made by the legislature may be inadequate and/or hurt the cause of the particular statute. In such cases, the judiciary must step in to fill the gap in the law. Similarly, in the present instance the judiciary must step in to propose changes to the 2021 amendment act and address lacunae in the same or declare that it is not good law.

iii. Legislative Amendment/Striking Down**:** The legislature must by way of an amendment do away with the unconditional stay on enforcement based on indeterminate grounds such as fraud and corruption and also ensure that it is not applied retrospectively to the disadvantage of award holders, thereby frustrating the purpose and aim of arbitration as a method of dispute resolution. Furthermore, it may even be wiser to entirely strike down the provisions introduced by the 2021 amendment act in order to revert to the pro-arbitration framework that India sought to foster for the longest time.

VII. CONCLUSION

It is therefore safe to conclude that the 2021 amendment appears to do more harm than good to the cause of arbitration in India. It is in conflict with the most basic tenets of arbitration as a method of dispute resolution and is a self-defeating piece of legislation. Not only does it disregard fundamental principles like Res-judicata by allowing retrospective application but also acts as a tool for unnecessary delay and judicial intervention by permitting unconditional stay on the grounds of fraud or corruption. Far from fulfilling its objectives of curbing fraud and corruption in contracts and arbitration agreements, it fails to inspire confidence and is a recipe for disaster to say the very least, defeating the very purpose for which arbitration was introduced.

The Amendment Act has fundamentally revived the problematic unconditional stay provision that was finally done away with by the 2015 Amendment Act albeit on limited grounds. This has resultantly dispossessed the courts of their solemn obligation to grant a conditional stay and has expressly declared a mandate in favour of them to grant an unconditional stay upon the fulfilment of the fraud and corruption standards. Furthermore, the perils of this ambiguous provision of the 2021

Amendment are discernible due to the lack of any guidance as regards the terms fraud and corruption. This development further promotes judicial involvement in determining allegations and the nature of claims raised on these grounds.

The abrupt and unjustifiable shift from the pro-enforcement approach of Indian courts, enabling them to grant an unconditional suspension of the enforcement of an arbitral award, undermines the presumption in favor of enforcement, finality, and the binding nature of such awards. This shift is particularly harmful in a jurisdiction like India, where the enforcement system for arbitral awards is already problematic and characterized by inconsistencies. This has an effect on the contracts' enforce ability as well as the businesses' ability to conduct business in an environment where the litigants are forced to engage in yet another unnecessary and unwarranted round of litigation when the arbitral award is enforced, depriving them of their right to receive the benefits of the award.

ANALYZING THE FEASIBILITY & LEGITIMACY OF THIRD-PARTY EXTENSION OF ARBITRATION AGREEMENT IN THE INDIAN ARBITRATION REGIME

Vedaant Agarwal & Shivankar Sukul*

I. INTRODUCTION

The legitimacy of extension of arbitration agreement to a non-signatory has been hotly debated over the course of years. Whereas, its supporters have, at various instances, highlighted its need in present day complex transactions, while its opponents have pointed out its incongruous position in the arbitration regime, which rests on principles of consent and party autonomy.[1] There are many ways in which arbitration agreements are extended to non-signatories such as agency, third-party beneficiary and equitable estoppel.[2] Group of Companies' doctrine is one such principle through which extension of arbitration agreements takes place to the affiliate companies of a group which are not signatories to the arbitration agreement.[3] While this doctrine has met a varying degree of acceptance around different jurisdictions, such as France[4], US[5] and UK[6], Indian courts have been fairly amenable to application of this doctrine.[7] However, the contours of this doctrine are uncertain due to unclear mandates laid down in the judicial pronouncements.

In this context, a three-judge bench of the Supreme Court in the matters of *Cox & Kings Ltd. v. SAP India Pvt. Ltd.* ["***Cox & Kings Ltd.***"][8] has raised questions on the legitimacy of the doctrine and referred the matter to a five-judge bench to reconsider not only the application of group of companies doctrine but rather the very idea of extending the scope of arbitration agreement to non-signatories. The main argument of the bench against the validity of extension of arbitration agreement to non-

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[1] Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?*, 2009 J. INT'L ARB. 647.

[2] Kushagra Jain &Vasundhara Sharan, *To Compel or not to Compel: Extension of Arbitration Agreements to Non-Signatories*, INDIACORPLAW (21st June 2021), available at https://indiacorplaw.in/2021/07/to-compel-or-not-to-compel-extension-of-arbitration-agreements-to-non-signatories.html ; Also See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (Transnational Publishers, 2nd ed., 2001).

[3] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION p. 1411 (2nd Edn., Kluwer Law International, 2014).

[4] United Steelworkers of America v. American Mfg. Co., 363 US 564 (1960).

[5] Joseph Abela Family Foundation v. Albert Abela Family Foundation et autres, Cour d'appel, 22 May 2008.

[6] Peterson Farms Inc. v. C&M Farming Ltd., (2004) 1 Lloyd's Rep 603 : 2004 EWHC 121 (Comm).

[7] Oil and Natural Gas Corporation Limited v. M/s Discovery Enterprises Pvt. Ltd. & Anr, Civil Appeal No. 2042 of 2022.

[8] Cox & Kings Ltd. v. SAP India Pvt. Ltd, Arbitration Petition, (Civil) No. 38/2020.

signatory was its incompatibility to the arbitration regime, which is based on party autonomy and mutual consent.[9]

This article seeks to frame an argument in favor of the concept of extension of arbitration agreement to non-signatories and also point out the pitfalls in the application of this concept. In order to do so the article, in Part II will seek to trace the jurisprudence of the Group of Companies doctrine leading up to the Chloro Controls Case India (P) Ltd. v. Severn Trent Water Purification Inc. & Anr. ["***Chloro Control Case***"] which established the Group of Companies doctrine in the Indian regime, which is currently being looked at by the five-judge bench, and will explain the distinction between the Group of Companies doctrine on basis of which joinder of parties can be achieved from the consolidation of arbitration agreements (multi claim arbitration).[10] Notably, this distinction was blurred in the case of *Chloro Control Case*. Part III will explain the judgment of *Chloro Control* and analyze the legislative response to it. In Part IV, the article will seek to trace the journey of this doctrine from the pronouncement of *Chloro Controls Case* and discover the ambiguities created in the application of this doctrine. Lastly, in Part V the article will conclude by providing a brief analysis on the validity and need of this doctrine in the Indian regime.

II. BACKGROUND TO THE GROUP OF COMPANIES' DOCTRINE

The Group of Companies' doctrine has been cited by arbitral tribunals and courts to either 'extend' the arbitration agreement or 'bind' a non-signatory affiliate company of the contracting party to the arbitration agreement.[11]

This doctrine originally finds its inception in the case of *Dow Chemical Company v. Isover Saint Gobain*, (ICC Case No. 4131) ["***Dow Chemicals***"].[12] The International Chamber of Commerce held that arbitration agreements could be extended to a third party on the basis of the "three-fold test" wherein the court has to look for three conjunctive requirements which are as follows:

i. Firstly, the parties have to establish a "tight group structure" that is to show a significant control of the parent company on the working of its group entities through organizational or financial links.

[9] *Id* ¶ 47.
[10] *Id* ¶ 50.
[11] Darshini Prasad & Charlie Caher., *Group of Companies Doctrine - Assessing the Indian Approach*, 9 (2) INDIAN JOURNAL OF ARBITRATION LAW (2020) 33-50.
[12] Dow Chemical v. Isover-Saint-Gobain, ICC Award No. 4131.

ii. Secondly, an active role and participation of the third party is to be established. This can be ascertained from the circumstances wherein the third party plays an active role in the negotiation, performance and termination of the parent contract.[13]

iii. Thirdly, the facts in correspondence are to demonstrate the "common intent of the parties" to be bound by the arbitration agreement. The implied consent has to be demonstrated, by evidence such as exchange of letters, emails, invoices to ascertain the mutual intent of the third party to be a part of the arbitral agreement.

This test demonstrates that Group of Companies operating as a 'single economic entity', can be bound to an arbitration agreement by virtue of their collective role in the performance of contract and mutual intent. Thus, despite being a non-signatory, the third party can be joined to the arbitral proceedings basis the doctrine laid down in *Dow Chemical Case*.[14]

In the Indian context, multi-party arbitration first came under the radar of the Supreme Court in *Indowind Energy Ltd. v. Wescare (I) Ltd*.["***Indowind Case***"][15] In that case, the court refused to refer all the parties to single and composite arbitration owing to the non-signatory status of the third party and relied upon Section 8 of the Arbitration and Conciliation Act, 1996 (prior to its 2015 Amendment)**["*A&C act*"]**.[16] The court held that under the existing language of Section 8, only the *"parties"* to the agreement could be referred to arbitration. Therefore, the definition of the term *"party"* under Section 2(1)(h) restricted the scope of Section 8 only to the parties that had signed the agreement.

The restrictive approach taken by the court in *Indowind Case* was also reflected in the decision of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya* ["***Sukanya Holdings***"].[17] The Apex Court, in the said case, held that third parties cannot be subjected to the arbitration proceedings without formal consent to an arbitration agreement. Since, the third party is not a signatory to the arbitral agreement, until ratification, approval, adoption or confirmation of the agreement, no claim or no dispute can be the subject-matter of reference to the arbitration. Hence, these two cases completely eliminated the scope for extension of arbitral agreement to non-signatories.

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[13] *Id*; Also See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (Transnational Publishers, 2nd ed.,2001).

[14] *Ibid*.

[15] Indowind Energy Ltd. v. Wescare (I) Ltd., (2010) 5 SCC 306 ¶ 10.

[16] Arbitration and Conciliation Act, 1996, § 8.

[17] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors., (2003) 5 SCC 351 ¶ 15.

At this juncture, it is necessary to distinguish the "Group of Companies" doctrine from the concept of "Group of Contracts". The "Group of Companies" doctrine can be applied to extend the arbitration agreement to third parties on basis of their role in contract negotiation and tight group structure. "Group of contracts" refers to arbitration agreements in separate contracts which could be referred to same tribunal on the basis of the fact that they form a part of same composite transaction.

Notably, even since the earlier days, courts took an accommodative approach towards 'multi-claim arbitration' (where two or more parties who enter into multiple contracts forming a composite transaction are referred to single arbitration) in *Olympus Superstructure Pvt. Ltd. v. Meena Vijay* Khetan ["***Olympus Superstructure Case***"].[18] In the case, parties had entered into 6 agreements, i.e., 3 main agreements and 3 ancillary agreements, each having an arbitral clause. The main agreements were terminated due to dispute between the parties, which was later referred for arbitration. Further disputes also arose under the ancillary agreements. The Apex Court had to determine whether the disputes under the ancillary agreements were subject to independent arbitration agreements or whether they can be combined into a single and composite arbitration finding reference from the main agreement. The court noted that parties had entered into a complex transaction by executing multiple agreements towards a common object and purpose. It was noted that, since the Group of Contracts are inseparable and form a single composite transaction, the arbitration in these contracts can be referred to a single tribunal. So as to avoid a situation of conflicting awards on issue, which overlapped between the two arbitration agreements. Hence, the court fundamentally referred the parties to a single and composite arbitration owing to the fact that all agreements formed part of the same transaction.

The Apex Court also accepted 'multi-claim arbitration' in *P. R. Shah v. B.H.H. Securities*,[19] where it reasoned that arbitration agreements from multiple contracts could be consolidated and referred to a single composite proceeding in order to avoid a multiplicity of proceedings and conflicting decisions. This position was reiterated by the High Court of Delhi in *Global Infonet v. Lenovo*,[20] wherein the court consolidated the claims arising from 3 separate agreements executed between 4 different parties into a single and composite arbitration since they formed a part of a single economic transaction.

[18] Olympus Superstructure Pvt Ltd v. Meena Vijay Khetan, (1999) 5 SCC 651.
[19] P R Shah, Shares & Stock Brokers (P). Ltd v B H Securities (P) Ltd, (2012) 1 SCC 594.
[20] Global Infonet Distribution Pvt. Ltd. v. Lenovo (India) Pvt. Ltd., 2019 SCC Online Del 9980.

This clearly demonstrates that before the decision of *Chloro Controls*, the Indian courts maintained a distinction between the concept of 'joinder' in multi-party arbitration and 'consolidation' in multi-claim arbitration.

III. CHLORO CONTROL V. SEVERN TRENT WATER PURIFICATION - A PARADIGM SHIFT IN THE TREATMENT ACCORDED TO THIRD PARTIES IN ARBITRATION

The melting point of all the aforesaid case laws and the group of companies doctrine by which joinder can be effected to consolidation, can be seen in *Chloro Controls Case*.[21] This case altered the position in *Sukanya Holdings* and the *Indowind case* and devised the position of law regarding joinder of non-signatory.

In the *Chloro Controls case*,[22] a dispute arose between an Indian party and a few foreign entities, who had entered into multiple contracts as part of a composite transaction, with arbitration seated in London. The main issue before the court was whether all these parties to the dispute could be referred to a single and composite arbitral tribunal. As the arbitration was seated in foreign jurisdiction, the Court had to invoke *Section 45* of the A&C act, which deals with *"*Power of judicial authority to refer parties to arbitration*"*.[23] Section 45 of the Arbitration Act provides courts with the authority to refer the dispute to arbitration "*at the request of one of the parties or any person claiming through or under him*" pursuant to a legal relationship, either encapsulated under an arbitration agreement or not.[24]

The court first compared Section 45 to Section 8 of the A&C act and outlined the substantial variance in language. In doing so, the court distinguished the decision in *Sukanya Holdings*, which was a case of domestic arbitration decided under Section 8 of the A&C act, whereas the instant case was a foreign seated arbitration dealt under Section 45, which had a much wider scope.

It observed that the expression "*any person claiming through or under him*" in Section 45 clearly represents the legislative intention to enlarge the scope of the words beyond "the parties" who are signatories to the arbitration agreement. Arbitration, accordingly, could be possible between a signatory and a party who is not originally named in the arbitration agreement.[25]

The party which seeks to argue in favour of such extension needs to prove that the non-signatory is claiming *"through or under"* the signatory party. Towards this end, the court installed the Group of

[21] Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc., (2013) 1 SCC 641.
[22] *Ibid.*
[23] Arbitration and Conciliation Act, 1996, § 45.
[24] *Ibid.*
[25] *Supra* note 23.

Companies' doctrine, in the Indian context, as a sufficient basis to establish a legal relationship between the non-signatory and the party to the arbitration agreement. It is to be noted that the court laid special emphasis on the requirement of 'implied consent' of the parties for application of Group of Companies doctrine. The implied consent can be discerned from a variety of factors such as conduct of the third-party during performance, negotiation or termination of contract or agency, joint venture relations between the parties of the contract with the supposed third party.

Interestingly, the court in the *Chloro Controls case*[26] also provided for an exception wherein a third party could be subjected to arbitration without even the implied consent of the signatories. This being possible in case of composite transactions where performance of the mother agreement may not be feasible without aid and performance of the supplementary agreements, for achieving the common object. In such a case, the reference to arbitration would be falling within the scope of the exception. Despite citing it as an exception, the court surprisingly, in the later part of its judgment, conjointly read the principle of 'composite performance' with the Group of Companies' doctrine, which blurred the clear boundaries earlier set between them.

IV. THE 2015 AMENDMENT: A LEGISLATIVE MISADVENTURE

It is important to note that despite pointing out the need for an arbitration regime to accommodate the idea of invocation of arbitration against non-signatories and in reference to multi-party agreements, the Apex court in the *Chloro Control Case* only incorporated the Group of Companies' doctrine with respect to the arbitrations seated in foreign jurisdictions.[27] The finding that non-signatories to the arbitration agreement can be bound by an arbitration agreement hinged on the wording of Section 45, which clearly mentioned the "*the parties or any person claiming through or under him*", thus providing the court a clear reason to extend the application of the provision to non-signatories, however no such phrase existed in Part I which dealt with domestic seated arbitrations.

> *"The expression 'person claiming through or under' would mean and take within its ambit multiple and multi-party agreements, though in exceptional case. Even non-signatory parties to some of the agreements can pray and be referred to arbitration provided they satisfy the pre-requisites under Sections 44 and 45 read with Schedule* I."[28]

This created an anomalous position where arbitration agreements could be consolidated or extended to non-signatories to meet the commercial realities of multi-party commercial disputes in cases of

[26] *Ibid.*
[27] *Ibid.*
[28] *Id ¶ 167.*

foreign seated arbitrations. However, in cases of domestic arbitrations, the courts and tribunals were helpless. The exasperation of courts to apply two different standards for domestic and foreign seated arbitrations was evident in the matters of *R.K. Productions v. N.K. Theaters*[29] and *Supreme Megha Constructions LLP v. Symphony Co-operative Housing Society Ltd*.[30] where they had to apply the ratio of the *Sukanya Holdings* as the doctrine of extension of arbitration agreement to non-signatories did not apply to domestic arbitrations.

This anomaly was flagged out in the 246th Law Commission Report, which recommended legislature to amend the definition of '*party'* under Section 2(1)(h) of the A&C act, to include the phrase *"person claiming through or under [a party]"* so that non-signatories can also be referred to the arbitration agreements under domestic arbitration.[31] However, the legislature overlooked this recommendation and instead amended Section 8 of the A&C act. The amended provision read as

> "*a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him……refer the parties to arbitration.*"[32]

This amendment, rather than curing the aforementioned anomaly, further complicated the matters. As of now while Section 8 of the A&C act extends the arbitration agreement to non-signatories in domestic seated arbitration, however no right under other provisions is accorded to such non-signatory under the Act. For instance, non-signatories do not have the jurisdiction to approach for interim relief under Section 9 of the A&C act .[33] They also do not have the jurisdiction to file an application to set aside an award under Section 34, despite the award being binding to them under Section 35 of the A&C act .[34] The regime has also completely foreclosed their right to appeal against the order of the arbitral tribunal by denying them the right to appeal any decision under Section 37 of the A&C act. [35]

So, while the 2015 Amendment provides validity to the Group of Companies doctrine under the Indian arbitration regime, shoddy drafting by the legislators have put the non-signatories at disadvantage by declaring arbitration decisions binding on them but denying them any right under

[29] R.K. Productions v. N.K. Theaters, (2012) SCC OnLine Mad 5029.

[30] Supreme Megha Constructions LLP v. Symphony Co-operative Housing Society Ltd., Notice of Motion (L) No. 2410 of 2014.

[31] 246th Law Commission Report, Amendments to the Arbitration and Conciliation Act 1996 (2014).

[32] Arbitration and Conciliation Act,1996, § 8.

[33] Mikuni Corporation v. UCAL Fuel Systems, 2008 (1) Arb LR 503 (Delhi).

[34] Gatx India v. Arshiya Rail Infrastructure, (2014) SCCOnline Delhi 4181.

[35] Prabhat Steel Traders Pvt. Ltd. v. Excel Metal Processors Pvt Ltd., Arbitration Petition No. 619/2017.

the process.[36] This also casts a doubt on the validity of doctrine as observed by the three judge bench in the matters of *Cox & Kings Ltd.*,[37] where the Court has questioned if mere addition of words *"claiming through or under"* in Section 8 would justify inclusion of non-signatory in an arbitration agreement. While the legislative history of the 2015 amendment clearly establishes the intent of the legislators to consolidate the doctrine in Indian context, the poor drafting has put it in uncertainty.

III. PLACING THE ROLE OF CONSENT IN EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES

As pointed out in the introduction, the main argument against the validity of the practice of extending the scope of arbitration agreements to non-signatories was based in its apparent conflict with the concepts of mutual consent, party autonomy and separate legal entity. However, this argument falls flat to its face on a detailed scrutiny of the *Chloro Control Case***,** where the consent was read to be a *sine qua non* for joining a non-signatory to an arbitration agreement.

Although the decision in *Chloro Control case* validated the practice of extending arbitration agreement to non-signatories, however such extension was not unregulated but was deeply rooted in the concept of consent. So, in order to extend the scope of arbitration to a non-signatory, its intention to be bound by the arbitration agreement by explicit or implicit manner was necessary. Towards this end, the parties need to establish by application of the Group of Companies doctrine, the implied consent of third parties by their conduct that can be ascertained from its active role in the negotiation while entering into contract, or performance to imply the will of such company to be a party to that contract.[38] Accordingly, the entire rationale of the judgment is deeply grounded on a consent-based analysis, where the *"'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties".*[39] This strong reliance on consent-based analysis essentially defeats the argument of the three-judge bench in case of *Cox & Kings Ltd***.,** which challenged the validity of the doctrine for diluting the concept of party autonomy and consent.

IV. THE RAMIFICATIONS OF BLURRING THE DIFFERENCE BETWEEN JOINDER AND CONSOLIDATION

As discussed in the previous section, the court in the matters of *Chloro Control case* alluded to the importance of consent for extending the scope of arbitration agreement to non-signatories. However,

[36] *Supra* note 10.
[37] *Ibid.*
[38] ICC Case No. 5894 at ¶ 27.
[39] *Supra* note 21 ¶ 67.

the court also carved an exception in this consent-based extension. The court was of the opinion that in cases of composite transactions, the arbitration agreement in the main contractual agreement will apply to all the ancillary agreements without a consent-based analysis.[40] Interestingly, the court termed this exception to be a part of "Group of Companies" doctrine instead of distinguishing this concept as consolidation of arbitration agreements, thereby creating a confusion between these two concepts. This essentially has two-fold problems. *Firstly,* it muddles up the original standards for application of the Group of Companies' doctrine. *Secondly,* reading down the exception as an integral part of the doctrine contradicts the court's own stance regarding the role of consent in application of the Group of Companies' doctrine.

At this juncture it is important to understand the difference between 'joinder' and 'consolidation' of arbitration.[41] Herein, 'joinder' or 'multi-party' arbitration, as seen from *Sukanya Holdings* and *Indowind cases*, involves a third party or non-signatory, joining or intervening, an ongoing arbitration proceeding on the basis of its implicit consent to be bound by the arbitration agreement. Whereas, 'consolidation' or 'multi-claim' arbitration, as seen from *Olympus Superstructure case*, involves amalgamation of two or more arbitrations, running through multiple contracts, into one single proceedings on the basis of commonality of subject matter. However, the distinction between these concepts was blurred by the court in the matters of *Chloro Control*, wherein the court conflated the distinct concepts of 'consolidation' or 'multi-claim' arbitration with Group of Companies' doctrine (in the form of exception of 'composite performance') which is a manifestation of 'joinder' or 'multi-party' arbitration.

This confusion created in *Chloro Control* regarding the essentials required for extending arbitration agreement to non-signatories was also evident in the matters of *Ameet Lalchand v. Rishabh Enterprises* ["***Ameet Lalchand***"],[42] where the court extended the applicability of arbitration agreement between Rishabh Enterprises and Dante to a third party Astonfield. Interestingly, this was done without the consent-based analysis and tight group structure. In this case, the extension was effectuated merely because the lease agreement between Rishabh Enterprises and Dante was the main agreement in the transaction of setting up a solar plant in Uttar Pradesh, and the purchase agreement between Rishabh Enterprises and Astonfield was an ancillary agreement essential for smooth operation of the main agreement. This judgment paves a dangerous way where courts might extend

[40] *Id* ¶ 68.

[41] Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions under Leading Arbitral Rules*, VOLUME 35(2) JOURNAL OF INTERNATIONAL ARBITRATION (2018) 173-202.

[42] Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.

arbitration agreements to non-signatories without even looking at the implied consent by conduct, thereby eroding the consensual nature and notions of party autonomy in the arbitration regime.

The decision in the matters of *Chloro Control* is to be blamed for muddling up the standard required for extension of arbitration agreement and blurring the distinction between consolidation and joinder by employment of Group of Companies' doctrine.

V. ENQUIRY FOR APPLICATION OF THE GROUP OF COMPANIES' DOCTRINE AT THE STAGE OF REFERENCE

Another very potent objection which was raised by the Apex Court in the matter of *Cox & Kings Ltd*.[43] was regarding the desirability of extending a roving enquiry into the merits of the case at the reference stage for application of Group of Companies' doctrine. It is to be noted that the current limited scope of jurisdiction is a result of umpteen number of judicial and legislative interferences, which included around a dozen Judgments and a set of two amendments. The jurisprudence culminated with the recent judgment of *Vidya Drolia v. Durga Trading* Corporation ["***Vidya Drolia***"],[44] where apart from ruling on the limited jurisdiction of courts at pre-reference stage to examine the arbitrability of the dispute, the Supreme Court also cautioned against the growing trend of courts delving into the merits of the dispute to decide on the issue of joinder and application of Group of Companies doctrine.

> "*Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group- company doctrine or good faith, etc., in a multi -party arbitration raises complicated factual questions, which are best left for the tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.*"[45]

Therefore, the enquiry about the nature of contracts and their role in the underlying transaction, which is necessary for consolidation and joinder of parties in arbitration, falls foul of the dictum of *Vidya Drolia*. However, it is notable to observe that application of Group of Companies' doctrine requires the court to delve into finding the commercial intent and merits of the case, which might be considered to be akin to a creeping overreach of jurisdiction at reference stage.

A solution to this apparent conflict could be reached if courts relinquish the jurisdiction to extend the arbitration agreement to non-signatory in favor of the tribunal in cases of complex facts and

[43] *Supra* note 10.
[44] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1.
[45] *Id* ¶ 239.

circumstances. This would allow courts to maintain a non-interventionist approach at the reference stage.

VI. THE PRINCIPLE OF NATURAL JUSTICE - A COLLATERAL DAMAGE IN THE EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES?

Almost six years after the first iteration of the Group of Companies' doctrine, a three-judge bench was constituted to decide upon a set of peculiar facts and circumstances in the matters of *Cheran Properties v. Kasturi & Sons Limited* ["***Cheran Properties***"].[46] In this case the question arose whether the award can be enforced against a subsidiary of a signatory which has not been heard during the arbitration proceedings. Answering in affirmative, the Supreme Court in this case held that Section 35 of the A&C act ,which declares arbitral award to be final and binding on the parties and "*persons claiming under them respectively",*[47] has a broad and a liberal scope where even the non-signatories to the arbitration agreement can be bound by the award. The judgment postulates that even in the case where the non-signatory has not been heard during the arbitration proceeding, they are bound by the award only because of their relation with the signatory to the agreement.[48] This not only stretches the scope of the Group of Companies' doctrine beyond logic and reason, but also runs contrary to the notions of natural justice and equal treatment of parties.

VII. CONCLUSION

The extension of arbitration agreement to a non-signatory has had a tumultuous run in the Indian context. The treatment of this issue, right from the decision in *Sukanya Holdings* to the ruling in *Chloro Controls case***,** forms the background in which the recent judgment in *Cox & Kings ltd*.**,** has referred pertinent questions on legitimacy of the very idea of extension of arbitration agreement, to a constitutional bench.

The doubts in this case revolved around the apparent conflict between extension of arbitration agreement to third parties and the notion of party autonomy and mutual consent in the arbitration regime. However, on critical examination this argument falls flat owing to the special emphasis on consent while extending the arbitration agreement under current jurisprudence.

Considering the present-day complex structure of transactions between the parties, it becomes important to include third parties in arbitration proceedings despite their non-signatory status. Therefore, a complete renunciation of the idea of the extension of an arbitration agreement is not

[46] Cheran Properties Limited v. Kasturi & Sons Limited, (2018) 16 SCC 413.
[47] Arbitration and Conciliation Act, 1996, § 35.
[48] See Cox & Kings ¶ 30, (Civil) No. 38/2020, Justice Suryakant's separate opinion.

warranted. However, the authors agree that certain creases need to be ironed out to streamline the application of this idea. Similar sentiments also echoed in the opinion of Justice Surya Kant in *Cox & Kings Ltd.*, where he advocated for a relook, not into the legitimacy of extension, but rather its manner of application in the Indian context.

> *"While at the outset, I concur that the contours of the Group of Companies Doctrine need to be settled by a larger bench, my thoughts are oriented in favour of the Doctrine as an integral part of Indian arbitral jurisprudence."*[49]

While the case of *Cox & Kings Ltd***.** claims to only discuss the idea of Group of Companies' doctrine, its arguments are focused against the broader concept of extension of arbitration agreements to third parties. In this context, it is necessary to distinguish the concept of 'joinder' of parties to the arbitration, where 'Group of Companies' doctrine is applicable, from the concept of 'consolidation' of arbitration agreement, where completely different considerations apply.

Regardless, the Indian judiciary, in a cavalier manner, has failed to maintain the distinction between the two concepts. Right from *Chloro Controls* where the court needlessly incorporated the principle of 'composite performance of agreements' in the 'Group of Companies' doctrine, to later decisions such as *Cheran Properties* and Ameet Lalchand reflect similar confusion.

Adding cherry on the cake, the legislature had its fair share in ensuring this train wreck. Despite the suggestions from the 246th Law Commission Report, an incomplete incorporation of third-party rights solely in Section 8, without reciprocal changes in the definition of parties under Section 2(1)(h), has complicated this problem.

It will be interesting to see how the five-judge bench of the Supreme Court deals with the myriad of issues surrounding the Group of Companies' doctrine. The authors are hopeful that while the doctrine stands retained in the Indian arbitration landscape, its application is tailored to suit the modern-day commercial needs.

[49] Cox & Kings ¶1, (Civil) No. 38/2020, Justice Surya Kant Separate Opinion.

STAMPING OF ARBITRATION AGREEMENTS: AN ANALYSIS OF THE EVOLVING ARBITRATION LANDSCAPE IN INDIA

Tejas Karia & Vrinda Pareek*

I. INTRODUCTION: FROM WHERE DOES THE QUESTION OF STAMPING OF ARBITRATION AGREEMENTS EMERGE?

The question of whether an arbitration agreement is required to be stamped under prevailing stamp duty laws has loomed large over the arbitration landscape in India for over a decade.

The requirement to pay 'stamp duty' on instruments executed in India or instruments executed outside India and received in India, arises from stamping laws i.e., the Indian Stamp Act 1899 ["**Stamp Act**"] or corresponding stamp-related legislation enacted by certain states ["**State Stamp Acts**"]. The broad scheme of stamp duty laws in India is that there is (a) a principal 'charging provision' i.e., a section which, in principle, makes instruments executed (or received) in India chargeable to stamp duty; and (b) a Schedule which is comprised of several Articles, prescribing rates of stamp duty payable on various categories of instruments.

Under the Stamp Act, the relevant Article in the Schedule that mentions "agreements" is Article 5, Schedule I. Sub-article (c) of Article 5 is a catch-all provision covering within its ambit all agreements not specifically provided for ["**Residuary Article**"]. The Residuary Article is mirrored in the State Stamp Acts as well. Accordingly, an agreement "not otherwise provided for" would be chargeable to stamp duty under the Residuary Article.

An arbitration agreement being "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*", would be eligible to stamp duty under the Residuary Article as it is not otherwise provided for separately and specifically in the Schedule.

II. EFFECT OF NON-STAMPING OF INSTRUMENTS

There are two key consequences of non-stamping of an instrument that is otherwise liable to be stamped[1]: (a) there is a bar on "*any person having by law or consent of parties authority to receive evidence*" (i.e., courts and tribunals) from admitting such unstamped document in evidence for any

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[1] Indian Stamp Act, 1899, § 35.

purpose; or (b) there is a bar on courts, tribunals or any other public officer from otherwise "acting upon" such instrument in any manner.

From a practical perspective, for appointment of an arbitrator under Section 11 or grant of interim reliefs under Section 9 of the Arbitration Act pursuant to an unstamped arbitration agreement (which ought to have been stamped under the Residuary Entry) would tantamount to "acting upon" the arbitration agreement.

III. A SERIES OF DIVERGENT DECISIONS

In the above backdrop, the Supreme Court of India as well as various High Courts across the country had been taking divergent positions on the question of whether an arbitration agreement is chargeable to stamp duty or not.

The question of stamping of 'arbitration agreements' was first adjudicated by the Supreme Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* ["***SMS Tea Estates***"].[2] Back in 2011, a 2-judge bench of the Hon'ble Supreme Court held that an unstamped arbitration clause in an agreement that is chargeable to stamp duty cannot be the basis for the appointment of an arbitrator. This is because Section 35 of the Stamp Act prevents the court from "acting upon" an unstamped instrument i.e., the unstamped arbitration agreement. The Supreme Court, therefore, remanded the matter back to the High Court of Gauhati for assessing whether stamp duty had been duly paid on the instrument, and only then appointing an arbitrator.

Following this decision in SMS Tea Estates, in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*[3] ["***Garware***"], the Supreme Court re-affirmed that an agreement that is not enforceable is said to be void in terms of Section 2(g) of the Indian Contract Act, 1872. Therefore, an unstamped arbitration agreement is unenforceable and void. The Supreme Court directed that while deciding Section 11 applications for appointment of arbitrators based on unstamped instruments, courts should first have the unstamped instrument impounded and adjudicated, and only after payment of applicable stamp duty and penalty should the court proceed to decide the Section 11 application. In a bid to harmonise the legislative mandates of the Arbitration Act and the Stamp Act, the court directed that the appointing high court may, while proceeding with the Section 11

[2] SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd. (2011) 14 SCC 66.
[3] Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd. (2019) 9 SCC 209.

application, the court may impound the instrument and pass it on to the stamp authorities for adjudication of stamp duty in a time-bound manner.

In December 2020, the Supreme Court in *Vidya Drolia v. Durga Trading Corpn.*[4] ["***Vidya Drolia***"] further affirmed the reasoning in Garware. The court held that existence and validity of an arbitration agreement are intertwined. Therefore, an arbitration agreement does not exist if it does not satisfy mandatory legal requirements (such as the requirement to pay stamp duty) – and that an invalid agreement is no agreement.

Finally, in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*[5] ["***NN Global***"], a three-judge bench of the Supreme Court held that arbitration agreement is independent from the underlying commercial contracts and is not chargeable to stamp duty. The Supreme Court further applied the principle of severability, stating that courts can sever the arbitration agreement from the unstamped instrument and appoint an arbitrator based on the valid (although unstamped) arbitration agreement. It also allowed appointments under Section 11 of the Arbitration Act "*pending payment of stamp duty*" on the substantive contract. Thus, in effect, in NN Global, the Supreme Court overruled SMS Tea Estates, doubted the ratio in Garware as well as the reasoning in Vidya Drolia. Since the Vidya Drolia decision was rendered by a coordinate bench, the question was referred to a 5-judge constitution bench.

The constitution bench decided the questions as to: (a) whether stamp duty under and in terms of the Stamp Act is payable on an arbitration agreement or clause contained within an overarching agreement, and (b) if the non-payment or deficient payment of such stamp duty renders the arbitration agreement unenforceable.

IV. CONSTITUTION BENCH SETTLES THE LEGAL POSITION

In *N.N. Global Mercantile Limited v. Indo Unique Flame Limited and Ors.*[6] ["**NN Global Reference**"], the constitution bench held by a 3:2 majority that an arbitration agreement or clause would not be enforceable under Indian contract law, if the instrument containing the arbitration agreement is not stamped in terms of the Stamp Act. Accordingly, such an arbitration agreement was held to not 'exist in law' or be capable of being acted upon – thereby requiring that at the stage of

[4] Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1.
[5] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd. (2021) 4 SCC 379.
[6] Civil Appeal No(s). 3802-3803 of 2020.

appointment of arbitrators by courts under Section 11 of the Arbitration Act, the appointing court must ascertain whether appropriate stamp duty has been paid on the underlying instrument as well as the arbitration agreement.

Some of the key considerations on the basis of which the Supreme Court has rendered this decision are:

i. the position that an arbitration agreement, of itself, is not liable to be charged with stamp duty is incorrect;
ii. an unstamped agreement cannot be taken notice of for any purpose, as contemplated in Section 35 of the Stamp Act – and therefore, remains unenforceable. Thus, even an arbitration agreement which is unstamped, does not exist in law;
iii. The fact that the Stamp Act is a 'fiscal enactment' intended to raise revenue does not take away from the fact that it is required to be implemented with full rigour; stamp duty is not just a question of 'technicality';
iv. Even in a reference under Section 11 of the Arbitration Act, the mandate of Sections 33 and 35 of the Stamp Act (dealing with impounding of unstamped instruments and adjudication of requisite stamp duty) must be given effect to by courts. The 'shirking' or relegating of this function to the arbitral tribunal appears unjustifiable. However, in case of deficiently stamped agreements, if the claim of deficient stamp duty appears untenable to the court, the court may refer the matter to arbitration on the basis of 'existence' of the arbitration agreement and leave the function of impounding of the agreement to the arbitrator.

V. RAMIFICATIONS OF THE DECISION IN NN GLOBAL: WHAT NEXT?

The decision in the NN Global Reference has certainly put to rest long-standing questions in connection with the validity and enforceability of unstamped arbitration agreements or arbitration agreements contained in unstamped instruments. This provides commercial parties with clarity on an important step to be completed after the execution of contracts i.e. payment of appropriate stamp duty in terms of the relevant Article under the Stamp Act Schedule.

Having said that, the NN Global Reference decision has also created several procedural inefficiencies in the operation of the Arbitration Act. For instance, the decision will cause severe delays in cases where arbitrators are required to be appointed or where interim reliefs are sought, on the basis of an arbitration agreement (or underlying instrument) that is unduly stamped, because the agreement will

first get impounded and adjudicated before it is acted on by courts. While the Supreme Court expressly left the question of Section 9 applications (concerning interim reliefs) open in the NN Global Reference, the same principle enunciated in relation to appointment of arbitrators can be applied for not granting interim reliefs until the agreement is duly stamped, even though the main objective of Section 9 is to protect the subject matter of the arbitration. Another procedural hurdle created by the decision is that it has created room for jurisdictional challenges (under Section 16 of the Arbitration Act) in ongoing arbitrations, on the ground that the arbitrator has been appointed pursuant to an unstamped agreement.

The decision in the NN Global Reference derogates from the twin objectives of the Arbitration Act, as amended and updated from time to time i.e., minimal judicial intervention at the pre-arbitration stage and efficient disposal of arbitrations and related matters. This has had the unintended effect of assisting defaulting parties in creating unwarranted delays in the arbitral process. As a result, India's growing image and reputation as a pro-arbitration jurisdiction and an alternative dispute resolution hub has been slightly dented.

A more harmonious and arbitration-friendly approach to the NN Global Reference would have been for the Supreme Court to hold that non-payment of stamp duty is a curable defect under the scheme of the Stamp Act itself. Accordingly, so long as arbitration agreement prima facie exists in terms of the Arbitration Act, it should not interfere in proceeding with appointment of arbitrators. The procedural function of impounding of the instrument and adjudication and payment of stamp duty could and should have been entirely delegated to the arbitration tribunal and the jurisdictional stamp duty authorities at the post-appointment stage. While the decision in the NN Global Reference certainly interprets the Stamp Act correctly and strictly, it may have taken a hyper-technical view of the same without according due significance to the objectives of the Arbitration Act.

Unless the law is amended or the NN Global Reference decision is reviewed, as the law currently stands, the issues highlighted above will continue to haunt the arbitrations in India in cases of non or insufficiently stamped arbitration agreement or underlying instrument. The answer to this anomaly would be in delegating the appointment to the designated arbitration institutions – and the function of resolving technical issues (such as undue stamping of the arbitration agreement or instrument) will be left to the domain of the arbitrator. This will negate the impact of NN Global Reference on India's global image as a pro-arbitration jurisdiction.

BOOK REVIEW

Commercial Arbitration in Australia under the Model Law, Doug Jones AO & Janet Walker CM, Lawbook Co: Thomson Reuters (Professional) Australia Limited, 2022, ISBN 978-0-455-50227-4, 697 pp., $242.00

Shashank Garg*

Professor Doug Jones' Commercial Arbitration in Australia (the First[1] and the Second[2] Edition) has been an authoritative work on the domestic arbitration structure in Australia; a guidebook and a commentary on the Commercial Arbitration Acts ["**CAAs**"] for those with a background in arbitration, and those who may be approaching the subject matter for the first time.

While the Federal Government of Australia had adopted the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law on International Commercial Arbitration in 1974 to govern international arbitrations, it was not until 2010 that the Commercial Arbitration Bill, 2010[3] was introduced in the Legislative Council for domestic arbitrations. At the time of the first edition, the Commercial Arbitration Bill, 2010 had only been enacted in New South Wales ["**NSW**"] and the erudite discussions by Professor Jones on the future implications of adopting the UNCITRAL Model Law in domestic arbitrations in Australia had many practitioners calling the text 'ahead of its time'.[4] Even at the time of the publication of the second edition, the Model Law was new to many states and the remaining states were yet to adopt the Model Law which led to the second edition primarily discussing the evolution of the laws and projections of what would lie ahead.

In fact, it was only in 2017 when the final bill was enacted in the Australian Capital Territory **["ACT"]**, which made all international and domestic arbitrations at the Federal and State levels governable by the UNCITRAL Model Law. This has led to the third edition, now renamed *Commercial Arbitration in Australia under the Model Law* to emphasise the influence of the Model Law on international and domestic arbitration in Australia. This third edition is an up-to-date guide which covers the recent judicial pronouncements, not only in Australia, but also across other leading

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[1] PROFESSOR DOUG JONES AO, COMMERCIAL ARBITRATION IN AUSTRALIA 677, (Lawbook Co. 2011 Thomson Reuters Australia Ltd 2010).

[2] PROFESSOR DOUG JONES AO, COMMERCIAL ARBITRATION IN AUSTRALIA 685, (Lawbook Co. Thomson Reuters Australia Ltd. 2013).

[3] Commercial Arbitration Bill 2010, available at: <https://www.parliament.nsw.gov.au/bill/files/976/First%20Print.pdf>.

[4] 16 BENJAMIN HAYWARD, BOOK REVIEW - COMMERCIAL ARBITRATION IN AUSTRALIA 569-577, (Deakin Law Review 2011)

common and civil law jurisdictions in arbitration, making this a must-read for practitioners where Model Law is followed in totality or in its adapted form. This book also sees the addition of Professor Janet Walker as a co-author along with Professor Jones, making this a brilliant read, especially with both the authors being leading figures in the field of International Arbitration with their truly global footprint as academics and practitioners. The Foreword[5] to this third edition eloquently sums up the invaluable nature of this text:

> *"This Third Edition has brought the work to another level. It remains the definitive and invaluable annotation of the Uniform Acts, but it has become a text on commercial arbitration the equal of any other from any part of the world."*

Given the authors' credentials, the authoritative nature of this text should not be surprising. Professor Jones is a leading independent international commercial and investor-state arbitrator with over 40 years' prior experience as an international transactional and disputes project lawyer. He is also an International Judge of the Singapore International Commercial Court. He holds professorial appointments at Queen Mary College, University of London, and Melbourne University Law School. In addition, he has held appointments at several international professional associations, including serving as the President of the Chartered Institute of Arbitrators ["**CIArb**"] and the Australian Centre for International Commercial Arbitration ["**ACICA**"].

Professor Walker is an independent arbitrator with chambers at Toronto Arbitration Chambers, Atkin Chambers in London, and Sydney Arbitration Chambers. She has served in commercial and treaty investment arbitrations as sole, presiding, and co-arbitrator in International Chamber of Commerce ["**ICC**"], International Centre for Dispute Resolution ["**ICDR**"], Delhi International Arbitration Centre ["**DIAC**"], Hong Kong International Arbitration Centre ["**HKIAC**"], Permanent Court of Arbitration ["**PCA**"], Singapore International Arbitration Centre ["**SIAC**"] administered, and in ad hoc arbitrations in a variety of seats. She is the Chair of ICC Canada, a member of the CIArb Canada Board and of the International Construction Law Association, and a member of the Toronto Commercial Arbitration Society and the Society of Construction Law, North America. She is also a professor of law and past associate dean of Osgoode Hall Law School, York University.

The insight provided by these doyens in the field is evident right from Chapter 1 which starts off with a history of Arbitration in Australia, the developments and reforms which led to the enactment of the

[5] THE HON JAMES ALLSOP AO, FOREWORD TO THE THIRD EDITION: COMMERCIAL ARBITRATION IN AUSTRALIA UNDER THE MODEL LAW 697, (Lawbook Co. Thomson Reuters Australia Ltd. 2022).

Superseded Uniform Acts and the *clarion call* that was the Hon'ble Chief Justice Spigelman AC's address which led to the Commonwealth Attorney-General's Department announcing that a domestic arbitration act was to be drafted based on the Model Law. The Chapter also covers and compares the arbitration reforms in other common law jurisdictions with the reforms and judicial pronouncements in Australia to showcase that Australia may well be on its way to becoming the next preferred seat for arbitration. Chapter 1 also discusses 'Arbitration in the context of Alternative Dispute Resolution' **["ADR"]** which is broadly divided into two sub-parts, non-binding ADR and binding ADR. These sub-heads provide a succinct and clear understanding of topics like mediation, facilitation, mini-trials, statutory adjudication, expert determination, etc. which is beneficial for all those who read this book. These topics are intermixed with case laws and detailed footnotes to further expand upon the understanding of the reader. This chapter in itself provides an insight into the academic minds of the authors, the eloquence with which topics have been elaborated upon for the clear understanding of the reader.

The succeeding chapters are arranged in a manner which follows the structure of the NSW. The sections are set out with the relevant notes wherever the language of the particular section differs from the corresponding article in the UNCITRAL Model Law. While explaining the provisions directly drawn from the Model Law, the authors have taken into consideration and referenced the *travaux préparatoires* of the UNCITRAL Model Law[6], *the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,*[7] *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006*[8] and the Case Law on UNCITRAL Texts ["**CLOUT**"][9] making this text a thoroughly referenced stand-alone authority.

The authors have dealt with topics such as 'Arbitrability of the dispute' which have conflicting viewpoints across common law countries in a clear and precise manner. Arbitrability of disputes in the field of competition law, patents, trademarks and copyright, trusts, taxation, etc. have been

[6] Travaux préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985), available at: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux>.

[7] UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, available at:
<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement>.

[8] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf>.

[9] Case Laws on UNCITRAL Texts, available at: <https://uncitral.un.org/en/case_law>.

analysed and discussed with great clarity in light of the judicial pronouncements of courts across various common law countries with particular focus on Australian courts.

An important provision which has been incorporated by the legislation makers of the CAAs and as has been noted by the authors is that Section 2A(3) allows courts to reference extrinsic material of UNCITRAL and its Working Groups which allows Australia's domestic legislation to have an 'international provenance'.[10] This further goes on to reinforce the modern view on arbitration i.e. even a domestic arbitration and court proceedings surrounding it often have transnational impact.

The text also delves into the importance of virtual hearings which has become the new normal post the COVID-19 pandemic. The CAAs have left the choice of conducting the proceedings up to the arbitrators, with most of them opting for virtual/hybrid hearings, especially in light of guidance notes issued by various arbitral institutions such as AAA-ICDR, ICC, HKIAC, etc. on virtual hearings. Another interesting provision which has been incorporated in the CAAs and is not in the UNCITRAL Model Law, is Section 27C 'Consolidation of Arbitral Proceedings.' The legislation makers have taken guidance from the Superseded Uniform Acts to empower the arbitral tribunals to consolidate two or more 'related' arbitration proceedings, if the party to the proceedings applies for the same. The grounds for such an application have been enumerated in the section itself and elaborated upon with relevant illustrations by the authors, which definitely helps the reader learn both theoretically and practically. The text also discusses a provision, which is said to have been called "the most controversial section in the CAA" i.e., Section 27D which provides an arb-med framework which is a practical and modern take on Article 30 of the UNCITRAL Model Law as it not only highlights the need for exploring an amicable settlement between the parties, but also provides a definite mechanism for it. The Australian provision has been cross-referenced and related with similar provisions which exist in jurisdictions such as Singapore and Hong Kong.

The authors have very articulately dealt with various widely debated and extremely relevant topics such as enforcement of an emergency award by analysing the recent judgement of the Indian Supreme Court in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*[11] which has legitimised an emergency award and its enforcement in India. The authors in their analysis indicate the need of such

[10] Janet Walker CM & Doug Jones AO, 'Australian Domestic Arbitration: One Country United under the Model Law', 2022, Kluwer Arbitration Blog, available at: <http://arbitrationblog.kluwerarbitration.com/2022/09/01/australian-domestic-arbitration-one-country-united-under-the-model-law/>.

[11] Amazon.Com NV Investment Holdings LLC v. Future Retail Ltd., (2022) 1 SCC 209.

progressive steps to be taken by the judiciary or the legislature especially when Model Law is silent on the same.

As the reader continues to traverse the entire book, the academic prowess of the authors becomes quite evident, especially since complex topics have been comprehensively dealt with in a lucid manner. I have no doubt that this authoritative text on the commercial arbitration law in Australia will provide necessary guidance to judges, practitioners and academics.

BOOK REVIEW

Everything You Need To Know About Arbitration In India, Authored by Tariq Khan; Foreword by Fali S. Nariman; Introduction by Justice Hima Kohli (Published by Thomson Reuters, 2022, ISBN- 978-93-93702-39-5), pp 444; Price INR 960

Dr. Christopher To*

Most legal textbooks on arbitration in India focus on the hard-core aspects of the law, making it difficult to comprehend for those unfamiliar with the Indian legal landscape. This book is a turning point, where Tariq Khan a leading expert in international arbitration focuses on providing the reader with a straightforward position of how arbitration is conducted in India from start to finish. The book is split into four main headings with the first heading on the "*Introduction to Arbitration in India*". Under this heading there are two chapters which provide the reader with the insights as to the essential features of arbitration and the history and development of arbitration in India. Under the features of arbitration, the author provides the reader with a bird's eye view of the basic concepts associated with arbitration such as confidentiality, party autonomy, neutrality, ad hoc versus institutional arbitration and the difference between domestic and international arbitration with the ultimate aim of setting the scene for the reader, as these are crucial concepts within the context of arbitration. Thereafter a focus on the history of arbitration in India provides those who are unfamiliar with the developments of arbitration in India with a clear and concise outline, which is easy to grasp and comprehend.

The second heading anchors on the "*Primer on Arbitration and Conciliation Act 1996*". Under this heading there are twelve chapters, providing the reader with the principles and procedures for conducting an arbitration in India from start to finish. The author begins with an elaborate continuation of the fundamental concepts of arbitration such as the principle of separability, principle of kompetenz-kompetenz, the concept of arbitrability, determining the proper law of the arbitration agreement, arbitration agreements, duties and responsibilities of the arbitral tribunal, conduct of the proceedings, making of the award to the enforcement and setting aside an arbitration award. Each chapter pivots on the important aspects of conducting an arbitration from a user's perspective. Information is pragmatic and easy to understand.

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The third heading concerns "*Drafting, Practice and Procedure*". Under this heading, there are four chapters. One chapter touches on the drafting of various documents, from the notice of arbitration to arbitral awards. This chapter greatly assists in understanding the finite elements of compiling various documents with ease and in conformity with the necessary procedural and legal requirements of conducting an arbitration in India. Other chapters focus on assisting practitioners in preparing their cases, dealing with dilatory tactics to the current trend of third party funding. The third heading is, without doubt, the most rewarding aspect of the book as it provides the reader with the necessary information to assist in drafting various documentation needed in an arbitration. Something practitioners will appreciate as it helps to streamline the preparation, while at the same time ensuring compliance.

The fourth heading examines the *Modern-Day Concepts* of arbitration to specific sector types of arbitration. Under this heading, there are twelve chapters ranging from blockchain technology, smart contracts and online dispute resolution to handling disputes within various sectors ranging from investment arbitration to consumer arbitration. Providing the reader with insights into current industry practices while introducing new innovative ideas and principles that will have an impact on resolving disputes of a futuristic nature. A fascinating combination of emerging old and new concepts to make arbitration cost-effective.

This book will be invaluable to local and international practitioners and parties. It will also be a vital teaching tool to assist those in understanding the intricacies of operating under the fast-paced arbitration environment that is emerging in India. Tariq Khan has given so generously his time, commitment and knowledge, of which I would like to congratulate him for his efforts in compiling a piece of work that blends theory into actual practice to provide the reader with the complete ins and outs of arbitrating in India. With the growth and focus of arbitration in India, practitioners will have the necessary awareness and the tools to effectively manage arbitrations from the vantage point of knowing that this book will be a valuable tool in shaping how one conducts arbitration in India efficiently and effectively.

The book will no doubt provide readers with indispensable guidance and support when conducting arbitration in India.