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ASIA ARBITRATION GUIDE

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8TH EDITION

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7. India

7.1 Which laws apply to arbitration in India?

The Arbitration and Conciliation Act, 1966 ("Arbitration Act") is the primary legislation which governs arbitration in India. Subsequently, the Arbitration Act has been amended by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on October 23, 2015 ("Amendment Act, 2015") and the Arbitration and Conciliation (Amendment) Act, 2019 ("Amendment Act, 2019"). On November 4, 2020, the President of India has promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("Ordinance") further amending the Arbitration Act. The Ordinance was then followed by the Arbitration and Conciliation (Amendment) Act, 2021, ("Amendment Act, 2021"), which was deemed to come into force from November 4, 2020 and repealed the Ordinance.

Principles from the Indian Contract Act, 1872 may be applied to the construction of an arbitration agreement and provisions of the Code of Civil Procedure, 1908 govern the enforcement of arbitral awards and applications to court in support of arbitral proceedings, in addition to the Arbitration Act. Various High Courts have notified rules governing the conduct of judicial proceedings like Bombay High Court (Fee Payable to Arbitrators) Rules, 2018. The rules of arbitration institutions will apply to arbitration proceedings, where institutional arbitration is adopted like the Mumbai Centre for International Arbitration ("MCIA") Rules, 2017 (2nd Edition) or Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018.

7.2 Is the Indian Arbitration and Conciliation Act based on the UNCITRAL Model Law?

Yes, the Arbitration Act is based largely on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980, (together, "Model Law"), but deviates from the Model Law in certain aspects.

7.3 Are there different laws applicable for domestic and international arbitration?

Currently, India has a consolidated legislation i.e. the Arbitration Act, under which Part I applies to arbitrations seated in India, and Part II relates to the enforcement of certain foreign awards, such as awards under Convention on the Recognition and Enforcement

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of Foreign Arbitral Awards ("New York Convention"), 1958 and the Convention on the Execution of Foreign Awards, 1927 ("Geneva Convention"). Pursuant to the Amendment Act, 2015, certain provisions of Part I of the Arbitration Act such as seeking interim relief from courts and assistance of courts in taking evidence, also apply to arbitrations seated outside of India, unless the arbitration agreement between the parties specifically excludes such an application.

7.4 Has India acceded to the New York Convention?

India signed the New York Convention on June 10, 1958 and ratified it on July 13, 1960, subjecting its applicability to the following conditions:

(i) Only awards made in the territory of another contracting state that are also notified as reciprocating territories by India would be recognised and enforced;
(ii) Only differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law would be considered arbitrable.

7.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The Arbitration Act provides that parties may contractually agree on the procedure for arbitration and does not stipulate restrictions on the choice of arbitration institutions, even if both parties are domiciled in the country or one party is domiciled in the country and the other party abroad. Therefore, parties may choose to agree on a foreign arbitration institution. In this regard, the Supreme Court, in the case of *Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.*[1], has also held that two Indian parties are free to exercise their autonomy and choose a foreign seat of arbitration. The Delhi High Court[2] in *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.* has held that two Indian parties can choose a foreign law as the law governing an arbitration under the contract, i.e. a different governing law for the arbitration clause, from the substantive law of the underlying contract.

1 *Pasl Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.*, (2021) 7 SCC 1.
2 *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.*, 2020 SCC Online Del 1476.

7.6 Does the Indian arbitration law contain substantive requirements for the arbitration procedures to be followed?

There are no substantive requirements for the procedure to be followed under the Arbitration Act. The Arbitration Act permits the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitration proceedings. In the event that parties are unable to agree on the procedure to be followed, then the arbitral tribunal may decide the procedure. Further, it must be noted that proceedings conducted by arbitration institutions will be governed by the procedure laid down in the institutional rules.

7.7 Does a valid arbitration clause bar access to state courts?

An arbitration clause does not operate as an absolute bar on accessing the Indian courts. If a dispute in a matter covered by a valid arbitration clause is brought before a court, then such a court is required to refer that to arbitration, if an application to that effect is made by the defendant not later than the date of submitting the first statement on the substance of the dispute to the court. Therefore, the pre-condition is an application before the court seeking reference to arbitration.

In addition, parties may be able to approach the courts (i) for appointment (Section 11) and removal of arbitrators (Section 13 & 14), (ii) seeking interim relief pending arbitration (Section 9), (iii) seeking extension of time for completion of arbitration proceedings (Section 29-A), (iv) seeking assistance of the court in taking evidence (Section 27), (v) seeking to set aside awards (Section 34), (vi) appeal against order of the inferior court/arbitral tribunal (Section 37) and (vii) enforcement of awards (Section 36 & 49).

The jurisdiction of Indian courts is different in cases where the arbitration is seated in India and where it is seated abroad.

7.8 What are the main arbitration institutions in India?

Arbitration institutions such as the Mumbai Centre for International Arbitration ("MCIA"), International Arbitration and Mediation Centre ("IAMC") in Hyderabad and institutions attached to various High Courts such as Delhi International Arbitration Centre ("DIAC") in Delhi, and the institutions in Karnataka, Punjab and Haryana. Apart from these, there are arbitration institutions run by the Chambers of Commerce in different states such as the Bombay Chambers of Commerce and Madras Chambers of Commerce. The Singapore International Arbitration Centre has also opened offshore offices in Mumbai and Gujrat International Finance Tec-City, Ahmedabad, given the increasing number of commercial arbitrations in India, although this office does not directly administer any India related arbitrations.

7.9 Addresses of major arbitration institutions in India?

Mumbai Centre for International Arbitration (MCIA)
Headquarters – 2nd Floor, Express Towers,
Ramnath Goenka Marg,
Nariman Point, Mumbai – 400021 (India)
Tel: +91 85918 83286
E-mail : contact@mcia.org.in
Website: www.mcia.org.in

Delhi International Arbitration Centre (DIAC)
Delhi High Court Campus
Shershah Road
New Delhi – 110503
Tel: +91-11-23386492, 23386493
E-mail: diac-dhc@nic.in
Website: https://dhcdiac.nic.in/

International Arbitration and Mediation Centre (IAMC)
21st and 22nd floor, Vijay Krishna Towers,
Financial District, Nanakramguda,
Hyderabad, Telangana 500032
E-mail: info@iamch.org.in
Website: https://iamch.org.in/

7.10 Arbitration Rules of major arbitration institutions?

The above-mentioned arbitration institutions have a specific set of rules which are available on their websites, as provided above.

7.11 What is/are the Model Clause/s of the major arbitration institutions?

The model clauses of the arbitration institutions are available on their respective websites. For instance, the MCIA suggests the following clause as a model clause[3]:

3 http://mcia.org.in/mcia-rules/model-clauses/.

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be_____.

The Tribunal shall consist of [one/three] arbitrators).

The language of the arbitration shall be.

The law governing this arbitration agreement shall be_____.

The law governing the contract shall be _____."

Additionally, the MCIA also provides for a model clause for expedited procedure, which has been reproduced below:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Mumbai in accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.

The parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 12.3 of the MCIA Rules.

The seat of the arbitration shall be _____.

The Tribunal shall consist of one arbitrator.

The language of the arbitration shall be _____

The law governing this arbitration agreement shall be _____.

The law governing the contract shall be_____.

The IAMC recommends the following arbitration clause in the contracts[4]:

In the event of any dispute arising out of or in connection with the present contract, including any question regarding its existence, validity or termination, the parties shall refer the same for arbitration to be finally resolved under the administration of International Arbitration and Mediation Centre ("IAMC") in accordance with the Arbitration Rules of International Arbitration and Mediation Centre ("IAMC Rules") for the time being in force. The seat of Arbitration shall be _____. The Tribunal shall consist of one or more arbitrators appointed in accordance with the said Rules. The language of the arbitration proceedings shall be English. The law governing the arbitration agreement shall be _____. The law governing the contract shall be _____.

4 https://iamch.org.in/arbitration/model-clause.

7.12 How many arbitrators are usually appointed?

Under Section 10 of the Arbitration Act, the parties may choose to determine the number of arbitrators. However, such number must be an odd number. In absence of any agreement between the parties on the number of arbitrators, a sole arbitrator is appointed

7.13 Is there a right to challenge arbitrators, and if so under which conditions?

An arbitrator may be challenged on the following grounds:

(i) if circumstances exist that give rise to justifiable doubts as to his/her independence or impartiality, or

(ii) if he/she does not possess the qualifications agreed to by the parties.

The grounds which give rise to the above circumstances have been mentioned in the Fifth Schedule of the Arbitration Act. Further, a party may challenge an arbitrator appointed by it, or in whose appointment such party has participated, only for reasons of which such party becomes aware after the appointment has been made.

Additionally, Section 12(5) of the Arbitration Act provides that notwithstanding any prior agreement between the parties to the contrary, any person whose relationship, with the parties, or the counsel, or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule of the Arbitration Act, shall be ineligible to be appointed as an arbitrator. However, the parties may waive the applicability of Section 12(5) of the Arbitration Act by way of an express agreement in writing between them.

A separate procedure for challenging the arbitrator(s) is provided for in Section 13 of the Arbitration Act.

7.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act does not impose any restrictions on the representation of parties during proceedings. However, the specific rules of the respective arbitration institution may prescribe certain restrictions.

7.15 When and under what conditions can courts intervene in arbitrations?

For arbitrations under the Arbitration Act, a court may not intervene in an arbitration proceeding except on application by either of the parties under the following circumstances:

(i) application for dispute to be referred to arbitration under Section 8 for domestic arbitrations and Section 45 for international arbitrations;
(ii) application for interim measures under Section 9, for international arbitrations as well, subject to any agreement to the contrary;
(iii) application for court to appoint arbitrator under Section 11;
(iv) application challenging the appointment of an arbitrator under Section 13;
(v) application to determine the termination of mandate of an arbitrator and appointment of a substitute arbitrator under Section 14;
(vi) application for assistance in taking evidence under Section 27;
(vii) application for seeking extension of time to complete the arbitral proceedings (Section 29-A);
(viii) application to set aside an arbitral award under Section 34;
(ix) enforcement of the award under Section 36;
(x) appeals from certain orders of the court/arbitral tribunal under Section 37;
(xi) application to order the tribunal to deliver the award to the applicant on payment to the court under Section 39;
(xii) application for jurisdiction under Section 42;
(xiii) extension of time period under Section 43;

In relation to arbitrations seated outside India, apart from points (i) (ii) and (vi) above, a court in India may intervene in relation to the enforcement of such foreign award delivered outside India under Sections 48 and 57.

7.16 Do arbitrators have powers to grant interim or conservatory relief?

Under Section 17 of the Arbitration Act, the arbitral tribunal may, during the arbitral proceedings, at the request of a party, grant interim relief of the nature specified in the provision. The Amendment Act, 2015 has extended the scope of reliefs which may be granted by an arbitral tribunal to bring at par with the reliefs which may be granted by a Court under Section 9 of the Arbitration Act. Section 17 provides that a party may make an application to the tribunal for the following reliefs:

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely—
   (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
   (b) securing the amount in dispute in the arbitration;
   (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
   (d) interim injunction or the appointment of a receiver;
   (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Further, Section 17(2) provides that subject to any orders which may be passed in an appeal under Section 37 of the Arbitration Act, the interim orders of the arbitral tribunal passed under Section 17 are deemed to be the orders of the Court for the purpose of enforcement.

Furthermore, the rules of certain arbitration institutions also allow an arbitral tribunal to grant interim relief. For instance, under the MCIA Rules, 2016 Article 15.1 allows an arbitral tribunal to *"at the request of a party, issue an order granting and injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief or provide appropriate security in connection with the relief sought."*

Similarly, Article 15.1 of the DIAC (Arbitration Proceeding) Rules, 2018 provides that *"A party may, during the arbitral proceedings apply to the Arbitral Tribunal for an interim measure of protection in respect of the subject matter of the dispute as it may consider necessary"*

7.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

– Forms and Contents

The form and contents of an arbitral award have been set out under Section 31 of the Arbitration Act. The following are the key requirements provided by the aforementioned provision:

- An arbitral award has to be in writing and must be signed by the members of the arbitral tribunal.
- Further, in arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall be sufficient, as long as the reason for any omitted signature is stated.
- The arbitral award must state the reasons upon which it is based, unless:
  - the parties have agreed that no reasons are to be given, or
  - the award is an arbitral award on agreed terms in the form of a settlement under Section 30.
- The arbitral award must provide the date and the place of arbitration
- After the arbitral award is made, a signed copy is required to be delivered to all parties.
- In the event that the arbitral award contemplates the payment of money, the award may include in the sum for which the award is made interest, at such rate of interest as considered reasonable by the tribunal and the period for which the interest is to be paid. However, this is subject to any prior agreement which may exist between the parties.
- Section 31 A inserted by the Amendment Act, 2015 has introduced a regime for costs. The arbitral tribunal will determine which party is entitled to costs and the amount of costs and the manner in which the costs are to be paid. The general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party.

– Deadlines for issuing arbitral awards

The Amendment Act, 2019 stipulates that the arbitral tribunal is to render its award within twelve months from the date of completion of pleadings. The Arbitration Act provides that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator(s), received a written notice of their appointment. There can be a further extension of a maximum period of six months with the consent of both parties. If the tribunal is in requirement of more time for issuing an award, then either party may apply for such an extension to the Court having jurisdiction. The mandate of the arbitrator shall continue during the pendency of the application for seeking extension of the arbitral tribunal until the disposal of the said application. However, the Court is likely to grant such extension only when sufficient cause has been shown and the arbitrators may be penalized for the delay, with a proportionate reduction of their fees, if the same can be attributable to them. The above deadline for issuing arbitral award is not applicable in the case of international commercial arbitrations.

– Other formal requirements for arbitral awards

An arbitral award may be required to be stamped in accordance with applicable stamping statutes.

(a) Stamp Duties requirements

The Arbitration Act is silent on the stamping and registration of an award. However, stamping of the arbitral award is required as per the requirements of the Indian Stamp Act 1899 or the relevant state stamp duty statutes, as may be applicable. Documents which are required to be stamped will not be admissible in evidence "for any purpose" if it is not duly stamped. In addition, penalties may also be levied. The rates at which stamp duty is levied may vary across states. The Supreme Court of India in *Shriram EPC Ltd v Rioglass Solar SA*[5] held that an award under Item 12 of Schedule I of Stamp Act, 1899 will not include a 'foreign award' and therefore a foreign award is not liable to incur stamp duty for its enforcement in India.

(b) Registration requirements

While the Arbitration Act is silent on registration requirements, pursuant to the Registration Act 1908, awards that purport to impact immovable property, must be registered. Failure to register a document that is mandatorily registered under the statute renders it unenforceable. The registration fee varies depending on the state in which the award is sought to be enforced.

7.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Under the scheme of the Arbitration Act, there are no grounds for appeals against arbitral awards. However, Section 34 of the Arbitration Act permits a party to make an application to a court to challenge an arbitral award under the following circumstances:

(i) if a party was under some incapacity;
(ii) the arbitration agreement is not valid under law;
(iii) the party making the application was not given proper notice as required;
(iv) the arbitral award deals with a dispute not contemplated in the terms of the submission to arbitration; or

5 *Shriram EPC Ltd v Rioglass Solar SA*, (2018) 18 SCC 313.

(v) the composition of the tribunal was not in accordance with the agreement of the parties.

Section 34 also permits a court to set aside an arbitral award if the court finds that the subject matter is not capable of settlement by arbitration or if the arbitral award is in conflict with the public policy of India. Domestic awards may also be set aside if found to be vitiated by patent illegality appearing on the face of the award, provided that the award cannot be set aside on the grounds that there was an erroneous application of the law or there is a requirement for re-appreciation of evidence.

Similarly, Section 48 states that the enforcement of a foreign award may be refused under the following conditions:

(i) if the parties were under some incapacity or the agreement was not valid under the law of the country where the award was made, or the agreement was subject to;
(ii) the party against whom the award is invoked was not given proper notice as required;
(iii) the award deals with a difference not contemplated by the submission to arbitration;
(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
(vi) the subject matter of the dispute is not capable of being settled by arbitration under the laws of India;
(vii) if the enforcement of the award would be contrary to the public policy of India.

In order to harmonise various decisions of the courts, the Amendment Act, 2015 has clarified that an award is in conflict of public policy if the making of the award was induced or affected by fraud or corruption, is in contravention of the fundamental policy of Indian Law or in conflict with the basic notions of morality or justice. However, the court shall not review the merits of the dispute in order to examine whether the award is contrary to the fundamental policy of Indian Law.

7.19 What procedures exist for enforcement of foreign and domestic awards?

7.19.1 Enforcement of Domestic Awards

Under Section 36 of the Arbitration Act, once an award is final or an application to set aside the arbitration award has been rejected, then such an award shall be executed under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

Recently, the Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated wherein it is provided that if the Court is satisfied that a *prima facie* is made out (a) that the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced by fraud or corruption, the Court shall stay the award unconditionally pending disposal of the challenge to the award.

7.19.2 Enforcement of Foreign Awards

If the court is satisfied that the foreign award is enforceable, it will be deemed to be a decree of the court. The party applying for the enforcement of the foreign award must produce the following: (a) the original award or authentic copy; (b) original arbitration agreement or authentic copy; (c) evidence necessary to prove that it is a foreign award. Further, if the award is in a foreign language, the party must produce a copy of the award that has been translated into English that is also certified by the diplomatic or consular agent of such country.

The Supreme Court in *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*[6], held that under the Arbitration Act a foreign award is already stamped as the decree. It observed that,

> *"In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again."*

7.20 Can a successful party in the arbitration recover its costs?

The Amendment Act, 2015 has introduced Section 31 A which is a regime of costs. While the arbitrators will determine whether costs are payable by one party to another, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The tribunal may make a contrary award by recording its reasons in writing.

Any agreement which has the effect that one of the parties has to pay the whole or part of the costs of the arbitration in any event shall only be valid if such agreement is made after the dispute in question has arisen.

Each arbitration institution will also have separate rules governing costs. For instance, under the MCIA Rules, Rule 32.6 of the MCIA Rules defines *"costs of the arbitration"* to include: *"(a) The Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable; (b) the MCIA's administrative fees and expenses; and (c) the costs of expert advice and of other assistance reasonably required by the Tribunal."* Rules 32 and 33, *inter alia*, provide for detailed rules on fixing the aforementioned *"costs*

6 *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd,* (2011) 8 SCC 333.

of the arbitration", including directing parties to make advance payments of such costs. The Registrar of the MCIA has the ultimate power to determine the costs and their payment, including directing payment of advance on the costs. Rule 29, *inter alia*, however, allows for the arbitral tribunal to make orders on apportionment of costs between the parties.

7.21 Are there any statistics available on arbitration proceedings in the country?

A 2013 PWC study found that 47 % of Indian companies that had chosen arbitration as their preferred method of dispute resolution chose *ad hoc* proceedings.[7] Despite the presence of arbitral institutions in India, many arbitrations involving Indian parties are administered by international arbitral institutions such as the Court of Arbitration of the International Chamber of Commerce, the Singapore International Arbitration Centre and the London Court of International Arbitration. Despite the existence of numerous arbitral institutions in India, parties in India prefer ad hoc arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the Arbitration Act.

India has an estimated 43 million cases pending in various courts[8]. As of 01.12.2022 there were 69,598 cases pending in the Supreme Court of India[9], around 5.9 million cases are pending in the High Courts[10].

7.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

7.22.1 Proposed Legislative Changes to The Arbitration Act

The government introduced new amendments via the Amendment Act, 2019. The highlights of the Amendment Act, 2019 are as follows:

7 pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.

8 https://njdg.ecourts.gov.in/njdgnew/?p=main.

9 https://main.sci.gov.in/statistics.

10 https://njdg.ecourts.gov.in/hcnjdgnew/.

a) Appointment of Arbitrators

Any request for appointment of arbitrator (s) is required to be disposed within thirty days from the date of service of notice on the opposite party. Parties can approach designated arbitration institutions for the appointment of arbitrators. For international commercial arbitrations, the appointments will be made by institutions designated by the Supreme Court of India. For domestic arbitrations, appointments will be made by the institution designated by a High Court. In the event there are no designated arbitral institutions available, the Chief Justice of the concerned High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions.

b) Arbitration Council of India

The Amendment Act, 2019 provides for the establishment of a statutory authority called the '*Arbitration Council of India*' ("the ACI"). The ACI will, *inter alia*, identify and grade qualifying arbitration institutions to be considered for designation, by High Courts or the Supreme Court for appointment of arbitrators.

c) Relaxation of time-lines

The Amendment Act, 2019 mandates the filing of statement of claim and statement of defence within six months of the constitution of the arbitral tribunal. The arbitration award must be passed by the arbitral tribunal within twelve months from the date of completion of pleadings.

d) Confidentiality of proceedings

The Amendment Act, 2019, provides for an express confidentiality provision requiring the arbitrator, arbitral institution and the parties to the arbitration agreement to maintain confidentiality of all arbitral proceedings except the award where its disclosures are necessary for the purpose of implementation and enforcement of the award. The Amendment Act, 2019 also provides for an express provision on

The Amendment Act, 2021, repealed the earlier Ordinance and introduced the following changes to the Arbitration Act:

e) Automatic Stay on arbitral awards

The Amendment Act, 2021 amended Section 36 of the Arbitration Act by introducing a proviso which states that, an unconditional stay can be granted on the enforcement of an arbitral award (even during the pendency of the setting aside application under Section 34 of the Arbitration Act) if the Court is satisfied on a prima facie basis that: (i) the underlying arbitration agreement or contract, or; (ii) the making of the arbitral award, was induced or effected by fraud or corruption.

f) Qualifications of Arbitrators

The Arbitration Act had earlier specified certain qualifications, experience and accreditation norms for arbitrators in the Eighth Schedule. The Amendment Act, 2021 has omitted the Eighth Schedule for arbitrators and states that the qualifications, experience, and norms for accreditation of arbitrations will be specified by regulations, as per Section 43J of the Arbitration Act.

7.22.2 Recent Supreme Court Decisions in relation to Arbitration

In the case of *ONGC v. Afcons Gunanusa JV*[11], a 3-judge bench of the Supreme Court held that the fees payable to the arbitrators had to be decided on the basis of a mutual agreement by all the parties and that arbitrators did not possess an absolute or unilateral power to determine the fees payable to them. The Supreme Court, however, observed that the arbitral tribunal has the autonomy to apportion the costs (including arbitrators' fees and expenses) between the parties and demand a deposit (advance on costs). It was further held that parties engaged in an arbitration proceeding may place reliance on the fee schedule provided under Schedule IV of the Arbitration Act or decide the fee payable to an arbitrator amongst themselves. In essence, it held that the nature of Schedule IV was non-mandatory, but it would nevertheless serve as a default provision in case the parties were unable to reach an agreement regarding the fees payable to an arbitrator.

In the case of *ONGC Ltd. v. Discovery Enterprises (P) Ltd and Ors.*[12], the Supreme Court, in the context of domestic arbitrations, traced the jurisprudential evolution of the Group of Companies Doctrine, i.e., the doctrine that postulates that an arbitration agreement which has been entered into by a company within a group of companies, can bind its non-signatory affiliates or sister concerns if the circumstances demonstrate a mutual intention of the parties to bind both the signatory and affiliated, non-signatory parties. The Supreme Court in this case held that in order to decide whether a company within a group of companies which is a non-signatory to an arbitration agreement can be bound on the basis of the Group of Companies Doctrine, the following factors are required to be considered by the law in its present state:

(i) The mutual intent of the parties;
(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;
(iii) The commonality of the subject-matter;
(iv) The composite nature of the transaction; and
(v) The performance of the contract.

11 *ONGC v. Afcons Gunanusa JV*, 2022 SCC OnLine SC 1122.
12 *ONGC Ltd. v. Discovery Enterprises (P) Ltd and Ors., (2022) 8 SCC 42.*

In the case of *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd and Anr.*[13], the Supreme Court has held that there are six ingredients which would make an arbitral award a foreign award, in the context of Section 44 of the Arbitration Act. The aforementioned ingredients have been listed below:

- The award must be an arbitral award on differences between persons arising out of legal relationships.
- The abovementioned differences may be in contract or outside of contract, for example, in tort
- The legal relationship so spoken of ought to be considered "commercial" under the law in India.
- The award must be made on or after the October 11, 1960.
- The award must be a New York Convention award i.e. it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories
- The award must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies.

Further, the Supreme Court also held that a foreign arbitral award where a non-signatory is named as a party to the arbitration award can be enforced against such a non-signatory party. The Court held that the challenge made by a non-signatory would not lie within the scope of Section 48(1)(a) of the Arbitration Act.

The Supreme Court in the case of *Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd*[14], upheld the view taken by a different bench of the Court in the case of *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*[15] and held that a Court at the stage of appointment of an arbitrator under Section 11 of the Arbitration Act, cannot ascertain whether the agreement is inadequately stamped. In light of the pendency of the issue of the effect of non-stamping of the main agreement on the enforceability of the arbitration agreement before the Constitution Bench of the Supreme Court, it was observed that due to the pendency of the said issue courts must '*ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood*'. This position was recently re-affirmed by the Supreme Court in *Weatherford Oil Tool Middle East Ltd. v. Baker Hughes Singapore PTE.*[16]

The Supreme Court in *Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd*[17] held that in granting an interim relief under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the Civil Procedure Code, 1906 ('CPC'). At the same time, the power of the Court to grant interim relief is not constrained by the procedural

13 *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd and Anr.*, (2022) 1 SCC 753.
14 *Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd.*, 2022 SCC OnLine SC 83.
15 N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379.
16 Weatherford Oil Tool Middle East Ltd. v. Baker Hughes Singapore PTE, 2022 SCC OnLine SC 1464.
17 Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd; 2022 SCC OnLine SC 1219.

rigors of every provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC. Further the Court, while affirming the views of various High Courts, held that the power of the Court under Section 9 of the Arbitration Act is wider than powers under the provisions of CPC. The Court observed that *'If a strong prima facie case is made out and the balance of convenience is in favour of interim relief being granted, the Court exercising power under Section 9 of the Arbitration Act should not withhold relief on the mere technicality of absence of averments, incorporating the grounds for attachment before judgment under Order 38 Rule 5 of the CPC'*. Lastly, the Court held that a strong possibility of diminution of assets is sufficient for a Court to grant relief under Section 9 of the Arbitration Act and proof of actual attempts to deal with, remove or dispose of the property with a view to defeat or delay the realisation of an impending Arbitral Award is not necessary.

v.

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